ORAL ARGUMENT NOT YET SCHEDULED

# United States Court of Appeals for the District of Columbia Circuit

**No. 14-5243 (L),**
**14-5254 (con.), 14-5260 (con.), 14-5262 (con.)**

PERRY CAPITAL LLC, for and on behalf of investment funds for which it acts as investment manager,

*Plaintiff-Appellant,*

v.

JACOB J. LEW, in his official capacity as the Secretary of the Department of the Treasury, MELVIN L. WATT, in his official capacity as Director of the Federal Housing Finance Agency, UNITED STATES DEPARTMENT OF THE TREASURY, and FEDERAL HOUSING FINANCE AGENCY,

*Defendants-Appellees.*

On Appeal from the United States District Court for the District of Columbia, No. 13-MC-01288 (Royce C. Lamberth, District Judge)

**BRIEF FOR THE INDEPENDENT COMMUNITY BANKERS OF AMERICA, THE ASSOCIATION OF MORTGAGE INVESTORS, MR. WILLIAM M. ISAAC, AND MR. ROBERT H. HARTHEIMER AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS**

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July 6, 2015

# CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

## A. PARTIES AND *AMICI CURIAE*

Except for the *amici curiae* listed below, all parties, intervenors, and *amici* appearing before this court are listed in the Initial Opening Brief for Institutional Plaintiffs, PERRY CAPITAL LLC:

***Independent Community Bankers of America***

***The Association of Mortgage Investors***

***Mr. William M. Isaac***

***Mr. Robert H. Hartheimer***

## B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Initial Opening Brief for Institutional Plaintiffs, PERRY CAPITAL LLC.

## C. RELATED CASES

This case has not previously been before this Court. References to related cases appear in the Initial Opening Brief for Institutional Plaintiffs, PERRY CAPITAL LLC.

/s/ Thomas P. Vartanian
Thomas P. Vartanian
DECHERT LLP

*Counsel for Amici Curiae*

Date: July 6, 2015

## CERTIFICATE AS TO NECESSITY OF SEPARATE AMICUS BRIEF

Counsel for the *amici* have conferred with counsel for other *amici* and have determined that separate briefing is necessary because the various *amici* groups bring substantially different perspectives to the case. Various *amicus* briefs address different aspects of the case and take potentially inconsistent positions on particular issues before the Court.

/s/ Thomas P. Vartanian
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*Counsel for Amici Curiae*

Date: July 6, 2015

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, *amici curiae* the Independent Community Bankers of America and the Association of Mortgage Investors state that they are trade associations, as defined in Circuit Rule 26.1(b), made up of members who will be impacted if this Court affirms the district court's opinion below.

These *amici curiae* certify that they have no outstanding shares or debt securities in the hands of the public, and have no parent company. No publicly held company has a 10% or greater ownership interest in either of these *amici curiae*.

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* There are no authorities upon which we chiefly rely.

# GLOSSARY

| | |
|---|---|
| AMI | The Association of Mortgage Investors |
| Dodd-Frank Act | The Dodd-Frank Wall Street Reform and Consumer Protection Act |
| FDIA | Federal Deposit Insurance Act |
| FDIC | Federal Deposit Insurance Corporation |
| FHFA | Federal Housing Finance Agency |
| FSLIC | Federal Savings and Loan Insurance Corporation |
| GSEs | Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac") |
| HERA | The Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 |
| ICBA | The Independent Community Bankers of America |
| SIFI | Systemically Important Financial Institution |
| Treasury | U.S. Department of the Treasury |

## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* the Independent Community Bankers of America (the "ICBA"), the Association of Mortgage Investors ("AMI"), and Messrs. William M. Isaac and Robert H. Hartheimer each have a common interest in the potentially far-reaching adverse precedent this case may set for the stakeholders of future receiverships and conservatorships of depository institutions undertaken by the Federal Deposit Insurance Corporation (the "FDIC"). Indeed, the FDIC's resolution and conservatorship authority—for failing or failed depository institutions—flows from a virtually identical, parallel statutory authority to that at issue in this case.

The ICBA is a nationwide trade organization dedicated to promoting and protecting the interests of community banks through the monitoring of, and advocacy in, federal issues that affect thousands of community banks and their customers. The ICBA is the nation's voice for more than 6,000 community banks of all sizes and charter types and is dedicated exclusively to representing the interests of the community banking industry and its members. The ICBA's member community banks seek to improve cities and towns by using local dollars

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[1] *Amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

to help families purchase homes and are actively engaged in the business of residential mortgage lending in the communities that they serve. If affirmed, the decision below would adversely impact the availability and cost of private capital for banks and thrifts. Investors in banks and thrifts put into conservatorship in the future will find it more difficult, or impossible, to limit a conservator to actions that (i) return the institution to a sound and solvent condition, and (ii) preserve and conserve the institution's assets for the ultimate benefit of its shareholders and creditors.

AMI is a Washington, D.C.-based non-profit, organized as the primary trade association representing investors in mortgage-backed securities, including public pension funds, unions, university endowments, and private retirement systems. AMI was founded to play a primary role in the analysis, development, and implementation of mortgage and housing policy to help keep homeowners in their homes and provide a sound framework that promotes continued home purchasing. AMI educates policy-makers and government authorities on housing finance and mortgage issues, including by regularly addressing the U.S. Congress, federal regulatory agencies, and state and local governments. It is an investor-only group comprised of a significant number of substantial institutional investors in commercial and residential mortgage-backed and other asset-backed securities. Its members manage a collective investment in asset-backed securities in excess of $1

trillion. If affirmed, the decision below would adversely impact the private mortgage-backed securities market to the detriment of home buyers, who will see less mortgage credit available and at considerably higher rates.

Mr. Isaac was appointed to the Board of the FDIC by President Carter in 1978, and served as the FDIC's Chairman from 1981 through 1985—one of the most tumultuous periods in U.S. banking history. During his tenure at the FDIC, he oversaw hundreds of bank failures and assistance transactions, including Continental Illinois and nine of the ten largest banks in Texas. Before his appointment to the FDIC, Mr. Isaac served as Vice President, General Counsel, and Secretary of the largest banking company in Kentucky, First Kentucky National Corporation and its subsidiaries. Currently, he serves as a Senior Managing Director and Global Head of the Financial Institutions practice at FTI Consulting, where he provides regulatory counseling and risk management services to financial institutions. As a former senior government regulator and sought-out advisor of financial institutions and governments around the globe, Mr. Isaac has an interest in assuring the orderly and legal regulation and supervision of financial institutions by the FDIC and other governmental financial supervisors who possess the same authority at issue in this case.

Mr. Hartheimer was the Director of the Division of Resolutions at the FDIC between 1994 and 1995 and Associate and Deputy Director from 1991 to 1994. In

these roles, he oversaw the closing, receivership, conservatorship, and sale of over 200 failed banks. Mr. Hartheimer is the Founder and Managing Member of Hartheimer LLC, a bank regulatory consulting firm. He represents banks, boards of directors, investors, and other financial institutions in bank regulatory matters, including counseling banks and investors on the bank resolution process. As a former government regulator, former director of three banks and bank holding companies nationwide and sought-out advisor of financial institutions, Mr. Hartheimer has an interest in assuring the orderly and legal regulation and supervision of financial institutions by the FDIC and other governmental financial supervisors who possess the same authority at issue in this case.

## SUMMARY OF ARGUMENT

At issue in this appeal is not the propriety of the conservatorships of Fannie Mae and Freddie Mac ("GSEs"), the extraordinary stock arrangements between the GSEs and the U.S. Department of the Treasury ("Treasury") that were created in those conservatorships, or, more generally, whether the GSEs should be reorganized, rehabilitated, or wound-up. The district court's opinion instead raises a serious constitutional due process issue by denying judicial review, which inevitably will lead to abuses of similar statutes in other contexts. Its opinion serves as a road map for government overreach and unreviewable disregard of property rights and state corporate law. At a minimum, the decision will make

capital more expensive—perhaps prohibitively so in times of stress—for all regulated or systemically important financial institutions ("SIFIs"), not just for the GSEs.

