No. 26-1450

In the United States Court of Appeals for the Sixth Circuit

MICHAEL ROP, STEWART KNOEPP, AND ALVIN WILSON,

Plaintiffs-Appellants,

v.

FEDERAL HOUSING FINANCE AGENCY, WILLIAM J. PULTE, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE FEDERAL HOUSING FINANCE AGENCY, AND U.S. DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN, No. 4:17-CV-00497

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellants Michael Rop, Stewart Knoepp, and Alvin Wilson ("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*, 594 U.S. 220 (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. 594 U.S. 220 (2021). 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 based on the Supreme Court's ruling, the district court denied Plaintiffs' motion for leave to amend and dismissed their claims entirely.

To get to that result, the district court had to discount Plaintiffs' plausible factual allegations, improperly weigh evidence, and make credibility determinations that have no place at the judgment on the pleadings stage. Further, the district court rejected Plaintiffs' good cause to amend their complaint.

Under the applicable leave-to-amend standard, the evolving legal framework following the *Collins* decision necessitates an amended complaint. And under the proper pleading 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 their 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.

President Trump said precisely that after his first term. In direct response to the Supreme Court's decision, the President 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. Prop. Second Am. Compl., RE106-1, PageID#2326. But "because of the unconstitutional restriction," he continued, his "Administration was denied the time it needed to fix this problem." *Id.* 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 was nothing left for the district 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 for further factual development.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The district court dismissed the case on the pleadings and entered final judgment on March 11, 2026. Plaintiffs filed a timely notice of appeal on May 7, 2026. The district court's final order disposed of all claims, and this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in denying Plaintiffs' motion for leave to amend by holding that Plaintiffs failed to establish "good cause" under FED. R. CIV. P. 16(b)(4).

2. Whether the district court erred in granting Defendants' motions for judgment on the pleadings under FED. R. CIV. P. 12(c) and denying Plaintiffs' motion for leave to amend their complaint as futile by concluding that Plaintiffs' complaint failed to plead sufficient facts tying their financial injuries to the unconstitutional removal restriction.

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. First Am. Compl. ¶ 15, RE17, PageID#200–01. 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). *Id*. ¶ 20, PageID#202. 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. *Id*. ¶ 21, PageID#202–03. 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.* ¶ 2, PageID#197; *see also* 12 U.S.C. § 4516(a)(3).

Second, HERA empowers the Director to appoint FHFA as the Companies' conservator. First Am. Compl., ¶ 2, RE17, PageID#197. If the Director exercises this power, FHFA is not "subject to the direction or supervision of any other agency of the United States." *Id*. ¶ 20, PageID#202; 12 U.S.C. § 4617(a)(7). The Director exercised this power in September 2008, putting the Companies into conservatorship. First Am. Compl., ¶ 33, RE17, PageID#209–10. The Companies remain in conservatorship to this day. *Id*. ¶ 101, PageID#242.

In 2008, acting as conservator of the Companies, FHFA entered into two agreements on the Companies' behalf with the Treasury Department. *Id.* ¶ 42, PageID#213. 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. *Id.* ¶ 43, PageID#213. In return, Treasury received several benefits. *Id.* First, Treasury received senior preferred stock that carried a liquidation preference. *Id*. ¶ 46, PageID#214. 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. *Id*. ¶ 45, PageID#213–14. 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. *Id*. ¶ 50, PageID#216.

FHFA and Treasury amended the PSPAs several times. Prop. First Am. Compl., ¶ 32, RE79-1, PageID#1881. Most relevant here is the Third Amendment of August 2012, in which FHFA and Treasury imposed what is known as the Net Worth Sweep. First Am. Compl., ¶ 84, RE17, PageID#233.[1] The Net Worth Sweep, a policy developed in part by Obama White House officials, *Id*. ¶ 96, PageID#239–40, forced the Companies to pay Treasury their *entire net worth* (minus a small capital buffer) every quarter. *Id*. In other words, the Companies were bound to pay Treasury 100% of their comprehensive income and retained assets—in perpetuity. *Id*. ¶ 84, PageID#233. This new arrangement resulted in massive payments to Treasury, totaling $300 billion—approximately $109 billion more than the

[1] In January 2021, FHFA and Treasury agreed to amend the PSPAs for a fourth time. Prop. First Am. Compl., ¶ 93, RE79-1, PageID#1907. 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*, 594 U.S. at 244.

