No. 22-20632

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

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

v.

DEPARTMENT OF THE TREASURY;
FEDERAL HOUSING FINANCE AGENCY;
SANDRA L. THOMPSON; JANET YELLEN,
*Defendants-Appellees.*

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

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## CERTIFICATE OF INTERESTED PERSONS

*Collins v. Treasury*, No. 22-20632

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

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Attorneys whose names are denoted with an asterisk entered appearances in the district court but have not entered appearances in the Fifth Circuit. In addition to the named parties listed above, all Fannie Mae and Freddie Mac shareholders have a financial interest in the outcome of this case.

Dated: February 1, 2023

s/ David H. Thompson
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**STATEMENT REGARDING ORAL ARGUMENT**

Plaintiffs-Appellants ("Plaintiffs") respectfully request oral argument. This appeal presents an important question regarding the Supreme Court's instructions to the lower courts in *Collins v. Yellen*, 141 S. Ct. 1761 (2021). Further, the outcome of this appeal will have practical implications for Fannie Mae, Freddie Mac, and their shareholders.

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## INTRODUCTION

In *Collins v. Yellen*, the Supreme Court agreed with Plaintiffs that a restriction on the President's ability to remove the Director of the Federal Housing Finance Agency was unconstitutional. This appeal concerns what comes next. The Supreme Court left the task of determining whether Plaintiffs could prove that they were entitled to a remedy for the unconstitutional removal restriction to the lower courts. Before Plaintiffs had a chance to make that showing, however, the district court dismissed Plaintiffs' claims entirely.

To get to that result, the district court had to discount plaintiffs' plausible factual allegations, improperly weigh evidence, impose novel legal doctrines, and make credibility determinations that have no place on a motion to dismiss.

Under the proper motion to dismiss standards, Plaintiffs have met their burden. Indeed, Plaintiffs have exceeded that burden not only by making plausible allegations but also by providing extensive concrete support for those allegations. Plaintiffs have followed the Supreme Court's instruction to explain what would have happened in a world without the unconstitutional removal restriction. To the extent the district court found that exercise too speculative, that is a quarrel with the Supreme Court's holding in *Collins*, not with the sufficiency of plaintiffs' allegations.

The only remaining question, according to the Supreme Court, is whether the

removal restriction harmed the Companies' shareholders by impeding the President's ability to pursue policies that would have benefited them. Specifically, the Court said that a public statement from the President explaining that he disapproved of the actions of FHFA's director and that he would have removed him from office would "clearly" show that the removal restriction harmed the shareholders.

Former President Trump has said precisely that. In direct response to the Supreme Court's decision, the former President has unequivocally stated that, if he had "controlled FHFA from the beginning of [his] Administration, as the Constitution required," he would have removed the FHFA director from office, "ordered FHFA to release these companies from conservatorship," "fully privatized the companies," and ensured that the companies' common stock increased in value. But "because of the unconstitutional restriction," he continued, his "Administration was denied the time it needed to fix this problem." ROA.1225. And the actions taken by the Trump Administration after it finally took control of FHFA are consistent with the former President's statement. Thus, there is nothing left for this Court to do other than to apply the Supreme Court's decision and order the district court to enter an injunction placing Plaintiffs in the position they would be in absent the unconstitutional removal restriction—or, at a minimum, to permit this case to move forward to summary judgment.

Independently, Plaintiffs have plausibly alleged that FHFA's self-funding structure—which grants the Director full control over FHFA's funding with no oversight from Congress—violates the Appropriations Clause. The district court invoked the discretionary "mandate rule" to dismiss Plaintiffs' Appropriations Clause claims on procedural grounds. But Plaintiffs' claims fall within the court's mandate. In any case, an exception to the discretionary mandate rule for intervening changes in law applies here.

The district court's dismissal should be reversed.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 2201. The district court dismissed Plaintiffs' claims with prejudice in a Memorandum and Order on November 21, 2022, and entered final judgment in a separate order under Federal Rule of Civil Procedure 58(a) on December 12, 2022. Plaintiffs filed a timely notice of appeal on December 5, 2022. *See* FED. R. APP. P. 4(a)(2); *Ueckert v. Guerra*, 38 F.4th 446, 451–453 (5th Cir. 2022). This Court has jurisdiction under 28 U.S.C. § 1291. Plaintiffs have standing because they were financially injured by decreased stock value. This injury is fairly traceable to the unlawful conduct Plaintiffs challenge—the implementation of the Third Amendment while the unconstitutional removal restriction remained in place—and would be redressed by

Plaintiffs' requested relief. *See Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021).

## STATEMENT OF THE ISSUES

1. Whether the FHFA director's unconstitutional removal restriction harmed Plaintiffs when the former President has publicly stated that the removal restriction was the only reason he did not remove the director and implement a policy that would have benefited Plaintiffs.
2. Whether Plaintiffs plausibly allege that the Federal Housing Finance Agency's self-funding structure violates the Appropriations Clause such that the Third Amendment to the Preferred Share Purchase Agreements between FHFA and Treasury should be vacated and set aside.

## STATEMENT OF THE CASE

### A. Fannie Mae, Freddie Mac, and the Net Worth Sweep.

Fannie Mae and Freddie Mac ("the Companies") are privately owned companies that sell mortgage-backed securities. ROA.1179. By insuring and securitizing mortgages, the Companies support the multi-trillion-dollar housing finance market and help make homeownership possible for millions of Americans. *Id.*

The Companies are regulated by the Federal Housing Finance Agency (FHFA). ROA.1180–81. In 2008, Congress passed and President Bush signed the Housing and Economic Recovery Act (HERA), the statute which created FHFA and

appointed the agency to regulate the Companies. *Id.* HERA established FHFA as an independent agency with a single Director. ROA.1180. HERA granted the single Director significant powers, two of which are most relevant here. First, the Director maintains full control over FHFA's funding without oversight from Congress through the typical appropriations process. *Id.* Instead, the Director may establish and collect assessments, in an amount to be determined by the Director, directly from the entities that FHFA regulates. The Director may use these funds not only for FHFA's expenses but also "to maintain a working capital fund." *Id.*; *see also* 12 U.S.C. § 4516(a). Second, HERA empowers the Director to appoint FHFA as the Companies' conservator. ROA.1181. If the Director exercises this power, FHFA is not "subject to the direction or supervision of any other agency of the United States." ROA.1181; 12 U.S.C. § 4617(a)(7). The Director exercised this power in September 2008, putting the Companies into conservatorship. ROA.1182. The Companies remain in conservatorship to this day. ROA.1209.

In 2008, acting as conservator of the Companies, FHFA entered into two agreements on the Companies' behalf with the Treasury Department. ROA.1182. These agreements are known as Preferred Stock Purchase Agreements (PSPAs). *Id.* Under the PSPAs, Treasury agreed to provide the Companies with a funding commitment that the Companies could draw upon if their liabilities exceeded their assets. ROA.1182. In return, Treasury received several benefits. *Id.* First, Treasury

received senior preferred stock that carried a liquidation preference. ROA.1183. A liquidation preference gives a shareholder the right to receive funds before other shareholders in the event the company is liquidated. *Id.* Treasury's initial liquidation preference was for $1 billion. *Id.* And Treasury's liquidation preference was set to increase by one dollar more for each dollar the Companies drew from Treasury's funding commitment. *Id.* Treasury's senior preferred stock also entitled it to quarterly dividends before all other shareholders. *Id.* Second, FHFA agreed that the Companies would issue warrants entitling Treasury to buy 79.9% of their common stock at a nominal price. ROA.1182. Finally, the Companies were to pay Treasury a quarterly market-based periodic commitment fee, although Treasury waived the fee in every quarter in which it could have been charged. ROA.1183.

FHFA and Treasury amended the PSPAs several times. ROA.1184. Most relevant here is the Third Amendment of August 2012, in which FHFA and Treasury imposed what is known as the Net Worth Sweep. ROA.1185–86.[1] The Net Worth Sweep, a policy developed in part by Obama White House officials, ROA.1186, forces the Companies to pay Treasury their *entire net worth* (minus a small capital

[1] In January 2021, FHFA and Treasury agreed to amend the PSPAs for a fourth time. ROA.1205. The amendments increased the amount of "net worth" the Companies could retain under the sweep. *Id.* In addition, the amendments permitted Treasury's liquidation preference to increase in an amount equal to the Companies' retained earnings. *Id.* The Supreme Court held that these amendments did not moot Plaintiffs' claims for retrospective relief. *Collins*, 141 S. Ct. at 1780.

buffer) every quarter. ROA.1185–86. In other words, the Companies are bound to pay Treasury 100% of their comprehensive income and retained assets—in perpetuity. ROA.1186. This new arrangement resulted in massive payments to Treasury, totaling $300 billion—approximately $109 billion more than the Companies received from Treasury. *See* ROA.1187 (noting that Fannie Mae disbursed $181 billion to Treasury while Freddie Mac disbursed $119 billion). Despite Fannie and Freddie's extraordinary profits in the years following the Net Worth Sweep, ROA.1185, the Net Worth Sweep guaranteed that the Companies could never pay down Treasury's liquidation preference, ROA.1187. The Net Worth Sweep thus stripped the Companies' junior preferred and common stock of all economic value by guaranteeing that any profits the Companies generate for investors would go to Treasury. ROA.1186–87; *see also* ROA.1186 ("An internal Treasury document dated August 16, 2012, expressed the same sentiment: 'By taking all of their profits going forward, we are making clear that the [Companies] will not ever be allowed to return to profitable entities.'").