In all material respects, the conservatorship and receivership provisions of the Housing and Economic Recovery Act ("HERA") are identical to parallel provisions of the Federal Deposit Insurance Act (the "FDIA"), and the legal linkage between HERA and the FDIA in the decision below is fundamental. As a purported method of financing the operations of the companies, the net worth sweep bears no resemblance to any prior financing arrangement ever entered into by the FDIC as conservator. The relinquishment of a private corporation's net worth cannot be defined as a routine asset disposition under any commonly understood meaning or FDIC precedent.

The net worth sweep precludes the preservation and building of any capital in the companies and leaves no foreseeable prospect that they will be returned to safe and solvent operating conditions. Furthermore, it systematically drains all future claims-paying resources over a *de minimis* threshold amount. Both of these outcomes are categorically inconsistent with the statutory duties of a conservator. Six years into an unnaturally long and unprecedented conservatorship, there is no plan or prospect that the GSEs will be returned to safe and solvent operating conditions, and no business resolution is in sight.

Parties and counsel responsible for this brief served as Director and subsequently Chairman of the FDIC (1978 through 1985), Director of Resolutions at the FDIC (1991-95) and General Counsel of the Federal Savings and Loan Insurance Corporation ("FSLIC") (1981-83) during periods of economic stress in the United Sates when a significant number of bank and thrift conservatorships, receiverships, and assistance transactions took place. In that regard, respectively, Mr. Isaac oversaw approximately 303 failure or assistance transactions, Mr. Hartheimer approximately 217,[2] and Mr. Vartanian approximately 430.[3] Together, this constitutes a material number of all such actions in the United States since 1934, when Federal deposit insurance was established. The challenged actions of the Federal Housing Finance Agency ("FHFA") cannot be characterized as those "routinely taken" by a conservator. They bear no resemblance to actions taken in conservatorships or receiverships overseen by the FDIC—the government's acknowledged model for the FHFA's conservatorship powers under HERA.

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[2] *See* FDIC Failures and Assistance Transactions ("FDIC Bank Resolution Data"), https://www2.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30&Header=1. Michael Krimminger, counsel for Investors Unite as *amicus curiae* in support of Appellants, further served as FDIC General Counsel during a period in which there were 134 failures or assistance transactions. *Id*.

[3] *See* Hearing Before the H. Comm. on Banking, Fin. and Urban Affairs, 101st Cong. 8 (1990) (statement by Richard T. Pratt, Chairman, Federal Home Loan Bank).

Instead, the common and well-understood function of an FDIC conservator is to place the regulated entity into a sound and solvent condition, and to preserve and conserve its assets for the eventual benefit of all shareholders and creditors, so that the entity can be returned to the control of its board of directors and shareholders. Plainly, there are situations when the tenure of a conservator or a receiver ultimately results in a "no assets" resolution that, as a practical matter, leaves no value for creditors or shareholders. But that outcome must be the result of statutorily contemplated and authorized actions, not an evasion of statutory duties and an end-run around a legal capital structure.

It may very well be that the FHFA's (and Treasury's) motives were rooted in the national interest. *Amici* take no position on the policy virtue of the government's actions in this case. But just as the FDIC does when resolving a bank, or as the FDIC is now expected to do when resolving SIFIs, the FHFA must comply with its statutory duties as conservator in order to enjoy the benefits of the anti-injunction provision of HERA, 12 U.S.C. § 4617(f). The actions of a conservator must be defended as such, not as the policy desires of a regulator. Both the FDIC and the FHFA (when acting as conservators and not regulators) have a fiduciary obligation to shareholders and other stakeholders that is embedded in the statutes that empower them to act.

Moreover, this Court and other courts have concluded that it is the availability of an administrative claims process and subsequent *de novo* judicial review that shields the FDIC's parallel anti-injunction provision from being violations of due process. Here, as applied, the district court's decision forecloses the ability of stakeholders to challenge the government's actions, whether six months, six years, or sixty years into conservatorship. At some point, the passage of time alone converts a conservatorship into something else. If the district court's opinion stands, private shareholders, creditors, and other stakeholders, including investors in residential mortgage-backed securities, lack access to *any* administrative claims process and will be denied judicial redress no matter how aberrant the conservatorship.

Fundamentally, an indefinite conservatorship cannot be used to circumvent the right of *de novo* judicial review that is available in a liquidating receivership. The principle of constitutional avoidance requires that courts read the anti-injunction provision to avoid such due process concerns. That principle is satisfied by reading the statute's use of "as a conservator" to limit the conservator's permissible actions to those of the common, traditional, and well-understood functions of a conservatorship.

Finally, the decision below is wrong with respect to property rights and reasonable investor expectations. The district court appears to reason that while

investors and creditors enjoy contractual and shareholder rights prior to conservatorship, those property rights are somehow "extinguished" during conservatorship. But it is well established that an FDIC conservatorship does not extinguish property rights. The Supreme Court in *O'Melveny & Myers v. FDIC,* 512 U.S. 79 (1994), established that a receiver merely steps into the shoes of the entity for which it acts and succeeds to all director and management rights of the entity—a principle that applies equally to a conservator. The FDIC must operate conservatorships subject to applicable state and federal law, except to the extent the FDIA expressly pre-empts or overrides those laws. Only in receivership are pre-receivership property rights exchanged for administrative claims.

Investors in regulated industries do not invest subject to a risk that some conservator may abrogate all of their property rights—temporarily or, as done so here until the conservator and another shareholder decides, forever. Nor do they invest subject to the risk that some conservator may circumvent the crystallization of claims and distributable value that would occur upon receivership. To the contrary, federal law expressly acknowledges the FDIC's fiduciary duty to preserve the value of a receivership estate and to respect capital structure priorities in conservatorship. The reasonable investor's expectation is that a conservator may not be enjoined from taking authorized but ill-conceived actions, but—at the same time—that the conservator may be compelled to act in accordance with its

statutory duties. Investors in regulated industries recognize the risk of regulatory intervention. They do not, however, invest subject to the risk of abuse of conservatorship.

The district court's decision effectively upends eighty years of regulatory convention, legal precedent, and investor expectations as to how a regulator will handle failing firms. Beyond the two GSEs, there are 6,500 banks, innumerable mortgage-creating vehicles, and multiple SIFIs impacted by this decision. If allowed to stand, the district court's decision puts at risk hundreds of billions of dollars of capital invested in banks, thrifts, SIFIs, and mortgage-related vehicles.

## ARGUMENT

### I. The District Court Erred in Finding that FHFA Was Acting as a Conservator

As alleged in the complaint before the district court, the FHFA's actions were not those of a conservator and cannot qualify for the protection of a statute meant to apply to a conservator's actions. Decades of receiverships and conservatorships demonstrate that the indefinite siphoning off of an institution's earnings and working capital are not within a conservator's basic and routine functions and would violate a conservator's statutory duties under either the FDIA or HERA.

Congress established federal deposit insurance during the Great Depression to rebuild confidence in the banking system, and it chartered the FDIC and the

FSLIC to insure deposits and to act as federal receivers or conservators for failed banks and savings institutions.[4] Since the early 1980s, there have been several periods marked by significant financial distress that have resulted in the failure of thousands of banks and savings institutions, each accompanied by the appointment of a receiver or conservator. In ***none*** of those thousands of receiverships or conservatorships did the FDIC, the FSLIC, or the RTC take actions remotely similar to the arrangements at issue in this case.

