IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

J. PATRICK COLLINS, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Civil Action No. 4:16-cv-03113

TREASURY DEFENDANTS' MOTION TO DISMISS

Defendants, the United States Department of the Treasury and Janet Yellen, in her official capacity as Secretary of the Treasury ("Treasury Defendants"), hereby move to dismiss Plaintiffs' Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The reasons for this motion are set forth below.

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Introductory Statement

During and after the 2008 financial crisis, the Department of the Treasury ("Treasury") committed hundreds of billions of dollars to stabilize the housing market, secure the availability of home financing for American taxpayers, and ensure the solvency of two government-sponsored enterprises, the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") ("the GSEs"). Treasury provided this financial assistance through a series of agreements with the Federal Housing Finance Agency ("FHFA"), which Congress created in the Housing and Economic Recovery Act of 2008 ("HERA") and empowered to act as conservator of the GSEs. In exchange, Treasury received certain financial interests in the GSEs, including senior preferred shares with a liquidation preference and periodic dividends. Plaintiffs filed this case seeking to undo one aspect of this arrangement: the August 17, 2012 "Third Amendment" to FHFA's and Treasury's stock purchase agreements.

Last year, the Supreme Court confirmed that the Third Amendment was a lawful exercise of FHFA's statutory conservatorship authority, declined to set aside the Third Amendment, and remanded the narrow question whether HERA's limitation on the President's authority to remove the FHFA Director affected the implementation of the Third Amendment and caused Plaintiffs cognizable harm. *See Collins v. Yellen*, 141 S. Ct. 1761 (2021). As described below, Plaintiffs have once again failed to demonstrate their entitlement to any relief.

Factual and Procedural Background

I. Fannie Mae, Freddie Mac, and the 2008 Housing Crisis

Congress created Fannie Mae and Freddie Mac to, among other things, "promote access to mortgage credit throughout the Nation." 12 U.S.C. § 1716(4). These government-sponsored enterprises provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. Am. Compl. ¶ 15, ECF

No. 80. With the 2008 collapse of the housing market, the GSEs experienced overwhelming losses due to a dramatic increase in default rates on residential mortgages. *See Collins*, 141 S. Ct. at 1771 (noting that the GSEs lost more in 2008 than they had earned in the past 37 years combined). In response, Congress passed HERA in July 2008. Pub. L. No. 110-289, 122 Stat. 2654. HERA created FHFA, an independent federal agency, to supervise and regulate the GSEs. 12 U.S.C. § 4501 *et seq.* The statute provided for FHFA to be headed by a single Director, nominated by the President and confirmed by the Senate, and removable during his term only for cause. 12 U.S.C. § 4512(a), (b)(1), (b)(2).

HERA granted the Director of FHFA authority to appoint the agency conservator or receiver of the GSEs. *Id.* §§ 4511, 4617(a)(2). The legislation authorizes the conservator to "operate" and "conduct all business" of the GSEs. *Id.* § 4617(b)(2)(B). HERA further amended the GSEs' statutory charters to grant Treasury the authority to "purchase any obligations and other securities issued by" the GSEs upon Treasury's determination that the terms of the purchase would "provide stability to the financial markets," "prevent disruptions" in mortgage financing, and "protect the taxpayer." *Id.* §§ 1719(g)(1); 1455(*l*).

II. Conservatorship and the Senior Preferred Stock Purchase Agreements

On September 6, 2008, FHFA's Director placed the GSEs into conservatorship. Am. Compl. ¶ 23. One day later, Treasury purchased senior preferred stock in each entity. *Id.* Under these Senior Preferred Stock Purchase Agreements ("PSPAs"), Treasury committed to provide up to $100 billion in taxpayer funds to each GSE to maintain its solvency by ensuring its assets were at least equal to its liabilities. *Id.* ¶ 24; *see also Collins*, 141 S. Ct. at 1772-73. The PSPAs provided Treasury with four principal entitlements. *See* Am. Compl. ¶¶ 25-31; *Collins*, 141 S. Ct. at 1773. First, Treasury received preferred stock with a senior liquidation preference of $1 billion for each GSE, plus a dollar-for-dollar

increase to that preference each time the GSEs drew upon Treasury's funding commitment.[1] Am. Compl. ¶ 28. Second, Treasury was entitled to quarterly dividends equal to 10% of its liquidation preference. *Id.* ¶ 29. Third, Treasury received warrants to purchase the GSEs' common stock. *Id.* ¶ 25. Fourth, the PSPAs entitled Treasury to a periodic commitment fee. *Id.* ¶ 31.

Treasury's initial funding commitment soon proved to be inadequate, and Treasury and FHFA amended the PSPAs twice to increase the commitment and to address the GSEs' ongoing net-worth deficits. *See id.* ¶ 32; *Collins*, 141 S. Ct. at 1773. By summer 2012, the GSEs had drawn approximately $187 billion from Treasury's funding commitment. Am. Compl. ¶ 34. To eliminate the very real risk that the GSEs "would have consumed some or all of the remaining capital commitment in order to pay their dividend obligations, which were themselves increasing in size every time the companies made a draw," *Collins*, 141 S. Ct. at 1777, Treasury and FHFA as conservator (under the leadership of Acting Director Edward DeMarco, *see* Am. Compl. ¶ 43) agreed to modify the PSPAs for a third time on August 17, 2012, *id.* ¶ 37. This "Third Amendment" replaced the fixed dividend obligation with a variable dividend equal to the amount, if any, by which the GSEs' net worth for the quarter exceeded a capital buffer. *Id.* This amendment ensured both that the GSEs "would never again have to use capital from Treasury's commitment to pay their dividends" and that "all of Treasury's capital was available to backstop the companies' operations during difficult quarters." *Collins*, 141 S. Ct. at 1777. The Third Amendment did not amend or alter Treasury's liquidation preference rights.

