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

PATRICK J. COLLINS, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
	§	
v.	§	**CIVIL ACTION NO. 4:16-CV-03113**
	§	
FEDERAL HOUSING FINANCE AGENCY, *et al.*,	§	
	§	
	§	
Defendants.	§	
	§	

MEMORANDUM OF FEDERAL HOUSING FINANCE AGENCY DEFENDANTS IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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Defendants Federal Housing Finance Agency ("FHFA") and its Director Sandra L. Thompson move to dismiss Plaintiffs' First Amended Complaint ("FAC") in its entirety with prejudice pursuant to Fed. R. Civ. P. 12(b).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is on remand from the U.S. Supreme Court and Fifth Circuit for one and only one discrete purpose: allowing the plaintiff shareholders to pursue any claims challenging any FHFA actions implementing the Third Amendment, a 2012 change to the dividends Fannie Mae and Freddie Mac paid Treasury, that plaintiffs could show were driven by the existence of the unconstitutional removal provision.

Plaintiffs' amended complaint bears no resemblance to the potential further proceedings envisioned by the Supreme Court. Instead, plaintiffs seek to launch the equivalent of a whole new case, bringing six entirely new counts that distill down to two novel theories.

The first new theory is that the Supreme Court's instructions call for this Court to compel FHFA to implement housing and economic policies that plaintiffs say the Trump Administration would have pursued if the removal statute had not existed. More specifically, plaintiffs claim the Trump Administration determined to wipe out the *entirety* of Treasury's senior preferred stock interests, which accrued mostly *before* the 2012 Third Amendment. They propose that this Court should therefore order that action now, transferring many billions of dollars of equity in Fannie Mae and Freddie Mac from Treasury to junior preferred shareholders like them.

The second new theory is that the method of funding Congress enacted for FHFA—annual assessments on the entities FHFA regulates—violates the Constitution's Appropriations Clause, which provides that money can be paid out of the Treasury only through congressional authorization. Plaintiffs contend that this renders FHFA incapable of functioning, and ask the Court to unwind actions by FHFA as Conservator going all the way back to 2008.

These claims are not properly before the Court on this limited remand. And even if they were, they are devoid of merit for a host of reasons. The claims seeking elimination of Treasury's preferred stock interests as a remedy for the removal restriction (new theory one) misread *Collins*, exceed constraints on compelling agencies to act, are barred by the conservatorship statute's anti-injunction provision, and are built on a farcical narrative thick with speculation and riddled with contradictions. Most notably, the actions the Trump Administration actually took relating to the Treasury preferred stock, two contract amendments in 2019 and 2021, greatly *increased* Treasury's liquidation preferences—the opposite of plaintiffs' theory.

As for the Appropriations Clause theory (new theory two), FHFA's funding mechanism was adopted by Congress based on its standard model for federal financial regulatory agencies, including the Federal Reserve. It is plainly constitutional, and plaintiffs' contrary assertions have no support in constitutional text, doctrine, or judicial precedent.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Issues: (1) Does the FAC state any plausible claim that the existence of the unconstitutional removal provision entitles plaintiffs to an injunction requiring FHFA and Treasury to eliminate Treasury's preferred stock? (2) Does the FAC state any plausible claim that FHFA's funding mechanism violates Article I of the Constitution and entitles plaintiffs to invalidation of actions by FHFA as Conservator?

Standard of Review: Under Rule 12(b)(6), courts must dismiss a complaint that fails to contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quote marks omitted). The court need not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Martin v. Equifax Info. Servs., LLC*, 2020 WL 1904496, at *1 (S.D. Tex. Apr. 17, 2020) (quote marks omitted).

NATURE AND STAGE OF PROCEEDINGS

This case is on remand from decisions of the U.S. Supreme Court, 141 S. Ct. 1761 (2021), and Fifth Circuit, 27 F.4th 1068 (2022). Plaintiffs own stock in Fannie Mae and Freddie Mac (the "Enterprises"), which play a central role in the nation's housing finance market. The Enterprises have been in conservatorship, with FHFA acting as Conservator, since the 2008 financial crisis, and have been financially supported by the U.S. Department of the Treasury through agreements whereby Treasury has infused hundreds of billions of dollars, and remains committed to infuse hundreds of billions more, in exchange for senior preferred stock of the Enterprises.

In their original complaint filed in 2016, plaintiffs alleged that the Third Amendment, a 2012 amendment to senior preferred stock purchase agreements between the Conservator and Treasury, harmed their economic rights as junior shareholders of the Enterprises. Plaintiffs asserted three statutory and one constitutional claim, all targeting the Third Amendment. The constitutional claim alleged that a statutory provision giving FHFA's Director for-cause protection against removal violated the separation of powers, and that the Third Amendment must be invalidated as a result. This Court (Atlas, J.) initially dismissed all of the claims. After a panel decision, the *en banc* Fifth Circuit ultimately reversed the dismissal of both the statutory and constitutional claims, but rejected invalidation of the Third Amendment.

Last year, the Supreme Court reversed the Fifth Circuit on the statutory claims, reinstating this Court's dismissal of those claims. As to the constitutional claim, the Court ruled (a) that the for-cause removal provision was unconstitutional, (b) that the unconstitutional removal provision did not affect the validity of the Third Amendment itself, but (c) that it could not be ruled out that the unconstitutional removal provision could have affected the validity of later acts *implementing* the Third Amendment. The Supreme Court remanded solely and specifically to give plaintiffs a chance to litigate claims, if any, seeking "retrospective relief" for such acts implementing the Third

Amendment on the ground that the unconstitutional removal provision "inflict[ed] compensable harm." 141 S. Ct. at 1788-89. The Fifth Circuit in turn remanded for this Court to "fulfill the Supreme Court's remand order." 27 F.4th at 1069.

The FAC, filed June 3, 2022, contains six counts, none of which seek retrospective relief for acts implementing the Third Amendment. Rather, four counts (I, III, V, and VI) seek an injunction ordering outright elimination of Treasury's preferred stock as a remedy for the unconstitutional removal statute. Two counts (II and IV) assert that Congress violated the Appropriations Clause by setting up FHFA to be funded by assessments on regulated entities, and seek vacatur of the Third Amendment, or the entire PSPAs, as relief.