It is well understood from statutory authority, regulatory action, and common experience with thousands of FDIC and FSLIC receiverships and conservatorships over the last eighty years that a conservatorship is a short-term solution leading either to rehabilitation or to a receivership and ultimately payment of creditors and stockholders. *See* Michael H. Krimminger, *FHFA's Permanent Conservatorship Ignores the Law*, American Banker, Jan. 7, 2015. When a conservator takes all of the earnings and working capital of an institution in conservatorship—even after it has returned to robust profitability—for the benefit

[4] The FDIC was established by the Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162. It currently operates under the FDIA, which was enacted in 1950. Pub. L. No. 81-797, 64 Stat. 873. FSLIC was established by the National Housing Act of 1934, Pub. L. No. 84-345, 48 Stat. 847. In 1989, the FSLIC was effectively merged with the FDIC and the Resolution Trust Corporation ("RTC") was established as a temporary receiver or conservator of failed thrifts in the savings and loan crisis. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, tit. V 103 Stat. 183. The RTC was granted powers and authorities much like those of FDIC and FSLIC.

of a single preferred shareholder (the government), and to the detriment of all other stakeholders, it has taken actions far beyond its routine and basic functions as conservator.[5] Eighty years of FDIC and FSLIC history demonstrate that institutions in conservatorship do not generally pay dividends during their rehabilitation, and that conservators do not operate an institution indefinitely for the government's benefit. On its face, this behavior is inconsistent with the rehabilitation of the company and the conservation and preservation of its assets. Accordingly, the district court's interpretation of the anti-injunction provision came as a stunning surprise for those familiar with FDIC and FSLIC conservatorships and receiverships and is not explainable simply because the resolution of the GSEs purportedly presents unique challenges.

Indeed, well-tested FDIC and FSLIC laws, rules, and precedents were simply imported into HERA by Congress to apply to the GSEs.[6] "While case law

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[5] As noted by Mr. Krimminger, a former FDIC General Counsel, preferring one creditor over all others "ignores the international standards underpinning all insolvency frameworks. This is important because one foundation of corporate finance, and our system of commercial laws, is that insolvency law assures creditors that the remaining value of the company will be paid out under defined priorities." *See* Krimminger, *supra*.

[6] During three most recent periods of significant banking distress, 1981 through 1985, 1988 through 1994, and 2007 through 2012, approximately 2,770 insured savings institutions and commercial banks failed or were involved in assistance transactions. *See* FDIC Bank Resolution Data. The handling and resolution of these bank failures and assistance transactions by the FDIC, FSLIC, and RTC created an accepted practice that allowed investors, lenders, and counterparties to understand the potential risks of future failures.

on HERA-related disputes is generally sparse, [c]ourts interpreting the scope of [section] 4617(f) have relied on decisions addressing the nearly identical jurisdictional bar applicable to the [FDIC] conservatorships contained in 12 U.S.C. § 1821(j)." *Perry Capital LLC v. Lew*, 2014 U.S. Dist. LEXIS 138066, at *21 (D.D.C. Sept. 30, 2014) (internal quotations omitted). Congress is presumed to know about prior statutory construction when it drafted HERA. *Lorillard v. Pons,* 434 U.S. 575, 581 (1982).[7]

Conservatorship powers of the FDIC do not merely mimic those of the FHFA; they are identical:

> (D) POWERS AS CONSERVATOR.—The Agency may, as conservator, take such action as may be—
>
> (i) necessary to put the regulated entity in a sound and solvent condition; and
>
> (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.

*Compare* 12 U.S.C. § 1821(d)(2)(D) (2012) *with* § 4617(b)(2)(D). This provision enumerates powers and limits the scope of conservatorship authority. Under

[7] Congress was well aware of the FDIA's provisions; the drafters of the relevant HERA provisions "quite literally 'marked-up' Sections 11 and 13 of the [FDIA]." *See* Mark Calabria, *The Resolution Of Systemically Important Financial Institutions: Lessons From Fannie And Freddie* (CATO Institute, Working Paper No. 25, 2015). Importantly, "[it] was also intended that the existing body of law, including court decisions, surrounding the FDIC's exercise of its conservatorship and receivership powers be incorporated into that governing the GSEs." *Id.*

banking laws the term "may" defines the boundaries of the authorities that a conservator or receiver has; it is not permissive and does not expand some otherwise general set of powers and authorities.

There is disagreement over whether language in 12 U.S.C. § 4617(a)(2) provides that winding-up the affairs of the GSEs is a legitimate purpose for the appointment of a conservator. *Amici* take no position on this grammatical dispute, or whether the FDIC as conservator is prohibited from winding up the affairs of an institution in conservatorship. Whether "winding–up" means selling the company either all or in part, or conducting a voluntary liquidation of the company to preserve value, the shareholders retain their property rights. Even in wind–up, a conservator still must act "to put the regulated entity in a sound and solvent condition" and "to preserve and conserve the assets and property of the regulated entity," and all proceeds of those actions belong to the stakeholders of the company. The only reasonable interpretation of section 4617(a)(2) is that a conservator may wind-up operations by taking actions consistent with reorganization and/or rehabilitation of an enterprise so as to preserve and conserve value for *stakeholders* through those winding–up operations. There is no authority for a conservator to wind–up operations because it furthers a public purpose.

The only actions that should be shielded from judicial review by the anti-injunction provisions are those that involve the "basic" or "routine" functions of a

conservator or receiver. *See, e.g., Nat'l Trust for Hist. Preserv. v. FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993), *vacated*, 5 F.3d 567 (D.C. Cir. 1993) ("*National Trust I*"), *reinstated in relevant part*, 21 F.3d 469 (D.C. Cir. 1994) ("*National Trust II*"). Section 1821(j) is not meant to "preclude[] courts from granting injunctive relief against the FDIC whenever and however it purports to act as a receiver." *National Trust I*, 995 F.2d at 240; *see Placida Prof. Ctr., LLC v. FDIC*, 512 Fed. Appx. 938 (11th Cir. 2013); *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997); *Elmco Properties, Inc. v. Second Nat'l Fed. Sav. Ass'n*, 94 F.3d 914, 923 (2d Cir. 1996).

When the Supreme Court had occasion to interpret similar anti-injunction provisions that formerly applied to the FSLIC's activities as a conservator or receiver under 12 U.S.C. § 1464(d)(6)(C), it held that the "provision prohibits untimely challenges to the receiver's appointment or collateral attacks attempting to restrain the receiver from carrying out its *basic functions*." *Coit Indep. Jt. Ventures v. FSLIC*, 489 U.S. 561, 575 (1989) (emphasis added). "Common sense and common experience make plain that such functions are routinely undertaken by receivers." *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1244 (11th Cir. 2010).

Outside of litigation, the FHFA apparently agrees that the routine function of a conservator is rehabilitation:

> [A]llowing capital distributions to deplete the entity's conservatorship assets *would be inconsistent with the*

> *[conservator's] statutory goals*, as they would result in the removing of capital at a time when the Conservator is charged with rehabilitating the regulated entity.

Conservatorship and Receivership, Final Rule, FHFA, 76 Fed. Reg. 35,724, 35,727 (June 20, 2011) (emphasis added). "[A] conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition." *Id*. at 35,730. Both former FHFA Directors also have agreed with this position.[8] There is no meaningful difference between a bank (under FDIC conservatorship) and the GSEs (under FHFA conservatorship) for purposes of evaluating the normal functions of a conservator. They are all companies with shareholders, creditors, counterparties and prudential regulators, and all operate with and through a government license.

Actions that are fundamentally inconsistent with the statutory obligation to rehabilitate an institution and return it to a safe and solvent condition are not the basic or routine functions of a conservator. Therefore, they are not eligible for

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[8] Then-FHFA Director James Lockhart III stated that conservatorship "is a statutory process designed to stabilize a troubled institution with the objective of maintaining normal business operations and restoring its safety and soundness." *The Appointment of FHFA as Conservator for Fannie Mae and Freddie Mac: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs,* 110th Cong. 15 (2008). Similarly, then-FHFA Director Edward DeMarco stated that when appointed, a conservator "stands in the place of each company's shareholders, boards, and management, with the responsibility to 'preserve and conserve the assets and property' of the companies" and to "take such action as may be . . . appropriate to carry on the business of the regulated entity." *Hearing Before the H. Fin. Serv. Subcomm. on Oversight and Investigations,* 112th Cong. 3 (2011).

immunity from judicial review. These actions demand scrutiny from the courts to evaluate whether *common sense and common experience make plain* that the contested action is one *within the routine or basic functions* of a conservator. The district court's opinion erred in not distinguishing between appropriate and aberrational actions by a conservator, thereby improperly protecting both from court review.

Drawing upon decades of experience with bank receiverships and conservatorships, *amici* submit that the district court's approach turns the law on its head. If the district court's reasoning were applied to the almost identical, parallel authorities of the FDIC, the resulting conservatorship powers that could be exercised by the FDIC without any judicial check would roil the banking industry, residential mortgage lending, and capital markets for SIFIs.

