No. 20-2071

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL ROP; STEWART KNOEPP; and ALVIN WILSON,

Plaintiffs-Appellants,

v.

THE FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation; SANDRA L. THOMPSON, in her official capacity as Director of the Federal Housing Finance Agency; and THE DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan, No. 1:17-cv-497

JOINT SUPPLEMENTAL BRIEF OF APPELLEES

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July 14, 2022

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INTRODUCTION

This Court's recent published decision in *Calcutt v. FDIC*, 37 F.4th 293 (6th Cir. 2022), issued after oral argument in this appeal, strongly supports Defendants' arguments in two substantial ways.

First, the panel majority opinion supports the argument that Plaintiffs cannot make the showing of harm required by *Collins v. Yellen*, 141 S. Ct. 1761 (2021), with respect to their claim relating to the unconstitutional removal provision. *See* Treasury Br. at 32-41, FHFA Br. at 47-56.

Second, Judge Murphy's separate opinion supports additional arguments FHFA makes relating to the removal-restriction claim, *see* FHFA Br. at 41-46, as well as Defendants' arguments that the *de facto* officer doctrine, *see* FHFA Br. at 29-34, and equitable principles underlying that doctrine, Treasury Br. at 24-29, preclude Plaintiffs' requested remedy for their Appointments Clause claim (assuming that claim had merit, which it does not). Accordingly, *Calcutt* strengthens the case for affirmance of the judgment below.

ARGUMENT

I. *Calcutt* Supports Defendants' Arguments that Plaintiffs' New Removal-Restriction Claim Fails

As explained in Defendants' briefs, Plaintiffs' new, post-*Collins* removal-restriction claim—in addition to being barred for other reasons—fails because it is implausible. *See* Treasury Br. at 32-41, FHFA Br. at 47-56. It is implausible, in

large part, because Plaintiffs cannot satisfy the requirement set forth in *Collins* that Plaintiffs establish that any harm they allegedly suffered was caused by the unconstitutional removal restriction. *Calcutt* reinforces Defendants' reading of *Collins*, and thus the conclusion that Plaintiffs' new claim in this appeal is untenable.

Like Defendants, *Calcutt* reads *Collins* to hold that, in order "[t]o establish [compensable] harm," the plaintiffs in that case "would need to show that the [challenged] removal restriction *specifically* impacted the agency actions of which they complained." 37 F.4th at 315 (emphasis in original). As the panel in *Calcutt* observed, this is confirmed by the concurring opinions in *Collins*, which note that plaintiffs must "establish that an unconstitutional removal restriction *specifically* caused an agency *action* in order to be entitled to judicial invalidation of that action." *Id.* (emphasis added).

The mere "*possibility* that the [agency] would have taken different actions … if [it had] not been unconstitutionally shielded from removal" is insufficient. *Id.* at 316 (emphasis in original). Indeed, "such a broad reading would effectively eliminate any need to show that unconstitutional removal protections caused harm, because a [plaintiff] could always assert a possibility that an agency with different personnel might have acted differently." *Id.* at 317. A "more concrete showing" is

needed than the "possibility" that harm from a removal restriction might have occurred. *Id.*

Plaintiffs here have failed to demonstrate harm. As explained in Defendants' briefs, the challenged removal restriction did not prevent former President Trump at all—let alone specifically—from reducing Treasury's financial interest in the enterprises, as Plaintiffs contend the former President wanted to do. *See* Treasury Br. at 32-41, FHFA Br. at 47-56. *Calcutt* confirms that Defendants' reading of *Collins* is the correct one, and that *Collins* accordingly forecloses the new claim Plaintiffs seek to raise in this case.

II. Judge Murphy's Separate Opinion in *Calcutt* Further Supports Defendants' Positions

Judge Murphy's opinion—technically a dissent from the judgment due to separate statutory issues not relevant here—agreed with the majority's treatment of the removal-restriction and Appointments Clause issues. It offered additional relevant commentary supporting the Court's unanimous judgment on those issues. That commentary makes a number of points relevant to the issues before the panel in this case.