Companies received from Treasury. *Id*. ¶ 121, PageID#251 (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, *id*. ¶ 124, PageID#252, the Net Worth Sweep guaranteed that the Companies could never pay down Treasury's liquidation preference. *Id*. 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. *Id.*; *see also id*. ¶ 101, PageID#242 (An internal Treasury document dated August 15, 2012, expressed the same sentiment: "[b]y 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 *Collins*, 594 U.S. at 249–51.

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." First Am. Compl. ¶ 20, RE17, PageID#202; 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. Prop. First Am. Compl. ¶ 65, RE79-1, PageID#1896. Instead, when President

Trump took office, the Obama-appointed, long-time Democratic Congressman Mel Watt served as director of FHFA. *Id*. Director Watt still had two years left in his statutory term and could not be fired without cause. *Id*. ¶ 76, PageID#1900–01. Director Watt was the last remaining Obama-appointed regulator leading a federal agency in the Trump Administration. *Id*. ¶ 51, PageID#1887–88.

The Trump Administration, meanwhile, had two overarching goals for Fannie Mae and Freddie Mac. First and foremost, the Trump Administration planned to lead the Companies out of conservatorship as quickly as possible. *Id*. ¶ 92 at PageID#1906. 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. *Id.* ¶ 56, PageID#1892. 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. After all, no private investor would purchase stock in a company that has its net worth stripped by the government each quarter. Second, and relatedly, Treasury's liquidation preference had to be eliminated. *Id.* ¶¶ 85–86, PageID#1904–05. 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. *Id.* 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.* ¶ 59, PageID#1893. 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. *Id.* ¶ 53, PageID#1888.

But the Trump Administration could not achieve its goals of leading the Companies out of conservatorship and into private ownership due to the removal restriction. *Id.* ¶ 53(a)–(k), PageID#1887–91. The Trump Administration and Director Watt disagreed on at least two critical issues. First, they disagreed about implementing the Net Worth Sweep. *Id.* ¶ 67, Page ID#1897. Second, they disagreed about whether the executive branch could or should lead the Companies out of conservatorship without further congressional action. *Id*; Dr. Mark A. Calabria, *Prepared Remarks at Mortg. Bankers Assoc. Nat'l Secondary Mkt. Conf. & Expo 2019*, U.S. FED. HOUS. (May 20, 2019), https://perma.cc/8BLX-LMN6. 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. Prop. First Am. Compl. ¶ 67, RE79-1, PageID#1897. This standoff continued until Director Watt's term ended two years into the Trump presidency. *Id.* ¶ 76, PageID#1900–01.

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. *Id*. 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. *Id.* ¶ 51, PageID#1887–88. 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. *Id.* (citing 12 U.S.C. § 4512(b)(4)).

In April 2019, the Senate confirmed President Trump's choice for FHFA Director, Mark Calabria. *Id.* ¶ 77, PageID#1901. 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 with the time remaining in President Trump's term. *See id.* ¶ 92, PageID#1906; *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://perma.cc/DF3V-VK6R. With only two years to accomplish the Administration's goals, Director Calabria and Treasury simply "ran out of time." Prop. First Am. Compl. ¶ 92, RE79-1, PageID#1906 (quoting Andrew

Ackerman, *Biden to Nominate Sandra Thompson to Lead Fannie and Freddie's Overseer*, WALL ST. J. (Dec. 14, 2021), https://perma.cc/N98H-3V7G).

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. First Am. Compl. ¶ 9, RE17, PageID#200. 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. *Id*. ¶ 21, PageID#202–03. The District Court initially dismissed Plaintiffs' amended complaint, holding that the alleged violation of the Appointments Clause presented a nonjusticiable political question and that the removal restriction was unconnected to Plaintiffs' injuries. *Rop v. Fed. Hous. Fin. Agency*, 485 F. Supp. 3d 930, 940–43 (W.D. Mich. 2020), *rev'd and remanded*, 50 F.4th 562 (6th Cir. 2022). Plaintiffs appealed. While that appeal was pending, the Supreme Court decided a case with similar claims out of the Fifth Circuit. *Collins*, 594 U.S. 220.