In December 2013, Melvin Watt was confirmed by the Senate as FHFA Director. Am. Compl. ¶ 45. In December 2017, FHFA (led by Director Watt) and Treasury negotiated another amendment to the PSPAs, pursuant to which Treasury agreed to permit the GSEs to retain up to $3 billion each in internal capital, and, in exchange for its forgone dividend payments, Treasury received a $3 billion

[1] A liquidation preference is a "priority right to receive distributions from the [GSEs'] assets in the event they are dissolved," *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 234 (D.D.C. 2014)).

increase in its liquidation preference for each GSE. *Collins*, 141 S. Ct. at 1774 n.8.

When Director Watt's term expired in January 2019, President Donald Trump designated Joseph Otting to serve as Acting Director. Am. Compl. ¶ 51. President Trump's nominee to serve as Director, Mark Calabria, was confirmed by the Senate in April 2019. *Id.* ¶ 77. In September 2019, Treasury and FHFA entered into a letter agreement which allowed the GSEs to increase their internal capital buffers from $3 billion each to a combined $45 billion. *See id.* ¶ 80. Treasury again received corresponding increases in its liquidation preference in exchange for allowing the GSEs to retain the additional capital. *Id.*; *see also Collins*, 141 S. Ct. at 1774 n.8. In January 2021, Treasury and FHFA (headed by Director Calabria) again modified the PSPAs. Am. Compl. ¶ 80. This time, the parties agreed to suspend all quarterly cash dividend payments until the GSEs build sufficient capital to meet specific thresholds. *Collins*, 141 S. Ct. at 1774. Once those thresholds are met, cash dividend payments to Treasury will resume. *Id.* at 1774-75. In the meantime, the agreement provides for the forgone dividend payments to be added to Treasury's liquidation preference. *Id.*; Am. Compl. ¶ 80.

III. Procedural History

Plaintiffs filed this challenge to the Third Amendment in October 2016. *See* Compl., ECF No. 1. They asserted three statutory claims—that Treasury and FHFA acted in excess of statutory authority and that Treasury acted arbitrary and capriciously—and a constitutional claim that FHFA's structure placed an unlawful restriction on the President's removal authority. *See id.* ¶¶ 155-189. The Court dismissed all of Plaintiffs' claims and entered judgment for Defendants. ECF Nos. 52 & 53. Plaintiffs appealed, and the case eventually made its way to the Supreme Court, which, in a decision issued June 23, 2021, rejected Plaintiffs' attempts to vacate the Third Amendment.

The Supreme Court first held that FHFA lawfully exercised its statutory conservatorship authority when it agreed to the Third Amendment and that, as a result, Plaintiffs' statutory challenge

to the Third Amendment was barred by HERA's "anti-injunction" provision.[2] *Collins*, 141 S. Ct. at 1775-78. The Supreme Court then determined that HERA unlawfully restricted the President's authority to remove FHFA's Senate-confirmed Director. *Id.* at 1783-87. However, despite that determination, the Court generally rejected Plaintiffs' remedial arguments. It held that the removal restriction had no bearing on FHFA's agreement to the Third Amendment (because FHFA was at that time headed by an Acting Director who was removable at will) and rejected Plaintiffs' request to set aside the Third Amendment. *Id.* at 1787-88. The Supreme Court also held that, with respect to later actions by confirmed Directors, there is "no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void." *Id.* at 1787. However, because it remained theoretically possible that actions taken by Senate-confirmed Directors in "*implement[ing]*" the Third Amendment could have resulted in harm to shareholders, *id.*, the Supreme Court remanded the case for the "lower courts" to determine "in the first instance" whether the shareholders were entitled to any retrospective relief. *Id.* at 1789.

Following the Supreme Court's decision, the Fifth Circuit reiterated that the Third Amendment "bore no constitutional infirmity in its inception" and that the "constitutional removal defect . . . did not render any of the actions taken by the FHFA in relation to the third amendment [] void," but remanded to this Court the question the Supreme Court raised, *i.e.*, whether Plaintiffs nonetheless were entitled to "retrospective relief." *Collin v. Yellen*, 27 F.4th 1068 (5th Cir. 2022).

Plaintiffs filed an amended complaint on June 3, 2022. They request that the Court enter an injunction both requiring "Defendants" to "eliminate the liquidation preference on Treasury's senior preferred stock (either by writing down the liquidation preference on Treasury's senior preferred stock to zero or by converting Treasury's senior preferred stock to common stock)," and prohibiting

[2] The statute provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." 12 U.S.C. § 4617(f).

"Defendants" from "further increasing the liquidation preference . . . except as necessary to offset any further draws on Treasury's funding commitment." Am. Compl., Prayer for Relief. Plaintiffs also assert a completely new claim that FHFA's funding structure violates the "constitutional power of the purse," *id.* ¶ 3, and on that basis again seek to "vacat[e] and set[] aside the Third Amendment," *id.*, Prayer for Relief. Plaintiffs also request that the Court "vacat[e] and set[] aside the PSPAs in their entirety." *Id.*

Statement of the Issues

1. Whether Plaintiffs have plausibly alleged that HERA's removal restriction specifically caused them cognizable harm that the Court could remedy with retrospective relief.

2. Whether Plaintiffs have properly raised and stated a claim that FHFA's funding mechanism violates the Appropriations Clause and whether invalidation of the Third Amendment and PSPAs would be an appropriate remedy for such a violation.

Summary

Plaintiffs' amended complaint is flatly inconsistent with the Supreme Court's decision in this case and the limited remand. Piling conjecture upon unverifiable assertion, Plaintiffs set forth an alternative history about what might have happened to federal housing policy writ large over a multi-year period absent HERA's removal restriction, eventually arriving at the convenient conclusion that Treasury would have reduced its financial interest in the GSEs—action that Treasury never came close to taking in the real world. Such speculation cannot substitute for well-pleaded factual allegations, and Plaintiffs' theory fails as a matter of law. Plaintiffs identify no agency action either taken or withheld because of HERA's removal restriction; no concrete harm plausibly suffered as a result of that restriction; and no appropriate retrospective relief. Indeed, the relief they seek—an injunction that would require the current Administration to take an action that Plaintiffs speculate the prior President desired to (but did not actually) take— "make[s] [no] sense" as a remedy related to a

constitutional doctrine born of "respecting the presidency." *Collins v. Mnuchin*, 938 F.3d 553, 594 (5th Cir. 2019) (*Collins II*), *aff'd in part, vacated in part, Collins v. Yellen*, 141 S. Ct. 1761.

