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Michael E. Gans
Clerk of the Court
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th St.
Room 24.329
St. Louis, MO 63102

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

Dear Mr. Gans:

Plaintiffs filed a letter notifying this Court of *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Sept. 6, 2019) (en banc). That decision 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* Treasury Br. 19-25; *Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1023-24 (8th Cir. 2008). *See also* Treasury Br. 25-32 (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 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 the 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. Op. 55-59; Treasury Br. 36-41.

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).

Sincerely,

/s/ Gerard Sinzdak
Gerard Sinzdak
Attorney for Department of the Treasury