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Via ECF

Lyle W. Cayce
Clerk of Court
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Collins v. Federal Housing Finance Agency*, No. 17-20364

Dear Mr. Cayce:

The Court should not follow the Seventh Circuit's opinion in *Roberts v. FHFA*, which fails to engage with Judge Brown's dissenting opinion in *Perry Capital*, overlooks the most powerful arguments in favor of Plaintiffs' APA claims, and has no bearing on Plaintiffs' constitutional claim.

When Congress says that an agency "may" do one thing, it does not simultaneously give the agency license to do the opposite. *See* Opening Br. 29-30. Like the *Perry Capital* majority, the Seventh Circuit was unable to identify a provision of HERA that affirmatively grants FHFA a conservatorship power to siphon essentially *all* of the Companies' capital into the federal government's coffers. Nor can the Seventh Circuit's interpretation of HERA as granting unlimited discretionary authority to FHFA as conservator be reconciled with common sense, let alone the avalanche of statements by FHFA itself over the last decade acknowledging that Section 4617(b)(2)(D) prescribes the agency's mandatory conservatorship mission. *See id.* at 31-32.

The Seventh Circuit also went seriously astray in concluding that FHFA's adoption of the Net Worth Sweep must be upheld so long as it "could have

believed" that it was serving the purpose of conserving the Companies' assets. *Roberts v. FHFA*, 2018 WL 2055940, at *5 (7th Cir. May 3, 2018). The court in *Roberts* was obliged, as is this Court, to accept as true the well-pled (and amply supported) factual allegations of the complaint, not to conjure purposes that contradict those detailed in the complaint, Compl. ¶¶ 17-20, 105, 137 (ROA.17-18, ROA.55, ROA.73), and, indeed, admitted publicly by the Government itself when it adopted the Sweep, *see* Compl. ¶ 135 (ROA.72).

The Seventh Circuit was also wrong to treat statutory shareholder challenges to the Net Worth Sweep as derivative and barred by 12 U.S.C. § 4617(b)(2)(A). *See* Opening Br. 43-53. FHFA did not succeed to Plaintiffs' right to bring this direct suit. Furthermore, the Seventh Circuit did not have before it a constitutional challenge to FHFA's structure, and the statute would be unconstitutional if it made vindication of constitutional rights contingent on FHFA's willingness to sue itself. Reply Br. 24-25.

Respectfully submitted,

/s/ David H. Thompson
David H. Thompson

Counsel for Appellants

cc: Counsel of Record (by ECF)