### B. The Removal Restriction Prevents the Trump Administration from Enacting Its Preferred Policies.

The Trump Administration sought to unwind these policies but was unable to do so because of HERA's removal restriction, later held unconstitutional by the Supreme Court in this case. *Collins*, 141 S. Ct. at 1783–84.

HERA's removal restriction provided that the FHFA Director served for a

five-year term and could only be removed by the President "for cause." ROA.1181; 12 U.S.C. § 4512(b)(2). Thus, President Trump was unable to nominate an FHFA Director in line with his Administration's policy goals. ROA.1190. Instead, when President Trump took office, the Obama-nominated, long-time Democratic Congressman Mel Watt still served as director of FHFA. ROA.1188. Director Watt still had two years left in his statutory term and could not be fired without cause. ROA.1190. Director Watt was the last remaining Obama-appointed regulator leading a federal agency in the Trump Administration. ROA.1191.

The Trump Administration, meanwhile, had two overarching goals for Fannie Mae and Freddie Mac. ROA.1191. First and foremost, the Trump Administration planned to lead the Companies out of conservatorship as quickly as possible. *Id.* Additionally, the Trump Administration planned to end government ownership of the Companies by selling off Treasury's stake in the Companies at a large profit. *Id.* The Administration intended to achieve these goals by selling new shares of the Companies' common stock to investors. ROA.1195. For that to work, though, two things had to happen. First, the Net Worth Sweep had to be eliminated so that the Companies could actually retain profits. ROA.1200, 1203–04. After all, no private investor would purchase stock in a company that has its net worth stripped by the government each quarter. ROA.1186–87. Second, and relatedly, Treasury's liquidation preference had to be eliminated. ROA.1196. Here again, no private

investor would purchase stock if Treasury's massive liquidation preference entitled it to billions of dollars before all other shareholders saw a single dollar. ROA.1195–1197. The Trump Administration planned to eliminate Treasury's liquidation preference by either writing the liquidation preference down to zero or converting Treasury's senior preferred shares (which carried the liquidation preference) to common stock (or some combination of the two). *Id.* Either approach would have allowed Treasury to sell its stake in the Companies for a large profit as part of the recapitalization—achieving the Administration's goals. ROA.1195–1197, 1212.

But the Trump Administration was not able to achieve its goals of leading the Companies out of conservatorship and into private ownership due to the removal restriction. ROA.1199, 1212. The Trump Administration and Director Watt disagreed on at least two critical issues. First, they disagreed about implementing the Net Worth Sweep. ROA.1200–01. Second, they disagreed about whether the executive branch could or should lead the Companies out of conservatorship without congressional action. ROA.1199–1200. Director Watt thought that any effort to release the Companies from conservatorship should occur by legislation, while the Trump Administration thought it both lawful and desirable for the executive branch to act without further legislation. ROA.1201–02. This standoff continued until Director Watt's term ended two years into the Trump presidency. *Id.*

Finally, after Director Watt's statutory term ended in January 2019, President

Trump was able to appoint an FHFA director in line with his Administration's policy goals. ROA.1190. Once able to select his own Director, President Trump moved quickly. President Trump announced who he would choose to serve as acting FHFA director and nominated a permanent director the month before Director Watt's term expired. ROA.1190. And President Trump installed a new acting director the same day Watt's term ended, despite statutory authority allowing President Trump to keep Watt in a holdover capacity following the end of his term. ROA.1190–91 (citing 12 U.S.C. § 4512(b)(4)).

In April 2019, the Senate confirmed President Trump's choice for FHFA Director, Mark Calabria. ROA.1204. Although Director Calabria and Treasury took several key steps toward accomplishing the Administration's goals of leading the Companies out of conservatorship and into private ownership, they were ultimately unable to complete the tasks in the two years remaining in President Trump's term. ROA.1204, 1208–1209. With only two years to accomplish the Administration's goals, Director Calabria and Treasury simply "ran out of time." ROA.1209 (quoting *Banking With Interest: Former FHFA Chief: The Next Collapse of Fannie, Freddie "May Well Be an Inevitability"* at 16:32, INTRAFI NETWORK (May 17, 2022), https://apple.co/3NQX0lN).

### C. Plaintiffs Prevail on their Constitutional Claim in the Supreme Court, Which Remands for Remedy.

Plaintiffs are individual shareholders of Fannie Mae and Freddie Mac. ROA.1178. They argued that the Net Worth Sweep must be set aside because, among other reasons, the FHFA was unconstitutionally structured as an independent agency with a single director removable only for cause. ROA.15, 29. The District Court dismissed Plaintiffs' complaint and granted defendants' cross-motion for summary judgment on Plaintiffs' constitutional claim. ROA.994–95. A divided panel of this Court held that FHFA is unconstitutionally structured (and rejected Plaintiffs' other claims no longer at issue here). *Collins v. Mnuchin*, 896 F.3d 640, 676 (5th Cir. 2018). This Court then granted rehearing en banc, *Collins v. Mnuchin*, 908 F.3d 151 (2018), and agreed that the FHFA is unconstitutionally structured. *Collins v. Mnuchin*, 938 F.3d 553 (2019). In a fractured opinion, the en banc court declined to set aside the Net Worth Sweep, however, and instead held that the proper remedy was to sever the removal restriction from the rest of the statute. *Id.* at 591–92. The Supreme Court granted certiorari. *Collins v. Mnuchin*, 141 S. Ct. 193 (2020) (mem.).

The Supreme Court agreed with Plaintiffs on their constitutional claim and held that HERA's "for-cause restriction on the President's removal authority violates the separation of powers." *Collins*, 141 S. Ct. at 1783–84. Rather than dictate a particular remedy, the Supreme Court remanded for the lower courts to determine whether the unconstitutional restriction "inflict[ed] compensable harm" on the

Companies' shareholders. *Id.* at 1789. While recognizing that "an unconstitutional provision is never really part of the body of governing law," the Court acknowledged that "it is still possible for an unconstitutional provision to inflict compensable harm." *Collins*, 141 S. Ct. at 1788–89. The Court provided illustrative examples in which "the statutory provision would clearly cause harm," including if "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." *Id.* at 1789. Because the Court could not "rule[] out" that Plaintiffs suffered compensable harm, it concluded that the question of remedy "should be resolved in the first instance by the lower courts." *Id.* President Biden fired Director Calabria and nominated a director "who reflects the administration's values" within *hours* of the Supreme Court handing down its opinion. ROA.1210.

Applying the Supreme Court's instruction, this Court heard oral argument on Plaintiffs' entitlement to retrospective relief. The en banc court concluded, over a dissent, that "the prudent course" was to remand to the district court "to fulfill the Supreme Court's remand order." *Collins v. Yellen*, 27 F.4th 1068, 1069 (5th Cir. 2022) (per curiam).

### D. Former President Trump Says He Would Have Fired Director Watt But For the Unconstitutional Removal Restriction.

Back in the district court, Plaintiffs amended their Complaint to comply with the Supreme Court's instruction to allege compensable harm caused by the

unconstitutional removal restriction. ROA.1176. Plaintiffs alleged, among other things, that the unconstitutional removal restriction prevented the Trump Administration from achieving its goals of ending the conservatorships and moving the Companies out of government ownership. *See generally* ROA.1176–1220. As an attachment to their Complaint, Plaintiffs provided a signed letter from President Trump to Senator Rand Paul. ROA.1225; *see also Letter from Donald Trump to Sen. Rand Paul*, REAL CLEAR POLITICS (Nov. 11, 2021), https://bit.ly/3ped1sP ("Letter"). In the letter, President Trump explains exactly the steps he would have taken but for the unconstitutional removal restriction. *Id.* President Trump acknowledges that "the Supreme Court has raised" a question "about what I would have been able to accomplish if I had been able to fire the incompetent Mel Watt from day one of my Administration." *Id.* President Trump directly answers that question: "From the start, I would have fired former Democrat Congressman and political hack Mel Watt from his position as Director and would have ordered FHFA to release these companies from conservatorship." *Id.* He further explains: "My Administration would have also sold the government's common stock in these companies at a huge profit and fully privatized the companies. The idea that the government can steal money from its citizens is socialism and is a travesty brought to you by the Obama/Biden administration." *Id.* As to the effect of the unconstitutional removal restriction, President Trump concludes that "[m]y Administration was denied the time it needed

to fix this problem because of the unconstitutional restriction on firing Mel Watt. It has to come to an end and courts must protect our citizens." *Id.*

Defendants each moved to dismiss Plaintiffs' amended complaint. ROA.1230, 1322. The district court granted the motion and again dismissed Plaintiffs' complaint. ROA.1523. As to Plaintiffs' removal claims, the district court reasoned that "Plaintiffs' evidence of harm is contradictory and largely non-cognizable." ROA.1522. And as to Plaintiffs' Appropriations Clause claims, the district court declined to analyze the sufficiency of plaintiffs' allegations, instead dismissing them as new arguments "exceed[ing] the scope of its mandate" under the discretionary "mandate rule." ROA.1523. Plaintiffs appealed.