First, with respect to the removal-restriction claim, Judge Murphy notes that presidential forbearance from exercising the removal power due to a misperception about the validity of a for-cause statute would not provide a basis for a constitutional claim. *Calcutt*, 37 F.4th at 339-40 (Murphy, J., dissenting). Rather,

at most, it might possibly support a claim under the APA: "I would leave open whether courts may vacate agency action as 'arbitrary and capricious' under the Administrative Procedure Act … if the President's reading tangibly affected the disputed action." *Id.* Judge Murphy, like FHFA, grounds this point on Justice Thomas's concurrence. *See id.*; FHFA Br. at 43-44. This supports FHFA's argument that Plaintiffs' claim "amounts in substance to an [APA] claim indisputably subject to § 4617(f)," FHFA Br. at 43-44, which forbids injunctions that would "restrain or affect the exercise of [the] powers or functions of the Agency as a conservator," 12 U.S.C. § 4617(f), and thus forbids the relief Plaintiffs seek here.

Second, also with respect to the removal-restriction claim, Judge Murphy observes that an "unconstitutional removal statute" does not make agency actions themselves "contrary to constitutional right" under Section 706(2)(B) of the APA, and that the APA "incorporate[s] . . . traditional remedial limits." *Calcutt*, 37 F.4th at 348 (Murphy, J., dissenting) (citing the same provisions of Tom C. Clark, *Att'y Gen.'s Manual on the Admin. Proc. Act* (1947) as cited in *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)). This supports FHFA's argument, based on *Norton* and the longstanding remedial limitations it embodies, that courts only review agency *in*action, and compel agencies to take affirmative action, in very narrow circumstances not present here. *See* FHFA Br. at 44-46.

Third, as relevant to the Appointments Clause challenge here, Judge Murphy's opinion strongly supports the application of the *de facto* officer doctrine. *See* FHFA Br. at 29-34. As explained in FHFA's brief, "[t]he *de facto* officer doctrine confers validity upon acts performed by a person acting under 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) (citing *Norton v. Shelby Cty.,* 118 U.S. 425, 440 (1886)); *Bhatti v. FHFA,* 15 F.4th 848, 852-53 (8th Cir. 2021) (same). This helps avoid 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." *Ryder,* 515 U.S. at 180; *Bhatti,*15 F.4th at 853. It also "protect[s] the public by insuring the orderly functioning of the government." *Ryder,* 515 U.S. at 180; *Bhatti,* 15 F.4th at 853 (same); *see also* Treasury Br. at 24-29 (arguing that equitable considerations, including those underlying the *de facto* officer doctrine, barred Plaintiffs' requested relief).

As Judge Murphy observes, "English courts introduced [the *de facto* officer doctrine] into the law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office, without being lawful officers." 37 F.4th at 343 (Murphy, J., dissenting) (citation and internal quotation marks

omitted); *see also id.* at 352 (explaining that "courts long recognized" that invalidating an officer's past actions on the ground that the officer had been improperly appointed could create "'endless confusion'") (quoting *Norton*, 118 U.S. at 441-42). The long history of judicial review in this area of law "refutes the theory that the Constitution of its own force compels courts to treat as 'void' any action taken by officers whose exercise of an office does not comport with a constitutional command." *Id.* at 345. Indeed, "[t]hat view would treat the *de facto* officer doctrine *itself* as unconstitutional," despite the fact that "it formed part of the legal backdrop against which the founders enacted the Constitution" and "[n]othing in the Constitution can be read to do away with it." *Id.* (emphasis in original). And this case illustrates the potential chaos and confusion that would result from invalidating an agency action of national significance based on an Appointments Clause challenge brought years after that action was taken. *See* FHFA Br. 29-34; Treasury Br. 24-29.

Accordingly, both the panel opinion and the separate points made in Judge Murphy's opinion strongly support Defendants' arguments in this appeal.

CONCLUSION

For the above reasons as well as those stated in Defendants' prior briefs and oral argument, this Court should affirm the judgment below.

Dated: July 14, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 3,000 words set forth in Plaintiffs' Motion for Leave to File Supplemental Brief, as granted by order of June 30, 2022, because it contains 1,318 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface in 14-point Times New Roman font.

/s/ Robert J. Katerberg
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2022, I filed the foregoing Joint Supplemental Brief of Appellees with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered users:

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