Further, Plaintiffs' newfound Appropriations Clause theory is asserted many years too late and plainly exceeds the scope of this remand. It is also meritless because FHFA's funding mechanism is consistent with the plain text of the Appropriations Clause, and Congress is permitted to authorize funding other than via yearly appropriations, as it has done with respect to numerous federal agencies. In all events, Plaintiffs' request that the Third Amendment or the PSPAs more broadly be invalidated on this basis contravenes bedrock equitable remedial principles and should be rejected. The Court should grant Treasury's motion and dismiss this case with prejudice.

Standard of Review

To withstand a motion to dismiss, 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) (citation omitted). Allegations that "rely on conjecture and speculation" are insufficient to survive a motion to dismiss. *Cook v. City of Dallas*, 683 F. App'x 315, 321 n.4 (5th Cir. 2017). In addressing a motion to dismiss, the Court may consider: "(a) documents attached to the complaint or identified as central to the claims made therein; (b) documents attached to the motion to dismiss that are referenced in the complaint; and (c) documents that are subject to judicial notice as public record." *Sparks v. Tex. Dep't of Transp.*, 144 F. Supp. 3d 902, 903 (S.D. Tex. 2015).

Argument

I. Plaintiffs' Removal Authority Claims Fail as a Matter of Law.

The Supreme Court and Fifth Circuit remanded an exceedingly narrow question and placed "extreme limits on the possible relief available to" Plaintiffs. *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1305 (Fed. Cir. 2022). Concurring opinions collectively reflecting the views of a majority of the Supreme Court confirm that Plaintiffs are unlikely to succeed. *See Collins*, 141 S. Ct. at 1795

(Thomas, J., concurring) (expressing "serious[] doubt" that Plaintiffs would be able to demonstrate their entitlement to a remedy); *id.* at 1802 (Kagan, J., concurring in part) (remand proceedings "may be brief indeed" because "the President, acting through the Secretary of the Treasury," had "oversight" of FHFA's actions) (citation omitted); *id.* at 1799 (Gorsuch, J., concurring in part) (remand a "speculative enterprise" likely "to go nowhere"). Against this backdrop, Plaintiffs' amended complaint—which seeks sweeping, forward-looking relief based on imaginative theories having no basis in fact—fails to state a plausible claim that HERA's removal restriction caused them cognizable harm. Thus, Counts I, III, V, and VI should be dismissed.

A. Plaintiffs' Claimed Relief Contravenes *Collins* and the Separation of Powers.

To establish an entitlement to any further relief, Plaintiffs must establish (1) that they have suffered a concrete injury traceable to a discrete agency action implementing the Third Amendment (the type of "pocketbook injury" Plaintiffs previously asserted, *Collins*, 141 S. Ct. at 1779) that this Court could remedy with retrospective relief; and (2) that there is a close causal nexus between that claimed injury and the unlawful removal restriction. Plaintiffs have not done so, and the theory of relief set forth in the amended complaint cannot be reconciled with the Supreme Court's decision.

To start, Plaintiffs fail even to identify what government action they are challenging. They refer obliquely to "agency action maintaining Treasury's liquidation preference," Am. Compl. ¶¶ 122, 144, but do not actually identify any such action on which the Court could focus its review. Indeed, Plaintiffs elsewhere make clear that what they are challenging is *in*action—a series of actions that FHFA and Treasury did not actually take over a multi-year period that Plaintiffs contend would have (if taken) inexorably led "Defendants or their predecessors in office" to "eliminate[] the liquidation preference on Treasury's senior preferred stock." *E.g.*, *id.* ¶ 101. That is not the type of action implementing the Third Amendment that *Collins* described. And Plaintiffs never explain how the mere existence of the liquidation preference—as distinct from the damage to their share value that

Plaintiffs allege results from the Third Amendment—causes them a concrete "pocketbook injury."

Moreover, Plaintiffs point to no discrete action either taken or not taken by an unconstitutionally insulated FHFA Director that *caused them* any concrete harm. *See Calcutt v. FDIC*, 37 F.4th 293, 315 (6th Cir. 2022) (citing *Collins* for the proposition that a challenger must show that an unconstitutional removal protection "specifically caused an agency action in order to be entitled to judicial invalidation of that action"). Instead, they hypothesize about how government housing policy might have played out in an imagined alternate reality, speculating about a multitude of actions that a number of government actors and other third parties allegedly might have taken over a multi-year period. *See, e.g.*, Am. Compl. ¶ 89 (speculating that "[b]ut for the removal restriction," President Trump would have fired Director Watt and replaced him with a different FHFA Director in January 2017; the GSEs "would have raised capital by selling new shares of common stock in 2019"; and "FHFA and Treasury would have taken the actions necessary from a business perspective to remove the liquidation preference on Treasury's senior preferred stock"). Courts should not credit that type of conjecture. *See, e.g.*, *West v. Lynch*, 845 F.3d 1228, 1236 (D.C. Cir. 2017) (standing is "lacking" where plaintiff's theory of harm required court to "pile conjecture on conjecture"); *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175–76 (D.C. Cir. 2012) ("convoluted theory of causation" that relies on speculation about "hypothetical chain of events fails as a showing of Article III standing"). And here, in view of the "extreme limits on the possible relief" that the Supreme Court imposed, Plaintiffs' speculation falls well short of establishing a causal link between any cognizable harm and HERA's removal restriction. *See Fairholme Funds*, 26 F.4th at 1305 (dismissing challenge by GSE shareholder to HERA removal restriction following *Collins* decision).

Further, Plaintiffs are not even seeking "retrospective relief." *Collins*, 141 S. Ct. at 1788.