## SUMMARY OF ARGUMENT

The Supreme Court has already held that the restriction on the President's ability to remove the FHFA director is unconstitutional. The only remaining question is whether that restriction harmed Plaintiffs by preventing the President from removing the FHFA director and implementing his policy of restoring the shareholders' value. The Supreme Court held that a public statement from the President expressing his displeasure with the FHFA director and explaining that the restriction prevented him from removing the director from office would "clearly" show that restriction harmed the shareholders. Former President Trump has issued just such a statement—explaining that, were it not for the removal restriction, he

would have removed the FHFA director and restored the shareholders' value.

Plaintiffs allege further facts supporting their claim for relief within the counterfactual framework the Supreme Court instructed the lower courts to apply. Plaintiffs plausibly allege that the Trump Administration: (1) intended to take the Companies out of conservatorship and privatize them; (2) took several steps to achieving those goals; and (3) was unable to achieve those goals because of the two years lost to the unconstitutional removal restriction. Plaintiffs support their factual allegations with statements made and actions taken by Trump Administration officials. Under *Collins*, Plaintiffs are entitled to a remedy.

Plaintiffs also plausibly allege that FHFA's self-funding structure—which grants the single Director full, unbounded control over FHFA's funding with no oversight from Congress—infringes on Congress's power of the purse and violates the Appropriations Clause. This Court recently held that an analogous single-headed independent agency similarly exempted from the appropriations process violated the Appropriations Clause. This precedent strongly supports Plaintiffs' claims.

Further, no threshold issue would bar Plaintiffs' requested relief. The discretionary "mandate rule" invoked by the district court does not foreclose Plaintiffs' claims. All of Plaintiffs' claims fall comfortably within the court's mandate on remand. Even if Plaintiffs' claims did not fall within the court's mandate, the exception to the discretionary mandate rule for intervening changes in law

applies.

Nor does 12 U.S.C. § 4617(f) bar Plaintiffs' claims. That provision "prohibits relief where the FHFA action at issue fell within the scope of the Agency's authority as a conservator," but *permits* relief "if the FHFA *exceeded* that authority." *Collins*, 141 S. Ct. at 1776 (emphasis added). Here, Plaintiffs allege that FHFA exceeded its authority in maintaining the Net Worth Sweep and the attendant liquidation preference since President Trump was unconstitutionally barred from firing the Director. And even if the Court disagrees with that analysis, section 4617(f) does not provide the kind of "clear statement" required to deprive Plaintiffs of *any* remedy for a constitutional violation. *Webster v. Doe*, 486 U.S. 592, 603 (1988).

In sum, Plaintiffs have satisfied the motion to dismiss standard, and the district court's dismissal should be reversed.

## STANDARD OF REVIEW

This district court dismissed Plaintiffs' complaint for failure to state a claim upon which relief can be granted. "This court reviews a district court's dismissal under Rule 12(b)(6) *de novo*, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs." *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009).

To survive 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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Under Rule 8(a)(2), a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief." *Olivarez v. T-mobile USA, Inc*., 997 F.3d 595 (5th Cir. 2021). "The court accepts well-pled facts as true and view[s] them in the light most favorable to the plaintiff." *Vardeman v. City of Housto*n, 55 F.4th 1045, 1050 (5th Cir. 2022) (internal quotation marks omitted). "All questions of fact and any ambiguities in the current controlling substantive law must be resolved in the plaintiff's favor." *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001). Defendants face "a heavy burden" to "show that there is no possibility that plaintiff would be able to establish" entitlement to relief. *Id.* at 357.

## ARGUMENT

### I. Plaintiffs Plausibly Allege their Entitlement to a Remedy for the Separation of Powers Violation Recognized by the Supreme Court.

#### A. Plaintiffs' Removal Remedy Allegations—Including A Dispositive Statement from Former President Trump—Satisfy the Motion to Dismiss Standard.

The Supreme Court has already held the removal restriction on the FHFA Director unconstitutional. The only remaining question is whether Plaintiffs can show that they were harmed by the unconstitutional removal restriction. Plaintiffs have done just that. Plaintiffs have provided a direct statement by former President Trump explaining that he would have fired Director Watt but for the unconstitutional

restriction—the kind of evidence the Supreme Court said would "clearly" cause harm. *Collins*, 141 S. Ct. at 1789. Even beyond that, Plaintiffs have alleged a body of facts showing that President Trump would have fired Director Watt and, with control over FHFA, pursued policies that would have benefitted Plaintiffs. To avoid the straightforward conclusion that Plaintiffs have stated a claim for a remedy, the district court improperly weighed evidence, imposed novel legal standards, and discounted Plaintiffs' allegations. Plaintiffs' removal remedy claims should survive and Plaintiffs should be put in the position they would have been but for the constitutional violation.

In *Collins*, the Supreme Court held that the structure of FHFA violated the separation of powers. 141 S. Ct. at 1783. Although the unconstitutional statutory provision was "automatically displace[d]" by the Constitution, the Court further held that the removal restriction could nevertheless "inflict compensable harm." *Id.* at 1788–89. And specifically in the context of litigation over the Net Worth Sweep, the Court said "the possibility that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect cannot be ruled out." *Id.* at 1789.

The Supreme Court left the question of whether plaintiffs can show that they are entitled to a remedy to the lower courts to resolve in the first instance. *Collins*, 141 S. Ct. at 1788–89. The Court reasoned that plaintiffs may have an "entitlement

to retrospective relief." *Id.* at 1788. The Court went on to provide examples in which the unconstitutional removal restriction "would *clearly* cause harm." *Id.* at 1789 (emphasis added). For example, the Court explained, "suppose 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." *Id.* In "th[at] situation[], the statutory provision would clearly cause harm." *Id.* The Court acknowledged that the plaintiffs argue that, absent the removal restriction, "the President might have replaced one of the confirmed Directors who supervised the implementation of the third amendment, or a confirmed Director might have altered his behavior in a way that would have benefited the shareholders." *Id.* The Supreme Court then remanded for the lower courts to evaluate that question in the first instance. *Id.* Thus, the Court sent the case back to the lower courts to determine whether evidence supported a conclusion that the President desired to remove the director but did not do so because of the removal restriction.

This Court has since clarified that to obtain a remedy, Plaintiffs must demonstrate: (1) "a substantiated desire by [President Trump] to remove [Director Watt]"; (2) "a perceived inability to remove [Director Watt] due to the infirm provision"; and (3) "a nexus between" President Trump's "desire to remove" Director Watt and Defendants' failure to eliminate the liquidation preference on Treasury's senior preferred stock. *CFSA v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022).

Plaintiffs' amended complaint plausibly alleges facts that, if proven, establish each of these elements.

In line with the Supreme Court's instructions to adopt a counterfactual framework, Plaintiffs allege facts showing what President Trump *would* have done absent the unconstitutional removal restriction. In particular, Plaintiffs allege that President Trump *would* have replaced Director Watt absent the unconstitutional removal restriction and that a confirmed Director appointed by President Trump at the beginning of his term *would* have acted differently than Director Watt in a way that benefited shareholders.

