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February 6, 2018

Via ECF

Lyle W. Cayce
Clerk of Court
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Collins v. Federal Housing Finance Agency*, No. 17-20364
(Oral Argument scheduled for March 7, 2018)

Dear Mr. Cayce:

In *California State Teachers' Retirement System v. Alvarez*, 2018 WL 547768 (Del. Jan. 25, 2018), the Delaware Supreme Court held that issue preclusion bars shareholders pursuing a derivative claim from relitigating the issue of demand futility decided against different shareholders pursuing derivative claims in earlier litigation. *Alvarez* should not affect the outcome of this case for three reasons.

First, Plaintiffs' claims are direct, not derivative. *See* Pls.' Br. 49-52; Pls.' Reply 21-24. The matter of issue preclusion with respect to derivative claims therefore is irrelevant.

Second, *Alvarez* held that "differing groups of shareholders *who can potentially stand in a corporation's stead* are in privity for the purposes of issue preclusion." 2018 WL 547768, at *17 n.133 (emphasis added). But here, the purportedly preclusive D.C. Circuit decision held that the shareholder-plaintiffs asserting derivative claims in that case *could not* potentially stand in the corporation's stead because of HERA's Succession Clause. *See Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1106 (D.C. Cir. 2017). The tie that bound the differing groups of shareholders in privity in *Alvarez* is thus lacking here.

Third, *Alvarez* is not binding on this Court, and it would violate due process to extend its reasoning to hold that Plaintiffs are bound by *Perry Capital's* Succession Clause holding. *See* Pls.' Reply 26-27. That is especially so with respect to Plaintiffs' constitutional claim. The *Perry Capital* court did not have any constitutional claims before it, and due process does not permit Congress to pass a law requiring the Companies to accept FHFA as their representative in pursuing constitutional claims against itself. *Id.* at 25.

Respectfully submitted,

/s/ David H. Thompson
David H. Thompson

Counsel for Appellants

cc: Counsel of Record (by ECF)