**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION**

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| J. PATRICK COLLINS, MARCUS J. LIOTTA, and WILLIAM M. HITCHCOCK,<br><br>Plaintiffs,<br><br>vs.<br><br>THE FEDERAL HOUSING FINANCE AGENCY, SANDRA L. THOMPSON, in her official capacity as Director of the Federal Housing Finance Agency, THE DEPARTMENT OF THE TREASURY, and JANET L. YELLEN, in her official capacity as Secretary of the Treasury,<br><br>Defendants. | No. 4:16-cv-03113 |

**NOTICE OF SUPPLEMENTAL AUTHORITY**

Last week, a unanimous panel of the Fifth Circuit decided *CFSA v. CFPB*, No. 21-50826 (5th Cir. Oct. 19, 2022) (attached as Exhibit A). *CFSA* is controlling precedent, and it forecloses many of the arguments in Defendants' motions to dismiss.

First, in *CFSA*, the Fifth Circuit clarified the test that this Court must apply to determine whether Plaintiffs are entitled to a remedy for their presidential removal claims. To obtain a remedy, Plaintiffs must demonstrate: (1) "a substantiated desire by [President Trump] to remove [Director Watt]"; (2) "a perceived inability to remove [Director Watt] due to the infirm provision"; and (3) "a nexus between" President Trump's "desire to remove" Director Watt and Defendants' failure to eliminate the liquidation preference on Treasury's senior preferred stock. *CFSA*, slip op. 19. The letter from former President Trump attached to Plaintiffs' amended complaint easily satisfies all three of those requirements, and the amended complaint's detailed allegations would

be more than sufficient even without the letter. In short, Plaintiffs are entitled to a remedy because "President Trump would have removed [Watt]" but for the unconstitutional removal restriction, and "[FHFA] would have acted differently as to [Treasury's liquidation preference]" had Director Watt been removed. *CFSA*, slip op. 20.

Second, *CFSA* held that the CFPB's funding structure violates the Appropriations Clause, and its reasoning applies with equal force to FHFA. In deciding the Appropriations Clause question before it, the *CFSA* Court drew upon the Constitution's text, structure, and history, embracing many of the same sources and arguments presented in Plaintiffs' opposition to the motions to dismiss. *Compare CFSA*, slip op. 24–28, *with* MTD Opposition 20–21. The Fifth Circuit rejected the CFPB's argument, also pressed by Defendants here, that "there is no constitutional infirmity because its funding scheme was enacted by Congress." *CFSA*, slip op. at 33–34. The Court also declined to follow many of the same out-of-circuit precedents upholding the CFPB's funding structure that Defendants rely upon. *CFSA*, slip. op. 34 & fn.15.

After *CFSA*, the only question that remains with respect to the merits of Plaintiffs' Appropriations Clause claim is whether FHFA can be distinguished from the CFPB. It cannot. In the wake of recent Supreme Court decisions, both are non-independent federal agencies headed by a single Director. *See CFSA*, slip. op. 32 (explaining that "the Director's newfound presidential subservience exacerbates the constitutional problem arising from the Bureau's budgetary independence" (cleaned up)). Both agencies do not receive appropriations of any kind, thus preventing Congress from exercising direct control over their funding. *Compare* 12 U.S.C. § 4516(f)(2) (providing that FHFA assessments are not appropriations), *with CFSA,* slip op. at 33 (relying upon analogous statutory provision that applies to the CFPB). Also like the CFPB, FHFA is funded via assessments that are "drawn from a source that is itself outside the appropriations

process"—in FHFA's case, Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. *See CFSA*, slip op. 30. And both agencies do "important work" with significant consequences for the national economy. *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021). If anything, FHFA's funding structure is *more* constitutionally problematic than that of the CFPB. While the CFPB's assessments are limited to no more than 12% of the operating expenses of the independent Federal Reserve, *see CFSA*, slip op. 29, FHFA can collect an *unlimited* amount of funding from Fannie and Freddie—financial behemoths that FHFA itself controls.

Third, *CFSA* forecloses Defendants' argument that Plaintiffs should be denied a remedy for FHFA's unconstitutional funding structure. In *CFSA*, the Fifth Circuit vacated a rule promulgated by the CFPB, reasoning that "without its unconstitutional funding, the Bureau lacked any other means to promulgate the rule." *CFSA*, slip op. 38. Likewise here, FHFA's "unconstitutional funding structure not only affected the complained-of decision, it literally *effected* the [Third Amendment]" since FHFA had no constitutional source of funding to take this action. *See id.* (cleaned up) (emphasis in original). Accordingly, the proper remedy for Plaintiffs' Appropriations Clause claim is to vacate the Third Amendment (or, if the Court deems it more appropriate, the PSPAs in their entirety).

Dated: October 25, 2022

Respectfully submitted,

/s/ David H. Thompson

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