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." *Id.* at 249–51. 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 259. 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." *Id.* 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 260. 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. Katy O'Donnell, *Biden Removes FHFA Director After Supreme Court Ruling*, POLITICO (June 23, 2021), https://perma.cc/CL9X-Y8X7.

After *Collins*, this Court reversed in part the district court's initial decision. With respect to the Appointments Clause claim, the Court concluded the claim was justiciable but failed on the merits. With respect to the removal claim, guided by *Collins*, this Court remanded the matter to the District Court for the narrow purpose of determining whether the unconstitutional removal restriction inflicted compensable retrospective harm on the shareholders.

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

Back in the district court, Plaintiffs attempted to amend their Complaint to comply with the Supreme Court's instruction to allege compensable harm caused by the unconstitutional removal restriction. Prop. First Am. Compl., ¶¶ 65–72, RE79-1 PageID#1896–99. 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. *Id.* As an attachment to their motion for leave to amend, Plaintiffs provided a signed letter from President Trump to Senator Rand Paul; *see also Letter from Donald Trump to Sen. Rand Paul*, REAL CLEAR POLITICS (Nov. 11, 2021), https://perma.cc/GS7G-KXU2 ("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.*

The District Court denied Plaintiffs' initial motion to amend as exceeding the scope of the remand order. Op. & Order Denying Mot. for Leave to Amend Compl., RE87, PageID#2011. The court held the remand was limited, not general, and the initial motion exceeded what this court had "sufficiently outlined" for the district court to follow. *Id.* PageID#2017. Both defendants moved for judgment on the pleadings on the operative complaint, and Plaintiffs moved again to amend the complaint. The district court denied Plaintiffs' motion for leave to amend and granted Defendants' motion for judgment on the pleadings. Op. & Order, RE121, PageID#2630. As to the removal claims, the district court reasoned that the operative complaint failed to plead facts that *Collins* hypothesized could be grounds for retrospective relief. The district court denied leave to amend, finding Plaintiffs lacked good cause. It also held the amendment futile because it failed to show a plausible, non-speculative claim of harm. *Id.*

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 explained 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. 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 first 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. The complaint supports these factual allegations with statements made and actions taken by Trump Administration officials. Under *Collins*, Plaintiffs are entitled to a remedy.

Further, no threshold issue would bar Plaintiffs' requested relief. The district court erred by denying leave to amend for an alleged lack of good cause under Rule 16. Plaintiffs demonstrated due diligence in seeking to amend their complaint following remand.

In sum, Plaintiffs should have been granted leave to amend, and their amended complaint states a claim that forecloses judgment on the pleadings. The district court's dismissal should be reversed.

STANDARD OF REVIEW

The district court granted Defendants' motion to dismiss on the pleadings. This Court reviews dismissals under Rule 12(c) de novo. *Berry v. Experian Info. Sols., Inc.*, 115 F.4th 528, 535 (6th Cir. 2024). "To survive a Rule 12(c) motion, the 'complaint must contain sufficient factual matter, accepted as true to state a claim to relief that is plausible on its face.'" *Id.* (internal quotation marks and citation omitted). This Court must accept all well-pleaded facts as true and the "motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Jackson v. Prof'l Radiology Inc.*, 864 F.3d 463, 466 (6th Cir. 2017) (internal quotation marks and citation omitted).

The district court also denied Plaintiffs' motion for leave to amend for a lack of good cause and for futility. This Court reviews the threshold good cause standard for abuse of discretion and reviews a finding of futility de novo. "Denial of a motion for leave to amend is reviewed by this court for an abuse of discretion . . . However, if leave to amend is denied on the grounds that it would be 'futile,' then de novo review is appropriate." *Leary v. Daeschner*, 349 F.3d 888, 904 (6th Cir. 2003).

