

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL ROP; STEWART KNOEPP; and
ALVIN WILSON,

Case No. 1:17-cv-00497

Hon. Paul L. Maloney

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE
AGENCY; MELVIN L. WATT, in his official
capacity as Director of the Federal Housing
Finance Agency; and THE DEPARTMENT
OF TREASURY,

Defendants.

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

The Sixth Circuit concluded its opinion in *Robinson v. FHFA*, 2017 WL 5623344, at *9 (6th Cir. Nov. 22, 2017), with this observation: “Absent constitutional defect, which Robinson has not alleged here, Congress is the proper governmental body to address poor legislative decisions.” The plaintiff in *Robinson* did not advance a claim under the nondelegation doctrine, and the Sixth Circuit’s words cannot be squared with FHFA’s argument that *Robinson* rejected such a claim *sub silentio*. The Sixth Circuit ruled as it did in *Robinson* because it concluded that HERA confers powers on FHFA that go “far beyond [those] contemplated in a traditional conservatorship arrangement.” *Id.* at *6. The Sixth Circuit did not dispute that this interpretation “erases any outer limit to FHFA’s statutory powers,” *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 642 (D.C. Cir. 2017) (Brown, J., dissenting)—it only held that to be what Congress

intended. *Robinson* thus provides critical support for Plaintiffs' nondelegation claim by adopting the interpretation of HERA on which this claim is predicated.

The Sixth Circuit's decision also rebuts FHFA's argument that its actions as conservator are not attributable to the government. The *Robinson* Court ruled that HERA confers on FHFA "explicit statutory authority to take conservatorship actions in the conservator's own interest, which here includes the public and governmental interests." 2017 WL 5623344, at *6 (quoting *Perry Capital*, 864 F.3d at 613). This decision means that, as conservator, FHFA has statutory authority to alter the rights of third parties—i.e., the Companies and their shareholders—to promote the public interest. The Sixth Circuit also held that by contract FHFA was able to immunize Treasury from claims that its decision to agree to the Net Worth Sweep was arbitrary and capricious under the APA. *Id.*, at *5. Further emphasizing the governmental nature of FHFA's conservatorship role, the court in *Jacobs v. FHFA*, 2017 WL 5664769, at *5 (D. Del. Nov. 27, 2017), rejected the argument "that HERA incorporated state law limitations on the Companies' authority in such a manner that [FHFA] exceeds its statutory authority under HERA when it violates state law." In sum, the *Robinson* and *Jacobs* decisions say that in imposing the Net Worth Sweep, FHFA exercised statutorily conferred power to further the government's interests by altering the rights of third parties, relieved another federal agency from its obligations under the APA, and lawfully entered into a transaction that would have been a clear violation of the duty of loyalty if undertaken by private management. This was an act of the government, not a private entity. *See Officers of the United States Within the Meaning of the Appointments Clause*, 2007 WL 1405459, at *11 (O.L.C. 2007) (governmental actors exercise "power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit").

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/s/ Matthew T. Nelson

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