In fact, plaintiffs have provided more than just counterfactual allegations. Although it is not Plaintiffs' burden to present evidence at the motion to dismiss stage, Plaintiffs have nonetheless presented *direct evidence* of President Trump's intent to have managed the FHFA absent the removal restriction and specifically to have fired Director Watt—straight from President Trump himself. Plaintiffs attached to their First Amended Complaint a letter from President Trump to Senator Rand Paul explaining the actions he would have taken in the first two years of his Administration had the unconstitutional removal restriction not been in place. ROA.1225. In the letter, President Trump focuses on "the need to privatize Fannie Mae and Freddie Mac," *Id.*, and "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," *Id.* President Trump acknowledges the Supreme Court's decision in this case and recognizes that "[t]he Supreme Court's decision asks what I would have done had I controlled FHFA from the beginning of my Administration, as the Constitution required." *Id.* President Trump leaves no doubt as to the answer to that question. He explains in no uncertain terms:

> From the start, I would have fired former Democrat Congressman and political hack Mel Watt from his position as Director and would have ordered FHFA to release these companies from conservatorship. My Administration would have also sold the government's common stock in these companies at a huge profit and fully privatized the companies. The idea that the government can steal money from its citizens is socialism and is a travesty brought to you by the Obama/Biden administration. My Administration was denied the time it needed to fix this problem because of the unconstitutional restriction on firing Mel Watt.
>
> *Id.*

That should be the end of any dispute over whether Plaintiffs are entitled to a retrospective remedy based upon their presidential removal claim. *Collins* states that "a public statement" by the President "expressing displeasure with actions taken by a Director" and "assert[ing] that he would remove the Director if the statute did not stand in the way" would "clearly" show that the removal restriction harmed shareholders. 141 S. Ct. at 1789. In other words, that public statement would be dispositive. Here, the former President has provided just such a statement in direct response to the Supreme Court's decision.

The Supreme Court instructed plaintiffs to present a counterfactual theory of

what President Trump would have done absent the unconstitutional removal restriction, particularly focusing on the former President's intent. Plaintiffs have presented direct, probative evidence about the former President's intent *from the former President himself*. That fact conclusively answers the question of what President Trump would have done absent the unconstitutional removal restriction. That fact *alone* precludes a motion to dismiss.

Even putting aside Plaintiffs' extraordinary *direct* facts proving President Trump's intent, plaintiffs also allege a body of probative *circumstantial* facts which independently demonstrate that plaintiffs can make out their case for relief. Here too, Plaintiffs have satisfied the *CFSA v. CFPB* factors, 51 F.4th at 632, by showing that President Trump wanted to fire Director Watt, did not do so because of the unconstitutional removal restriction, and would have taken action to benefit Plaintiffs if he had.

Plaintiffs allege that "[f]rom the beginning, the Trump Administration had two primary policy objectives for Fannie and Freddie: (1) releasing the Companies from conservatorship as promptly as practicable; and (2) ending government ownership of the Companies by selling Treasury's stake at a large profit." ROA.1191. Plaintiffs pointed to *fourteen* different statements from President Trump and Trump Administration officials expressing those goals. *See* ROA.1191–94, 1196–97. Below are just a handful of Plaintiffs' specific factual allegations outlining

the Trump Administration's goals and steps taken towards those goals:

- "Steven Mnuchin said in an interview shortly after President-elect Trump nominated him to serve as Treasury Secretary that the new Administration intended to get [Fannie and Freddie] out of government control." ROA.1191 (internal quotation marks omitted); *see also* ROA.1192 ("In testimony before the House Financial Services Committee in the summer of 2017, Secretary Mnuchin stated that leaving [Fannie and Freddie] in conservatorship makes no sense." (internal quotation marks omitted)).
- "President Trump's eventual pick for FHFA Director, Mark Calabria, then serving as Vice President Pence's chief economist, said that the Trump Administration is committed to ending the conservatorship of Fannie Mae and Freddie Mac." ROA.1192 (internal quotation marks omitted); *see also* ROA.1192–93 ("In a speech after becoming FHFA Director, Mr. Calabria stated that the centerpiece of our strategy is to end the Fannie and Freddie conservatorships." (internal quotation marks omitted)).
- "In 2018, the Executive Office of the President issued a report outlining numerous proposals to end the conservatorship of Fannie Mae and Freddie Mac and transition[] Fannie Mae and Freddie Mac to fully private entities." ROA.1192 (internal quotation marks omitted).
- "In a March 2019 directive, President Trump instructed Treasury to consult

with FHFA and develop proposals for [e]nding the conservatorships of Fannie and Freddie." ROA.1192 (internal quotation marks omitted).

- "During Director Calabria's tenure, FHFA also sent an annual report to Congress stating that FHFA's end-state vision for the Enterprises is to return [them] to operating as fully-private companies outside of conservatorship." ROA.1194 (internal quotation marks omitted).
- "In September 2019, Treasury issued a report in response to the President's March 2019 directive. On page one, the report stated that the Companies' conservatorships should come to an end. The Treasury report also stated that the Companies should be recapitalized and exit conservatorship as promptly as practicable. On the same day, FHFA issued a press release praising the Treasury report and saying that [a]fter nearly 11 years, ending the conservatorships of Fannie Mae and Freddie Mac is now a top priority for this Administration and the FHFA." ROA.1193 (internal quotation marks and citations omitted).
- "Mr. Mnuchin said the new Administration wanted to privatize the Companies and that [i]t makes no sense that these are owned by the government." ROA.1196 (internal quotation marks omitted).
- "Director Calabria said he expected that, as part of a public offering of new shares of Fannie and Freddie stock, Treasury would sell off its shares to

recoup the taxpayer investment." ROA.1196–97 (internal quotation marks omitted).

Plaintiffs further allege that, given the financial condition of the Companies when President Trump took office, ROA.1194, the Trump Administration could not immediately accomplish its stated goals of releasing the Companies from conservatorship without certain preparatory steps, *Id.* Plaintiffs provide support for this factual allegation with a statement from Director Calabria, who explained that: "A precondition for responsibly ending the conservatorships is that the Enterprises must be well-regulated and well-capitalized, such that once Fannie Mae and Freddie Mac exit, they never have to return." ROA.1194. This process would take time. "Although the Companies had returned to sustained profitability by 2017, building up the capital reserves necessary to exit conservatorship solely through retained earnings would have taken many years." *Id.*

Thus, Plaintiffs allege, "[t]o achieve its objective of ending the conservatorships as promptly as practicable, the Trump Administration's policy was to recapitalize the Companies in part by having the Companies sell new shares of common stock to private investors." ROA.1195. The complaint quotes a statement from Secretary Mnuchin outlining this plan. He explained: "So we really see two things. One, retaining earnings, that is one way we will accumulate capital. And then, two, we will have to raise third-party capital." *Id.* Secretary Mnuchin also

stated that, in his view, the Companies "can raise a very significant amount of capital from the private sector." *Id.*; see also *Id.* ("It's always been my view that an exit from conservatorship is going to require a large capital raise by Fannie and Freddie.").

The Trump Administration planned to raise this needed capital "through a series of [stock] issuances." ROA.1195. But "[t]o raise billions of dollars of capital in the private markets, the new issuances of common stock that the Trump Administration intended for the Companies to sell would need to be attractive to private investors." *Id.* "The only way to make such stock attractive to private investors was to eliminate the liquidation preference on Treasury's senior preferred stock." *Id.* That is because "[t]he large liquidation preference on Treasury's senior preferred stock, combined with the fact that Treasury's senior preferred stock has priority over all other stock issued by the Companies, prevented all shareholders in the Companies other than Treasury from ever receiving a return on their investments." ROA.1195–96; *see also* ROA.1197 ("[T]he Companies' common stock has no economic value so long as that liquidation preference remains.")

For that reason, "[p]rivate investors would not purchase a new issuance of common stock in the Companies so long as the liquidation preference remained." ROA.1196. "Therefore, a necessary step in fulfilling the Trump Administration's goal of recapitalizing the Companies through a new issuance of common stock and

releasing them from conservatorship was to eliminate the liquidation preference on Treasury's senior preferred stock." *Id.* "That step could be accomplished in either of two ways: (1) by writing down the liquidation preference to zero and promising not to further increase the liquidation preference in the absence of additional draws on Treasury's funding commitment; or (2) by converting Treasury's senior preferred stock to common stock." *Id.* Plaintiffs allege further support for this allegation in a September 2019 Treasury report, "which responded to the President's March 2019 directive and listed ending the conservatorships as a top priority in fulfilling the President's mandate." ROA.1197. There, "Treasury recommended that the Administration consider (1) [e]liminating all or a portion of the liquidation preference of Treasury's senior preferred shares; or (2) exchanging all or a portion of that interest for common stock or other interests in the Companies." *Id.* (internal quotation marks omitted). This indicates that in addition to either simply eliminating the liquidation preference in full or converting to common in full, the Administration could have eliminated the liquidation preference by writing it down in part and converting the rest to common stock.

Having alleged ample facts establishing the Trump Administration's plan for the Companies as well as the steps necessary to complete that plan, Plaintiffs further allege that the Trump Administration was unable to complete its plan because of the unconstitutional removal restriction. When President Trump took office, Director

Watt still had two years left to serve and could not be fired without cause under HERA's removal restriction. ROA.1190. "So long as Director Watt was at the helm of FHFA, the Trump Administration was unable to make progress on its policy objectives for Fannie and Freddie." ROA.1199; *see also* ROA.1199–1203 (outlining the policy disagreements between Director Watt and the Trump Administration). The Trump Administration understood that "we need to wait really for Director Watt's term to end to and to have our appointee," and made the decision "to wait for a nominee" to begin effectively implementing its plan for the Companies. ROA.1202 (Statement from Craig Phillips). "In sum, although the Administration was committed to selling Treasury's stake in the Companies and ending the conservatorships, Director Watt's unconstitutionally protected tenure did nothing but cost the Administration critical time—two full years—in pursuing those goals." *Id.*

When President Trump was finally able to nominate his own chosen Director, "the Trump Administration could at last begin the process of planning and implementing the concrete steps necessary to release the Companies from conservatorship and end government ownership." ROA.1204. Plaintiffs allege that "[t]here were five key steps necessary for the Companies to exit conservatorship—the first four of which Director Calabria and Treasury completed in whole or in part." *Id.*; *see also* ROA.1204–06 (outlining the five steps). And Plaintiffs further allege

that several of these steps were "*sequential*," ROA.1207 (emphasis in original), and "could not be carried out unilaterally by Treasury," *Id.*

As for timing, "Director Calabria repeatedly said that he anticipated that the Companies would sell new shares of stock to private investors in 2021." ROA.1208. "When the Trump Administration ended, FHFA and Treasury were on track to position the Companies to sell a new issuance of common stock in 2021—roughly two and a half or three years after Director Watt's term ended in January 2019." *Id.* Thus, "[i]f President Trump had fired Director Watt and installed his own FHFA director in January 2017, the Administration would have been able to start pursuing its policy objectives for Fannie and Freddie two years sooner." *Id.* "But for the removal restriction," *Id.*, then, "President Trump would have fired Director Watt at the start of his Administration and the Companies would have raised capital by selling new shares of common stock in 2019," *Id.* And "[b]efore such a stock issuance occurred," as explained above, FHFA and Treasury would have had to "remove the liquidation preference on Treasury's senior preferred stock because the liquidation preference impeded the Companies' ability to sell new stock and Treasury's ability to monetize its warrants in subsequent stock offerings by the Companies." *Id.* at 1208–09.

Plaintiffs' allegations are further supported by the Trump Administration's last official word on the matter, contained in a January 2021 letter agreement

between FHFA (on behalf of the Companies) and Treasury, which turned off cash dividend payments under the Net Worth Sweep while directing those amounts to be added to the liquidation preference instead. ROA.1210; ROA.1368–78. Included in the agreement was a "Commitment to Develop Proposal to Resolve Conservatorship." ROA.1377. "In order to facilitate the exit from conservatorship," *id.*, the agreement specified, "Treasury and the Enterprise commit to work to restructure Treasury's investment and dividend amount in a manner that facilitates the orderly exit from conservatorship, ensures Treasury is appropriate compensated, and permits the Enterprise to raise third-party capital and make distributions as appropriate," *Id.* As Plaintiffs have alleged, the Administration only could have achieved these goals through elimination of the liquidation preference, whether through a write-down, conversion, or some combination of the two.

All of this publicly available information is confirmed by former President Trump's statement. ROA.1225. He stressed that he would have "sold the government's *common* stock in these companies at a huge profit." *Id.* President Trump's reference to the government profiting from common stock reveals how his administration planned to change the Companies' capital structures; if Treasury's senior preferred shares remained outstanding with a multi-billion-dollar liquidation preference, no economic value could ever be realized by Treasury through the sale of common stock it obtained after exercising its warrants. Thus, this reference

necessarily implies that the Net Worth Sweep would be ended and the liquidation preference on the Treasury's senior preferred stock would be reduced to zero.

Taking these factual allegations together, Plaintiffs have clearly stated a claim for relief. Plaintiffs plausibly allege—indeed, with ample support that goes beyond Plaintiffs' burden at this motion to dismiss stage—that the Trump Administration: (1) intended to take the Companies out of conservatorship and privatize the Companies; (2) took several key steps to achieving those goals; and (3) was unable to achieve those goals because of the two years lost to the unconstitutional removal restriction.

### B. Even If the Former President's Statement Is Not Dispositive, Any Remaining Uncertainty Should Be Resolved In Plaintiffs' Favor.

If the Court decides that former President Trump's statement—the precise hypothetical evidence *Collins* said would "clearly" show harm—is not dispositive, the Court should hold that Defendants may avoid Plaintiffs' requested remedy only by making a clear showing that the removal restriction did *not*, in fact, harm Plaintiffs. Several doctrines support this conclusion.

For one, "where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." 2 McCormick on Evidence § 337 (8th ed. 2022); *see Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 626 (1993) (observing that it is

"entirely sensible to burden the party more likely to have information relevant to the facts about [the matter at issue] with the obligation[s] to demonstrate [those] facts").

Here, we already know what the former President thinks, and any non-public facts relevant to this issue are in the exclusive possession of Defendants and their other former officers and employees. Under these circumstances, Defendants should bear the burden. *Cf. Gomez v. Toledo*, 446 U.S. 635, 641 (1980) (Defendant bears burden of establishing entitlement to qualified immunity because it "depends on facts peculiarly within the knowledge and control of the defendant" and "will frequently turn on factors which a plaintiff cannot reasonably be expected to know."). Just as courts shift the burden of persuasion once a plaintiff makes a *prima facie* case of employment discrimination, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), or a violation of the Equal Protection Clause, *see Alexander v. Louisiana*, 405 U.S. 625 (1972), the Court should hold that Plaintiffs have made (at the very least) a *prima facie* showing that the unconstitutional removal restriction inflicted compensable harm. The burden should thus shift to Defendants to disprove harm.

For another, the "presumption of regularity" counsels that courts should take the official statements of public officials at face value. *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926). As the United States represented to the Supreme Court on behalf of then-President Trump, that presumption "carries the utmost force

with respect to the President himself." Br. for the United States at 78, *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540, 2017 WL 3475820 (U.S. Aug. 10, 2017). Only "clear evidence to the contrary" may overcome the presumption of regularity and permit a court to reject the reasons given by a public official regarding an official act. *Chem. Found.*, 272 U.S. at 14–15; *see also Nat'l Archives and Records Admin v. Favish*, 541 U.S. 157, 174 (2004) ("[W]here the presumption is applicable, clear evidence is usually required to displace it."). If the Court determines the presidential statement is not dispositive, it should require Defendants to come forward with—as the United States previously put it—"the clearest showing to the contrary." Br. for the United States, *supra*, at 78. Absent that showing, the Court should not second-guess the statement of a former President of the United States describing the President's own thought process.

The only way for Defendants to prevail now is if this Court says the statement from the former President of the United States—about the former President's *own* thinking—is false. But that ruling would call for judges to inquire into the supposed "'real' reasons" the President did not attempt to terminate Director Watt. *Reno v. AAADC*, 525 U.S. 471, 491 (1999). Even if Defendants conjured up some argument about alleged "real" reasons, "a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Id.*

Burden shifting also takes into account "substantive policy." Mueller & Kilpatrick, 1 Federal Evidence § 3.3 (4th ed. 2022); *see Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973) (allocation of burden of proof is "a question of policy and fairness based on experience"). The Constitution itself sets forth the policy interest here—the separation of powers "protects individual liberty." *Bond v. United States*, 564 U.S. 211, 223 (2011). To ensure that policy is not illusory, the Court should place the burden on the government to show that an unconstitutional removal restriction did not cause harm given the former President's unequivocal statement.

Moreover, the treatment of an agency that fails to follow the APA's notice-and-comment procedures also supports placing the burden on the government. When an agency fails to satisfy the notice-and-comment requirement, courts find harmless error only if it is clear the failure did not affect the agency's decision; "if there is any uncertainty at all as to the effect of that failure," the error cannot be deemed harmless. *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002). Otherwise, the agency could simply ignore notice and comment and then evade judicial review by stating that the process would not have affected the agency's decision anyway. *Id.* 96–97.

The same principle suggests the burden should be placed on the government. The dangers highlighted by *Sugar Cane Growers* are especially concerning where, as here, the government has changed hands from one political party to another that

has little interest in vindicating the prior administration's policy goals. For two years, Democratic appointee Mel Watt stymied a Republican administration's policy goals in violation of the Constitution, harming Plaintiffs in the process. And now, a Democratic administration is back in power and seeks to argue that Director Watt's tenure made no difference at all. In this way, holding the constitutional error harmless would permit one political party to evade judicial review of its own separation-of-powers violation that has injured Plaintiffs. The Court should reject this all's-fair-in-politics understanding of the separation of powers and require a clear showing from Defendants before concluding that the removal restriction did not harm Plaintiffs.

### C. The District Court Improperly Discounted Plaintiffs' Well-Pleaded Allegations, Weighed Evidence, and Made Credibility Determinations, Among Other Errors.

The district court's dismissal failed to account for much of the Plaintiffs' well-pleaded factual allegations outlined above. As for the allegations the district court did consider, the district court discounted several of Plaintiffs' critical factual allegations, openly weighed the evidence, and made unsupported credibility determinations on a motion to dismiss. These fundamental errors pervade the district court's opinion.

For example, the district court ultimately concluded that Plaintiffs' claims should be dismissed because "Plaintiffs' *evidence* of harm is contradictory and

largely non-cognizable." ROA.1522 (emphasis added). Elsewhere too, the district court openly weighed the strength of Plaintiffs' evidence against contrary evidence, rather than accept Plaintiffs' factual allegations as true. *See, e.g.*, ROA.1518–20 (analyzing statements by Director Calabria and Secretary Mnuchin to conclude that the evidence "do[es] not specifically outline a plan for ending the conservatorship"); ROA.1520 (remarking that the evidence of President Trump's letter "should not be given significant weight"); ROA.1520 (weighing contrary evidence that "[u]nder both Directors Watt and Calabria, FHFA took similar steps to enable the [Companies] to retain capital while simultaneously amending the PSPAs to increase Treasury's liquidation preferences").

Critically, the district court improperly discounted Plaintiffs' allegations surrounding President Trump's letter, reasoning that the letter "should not be given significant weight." ROA.1520. But the district court may not weigh evidence or make credibility judgments on a motion to dismiss. The district court's substantive analysis of evidence has no place in the motion to dismiss stage and is alone sufficient to justify reversal. Still, additional errors in the district court's opinion further require reversal.

*First*, the district court imported—and imposed on Plaintiffs—an unrelated substantive legal doctrine from the administrative law context. To discount Plaintiffs' allegations surrounding President Trump's letter, the district court

analogized the letter to a post-hoc justification by an administrative agency. *See* ROA.1520 ("Permitting agencies to invoke belated justifications . . . can upset the orderly functioning of the process of review." (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909 (2020))). But this analogy fails.

The Supreme Court has provided two "values" underlying the doctrine that agencies may not rely on post-hoc justifications in litigation. *Regents*, 140 S. Ct. at 1909. Those two values are: (1) to "instill[] confidence" in an administrative agency's given reasons, *Id.*, such that a reviewing court has "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question," *Auer v. Robbins*, 519 U.S. 452, 462 (1997); and (2) to preserve "the orderly functioning of the process of review" of agency action. *Regents*, 140 S. Ct. at 1909 (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)). Neither value would be advanced by extending the rule against post hoc justifications to the remedial analysis in this case.

The "reasoned explanation requirement of administrative law," *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019), of course does not apply to Plaintiffs, who are private citizens. Nor does the reasoned explanation requirement apply to former Presidents. To the extent there may be reason to doubt the credibility of President Trump's letter, that credibility judgment cannot be made at the motion to

dismiss stage. *Ramirez v. Escajeda*, 921 F.3d 497, 501 (5th Cir. 2019) ("*Iqbal* does not allow us to question the credibility of the facts pleaded[.]" (quoting *Iqbal*, 556 U.S. at 679)).

More fundamentally, though, the district court's analogy to contemporaneous agency explanations makes no sense. Administrative agencies are required to provide contemporaneous reasoned explanations for things they actually do. Here, President Trump is explaining what he *would have done* in a counterfactual situation made relevant for the first time by a Supreme Court decision that issued after he left office. Under the district court's reasoning, a sitting President would have to make a public, contemporaneous statement for *every* action he would like to take but cannot take because of some limitation on his authority. And here, President Trump would have had to do so with no prior notice of that requirement. This would be an exercise in absurdity, not a basis for denying relief for constitutional harms.

Likewise, the "orderly functioning" value of contemporaneous agency explanations does not apply here. Plaintiffs amended their complaint after the Supreme Court instructed Plaintiffs and the lower courts to engage in a counterfactual inquiry. This was Plaintiffs' first chance to provide the counterfactual evidence the Supreme Court envisioned. Plaintiffs—or President Trump for that matter—had no way of knowing that they needed to amass counterfactual evidence *before* the Supreme Court established the counterfactual test. If anything, the value

of "orderly functioning" dictates just the opposite. After the Supreme Court announces a new rule of law that requires Plaintiffs to proffer a novel form of evidence, a lower court may not bar relief because Plaintiffs did not produce the evidence *before any Court* indicated such evidence might be needed. Thus, there is no risk here of "forcing both litigants and courts to chase a moving target" with a post-hoc justification. *Regents*, 140 S. Ct. at 1909. If there is any such risk, it is in the district court's novel limitations on Plaintiffs' ability to seek relief for the constitutional harm recognized by the Supreme Court.

*Second*, the district court created and imposed on Plaintiffs new, heightened evidentiary standards for stating a claim for a remedy under *Collins*. For example, the district court held that Plaintiffs did not plausibly allege that the Trump Administration had a "concrete plan" to end the conservatorships. ROA.1518–19. But the requirement for proof of a "concrete plan" is found nowhere in the Supreme Court's decision in this case or in any other relevant authority. *See also* ROA.1519 (requiring Plaintiffs to show that the Administration had a "clear path" to its goals). Notably, the Supreme Court's example, which the Court said would "clearly" cause compensable harm, consisted solely of a statement by a President. *Collins*, 141 S. Ct. at 1789 ("Or suppose 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. In [that] situation[], the statutory

provision would clearly cause harm."). The Supreme Court—unlike the district court—did not impose an additional, heightened requirement for a "concrete plan" or "clear path" to execute the President's intent. ROA.1518–19.

*Third*, the district court improperly based its analysis on a policy judgment that Plaintiffs' relief would be too sweeping or invasive to the current Administration. The district court held that Plaintiffs' request for declaratory and injunctive relief exceeded the scope of the court's mandate because Plaintiffs' request for injunctive and declaratory relief "would require the Court to exercise sweeping administrative duties based on the unachieved policy preference of a prior Administration, impeding the current Administration's own ability to effectuate its policy preferences through the appointment of a new FHFA director." ROA.1521. For one, this broad policy consideration is again wholly outside the bounds of the district court's limited inquiry at the motion to dismiss stage. For another, the district court's reasoning fails on its own terms. Separation of powers cases of course often carry significant policy implications. And a presidential Administration may have to take actions it might otherwise not take in order to remedy a constitutional violation that occurred during a prior Administration. *Cf. Regents*, 140 S. Ct. at 1901 (requiring the Trump Administration to adhere to the Obama Administration's DACA program). *Cf. Milliken v. Bradley*, 433 U.S. 267, 281 (1977) ("The scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and

flexibility are inherent in equitable remedies."). That inherent fact of remedies in the separation of powers context provides no basis for dismissing Plaintiffs' claims out of hand.

And Plaintiffs' proposed remedy is retrospective in nature, as the Supreme Court recognized. *See* ROA.1177 ("Plaintiffs are therefore entitled to retrospective relief to put them in the position they would have been in were it not for the unconstitutional removal restriction."); *see also* ROA.1221 (requesting "an injunction that restores Plaintiffs to the position they would have been in were it not for the unconstitutional removal restriction"); *see also Rop v. FHFA*, 50 F.4th 562, 576 (6th Cir. 2022) ("But, on appeal, like in *Collins*, shareholders ask only for relief effecting a zeroing out of Treasury's liquidation preference or converting of Treasury's senior preferred stock to common stock. The Court identified this as retrospective relief, *Collins*, 141 S. Ct. at 1787 & n.22, and this request for retrospective relief is tethered to shareholders' argument that the Recovery Act's removal restriction is unconstitutional."). Finally, the principal practical effect of Plaintiffs' requested remedy would be to put Fannie and Freddie in a *stronger* financial position, which if anything would *expand* the policy options of the current Administration.

At the motion to dismiss stage, the district court was required to take Plaintiffs' plausible allegations as true. Instead, the district court disbelieved

Plaintiffs' plausible allegations, weighed the evidence in Defendants' favor, and chose to disbelieve a former President of the United States. The district court ultimately discounted Plaintiffs' factual allegations as "mere speculation." ROA.1521; *see also* ROA.1523 ("Plaintiffs' Amended Complaint fails to plead that any harm was more than speculative."). But Plaintiffs have done precisely what the Supreme Court called for. The Supreme Court instructed Plaintiffs, and in turn the lower courts, to determine what *would* have happened absent the unconstitutional removal restriction. That is—by definition—a counterfactual exercise. Plaintiffs' duty under the Court's framework was to allege facts to establish, by a preponderance of evidence, what would have happened under different circumstances. Plaintiffs did just that—and more. Indeed, President Trump's letter takes all speculation out of the matter. ROA.1225. In the end, the district court may be entitled to disagree with the Supreme Court's prescription of a counterfactual inquiry. But it is not entitled to dismiss Plaintiffs' plausible allegations on that basis.

### D. Section 4617(f) Does Not Bar Plaintiffs' Claims.

Finally, 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator," except in certain situations, does not bar Plaintiffs' removal remedy claims. This provision "prohibits relief where the FHFA action at issue fell within the scope of the Agency's authority as a conservator," but *permits* relief "if the

FHFA *exceeded* that authority." *Collins*, 141 S. Ct. at 1776 (emphasis added). "Where the FHFA does not exercise but instead exceeds those powers or functions, the anti-injunction clause imposes no restrictions." *Id.*

Here, Plaintiffs allege that Director Watt exceeded his authority by continuing to exercise the powers of FHFA Director when, but for HERA's unconstitutional removal protection, President Trump would have removed him from office. ROA.1219 ("Because of the unconstitutional removal restriction, Watt's actions as head of FHFA were taken without observance of procedure required by law—namely Article II of the Constitution."). *Collins* is best read as indicating that when HERA's unconstitutional removal provision "inflict[s] compensable harm" in this way, it does so because the Director's activities cease to be authorized. *Collins*, 141 S. Ct. at 1789. The majority provides two examples of how the removal provision could cause compensable harm—a court blocking removal and the President indicating he would have removed the official but for the statutory removal protection. *Id*. In concurrence, Justice Thomas, who joined the majority, explained that "[a] removal restriction may unconstitutionally insulate an officer such that his actions are unlawful. If the President tries to remove an official but a court blocks this action, then that official is not lawfully occupying his office and would likely be acting without authority." *Id*. at 1793 n.6 (Thomas, J., concurring). While Justice Thomas does not expressly mention the Presidential statement example, the majority

placed both it and the example of a removal blocked by a court on the same footing. In both circumstances, therefore, the insulated official would be acting beyond his constitutional authority.

Even assuming (incorrectly) that FHFA acted within its authority as conservator at all times on all matters, § 4617(f) lacks the clear statement required to bar all remedies for a *constitutional* claim. *See Webster*, 486 U.S. at 603. "The Supreme Court has long held that a statutory bar to judicial review precludes review of constitutional claims only if there is 'clear and convincing' evidence that Congress so intended." *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 308 (D.C. Cir. 2014) (citation omitted).

There is no such evidence here. The Supreme Court has already implicitly recognized that § 4617(f) contains no such clear statement. The Supreme Court applied § 4617(f) to bar Plaintiffs' *statutory* claim yet made no mention of the provision with respect to Plaintiffs' *constitutional* claim despite extensive analysis of that claim. The entire second half of the Supreme Court's opinion would have been superfluous if the simple answer were that § 4617(f) barred the removal claim entirely. The better answer is that § 4617(f) has no bearing here.

### E. Treasury's Role Does Not Dispel the Harm from the Constitutional Violation.

In *Collins*, Justice Kagan wrote a separate opinion, joined only by Justices Breyer and Sotomayor, contending that the removal restriction did not harm

Plaintiffs because "FHFA's policies were jointly created by the FHFA and Treasury and . . . the Secretary of the Treasury is subject to at will removal by the President." *Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring in part and dissenting in part) (internal quotation marks and brackets omitted). The President's ability to remove the Treasury Secretary at will, Justice Kagan reasoned, "seems sufficient" to show the removal restriction did not harm the plaintiffs. *Id.*

Justice Kagan's argument may have had some force with respect to the decision to *adopt* the Net Worth Sweep, which Treasury could have vetoed, but it has no force with respect to FHFA and Director Watt's decision to maintain the status quo rather than position Fannie and Freddie for exiting conservatorship, as the Trump administration desired. As an initial matter, the Third Amendment was an agreement between FHFA and Treasury and could not be amended unilaterally by Treasury. ROA.1207–08. More significantly, the constitutional problem is that the President of the United States wanted to return the Companies to private control *in a particular way* that required FHFA's cooperation and would have benefited Plaintiffs. Under our constitutional structure, the President was entitled to pursue that policy rather than being put to the choice of either sitting idly by until Director Watt's term ended or attempting to address the situation through whatever second-best alternatives he could carry out through Treasury acting alone.

The President had a policy he intended to implement; but as the President himself has made clear, the removal restriction prevented him from implementing that policy during his administration. The restriction thus violated the Constitution and harmed Plaintiffs. Even under Justice Kagan's opinion, that entitles Plaintiffs to a remedy, for Justice Kagan "agree[d] that plaintiffs alleging a removal violation are entitled to injunctive relief . . . when the President's inability to fire an agency head affected the complained-of decision." *Id*. at 1801.

## II. Plaintiffs Plausibly Allege that the FHFA's Self-Funding Structure Violates the Appropriations Clause.

### A. Plaintiffs' Appropriations Clause Claims Fall Within the Court's Mandate.

The district court dismissed Plaintiffs' Appropriations Clause claims by invoking the discretionary "mandate rule." *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004). "Having found cause to dismiss on procedural grounds, the Court [did] not reach the merits" of Plaintiffs' Appropriations Clause allegations. ROA.1523.

The "so-called mandate rule," is a "specific application" of the law of the case doctrine. *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002). It is "not a jurisdictional rule, but a discretionary practice." *Id.* The mandate rule "provides that a lower court on remand must implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of that court." *Id.* The

mandate rule "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Id.* (quoting *Messinger v. Anderson*, 225 U.S. 436, 444 (1912)). Additionally, the mandate rule contains several exceptions, that "if present, would permit a district court to exceed [the] mandate on remand." *Id.* This Court "review[s] de novo a district court's application of [a] remand order, including whether the law-of-the-case doctrine or mandate rule forecloses the district court's actions on remand." *Ball v. LeBlanc*, 881 F.3d 346, 350 (5th Cir. 2018).

Plaintiffs' Appropriations Clause claims, which they raised in their amended complaint following the Supreme Court's remand, fall within the scope of this Court's and the Supreme Court's mandate on remand. The Supreme Court "remanded for further proceedings consistent with [its] opinion." *Collins*, 141 S. Ct. at 1789. This Court in turn "remand[ed] to the district court to fulfill the Supreme Court's remand order." *Collins*, 27 F.4th, at 1069. Plaintiffs' Appropriations Clause arguments fulfill "both the letter and the spirit of the [Supreme Court's] mandate." *Matthews*, 312 F.3d at 657. In fact, the Supreme Court explicitly discussed the FHFA's unusual appropriations structure in the *Collins* majority opinion. 141 S. Ct. at 1772. The Court explained that "the FHFA is not funded through the ordinary appropriations process." *Id.* "Rather, the Agency's budget comes from the assessments it imposes on the entities it regulates, which include Fannie Mae,

Freddie Mac, and the Nation's federal home loan banks." *Id.* The fact that Plaintiffs raised their Appropriations Clause claims only after the Supreme Court's remand does not alter the analysis. *See United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993) ("[I]n determining whether a trial court is duty bound to rethink an issue foregone in an earlier appeal, the court 'must implement both the letter and spirit of the [previous] mandate, taking into account the appellate court's opinion and the circumstances it embraces.'" (cleaned up).

Besides the Supreme Court's direct discussion of FHFA's unusual funding structure, the Supreme Court's decision in *Collins* recognized a fundamental shift in the constitutional separation of powers as applied to FHFA. The agency's unusual funding structure likewise implicates that shifted balance of power. Now that the President has greater control over FHFA through the constitutional removal power recognized in *Collins*, the natural follow-on question is whether Congress should be permitted to exercise *its* constitutional appropriation power over FHFA as well. The Supreme Court has explained that "our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence[.]" *Mistretta v. United States*, 488 U.S. 361, 381 (1989). The question of FHFA's place in the constitutional separation of powers, including Congress's important appropriations powers, flows directly from the Court's separation of powers holding in *Collins*. *See CFSA*, 51 F.4th at 640 (explaining that

"the Director's newfound presidential subservience exacerbates the constitutional problem arising from the Bureau's budgetary independence" (cleaned up)).

Alternatively, even if Plaintiffs' appropriations clause claims did not naturally fit within the mandate, they also fall within a recognized exception to the discretionary mandate rule for intervening changes in law. This Court has recognized three exceptions to the mandate rule: "(1) The evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice." *Matthews*, 312 F.3d at 657; *see also United States v. McCrimmon*, 443 F.3d 454, 460 (5th Cir. 2006).

Here, the Supreme Court's constitutional holding in *Collins*, which recognized a major shift in the understanding of FHFA's basic constitutional structure, provides an intervening change in controlling law.

Importantly, despite the district court's assumption to the contrary, ROA.1521–22, the intervening law exception does not require that the intervening change come from some *other* body besides the one that remanded the case, or some *other* case besides the one on remand. The district court nevertheless recognized such an exception-to-the-exception and imposed on Plaintiffs a new limitation to the intervening law exception. *See* ROA.1521–22 ("Allowing parties to introduce new issues on remand because a higher court has decided the initial issue in that same

decision would frustrate the very purpose of the mandate rule."). Here too, it was error to dismiss Plaintiffs' claims on the basis of a new legal rule. *See Lewis*, 252 F.3d at 357 (on a motion to dismiss, "any ambiguities in the current controlling substantive law must be resolved in the plaintiff's favor"). Not to mention, this exception-to-the-exception would be arbitrary and contradict the discretionary mandate rule's flexible goal of effectuating the "letter and the spirit" of the remand. *Matthews*, 312 F.3d at 657. The intervening law exception only requires that the change in law constitutes controlling authority. That is certainly the case here.

If this Court nonetheless decides to bless the district court's new limitation on the intervening law exception to the mandate rule, Plaintiffs would still satisfy the new standard. Plaintiffs can point to a separate intervening change in law outside the context of this case. In *CFSA v. CFPB*, this Court held that "Congress's decision to abdicate its appropriations power under the Constitution, i.e., to cede its power of the purse to the [Consumer Financial Protection Bureau], violates the Constitution's structural separation of powers." 51 F.4th 616, 623 (5th Cir. 2022). That Appropriations Clause holding is directly relevant to plaintiffs' analogous Appropriations Clause claims here, and gives this Court even further reason not to apply the discretionary mandate rule to bar Plaintiffs' claims.

### B. Plaintiffs' Appropriations Clause Allegations Satisfy the Motion to Dismiss Standard.

Plaintiffs plausibly allege a violation of the Appropriations Clause. Plaintiffs allege that "FHFA's structure violates the Constitution's separation of powers by empowering it to act without oversight from Congress through the appropriations process." ROA.1177. This violation arises from FHFA's unusual self-funding structure. "HERA grants the Director full control over FHFA's funding with no oversight from Congress through the normal appropriations process." ROA.1181. "The Director has the power to establish and collect assessments directly from the entities that FHFA regulates, not only for expenses but also to maintain a working capital fund. The Director alone determines the amount of those assessments." *Id.* (internal quotation marks and citation omitted).

Meanwhile, "Article I of the United States Constitution grants *Congress* the power over the purse," through the appropriations power. ROA.1213 (cleaned up). The Constitution's grant of the appropriations power to Congress "precludes the operation of an executive agency headed by a single person wielding significant executive power other than through funds periodically appropriated by Congress." ROA.1177. And FHFA exercises extraordinary power over the American economy. "FHFA regulates the massively important housing finance market and is funded through assessments on the entities it regulates and that FHFA's single director sets with no congressional oversight." *Id.*

Recent precedent of this Court strongly supports Plaintiffs' Appropriations Clause claims. In *CFSA v. CFPB*, this Court held that the CFPB's funding structure violates the Appropriations Clause. The Court explained: "The Appropriations Clause's 'straightforward and explicit command' ensures Congress's *exclusive* power over the federal purse. 51 F.4th at 637 (quoting *OPM v. Richmond*, 496 U.S. 414, 424 (1990)) (emphasis in original). The Court's reasoning applies with equal force to FHFA, given its unusual status outside of the constitutionally prescribed appropriations process.

In light of this Court's holding in *CFSA*, the only question that remains with respect to the merits of Plaintiffs' Appropriations Clause claim is whether FHFA can be meaningfully distinguished from CFPB. It cannot. Both are non-independent federal agencies headed by a single Director. *Id.* at 640 (explaining that "the Director's newfound presidential subservience exacerbates the constitutional problem arising from the Bureau's budgetary independence" (cleaned up)). Both agencies do not receive appropriations, thus preventing Congress from exercising direct control over their funding. *Compare* 12 U.S.C. § 4516(f)(2) (providing that FHFA assessments are not appropriations), *with* 51 F.4th at 638 (discussing analogous statutory provision as to CFPB). If anything, FHFA's funding structure is *more* constitutionally problematic than that of the CFPB. While the CFPB's assessments are limited to no more than 12% of the operating expenses of the

independent Federal Reserve, 51 F.4th at 624, the sole limitation on FHFA's funding power is the Director's unbounded judgment of what is "reasonable." *See* 12 U.S.C.A. § 4516(a). FHFA can thus collect *unlimited* funds from the Companies with no oversight from Congress. All the while, FHFA exercises sweeping powers over the Companies and the American housing market. ROA.1177. This structure renders FHFA "no longer dependent and, as a result, no longer accountable to Congress and, ultimately, to the people." *CFSA*, 51 F.4th at 639 (internal quotation marks omitted).

As to remedy, "[s]o long as this constitutional infirmity in FHFA's funding structure persists, FHFA lacks constitutional authority to act." ROA.1177. After all, "[a]n executive agency that lacks constitutionally authorized funding to operate lacks the authority necessary 'to carry out the functions of the office.'" ROA.1213 (quoting *Collins*, 141 S. Ct. at 1788). "The FHFA adopted the Third Amendment at a time when it lacked constitutionally authorized funding to operate," ROA.1214, and so "the Third Amendment must be vacated and set aside," *Id.*; *see also* ROA.1216–17 (Plaintiffs' Appropriations Clause claims brought under the APA).

Because FHFA lacked constitutional authority to act due to the Appropriations Clause violation, it follows that Section 4617(f) does not bar relief. *See Collins*, 141 S. Ct. at 1776.

Plaintiffs have stated a claim that the FHFA's self-funding structure violates

the Appropriations Clause and that the appropriate remedy for this constitutional violation is to vacate and set aside the Third Amendment. Here again, this Court should Plaintiffs in the position they would have been in but for the violation of the Constitution.

## CONCLUSION

The district court's judgment should be reversed.

Dated: February 1, 2023

Respectfully submitted,

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# STATUTORY ADDENDUM

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**12 U.S.C. § 4617**

§ 4617 Authority over critically undercapitalized regulated entities

(a) Appointment of the Agency as conservator or receiver

. . . .

(2) Discretionary appointment

The Agency may, at the discretion of the Director, be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity.

. . . .

(b) Powers and duties of the Agency as conservator or receiver

. . . .

(2) General powers

(A) Successor to regulated entity

The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to—

(i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity; and

. . . .

(D) Powers as conservator

The Agency may, as conservator, take such action as may be—

(i) necessary to put the regulated entity in a sound and solvent condition; and

(ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.

(E) Additional powers as receiver

In any case in which the Agency is acting as receiver, the Agency shall place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity in such manner as the Agency deems appropriate, including through the sale of assets, the transfer of assets to a limited-life regulated entity established under subsection (i), or the exercise of any other rights or privileges granted to the Agency under this paragraph.

. . . .

(J) Incidental powers

The Agency may, as conservator or receiver—

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this section, and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity or the Agency.

. . . .

(3) Authority of receiver to determine claims

. . . .

(B) Notice requirements

The receiver, in any case involving the liquidation or winding up of the affairs of a closed regulated entity, shall—

(i) promptly publish a notice to the creditors of the regulated entity to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the date of publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the date of publication under clause (i).

. . . .

(c) Priority of expenses and unsecured claims

(1) In general

Unsecured claims against a regulated entity, or the receiver therefor, that are proven to the satisfaction of the receiver shall have priority in the following order:

(A) Administrative expenses of the receiver.

(B) Any other general or senior liability of the regulated entity (which is not a liability described under subparagraph (C) or (D).

(C) Any obligation subordinated to general creditors (which is not an obligation described under subparagraph (D)).

(D) Any obligation to shareholders or members arising as a result of their status as shareholder or members

. . . .

(f) Limitation on court action

Except as provided in this section or at the request of the Director, 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.

. . . .

(i) Limited-life regulated entities

(1) Organization

(A) Purpose

The Agency, as receiver appointed pursuant to subsection (a)—

. . . .

(ii) shall, in the case of an enterprise, organize a limited-life regulated entity with respect to that enterprise in accordance with this subsection.

. . . .

(6) Winding up

(A) In general

Subject to subparagraphs (B) and (C), not later than 2 years after the date of its organization, the Agency shall wind up the affairs of a limited-life regulated entity.

(B) Extension

The Director may, in the discretion of the Director, extend the status of a limited-life regulated entity for 3 additional 1-year periods.

. . . .

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on February 1, 2023 by using the appellate CM/ECF system and that service was accomplished on all counsel of record by the appellate CM/ECF system and via US Mail on the below:

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Dated: February 1, 2023

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**CERTIFICATE OF COMPLIANCE**

I certify that this Brief of Plaintiffs-Appellants complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 12,262 words, excluding the parts exempted by FED. R. APP. P. 32(f).

This brief also complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 (Version 2212) in Times New Roman 14-point font.

Dated: February 1, 2023

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