STATEMENT OF FACTS

A. The Conservatorships and Preferred Stock Agreements

The Enterprises are chartered by Congress to provide liquidity to the mortgage market by purchasing residential loans. FAC ¶¶ 13-15. On the brink of the Great Recession, motivated by concern that the Enterprises' "troubling financial condition would imperil the national economy," *Collins*, 141 S. Ct. at 1770, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"). 12 U.S.C. § 4511 *et seq*. HERA created a new agency, FHFA, to supervise and regulate the Enterprises. FHFA is headed by a Director appointed by the President and confirmed by the Senate. *Id.* § 4512(b).[1] As is standard for federal financial regulatory agencies (*e.g.*, Federal Reserve and OCC), FHFA is funded through annual assessments on entities FHFA regulates. *Id.* § 4516. FHFA's finances are audited annually by the Governmental Accountability Office (an arm of Congress), which reports to Congress on "the financial operations and condition of the

[1] HERA provides that the Director can be removed by the President only for cause. The Supreme Court's decision in this case found that limitation—and *only* that limitation—unconstitutional and unenforceable. 141 S. Ct. at 1783-87.

Agency, together with such recommendations" as deemed advisable. *Id*.

Congress authorized the FHFA Director to place the Enterprises in conservatorships or receiverships "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." 12 U.S.C. § 4617(a)(2). Consistent with other conservatorship and receivership statutes, "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." *Id.* § 4617(f).

In September 2008, FHFA's Director placed the Enterprises into conservatorships. FAC ¶ 23. Treasury entered into Senior Preferred Stock Purchase Agreements ("PSPAs") with the Enterprises, committing to advance funds to each Enterprise for each quarter in which its liabilities exceeded its assets. *Id.* ¶¶ 23, 24. In exchange, Treasury received newly issued shares of Enterprise senior preferred stock with "four key entitlements." *Collins*, 141 S. Ct. at 1773.

The first "key entitlement" was "a senior liquidation preference equal to $1 billion in each company, with a dollar-for-dollar increase every time the company drew on the capital commitment." *Id*.; FAC ¶ 28. If new Enterprise stock is issued to the public in the future, proceeds must be used to pay down the liquidation preferences. ECF 24-2, ¶ 4.[2] A second entitlement was quarterly cash dividends at an annual rate of 10% of Treasury's outstanding liquidation preference. FAC ¶ 29. The third and fourth entitlements were a warrant to purchase 79.9% of the Enterprises' common stock, and a periodic commitment fee. *Collins*, 141 S. Ct. at 1773.

In the ensuing years, Treasury provided the Enterprises with nearly $187 billion under this arrangement to keep them afloat and the U.S. housing markets functioning. FAC ¶ 34. Since those

[2] The preferred stock certificates were attached as Exhibit B to FHFA's 2017 motion to dismiss and are in the record at ECF No. 24-2. In addition, the PSPAs themselves were attached as Exhibit A to FHFA's 2017 motion to dismiss and are in the record at ECF No. 24-1. The appellate courts extensively consulted these documents in previous phases of this case. *E.g.*, 141 S. Ct. at 1772 n.3, 1777-78 & n.13. This Court should likewise consider these documents on remand as they "were referred to in the [FAC]" and "are central to the plaintiffs' claims." *In re Katrina Canal Breaches Litig.,* 495 F.3d 191, 205 (5th Cir. 2007).

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

At that point, Treasury and the Enterprises, through FHFA as Conservator, entered into the Third Amendment changing the Treasury dividend formula—the transaction that was the exclusive focus in all previous stages of this case. *Id.* ¶ 37. This did not alter the liquidation preferences, which already stood at $189 billion as consideration for funds infused by Treasury in 2008-2012. FHFA Acting Director Edward DeMarco approved the amendment on behalf of the Conservator. *Id.* ¶ 43.

In January 2014, a new FHFA Director appointed by President Obama, Melvin L. Watt, took office to serve a five-year term expiring in January 2019. *Id.* ¶¶ 43, 45, 76.

B. Relevant FHFA and Treasury Actions During the Trump Administration

Donald Trump became President in January 2017 and appointed Steven Mnuchin as his Treasury Secretary. FAC ¶¶ 49, 53. Former President Trump did not remove or seek to remove FHFA Director Watt, nor did he criticize Director Watt while in office.

Secretary Mnuchin and others in the Trump Administration expressed a goal of ending the conservatorships. *E.g.*, *id.* ¶¶ 53, 67. FHFA Director Watt also repeatedly stressed that conservatorship "should not be a permanent state." *Id.* ¶ 47; *see also id.* ¶ 48 (2016 FHFA report: "FHFA continues to believe that conservatorship is not a desirable end state"). Director Watt also believed Congress would have an important role in the complex housing policy considerations involved in charting a path out of conservatorship. *E.g.*, *id.* ¶¶ 47, 48, 65, 66, 70.

Under Director Watt, FHFA took steps toward preparing the Enterprises for a post-conservatorship world. In December 2017, he executed a letter amendment providing for the Enterprises to maintain capital reserves, which reduced Treasury's cash dividend. *Collins*, 141 S. Ct. at 1774 n.8. In July 2018, Director Watt issued the first iteration of a regulatory framework to

govern the amount of capital the Enterprises would need to maintain upon exit from conservatorship. 83 Fed. Reg. 33,312 (July 17, 2018).

In late 2019, Treasury Secretary Mnuchin mentioned the possibility of eventually "rais[ing] third-party capital" from the private sector in connection with ending the conservatorships. FAC ¶ 56. That is the first point in time the FAC alleges that topic was raised: despite the FAC containing many public statements from throughout the Trump Administration, no cited statement from 2017 or 2018 mentions capital-raising. Nor do plaintiffs allege Director Watt ever took a position on raising capital from the private sector.

When FHFA Director Watt's term ended in January 2019, then-President Trump chose FHFA's new leadership—first, Acting Director Joseph Otting, who served from January 2019 through April 2019, and then Director Mark Calabria. *Id.* ¶¶ 51, 76, 77. Thus, it is undisputed that former President Trump, in addition to having plenary control of the Treasury Department at all times, controlled the leadership of FHFA for the second half of his Administration.

