ARNOLD & PORTER KAYE SCHOLER

**Howard N. Cayne**
+1 202.942.5656 Direct
Howard.Cayne@apks.com

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**VIA ECF**

Deborah S. Hunt, Esq.
Clerk of the Court
United States Court of Appeals for the Sixth Circuit
Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, OH 45202

Re: Robinson v. Federal Housing Finance Agency, No. 16-6680

Dear Ms. Hunt:

Appellant's October 4 letter constitutes the second use of Rule 28(j) not for its proper purpose of informing the Court of any new judicial decision, statute, or regulation, but rather to improperly supplement the record with out of context words from FHFA documents irrelevant to the resolution of the issues presented on appeal. *See* Doc. 31-1.

Once again, the purported "new authorit[ies]"—this time FHFA's Strategic Plan and recent congressional committee testimony by Director Watt—are fully consistent with FHFA's litigation position. The plan's references to "statutory mandates" refer not to specific, judicially-enforceable duties, but rather to HERA's "expansive grants of permissive, discretionary authority," which provide FHFA "extraordinarily broad flexibility to carry out its role as conservator." *Perry Capital v. Mnuchin*, 864 F.3d 591, 606-07 (D.C. Cir. 2017).

Appellant mischaracterizes Director Watt's remarks as describing "the Companies' lack of capital" as "'especially irresponsible.'" The Director was not addressing the adequacy of the Enterprises' capital as a general

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matter, but rather his oft-stated concern about the phase-out of the "limited buffer" of capital currently in place under the Third Amendment. Director Watt expressed concern that, after such phase-out, any quarterly loss "would result in an additional draw of taxpayer support" and reduce the finite Treasury commitment to the Enterprises. He also cautioned that it would be a "serious misconception" to construe any actions "to avoid additional draws of taxpayer support…as a step toward recap[italization] and release." The Director's comments actually confirm, rather than contradict, that HERA contains no "mandate, command, or directive to build up capital for the financial benefit of the Companies' stockholders." *Perry Capital*, 864 F.3d at 607.

Appellant's 28(j) letter also is inappropriate because the quoted "especially irresponsible" comment is nothing new: the exact same sentence appeared in the May 2017 testimony Appellant submitted in her prior 28(j) letter. Doc. 31-2, at 5.

Finally, the second paragraph of Appellant's letter improperly attempts to introduce new arguments by citing cases and statutes that have long been in existence and that Appellant could have—but did not—address in her briefs.

Respectfully Submitted,

/s/ Howard N. Cayne
Howard N. Cayne

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