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June 27, 2018

VIA ECF

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

Re: *Collins et al. v. Mnuchin et al.*, No. 17- 20364;
Response to Fed. R. App. P. 28(j) Letter

Dear Mr. Cayce:

FHFA Appellees write in response to Plaintiffs' June 25, 2018 letter regarding two recent decisions.

Plaintiffs neglect to mention that in *Lucia v. SEC*, 2018 WL 3057893 (U.S. June 21, 2018), the Court specifically declined to grant certiorari on or otherwise address the type of constitutional claim made in this case, namely “whether the statutory restrictions on removing the Commission’s ALJs are constitutional.” *Id.* at *5 n.1. Rather, the issue in *Lucia* was whether certain SEC ALJs qualified as “Officers of the United States” under the Appointments Clause. Plaintiffs’ complaint in this case does not even mention the Appointments Clause, let alone assert a claim under it.

Plaintiffs argue that the remedy in *Lucia*—vacating the decision by the unconstitutionally appointed ALJ and remanding for a new hearing before a properly appointed ALJ—supports dispensing with Article III standing requirements in this case and vacating the Third Amendment. Not

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so. The remedy for the unconstitutional appointment in *Lucia* is no more relevant here than are the other Appointments Clause cases discussed in FHFA’s brief voiding purported adjudications by “judges or other officials [who] were invalidly appointed” and thus had no power to act. Br. 42-43 & n.9. Removal restriction claims are different: as *Free Enterprise Fund* held, if a removal restriction exceeds constitutional limits, the remedy is not to vitiate an agency’s very existence or automatically annul its past transactions, but simply to treat the removal restriction as inoperative. *Id.* at 41-43.

CFPB v. RD Legal Funding, LLC, No. 17-890, at 99-100 (S.D.N.Y. June 21, 2018), does nothing more than summarily adopt by reference certain parts of dissenting opinions in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), and contributes no new analysis. The dissenting opinions in *PHH*, and the new district court decision adopting them, are wrong for the reasons expressed by the *PHH* majority and numerous other decisions rejecting constitutional challenges to the CFPB. Br. 48 (collecting cases). Plaintiffs also rely on a discussion rejecting a CFPB ratification defense, but FHFA has not asserted a ratification defense in this case.

Respectfully Submitted,

/s/ Howard N. Cayne
Howard N. Cayne

*Counsel for Appellees Federal
Housing Finance Agency and
Melvin L. Watt*

cc: Counsel of Record (by ECF)