

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

WAZEE STREET OPPORTUNITIES
FUND IV LP, *et al.*,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE
AGENCY, *et al.*,

Defendants.

Civil Action No. 2:18-cv-3478-NIQA

NOTICE OF SUPPLEMENTAL AUTHORITY
BY THE U.S. DEPARTMENT OF THE TREASURY

The United States Department of the Treasury (“Treasury”) submits this notice to inform the Court of a recent decision from the Fifth Circuit of Appeals, *Collins v. Mnuchin*, No. 17-20364, 2019 WL 4233612 (5th Cir. Sept. 6, 2019) (en banc), that, while not controlling in this case, addresses issues raised in the parties’ pending dispositive motions.

Collins addressed the same question presented in Count I of Plaintiff’s complaint: whether the HERA’s for-cause removal protection for the FHFA Director violates the separation of powers. The Fifth Circuit held that it does. *Collins*, 2019 WL 4233612, at *22 (“HERA’s for-cause protection infringes Article II. It limits the President’s removal power and does not fit within the recognized exception for independent agencies.”). 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 Supp. of Treasury’s Mot. to Dismiss at 8-13, ECF No. 15-1 (“Treasury MTD”); *see also id.* at

13-16 (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.

For the reasons stated in Treasury's briefs, the Court should dismiss Plaintiffs' complaint and, for those reasons and those further stated in *Collins*, should decline to set aside the Third Amendment in any event.

Dated: September 27, 2019

Respectfully submitted,

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