Rather, they seek a *prospective* injunction[3] that would require the current Administration to take certain affirmative steps to implement Plaintiffs' preferred policy outcomes. In commandeering the current President and his chosen leaders to effectuate the policy choices the past Administration allegedly preferred (but did not actually enact when given the chance, *see infra* pp. 14-16), Plaintiffs' requested remedy would turn Article II, and the very interests underlying the Supreme Court's decision in *Collins*, on its head. *See Collins*, 141 S. Ct. at 1784 ("The removal power helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch, and it works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote."). Such unprecedented relief would itself contravene the separation of powers. *See, e.g.*, *Loving v. United States*, 517 U.S. 748, 757 (1996) ("the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties"); *Collins II*, 938 F.3d at 594 (out of "respect for the Constitution and our co-equal branches of government," finding that it would not "make sense" to undo the Third Amendment and "wipe out an action approved or ratified by two different Presidents' directors under the guise of respecting the presidency").

B. Plaintiffs Do Not Plausibly Allege That HERA's Removal Restriction Caused Them To Suffer Harm From Treasury's Liquidation Preference.

Plaintiffs' new theory of injury from HERA's removal restriction is also meritless. Most importantly, the "Secretary of the Treasury is 'subject to at will removal by the President,'" so there is no need to "speculate about whether appropriate presidential oversight would have stopped" the policies about which Plaintiffs complain. *Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring in part) (citation omitted); *see also Fairholme Funds*, 26 F.4th at 1304-05. Even setting that aside, Plaintiffs'

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[3] As explained in FHFA's briefing, such relief is also barred by HERA's anti-injunction provision, 12 U.S.C. § 4617(f). *See* FHFA Defs.' Mot. to Dismiss ("FHFA MTD"), Sec. II.B.

alternative history allegations are speculative and inconsistent with their allegations about what actually happened during the multi-year period when President Trump's chosen Directors headed FHFA.

1. President Trump Retained Plenary Control over Treasury's Financial Interest in the GSEs.

Plaintiffs' case is based upon conjecture that, absent the removal restriction, (1) President Trump would have removed Director Watt in 2017 and replaced him with a different Director; and (2) that the hypothetical Director and Treasury, through some speculative series of actions, would have attempted to "remove the liquidation preference on Treasury's senior preferred stock." Am. Compl. ¶ 89. This is, of course, pure conjecture, the truth of which is inherently unknowable and cannot be assumed. *See Gallop v. Cheney*, 642 F.3d 364, 368 (2d Cir. 2011) ("the courts have no obligation to entertain pure speculation and conjecture"). But even assuming *arguendo* the premise of Plaintiffs' counterintuitive hypothetical—*i.e.*, that President Trump wanted to dramatically reduce Treasury's interest in the GSEs without any corresponding benefit to Treasury or taxpayers—HERA's removal restriction did not, as a matter of law, impede the President from pursuing that goal. President Trump had plenary authority over Treasury's financial interest in the GSEs and could have directed Treasury to reduce that interest—*e.g.*, by giving up its dividend rights, by reducing its liquidation preference, or by trading in its preferred shares for less valuable common shares—at any time.

Significantly, although Plaintiffs assert that certain of the policy decisions in their hypothetical retelling would have required FHFA involvement,[4] nothing prevents—or would have prevented during times relevant to the amended complaint—Treasury from taking action to reduce its own financial interest in the GSEs. Indeed, Treasury for years voluntarily waived the periodic commitment

[4] Those actions—*e.g.*, promulgating a "rule specifying how much capital the [GSEs] would be required to maintain once released from conservatorship"; amending the "bilateral" PSPAs, Am. Compl. ¶ 86—do not involve reducing or eliminating Treasury's liquidation preference, which Plaintiffs do not plausibly allege FHFA could or would have prevented Treasury from doing.

fee to which it was entitled under the initial PSPAs. *See Collins*, 141 S. Ct. at 1773 n.4. And even if FHFA's approval or a modification to the PSPAs were required, there is nothing in Plaintiffs' amended complaint to support the conjecture that Director Watt (or any other FHFA Director) would have opposed an amendment that, at no cost to the GSEs, wrote down Treasury's liquidation preference or converted its preferred stock. Treasury incorporates by reference FHFA's further argument about the implausibility of Director Watt preventing any of the actions that Plaintiffs now hypothesize President Trump desired to effectuate. *See* FHFA MTD, Sec. II.C.

2. Plaintiffs' Theory of Harm is Speculative and Implausible.

Setting aside President Trump's plenary control over Treasury, Plaintiffs' theory about what would have happened in the absence of the removal restriction is fundamentally implausible. Absent factual allegations plausibly showing their entitlement to retrospective relief, Plaintiffs' amended complaint should be dismissed pursuant to Rule 12(b)(6). *See, e.g.*, *Laguna Hermosa Corp. v. United States*, 671 F.3d 1284, 1288 (Fed. Cir. 2012) ("A complaint must be dismissed under Rule 12(b)(6) when the facts asserted do not give rise to a legal remedy . . . ."); *Doe v. Carter*, 7:10-cv-147-O, 2011 WL 4962060, at *5 (N.D. Tex. Oct. 19, 2011) ("As a general rule, 'a court will not entertain a claim for injunctive relief where the allegations take it into the area of speculation and conjecture.'" (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)).

1. Plaintiffs' theory is based primarily on a letter from former-President Trump to Senator Rand Paul, dated November 11, 2021, in which the former President hypothesizes about "what [he] would have been able to accomplish if [he] had been able to fire the incompetent Mel Watt from day one of [his] Administration." ECF No. 80-1. This is not the silver bullet Plaintiffs make it out to be. Like the rest of Plaintiffs' complaint, the letter is theoretical—it describes nothing that the former President did while President, only what he now surmises he "would have been able to accomplish" under hypothetical conditions. *Id.* It is well established that courts need not defer to

such a *post hoc* "convenient litigating position." *E.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020); *see also Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 737 (D. Or. 1997) ("[A]gencies do not formulate policy … through post-hoc affidavits from former agency officials, on behalf of a private litigant, expressing the affiant's personal view" on agency policy).

