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VIA ECF

Michael E. Gans
Clerk of Court
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
St. Louis, MO 63102

Re: Saxton v. Federal Housing Finance Agency, No. 17-1727

Dear Mr. Gans:

Appellants' October 10 letter constitutes an improper use of Rule 28(j) because it does not inform the Court of any new judicial decision, statute, or regulation. Instead, it attempts to supplement the record with out-of-context FHFA statements irrelevant to the resolution of the issues on appeal.

The purported "new authorit[ies]"—FHFA's Strategic Plan and recent congressional committee testimony by Director Watt—are fully consistent with FHFA's litigation position. As explained in FHFA's brief, such references to "statutory mandates" refer not to specific, judicially-enforceable duties, but rather to HERA's "expansive grants of permissive, discretionary authority," which provide FHFA "extraordinarily broad flexibility to carry out its role as conservator." *Perry Capital v. Mnuchin*, 864 F.3d 591, 606-07 (D.C. Cir. 2017). *See* FHFA Br. 25 (FHFA "balance[s] various, potentially competing, high-level goals and priorities set forth by Congress").

Appellants mischaracterize Director Watt's remarks as describing "the Companies' lack of capital" as "'especially irresponsible.'" The Director was not addressing the adequacy of the Enterprises' capital as a general matter, but rather his oft-stated concern about the phase-out of the "limited buffer" of capital currently in place under the Third Amendment. Director Watt expressed concern that, after such phase-out, any quarterly loss "would result in an additional draw of taxpayer support" and reduce the finite Treasury commitment to the Enterprises. He also cautioned that it would be a "serious misconception" to construe any actions "to avoid additional draws of taxpayer support…as a step toward recap[italization] and release." The Director's comments actually confirm, rather than contradict, that HERA contains no "mandate, command, or directive to build up capital for the financial benefit of the Companies' stockholders." *Perry Capital*, 864 F.3d at 607.

Appellants' 28(j) letter also is inappropriate because the quoted "statutory mandates" and "especially irresponsible" comments are nothing new: they both appeared in the May 11, 2017 testimony Appellants quoted in their briefs. Saxton Br. 21, Reply Br. 7.

Finally, the second paragraph of Appellants' letter improperly attempts to introduce new arguments by citing cases and statutes that have long been in existence and that Appellants could have—but did not—address in their briefs.

Respectfully Submitted,

/s/ Howard N. Cayne
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