

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MICHAEL ROP, STEWART KNOEPP, and
ALVIN WILSON,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE
AGENCY, MELVIN L. WATT, in his official
capacity as Director of the Federal Housing
Finance Agency, and THE DEPARTMENT
OF THE TREASURY,

Defendants.

Case No. 1:17-cv-00497

Hon. Paul L. Maloney

**PLAINTIFFS’ RESPONSE TO FHFA’S NOTICE OF SUPPLEMENTAL
AUTHORITY CONCERNING *ROBERTS v. FHFA***

The court in *Roberts v. FHFA*, --- F.3d ---, 2018 WL 2055940 (7th Cir. May 3, 2018), did not have before it any constitutional claims. The *Roberts* court thus had no occasion to decide whether 12 U.S.C. § 4617(b)(2)(A) makes vindication of important federal constitutional principles dependent on FHFA’s ability and willingness to sue itself. *See* Dkt. 31, Pls.’ Br. in Opp. to Def. Dept. of the Treasury’s Mot. to Dismiss (“Pls.’ Resp.”) 15–16, Pg.ID 598-99. Nor did the *Roberts* court address whether federal constitutional claims like those at issue here should be treated as direct as a matter of federal common law. *Id.* at 11–12, Pg.ID 594-95. Accordingly, nothing in the Seventh Circuit’s recent opinion undermines Plaintiffs’ arguments that they are entitled to press the constitutional claims at issue in this case.

To be sure, the Seventh Circuit sided with the D.C. Circuit in ruling that derivative *statutory* claims are barred during conservatorship, even when the conservator is conflicted. But there is “an apparent circuit split” on this issue, *Saxton v. FHFA*, 245 F. Supp. 3d 1063, 1079 (N.D.

Iowa 2017), and the contrary opinions of the Federal and Ninth Circuits are more persuasive, *see* Dkt. 31, Pls.’ Resp. 16–17, Pg.ID 599-600 (discussing *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1283 (Fed. Cir. 1999), and *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1024 (9th Cir. 2001)). But even if the Court agrees with the D.C. and Seventh Circuits that derivative statutory claims may not proceed during conservatorship, it should not extend the same rule to constitutional claims when doing so would allow a federal agency to violate the Constitution with impunity.

Far from supporting dismissal of this suit, the Seventh Circuit ruled that under HERA the FHFA is free to operate Fannie and Freddie to advance whatever ends it pleases—without meaningful direction or oversight from the President, Congress, or the judiciary. No other federal agency in our Nation’s history has ever been so thoroughly insulated from oversight by all three branches of government, and this arrangement is a stark violation of both the separation of powers and the nondelegation doctrine. *See* Dkt. 33, Br. in Supp. of Pls.’ Mot. for Summ. J. 3–12, Pg.ID 906-15.

Dated: May 21, 2018

Respectfully submitted,

/s/ Matthew T. Nelson

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May 2018, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system, causing a true and correct copy to be served on all counsel of record.

/s/ Matthew T. Nelson

Matthew T. Nelson