In any event, the former President's letter only underscores that Plaintiffs have failed to establish the kind of harm that the Supreme Court envisioned. In *Collins*, the Supreme Court suggested that GSE shareholders might be able to establish harm by showing "that the President *had made* a public statement expressing displeasure with actions taken by a Director and *had asserted* that he would remove the Director if the statute did not stand in the way." *Collins*, 141. S. Ct. at 1789 (emphasis added). This does not encompass a letter written more than a year after the President left office and for the express purpose of speculating after-the-fact about an issue raised in litigation. Critically, Plaintiffs do not allege that President Trump—while he was actually in office—expressed any concerns about Director Watt's handling of the Third Amendment or desired to take the particular actions Plaintiffs now theorize. That absence is much more telling about the practical effect of the removal restriction on the former President than his *post hoc* letter. *See Am. Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 925 (D.C. Cir. 2017) ("[A]fter-the-fact claims about agency intentions do not work when agency actions evince the opposite."). And even on its own terms, former President Trump's letter demonstrates that he had no interest in gratuitously reducing Treasury's stake in the GSEs. Instead, he states that his "Administration would have . . . sold the government's common stock in these companies at a huge profit." ECF No. 80-1. That assertion cannot be squared with Plaintiffs' contention that the former President wanted simply to write-off Treasury's valuable liquidation preference or forego its more valuable preferred shares.

2. The contention that President Trump did not "believe he had the power to" remove Director Watt because of the statutory removal restriction is also implausible. Am. Compl. ¶ 1. In

Collins, the Supreme Court highlighted that "an unconstitutional provision is 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)." 141 S. Ct. at 1788–89; *see also id.* at 1793 (Thomas, J., concurring). Consistent with this understanding, the Trump Administration never defended the constitutionality of HERA's removal restriction, and it argued that the provision was invalid and unenforceable. *See, e.g.*, *id.* at 1775 ("the federal parties did not contest the Fifth Circuit's conclusion that the … removal restriction improperly insulates the Director from Presidential control"). The Trump Administration was thus of the view, affirmed by the Supreme Court, that the President at all times had plenary authority to remove FHFA's Director if he so desired.[5] Plaintiffs' post-hoc contentions to the contrary are insufficient to support a plausible inference that the removal restriction prevented President Trump from removing Director Watt (much less that it prevented the agency under different leadership from taking actions to benefit Plaintiffs). *Cf. Calcutt*, 37 F.4th at 340-41 (Murphy, J., concurring).

3. Plaintiffs further suggest that, after confirmation of President Trump's chosen Director, FHFA and Treasury set forth on a "relentless[]" and inevitable path to achieve the changes to Treasury's financial interest in the GSEs that Plaintiffs now contend would benefit them most. *See* Am. Compl. ¶ 2. Their theory of recovery is dependent on the notion that the elimination of Treasury's liquidation preference was a foregone conclusion and that President Trump's chosen heads of FHFA and Treasury simply "ran out of time." *Id.* ¶ 84. But the actual historical record, evident through public documents cited in and embraced by Plaintiffs' amended complaint, tells a dramatically

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[5] Indeed, a Fifth Circuit panel agreed with these arguments and confirmed in July 2018 that HERA placed an unconstitutional restriction on the President's removal authority. *See Collins v. Mnuchin*, 896 F.3d 640 (5th Cir. 2018). This is in contrast to the hypothetical scenario that the Supreme Court suggested might demonstrate harm, *i.e.*, "the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal." *Collins*, 141 S. Ct. at 1789.

different story. Plaintiffs thus fail to state a plausible claim to relief.

To begin with, President Trump chose two individuals to lead FHFA between January 2019 and the end of his term in January 2021. Each Director "consistently reevaluated" the PSPAs, *Collins*, 141 S. Ct. at 1781, and FHFA and Treasury twice agreed to amendments to the PSPAs' terms. *See* Am. Compl. ¶ 80. Each amendment increased the GSEs' ability to retain capital while "permitt[ing] the liquidation preference to increase in an amount equal to the retained earnings." *Id.* Far from negotiating a reduction in Treasury's liquidation rights—as Plaintiffs argue President Trump's hypothetical Director would have done and now request that the Court order—President Trump's chosen Director agreed to increases in Treasury's liquidation preference. In other words, when given the opportunity in the real world (rather than Plaintiffs' made-up one), the Director that President Trump actually selected took an approach in direct conflict with what Plaintiffs now seek to attribute to that Director and the former President.

Plaintiffs' reliance on a "Housing Reform Plan" that Treasury prepared in response to a March 2019 Presidential memorandum is indicative of their flawed approach. *See* U.S. Dep't of the Treasury, *Hous. Reform Plan* (Sept. 2019), https://perma.cc/LF79-933N ("Housing Reform Plan") (attached as Ex. A). Selectively quoting isolated passages, Plaintiffs contend that this document demonstrates the Trump Administration's unwavering commitment to eliminating Treasury's liquidation preference. *See* Am. Compl. ¶¶ 62-63. But President Trump did not even issue the memorandum until more than two years into his term. And Treasury's 45-page report actually presents a suite of policy options, highlighting the complexities and uncertainties involved in agency policymaking and belying Plaintiffs' claims that any particular outcome was preordained. The plan merely identifies "[e]liminating all or a portion of Treasury's liquidation preference" or "exchanging all or a portion of that [liquidation preference] for common stock or other interests in the GSE" as one possible "option[]" among many "[p]otential approaches to recapitalizing a GSE." Housing Reform Plan at 27. The plan also identifies

four other options, including "[a]djusting the variable dividend on Treasury's senior preferred shares" or "[p]lacing the GSE in receivership," acknowledges that "other options" exist, and does not endorse any of these options. *See id.* (emphasizing that each option "poses a host of complex financial and legal considerations" that would require "careful consideration" as part of Treasury's and FHFA's broader effort "to identify and assess these and other strategic options"). Far from supporting Plaintiffs' case, Treasury's plan renders implausible the notion that with just a bit more time, Treasury definitively would have eliminated its liquidation preference in the manner Plaintiffs describe.[6]

C. Plaintiffs Fail to State APA Claims.

Plaintiffs' third, fifth, and sixth counts should also be dismissed for the independent reason that they fail to state a claim under the APA.

