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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

Dear Mr. Cayce:

Aurelius Investment v. Puerto Rico, 915 F.3d 838 (1st Cir. 2019), concerned an entity that is not an "agency . . . of the Federal Government," 48 U.S.C. § 2121(c)(2). *Aurelius* therefore did not implicate the APA's command that "[t]he reviewing court *shall* . . . set aside *agency* action . . . contrary to constitutional right [or] power." 5 U.S.C. § 706 (emphasis added). Moreover, Plaintiffs challenge the constitutionality of FHFA's structure, not the manner in which an officer was appointed, and there can be no de facto officer in the absence of a constitutionally valid office. *See Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886).

Furthermore, the centerpiece of the *Aurelius* court's remedial analysis was its recognition that invalidating the board's past actions would have thrown the entire economy of Puerto Rico into turmoil. Far from threatening anything similar, a ruling in Plaintiffs' favor would put Fannie and Freddie on a path to soundness and solvency in accordance with FHFA's statutory mission.

In contrast to the First Circuit's decision in *Aurelius*, the Supreme Court has *never* used the de facto officer doctrine to limit the remedies available for a meritorious constitutional claim but instead only applies the doctrine in cases that concern "merely technical" statutory violations. *Glidden Co. v. Zdanok*, 370 U.S.

530, 536 (1962) (plurality); *accord Nguyen v. United States*, 539 U.S. 69, 78 (2003). *Buckley v. Valeo*, 424 U.S. 1, 142 (1976), was not a de facto officer doctrine case, the plaintiffs were accorded all the relief they sought, and in any event its remedial analysis is no longer good law. *See* Plaintiffs' Opening En Banc Br. 24-28. Using the doctrine to withhold meaningful relief for violations of the separation of powers would contravene the Supreme Court's instruction that courts should craft remedies that create incentives to bring such suits. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

Finally, FHFA overlooks *Bowsher v. Synar*, 478 U.S. 714, 736 (1986), when it says that "plaintiffs cannot identify any case ordering vacatur" in which a statute unconstitutionally inhibited the President's ability to supervise the Executive Branch.

Respectfully submitted,

/s/ David H. Thompson
David H. Thompson

Counsel for Appellants

cc: Counsel of Record (by ECF)