

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

ATIF F. BHATTI, TYLER D. WHITNEY,
and MICHAEL F. CARMODY,

Case No: 17-CV-02185-PJS-HB

Plaintiffs,

-vs-

THE FEDERAL HOUSING FINANCE
AGENCY, MELVIN L. WATT, in his
official capacity as Director of the Federal
Housing Finance Agency, and THE
DEPARTMENT OF THE TREASURY,

**MOTION FOR
LEAVE TO FILE
SUPPLEMENTAL BRIEF**

Defendants.

Plaintiffs respectfully move for leave to file a supplemental brief of not more than 2,750 words. In support of this motion, Plaintiffs state as follows:

1. The Court held a lengthy oral argument on the parties' dispositive cross-motions on December 21, 2017. The Court began the oral argument by saying "I feel like I have about five lawsuits here," Oral Argument Transcript 4:3 ("Tr."), and later described this as a "very, very difficult case," *id.* at 154:5.

2. In light of the Court's questions at oral argument, Plaintiffs believe that the parties could offer a limited number of supplemental points and authorities that would materially assist the Court as it considers the many disputed issues in this case.

3. First, the Court asked several questions about the specific mechanics of unwinding the Net Worth Sweep. *See, e.g., id.* at 22:20-23 ("Has anybody just ballparked this, that if they had never signed the Third Amendment, if they had just gone with the regime that

existed before the Third Amendment, what the dollars would look like today?”). Plaintiffs propose in their supplemental brief to provide the Court with an explanation of how the Net Worth Sweep could be unwound, along with a calculation demonstrating how this unwinding would affect the balance of Treasury’s holdings in the Companies.

4. Second, the Court inquired at oral argument why Plaintiffs’ challenge to the Net Worth Sweep does not ask the Court to improperly “exchange one unconstitutional regime with another unconstitutional regime” since both the Second and Third Amendments were signed during periods when FHFA’s leadership structure was unconstitutional. *Id.* at 17:25-18:1. Plaintiffs propose to direct the Court to other cases in which courts have confronted similar issues.

5. Third, the Court asked several questions about the practical consequences of a ruling that FHFA operated for an extended period in violation of the separation of powers or the Appointments Clause. *See, e.g., id.* at 18:22-25, 19:20-20:15. Plaintiffs seek permission in their supplemental brief to provide the Court with information regarding these practical consequences, including information concerning how other agencies have used blanket ratification of prior actions to expeditiously deal with such rulings in the past.

6. Fourth, Plaintiffs seek permission to briefly explain how their Appointments Clause claim relates to the Vacancies Reform Act—which relates to questions the Court asked at oral argument about how other agencies would be affected by a ruling that Edward DeMarco’s lengthy service as FHFA’s acting Director violated the Appointments Clause. *See Tr.* 76:6-13.

7. Fifth, Plaintiffs propose to briefly address whether they have standing to challenge FHFA's leadership structure despite the fact that the Net Worth Sweep was approved by Treasury—an agency that the President controlled. This issue was the subject of significant questioning from the Court at oral argument. *See id.* at 4:21-7:24.

8. Sixth, Plaintiffs seek to address whether, by entering into the Net Worth Sweep, FHFA exercised inherently executive power such that its actions would not violate the nondelegation doctrine even if the statutory provisions that confer conservatorship authority on FHFA do not include an intelligible principle to guide the agency's exercise of discretion. *See id.* at 104:22-105:6.

9. Finally, Plaintiffs propose to direct the Court to additional authorities relevant to whether under HERA's Succession Clause FHFA could assert Plaintiffs' constitutional claims in a case in which it was both the plaintiff and the defendant. *See id.* at 122:22-123:5.

10. Plaintiffs consulted counsel for Defendants regarding this motion, and can report Defendants oppose this motion. Plaintiffs would not oppose the Defendants filing a supplemental brief of comparable length to Plaintiffs' supplemental brief if the Court grants this motion.

Dated: January 19, 2018

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