In early 2019, President Trump directed Treasury to "develop a plan for administrative and legislative reforms" toward various goals, including "[e]nding the conservatorships of the GSEs upon the completion of specified reforms" while "[p]roviding that the Federal Government is properly compensated for any explicit or implicit support it provides to the GSEs or the secondary housing finance market." 84 Fed. Reg. 12,479 (Mar. 27, 2019); *see* FAC ¶ 53(f). The Presidential Memorandum listed over ten specific housing policy goals. Those goals did not include any capital-raising activities or elimination of Treasury's preferred stock investment. To the contrary, the Presidential Memorandum emphasized that an essential condition for ending the conservatorships would be to ensure "the Federal Government is fully compensated" for its financial support. 84 Fed. Reg. at 12,480.

In September 2019, Treasury issued the report called for by the President's Memorandum. *See* U.S. Dep't of the Treas., Housing Reform Plan (Sept. 2019) (attached as Ex. A to Treasury's motion to dismiss).[3] The report outlined a number of potential legislative and administrative housing finance policy reforms. While the report referred to "recapitaliz[ing]" the GSEs "with significant first-loss private capital," it also conveyed Treasury's expectation of "leaving the PSPA commitment in place after the conservatorships." *Id.* at 3; *see also id.* at 13 ("[K]eeping each PSPA in place would have the benefit of preserving a mechanism for recouping any funds that might be extended by Treasury to a GSE in the future while ensuring taxpayers are compensated for continuing to provide that support."). Treasury identified five specific PSPA amendments that would be "preconditions for ending the conservatorships," none of which included eliminating the liquidation preferences. *Id.* at 26-27.

Plaintiffs focus on a bullet on page 27 of the report referring to "[e]liminating all or a portion of the liquidation preference of Treasury's senior preferred shares or exchanging all or a portion of that interest for common stock or other interests in the GSE" as one of a number of "[p]otential approaches to recapitalizing a GSE." *Id.* at 27; *see* FAC ¶ 62. Other approaches included adjusting the "dividend[s] on Treasury's senior preferred shares so as to allow the GSE to retain [more] earnings," "[n]egotiating exchange offers for one or more classes of the GSE's existing junior preferred stock," and "[p]lacing the GSE in receivership, to the extent permitted by law, to facilitate a restructuring of the capital structure." Treasury Housing Reform Plan at 27. The list concludes with the admonition that "[e]ach of these options poses a host of complex financial and legal considerations that will merit careful consideration," and stipulation that "appropriate compensation to Treasury" be provided as part of reforms. *Id.* at 27-28.

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[3] The Court should consider the Treasury report as a document central to and referred to in the FAC. *Katrina Canal Breaches,* 495 F.3d at 205; FAC ¶¶ 53(h), 62, 63, 64.

FHFA, as Conservator, and Treasury consummated one of the "[p]otential approaches" in the list: amending the PSPAs to adjust Treasury's dividend so the Enterprises could retain more earnings. Specifically, in September 2019 and again in January 2021, FHFA as Conservator and Treasury entered into further letter agreements to amend the PSPAs to allow the Enterprises to build-up capital. FAC ¶¶ 80, 93; *see Collins*, 141 S. Ct. at 1774 n.8, 1774-75.[4] These amendments built on the December 2017 amendments providing for capital reserves. *Id.* at 1774 n.8; *supra* at 6-7. They retained the liquidation preferences and established that for the foreseeable future, dividends to Treasury would accrue as "increases in the liquidation preference." *Collins*, 141 S. Ct. at 1774. Both amendments also retained the provision that proceeds of stock offerings must be used at least in part to pay down the liquidation preferences. *See supra* at 5.

Other than these PSPA amendments providing for major *increases* in the Treasury liquidation preferences, there is no allegation in the FAC that Treasury or FHFA embarked on any of the other "[p]otential approaches to recapitalizing" the Enterprises listed in the Treasury Housing Reform Plan. And there is no allegation that Treasury and FHFA ever moved toward eliminating Treasury's liquidation preferences.

In December 2020, FHFA, as regulator, issued a final rule adopting a regulatory framework governing the amount of capital the Enterprises must retain after exiting conservatorship. 85 Fed. Reg. 82,150 (Dec. 17, 2020); FAC ¶ 82. As noted, FHFA had previously promulgated a proposed rule on the same subject in 2018 under Director Watt's leadership. *See supra* at 6-7. The 2020 final rule credited Director Watt's proposed rule as its "foundation." 85 Fed. Reg. at 82,150.

In January 2021, President Biden took office. The Biden Administration's policy

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[4] Copies of these amendments are attached as Exhibits 1-4 and are available in the public record at https://bit.ly/3CS5mVL (Fannie Mae 2019); https://bit.ly/3iNyIg2 (Freddie Mac 2019); https://bit.ly/3CRWcs9 (Fannie Mae 2021); and https://bit.ly/37OyT4s (Freddie Mac 2021). The Court should consider them as central to and referred to in the FAC. *Katrina Canal Breaches,* 495 F.3d at 205.

objectives regarding the Enterprises and conservatorships differ from those of the Trump Administration. FAC ¶¶ 91-96. FHFA Director Calabria left office in June 2021. *Id.* ¶ 94. President Biden designated then Deputy Director for Housing Mission and Goals Sandra Thompson as FHFA Acting Director, and later nominated her as Director, an office to which she was recently confirmed. *Id.* ¶ 96.

Plaintiffs attach to their complaint, and rely heavily on, a purported November 11, 2021 letter allegedly signed by former President Trump ten months after he left office. FAC Ex. A.[5] The letter states that former President Trump would have removed Director Watt at the start of his Administration, but does not express any disagreement with any action by Director Watt. The letter also states that former President Trump would have "ordered FHFA to release these companies from conservatorship" and "would have also sold the government's common stock in these companies at a huge profit." *Id*. There is no allegation in the FAC that President Trump ever gave such an order during his Administration, and Treasury did not own common stock in the Enterprises. The unauthenticated, *post hoc* letter does not mention Treasury's preferred stock or any potential action with respect to the liquidation preferences.