1. Plaintiffs' third and fifth counts make no attempt to identify the "agency action" purportedly challenged. *See* Am. Compl. ¶¶ 117-22 (alleging agency action contrary to constitutional right); *id.* ¶¶ 137-44 (alleging agency action that is arbitrary, capricious, or otherwise not in accordance with law). The party invoking the APA must establish that the challenged government action fits within the APA's waiver of sovereign immunity: judicial review is available only to challenge "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) ("When … review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'"). Agency action includes only the set of "circumscribed, discrete" actions that the APA defines. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004) (citing 5 U.S.C. § 551(13)); *see also, e.g.*, *Indep. Equip. Dealers*

[6] The plan also makes clear that "protecting taxpayers" from future bailouts and ensuring that "the Federal Government is properly compensated for any explicit or implicit support it provides the GSEs" should be central components of any reform policy, contrary to Plaintiffs' claims that Treasury would have eliminated its liquidation preference. Housing Reform Plan at 1, 28.

Ass'n v. EPA, 372 F.3d 420, 427 (D.C. Cir. 2004) (Roberts, J.) (confirming that "action" under APA is "not so all-encompassing as to authorize [courts] to exercise judicial review [over] everything done by an administrative agency" (citation omitted)). The challenged action must also "mark the 'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted); *see also Alabama-Coushatta Tribe v. United States*, 757 F.3d 484, 490-91 (5th Cir. 2014) (affirming dismissal for lack of agency action where "complaint fail[ed] to point to any 'identifiable action or event'" and instead contained only "allegations of past, ongoing, and future harms" challenging "the way the Government administers [a] program[] and not … a particular and identifiable action taken by the government").

Plaintiffs' attempts to shoehorn their grievances regarding several years of federal housing policy into "agency action" as defined by the APA are baseless. Conduct so nebulous as "maintaining Treasury's liquidation preference," Am. Compl. ¶¶ 122, 144, is not cognizable agency action—much less final agency action—yet Plaintiffs ground their challenge entirely on allegations of intangible intent by the Trump Administration to secure changes to Treasury's financial interest in the GSEs that it never tried to make. It is well established that Plaintiffs "cannot seek *wholesale* improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made," because the APA requires a litigant to "direct its attack against some particular 'agency action' that causes it harm." *Lujan*, 497 U.S. at 891. Because the former is precisely what Plaintiffs attempt to do, they cannot proceed under the APA.

2. Plaintiffs' sixth count, which challenges agency *inaction*, Am. Compl. ¶¶ 145-51, is even more easily dispatched. As Plaintiffs note, 5 U.S.C. § 706(1) permits courts in narrow circumstances to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* ¶ 146. But such a claim "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton*, 542 U.S. at 64. Section 706(1) empowers courts to grant relief "only if there

is 'a specific unequivocal command' placed on the agency to take a 'discrete agency action,'" and that action "must be pursuant to a legal obligation 'so clearly set forth that it could traditionally have been enforced through a writ of mandamus.'" *Viet. Veterans of Am. v. CIA*, 811 F.3d 1068, 1075-76 (9th Cir. 2016) (citation omitted).

Once again, Plaintiffs make no attempt to satisfy the APA's strictures. They do not plead any statutory or even regulatory duty with which Treasury failed to comply or identify any legal authority commanding the government to have eliminated the liquidation preference. Nor could they: no statute commands the Treasury Secretary (much less the FHFA Director) to have taken such action. On the contrary, HERA grants broad discretion to oversee the GSEs and ensure stability in the housing-finance market. *See supra* p. 2. Indeed, Plaintiffs do not even claim that the government had any duty to eliminate the liquidation preference—only that President Trump desired that outcome but failed to achieve it. The APA does not countenance claims to force government to carry out *policy objectives* that its predecessors in office purportedly preferred but failed to enact. *See Norton*, 542 U.S. at 63-64 (relief under § 706(1) limited to "the ordering of a precise, definite act . . . about which [an official] had no discretion" (citation omitted)). In the absence of a mandatory duty to act, there is nothing for the Court to compel.

II. The Court Should Dismiss Plaintiffs' Appropriations Clause Claims.

Counts II and IV—now raised for the first time nearly ten years after the Third Amendment's execution and nearly 14 years after adoption of the PSPAs—are not appropriately considered on this remand. Treasury adopts by reference FHFA' argument that all of Plaintiffs' claims exceed the scope of this limited remand. *See* FHFA MTD, Sec. I. In any event, the Appropriations Clause claims are meritless and provide no basis for invalidating the Third Amendment and the PSPAs.

A. FHFA's Funding Structure Does Not Violate the Appropriations Clause.

To start, Plaintiffs claim that FHFA's ability to "self-fund" without "periodic, temporally

bound appropriations" violates the Appropriations Clause, Am. Compl. ¶ 105, 111, finds no support in the Constitution's text. The Appropriations Clause states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Contrary to Plaintiffs' contention, then, the Constitution places no limitations on how Congress appropriates funds to federal agencies. Indeed, Congress "may choose . . . to loosen its own reins on public expenditure" and "decide not to finance a federal entity with appropriations" at all. *Am. Fed'n of Gov't Emps., AFL-CIO, Loc. 1647 v. FLRA* ("*AFGE*"), 388 F.3d 405, 408-09 (3d Cir. 2004); *see also Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (the Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress"). Nor does the Constitution place any general temporal restriction on congressional appropriations; indeed, where it imposes any time limit on particular types of appropriations in particular circumstances, those limits are explicitly stated. *See* U.S. Const. art. I, § 8, cl. 12 (limiting the duration of appropriations for raising and supporting armies to two years). Congress is thus free to "authorize appropriations that continue for a longer period of time" than a single year. *AFGE*, 388 F.3d at 409.

