

September 23, 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
Room 24.329
St. Louis, MO 63102

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

Dear Mr. Gans:

FHFA writes in response to Plaintiffs-Appellants' September 9 letter regarding *Collins v. Mnuchin*, No. 17-20364 (5th Cir. 2019) (en banc).

Collins's 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.” *Id.* at 97 (Higginson, J., dissenting).

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 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

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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. 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.” *Id.* at 98-99, 101. While Appellants and the *Collins* majority rely heavily on *PCAOB*, 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.

Appellants’ challenge rests on “a tenuous interpretation” of scholarship, and “empirical claims” that are “dubious” at best. *Id.* at 103-04. 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. “[A]n agency structure requiring the President to appoint a political opponent can hardly be said to enhance presidential sway.” *Id.*

The Court should affirm the judgment of dismissal.

Respectfully submitted,

/s/ Robert J. Katerberg
Robert J. Katerberg

*Counsel for FHFA Defendants-
Appellees*

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth 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.

/s/ Robert J. Katerberg
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