To show good cause in a motion for leave to amend, the moving party only needs to show "diligence in attempting to meet the scheduling order's requirements." *Garza v. Lansing Sch. Dist.*, 972 F.3d 853, 879 (6th. Cir. 2020) (internal quotation marks omitted). An abuse of discretion occurs when the trial court committed a clear error of judgment. *Leary*, 349 F.3d at 904. A de novo review of the district court's assessment of futility of the amended complaint is identical to a Rule 12(b)(6) motion to dismiss. *Grand Traverse Band of Ottawa and Chippewa Indians v. Blue Cross Blue Shield of Mich.*, 146 F.4th 496, 515 (6th Cir. 2025). 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)). "Plausibility is not the same as probability, but rather 'asks for more than a sheer possibility that a defendant has acted unlawfully.'" *Ctr. for Bio-Ethical Reform Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011).

Finally, this Court reviews a district court's compliance with an appellate mandate de novo, as the interpretation of a prior remand order constitutes a pure question of law. *Kennard v. Means Indus., Inc.*, 660 Fed. Appx. 333, 335 (6th Cir. 2016).

ARGUMENT

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

A. Plaintiffs Demonstrated Due Diligence in Seeking Leave to Amend.

The district court abused its discretion by denying Plaintiffs leave to file a Second Amended Complaint under Rules 16(b)(4) and 15(a)(2). The district court's holding that Plaintiffs failed to establish "good cause" does not adequately consider the timeline of this complex litigation. It also overlooks the substantial diligence that plaintiffs exercised in responding to legal and factual developments. Defendants have suffered no undue prejudice, the district court's finding of lack of good cause should not stand.

Where a party seeks to amend a pleading after the expiration of a scheduling deadline, the court considers Rules 15 and 16. Under Rule 16(b)(4), a scheduling order may be modified for "good cause and with the judge's consent." The primary measure of that good cause standard is the moving party's diligence. To show good cause, plaintiffs must establish that "despite their diligence they could not meet the original deadline." *Leary*, 349 F.3d at 907.

Plaintiffs have met this baseline. The district court abused its discretion when it penalized them for filing the instant motion in April 2025. The timeline of events was driven by the progression of a constitutional dispute through the appellate courts. Op. & Order Denying Mot. for Leave to Amend Compl., RE87, PageID#2011–15. Following the Sixth Circuit's October 2022 remand order, the parties were tasked with pleading specific financial and political harm under the framework the Supreme Court articulated in *Collins*. Plaintiffs sought leave to amend by the court-ordered August 2023 deadline. The district court subsequently denied that motion in December 2024—after the August 2023 deadline had long passed—reasoning that the scope of certain proposed amendments exceeded the mandate on remand. *Id.* PageID#2011. In March 2025, with no order reopening the deadline after that initial December ruling, Defendants filed Rule 12(c) motions for judgment on the pleadings. FHFA Mot. J. on Pleadings, RE99, PageID#2226; Treasury Mot. J. on Pleadings, RE101, PageID#2246. Within days of those motions, Plaintiffs moved for leave to file their Second Amended Complaint, which included adjustments to account for the district court's earlier order limiting the scope of potential claims on remand. Mot. For Leave to File Am. Compl., RE106, PageID#2277.

Thus, Plaintiffs did comply with the district court's August 2023 deadline for filing an amended complaint. But Plaintiffs cannot be expected to have predicted, at the time of filing, that the district court would find their Appropriations Clause theory outside the scope of the remand. After all, Plaintiffs' diligence under Rule 16 should be assessed in light of the district court's December 2024 holding, not the original 2023 amendment deadline, which Plaintiffs met at the time.

Good cause under Rule 16(b)(4) turns on diligence, but diligence is measured against why amendment became necessary in the first place. The amendment arose not from Plaintiffs' error or failure to collect available facts, but because the Supreme Court in *Collins* and this Court on remand both directed the district court to determine as an initial matter whether the removal restriction inflicted compensable harm on Plaintiffs.