C. The Supreme Court's Decision

As referenced above, up until the FAC this litigation challenged a specific agency action: the 2012 Third Amendment (and FHFA's subsequent implementation of it). The original complaint had three counts alleging that the Third Amendment was *ultra vires* or arbitrary and capricious, and one count seeking vacatur due to the unconstitutional removal provision.

The Supreme Court held that HERA's bar on court action that "restrain[s] or affect[s] the exercise of powers or functions of the Agency as a conservator or a receiver," 12 U.S.C. § 4617(f),

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

required dismissal of the *ultra vires* and arbitrary-and-capricious claims. 141 S. Ct. at 1775-78. As to the removal-restriction claim, the Court held the removal provision unconstitutional, but denied the requested remedy of invalidating the Third Amendment. *Id.* at 1781-87. The fact that the Third Amendment was adopted by an Acting Director to whom the removal provision did not apply "defeat[ed]" the request to set aside the Third Amendment in its entirety. *Id.* at 1787.

The Court, however, understood plaintiffs' claims to extend beyond just the initial adoption of the Third Amendment to its subsequent implementation, some of which occurred under Senate-confirmed Directors who were covered by the removal provision. *See* Reply Br. 13, *Collins v. Yellen*, No. 19-422 (U.S. S. Ct.) (arguing that regardless of whether the removal provision applied to the Acting Director, confirmed Directors who were so covered still "ordered and approved the payment of Net Worth Sweep dividends" and "directed" its legal defense). Thus, the Court "consider[ed] the shareholders' contention about remedy with respect to only the actions that confirmed Directors have taken to *implement* the third amendment during their tenures." 141 S. Ct. at 1787. The Court mostly rejected those contentions as well, describing the argument that implementing actions were "void *ab initio*" as "neither logical nor supported by precedent." *Id.*; *see also id.* at 1788 & n.23 ("no basis" to conclude "any head of the FHFA lacked the authority to carry out the functions of the office"). Further, the unconstitutional removal provision was never enforceable or "part of the body of governing law" anyway. *Id.* at 1788. However, because it could not "be ruled out" that the existence of the removal provision could still have specifically influenced how confirmed Directors implemented the Third Amendment in a way that "inflict[ed] compensable harm" on plaintiffs, the Court remanded to give plaintiffs a chance to pursue such limited claims, if they had any. *Id.* at 1789.

Five Justices openly doubted plaintiffs' prospects on remand. *See id.* at 1795 (Thomas, J.,

concurring) ("I seriously doubt that the shareholders can demonstrate that any relevant action by an FHFA Director violated the Constitution. And, absent an unlawful act, the shareholders are not entitled to a remedy."); *id.* at 1799 (Gorsuch, J., concurring in part) ("speculative enterprise" expected to "go nowhere"); *id.* at 1802 (Kagan, J., concurring in part, joined by two other Justices) ("the lower court proceedings may be brief indeed" because the President's undisputed plenary control over Treasury "seems sufficient to answer the question the Court kicks back").

ARGUMENT

I. Plaintiffs' Claims Are All New and Exceed the Mandate in this Limited Remand

The Fifth Circuit's "mandate rule requires a district court on remand to effect our mandate and do nothing else." *Gen. Universal Sys., Inc. v. HAL, Inc*, 500 F.3d 444, 453 (5th Cir. 2007) (quote marks omitted). A district court on remand is limited to "only those discrete, particular issues identified by the appeals court." *United States v. McCrimmon*, 443 F.3d 454, 460 (5th Cir. 2006) (quote marks omitted). Following remand, district courts need not and do not ordinarily entertain claims "not within the scope of the remand." *Gen. Universal*, 500 F.3d at 453; *see*, *e.g.*, *Schwarze v. Wainwright*, 2022 WL 903744, *4 (S.D. Tex. Feb. 18, 2022) (rejecting post-remand amended complaint and injunction motion pressing new and distinct claims "outside of the scope of this remand"). The rule bars not only "litigation of issues decided by the district court but foregone on appeal," but also issues "otherwise waived, for example because they were not raised in the district court" before the appeal. *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004).

Here, the Fifth Circuit's mandate directs this Court to "fulfill the Supreme Court's remand order," *Collins*, 27 F.4th at 1069, which in turn, provided that "[t]he parties' arguments should be resolved in the first instance by the lower courts." *Collins*, 141 S. Ct. at 1789. Those arguments related exclusively to the possibility of "retrospective relief" for "implementation of the Third Amendment" that caused "compensable harm." *Id.* at 1788. Indeed, the relevant portion of the

Court's opinion is framed by the opening comment that it "consider[s] the shareholders' contention about remedy with respect to only the actions that confirmed Directors have taken to *implement* the third amendment during their tenure." *Id.* at 1787 (emphasis in original).[6] Simply put, the sole claim plaintiffs were authorized to pursue was a claim that implementation of the Third Amendment was influenced by the removal provision and caused compensable harm.

The FAC transforms this case in a manner that far exceeds this limited mandate. The FAC does not include the one type of claim the Supreme Court authorized to be pursued on remand, and plaintiffs have therefore waived that claim. Instead, the FAC introduces six new counts, none of which have anything to do with implementation of the Third Amendment. The four removal-restriction counts (I, III, V, and VI) do not challenge the Third Amendment at all; indeed, the liquidation preferences those counts seek to wipe out had already accrued $189 billion *before* the Third Amendment. The other two counts (II and IV) bring a new and separate legal theory involving a distinct constitutional provision (Article I's Appropriations Clause) not previously invoked in this case's six-year history. This post-remand stage is the time for steering litigation to a close, not opening up multiple new fronts. This court should do "no more, no less" than what the Supreme Court and Fifth Circuit directed. *McCrimmon*, 443 F.3d at 459. That means dismissing plaintiffs' expansive and transformative new claims and, because plaintiffs have not included the one type of claim permitted, dismissing the entire action with prejudice.