## II. Due Process Requires that Shareholders in a Conservatorship be Provided with an Avenue for Relief

The district court's opinion creates a constitutional issue by denying stakeholders in conservatorships due process by effectively barring judicial review of a conservatorship.[9] In doing so it directly collides with this Court's opinion that "serious due process concerns would be implicated if parties aggrieved by the

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[9] For illustration, suppose that a conservator, for no valid reason, took all of the conservatorship's net worth above $1 and bought a fleet of yachts for government use. Under the lower court's analysis there would be no review or remedy.

FDIC's actions as receiver were left entirely without remedies." *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995). Judge Wald's concurrence in *National Trust II*, sets forth this due process concern quite directly:

> 'Congress did not intend the [Anti–Injunction] Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy . . . .' I am somewhat assuaged by the fact . . . that a private person genuinely aggrieved by such unlawful FDIC action could generally bring suit for damages, or seek administrative redress through the § 1821(d) monetary claims procedure which ultimately includes judicial review . . . . And, of course, we do not decide today what might happen if the denial of an injunction in any particular situation itself violated constitutional due process.

*National Trust II*, 21 F.3d. at 472-73 (quoting *South Carolina v. Regan*, 465 U.S. 367, 378 (1984)); *see also Nat'l Union Fire Ins. Co. of Pittsburgh v. City Sav., F.S.B.*, 28 F.3d 376, 389–90 (3rd Cir. 1994).

In bank receivership cases, all stakeholders are relegated to claimants against the receivership estate. Accordingly, the FDIC's ability initially to act without judicial interference in a receivership has been upheld, but ***only*** because aggrieved claimants "have opportunities to seek money damages or other relief through the administrative claims process . . . and their claims are ultimately subject to judicial review." *Freeman*, 56 F.3d at 1399. Inversely, when no administrative claims process is available and aggrieved parties are left with no recourse, due process is violated. *See, e.g.*, *Elmco Properties,* 94 F.3d 914 (2d Cir. 1996); *FDIC v.*

*diStefano*, 839 F. Supp. 110 (D.R.I. 1993). In fact, the administrative receivership claims process in the FDIA was expressly established by Congress in response to the Supreme Court's opinion in *Coit*, where the Court stated that certain causes of action "involve 'private rights' which are at the 'core' of 'matters normally reserved to Article III courts.'" 489 U.S. 561, 578–79 (1989).

Unless aberrational conservatorship actions are subject to judicial review, no similar opportunity for administrative redress and *de novo* judicial review is available in a conservatorship. The district court's overbroad reading of the anti-injunction provision and its refusal to allow claims by shareholders under any circumstance, even in what could be never–ending conservatorship, raises serious due process issues for conservatorship stakeholders.

The canon of constitutional avoidance requires that the anti-injunction provision be given an alternative interpretation, if fairly possible, that will head off this constitutional problem. *Placida*, 512 Fed. Appx. at 950 (citing *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961)). In this case, fealty to that principle suggests a plain solution: this Court should tether the phrase "as a conservator" in section 4617(f) and the exemption from judicial review and restraint, to traditional, common, and well-recognized functions of conservators.

Last, *amici* wholly reject any hypothesis that *post hoc* administrative review of the actions of a conservator (should a conservator be replaced by a receiver)

could satisfy due process concerns. There is no assurance that a receiver administratively would ever reverse the prior actions of the conservator or that a court could review such actions.[10] But it is crystal clear that in order to avoid due process violations, parties must have a meaningful right to test the limits of government authority.[11] When a conservatorship is indefinite and distributable assets are being dissipated with no foreseeable prospect of resolution, either inordinate delay or the denial of any opportunity for judicial review raises serious due process concerns.

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[10] Every time a court has upheld the FDIA's anti-injunction provision, the case has involved a receivership, where claimants could seek *de novo* judicial review after exhausting the administrative process. Unlike those cases, a never-ending conservatorship allows for the evasion of judicial review. This is contrary to law because the very existence of the administrative receivership claims process in the FDIA was expressly enacted in response to *Coit*. *See* Comm. on Banking, Fin. and Urban Affairs, Financial Institutions Reform, Recovery and Enforcement Act of 1989, H.R. Doc. No. 101-54 part 1, at 419 (1st Sess. 1989). Due process still demands that the judiciary review the validity and legality of actions in an admittedly indefinite conservatorship. Regardless, this Court should make clear that there cannot be legal or practical impediments that forever preclude retrospectively crafted remedies. For example, this Court could direct that a receiver, if any, is not required to adhere to improper actions taken by the conservator and could reduce the claim on account of the Senior Preferred Liquidation Preference, or could compel the turnover of funds from Treasury.

[11] Even if an aggrieved investor may still bring a takings claim, this cannot obviate the procedural due process issues raised by the district court's interpretation of the anti-injunction provision.

## III. Corporate Stakeholders Retain Rights in a Conservatorship Which Cannot Be Less Than What They Would Have in a Receivership

HERA expressly provides that both a receiver and conservator succeed to all "rights, titles, powers, and privileges" of the institution and its directors, officers, and stockholders. 12 U.S.C. §§ 1821(d)(2)(i), 4617(b)(2)(i) (2012). Such rights, however, still exist in a conservatorship. When a conservator is appointed, it "steps into the shoes" of the institution, thereby "obtaining the rights" of the institution's shareholders, board of directors, and officers. *O'Melveny & Myers*, 512 U.S. at 86.

For these purposes, Fannie Mae (Delaware) and Freddie Mac (Virginia), are subject to state corporation law. The securities of both still trade publicly. When the rights to operate a company, vote its shares, and otherwise manage its affairs are assumed by a conservator, the underlying ownership rights of the shareholders are not extinguished. *See* §§ 1821(d)(2)(i), 4617(b)(2)(i). The conservator assumes the fiduciary duties that directors and officers owe to shareholders. *See O'Melveny & Meyers*, 512 U.S. at 85–88.[12]

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[12] Because a conservator steps into the shoes of the institution's board of directors, management, and shareholders, the conservator assumes the duties and obligations that boards, officers, and shareholders owe each other. *See* Steven Davidoff Solomon & David T. Zaring, *After the Deal: Fannie, Freddie and the Financial Crisis Aftermath*, 95 B.U. L. Rev. 371, 390–94 (2015). These include the fiduciary duties of care and loyalty that both directors and officers owe to an institution's shareholders, including heightened fiduciary duties of controlling shareholders, which exist to protect the interests of minority shareholders. *Id.*

In fact, HERA expressly provides that:

> Notwithstanding any other provision of law, ***the appointment of the Agency as receiver . . . shall terminate all rights and claims that the stockholders*** and creditors of the regulated entity may have . . . .

12 U.S.C. § 4617(b)(k)(i) (emphasis added). Except as specifically abrogated by statute, shareholders' and stakeholders' property and common law rights continue, unless and until a receiver is appointed under HERA, at which time parties receive claims against the estate in lieu of their former suite of rights. Again, drawing upon decades of experience with bank receiverships and conservatorships, *amici* submit that the FDIC always has respected the principle that state law and capital structure rights continue to exist in conservatorship, operating pursuant to identical language in the FDIA.

Claimants in a receivership have access to an administrative claims process, which is subject to *de novo* judicial review, notwithstanding the anti-injunction provision. § 1821(d)(7). There is no such process in a conservatorship because the stakeholders still hold their valid corporate interests in the institution. HERA, as

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(citing *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009) (holding corporate officers of Delaware corporations owe the same fiduciary duties as directors)). Similarly, FDIC receivers are fiduciaries to the claimants of a receivership. *See Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1371 (Fed. Cir. 2004) (citing 12 U.S.C. § 1823(d)(3)). These fiduciary duties require the FDIC to protect property rights.

the FDIA, includes a priority of expenses and unsecured claims waterfall in receivership. *Amici* submit that the reason the "priority of expenses and unsecured claims" waterfall set forth in section 4617(c) (and in parallel section 1821(d)(11)) only addresses receivership distributions is because it is self-evident that shareholder and creditor rights still exist in conservatorship.

