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

MICHAEL ROP, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Case No. 1:17-cv-00497

FHFA DEFENDANTS' RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants FHFA and Director Mark A. Calabria respectfully submit this response to Plaintiffs' Notice of Supplemental Authority Concerning *Collins v. Mnuchin* (ECF No. 60, PageID.1618-19). *Collins*' holding that the protection of an FHFA Director from arbitrary removal is unconstitutional is fundamentally flawed. As other Judges of the Fifth Circuit opined, "[i]t is wrong to declare the FHFA unconstitutionally structured." *Collins v. Mnuchin*, slip op. at 97 (Higginson, J., dissenting).[1]

It has long been recognized that independence of financial regulators is vital so they can perform their important functions taking the long view and without fear or favor stemming from political influences. It is likewise axiomatic that financial regulation and supervision often calls

[1] Plaintiffs in *Collins* recently filed a petition for a writ of certiorari seeking U.S. Supreme Court review of the Fifth Circuit's decision as to both (1) whether FHFA's structure violates the separation of powers, and (2) the separate conclusion of the *en banc* Fifth Circuit that vacatur of the Third Amendment was not an available remedy for the alleged constitutional violation. *Collins v. Mnuchin*, Supreme Court Docket No. 19-_____ [docket number forthcoming] (filed Sept. 25, 2019).

for the type of prompt, decisive decision-making that only an individual can provide. Nothing in the Constitution forbade Congress from pursuing both of those salutary policies together when it created FHFA to help confront the worst economic crisis in many decades. FHFA has explicit and defined and, in some instances, limited authorities compared to other financial regulators. FHFA regulates a small number of institutions and only with authorized powers.

The Supreme Court has repeatedly upheld "Congress's power to insulate officials against presidential removal" across "widely varying institutional contexts." *Id.* at 99-100 (Higginson, J., dissenting); *see* Br. FHFA Defs. Br. Supp. Mot. Dismiss at 12 (ECF No. 25, PageID.405) (discussing cases) ("MTD Br."). The few decisions invalidating removal restrictions involved either "provisions that located control over removal wholly or partly in the legislative branch" or "double good-cause tenure not present here." *Collins* slip op. at 98-99, 101 (Higginson, J., dissenting). While both Plaintiffs and the *Collins* majority rely heavily on *Free Enterprise Fund*, neither can explain how that decision, "which affirmed one layer of good-cause tenure while condemning two, somehow requires us to invalidate the one layer protecting the FHFA Director." *Id.* at 99 (Higginson, J., dissenting).

Plaintiffs' challenge rests on "a tenuous interpretation" of scholarship, and "empirical claims" that are "dubious" at best. *Id.* at 103-04 (Higginson, J., dissenting). A single-Director structure "just as readily promote[s] accountability as inhibit[s] it," whereas the "internal checks" and potential "bipartisan balance" of a multi-member board "tie a President's hands as much as free them." *Id.* at 104 (Higginson, J., dissenting); *see* MTD Br. at 14-16 (PageID.407-09). "[A]n agency structure requiring the President to appoint a political opponent can hardly be said to enhance presidential sway." *Collins* slip op. at 104 (Higginson, J., dissenting).

The Court should deny Plaintiffs' motion for summary judgment and dismiss Plaintiffs' claims.

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Respectfully submitted,

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