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[6] Numerous other passages throughout the Court's opinion reinforce that nothing beyond adoption and implementation of the Third Amendment was at issue. *See*, *e.g.*, *id.* at 1775 (recounting that plaintiffs seek "an order enjoining the FHFA and Treasury from taking any further action to implement the third amendment"), 1779 (basing Article III standing on alleged injury from "adoption and implementation of the third amendment"), *id.* ("the relevant action in this case is the third amendment"), 1781 (understanding plaintiffs' argument as being that the harm "did not come to an end . . . when the amendment was adopted" but rather continued through confirmed Directors' "continuing to implement the third amendment"), *id.* ("Only harm caused by a confirmed Director's implementation of the third amendment could . . . provide a basis for relief."), 1787 (discussing plaintiffs' position that "the third amendment was adopted and implemented" without authority).

II. The Court Should Dismiss Plaintiffs' Claims for an Injunction Requiring Elimination of Treasury's Liquidation Preferences (Counts I, III, V, VI)

Even if plaintiffs' new claims seeking elimination of the liquidation preferences were properly before this Court—which they are not—they still suffer from a host of fatal flaws. As a threshold matter, they grossly misread the Supreme Court's discussion of the appropriate inquiry as to remedies for an invalid removal restriction. The Court did not invite open-ended speculation about whether FHFA leadership would have been different and if so, what alternate policies and dispositions of Treasury's investment might have been pursued. The analysis is simply whether any act by the Conservator was skewed to plaintiffs' detriment because the former President or Director Watt mistakenly believed the Director did not have to take direction from the President. Echoing the comments by five of the Justices, *see supra* at 11-12, lower courts applying *Collins* have uniformly observed that the path it offers for potential relief is exceedingly narrow.[7] Plaintiffs' misguided effort to parlay the Supreme Court's decision into a broad new lawsuit seeking major prospective policy changes not only distorts that decision beyond recognition, but runs up against separate legal bars and plausibility problems that plaintiffs cannot overcome.

A. Courts Cannot Compel Agencies to Take Discretionary Policy Actions That Are Not Required By Law

While courts often review final agency actions, the circumstances in which courts can review an agency's *failure* to act, and can enjoin an agency to take particular actions, are rare and highly circumscribed. Counts I, III, V, and VI challenge agency *inaction*—the failure to take action to eliminate Treasury's liquidation preferences. However, a claim to compel agency action

[7] *See*, *e.g.*, *Calcutt v. FDIC*, 37 F.4th 293 (6th Cir. 2022) (a "*possibility* that the [agency] would have taken different action" is not enough); *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1305 (Fed. Cir. 2022) ("extreme limits on the possible relief"); *Bayview Loan Servicing, LLC v. 6364 Glenolden St. Tr.*, 2021 WL 4938115, *1 (9th Cir. Oct. 22, 2021) (*Collins* requires "causally linking a specific, tangible harm to the for-cause removal provision").

"can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

The "limitation to discrete agency action" precludes "the kind of broad programmatic attack" that is better left to "'the offices of the [agency] or the halls of Congress, where programmatic improvements are normally made.'" *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)). The limitation to action the agency is "required to take," in turn, "rules out judicial direction of even discrete agency action that is not demanded by law." *Id.* at 65; *see Louisiana v. United States*, 948 F.3d 317, 323-24 (5th Cir. 2020) (holding that *Norton* required dismissal of claim seeking to enjoin Army Corps to maintain and repair waterway because the statute merely *authorized* and did "*not direct* the Corps to take such measures").

While *Norton* involved a suit to "compel agency action unlawfully withheld" under § 706(1) of the APA, these principles long predate the APA and derive from practice involving writs like mandamus that were "limited to enforcement of a specific, unequivocal command," that is, "the ordering of a precise, definite act about which an official had no discretion whatever." *Norton*, 542 U.S. at 63 (cleaned up); *see Marbury v. Madison*, 5 U.S. 137, 170-71 (1803) (emphasizing that a mandamus petition seeking "to control, in any respect" the conduct of Executive Branch business "in which executive discretion is to be exercised" "would be rejected without hesitation"). Because "how the executive, or executive officers, perform duties in which they have a discretion" is outside the province of the courts, mandamus or other writs commanding executive performance are appropriate only where an agency "is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of President." *Marbury*, 5 U.S. at 170-71; *accord* Attorney General's Manual on the Administrative Procedure Act 108 (1947) (emphasizing that a court cannot

"substitute its discretion for that of an administrative agency and thus exercise administrative duties," and for Article III courts to do so would violate the separation of powers).

Plaintiffs' claims here do not pass muster under these principles. They fail the first *Norton* condition because the action that plaintiffs say the agencies should have taken—a drastic overhaul of the preferred stock to eliminate Treasury's value in favor of private shareholders—is far from ministerial and the opposite of discrete. They fail the second *Norton* condition because no constitutional or statutory provision or other source of law ever "demanded" that FHFA or Treasury take such actions. On the contrary, the statutes authorizing Treasury to purchase Enterprise securities refer to "[t]he need" for such securities to establish "preferences or priorities regarding payments to the government." 12 U.S.C. §§ 1719(g)(1)(C)(i), 1455(l)(1)(C)(i). In appropriations legislation, Congress further expressly disapproved of any actions to "sell, transfer, relinquish, liquidate, divest, or otherwise dispose" of Treasury's interests, flatly prohibiting such actions through the Trump Administration's first year, and emphasizing the "sense of Congress" that even after the outright prohibition expired, no such actions should be taken absent congressional authorization. Pub. L. No. 114-113, § 702, 129 Stat. 2242, 3025 (2015).