This is precisely the circumstance the Sixth Circuit found sufficient to establish good cause in *Inge v. Rock Financial Corp*., 281 F.3d 613 (6th Cir. 2002). There, the court held that a plaintiff who moved to amend *after* a district court's dismissal order identified a pleading gap tied to a novel legal theory had acted with sufficient diligence because the need to amend was triggered by the court itself. *Id.* at 626. Just so here. The December 2024 order identified the boundary of what allegations would be allowed on remand. Plaintiffs could not have pled within that unknown boundary before the court defined it. After Defendants filed their Rule

12(c) motions in March 2025, Plaintiffs promptly moved to update their pleading with due diligence. *Compare* Defs.' Mots. for J. on the Pleadings, RE99, RE101, *with* Pls.' Mot. for Leave to File Second Am. Compl., RE106.

And Defendants cannot credibly claim unfair surprise or prejudice here. The removal restriction of the Director and subsequent harm from the President's inability to remove and replace him with the President's chosen Director has been the core of this litigation since 2017. The Second Amended Complaint merely adds to the existing operative counts with new factual allegations consistent with the Supreme Court's instructions to allege compensable harm, such as the November 2021 President Trump letter. Defendants have long had comprehensive notice of the claims against them and of the Supreme Court's instructions to develop facts on remand. Granting Plaintiffs leave to amend requires the Defendants only to respond to the clarified factual allegations. That ordinary litigation burden does not rise to the level of prejudice needed to defeat an amendment. *See Morse v. McWhorter*, 290 F.3d 795, 801 (6th Cir. 2002) (stating "another round of motion practice… does not rise to the level of prejudice that would warrant denial of leave to amend.").

This timeline and course of action comport with the standards set by this Circuit. Leave to amend should be freely given when the moving party exercises "due diligence." *Spadafore v. Gardner*, 330 F.3d 849, 853 (6th Cir. 2003). Plaintiffs have been continuously engaging in good faith efforts to advance these complex claims after extensive appellate proceedings, including a merits case before the Supreme Court of the United States. Plaintiffs did not cause tactical or "undue delay," nor did they act in "bad faith." *Knight Cap. Partners Corp. v. Henkel AG & Co.*, 930 F.3d 775, 786 (6th Cir. 2019).

After any consideration of Rule 16, Rule 15(a)(2) mandates that a court should "freely give leave when justice so requires." A district court may weigh a handful of narrow factors to deny this request. Those reasons are "undue delay or bad faith in filing the motion, repeated failures to cure previously-identified deficiencies, futility of the proposed amendment, and lack of notice or undue prejudice to the opposing party." *Id.* As explained further below, the district court erred in deeming Plaintiffs' amendments futile, and there is no other basis for denying leave to amend.

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

The district court erred by granting judgment on the pleadings and denying leave to amend on the basis of futility. Both rulings turn on the application of the 12(b)(6) standard. A proposed amendment is futile only if it cannot withstand a Rule 12(b)(6) motion to dismiss. *Grand Traverse*, 146 F.4th at 515. To survive a 12(b)(6) motion, a complaint need only allege "direct or inferential allegations respecting all the material elements under some viable legal theory" sufficient to support a plausible inference of liability. *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008).

Plaintiffs have plausibly alleged that they were harmed by the unconstitutional removal restriction. Plaintiffs have provided a direct statement by 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" demonstrate harm. *Collins*, 594 U.S. at 260.

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 misread *Collins*, imposed novel legal standards, and discounted Plaintiffs' plausible allegations.

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. *Id.* at 258–59. The Court reasoned that plaintiffs may have an "entitlement to retrospective relief." *Id*. at 259. The Court went on to provide examples in which the unconstitutional removal restriction "would *clearly* cause harm." *Id.* at 260 (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 shareholders argued 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.

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.

This Court has said "*Collins* . . . provides a clear instruction: To invalidate an agency action due to a removal violation, that constitutional infirmity must 'cause harm' to the challenging party." *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022), *cert. granted, opinion rev'd*, 598 U.S. 623 (2023) (quoting *Collins*, 594 U.S. at 260). This Court defined harm as including "preventing superior officers from removing Board members when they attempted to do so, or possibly by altering the board's behavior." *Id.* Plaintiffs' amended complaint plausibly alleges facts that, if proven, establish the necessary harm for relief.