Claimants in a receivership—after the life of a company is effectively terminated—cannot have more rights than the equity shareholders of an institution in conservatorship, who remain the rightful owners of a company that still has a corporate existence and capital structure. Similarly, assuming *arguendo* that a conservator may dissolve a company and "wind–up" its business affairs, the conservator can only do so for the benefit of all of the company's stakeholders. Otherwise, the statutory admonition for the conservator to conserve and preserve would be meaningless. This Court should not sanction a result that indefinitely strips stakeholders of rights in a conservatorship (particularly if the company is a going and profitable concern), and then magically creates rights if the company later is put into receivership.

## IV. The District Court's Decision Will Seriously Unsettle Expectations for Investors in Financial Institutions and Housing-Related Securities and Produce Significant Economic Dislocations

Given that the FDIC insures or regulates approximately 6,500 banks and thrift institutions in the U.S. and has overseen thousands of bank receiverships and conservatorships since 1933, the potential impact of the district court's decision is enormous. The FDIC should not be able to operate a bank under a putative conservatorship with no intent to return it to solvency, and continually transfer away (perhaps into the coffers of the Deposit Insurance Fund or another governmental entity) all profits and capital of the institution, thereby denying investors the return of their ownership and governance rights. Even the potential use of that extraordinary authority would undercut certainty and confidence that supports the sound and efficient operation of financial markets.

Indeed, the district court's decision creates perverse incentives for the FDIC. Since the law requires the FDIC to seek the least-cost resolution for troubled banks (12 U.S.C. § 1823(c)(4)), establishing such a "conservatorship" that would enable the FDIC to drain the bank indefinitely of all capital and earnings would ***always*** represent the least-cost solution for the FDIC. That could mean that it would opt against the kind of bank resolutions it has always previously pursued—bids from potential acquirers who can infuse new capital and provide new management—because those bids would require financial assistance from the FDIC.

At a minimum, if conduct alleged in this case is left unexamined, governmental authorities gain leverage that they have not been delegated by Congress and would not have in any administrative or regulatory capacity. How the GSEs are resolved (or not resolved) has material consequence for community banks, mortgage investors, and stakeholders in regulated financial industries. The GSE guarantee business model may be unique, but the GSEs themselves rely on state corporations law to raise private capital. The 2008 financial crisis may have been extraordinary, but the governmental impulse to "protect the taxpayer" or to use resolution authority to effect public policy goals surely can arise in a myriad of scenarios. Therefore, this case's significance vastly exceeds its specific facts, particularly given the breadth of financial institutions now regulated by governmental entities that rely on similar statutory language.

Private investors financed the GSEs pre-conservatorship. In 2007 and 2008 alone, community banks, insurance companies, retail investors and institutional investors supported the U.S. mortgage finance system by injecting approximately $22 billion of new capital into both companies. Indeed, Fannie Mae issued new shares of Series T preferred stock as late as May 2008, which paid just one quarterly dividend before the company was placed in conservatorship three months

later—hardly an example of "public loss/private gain."[13] Private capital for heavily regulated companies like banks, insurance companies, and SIFIs will become more costly and potentially unavailable if allegations of statutory overreach wholly escape judicial review. This inevitable effect extends not only to the regulated entity, but also to companies that seek to compete with favored entities.

If the government can deliberately leech the earnings of a private corporation through a never-ending conservatorship, it allows an unelected regulator to advance its own public policy with diminished political oversight, free from cost constraints. There is ample authority in the law for regulated banks and other companies to be placed in receivership by the government. But there is no statutory middle ground that permits the government to use conservatorship to

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13 *See* Tara Rice & Jonathan Rose, *When Good Investments Go Bad: The Contraction in Community Bank Lending After the 2008 GSE Takeover*, Board of Governors of the Federal Reserve System International Finance Discussion Papers, (Mar. 2012), http://www.federalreserve.gov/pubs/ifdp/2012/1045/ifdp1045.pdf. Congress encouraged insured depository institutions, including community banks, to purchase GSE securities. *See, e.g.*, 12 U.S.C. §§ 24(7), 1464(c) (2012).

Based on reasonable investment-backed expectations that a conservator would preserve assets and respect priority of capital structure, in accordance with FDIA precedent, many community banks held on to these securities through August 2012. So did many of AMI's investors. Markets take note of facts and law. Factually, the GSEs were not placed in receivership in 2008 and they returned to profitability by 2012. Legally, whether the GSEs would have been insolvent but for earlier government support is speculative, and could not have informed investor rights or expectations in 2012.

mimic a receivership and effectively nationalize a live company. Receivership (whether related to banks, GSEs, or SIFIs in other parts of the financial markets) is a nuclear option, with dramatic consequences for the resolved entity, counterparties, and, sometimes, entire markets. While officials understandably may seek to avoid receivership, Congress did not create a "receivership-lite" option.

Even more troubling is that the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") significantly expanded the group of companies for which the FDIC may act as receiver. The potentially implicated companies are no longer confined to insured depository institutions.[14] Therefore, the district court's misapplication of the law may well alter the relationship between private sector investors and debt holders for a much wider range of U.S. companies than just banks, and this potential will dampen the availability of capital and broadly increase the cost of capital.

Nor are the effects of this decision limited to equity holders. If investors and counterparties, including residential mortgage-backed securities investors, never

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[14] The impact of the district court's aggressive interpretation of the anti-injunction provision, in light of new laws, is much broader than it may seem. Indeed, Title II of the Dodd-Frank Act allows for the FDIC's appointment as the receiver for certain bank *and non-bank* institutions whose failure would seriously affect U.S. financial stability. Therefore, a whole new group of financial firms could, upon failure, be resolved by the FDIC under its Title II rules, rather than the bankruptcy courts. Title II applies an anti-injunction provision to the FDIC in its exercise of receivership powers or functions. 12 U.S.C. § 5390(e) (2012).

really know at the time of investment what the rules of engagement will be, or if they believe that their rights may be subject to a never-ending limbo in the event of the company's distress, that uncertainty will adversely impact their appetite for, and therefore the pricing of, such investments.[15] Investors in regulated industries, retain an expectation in the protection of their financial rights, and they are entitled to rely on the understanding that a conservator will act to conserve and preserve the value of the company and of their investment, honoring pre-existing capital and investment conventions and priorities.

If investors seek alternative investment vehicles, withholding capital and other forms of liquidity funding from banks, or demand higher returns for that capital, those higher costs of capital will be passed on to the American banking and home-buying public. If allowed to stand, the decision will make capital more expensive—perhaps prohibitively so in times of stress—and raises the probability of dislocation of the national financial system.

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[15] Mortgage origination costs have risen since 2013 as the industry attempts to comply with new complex regulations from the Consumer Financial Protection Bureau as well as from the GSEs. These higher costs are passed on to consumers in the form of higher rates and fees for home loans and impaired access to credit for less creditworthy consumers. Lenders are reluctant to make loans that may default, or have higher compliance and servicing costs, as the costs and uncertain outcomes and actions from regulators create a risk that most lenders are unable to manage. Residential mortgage-backed securities investors similarly rely on an FDIC course of conduct that has developed over time to protect the value of their investments.

## CONCLUSION

The only reading that leads to a logical and consistent construction of the statute—the reading that will preserve the shareholders and stakeholder's rights and claims and will preserve due process rights—is to interpret the phrase "as a conservator" to refer to the exercise of those duties and authorities that fall within the traditional functions of a conservator. The only reading that preserves capital structure and state corporations law is one that limits a conservator's power to actions (i) returning the institution to a sound and solvent condition, and (ii) preserving and conserving the institution's assets for the ultimate benefit of its shareholders and creditors.

The combination of an unconstrained exercise of authority with effective immunity from judicial challenge threatens to unleash a new species of government intervention. It presents a clear danger to the stability of financial markets and the availability and price of capital for banks and other important financial institutions.

For the foregoing reasons, *amici* urge this Court to reverse the judgment of the district court.

Respectfully submitted,

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# ADDENDUM

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## ADDENDUM OF PERTINENT AUTHORITIES

Except for the following, all applicable statutes, etc., are contained in the Brief for Initial Opening Brief for Institutional Plaintiffs, PERRY CAPITAL LLC.