This *Norton* analysis applies not only to Count VI, which is expressly styled as an APA § 706(1) claim to compel "agency action unlawfully withheld," but to all of the counts that functionally challenge failure to act (*i.e.*, Counts I, III, and V). *See Louisiana*, 948 F.3d at 321, 323-24 (applying *Norton* failure-to-act analysis to claim that amounted in substance to a challenge to Army Corps' inaction, despite not being directly pleaded as such).[8]

[8] While Count I does not expressly invoke the APA, that does not overcome the equitable remedial principles in *Norton* either. The authority cited as the basis for Count I, *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), rejected requests for "broad injunctive relief" and confined the remedy to severing the unconstitutional removal provision to conform the agency to constitutional requirements. *See* 561 U.S. at 508-10, 513. Plaintiffs asserted in earlier stages of this litigation that "there was nothing to vacate" in *Free Enterprise Fund*, making it irrelevant to remedies in this case. ECF No. 32, at 69; *see* Br. of Patrick J. Collins, et al., at 65, *Collins v. Mnuchin*, No. 19-422 (U.S. S. Ct.). *Free Enterprise Fund* does not support any remedy beyond that which the Supreme Court already

B. The Claims Are Barred by HERA's Anti-Injunction Provision

These claims also are barred by an FHFA-specific statutory provision: "no court may take any action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f). This provision "sharply circumscribe[s] judicial review of any action that the FHFA takes as a conservator or receiver." *Collins*, 141 S. Ct. at 1775. Injunctive relief is prohibited for any FHFA action "within the scope of the Agency's authority as a conservator," and allowed only if "the FHFA does not exercise but instead exceeds those powers or functions." *Id.* at 1776.

The matters implicated by the FAC—the terms of the preferred stock investments governing Treasury's ongoing support of the Enterprises—are plainly within FHFA's authority as Conservator. The Supreme Court squarely held that the Third Amendment—which pertained to one aspect of the preferred stock—was within the Conservator's authority. *Collins*, 141 S. Ct. at 1775-78.[9] It necessarily follows that determining whether to adopt a much more consequential amendment, effectively ending the entire preferred stock relationship in its current form, is also part of the Conservator's powers and functions.

Moreover, *Collins* makes clear that the existence of the unconstitutional removal restriction never detracted from FHFA's authority as Conservator. In contrast to issues caused by "a Government actor's exercise of power that the actor did not lawfully possess" in certain other separation-of-powers cases, "there is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office." *Id.* at 1788; *see also id.* at 1788 n.23

granted—striking the removal restriction so as to recognize the full extent of the President's removal authority going forward.

[9] While the Supreme Court reached this holding in the context of the statutory claims seeking vacatur of the Third Amendment, and § 4617(f) of course did not prevent the Court from evaluating the constitutionality of the removal statute, the Court's § 4617(f) holding applies with full force to the extraordinary prospective injunction that plaintiffs now seek for the first time on remand.

("[s]ettled precedent" confirms "the unlawfulness of the removal provision does not strip" FHFA's Director of statutory or constitutional authority to perform the "responsibilities of his office"); *id.* at 1793 (Thomas, J., concurring) (removal-restriction issue posed "no barrier" to FHFA Directors "exercising power").[10]

C. Plaintiffs' Factual Narrative is Far-Fetched and Contradicted By the Trump Administration's Actions

Even if the legal bars discussed above were not dispositive, Counts I, III, V, and VI would still fail to plausibly plead a claim because they are speculative, attenuated, and lack any well-pleaded factual foundation. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). While the FAC offers a narrative filled with details and citations, what is missing is anything plausibly indicating that the Trump Administration ever determined to pursue the elimination of Treasury's preferred stock, let alone that Director Watt or the unconstitutional removal restriction obstructed such a pursuit.

Rather, the sources and facts marshaled in the FAC simply indicate that the Trump Administration had an interest in much more general outcomes, *e.g.*, ending the conservatorships and potentially raising capital through public offerings of stock. *Plaintiffs* equate those outcomes with a supposed need to wipe out Treasury's preferred stock in its entirety and in advance, but that is plaintiffs' own unsupported leap, and is not supported by any of the documents, speeches, press releases, congressional testimonies, or podcast interviews collected in the FAC. On the contrary, those materials refute the leap—particularly the Trump Administration's 2019 and 2021 PSPA amendments, which embody the *opposite* of the approach plaintiffs ascribe to that Administration.

Nothing would prevent the Treasury preferred stock and liquidation preferences from continuing to exist in some form after conservatorship ends or at the time of new stock offerings.

[10] Justice Thomas specifically observed that claims challenging Conservator action based on the unconstitutional removal provision would run up against "the Act's anti-injunction provision." *Id.* at 1794 n.7 (Thomas, J., concurring).

To be sure, there might be a need for modification of the Enterprises' capital structures. But that could be accomplished, among other ways, by using the proceeds of stock offerings in whole or in part to pay down the liquidation preferences. In fact, that concept is baked into the preferred stock as a requirement, with Treasury effectively having a first lien on money raised through new stock sales. ECF 24-2, ¶ 4. The Trump Administration retained that concept in the 2019 and 2021 PSPA amendments. *See supra* at 9. As Treasury explained in its September 2019 report, other "[p]otential approaches to recapitalizing the GSEs" included negotiated reductions in shareholders' interests and even receivership—an alternative Secretary Mnuchin and Director Calabria both repeatedly stressed was on the table in a congressional hearing plaintiffs themselves rely on. Treasury Reform Plan at 27; *The End of Affordable Housing? A Review of the Trump Administration's Plans to Change Housing Finance in America*, 116th Cong., at 31-32, 43, 60, 61 (Oct. 22, 2019) (cited in FAC ¶ 56).

While the same Treasury report floats the possibility of reducing "all or a portion of" the Treasury interest as another "[p]otential approach," that is the *only place* in the FAC's dozens of cited materials where the concept central to plaintiffs' theory is brought up at all. Not a trace of that potential reduction concept appears in the President's own articulation of his housing finance reform priorities in his 2019 memorandum—the *only* document plaintiffs cite directly reflecting the will of the President himself while he was in office. 84 Fed. Reg. 12,479. On the contrary, that document twice identifies *protecting* Treasury's economic interest as a Presidential prerequisite for ending the conservatorships.

