

July 24, 2018

VIA ECF

Michael E. Gans
Clerk of Court
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
Room 24.329
St. Louis, MO 63102

Re: *Saxton v. Federal Housing Finance Agency*, No. 17-1727
Response to Appellants' Notice of Supplemental Authority
under Fed. R. App. P. 28(j)

Dear Mr. Gans:

We write in response to Appellants' letter regarding *Collins v. FHFA* (5th Cir.) ("Op."). With *Collins*, the Fifth Circuit joined the D.C., Sixth, and Seventh Circuits to become the fourth Court of Appeals to hold that HERA bars APA challenges to the Third Amendment that are materially identical to Appellants'.

Appellants urge the Court to disregard the *Collins* decision and its predecessors and instead follow the *Collins* dissent. Appellants praise the dissent's length and criticize the majority for "explaining its rationale in a single paragraph." But the majority's decision expressly rests on "the same well-reasoned basis" as *Roberts*, *Robinson*, and *Perry Capital*, Op. at 14-15, which together have devoted many paragraphs to explaining their rationale. And the dissent merely repeats arguments that have been analyzed and rejected by every appellate and district court to consider them.

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Appellants trumpet the dissent's conclusion that the Conservator's "only" power is to restore the Enterprises to solvency and that it lacks the power to "wind up" the Enterprises. *See* Op. 68-70. But HERA's plain text is to the contrary. *See Roberts*, 889 F.3d at 404; *Robinson*, 876 F.3d at 231; *Perry Capital*, 864 F.3d at 609-10, 612. HERA grants conservators the power to "wind[] up" the Enterprises, 12 U.S.C. § 4617(a)(2), reflecting Congress's understanding that "sometimes conservatorship will involve managing the regulated entity in the lead up to the appointment of a liquidating receiver." *Perry Capital*, 864 F.3d at 609-10.

Appellants point out that the dissent cites *RTC v. CedarMinn Building, L.P.*, 956 F.2d 1446 (8th Cir. 1992), in a pair of string citations, but, as addressed in oral argument and detailed in FHFA's brief, *CedarMinn* does not support Appellants' position. FHFA Br. 26-27, 37-38.

The other aspects of the dissent that Appellants highlight have also been thoroughly refuted in *Perry Capital*, *Robinson*, and *Roberts*. For example, the dissent argues that courts must evaluate the Conservator's actions by the standards of "common law," "traditional" conservators, Op. at 69, while ignoring the fact that Congress "explicitly delegated to FHFA conservatorship authority that exceeds the customary meaning of the term," *Robinson*, 876 F.3d at 229-30.

Respectfully submitted,

/s/ Howard N. Cayne
Howard N. Cayne

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