**12 U.S.C. § 24(7)**

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

. . .

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock; Provided, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker, held by the association for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on August 23, 1935. . . . The limitations and restrictions herein contained as to dealing in, underwriting and purchasing for its own account, investment securities shall not apply to . . . obligations, participations, or other instruments of or issued by the Federal National Mortgage Association, or . . . or mortgages, obligations or other securities which are or ever have been sold by the Federal Home Loan Mortgage Corporation pursuant to section 305 or section 306 of the Federal Home Loan Mortgage Corporation Act . . . .

**12 U.S.C. § 227**

The short title of the Act of June 16, 1933, ch. 89, 48 Stat. 162, shall be the "Banking Act of 1933."

**12 U.S.C. § 1464(c)**

(c) **Loans and investments**

To the extent specified in regulations of the Comptroller, a Federal savings association may invest in, sell, or otherwise deal in the following loans and other investments:

(1) **Loans or investments without percentage of assets limitation**

Without limitation as a percentage of assets, the following are permitted:

(A) **Account loans**

Loans on the security of its savings accounts and loans specifically related to transaction accounts.

(B) **Residential real property loans**

Loans on the security of liens upon residential real property.

(C) **United States Government securities**

Investments in obligations of, or fully guaranteed as to principal and interest by, the United States.

(D) **Federal home loan bank and Federal National Mortgage Association securities**

Investments in the stock or bonds of a Federal home loan bank or in the stock of the Federal National Mortgage Association.

(E) **Federal Home Loan Mortgage Corporation instruments**

Investments in mortgages, obligations, or other securities which are or have been sold by the Federal Home Loan Mortgage Corporation pursuant to section 305 or 306 of the Federal Home Loan Mortgage Corporation Act [12 U.S.C. 1454 or 1455].

(F) **Other Government securities**

Investments in obligations, participations, securities, or other instruments issued by, or fully guaranteed as to principal and interest by, the Federal National Mortgage Association, the Student Loan Marketing Association, the Government National Mortgage Association, or any agency of the United States. A savings association may issue and sell securities which are guaranteed pursuant to section 306(g) of the National Housing Act [12 U.S.C. 1721 (g)].

(G) **Deposits**

Investments in accounts of any insured depository institution, as defined in section 3 of the Federal Deposit Insurance Act [12 U.S.C. 1813].

(H) **State securities**

Investments in obligations issued by any State or political subdivision thereof (including any agency, corporation, or instrumentality of a State or political subdivision). A Federal savings association may not invest more than 10 percent of its capital in obligations of any one issuer, exclusive of investments in general obligations of any issuer.

(I) **Purchase of insured loans**

Purchase of loans secured by liens on improved real estate which are insured or guaranteed under the National Housing Act [12 U.S.C. 1701 et seq.], the Servicemen's Readjustment Act of 1944, or chapter 37 of title 38.

(J) **Home improvement and manufactured home loans**

Loans made to repair, equip, alter, or improve any residential real property, and loans made for manufactured home financing.

(K) **Insured loans to finance the purchase of fee simple**

Loans insured under section 240 of the National Housing Act [12 U.S.C. 1715z–5].

(L) **Loans to financial institutions, brokers, and dealers**

Loans to—

(i) financial institutions with respect to which the United States or an agency or instrumentality thereof has any function of examination or supervision, or

(ii) any broker or dealer registered with the Securities and Exchange Commission,

which are secured by loans, obligations, or investments in which the Federal savings association has the statutory authority to invest directly.

(M) **Liquidity investments**

Investments (other than equity investments), identified by the Comptroller, for liquidity purposes, including cash, funds on deposit at a Federal reserve bank or a Federal home loan bank, or bankers' acceptances.

(N) **Investment in the national housing partnership corporation, partnerships, and joint ventures**

Investments in shares of stock issued by a corporation authorized to be created pursuant to title IX of the Housing and Urban Development Act of 1968 [42 U.S.C. 3931 et seq.], and investments in any partnership, limited partnership, or joint venture formed pursuant to section 907(a) or 907(c) of such Act [42 U.S.C. 3937 (a) or (c)].

(O) **Certain HUD insured or guaranteed investments**

Loans that are secured by mortgages—

> (i) insured under title X of the National Housing Act [12 U.S.C. 1749aa et seq.], or
>
> (ii) guaranteed under title IV of the Housing and Urban Development Act of 1968, under part B of the National Urban Policy and New Community Development Act of 1970 [42 U.S.C. 4511 et seq.], or under section 802 of the Housing and Community Development Act of 1974 [42 U.S.C. 1440].

(P) **State housing corporation investments**

Obligations of and loans to any State housing corporation, if—

(i) such obligations or loans are secured directly, or indirectly through an agent or fiduciary, by a first lien on improved real estate which is insured under the provisions of the National Housing Act [12 U.S.C. 1701 et seq.], and

(ii) in the event of default, the holder of the obligations or loans has the right directly, or indirectly through an agent or fiduciary, to cause to be subject to the satisfaction of such obligations or loans the real estate described in the first lien or the insurance proceeds under the National Housing Act.

(Q) **Investment companies**

A Federal savings association may invest in, redeem, or hold shares or certificates issued by any open-end management investment company which—

(i) is registered with the Securities and Exchange Commission under the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], and

(ii) the portfolio of which is restricted by such management company's investment policy (changeable only if authorized by shareholder vote) solely to investments that a Federal savings association by law or regulation may, without limitation as to percentage of assets, invest in, sell, redeem, hold, or otherwise deal in.

(R) **Mortgage-backed securities**

Investments in securities that—

(i) are offered and sold pursuant to section 4(5) of the Securities Act of 1933; [1] or

(ii) are mortgage related securities (as defined in section 3(a)(41) of the Securities Exchange Act of 1934) [15 U.S.C. 78c (a)(41)],

subject to such regulations as the Comptroller may prescribe, including regulations prescribing minimum size of the issue (at the time of initial distribution) or minimum aggregate sales price, or both.

(S) **Small business related securities**

Investments in small business related securities (as defined in section 78c (a)(53) of title 15), subject to such regulations as the Comptroller may prescribe, including regulations concerning the minimum size of the issue (at the time of the initial distribution), the minimum aggregate sales price, or both.

(T) **Credit card loans**

Loans made through credit cards or credit card accounts.

(U) **Educational loans**

Loans made for the payment of educational expenses.

(2) **Loans or investments limited to a percentage of assets or capital**

The following loans or investments are permitted, but only to the extent specified:

(A) **Commercial and other loans**

Secured or unsecured loans for commercial, corporate, business, or agricultural purposes. The aggregate amount of loans made under this subparagraph may not exceed 20 percent of the total assets of the Federal savings association, and amounts in excess of 10 percent of such total assets may be used under this subparagraph only for small business loans, as that term is defined by the Comptroller.

(B) **Nonresidential real property loans**

(i) In general Loans on the security of liens upon nonresidential real property. Except as provided in clause (ii), the aggregate amount of such loans shall not exceed 400 percent of the Federal savings association's capital, as determined under subsection (t) of this section.

(ii) Exception The Comptroller may permit a savings association to exceed the limitation set forth in clause (i) if the Comptroller determines that the increased authority—

(I) poses no significant risk to the safe and sound operation of the association, and

(II) is consistent with prudent operating practices.

(iii) Monitoring If the Comptroller permits any increased authority pursuant to clause (ii), the Comptroller shall closely monitor the Federal savings association's condition and lending activities to ensure that the savings association carries out all authority under this paragraph in a safe and sound manner and complies with this subparagraph and all relevant laws and regulations.

(C) **Investments in personal property**

Investments in tangible personal property, including vehicles, manufactured homes, machinery, equipment, or furniture, for rental or sale. Investments under this subparagraph may not exceed 10 percent of the assets of the Federal savings association.

(D) **Consumer loans and certain securities**

A Federal savings association may make loans for personal, family, or household purposes, including loans reasonably incident to providing such credit, and may invest in, sell, or hold commercial paper and corporate debt securities, as defined and approved by the Comptroller. Loans and other investments under this subparagraph may not exceed 35 percent of the assets of the Federal savings association, except that amounts in excess of 30 percent of the assets may be invested only in loans which are made by the association directly to the original obligor and with respect to which the association does not pay any finder, referral, or other fee, directly or indirectly, to any third party.

