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July 9, 2019

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 (*en banc* oral argument held January 23, 2019)

Dear Mr. Cayce:

The Federal Housing Finance Agency (FHFA) Defendants-Appellees write to advise the Court (a) of a leadership change at FHFA that necessitates substitution of parties under Fed. R. App. P. 43(c)(2), and (b) that under its new leadership FHFA has reconsidered the constitutional issue in this case, presently taking the position that HERA's for-cause removal provision is constitutional, and urges the Court to uphold the constitutionality of the structure Congress chose for FHFA.

1. In April, Mark A. Calabria was sworn in to serve a five-year term as FHFA Director following presidential nomination and Senate confirmation. Pursuant to Rule 43(c)(2), Director Calabria should be substituted for Acting Director Joseph Otting as a defendant-appellee.

2. In this case, Plaintiffs-Appellants challenged the validity of a transaction known as the Third Amendment in part as it is unconstitutional for FHFA to be led by a single Director removable by the President only for cause. Before the district court and the Panel, and in its petition for rehearing

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en banc, FHFA defended the constitutionality of this provision. Shortly after this Court granted rehearing *en banc*, the term of the prior Senate-confirmed Director expired. Under interim leadership between January and April 2019, including during *en banc* briefing and oral argument, FHFA elected not to defend the constitutionality of its structure. At all relevant times FHFA argued and continues to argue the issue does not affect the Third Amendment's validity.

Under its new Director, FHFA has considered this issue. FHFA now advises the Court FHFA takes the position going forward that HERA's structure is constitutional. FHFA respectfully requests that the Court consider the arguments on that issue presented at pages 46-56 of FHFA's Panel brief, and pages 10-15 of FHFA's *en banc* petition, as presenting FHFA's operative position. FHFA withdraws the statements relating to this issue at page 3 of FHFA's supplemental *en banc* brief and to similar effect at *en banc* argument. FHFA respectfully requests that, to the extent the Court finds it necessary to reach the constitutional issue, the Court uphold FHFA's structure and otherwise affirm the judgment below as to the Third Amendment.

Respectfully Submitted,

/s/ Robert J. Katerberg

Robert J. Katerberg

*Counsel for Defendants-Appellees
Federal Housing Finance Agency and
Director Mark A. Calabria*

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Robert J. Katerberg
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