

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MICHAEL ROP, STEWART KNOEPP, and
ALVIN WILSON,

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 THE TREASURY,

Defendants.

Case No. 1:17-cv-00497

Hon. Paul L. Maloney

**PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY
CONCERNING *COLLINS v. MNUCHIN***

On July 16, 2018, the Fifth Circuit held that the “unique constellation” of features that insulate FHFA from presidential oversight “offends the Constitution’s separation of powers.” *See Collins v. Mnuchin*, 896 F.3d 640, 653–59 (5th Cir. 2018) (Exhibit A). The Department of Justice subsequently responded to a petition for en banc rehearing in *Collins* by filing an opposition brief that says that “the for-cause removal protection accorded to the FHFA’s single Director impermissibly infringes on the President’s control of the exercise of executive power.” *See* Opposition to Petition for Rehearing En Banc at 12, *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Sept. 13, 2018) (Exhibit B) (“Treasury *Collins* Br.”). With the Fifth Circuit and the United States having now endorsed Plaintiffs’ position that FHFA’s structure is unconstitutional, the Court should enter summary judgment in Plaintiffs’ favor on Counts I and II.

As in this case, the plaintiffs in *Collins* are Fannie and Freddie shareholders who were injured by the Net Worth Sweep. The Fifth Circuit held that shareholders have standing to

challenge FHFA's structure and rejected the same standing arguments that FHFA presses here. *Compare Collins*, 896 F.3d at 653–59, with R.25, Br. of FHFA Defs. in Supp. of Mot. to Dismiss at 7–11, Pg.ID 400–01. The *Collins* court also reached the merits of the shareholders' constitutional claim despite arguments by Treasury—identical to arguments Treasury advances in this case—that the claim was derivative and barred by HERA's Succession Clause, 12 U.S.C. § 4617(b)(2)(A)(1). *Compare Treasury Collins Br.* at 46–47, with R.34, Treasury's Reply Br. in Supp. of Mot. to Dismiss at 3–7, Pg.ID 929–33. As *Collins* shows, none of Defendants' arguments provides a basis for avoiding the merits of Plaintiffs' constitutional claims.

Despite ruling for the plaintiffs with respect to standing and the merits, the Fifth Circuit panel declined to vacate the Net Worth Sweep. *Collins*, 896 F.3d at 675–76. Plaintiffs respectfully submit that this aspect of the *Collins* decision is at odds with *Bowsher v. Synar*, 478 U.S. 714, 736 (1986), a case in which the Supreme Court affirmed a lower court's decision to set aside a final decision by an official who was unconstitutionally insulated from presidential oversight. *See Synar v. United States*, 626 F. Supp. 1374, 1378, 1394–1404 (D.D.C. 1986); *Synar Judgment* (Exhibit C) (declaring that “the presidential sequestration order issued on February 1, 1986 pursuant to the unconstitutional automatic deficit reduction process be, and hereby is, declared without legal force and effect”). The plaintiffs in *Collins* have petitioned the Fifth Circuit to take up this remedial issue en banc. Irrespective of whether that petition is granted, the panel's decision in *Collins* strongly supports nearly all of Plaintiffs' arguments with respect to Counts I and II.

Dated: September 25, 2018

Respectfully submitted,

/s/ Matthew T. Nelson

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September 2018, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system, causing a true and correct copy to be served on all counsel of record.

/s/ Matthew T. Nelson

Matthew T. Nelson