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March 21, 2019

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
St. Louis, MO 63102

Re: *Bhatti v. Federal Housing Finance Agency*, No. 18-2506

Dear Mr. Gans:

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, in Counts I and II, Plaintiffs challenge the constitutionality of FHFA's structure, 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 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 Br. 46-48. Using the doctrine to withhold meaningful relief for violations of the separation of powers and the Appointments Clause would also 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).

The Supreme Court affirmed judgments that vacated past agency actions on separation of powers grounds in *Bowsher v. Synar*, 478 U.S. 714 (1986), and *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), and the Court should follow those decisions rather than *Aurelius*.

Respectfully submitted,

/s/ David H. Thompson
David H. Thompson

Counsel for Appellants

cc: Counsel of Record (by ECF)