

November 20, 2018

**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  
Room 24.329  
St. Louis, MO 63102

Re: *Bhatti, et al. v. Federal Housing Finance Agency, et al.*, No. 18-2506; Notice of Supplemental Authority under Fed. R. App. P. 28(j)

Dear Mr. Gans:

I write on behalf of the FHFA Defendants-Appellees to notify the Court of the attached recent decision of the Third Circuit relevant to this appeal. On November 14, 2018, after FHFA filed its brief in this appeal, the Third Circuit issued a precedential decision in *Jacobs v. FHFA*, --- F.3d ---, 2018 WL 5931515, rejecting challenges to the Third Amendment brought by Enterprise shareholders. While *Jacobs* involved state-law claims rather than federal constitutional claims, the court joined its sister circuits uniformly holding that “the Third Amendment is an exercise of the Agency’s power to take over Fannie and Freddie’s assets and operate their businesses,” which necessarily includes actions to “secure ongoing access to capital, manage debt loads, control cash flow, and decide whether and how to pay dividends.” *Id.* at \*4. “The Third Amendment is in essence a renegotiation of an existing lending agreement (albeit with equity rather than debt),” a

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“traditional power of corporate officers or directors.” *Id.* (citing *Saxton v. FHFA*, 901 F.3d 954, 960-61 (8th Cir. 2018) (Stras, J., concurring)).

Those holdings lend further support to FHFA’s argument that the Third Amendment did not constitute an exercise of sovereign executive power, making vacatur of the Third Amendment particularly inappropriate as a remedy for Plaintiffs’ claims that FHFA is unconstitutionally insulated from presidential control (Counts I and II). FHFA Br. at 20. The holdings in *Jacobs* also support FHFA’s argument, and the reasoning of the District Court in this case, that Plaintiffs’ nondelegation claims (Counts IV and V) fail because, *inter alia*, the Third Amendment did not constitute an exercise of the type of legislative or otherwise governmental powers subject to the nondelegation doctrine. FHFA Br. at 54; Add. 40-41 (holding that “the non-delegation doctrine is not implicated in this case, because FHFA was not exercising governmental power when it agreed to the Third Amendment” and “[t]he Third Amendment is simply a contractual arrangement that FHFA entered into on behalf of two private entities—Fannie and Freddie—in its capacity as their conservator.”).

This Court should affirm the District Court.

Respectfully submitted,

/s/ Howard N. Cayne

Howard N. Cayne

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Federal Housing Finance Agency and  
Melvin L. Watt*

Enclosure