UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

WAZEE STREET OPPORTUNITIES FUND IV, LP, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Case No. 2:18-cv-03478-NIQA

FHFA DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW
PURSUANT TO THE COURT'S OCTOBER 2, 2019 ORDER

Pursuant to the Court's October 2, 2019 Order (ECF No. 38), Defendants Federal Housing Finance Agency ("FHFA") and its Director Mark A. Calabria respectfully submit this supplemental memorandum of law addressing the Fifth Circuit's decision in *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc).

Collins is a shareholder litigation challenging the Third Amendment on the ground that it is unconstitutional for FHFA to have a single Director protected from removal without cause, similar to the claims asserted in Counts I and II in this case.[1] A majority of Fifth Circuit judges held that FHFA's structure is unconstitutional, but a separate majority held that invalidation of the Third Amendment is not an appropriate remedy for that issue. While no part of *Collins* is binding precedent on this Court, FHFA respectfully

[1] *Collins* did not include claims similar to those made in Counts III, IV, and V in this case and is irrelevant to the parties' arguments concerning those counts.

submits that the first holding in *Collins* (on the removal-restriction constitutionality) is wrong, and the second holding in *Collins* (on remedy) is correct and persuasive. The shareholder-plaintiffs in *Collins* have filed a petition for certiorari seeking Supreme Court review of both issues. *Collins v. Mnuchin*, No. 19-422 (U.S. S. Ct.; filed Sept. 25, 2019).[2]

A. *Collins*'s Holding on the Constitutionality of HERA's For-Cause Removal Provision is Wrong.

Collins' holding that the protection of an FHFA Director from arbitrary removal is unconstitutional is fundamentally flawed. As dissenting Judges of the Fifth Circuit opined, "[i]t is wrong to declare the FHFA unconstitutionally structured." *Collins*, 938 F.3d at 614 (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 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 616

[2] Additionally, on October 18, 2019, the U.S. Supreme Court granted certiorari in a case testing the constitutionality of the Consumer Financial Protection Bureau, which has a single director protected from removal without cause. *CFPB v. Seila Law LLC*, 923 F.3d 680 (9th Cir. 2019), *cert. granted*, No. 19-7 (U.S. Oct. 18, 2019).

(Higginson, J., dissenting); *see also* Mem. in Supp. FHFA Defs.' Mot. to Dismiss at 15-16 (ECF No. 16) (discussing cases) ("MTD Mem."). 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*, 938 F.3d at 615, 617 (Higginson, J., dissenting). While both Plaintiffs and the *Collins* majority rely heavily on *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), 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." *Collins*, 938 F.3d at 615 (Higginson, J., dissenting).

Plaintiffs' challenge rests on "a tenuous interpretation" of scholarship, and "empirical claims" that are "dubious" at best. *Id.* at 617 (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.*; *see* MTD Mem. at 18-20. "[A]n agency structure requiring the President to appoint a political opponent can hardly be said to enhance presidential sway." *Collins*, 938 F.3d at 618 (Higginson, J., dissenting).

B. *Collins's* Holding Rejecting Invalidation of the Third Amendment as a Remedy for the Removal-Restriction Issue is Correct.

Even if *Collins*'s constitutional analysis were correct, however, the court's further holding that "the appropriate remedy for that finding is to declare the 'for cause' provision severed" supports FHFA's position that invalidation of the Third Amendment is not an available remedy in this case. *Collins*, 938 F.3d at 595; *see* MTD Mem. at 12-15. Informed by the remedial analysis in *Free Enterprise Fund*, 561 U.S. 477, the Court explained that "[w]hen addressing the partial unconstitutionality of a statute such as this

one, we seek to honor Congress's intent while fixing the problematic aspects of the statute." *Collins*, 938 F.3d at 592. Thus, the appropriate remedy is limited to "sever[ing] the 'for cause' restriction on removal of the FHFA director from the statute." *Id.*

The Court rejected plaintiffs' analogy to certain cases involving unconstitutional *appointments* (as opposed to restrictions on *removal*). In those cases, the officials' actions were "void *ab initio*" because they were "vested with authority that was never properly theirs to exercise." *Id.* at 593. "Restrictions on removal are different": the officers were "duly appointed by the appropriate officials and exercise authority that is properly theirs," and the theory is simply that "they are too distant from presidential oversight to satisfy the Constitution's requirements. *Id*.

The Court emphasized the absence of any precedent invalidating past agency actions due to an unconstitutional removal restriction. *Id.* *Bowsher v. Synar*, 478 U.S. 714 (1986), "is off-point" because, among other reasons, "it involved a challenge—not to an executive-branch official 'insulated' from presidential oversight—but to the Comptroller General, essentially a legislative officer, removable by Congress, who was purporting to exercise executive power." *Collins*, 938 F.3d at 595 (Duncan, J., concurring).

Finally, the Court observed that it would be particularly anomalous to invalidate the Third Amendment because the President "had plenary authority to stop the adoption of the Net Worth Sweep" through his control of the Secretary of the Treasury. *Id.* at 594; *see* MTD Mem. at 9-11. Of course, "plaintiffs may not sue to invalidate an agency action due to lack of presidential oversight when their allegations show that the President had oversight of the action." *Collins*, 938 F.3d at 594 n.6.

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

Dated: October 23, 2019

Respectfully submitted,

/s/ Leslie M. Greenspan.

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2019, I filed and served via the Court's ECF system a true and correct copy of the foregoing documents.

/s/ Leslie M. Greenspan
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