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September 9, 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
St. Louis, MO 63102

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

Dear Mr. Gans:

In *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Sept. 6, 2019) (en banc)

(“Op.”), attached as Ex. A, the Fifth Circuit held that:

- “FHFA’s design . . . violates the separation of powers,” Op.4;
 - standing “does not require proof that an officer would have acted differently in the ‘counterfactual world’ where he was properly authorized,” Op.44;
 - constitutional claims are not barred by HERA’s succession provision, Op.45-46;
 - “HERA’s removal restriction applied to” Acting Director DeMarco, Op.50;
- and

- as a “federal agency, empowered by a federal statute, enriching the federal government,” FHFA “invoked executive power” when adopting the Net Worth Sweep, Op.51.

The court also refused to interpret HERA to grant FHFA authority untethered from “limited powers to ‘preserve and conserve’ the GSEs’ assets and property” because FHFA would then “lack any intelligible principle to guide its discretion as conservator.” Op.33. This Court, by contrast, held that “Congress came close to handing a blank check to the FHFA.” *Saxton v. FHFA*, 901 F.3d 954, 960 (8th Cir. 2018) (Stras, J., concurring). While that allowed this Court to reject the statutory claim *Collins* revived, it runs headlong into the non-delegation problem *Collins* avoided. *See* Plaintiffs’ Br. 48–50.

By a vote of nine to seven, the Fifth Circuit declined to vacate the Net Worth Sweep. That was error. “When a plaintiff with Article III standing challenges the action of an unconstitutionally-insulated officer, that action must be set aside.” Op.118 (Willett, J., dissenting); *see also* Op.86–90 (Oldham, J., dissenting). Indeed, Congress has instructed that unconstitutional agency action “shall” be “set aside.” 5 U.S.C. § 706(2).

The judges who declined to vacate the Net Worth Sweep despite FHFA’s unconstitutional structure relied heavily on *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). “But no Board action

had become final against the plaintiff” in that case, so there was nothing to vacate. Op.119 (Willett, J., dissenting). *Free Enterprise Fund*’s adoption of the narrower of two possible *prospective* remedies is irrelevant to whether Plaintiffs are entitled to a *retrospective* remedy vacating the Net Worth Sweep. See Plaintiffs’ Reply Br. 9.

Respectfully submitted,

/s/ David H. Thompson
David H. Thompson

Counsel for Appellants

cc: Counsel of Record (by ECF)