(3) **Loans or investments limited to 5 percent of assets**

The following loans or investments are permitted, but not to exceed 5 percent of assets of a Federal savings association for each subparagraph:

(A) **Community development investments**

Investments in real property and obligations secured by liens on real property located within a geographic area or neighborhood receiving concentrated development assistance by a local government under title I of the Housing and Community Development Act of 1974 [42 U.S.C. 5301 et seq.]. No investment under this subparagraph in such real property may exceed an aggregate of 2 percent of the assets of the Federal savings association.

(B) **Nonconforming loans**

Loans upon the security of or respecting real property or interests therein used for primarily residential or farm purposes that do not comply with the limitations of this subsection.

(C) **Construction loans without security**

Loans—

(i) the principal purpose of which is to provide financing with respect to what is or is expected to become primarily residential real estate; and

(ii) with respect to which the association—

(I) relies substantially on the borrower's general credit standing and projected future income for repayment, without other security; or

(II) relies on other assurances for repayment, including a guarantee or similar obligation of a third party.

The aggregate amount of such investments shall not exceed the greater of the Federal savings association's capital or 5 percent of its assets.

(4) **Other loans and investments**

The following additional loans and other investments to the extent authorized below:

(A) **Business development credit corporations**

A Federal savings association that is in compliance with the capital standards prescribed under subsection (t) of this section may invest in, lend to, or to [2] commit itself to lend to, any business development credit corporation incorporated in the State in which the home office of the association is located in the same manner and to the same extent as savings associations chartered by such State are authorized. The aggregate amount of such investments, loans, and commitments of any such Federal savings association shall not exceed one-half of 1 percent of the association's total outstanding loans or $250,000, whichever is less.

(B) **Service corporations**

Investments in the capital stock, obligations, or other securities of any corporation organized under the laws of the State in which the Federal savings association's home office is located, if such corporation's entire capital stock is available for purchase only by savings associations of such State and by Federal associations having their home offices in such State. No Federal savings association may make any investment under this subparagraph if the association's aggregate outstanding investment under this subparagraph would exceed 3 percent of the association's assets. Not less than one-half of the investment permitted under this subparagraph which exceeds 1 percent of the association's assets shall be used primarily for community, inner-city, and community development purposes.

(C) **Foreign assistance investments**

Investments in housing project loans having the benefit of any guaranty under section 221 of the Foreign Assistance Act of 1961 [22 U.S.C. 2181] or loans having the benefit of any guarantee under section 224 of such Act [22 U.S.C. 2184], [1] or any commitment or agreement with respect to such loans made pursuant to either of such sections and in the share capital and capital reserve of the Inter-American Savings and Loan Bank. This authority extends to the acquisition, holding, and disposition of loans guaranteed under section 221 or 222 of such Act [22 U.S.C. 2181 or 2182]. Investments under this subparagraph shall not exceed 1 percent of the Federal savings association's assets.

(D) **Small business investment companies**

A Federal savings association may invest in stock, obligations, or other securities of any small business investment company formed pursuant to section 301(d) of the Small Business Investment Act of 1958 [15 U.S.C. 681 (d)] [1] for the purpose of aiding members of a Federal home loan bank. A Federal savings association may not make any investment under this subparagraph if its aggregate outstanding investment under this subparagraph would exceed 1 percent of the assets of such savings association.

(E) **Bankers' banks**

A Federal savings association may purchase for its own account shares of stock of a bankers' bank, described in Paragraph Seventh of section 24 of this title or in section 27 (b) of this title, on the same terms and conditions as a national bank may purchase such shares.

(F) **New Markets Venture Capital companies**

A Federal savings association may invest in stock, obligations, or other securities of any New Markets Venture Capital company as defined in section 689 of title 15, except that a Federal savings association may not make any investment under this subparagraph if its aggregate outstanding investment under this subparagraph would exceed 5 percent of the capital and surplus of such savings association.

(5) **Transition rule for savings associations acquiring banks**

(A) **In general**

If, under section 5(d)(3) of the Federal Deposit Insurance Act [12 U.S.C. 1815 (d)(3)], [1] a savings association acquires all or substantially all of the assets of a bank, the appropriate Federal banking agency may permit the savings association to retain any such asset during the 2-year period beginning on the date of the acquisition.

(B) **Extension**

The appropriate Federal banking agency may extend the 2-year period described in subparagraph (A) for not more than 1 year at a time and

not more than 2 years in the aggregate, if the appropriate Federal banking agency determines that the extension is consistent with the purposes of this chapter.

(6) **Definitions**

For purposes of this subsection, the following definitions shall apply:

(A) **Residential property**

The terms "residential real property" or "residential real estate" mean leaseholds, homes (including condominiums and cooperatives, except that in connection with loans on individual cooperative units, such loans shall be adequately secured as defined by the Comptroller) and, combinations of homes or dwelling units and business property, involving only minor or incidental business use, or property to be improved by construction of such structures.

(B) **Loans**

The term "loans" includes obligations and extensions or advances of credit; and any reference to a loan or investment includes an interest in such a loan or investment.

**12 U.S.C. § 1464(d)(6)(C)**

**(d) Regulatory authority**

(6) **Compliance with monetary transaction recordkeeping and report requirements**

. . .

(C) **Order to comply with requirements**

If the appropriate Federal banking agency determines that a savings association—

(i) has failed to establish and maintain the procedures described in subparagraph (A); or

(ii) has failed to correct any problem with the procedures maintained by such association which was previously reported to the association by the appropriate Federal banking agency,

the appropriate Federal banking agency shall issue an order under section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818] requiring such association to cease and desist from its violation of this paragraph or regulations prescribed under this paragraph.

**12 U.S.C. § 1821(d)**

(d) **Powers and duties of Corporation as conservator or receiver**

**. . .**

(2) **General powers**

**. . .**

(D) **Powers as conservator**

The Corporation may, as conservator, take such action as may be—

(i) necessary to put the insured depository institution in a sound and solvent condition; and

(ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution.

. . .

(7) **Review of claims**

(A) **Administrative hearing**

If any claimant requests review under this subparagraph in lieu of filing or continuing any action under paragraph (6) and the Corporation agrees to such request, the Corporation shall consider the claim after opportunity for a hearing on the record. The final determination of the Corporation with respect to such claim shall be subject to judicial review under chapter 7 of title 5.

(B) **Other review procedures**

(i) In general The Corporation shall also establish such alternative dispute resolution processes as may be appropriate for the resolution of claims filed under paragraph (5)(A)(i).

(ii) Criteria In establishing alternative dispute resolution processes, the Corporation shall strive for procedures which are expeditious, fair, independent, and low cost.

(iii) Voluntary binding or nonbinding procedures The Corporation may establish both binding and nonbinding processes, which may be conducted by any government or private party, but all parties, including the claimant and the Corporation, must agree to the use of the process in a particular case.

(iv) Consideration of incentives The Corporation shall seek to develop incentives for claimants to participate in the alternative dispute resolution process.

. . .

(11) **Depositor preference**

(A) **In general**

Subject to section 1815 (e)(2)(C) of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

(i) Administrative expenses of the receiver.

(ii) Any deposit liability of the institution.

(iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).

(iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).

(v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

(B) **Effect on State law**

(i) In general The provisions of subparagraph (A) shall not supersede the law of any State except to the extent such law is inconsistent with the provisions of such subparagraph, and then only to the extent of the inconsistency.

(ii) Procedure for determination of inconsistency Upon the Corporation's own motion or upon the request of any person with a claim described in subparagraph (A) or any State which is submitted to the Corporation in accordance with procedures which the Corporation shall prescribe, the Corporation shall determine whether any provision of the law of any State is inconsistent with any provision of subparagraph (A) and the extent of any such inconsistency.

(iii) Judicial review The final determination of the Corporation under clause (ii) shall be subject to judicial review under chapter 7 of title 5.

(C) **Accounting report**

Any distribution by the Corporation in connection with any claim described in subparagraph (A)(v) shall be accompanied by the accounting report required under paragraph (15)(B).

