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November 7, 2017

## **Via ECF**

Gino J. Agnello  
Clerk of Court  
United States Court of Appeals for the Seventh Circuit  
Everett McKinley Dirksen United States Courthouse  
219 S. Dearborn Street  
Room 2722  
Chicago, IL 60604

Re: *Roberts v. Federal Housing Finance Agency*, No. 17-1880

Dear Mr. Agnello:

The Sixth Circuit's opinion in *Robinson v. FHFA*, 2017 WL 5623344 (6th Cir. Nov. 22, 2017), breaks no new ground. The decision essentially mirrors the arguments previously adopted by the majority in *Perry Capital v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017), and persuasively rebutted by Judge Brown in dissent.

Like the *Perry Capital* majority, *Robinson* read out of HERA any conservatorship duty to preserve assets or restore the Companies to soundness, but ignored the many statements by FHFA's senior leadership acknowledging the mandatory nature of FHFA's restorative statutory mission. *See* Pls. Br. 35-37. *Robinson* also failed to address the nondelegation problem created by interpreting HERA to permit FHFA to do literally *anything* with the Companies' assets. *Id.* at 41-42. Contrary to the Sixth Circuit's ruling, HERA confers on FHFA a limited set of enumerated powers that the agency may not exceed, and pillaging the Companies' balance sheets is not among them.

The Sixth Circuit also erred in ruling that Section 4617(b)(2)(J) permits FHFA as conservator to act in its own "best interests" without regard to HERA's

specification of FHFA's conservatorship authorities. Far from a freestanding conferral of additional, unbounded power, this provision *limits* FHFA's authority by requiring it to make a "best interests" determination before taking actions otherwise "authorized by" HERA. FHFA has never claimed to have made any such finding with respect to the Net Worth Sweep. *Robinson's* more expansive reading of Section 4617(b)(2)(J) makes Section 4617(b)(2)(D) and much of the rest of the statute surplusage, violates the canon that the specific governs the general, and hides an elephant in the mousehole of a provision that purports to only confer "incidental" powers. *See* Reply Br. 9-10. For these and the other reasons canvassed in Plaintiffs' briefs, *Robinson and Jacobs v. FHFA*, 2017 WL 5664769 (D. Del. Nov. 27, 2017), apply Section 4617(f) far too broadly. (*Jacobs* is also far afield because it involved state-law claims alleging that Treasury's stock is void under state law, not federal APA claims alleging that FHFA and Treasury exceeded their authority under HERA.) This Court should instead follow Judge Brown's dissent.

Respectfully submitted,

/s/ David H. Thompson  
David H. Thompson

*Counsel for Appellants*

cc: Counsel of Record (by ECF)

**CERTIFICATE OF SERVICE**

I hereby certify that on December 7, 2017, an electronic PDF of this Rule 28(j) letter was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

/s/ David H. Thompson  
David H. Thompson