It bears repeating: fleeting mention of reducing "all or a portion" as one of several options, as a bullet on page 27 of a single September 2019 Treasury document (long after Director Watt had left office), is as close as the FAC ever gets to anchoring plaintiffs' outlandish theory in actual

historical events. This comes up far short of plausibly pleading that the Trump Administration pursued a goal of eliminating Treasury's liquidation preferences.[11]

Even if plaintiffs plausibly pleaded that the Trump Administration had a policy of eliminating the liquidation preferences (which they have not), the FAC still comes up short for lack of plausible factual allegations that such a goal would or could have been "[s]tymied by Director Watt" (FAC at p. 24)—as would be necessary for the removal restriction to cause harm. It was Treasury's investment, and "the President had oversight" all along through his plenary control over Treasury. *See Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring). Director Watt's view of Congress's role in housing finance reform, which plaintiffs play up in their effort to paint him as an antagonist, is beside the point. To be sure, Congress could have disapproved relinquishment of $200 billion Treasury stock interests and legislated to stop it. *See supra* at 16 (discussing appropriations law doing exactly that). But the prospect of congressional intervention would exist no matter who was the FHFA Director and has nothing to do with the removal restriction—rendering the idea that Director Watt's "for cause" protection was the sole obstacle even more speculative and less plausible. Regardless of Director Watt's perspective on Congress's role, plaintiffs offer nothing plausibly suggesting Director Watt himself would have blocked any initiative by Treasury to voluntarily reduce its own economic interest.

The clearest sign of all that plaintiffs' theory is divorced from reality is that once President Trump's chosen appointees headed both FHFA and Treasury, the actions they took were the *opposite* of what plaintiffs' theory would predict. Specifically, Secretary Mnuchin and Director

[11] Plaintiffs' depiction of four "steps" taken by the Trump Administration toward public stock offerings, with only cancellation of the liquidation preferences remaining, is misleading for similar reasons. All four "steps" made sense as preparations for *any* post-conservatorship regime and any public stock offering, not just one in which the liquidation preferences are cancelled in advance. In fact, Director Watt himself took actions similar to what plaintiffs describe as the first three steps: PSPA amendments reducing Treasury's dividend and allowing the Enterprises to retain earnings, and a regulatory capital rule for the post-conservatorship era. *See supra* at 6-7.

Calabria's September 2019 and January 2021 PSPA amendments not only retained the liquidation preferences as a Treasury "key entitlement," *Collins*, 141 S. Ct. at 1773, but also provided that future dividends to Treasury would accrue as "*increases* in the liquidation preference," *id.* at 1774 (emphasis added); *see also id.* at 1774 nn. 8, 10. Both amendments also continued to require that future stock offering proceeds be used, at least in part, to pay down Treasury's liquidation preferences. The January 2021 amendments reiterated the imperative to "compensate[] taxpayers for the support they have provided and continue to provide." Exs. 3, 4 at 10.

Indeed, before the Supreme Court, plaintiffs denounced those amendments for "do[ing] nothing to reverse the nationalization of Fannie and Freddie" and "only further entrench[ing] Treasury's status as the sole shareholder that can ever receive a return on its investment." Letter in Response of Patrick J. Collins, et al., *Collins v. Yellen*, No. 19-422 (U.S. S. Ct. Mar. 31, 2021). Plaintiffs insisted that the Trump amendments "ma[de] it impossible for the Companies to raise additional capital through the sale of new stock" (*id.*)—the exact opposite of their present assertion that former President Trump's appointees "relentlessly pursued" that objective. FAC ¶ 2.

Plaintiffs cannot cure this glaring contradiction through the alleged letter from former President Trump attached to the FAC. What matters are contemporaneous actions and statements *while in office*, not purported retrospective comments by a *former* President about events years earlier in an effort to influence pending litigation. Article II vests no power in former Presidents, nor is a former President politically accountable for policies he supports. In fact, to permanently enjoin the agencies to implement certain policies, based on a former President's alleged *post hoc* statements about what he would have liked to accomplish, would usurp the political branches' constitutional policymaking roles in matters of critical national importance to the housing markets and economy at large. That would undermine the separation of powers, not vindicate it.

III. Plaintiffs' Appropriations Clause Claims Are Without Merit (Counts II, IV)

If the Court takes up plaintiffs' new Appropriations Clause claims despite their being outside the remand mandate, it should dismiss them as time-barred or alternatively because they fail as a matter of law on the merits.

Unlike the new removal restriction claims challenging alleged inaction during Trump Administration, Counts II and IV attack and seek vacatur of the Third Amendment or, alternately, of "the PSPAs in their entirety." FAC ¶¶ 115-116, 135-136, Prayer for Relief ¶ 6. The PSPAs were adopted on September 7, 2008, *id.* ¶¶ 23-24, and the Third Amendment was adopted on August 17, 2012, *id.* ¶ 37. The statute of limitations for non-tort claims challenging agency action is six years. 28 U.S.C. § 2401(a); *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997). Thus, the limitations period expired on September 7, 2014 for vacatur of the PSPAs and on August 17, 2018 for vacatur of the Third Amendment.

The new counts do not relate back to the original complaint because they do not "assert a claim . . . that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B); *see*, *e.g.*, *United States v. Alaniz*, 5 F.4th 632, 636 (5th Cir. 2021) ("common core of operative facts" needed). There are no common operative facts between (a) the original complaint's claims under Article II and the APA, and (b) the FAC's newfound theory that Congress violated its own "power of the purse" under Article I.

Even if not time-barred, Counts II and IV should be dismissed on the merits as contrary to the plain meaning of the Appropriations Clause, overwhelming judicial precedent, and longstanding consensus practice of the political branches. Plaintiffs' thesis is that Congress's statutory decision to fund FHFA operations through annual assessments on the regulated entities, 12 U.S.C. § 4516, violates Article I, Section 9, Clause 7 of the Constitution. However, that provision simply states: "No Money shall be drawn from the Treasury, but in Consequence of

Appropriations made by Law[.]" The "straightforward and explicit command" is "simply that no money can be paid out of the Treasury unless it had been appropriated by an act of Congress." *OPM v. Richmond*, 496 U.S. 414, 424 (1990) (quote marks omitted). Funding FHFA's operations through assessments *on the regulated entities* does not entail drawing money "*from the Treasury*." Even if it could somehow be deemed as such, that funding mechanism was instituted "by Law," *i.e.*, the consequence of duly adopted congressional action.