**12 U.S.C. § 1821(j)**

(j) **Limitation on court action**

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

**12 U.S.C. § 1823(c)(4)**

(c) **Assistance to insured depository institutions**

(4) **Least-cost resolution required.—**

(A) **In general.—** Notwithstanding any other provision of this chapter, the Corporation may not exercise any authority under this subsection or

subsection (d), (f), (h), (i), or (k) of this section with respect to any insured depository institution unless—

(i) the Corporation determines that the exercise of such authority is necessary to meet the obligation of the Corporation to provide insurance coverage for the insured deposits in such institution; and

(ii) the total amount of the expenditures by the Corporation and obligations incurred by the Corporation (including any immediate and long-term obligation of the Corporation and any direct or contingent liability for future payment by the Corporation) in connection with the exercise of any such authority with respect to such institution is the least costly to the Deposit Insurance Fund of all possible methods for meeting the Corporation's obligation under this section.

(B) **Determining least costly approach.**— In determining how to satisfy the Corporation's obligations to an institution's insured depositors at the least possible cost to the Deposit Insurance Fund, the Corporation shall comply with the following provisions:

(i) **Present-value analysis; documentation required.**— The Corporation shall—

(I) evaluate alternatives on a present-value basis, using a realistic discount rate;

(II) document that evaluation and the assumptions on which the evaluation is based, including any assumptions with regard to interest rates, asset recovery rates, asset holding costs, and payment of contingent liabilities; and

(III) retain the documentation for not less than 5 years.

(ii) **Foregone tax revenues.**— Federal tax revenues that the Government would forego as the result of a proposed transaction, to the extent reasonably ascertainable, shall be treated as if they were revenues foregone by the Deposit Insurance Fund.

(C) **Time of determination.**—

(i) **General rule.**— For purposes of this subsection, the determination of the costs of providing any assistance under paragraph (1) or (2) or any other provision of this section with respect to any depository institution shall be

made as of the date on which the Corporation makes the determination to provide such assistance to the institution under this section.

(ii) **Rule for liquidations.—** For purposes of this subsection, the determination of the costs of liquidation of any depository institution shall be made as of the earliest of—

(I) the date on which a conservator is appointed for such institution;

(II) the date on which a receiver is appointed for such institution; or

(III) the date on which the Corporation makes any determination to provide any assistance under this section with respect to such institution.

(D) **Liquidation costs.—** In determining the cost of liquidating any depository institution for the purpose of comparing the costs under subparagraph (A) (with respect to such institution), the amount of such cost may not exceed the amount which is equal to the sum of the insured deposits of such institution as of the earliest of the dates described in subparagraph (C), minus the present value of the total net amount the Corporation reasonably expects to receive from the disposition of the assets of such institution in connection with such liquidation.

(E) **Deposit insurance fund available for intended purpose only.—**

(i) **In general.—** After December 31, 1994, or at such earlier time as the Corporation determines to be appropriate, the Corporation may not take any action, directly or indirectly, with respect to any insured depository institution that would have the effect of increasing losses to the Deposit Insurance Fund by protecting—

(I) depositors for more than the insured portion of deposits (determined without regard to whether such institution is liquidated); or

(II) creditors other than depositors.

(ii) **Deadline for regulations.—** The Corporation shall prescribe regulations to implement clause (i) not later than January 1, 1994, and the regulations shall take effect not later than January 1, 1995.

(iii) **Purchase and assumption transactions.—** No provision of this subparagraph shall be construed as prohibiting the Corporation from allowing any person who acquires any assets or assumes any liabilities of

any insured depository institution for which the Corporation has been appointed conservator or receiver to acquire uninsured deposit liabilities of such institution so long as the insurance fund does not incur any loss with respect to such deposit liabilities in an amount greater than the loss which would have been incurred with respect to such liabilities if the institution had been liquidated.

(F) **Discretionary determinations.—** Any determination which the Corporation may make under this paragraph shall be made in the sole discretion of the Corporation.

(G) **Systemic risk.—**

(i) **Emergency determination by secretary of the treasury.—** Notwithstanding subparagraphs (A) and (E), if, upon the written recommendation of the Board of Directors (upon a vote of not less than two-thirds of the members of the Board of Directors) and the Board of Governors of the Federal Reserve System (upon a vote of not less than two-thirds of the members of such Board), the Secretary of the Treasury (in consultation with the President) determines that—

(I) the Corporation's compliance with subparagraphs (A) and (E) with respect to an insured depository institution for which the Corporation has been appointed receiver would have serious adverse effects on economic conditions or financial stability; and

(II) any action or assistance under this subparagraph would avoid or mitigate such adverse effects,

the Corporation may take other action or provide assistance under this section for the purpose of winding up the insured depository institution for which the Corporation has been appointed receiver as necessary to avoid or mitigate such effects.

(ii) **Repayment of loss.—**

(I) **In general.—** The Corporation shall recover the loss to the Deposit Insurance Fund arising from any action taken or assistance provided with respect to an insured depository institution under clause (i) from 1 or more special assessments on insured depository institutions, depository institution holding companies (with the concurrence of the Secretary of the Treasury

with respect to holding companies), or both, as the Corporation determines to be appropriate.

(II) **Treatment of depository institution holding companies.**— For purposes of this clause, sections 1817 (c)(2) and 1828 (h) of this title shall apply to depository institution holding companies as if they were insured depository institutions.

(III) **Regulations.**— The Corporation shall prescribe such regulations as it deems necessary to implement this clause. In prescribing such regulations, defining terms, and setting the appropriate assessment rate or rates, the Corporation shall establish rates sufficient to cover the losses incurred as a result of the actions of the Corporation under clause (i) and shall consider: the types of entities that benefit from any action taken or assistance provided under this subparagraph; economic conditions, the effects on the industry, and such other factors as the Corporation deems appropriate and relevant to the action taken or the assistance provided. Any funds so collected that exceed actual losses shall be placed in the Deposit Insurance Fund.

(iii) **Documentation required.**— The Secretary of the Treasury shall—

(I) document any determination under clause (i); and

(II) retain the documentation for review under clause (iv).

(iv) **GAO review.**— The Comptroller General of the United States shall review and report to the Congress on any determination under clause (i), including—

(I) the basis for the determination;

(II) the purpose for which any action was taken pursuant to such clause; and

(III) the likely effect of the determination and such action on the incentives and conduct of insured depository institutions and uninsured depositors.

(v) **Notice.**—

(I) **In general.**— Not later than 3 days after making a determination under clause (i), the Secretary of the Treasury shall provide written notice of any determination under clause (i) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives.

(II) **Description of basis of determination.—** The notice under subclause (I) shall include a description of the basis for any determination under clause (i).

(H) **Rule of construction.—** No provision of law shall be construed as permitting the Corporation to take any action prohibited by paragraph (4) unless such provision expressly provides, by direct reference to this paragraph, that this paragraph shall not apply with respect to such action.

**12 U.S.C. § 5390**

Powers and duties of the Corporation

(e) **Limitation on court action**

Except as provided in this subchapter, no court may take any action to restrain or affect the exercise of powers or functions of the receiver hereunder, and any remedy against the Corporation or receiver shall be limited to money damages determined in accordance with this subchapter.

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rule 32, I hereby certify that the foregoing Brief of *Amici Curiae* the Independent Community Bankers of America, the Association of Mortgage Investors, Mr. William M. Isaac, and Mr. Robert H. Hartheimer in Support of Appellants contains 6,995 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court. The brief complies with the typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure as it was prepared using the Microsoft Word 2007 in 14-point Times New Roman font.

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Date: July 6, 2015

## CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25, I hereby certify that on this 6th day of July, 2015, I served a copy of the foregoing Brief of the Independent Community Bankers of America, the Association of Mortgage Investors, Mr. William M. Isaac, and Mr. Robert H. Hartheimer in Support of Appellants electronically through the Court's CM/ECF system upon all counsel of record registered in CM/ECF.

Additionally, eight (8) paper copies will be sent to the Court within the time required by this Court's rules.

/s/ Robert J. Rhatigan

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Date: July 6, 2015