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July 16, 2019

VIA ECF

Lyle W. Cayce
Clerk of Court
United States Court of Appeals for the Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Collins et al. v. Mnuchin et al.*, No. 17-20364 (*en banc* oral argument held January 23, 2019)

Dear Mr. Cayce:

FHFA Defendants-Appellees write in response to Plaintiffs-Appellants' July 11 letter citing *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019).

Department of Commerce has no relevance here. Plaintiffs rely principally on a sentence generally summarizing and quoting the APA's judicial review provision. 139 S. Ct. at 2567. However, the very next sentence explains that "[r]eview is not available, however, 'to the extent that' a relevant statute precludes it...." *Id.* (quoting 5 U.S.C. § 701(a)(2)). Unlike the Census Act, HERA contains just such a provision: 12 U.S.C. § 4617(f), which precludes courts from "tak[ing] any any action to restrain or affect the exercise of powers or functions [of FHFA] as a conservator...."

Section 4617(f) also disposes of Plaintiffs' argument that the Third Amendment must be vacated because FHFA's rationale for it was allegedly "pretextual." All courts to have considered the issue have agreed that under § 4617(f), subjective motive is irrelevant and the sole issue is whether the

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action involves a function of financial-institution conservators. *See, e.g., Perry Capital v. Mnuchin*, 864 F.3d 591, 612 (D.C. Cir. 2017) (“[N]othing... in [HERA] hinges FHFA’s exercise of its conservatorship discretion on particular motivations.”); *id.* at 644 (Brown, J., dissenting) (agreeing “no portion of HERA’s text invites such an analysis” into motives).

The Court found pretext relevant in *Department of Commerce* as part of its scrutiny of the factual explanation the agency furnished to support its action. But under HERA, the inquiry begins and ends at statutory authority. The Complaint here does not even include any arbitrary-and-capricious claim against FHFA. ROA.81-83.

Nor does *Department of Commerce* support Plaintiffs’ position that if the Court holds HERA’s good-cause removal provision unconstitutional, vacatur of the Third Amendment becomes mandatory. There was no removal-restriction claim in *Department of Commerce*. In *Free Enterprise Fund*, the Court held that the applicable remedy for an unconstitutional albeit severable removal restriction is to excise the offending limitation—while leaving the agency, its actions, and authority intact. Panel 51-53; FHFA Supp. En Banc Br. 24-26. Nothing in *Department of Commerce* suggests any departure from that teaching.

Respectfully Submitted,

/s/ Robert J. Katerberg
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*Counsel for Defendants-Appellees
Federal Housing Finance Agency and
Director Mark A. Calabria*

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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