The Appropriations Clause does not forbid Congress from establishing funding streams for agencies separate from the annual appropriations process established by statute. It is well-established that Congress may "decide not to finance a federal entity with appropriations." *Am. Fed'n of Gov't Employees, AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405, 409 (3d Cir. 2004); *AINS, Inc. v. United States*, 56 Fed. Cl. 522, 539 (2003) (Appropriations Clause "does not in any way circumscribe Congress from creating self-financing programs" for agencies), *aff'd*, 365 F.3d 1333 (Fed. Cir. 2004). Two federal courts have already approved FHFA's funding mechanism in other cases challenging the Third Amendment. *See Rop v. FHFA*, 485 F. Supp. 3d 900, 939 (W.D. Mich. 2020), *on appeal*, No. 20-2071 (6th Cir.); *Bhatti v. FHFA*, 332 F. Supp. 3d 1206, 1217 (D. Minn. 2018), *aff'd in part, rev'd in part on other grounds*, 15 F.4th 848 (8th Cir. 2021).

Indeed, FHFA's funding mechanism conforms to Congress's near universal practice for federal financial regulators for over a century. *See generally* Congressional Research Service, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* at 25-27 (2017). Establishing the Federal Reserve in 1913, Congress provided that the Board would be funded through the "power to levy semiannually on the Federal reserve banks . . . an assessment sufficient to pay its estimated expenses." Pub. L. No. 63-43, § 10, 38 Stat. 251, 261 (1913) (codified as amended at 12 U.S.C. § 243). Other examples of note include the OCC, 12 U.S.C.

§ 16; FDIC, 12 U.S.C. § 1811; NCUA, 12 U.S.C. § 1755; Farm Credit Administration, 12 U.S.C. § 2250; and the Public Company Accounting Oversight Board, 15 U.S.C. § 7219. No court has ever even hinted at any constitutional problem with the funding of any of these agencies.

The FAC highlights an opinion by a minority of judges in a recent Fifth Circuit decision, *CFPB v. All Am. Check Cashing Inc.*, 33 F.4th 218 (5th Cir. 2022) (en banc). In that case, the *en banc* Fifth Circuit held that an unconstitutional removal restriction applicable to the CFPB Director did not require the dismissal of an enforcement lawsuit brought by the CFPB. Five of the Court's 17 judges wrote separately that they perceived a distinct constitutional problem with CFPB's funding structure, under which the CFPB can demand whatever funds it needs from the Federal Reserve up to 12% of the Fed's own budget. *Id.* at 220-42 (Jones, J., concurring).

The *Check Cashing* minority opinion is not binding circuit law, and is a solitary outlier contradicted by all other courts to have considered similar claims against the CFPB.[12] In any event, to the extent that it is credited, it supports FHFA, not plaintiffs. The judges' conclusions about the CFPB turned on that agency's unique role as "a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens,'" *id.* at 236 (quoting *Seila Law*, 140 S. Ct. 2183, 2202 n.8 (2020), and on its unilateral power to tap on demand 12% of the Fed's budget (over $700 million per year), with Congress "even renounc[ing] its own power to review the CFPB's budget," *id.* at 223, 233. "In short, the CFPB is unique." *Id.* at 236. The judges contrasted the CFPB as "in an entirely different league" and "not remotely comparable" to conventional financial regulatory agencies like the Fed, FDIC, and OCC, which have "more targeted" missions

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[12] *See*, *e.g.*, *PHH Corp. v. CFPB*, 881 F.3d 75, 95-96 (D.C. Cir. 2018) (en banc); *CFPB v. Citizens Bank, N.A.*, 504 F. Supp. 3d 39, 57 (D.R.I. 2020); *CFPB v. Fair Collections & Outsourcing, Inc.*, 2020 WL 7043847, at *7-9 (D. Md. Nov. 30, 2020); *CFPB v. Think Finance LLC*, 2018 WL 3707911, at *1-2 (D. Mont. Aug. 3, 2018); *CFPB v. Navient Corp.*, 2017 WL 3380530, at *16 (M.D. Pa. Aug. 4, 2017).

and authority, lack roving prosecutorial powers, and are funded via assessments on regulated entities (or similar mechanisms) rather than a blank check. *Id.* at 236-37; *see also id.* at 225 (describing CFPB as "wholly unprecedented").

FHFA's safety-and-soundness mission places it squarely in the heartland of long-established financial institution regulators like the Fed, FDIC, and OCC, among others. While the CFPB may regulate and initiate enforcement proceedings against "*any* person that engages in offering or providing a consumer financial product or service"—a vast swath picking up thousands of private businesses, 12 U.S.C. § 5481(6)(A), FHFA's purview is limited to the Enterprises and a handful of other specified government-created entities (the Federal Home Loan Banks). 12 U.S.C. §§ 4511, 4502(20). Unlike the CFPB, FHFA cannot simply "requisition[]" whatever funds it purports to need from another federal agency with no strings attached. *Id.* at 223. Rather, FHFA is "funded by imposing fees on the entities it regulates," in accordance with the Fed/OCC model approved by the *Check Cashing* minority opinion. *Id.* at 236.

Finally, any conceivable issue with FHFA's funding mechanism would have no connection with, and would provide no basis for invalidating, the PSPAs or the Third Amendment. FHFA does not fund the Enterprises' or Treasury's performance of their respective PSPA obligations. The money for draws to avoid Enterprise insolvency comes from Treasury, and the money for dividends to Treasury comes from the Enterprises. Moreover, plaintiffs' requested relief is barred by laches because unlike *Check Cashing*, where the issue was raised at the first opportunity, here plaintiffs delayed for many years, during which Treasury's commitment served as the foundation for a stable housing finance market and numerous market participants relied on it. FHFA joins and incorporates the laches and other arguments in Treasury's motion to dismiss at Section II.C.

CONCLUSION

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

Respectfully submitted,

Dated: July 18, 2022

/s/ Robert J. Katerberg

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CERTIFICATE OF SERVICE

I hereby certify that, on July 18, 2022, a copy of the foregoing was electronically filed with the Clerk of Court of the United States District Court for the Southern District of Texas, using the CM/ECF system, which will send a Notice of Electronic filing to all parties of record.

/s/ Robert J. Katerberg