

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

MICHAEL ROP, STEWART KNOEPP, and
ALVIN WILSON,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE
AGENCY, MELVIN L. WATT, in his official
capacity as Director of the Federal Housing
Finance Agency, and THE DEPARTMENT
OF THE TREASURY,

Defendants.

Case No. 1:17-cv-00497

Hon. Paul L. Maloney

**PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY
CONCERNING *COLLINS v. MNUCHIN***

In *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Sept. 6, 2019) (en banc) (“Op.”), attached as Ex. A, the Fifth Circuit held that:

- “FHFA’s design ... violates the separation of powers,” Op. 4;
- Standing “does not require proof that an officer would have acted differently in the ‘counterfactual world’ where he was properly authorized,” Op. 44;
- Constitutional claims are not barred by HERA’s succession provision, Op. 45–46;
- HERA’s “removal restriction applied to [A]cting Director [DeMarco],” Op. 50; and
- As a “federal agency, empowered by a federal statute, enriching the federal government,” FHFA “invoked executive power” when adopting the Net Worth Sweep, Op. 51.

The court also refused to interpret HERA to grant FHFA authority untethered from “limited powers to ‘preserve and conserve’ the GSEs’ assets and property” because FHFA would then “lack any intelligible principle to guide its discretion as conservator.” Op. 33. The Sixth

Circuit, by contrast, held that HERA “endows FHFA with extraordinarily broad flexibility” and does not “compel it in any judicially enforceable sense . . . to preserve Fannie’s and Freddie’s assets.” *Robinson v. FHFA*, 876 F.3d 220, 230, 232 (6th Cir. 2017). This unbounded interpretation of HERA violates the non-delegation doctrine. *See* R. 33, Pls.’ Summ. Disp. Br. 11–12, Pg.ID 914-15.

By a vote of nine to seven, the Fifth Circuit declined to vacate the Net Worth Sweep. That was error. “When a plaintiff with Article III standing challenges the action of an unconstitutionally-insulated officer, that action must be set aside.” Op. 118 (Willett, J., dissenting); *see also* Op. 86–90 (Oldham, J., dissenting). Indeed, Congress has instructed that unconstitutional agency action “shall” be “set aside.” 5 U.S.C. § 706(2).

The judges who declined to vacate the Net Worth Sweep despite FHFA’s unconstitutional structure relied heavily on *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). “But no Board action had become final against the plaintiff” in that case, so there was nothing to vacate. Op. 119 (Willett, J., dissenting). *Free Enterprise Fund’s* adoption of the narrower of two possible *prospective* remedies is irrelevant to whether Plaintiffs are entitled to a *retrospective* remedy vacating the Net Worth Sweep. *See* R.32, Pls.’ Br. in Opp’n to FHFA Mot. to Dismiss 11, Pg.ID 891.

Dated: September 10, 2019

Respectfully submitted,

/s/ Matthew T. Nelson

Matthew T. Nelson

Ashley G. Chrysler

WARNER NORCROSS + JUDD LLP

900 Fifth Third Center, 111 Lyon St., N.W.

Grand Rapids, Michigan 49503-2487

616.752.2000

mnelson@wnj.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September 2019, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system, causing a true and correct copy to be served on all counsel of record.

/s/ Matthew T. Nelson

Matthew T. Nelson