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

MICHAEL ROP, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Case No. 1:17-cv-00497 **Oral Argument Requested**

RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY CONCERNING *COLLINS V. MNUCHIN*

Defendants Federal Housing Finance Agency and Melvin L. Watt hereby respond to Plaintiffs' notice of supplemental authority regarding a recent decision by a split panel of the Fifth Circuit, *Collins v. Mnuchin*, 896 F.3d 640 (5th Cir. 2018). As discussed below, the *Collins* majority's opinion that FHFA's structure is unconstitutional is wrong, but the unanimous end result in *Collins*—leaving the Third Amendment intact—is correct, consistent with FHFA's arguments in this case, and demonstrates Plaintiffs' lack of standing to bring Counts I and II here.

1. The *Collins* majority's opinion that FHFA's structure is unconstitutional is wrong for the reasons set forth in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), *Bhatti v. FHFA*, --- F. Supp. 3d ----, 2018 WL 3336782, at *5-8 (D. Minn. July 6, 2018) (notice of appeal filed by Plaintiff), Fifth Circuit Chief Judge Stewart's compelling dissent in *Collins*, 896 F.3d at 676-78 (which Plaintiffs neglect to mention), and Defendants' prior briefs filed in this case. FHFA has petitioned the Fifth Circuit for rehearing *en banc* on the constitutional issue (which Plaintiffs also neglect to mention).

2. In any event, the *Collins* panel's unanimous rejection of the plaintiffs' request for invalidation of the Third Amendment as relief for their constitutional claim is correct, and precisely tracks Defendants' arguments in this case. The court explained that "[w]hen fashioning relief for constitutional violations, courts try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact" and the usual remedy for a "removal limitation cross[ing] constitutional lines" is to "declare the limitation inoperative, prospectively correcting the error." 896 F.3d at 675 (quotation marks omitted); *accord* ECF No. 25 at 9, PageID.402; ECF No. 36 at 5, PageID.956. "[C]ourts routinely accord validity to past acts of unconstitutionally structured governmental agencies." 896 F.3d at 675 (quotation marks omitted). Thus, the court held, "severing the removal restriction from HERA is the proper remedy" and "[w]e leave intact the remainder of HERA and the FHFA's past actions—including the Third Amendment." *Id.* at 675-76; *accord* ECF No. 36 at 7, PageID.958. In light of the panel's unequivocal denial of the central relief being requested in both cases, Plaintiffs' assertion that *Collins* supports "nearly all" of their arguments (ECF No. 47 at 2, PageID.1421) is puzzling at best.

Indeed, the fact that the remedy in *Collins* was simply an abstract prospective declaration of the President's power to remove an FHFA Director without cause—leaving intact the source of the sole injury Plaintiffs purport to have suffered—only underscores that Plaintiffs here lack Article III standing to bring Counts I and II. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).[1]

[1] The *Collins* panel thus had to reach beyond the Third Amendment (the focus of Plaintiffs' case both there and here) and strain to find Article III standing based on an unpled theory of "*ongoing* injury" from "being subjected to enforcement or regulation by an unconstitutionally constituted

3. Plaintiffs attach a 1986 district court order and present new arguments based on it. This is not a proper use of a notice of supplemental authority. Plaintiffs had a full and fair opportunity to raise all of the issues and authorities that they consider relevant. In 74 pages of briefing, Plaintiffs never once cited the 1986 order.

To the extent the Court is inclined to consider the new argument, it is wholly without merit. What was unconstitutional in *Bowsher v. Synar*, 478 U.S. 714 (1986), was not a limitation on the President's removal power, but a highly unusual assignment of *core executive functions* to the Comptroller General, an arm of the Legislative Branch. The remedy for an unconstitutional cross-branch assignment of functions naturally was to vacate executive actions taken by a legislative officer pursuant to those functions. No such claim is made here or in *Collins*. In any event, the Third Amendment would not be subject to vacatur even under a (misplaced) analogy to *Bowsher*: unlike the Comptroller General's duties in *Bowsher*, the Third Amendment was an economic transaction by a financial institution conservator, not the type of "executive governmental functions that the Constitution commits to the President's supervision." ECF No. 25 at 10, PageID.403; *cf. Synar v. United States*, 626 F. Supp. 1374, 1399-1400 & n.29 (D.D.C. 1986) (listing myriad non-executive functions of Comptroller General that were left intact).

Dated: October 1, 2018

Respectfully submitted,

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body." 896 F.3d at 657. That construct is misplaced for reasons Defendants have previously briefed here, and which the *Collins* panel did not confront. *See* ECF No. 36 at 7-8, PageID.958-959. FHFA's pending petition to the Fifth Circuit to rehear the case *en banc* accordingly raises Article III standing along with the merits.

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