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.

Civil Action No. 1:17-cv-00497
Hon. Paul L. Maloney

U.S. DEPARTMENT OF THE TREASURY'S RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY CONCERNING *COLLINS V. MNUCHIN*

On September 10, 2019, Plaintiffs filed a notice of supplemental authority concerning *Collins v. Mnuchin*, No. 17-20364, 2019 WL 4233612 (5th Cir. Sept. 6, 2019) (en banc). ECF No. 60. That decision, while not controlling in this case, supports the government more than Plaintiffs.

Although Treasury agrees that the FHFA Director's removal restriction is unconstitutional, the Fifth Circuit should not have reached that question. The court erred in holding that shareholders may bring this claim notwithstanding HERA's succession clause, because neither the APA nor the Constitution implicitly displace the traditional rule that shareholders may not directly sue for injuries to their corporation. *See* Mem. in Support of Treasury's Mot. to Dismiss at 23-24, PageID. 316-317, ECF No. 23 ("Treasury MTD"); *see also id*. at 12-14, PageID. 305-307 (arguing

that Plaintiffs' constitutional claim is also not presented because, *inter alia*, FHFA is not a governmental actor when acting as conservator).

In any event, the Fifth Circuit correctly concluded that the appropriate remedy was to sever the removal provision, not, as Plaintiffs contend, to set aside the Third Amendment. Agreeing with the government's arguments, the court explained that it would be inequitable to set aside the Third Amendment based on FHFA's unconstitutional removal provision where (1) the President nevertheless retained full oversight through his control over the Treasury Department (the Amendment's counter-party), and (2) Plaintiffs' theory would invalidate all FHFA actions but they had cherry-picked only those that did not benefit them in hindsight. *Collins*, 2019 WL 4233612, at *25-28.

Contrary to Plaintiffs' assertion, the APA did not require the court to "set aside," 5 U.S.C. § 706(2), the Third Amendment. Section 706 does not override a court's consideration of equitable principles when deciding whether injunctive relief is appropriate. *See Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944) (statute stating that an injunction "shall be granted" did not displace "traditions of equity" or "impose an absolute duty" to issue an injunction); *Heckler v. Chaney*, 470 U.S. 821, 833 (1985) ("APA did not significantly alter the 'common law' of judicial review of agency action). Indeed, the Supreme Court has made clear that "equitable defenses may be interposed" in an APA case. *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967).

Dated: September 27, 2019

Respectfully submitted,

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