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

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

**FHFA DEFENDANTS' RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY**

On April 10, 2017, Plaintiffs filed a Notice of Supplemental Authority (ECF No. 50) attaching a brief the U.S. Securities and Exchange Commission filed in a pending case in the D.C. Circuit (*Laccetti v. SEC*, No. 16-1368). A brief filed by another government agency in unrelated litigation in another court does not constitute authority. *See, e.g., Bowen v. Georgetown Hosp.*, 488 U.S. 204, 212 (1988) (contrasting official government policy reflected in "regulations, rulings, or administrative practice" with "agency litigating positions" not entitled to deference). In any event, the SEC brief is not inconsistent with and does not call into question any of FHFA's arguments in this case.

In its D.C. Circuit brief, the SEC urges the court to affirm an SEC order imposing a disciplinary sanction on an accountant following a PCAOB administrative adjudication, and to reject the accountant's argument that the sanction was invalid because PCAOB members at one time had a degree of protection from removal that was held to violate the separation of powers. ECF No. 50-1 at 33-42. There is no inconsistency with FHFA's

position in this case that Plaintiffs' removal-restriction claim could not serve as a basis for invalidation of the Third Amendment.

Plaintiffs disregard the overall thrust of the SEC brief and instead seize on a few snippets describing (in one case simply quoting) a prior D.C. Circuit decision, *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012). The parties already addressed *Intercollegiate* in regular briefing, where Plaintiffs conceded that it purely involved a claim for "an Appointments Clause violation," not the type of claim made in this case that removal restrictions unconstitutionally insulated the officials from presidential control. ECF No. 41 at 5. As already explained, that distinction makes *Intercollegiate* inapposite. ECF No. 36 at 7 & n.3; ECF No. 49 at 4-5.

In their effort to portray a conflict, Plaintiffs also overstate FHFA's position. FHFA does not take the categorical position that "a violation of the President's constitutional removal power can *never* provide a basis for vacating a final agency decision." ECF No. 50 at 1 (emphasis added). The relevant authority weighs generally against retroactive invalidation as a remedy in a removal-restrictions case, but the Court need not rule out the possibility of vacatur as a remedy in other settings, such as where a respondent in an agency adjudicatory proceeding raises the constitutional challenge in real time as a defense in that proceeding and preserves it for a direct appeal from the resulting agency action. *See* ECF No. 49 at 5 n.1. Here, Plaintiffs waited four years to challenge a settled action by FHFA acting in its capacity as Conservator that was not an adjudication of their rights, and vacatur would not be an appropriate remedy.

Dated: April 13, 2017

Respectfully submitted,

*/s/ Thad T. Dameris*

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was served upon the parties to this action by serving a copy upon each party listed below on April 13, 2017, by the Electronic Filing System.

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