In fact, Plaintiffs have provided more than just counterfactual allegations. Although it is not Plaintiffs' burden to present evidence at the pleadings 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 former 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. Prop. Second. Amend. Compl. RE 106-1, PageID#2326. In the letter, President Trump focuses on "the need to privatize Fannie Mae and Freddie Mac," 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 *Collins* 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. *Collins*, 594 U.S. at 260. 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 President's intent. Plaintiffs have presented direct, probative evidence about the President's intent *from the President himself*.

That fact conclusively answers the question of what President Trump would have done absent the unconstitutional removal restriction. That fact *alone* precludes dismissal for failure to state a claim.

Even putting aside Plaintiffs' extraordinary *direct* evidence proving President Trump's intent, plaintiffs also allege a body of probative *circumstantial* evidence which independently demonstrates that plaintiffs can make out their case for relief.

The complaint alleges 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." Prop. First Am. Compl., ¶ 52, RE79-1, PageID#1888. Plaintiffs pointed to *fourteen* different statements from President Trump and Trump Administration officials expressing those goals. *See id.* ¶ 53, PageID#1888–91. 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." *Id.* ¶ 53(b), PageID#1888. (internal quotation marks omitted); *see also id.* ¶ 53(c), PageID#1889. "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." *Id*. ¶ 53(d), PageID#1889. (internal quotation marks omitted); *see also id.* ¶ 53(g), PageID#1889–90 ("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." *Id.* ¶ 53(e), PageID#1889 (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." *Id.* ¶ 53(f) (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." *Id*. ¶ 53(k), PageID#1891. (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." *Id.* ¶ 53(h), PageID#1890. (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." *Id.* ¶ 60(a), PageID#1893. (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." *Id.* ¶ 60(c), PageID#1893–94 (internal quotation marks omitted).

Plaintiffs further allege that, given the financial condition of the Companies when President Trump took office, *id.* ¶ 64, PageID#1895, 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." *Id*. ¶ 54, PageID#1891. (quoting Statement of Dr. Mark A. Calabria, FHFA Director, Before the U.S. House of Representatives Committee on Financial Services, FEDERAL HOUSING FINANCE AGENCY (Oct. 22, 2019), https://perma.cc/7P96-N6H3). 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.* ¶ 55, PageID#1891–92.

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." *Id.* ¶ 56, PageID#1892. 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.* (quoting *Housing Finance Reform: Next Steps: Hearing Before the S. Comm. On Banking, Housing,* *and Urban Affairs*, 116th Cong. 30 (Sep. 10, 2019)). Secretary Mnuchin also stated that, in his view, the Companies "can raise a very significant amount of capital from the private sector." *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." *Id.* ¶ 57, PageID#1892. 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.* ¶ 58, PageID#1892–93. "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." *Id.*; *see also id.* ¶ 61, PageID#1894. ("[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." *Id.* ¶ 58, Page ID#1893. "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.* ¶ 59, Page ID#1893. "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." *Id.* ¶ 62, PageID#1894. 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. "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." *Id*. ¶ 65, PageID#1896; *see also id.* ¶¶ 66–70, PageID#1896–99 (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. *Id.* ¶ 72, PageID#1899 (quoting *Interview with Craig Phillips, Former Counselor to the Secretary of the Treasury,* SitusAMC—On The Hill, at 10:14–11:05, https://perma.cc/2DWW-7TXL (statement from former senior Treasury official 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.* ¶ 73, PageID#1899.

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." *Id.* ¶ 77, PageID#1901. 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.* ¶ 78, PageID#1901; *see also Prepared Remarks of Dr. Mark A. Calabria, Dir. of FHFA at MBA 2019 Annual Convention & Expo*, U.S. FEDERAL HOUSING (Oct. 28, 2019), https://perma.cc/F4RQ-83JM (outlining the five steps). And Plaintiffs further allege that several of these steps were "*sequential*," Prop. First Am. Compl., ¶ 85, RE79-1, PageID#1904, and "could not be carried out unilaterally by Treasury." *Id.* ¶ 86, PageID#1904.