In light of these principles, Congress did not run afoul of the Appropriations Clause by authorizing FHFA to establish and collect assessments from regulated entities to cover costs and expenses. *See Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990) (noting that the purpose of the Appropriations Clause is to "assure that public funds [are] spent according to the letter of the difficult judgments reached by Congress"); *Cincinnati Soap Co.*, 301 U.S. at 321-22 (Congress has "wide discretion in the manner of prescribing details of expenditures for which it appropriates"). These assessments are not "drawn from the Treasury" without an appropriation, and Congress remains free to alter the terms of FHFA's funding as it sees fit. Indeed, two courts have already rejected similar attacks on FHFA's funding structure by other GSE shareholders. *See Bhatti v. FHFA*, 332 F. Supp. 3d 1206, 1217 (D. Minn. 2018) ("Congress's choice to limit its own budgetary oversight does not

violate the principle of separation of powers . . ."), *reversed on other grounds* 15 F.4th 848 (8th Cir. 2021); *Rop v. FHFA*, 485 F. Supp. 3d 900, 939 (W. D. Mich. 2020), *on appeal*, No. 20-2071 (6th Cir.) ("The Court is aware of no authority supporting the notion that an independent source of funding creates a separation-of-powers problem."). Plaintiffs, on the other hand, asks the judiciary to impose a limit on Congress's authority to provide for federal agencies to self-fund that has no anchor in either constitutional text or precedent. The Court should decline that invitation because adopting Plaintiffs' theory would present the very type of separation-of-powers concerns that Plaintiffs are allegedly seeking to remedy. *Cf. Marshall Field & Co. v. Clark*, 143 U.S. 649, 670-71, 673 (1892) (out of "respect due to a coordinate branch of the government," rejecting proposed constraint on Congress's constitutional duties that had no basis in constitutional text).

This would be particularly inappropriate given the budgetary oversight that Congress maintains over FHFA. Primarily, Congress has "plenary control over the salary, duties, and even existence of executive offices." *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 500 (2010). To the extent Congress is dissatisfied with FHFA's direction, it can take action to change the manner in which FHFA receives its funding, including by making the agency subject to an annual appropriations process. Congress also has tools to keep abreast of FHFA's activities. For example, the FHFA Director is annually required to submit both a general report and a report on enforcement actions to Congress. 12 U.S.C. § 4521. And the Comptroller General, "an officer of the legislative branch," *Bowsher v. Synar*, 478 U.S. 714, 731 (1986), is authorized to conduct a full audit of the FHFA at any time, 12 U.S.C. § 4524. In sum, FHFA is subject to Congress's power of the purse: FHFA was created by Congress; its director was confirmed by Congress; Congress can investigate and audit the agency at any time; and Congress maintains plenary control over the agency's funding.

B. The *All American Check Cashing* Concurrence Is Inapposite.

Plaintiffs' Appropriations Clause claim is based largely on a recent Fifth Circuit concurrence

in a case involving an entirely different agency with a different organic statute—the Consumer Finance Protection Bureau ("CFPB"). *See* Am. Compl. ¶ 3 (citing *CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 242 (5th Cir. 2022) (en banc) (Jones, J., concurring)). For several reasons, that concurring opinion is inapposite here.

To begin with, the concurring opinion "did not garner majority support" and is therefore "not binding precedent." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). Nor is it persuasive. As the concurrence itself recognizes, "the D.C. Circuit and several district courts have rejected the argument that the CFPB's funding mechanism is unconstitutional." *All Am. Check Cashing*, 33 F.4th at 239-40 (Jones, J., concurring) (citing *PHH Corp. v. CFPB*, 881 F.3d 75, 95-96 (D.C. Cir. 2018) (en banc), *abrogated on other grounds by Seila Law v. CFPB*, 140 S. Ct. 2183 (2020), and six district court opinions). No court has ever held that a congressional decision to provide for some degree of self-funding, at either the CFPB or any other federal agency, violates the Constitution, and this Court should reject Plaintiffs' invitation to become the first.

In any case, the concurrence in *All American Check Cashing* does not support Plaintiffs' broader claim that any "power to self-fund" renders an agency without "constitutionally authorized funding to operate." Am. Compl. ¶¶ 113, 115. Indeed, Judge Jones's concurrence recognized that multiple federal agencies—including the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency ("OCC")—"enjoy some level of self-funding," 33 F.4th at 235, and did not cast doubt on any of those funding structures. Rather, it distinguished the CFPB because of what the concurrence described as the CFPB's "unique" authority to act as a "mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries," *id.* at 236, and the fact that it "remains doubly insulated from the appropriations process" through its ability to "siphon[] funds" from another independent federal agency, *id.*; *see also id.* at 235-36 (discussing the more targeted missions and authorities of the fiscal regulatory agencies.)

Even if the Court were to apply the logic of Judge Jones's concurrence, Plaintiffs' claim would fail. Unlike the CFPB, FHFA's funding is not doubly insulated from Congress: FHFA is funded directly through assessments on the entities it regulates, 12 U.S.C. § 4516, and thus "bear[s] the brunt of public disapproval for the funds it collects." *All Am. Check Cashing*, 33 F.4th at 236 (Jones, J., concurring (citation omitted)). Moreover, FHFA is guided by a targeted "mission and corresponding authority." *Id.* at 235. Just as the OCC "supervises national banks and federal savings associations to ensure that they 'operate in a safe and sound manner,'" *id.*, FHFA ensures its narrow group of regulated entities "operat[e] in a safe and sound manner to serve as a reliable source of liquidity and funding for the housing finance market throughout the economic cycle." *About FHFA*, FHFA, https://www.fhfa.gov/AboutUs (last visited July 15, 2022).

Extending the logic of the *All American Check Cashing* concurrence to FHFA would, contrary to law and practice, undermine a broad array of funding arrangements across the government. It is well established that Congress may "create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process" as part of its plenary control over appropriations. *PHH Corp.*, 881 F.3d at 95; *accord AFGE*, 388 F.3d at 409. Congress has exercised this authority on numerous occasions to create a variety of self-funded government entities. This includes not only the financial regulator institutions described above, but also the United States Postal Service, which is funded through a permanent and indefinite appropriation of all revenues that the agency earns. 39 U.S.C. § 2401. Other examples abound, including the National Credit Union Association which, similar to the FHFA, is funded by assessments of annual fees, 12 U.S.C. § 1755, and United States Citizenship and Immigration Services, which is funded primarily through user fees, 8 U.S.C. § 1356.[7] Accepting Plaintiffs' far-reaching legal theory—which extends well beyond the *All*

[7] Several other agencies similarly receive a portion of their operating costs through self-funding mechanisms, such as user fees or annual assessments. *See, e.g.*, 12 U.S.C. § 2250 (the Farm Credit

American Check Cashing concurrence—would contradict Congress's longstanding practice of creating agencies with some budgetary independence and broadly impact the government's proper functioning.

C. Plaintiffs Are Not Entitled To Injunctive Relief Setting Aside the Third Amendment or the PSPAs.

Even if Congress's chosen method of funding FHFA did violate its own "power of the purse," that would provide no basis for vacating the Third Amendment or the PSPAs. Equitable relief "does not follow from success on the merits as a matter of course." *Winter v. NRDC, Inc.*, 555 U.S. 7, 32 (2008). Rather, a court must consider whether the requested relief comports with "what is necessary, what is fair, and what is workable." *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam). Relief vacating the Third Amendment or the PSPAs does not meet this standard.

First, injunctive relief nullifying the Third Amendment is inconsistent with the reasoning of *Collins*, where the Supreme Court determined that similar remedial arguments were "neither logical nor supported by precedent." *Collins*, 141 S. Ct. at 1787. Instead, the Supreme Court found "no reason to hold that the third amendment must be completely undone" and emphasized that "there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void." *Id.* at 1787-88. It would be a strange result indeed if on remand from that very decision, this Court were to invalidate the Third Amendment based on the theory that a recently discovered alleged structural defect required the years-after-the-fact invalidation of every action FHFA ever took. *See John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017) (recognizing "traditional constraints on separation-of-powers remedies" and noting "vacatur of past actions is not routine").

Moreover, even if "cases involving Appointments Clause defects" that affect "a government

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Administration uses annual assessments to cover the cost of administering programs); 35 U.S.C. § 42 (Patent and Trademark Office appropriations are offset by trademark registration and patent application fees); 54 U.S.C. § 100904 (the National Park Service is partially funded through revenues generated from fees); 25 U.S.C. §§ 2717, 2717a (the National Indian Gaming Commission is funded entirely by fees collected from certain gaming operations); 15 U.S.C. §§ 77f(b), 78m(e), 78n(g), 78ee(i) (the Securities and Exchange Commission collects fees to offset appropriations).

actor's authority to act," *All Am. Check Cashing*, 33 F.4th at 242 (Jones, J., concurring), were applicable, invalidation of the Third Amendment and PSPAs would not be an appropriate remedy. Indeed, the equitable principles underlying the de facto officer doctrine—which "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient," *Ryder v. United States*, 515 U.S. 177, 180 (1995)—counsel against Plaintiffs' requested remedy. Here, any defect in the way FHFA is funded does not remove its Director's authority to act at all. But even if it did, there could not be a clearer case for avoiding the risk of "chaos" and "multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question." *Id.*; *see Bhatti*, 332 F. Supp. 3d at 1225 (concluding that the de facto officer doctrine barred the court from setting aside the Third Amendment based on an Appointments Clause claim where the plaintiffs were "attempting to unwind the actions of an executive agency going back more than five [now nine] years—actions of national (indeed, international) significance that have been the basis of trillions of dollars' worth of economic activity"), *aff'd in relevant part*, 15 F.4th at 852-53.

Other equitable considerations point in the same direction. Setting aside the Third Amendment (and even more so the PSPAs) at this point would be massively disruptive—not necessary, fair, or workable. Simply put, the "$200 billion-plus lifeline" that the PSPAs facilitated "is what saved the [GSEs]." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 614 (D.C. Cir. 2017). And the Third Amendment "ensure[d] market stability" in the national housing market at a time when the draws-to-pay dividend cycle created a risk that the GSEs' "would have consumed some or all of the remaining capital commitment in order to pay their dividend obligations." *Collins*, 141 S. Ct. at 1777; *see also Jacobs v. FHFA*, 908 F.3d 884, 893-94 (3d Cir. 2018) (emphasizing that the Third Amendment represented a "risk-averse" measure that assured the GSEs' ongoing operation). In turn, market participants such as lenders, investors, and others, relied on the PSPAs, the Third Amendment and

the safeguards they placed on the housing finance market in structuring their relationships with the GSEs over the past several years. A judicial order now setting aside the Third Amendment and/or the PSPAs would undo those safeguards, undermine all of the transactions that presumed those safeguards' existence, and potentially cast the market into turmoil.

This would be a particularly anomalous result in light of the utter disconnect between the manner in which FHFA receives its funding and the actions Plaintiffs seek to invalidate. The PSPAs, including the Third Amendment, are a mechanism by which Treasury provides financial support to the GSEs. They do not involve the expenditure of any of the assessments that FHFA collects to fund its own operations. And in any event, Congress funds Treasury through ordinary appropriations, thus maintaining whatever "power of the purse" that Plaintiffs assert is required with respect to policies, such as the Third Amendment, that are "jointly created by the FHFA and Treasury." *Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring in part).

Finally, Plaintiffs' delay in raising an Appropriations Clause claim counsels against setting aside the Third Amendment or the PSPAs. *See Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 708 (5th Cir. 1994) ("Laches is founded on the notion that equity aids the vigilant and not those who slumber on their rights." (citation omitted)). Plaintiffs raise this claim nearly ten years after the Third Amendment was adopted and almost 14 years after the PSPAs. They do so only after allowing these arrangements to play out for multiple years and after several rounds of unsuccessful litigation, when the claim is one that could have been asserted from the start. The Court should reject such gamesmanship based on the equitable doctrine of laches. *See Envt'l Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 478-81 (5th Cir. 1980).

Conclusion

For the foregoing reasons, the Court should dismiss this case with prejudice.

Dated: July 18, 2022 Respectfully submitted,

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I certify that on July 18, 2022, this document was filed by CM/ECF, which will serve a copy on all counsel registered.

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