As for timing, "Director Calabria repeatedly said that he anticipated that the Companies would sell new shares of stock to private investors in 2021." *Id.* ¶ 87, PageID#1905. "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.* ¶ 88, PageID#1905. 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*. ¶ 89, PageID#1905–06. "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.*

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. *Id.* ¶ 80, PageID#1902. Included in the agreement was a "Commitment to Develop Proposal to Resolve Conservatorship." *Id.* ¶ 83, PageID#1903. "In order to facilitate the exit from conservatorship," *id.* ¶ 93, PageID#1907, 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 appropriately 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. Prop. Second. Am. Compl., ¶ 57 RE106-1, PageID#2299. He stressed that he would have "sold the government's *common* stock in these companies at a huge profit." *Id.* (emphasis added). 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.

C. The District Court Failed to Draw All Reasonable Inferences in Plaintiffs' Favor.

The district court's dismissal failed to account for many 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, refused to draw all reasonable inferences in plaintiff's favor, and created and imposed on plaintiffs a heightened evidentiary standard that finds no support in *Collins* or any other source of law. These fundamental errors pervade the district court's opinion.

For example, Plaintiffs included various statements and specific documents issued by members of the Trump Administration to demonstrate an intent to alter the course of the FHFA. The district court brushed those aside, saying they "merely set forth policy goals (desires or aspirations), not specific plans to achieve those goals." Op. & Order, RE121, PageID#2630. Additionally, the court held that plaintiffs allege that the Trump Administration had a five-step plan, but the complaint "contains no well-pleaded facts demonstrating the five-step plan would have been completed if President Trump had an extra two years with his appointed Director in charge of FHFA." *Id.* PageID#2631 (quoting *Collins v. Dep't of the Treasury*, 83 F.4th 970, 983 (5th Cir. 2023)).

Critically, the district court improperly discounted Plaintiffs' allegations surrounding President Trump's letter and the five-step plan. The court correctly stated that it must accept as true "all well-pled factual allegations in the complaint and must draw all reasonable inferences in the plaintiff's favor." *Id.* PageID#2625. However, the district court did not draw inferences in Plaintiffs' favor. It made a substantive analysis of the evidence that has no place at this the pleadings stage and is alone sufficient to justify reversal.

The district court imposed on plaintiffs what was essentially a premature summary judgment review. In discussing the letter from President Trump, the court noted that it was issued after President Trump left office. A reasonable inference to draw in the plaintiffs' favor would be that this letter recognized the President's true intent. The court did not do so. It drew a negative inference that it was an irrelevant post-Presidency statement. That assessment does not align with the standards of Rule 12(c), which require the court to draw the most favorable inference to the plaintiff. *See Fritz v. Charter Tp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) ("The standard of review for a Rule 12(c) motion is the same as for a motion under Rule 12(b)(6) . . . [f]or purposes of a motion for judgment on pleadings, all well pleaded material allegations of the pleadings of the opposing party must be taken as true.") (internal quotation marks omitted). In this case, such an inference would have been that this letter represented a retrospective confirmation of what the President thought in 2017. Instead, the court assessed it substantively and decided it was not reflective of the President's contemporaneous thoughts.

The district court improperly discounted Plaintiffs' allegations surrounding President Trump's letter by creating, and imposing on Plaintiffs, a novel requirement that any statement by the President be public and "contemporaneous." As an initial matter, even putting aside whether the district court's new requirement for a "publicly expressed" statement is valid, President Trump's letter here *was* publicized. The letter was made available to the public on a broadly accessible news website. *See* Letter. Thus, even accepting that requiring a contemporaneous expression of displeasure and a desire to remove is required, the publicly available letter from former President Trump satisfies that standard.

The district court's requirement for a contemporaneous explanation meanwhile makes no sense. 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. That would be an exercise in absurdity, not a basis for denying relief for constitutional harms. And in any case, it is entirely reasonable that a President would only be able to holistically evaluate his presidency and what he was and was not able to accomplish under the applicable constraints *after* all is said and done.

In the end, a Rule 12(c) motion assesses the sufficiency of the allegations. The court is not asked to determine the admissibility or final evidentiary weight of the proof. The district court decided that the President's statement was not sufficient evidence under a heightened standard announced for the first time in the district court's dismissal order. It was wrong to do so. The letter spells out what the Supreme Court in *Collins* gave as the prototypical example that would be sufficient for relief. The district court cannot undermine that holding by requiring supplemental evidence, and the discussion in *Collins* gives the district court no reason to reject President Trump's statement. *Compare Collins*, 594 U.S. at 260 ("Or suppose that the President had made a public statement expressing displeasure with the actions taken by a director and had asserted that he would remove the director if the statute did not stand in the way") *with* Letter ("From the start I would have fired the former Democrat Congressman and political hack Mel Watt from his position as Director and would have ordered FHFA to release these companies from conservatorship.").

Additionally, the district court imposed other 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 "specific plans to achieve" the administration's goals. Op. & Order, RE121, PageID#2630. The requirement for proof of a "specific plan" is found nowhere in the Supreme Court's *Collins* decision or in any other relevant authority. *Collins*, 594

U.S. at 260 ("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 "specific plan" to execute the President's intent.

On a motion for judgment on the pleadings, the district court was required to take Plaintiffs' plausible allegations as true. Instead, the district court imposed novel and heightened pleading standards, discounted Plaintiffs' plausible allegations, and chose to disbelieve a former President of the United States. As to *Collins*, the district court read the Supreme Court's decision to permit too little and require too much. *Collins* permits Plaintiffs to seek retrospective relief for their constitutional claims. And *Collins* does not require some heightened showing of certainty to demonstrate harm. Plaintiffs have provided exactly what *Collins* envisioned—a statement from a President expressing that he would have fired the FHFA Director but for the unconstitutional removal restriction. Under the proper and straightforward reading of *Collins*, Plaintiffs have stated a claim for retrospective relief.

Indeed, 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 that establish 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. Prop. Second Am. Compl. RE106-1, PageID#2326. To the extent the district court nevertheless found the framework too speculative, that is a quarrel with the Supreme Court's holding in *Collins*, not with the sufficiency of plaintiffs' allegations. In the end, the district court may disagree with the Supreme Court's prescription of a counterfactual inquiry, but that is not a proper basis for dismissal of the complaint.

D. Any Remaining Uncertainty Should Be Resolved In Plaintiffs' Favor.

Plaintiffs' allegations should entitle them to relief under any standard. As just explained, Plaintiffs have alleged the precise hypothetical evidence *Collins* said would "clearly" show harm in the form of a statement from the President. But if there is any uncertainty, 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 the Plaintiffs.

Specifically, "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 (9th ed. 2025); *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 President thinks, and any non-public facts relevant to this issue are in the exclusive possession of Defendants and their current or 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.

Finally, in demanding evidence that the Administration's strategy would have been fully completed in time absent the unconstitutional removal restriction, Op. & Order, RE121, PageID#2631, the district court improperly shifted the standard from "facial plausibility" to absolute certainty. *Ashcroft*, 556 U.S. at 678. The Second

Amended Complaint contains concrete, non-speculative allegations that mirror identically the Supreme Court's guidance in *Collins*. The Complaint states a viable legal claim, and the district court's finding of futility under Rule 12(b)(6) should be reversed.

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

The district court briefly referenced the President's control over Treasury. Op. & Order, RE121, PageID#2632. 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*, 594 U.S. at 275 (Kagan, J., concurring in part and dissenting in part) (cleaned up). 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.* at 276.

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. Prop. First Am. Compl., RE79-1, PageID#1904. 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." *Collins*, 594 at 274 (Kagan, J., concurring in part and dissenting in part).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order granting Defendants' motions for judgment on the pleadings and denying Plaintiffs' motion for leave to amend.

Dated: August 7, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 10,405 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure and 6 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 using Microsoft 365 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2026, I filed the foregoing Opening Brief of Plaintiff-Appellants Michael Rop, Stewart Knoepp, and Alvin Wilson 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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No. 26-1450

In the United States Court of Appeals for the Sixth Circuit

MICHAEL ROP, STEWART KNOEPP, AND ALVIN WILSON,

Plaintiffs-Appellants,

v.

FEDERAL HOUSING FINANCE AGENCY, WILLIAM J. PULTE, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE FEDERAL HOUSING FINANCE AGENCY, AND U.S. DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN, No. 4:17-CV-00497

ADDENDUM TO PLAINTIFFS-APPELLANTS' OPENING BRIEF

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS