No. 14-5243 (Consolidated with 14-5254, 14-5260, 14-5262)

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PERRY CAPITAL, LLC, *et al.*,
Plaintiffs-Appellants,

v.

JACOB J. LEW, in his official capacity as the Secretary of the Department of the Treasury, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLEES FEDERAL HOUSING FINANCE AGENCY, MELVIN L. WATT, FANNIE MAE, AND FREDDIE MAC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28, Appellees the Federal Housing Finance Agency ("FHFA"); Melvin L. Watt, in his official capacity as the Director of FHFA, as Conservator for the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac," together with Fannie Mae, the "Enterprises"); Fannie Mae; and Freddie Mac, state as follows:

1. Parties and *Amici*

Plaintiffs-Appellants ("Plaintiffs") in these consolidated cases are:

- Perry Capital, LLC, for and on behalf of investment funds for which it acts as investment manager (14-5243);
- Fairholme Funds, Inc., on behalf of its series, the Fairholme Fund (14-5254);
- Fairholme Fund, a series of Fairholme Funds, Inc. (14-5254);
- Berkley Insurance Company (14-5254);
- Acadia Insurance Company (14-5254);
- Admiral Indemnity Company (14-5254);
- Admiral Insurance Company (14-5254);
- Berkley Regional Insurance Company (14-5254);
- Carolina Casualty Insurance Company (14- 5254);
- Midwest Employers Casualty Insurance Company (14-5254);

- Nautilus Insurance Company (14-5254);
- Preferred Employers Insurance Company (14-5254);
- Arrowood Indemnity Company (14-5260);
- Arrowood Surplus Lines Insurance Company (14-5260);
- Financial Structures Limited (14-5260);
- Melvin Bareiss (14-5262);
- Joseph Cacciapelle (14-5262);
- John Cane (14-5262);
- Francis J. Dennis, derivatively on behalf of the Federal National Mortgage Association (14-5262);
- Michelle M. Miller (14-5262);
- Marneu Holdings Co., derivatively on behalf of the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation (14-5262);
- United Equities Commodities, Co. (14-5262);
- 111 John Realty Corp., derivatively on behalf of the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation (14-5262).

Listed as Plaintiffs-Appellees on the Court's docket for No. 14-5262 are Mary Meiya Liao; American European Insurance Company; Barry P. Borodkin; and Barry P. Borodkin Sep Ira. It appears that these parties should be designated as Plaintiffs-Appellants, since they are part of the Consolidated Class Action and Derivative Plaintiffs that filed both the Consolidated Amended Complaint and the Notice of Appeal in the district court under Case No. 1:13-mc-1288.

Defendants-Appellees ("Defendants") in these consolidated cases are:

- Jacob J. Lew, in his official capacity as the Secretary of the Department of the Treasury (14-5243, 14-5260, 14-5262);
- Melvin L. Watt, in his official capacity as the Director of the Federal Housing Finance Agency (14-5243, 14-5254, 14-5260);
- United States Department of the Treasury (14-5243, 14-5254, 14-5260, 14-5262);
- Federal Housing Finance Agency (14-5243, 14-5254, 14-5260, 14-5262);
- Federal National Mortgage Association (14-5260, 14-5262);
- Federal Home Loan Mortgage Corporation (14-5260, 14-5262).

No *amici* appeared in the district court.

The following parties have appeared before this Court as *amici*:

- 60 Plus Association, Inc. (14-5243, 14-5254, 14-5260, 14-5262);
- Center For Individual Freedom (14-5243, 14-5254, 14-5260, 14-5262);
- Timothy Howard (14-5243, 14-5254, 14-5260, 14-5262);
- Independent Community Bankers of America, the Association of Mortgage Investors, William H. Isaac, and Robert H. Hartheimer (14-5243, 14-5254, 14-5260, 14-5262);
- Investors Unite (14-5243, 14-5254, 14-5260, 14-5262);

- Jonathan R. Macey (14-5243);
- National Black Chamber of Commerce (14-5243, 14-5254, 14-5260, 14-5262);
- Louise Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, L.P. (14-5243, 14-5254, 14-5260, 14-5262).

As an individual and an independent federal agency, Mr. Watt and FHFA are not required to file corporate disclosure statements under Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1.

Fannie Mae is a government-sponsored enterprise chartered by Congress to "establish secondary market facilities for residential mortgages," to "provide stability in the secondary market for residential mortgages," and to "promote access to mortgage credit throughout the Nation." 12 U.S.C. § 1716(1), (4). Fannie Mae has no parent corporation, and it is a publicly traded company. According to SEC filings, no publicly held corporation owns more than 10% of Fannie Mae's common stock.

Freddie Mac is a government-sponsored enterprise chartered by Congress "to promote access to mortgage credit throughout the Nation." 12 U.S.C. § 1451 note. Freddie Mac has no parent corporation. It is a publicly traded company and, according to public securities filings, no publicly held corporation owns 10% or more of Freddie Mac's common stock.

2. Rulings Under Review

Plaintiffs-Appellants seek review of (1) the Memorandum Opinion and Order entered on September 30, 2014, by the Honorable District Court Judge Royce Lamberth granting Defendants-Appellees' motion to dismiss (available at *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014)); and (2) the Order Denying Plaintiffs-Appellants' Motion for Supplementation of the Administrative Record, Limited Discovery, Suspension of Briefing on the Defendants' Dispositive Motions, and a Status Conference, also entered on September 30, 2014.

3. Related Cases

This case has not previously been before this or any other Court besides the district court.

Appellees know of no "related cases," as that term is defined by this D.C. Circuit Rule 28(a)(1)(C), pending in other federal appellate courts or any other court in the District of Columbia.

There are multiple cases involving similar issues and parties pending in the United States Court of Federal Claims: *Washington Fed. v. United States*, No. 13-385C (Fed. Cl. filed Jun. 10, 2013); *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl. filed Jul. 9, 2013); *Cacciapalle v. United States*, No. 13-466C (Fed. Cl. filed Jul. 10, 2013); *American European Ins. Co. v. United States*, No. 13-496C (Fed. Cl. filed Jul. 19, 2013); *Arrowood Indemnity Co. v. United States*,

No. 13-698C (Fed. Cl. filed Sept. 18, 2013); *Dennis v. United States*, No. 13-542C (Fed. Cl. filed Aug. 5, 2013); *Fisher v. United States*, No. 13-608C (Fed. Cl. filed Aug. 26, 2013); *Reid v. United States*, No. 14-152C (Fed. Cl. filed Feb. 26, 2014); and *Rafter v. United States*, No. 14-740C (Fed. Cl. filed Aug. 14, 2014). *Cacciapall*e, *American European Insurance*, and *Dennis* have been consolidated, and *Cacciapalle* has been designated as a putative class action.

Additionally, cases raising similar issues are pending in the United States District Courts for the Northern District of Iowa (*Saxton v. FHFA*, No. 1:15-cv-00047 (N.D. Iowa filed May 28, 2015)), the District of Delaware (*Jacobs v. Fed. Nat'l Mortg. Ass'n*, No. 15-cv-00708 (D. Del. filed Aug. 17, 2015)), and the Eastern District of Kentucky (*Robinson v. FHFA*, No. 7:15-cv-00109 (E.D. Ky. filed Oct. 23, 2015)).

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GLOSSARY

Cl. Br.	Brief of Class Plaintiffs
Dkt	District Court Docket
Fannie Mae	Federal National Mortgage Association
FDIC	Federal Deposit Insurance Corporation
FIRREA	Financial Institutions Reform, Recovery, and Enforcement Act of 1989
Freddie Mac	Federal Home Loan Mortgage Corporation
First Amendment	First amendment to the Preferred Stock Purchase Agreements
FHFA	Federal Housing Finance Agency
FHFA####	FHFA Document Compilation
Enterprises	Fannie Mae and Freddie Mac
GSEs	Government Sponsored Enterprises–*i.e.*, Fannie Mae and Freddie Mac
HERA	Housing and Economic Recovery Act of 2008
Inst. Br.	Brief of Institutional Plaintiffs
JA	Joint Appendix
PCF	Periodic Commitment Fee
Purchase Agreements	Preferred Stock Purchase Agreements between FHFA and the Department of Treasury
Second Amendment	Second amendment to the Preferred Stock Purchase Agreements

Third Amendment	Third amendment to the Preferred Stock Purchase Agreements
TR####	Treasury's Administrative Record
Treasury	United States Department of the Treasury

INTRODUCTION

Congress has spoken clearly to the issues at the heart of this case: so long as Fannie Mae and Freddie Mac are in conservatorship, (1) "no court may take any action to restrain or affect the exercise of powers or functions" of FHFA as Conservator (12 U.S.C. § 4617(f)), and (2) the Conservator holds and may exercise "all rights" of "any stockholder" of Fannie Mae and Freddie Mac (*id.* § 4617(b)(2)(A)(i)). The present lawsuits—in which shareholders of Fannie Mae and Freddie Mac ask the Court to vacate the Conservator's decision to amend the longstanding financing agreement between the Enterprises and Treasury—contradict these clear Congressional directives. The district court properly dismissed Plaintiffs' claims, and this Court should affirm.

Fannie Mae and Freddie Mac are corporations chartered by Congress to provide liquidity to the national housing finance market. The FHFA, an independent agency created by the Housing and Economic Recovery Act of 2008 ("HERA") (Pub. L. No. 110-289, § 1101, 122 Stat. 2654, 2661 (codified at 12 U.S.C. § 4511 *et seq*.)), serves as the regulator of the Enterprises. *See* 12 U.S.C. § 4513(a). HERA grants the Director of FHFA authority to appoint the Agency conservator or receiver of the Enterprises, and, of particular import here, *requires* the Director to seize the Enterprises, place them in receivership, and liquidate their assets if "the assets of [an Enterprise] are, and during the preceding 60 calendar

days have been, less than the obligations of [the Enterprise]." *Id.* § 4617(a)(4)(i).

On September 6, 2008, having concluded that the Enterprises could not fulfill their critical public mission without intervention, FHFA's Director placed them in statutory conservatorships, with FHFA as Conservator. As Conservator, FHFA "immediately succeed[ed] to . . . all rights, titles, powers, and privileges of the [Enterprises], and of any stockholder, officer, or director of [the Enterprises]." *Id.* § 4617(b)(2)(A). Congress vested the Conservator with broad powers to:

- "operate" the Enterprises;
- "carry on the business" of the Enterprises;
- enter into contracts on behalf of the Enterprises;
- "transfer or sell any [Enterprise] asset … without any approval";
- take actions to put the Enterprises in a "sound and solvent condition"; and
- "preserve and conserve" their assets. *Id.* § 4617(b)(2).

Further, HERA authorizes the Conservator to exercise its powers in the manner it "determines is in the best interests of the [Enterprises] or the Agency." *Id.* § 4617(b)(2)(J)(ii); *see also id.* § 4617(b)(2)(D). HERA's anti-injunction provision, *id.* § 4617(f), precludes judicial review of actions within the Conservator's expansive powers and functions.

In September 2008, the Conservator and the Department of the Treasury entered into the Senior Preferred Stock Purchase Agreements ("PSPAs"), pursuant to which, after amendments, Treasury committed to infuse almost a half-trillion dollars into the Enterprises when and as necessary to eliminate any net worth deficit and avoid triggering HERA's mandatory receivership and liquidation directive. In exchange for this ongoing and open-ended financial commitment, the PSPAs granted Treasury a comprehensive package of rights, including:

(1) an initial senior liquidation preference of one billion dollars for each Enterprise, plus the total amount of Enterprise draws on Treasury funds (currently $187 billion);

(2) warrants to acquire 79.9% of the Enterprises' common stock for a nominal payment;

(3) payment from each Enterprise of a cumulative annual dividend in the amount of 10% of the funds drawn from Treasury under the agreement; and

(4) payment of a Periodic Commitment Fee ("PCF") "intended to fully compensate" taxpayers for the continuing Treasury commitment of funds.

Soon after their placement into conservatorships, both Enterprises had a negative net worth and therefore invoked Treasury's contractual obligation to infuse sufficient capital so that the Enterprises would not trigger mandatory receivership and liquidation by virtue of their negative net worth position. To date,

Treasury has been required to make twenty-four different infusions in the Enterprises totaling more than $187 billion. *See* Fed. Hous. Fin. Agency, *Treasury and Federal Reserve Purchase Programs for GSE and Mortgage-Related Securities Data as of November 6, 2015*, at 2 (2015), http://goo.gl/D54JHs (hereinafter "FHFA Data as of November 6, 2015"). In each instance, Treasury's support allowed one or both of the Enterprises to avoid what otherwise would have been mandatory liquidation under HERA. Moreover, the PSPAs require that Treasury continue, indefinitely, to commit an additional $258 billion in support of the Enterprises.

Plaintiffs challenge *none* of the actions taken by Treasury and FHFA from September 6, 2008, to August 16, 2012, including the investment and commitment of taxpayer funds to keep the Enterprises out of receivership. Plaintiffs instead attack only the Third Amendment to the PSPAs—the Conservator's August 17, 2012 agreement to modify how Treasury is compensated for its financial support of the Enterprises, replacing the fixed 10% dividend and PCF with a variable rate dividend equal to the Enterprises' quarterly profits, if any.

Plaintiffs contest the necessity for, motive behind, and specific terms of the Third Amendment. Plaintiffs argue that the Conservator must, as a threshold matter, justify the purpose and efficacy of its decision to amend the PSPAs before invoking HERA's jurisdiction-withdrawal provision. That is, Plaintiffs argue that

the court below committed legal error by failing to assess the Conservator's underlying motives and the effectiveness of the Third Amendment *prior to* determining that Congress divested the Court of jurisdiction to review the Conservator's agreement to amend.

HERA bars the second-guessing of the Conservator's judgment on which Plaintiffs predicate their complaints. Congress gave the Conservator "broad powers to operate Fannie and Freddie," to "assume complete control" over the Enterprises, and to exercise "exclusive authority over [their] business operations." *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1058, 1060 (N.D. Ill. 2013). Further, courts have repeatedly held that plaintiffs cannot attack the Conservator's motives because "FHFA's underlying motives or opinions … do not matter for the purposes of § 4617(f)"; HERA "narrows the Court's jurisdictional analysis to *what* the Third Amendment entails, rather than *why* FHFA executed the Third Amendment." Mem. Op. ("Dkt.51"), at 22 (JA__). Nowhere does HERA impose on the Conservator the duty imagined by Plaintiffs to maximize shareholder value. Rather, HERA transfers all shareholder rights to the Conservator and authorizes the Conservator to act in the best interests of the Agency and to operate the Enterprises "consistent with the public interest." 12 U.S.C. § 4513(a)(1)(B)(v).

The district court correctly held that the Conservator acted within its statutory powers and functions when it executed the Third Amendment, holding

that "the language of [HERA] enabled FHFA…to take unprecedented steps to salvage the largest players in the mortgage finance industry before their looming collapse triggered a systemic panic." Dkt.51, at 52 (JA__). In these circumstances, "Congress…parted the legal seas so that FHFA and Treasury could effectively do whatever they thought was needed to stabilize and, if necessary, liquidate, the GSEs." *Id.*

The district court reached this conclusion and dismissed the complaints only after accepting Plaintiffs' allegations as true. Accordingly, there is no conceivable need for Plaintiffs to supplement the record on appeal with supposed evidence to buttress their (for the present purposes) uncontested allegations. *See* FHFA Opp'n to Mot. for Judicial Notice, *Perry Capital LLC v. Lew*, No. 14-5243, Doc. Number 1569025 (Aug. 20, 2015); *see also* Order, *Saxton v. FHFA*, No. 15-cv-00047 (LRR) (N.D. Iowa Dec. 3, 2015) (refusing amicus motion to supplement the record in related litigation "because the court will not consider facts and evidence outside of the pleadings in determining facial challenges to subject matter jurisdiction under Rule 12(b)(1)").

For the reasons stated by the district court and as explained below, Plaintiffs' complaints fail as a matter of law. Accordingly, the district court had no need to address the motion for summary judgment, or the evidence submitted in support of that motion showing that the Conservator acted properly and prudently in

executing the Third Amendment. The district court's judgment should be affirmed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the claims pursuant to 28 U.S.C. §§ 1331 and 1332(d)(2)(A), 12 U.S.C. §§ 1343(a)(3), 1346(a)(2), 1367(a), 1452(c), 1723a(a), and 4617(b)(2)(A). This Court has jurisdiction over the district court's final order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether 12 U.S.C. § 4617(f)—which mandates that "no court may take any action to restrain or affect the exercise of powers or functions" of the FHFA as Conservator of Fannie Mae and Freddie Mac—bars Plaintiffs' claims seeking to enjoin the Conservator's decision to amend the funding agreement between the Enterprises and Treasury.

II. Whether 12 U.S.C. § 4617(b)(2)(A)(i)—which provides that FHFA as Conservator succeeds to "all rights, titles, powers, and privileges" of the Enterprises and their shareholders —bars Plaintiffs' complaints.

III. Whether Plaintiffs' claims for breach of contract and the implied covenant of good faith and fair dealing fail as a matter of law where those claims are based on

(a) an alleged loss of opportunity to receive dividends, even though the contracts provide the Enterprises, and thus the Conservator, "sole discretion" to decide whether and when to issue dividends; and

(b) an alleged loss of opportunity to receive a liquidation preference, even though there has been no liquidation of the Enterprises.

IV. Whether the district court abused its discretion by denying as moot Plaintiffs' motion to supplement FHFA's document compilation where that compilation was "irrelevant" to the resolution of the motions to dismiss.

STATUTES AND REGULATIONS

Except for the pertinent statutes reproduced in the addendum to this brief, all applicable statutes, etc. are contained in the Briefs for Plaintiffs and the Brief for Treasury.

STATEMENT OF THE CASE

I. Factual Background

A. The Importance of the Enterprises to the National Economy and the Dangers of Their Collapse

The Enterprises are chartered by Congress to provide liquidity and stability to the national housing-finance system. By 2007, the housing market began to collapse, with homeowners defaulting on mortgages at accelerating rates. At that time, the Enterprises owned or guaranteed mortgages worth more than $5 trillion—nearly half the U.S. mortgage market. FHFA3534 (JA__) (FHFA Office of Inspector Gen., *Fannie Mae and Freddie Mac: Where the Taxpayers' Money Went* (May 24, 2012)). "By 2008, the United States economy faced dire straits," the value of the Enterprises' assets deteriorated dramatically, and the Enterprises

suffered major losses in their portfolios. *See* Dkt.51, at 4 (JA__); Fairholme Compl. ¶ 38 (JA__); Consol. Compl. ¶ 47 (JA__).

B. Congress Enacts HERA

Responding to the "systemic danger that a Fannie Mae or Freddie Mac collapse posed to the already fragile national economy," Dkt.51, at 4 (JA__), Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA") (Pub. L. No. 110-289, § 1101, 122 Stat. 2654, 2661 (codified at 12 U.S.C. 4511 *et seq*.)). HERA created FHFA as an independent agency to supervise and regulate the Enterprises, as well as the Federal Home Loan Banks, and to serve if necessary as the statutory conservator or receiver for the Enterprises. Under HERA, Congress tasked FHFA as regulator with ensuring that the Enterprises operate in a "safe and sound manner," "consistent with the public interest," while "foster[ing] liquid, efficient, competitive, and resilient national housing finance markets." 12 U.S.C. § 4513(a)(1)(B). Congress also authorized FHFA's Director to "appoint [FHFA] as conservator or receiver for a regulated entity…for the purpose of reorganizing, rehabilitating, or winding up [its] affairs." *Id.* § 4617(a)(1), (2).

"[R]ecognizing that Treasury (*i.e.*, taxpayer) funds may soon be necessary to capitalize the struggling [Enterprises]," Dkt.51, at 5 (JA__), Congress, through HERA, temporarily authorized Treasury to "purchase any obligations and other securities issued by the [Enterprises]." 12 U.S.C. § 1455(*l*)(1)(A); *id.*

§ 1719(g)(1)(A). "The purpose of HERA's provision authorizing Treasury to invest in the [Enterprises] was . . . to 'prevent disruptions in the availability of mortgage finance.'" Dkt.51, at 5 n.3 (JA__) (quoting 12 U.S.C. §1455(*l*)(1)(B)).

C. FHFA Is Appointed Conservator and Succeeds by Operation of Law to All the Rights of the Enterprises and Their Shareholders

On September 6, 2008, having concluded that the Enterprises could not operate safely and soundly and fulfill their critical statutory mission, FHFA's Director placed the Enterprises in conservatorship. FHFA, as Conservator, "immediately succeed[ed] to . . . ***all*** rights, titles, powers, and privileges of the [Enterprises], and of ***any stockholder***, officer, or director of [the Enterprises]." 12 U.S.C. § 4617(b)(2)(A) (emphasis added).

In addition to vesting the Conservator with all the powers of the Enterprises and their owners, officers, and directors, HERA authorizes FHFA as Conservator to:

- "conduct all business of the [Enterprises]," *id.* § 4617(b)(2)(B)(i);
- "perform all functions of the [Enterprises] in the name of the [Enterprises] which are consistent with the appointment as conservator," *id.* § 4617(b)(2)(B)(iii);
- "preserve and conserve the assets and property of the [Enterprises]," *id.* § 4617(b)(2)(B)(iv);

- "take over the assets of and operate the [Enterprises] with all the powers of the shareholders, the directors, and the officers," *id.* § 4617(b)(2)(B)(i); and

- "transfer or sell any asset or liability of the [Enterprises] without any approval, assignment, or consent with respect to such transfer or sale," *id.* § 4617(b)(2)(G).

Further, HERA empowers the Conservator to "take any [authorized action], which the Agency determines is in the best interests of the [Enterprises] or the Agency." *Id.* § 4617(b)(2)(J)(ii). Reinforcing and facilitating the exercise of the Conservator's plenary operational authority, Congress shielded the Conservator's actions from judicial review. Under 12 U.S.C. § 4617(f), "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator."

D. Pursuant to the PSPAs, Treasury Makes Unprecedented Financial Investment in Consideration for a Panoply of Rights That Protect Taxpayers

1. Treasury Invests in the Enterprises Through the PSPAs

Treasury and FHFA—acting in its capacity as Conservator of the Enterprises—entered into two PSPAs, one for each Enterprise, by which Treasury agreed to invest billions of taxpayer dollars into the Enterprises. *See* FHFA0128; 0142 (JA__) (PSPAs (Sept. 26, 2008)). The PSPAs represented a new capital paradigm for the Enterprises: Treasury committed to keep the Enterprises out of a negative net worth position, and that commitment, rather than a buildup of capital,

was the new, market-accepted assurance of the safety and soundness of the Enterprises while operating in conservatorships.

Under the PSPAs, if in any calendar quarter an Enterprise's net worth is negative—defined as liabilities exceeding assets in accordance with U.S. Generally Accepted Accounting Principles—the Enterprise *must* draw funds from Treasury in the amount necessary to cure its negative net worth. *See* FHFA0131-0132; 0145-1046 (JA__) (PSPAs (Sept. 26, 2008), § 2.2). Thus, each draw from Treasury, by definition, saves the Enterprises from mandatory receivership. *See* 12 U.S.C. § 4617(a)(4). Sixteen times between 2008 and 2010, and twenty-four times total, at least one of the Enterprises' liabilities exceeded its assets, forcing a draw on the Treasury commitment to remedy the deficiency. *See* FHFA Data as of November 6, 2015, at 2; Class Compl. ¶ 10 (JA__).

The PSPAs initially capped Treasury's commitment to invest taxpayer funds at $100 billion per Enterprise. The parties subsequently amended the PSPAs (via the "First Amendment") to double the cap to $200 billion per Enterprise. FHFA0676; 0681 (JA__) (PSPAs (May 6, 2009)). Thereafter, Treasury and the Conservator again amended the PSPAs (the "Second Amendment") to, among other things, further increase the remaining cap on Treasury's commitment to invest in the Enterprises: $117.6 billion (over and above the $116.1 billion already invested) for Fannie Mae; and $140.5 billion (over and above the $71.3 billion

already invested) for Freddie Mac. FHFA1137; 1143 (JA__) (PSPAs (Dec. 24, 2009)). These commitments continue to this day, and in perpetuity, with Treasury obliged to invest an additional $258 billion as necessary to avoid mandatory receivership. *Id.*

2. The PSPAs Comply With the Congressional Mandate That Treasury's Investment Must Be Structured to "Protect the Taxpayer"

The statutory authority by which Treasury is permitted to invest taxpayer funds in the Enterprises at a time of highest risk—*i.e.*, when they have negative net worth—specifically requires that such investment be structured to "***protect the taxpayer***." 12 U.S.C. § 1719(g)(1)(B)-(C) (emphasis added). Thus, as Congress required, the PSPAs gave Treasury a bundle of rights, entitlements, and financial commitments.

The original PSPAs compensate Treasury as follows:

- Initial Commitment Fee: consisting of (a) an initial senior liquidation preference of $1 billion for each Enterprise, and (b) warrants to acquire 79.9% of the Enterprises' common stock for a nominal payment. FHFA0133;0147 (JA__ (PSPAs (Sept. 26, 2008), § 3.1).

- Senior Liquidation Preference: equal to the total amount of Enterprise draws on Treasury funds, currently $187 billion, plus the $1 billion initial liquidation preferences. *Id.* Thus, if the Enterprises are liquidated through receivership, Treasury must be paid $189 billion from the proceeds of the liquidation before preferred and common shareholders recover anything.

- Dividends: requiring the Enterprises to pay Treasury a 10% annual dividend, assessed quarterly, based on the amount of the liquidation preference. TR0109; 0143 (JA___) (Treasury Stock Certificate § 2). The dividend was cumulative; if the Enterprises failed to pay the dividend in cash, then the dividend would be accrued at a rate of 12% and added to Treasury's liquidation preference. *Id*. at § 2(c).

- Periodic Commitment Fee: entitling Treasury to recover, *over and above the dividends*, an annual fee that was "intended to fully compensate [Treasury] for the support provided by the ongoing Commitment." FHFA0133; 0147 (JA___) (PSPAs (Sept. 26, 2008), § 3.2(b)). As Plaintiffs concede, the Periodic Commitment Fee was to reflect "the market value of the Commitment as then in effect." *Id.*; Inst. Br. at 10.[1]

- PSPA Covenants: imposing covenants that preclude the Enterprises from paying dividends on common and preferred stock, redeeming stock, and exiting conservatorship (other than through receivership) without Treasury consent, and that make clear that shareholders are not third-party beneficiaries to the PSPAs. *See* FHFA0135-0138; 0149-0152 (JA__) (PSPAs (Sept. 26, 2008), §§ 5.1, 5.3, 5.6, 6.1).

In sum, the PSPAs—consistent with Treasury's statutory obligation to "protect the taxpayer"—effectively assure that federal taxpayers will receive compensation for the actions and commitments they took to save the Enterprises

[1] Plaintiffs attempt to minimize the import of the Periodic Commitment Fee. Class Plaintiffs ignore it altogether, failing to mention it even once. And the Institutional Plaintiffs describe its calculation as a routine, "normal commercial practice," analogizing to fees paid in connection with construction bonds. Inst. Br. 11. But the commitment here, and the associated PCF, was anything but routine. The PCF was required to be in an amount calculated to fully reflect the market value of Treasury's unprecedented—and irreplaceable—support, without which the Enterprises would have been placed in receivership, and liquidated.

from mandatory receivership. To eliminate any doubt, in July 2010, Congress passed, and the President signed, the "Pay It Back Act," which earmarked payment of the PCF for deficit-reduction purposes, and underscored and effectuated the Congressional intent to "pay back" the taxpayers. 12 U.S.C. § 1455 note (Pub. L. No. 111-203, Title XIII, § 1304(d), July 21, 2010, 124 Stat. 2134).

Given these realities, even the Perry Plaintiffs explicitly acknowledge that ***before and without consideration of the Third Amendment***, "the PSPAs mean that 'preferred and common shareholders of [the Companies] effectively lost their investments.'" Perry Compl. ¶ 17 (JA__) (quoting FHFA Office of Inspector Gen., *supra*, at 25). Notably, Plaintiffs do not challenge any of the actions or circumstances that led to the "effective los[s] [of] their investments," *id.*; in the words of the Perry Plaintiffs, they "do[] not challenge the government's decisions made during the financial crisis of 2008, the decision to place Fannie Mae and Freddie Mac in conservatorship, or the terms of Treasury's 2008 financial support for the Companies." Inst. Br. at 1.

E. The Third Amendment Replaces the Fixed Dividend and Periodic Commitment Fee with a Variable Dividend Based on Net Worth

On August 17, 2012, FHFA and Treasury further amended the PSPAs—via the Third Amendment—to replace the fixed dividend (which was owed whether the Enterprises were profitable or not), and the PCF, calculated to fully compensate taxpayers, with a variable dividend equal to the Enterprises' profits, if any. The

Third Amendment ensured that the Enterprises' obligations to pay Treasury could never exceed their operating profits. Thus, if the Enterprises made no profits, they would have no obligation to pay Treasury anything—neither a dividend nor the PCF. The Third Amendment thereby removed any uncertainty as to whether the Enterprises could afford to pay dividends to Treasury out of operating profits; it also relieved the Enterprises of the obligation to pay the PCF for as long as the variable dividend is in effect.[2]

SUMMARY OF ARGUMENT

Plaintiffs disagree with a business decision made by FHFA as Conservator of the Enterprises. In particular, Plaintiffs object to an agreement between the Conservator and Treasury to amend, for a third time, the financing agreements by which Treasury rescued the Enterprises from insolvency and mandatory receivership. Even though Plaintiffs provided ***no*** capital to save the Enterprises, they contend that the Third Amendment was too favorable to Treasury, which invested billions in taxpayer capital at a time of historic distress and remains contractually bound to infuse an additional quarter-trillion dollars in support of ongoing Enterprise operations.

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[2] The Third Amendment traded the Enterprises' obligation to pay at least $19 billion annually in dividends plus the PCF for a promise to pay an amount equal to the Enterprises' profits, which historically had averaged far less than $19 billion per year. *See* FHFA3596, 3598, 3677 (JA__) (Freddie Mac 10-Q dated Aug. 7, 2012); FHFA3849, 3359, 3429 (JA__) (Fannie Mae 10-Q dated Aug. 8, 2012).

Plaintiffs assert a variety of claims seeking rescission of the Third Amendment, as well as money damages. Plaintiffs' claims fail as a matter of law, and the district court correctly granted the motions to dismiss.

First, HERA bars precisely this type of second-guessing of the Conservator's decisions, stripping the courts of jurisdiction over all claims seeking declaratory or equitable relief against the Conservator: "no court may take any action to restrain or affect the exercise of powers or functions of the [FHFA] as a conservator." 12 U.S.C. § 4617(f). The powers and functions of the Conservator are far-reaching and include, *inter alia,* the power to:

- "take over the assets of and operate the [Enterprises] with all the powers of the shareholders, the directors, and the officers," *id.* § 4617(b)(2)(B)(i);
- "carry on the business" of the Enterprises, *id.* § 4617 (b)(2)(D)(ii); and
- "put the [Enterprises] in a sound and solvent condition." *id.* § 4617 (b)(2)(D)(i).

Because the Conservator acted squarely within these statutory powers in executing the Third Amendment—an agreement to amend the terms of funding for the Enterprises—Plaintiffs' claims seeking declaratory or equitable relief are statutorily barred. Indeed, recent legislation supports the view that the Third Amendment falls within the statutory authority of the agencies.

Plaintiffs attempt to convert HERA's broad grant of permissive authority to

the Conservator into mandatory operational requirements. They urge an interpretation permitting courts to evaluate any Conservator action that allegedly fails to "preserve and conserve assets" or promote "best interests." They also try to impose fiduciary and other duties on the Conservator to always act in the best interests of shareholders, when HERA instead authorizes the Conservator to "[act] in the best interests of the [Enterprises] or the Agency," *id.* § 4617(b)(2)(J). Plaintiffs' position is contrary to HERA's plain language, and it subverts the obvious purpose of the statute, converting a jurisdiction-shield for the Conservator into a sword for any disgruntled shareholder.

Second, by transferring shareholder rights to the Conservator, HERA strips Plaintiffs of the right to assert claims during conservatorship. HERA provides that, upon appointment, FHFA as Conservator "immediately succeed[ed]" by operation of law to "all rights, titles, powers, and privileges of the [Enterprises] and of any stockholder" of the Enterprises. *Id.* § 4617(b)(2)(A)(i). The only interpretive tool needed to apply this provision is the simplest one: "[R]ead the statute!" *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012).

Third, Plaintiffs' claims for alleged loss of opportunity to receive a liquidation preference are not ripe. To the extent the Enterprises' junior preferred shareholders are entitled to any liquidation preference, it would be triggered only upon a liquidation. But the Enterprises have not been liquidated, nor are they in

any "de facto" liquidation. Accordingly, Plaintiffs' claims for their liquidation preference are not ripe.

Fourth, Plaintiffs' claims for alleged loss of opportunity to receive dividends fail to state a claim because the stock certificates provide the Enterprises' Boards of Directors (and thus, the Conservator) "sole discretion" to decide whether and when to issue dividends. Moreover, the PSPAs, in a provision that Plaintiffs do *not* challenge, also provide Treasury the discretion to permit or disallow dividends. Thus, there is no "right" to dividends.

The potpourri of *amici* do nothing to salvage Plaintiffs' claims. *Amici* variously seek to import principles of elder care and probate law that have no relevance here—taking the Court on a detour through the Uniform Guardianship and Protective Proceedings Act—or propose results-driven ad hoc tests to circumvent the jurisdiction-withdrawal provisions of HERA. Others raise new arguments that are procedurally improper and, in any event, meritless.

In sum, as the district court observed, HERA endowed FHFA with sweeping powers "enabl[ing] FHFA and, consequently, Treasury, to take unprecedented steps to salvage the largest players in the mortgage finance industry before their looming collapse triggered a systemic panic." Dkt.51, at 52 (JA__). Plaintiffs' claims contravene these powers and, if allowed to proceed, would entangle courts in the operations of the Enterprises, enabling disaffected shareholders to disrupt the

Conservator's efforts to ensure that the Enterprises can continue to fulfill their critical public mission. The district court correctly applied HERA to dismiss all claims. This Court should affirm.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of a motion to dismiss. *Emory v. United Air Lines, Inc.*, 720 F.3d 915, 921 (D.C. Cir. 2013). This Court reviews for abuse of discretion a district court's decision to deny a request to supplement an administrative record. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008).

ARGUMENT

I. Section 4617(f) Bars Plaintiffs' Claims Seeking Declaratory and Equitable Relief

Plaintiffs' claims seek far-reaching declaratory and equitable relief, including an order rescinding the Third Amendment and forcing Treasury to return to the Enterprises all dividends resulting therefrom. Indeed, the majority of Plaintiffs' claims—including all APA claims—seek exclusively injunctive relief. Dkt.51, at 11 (JA__). The district court correctly dismissed these claims as barred by 12 U.S.C. § 4617(f). Dkt.51, at 11-26 (JA__).

A. Section 4617(f) Withdraws from Federal Court the Jurisdiction to Issue Declaratory or Equitable Relief That Would Restrain or Affect the Conservator's Exercise of Powers

To enable FHFA as Conservator to carry out its functions, Congress enacted Section 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator." As Plaintiffs themselves acknowledge, Section 4617(f) "prevents second-guessing of the business judgments of the conservator," enabling it to take "decisive actions." Inst. Br. 27.

Courts across the country consistently apply Section 4617(f) to bar claims seeking declaratory and equitable relief that would "restrain or affect" the Conservator. *See, e.g.*, *Cty. of Sonoma v. FHFA*, 710 F.3d 987, 993 (9th Cir. 2013) (holding Section 4617(f) barred APA claims against FHFA); *Leon Cty. v. FHFA*, 700 F.3d 1273, 1278-79 (11th Cir. 2012) (same); *Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012) (same); *La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188, 190-91 (4th Cir. 2011) (holding Section 4617(f) barred shareholder derivative claims against former officers and directors).

Although this Court has not yet addressed Section 4617(f), it has addressed the materially identical provision that governs the operation of FDIC

conservatorships and receiverships, 12 U.S.C. § 1821(j),[3] and described it as "effect[ing] a sweeping ouster of courts' power to grant equitable remedies," *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995), and imposing "'drastic' restrictions on a court's ability to institute equitable remedies." *MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 247 (D.C. Cir. 2013). Given the "breadth" of its language, "*the statute would appear to bar a court from acting in virtually all circumstances*." *Nat'l Trust for Historic Pres. in U.S. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring) (emphasis added); *see also Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1016 (8th Cir. 2013) (Section 1821(j) is "construed broadly to constrain the court's equitable powers."); *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010) (Section 1821(j) is "interpreted broadly").

The jurisdictional bar applies "regardless of the claimant's likelihood of success on the merits of his underlying claims." *Freeman*, 56 F.3d at 1399. Accordingly, even plausible and specific allegations that a conservator or receiver acted improperly—or in violation of a contract or state or federal law—"do[] not alter the calculus." *See Volges v. RTC*, 32 F.3d 50, 52 (2d Cir. 1994); *see also*

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[3] Section 1821(j), which was enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. No. 101–73, 103 Stat. 183, provides that "no court may take any action . . . to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j).

MBIA Ins. Corp. v. FDIC, 816 F. Supp. 2d 81, 103 (D.D.C. 2011) (applying Section 1821(j) because "it is not enough for [the plaintiff] to allege that [the conservator] came to the wrong conclusion" or that an alternative course of action "would have been preferable"), *aff'd*, 708 F.3d 234 (D.C. Cir. 2013).

The breadth of this jurisdictional bar is supported by sound policy. By definition, conservators are appointed only in challenging circumstances—here, two entities critical to the national economy were saved from insolvency only by the infusion of billions of taxpayer dollars—where difficult choices must be made. Inevitably, shareholders will disagree with some of these decisions, as Plaintiffs do here. But it would be unworkable if conservators could be hauled into court and put through the rigors of protracted litigation every time a shareholder questions a conservator's decision. Jurisdiction-withdrawal statutes such as Section 4617(f) embody Congress's policy judgment that enabling conservators to focus on the work Congress empowered them to do, without the distraction of litigation, is more important than leaving the courthouse doors open to all claims.

B. The District Court Correctly Concluded that the Conservator's Execution of the Third Amendment Was Within the Conservator's Statutory Powers Under HERA

Section 4617(f)'s jurisdictional bar applies whenever the Conservator acts within its statutory authority. That authority is expansive.

In HERA, Congress gave the Conservator "broad powers" to "assume

complete control" over the Enterprises and exercise "exclusive authority over [their] business operations." *City of Chicago*, 962 F. Supp. 2d at 1060. The district court properly characterized HERA as "a statute of exceptional scope that gave immense discretion to FHFA as a conservator." Dkt.51, at 20 (JA__).

Of particular relevance here, and as noted above, Congress empowered the Conservator to:

- "operate" the Enterprises;
- "carry on the business" of the Enterprises;
- "perform all functions" of the Enterprises;
- enter into contracts on behalf of the Enterprises; and
- "transfer or sell any [Enterprise] asset or liability…without any approval, assignment, or consent," 12 U.S.C. § 4617(b)(2).

These broad powers are key to determining whether Section 4617(f) precludes judicial review over Plaintiffs' claims. As the district court concluded, the analysis is straightforward and "quite narrow": the court must simply determine whether the Conservator was exercising one of its statutory powers or functions under HERA. *Bank of Am. Nat'l Ass'n*, 604 F.3d at 1243; *see also* Dkt.51, at 21 (JA__). For example, was the Conservator exercising a right, power, or privilege of the Enterprises, their management, boards, or stockholders when it amended the funding mechanism of the PSPAs? Was the Conservator entering a

contract? Was it transferring or selling an asset? If the Conservator was doing any of these things, or otherwise acting within its "exceptional scope," then "the [Conservator] is protected from all court action that would 'restrain or affect' the exercise of those powers." *Bank of Am. Nat'l Ass'n*, 604 F.3d at 1243; *see also Cty. of Sonoma*, 710 F.3d at 992 ("If the [conduct] falls within FHFA's conservator powers, it is insulated from review and this case must be dismissed."); *Town of Babylon*, 699 F.3d at 228 ("A conclusion that the challenged acts were directed to an institution in conservatorship and within the powers given to the conservator ends the [Section 4617(f)] inquiry.").

Here, the Conservator acted well within its statutory powers and functions. The decision to execute the Third Amendment—exercising the power to contract, amend the terms of a funding agreement, and maintain liquidity—went to the core of managing and operating the Enterprises. Structuring and preserving funding is a quintessential act for the conservator of a financial institution. Just as the Conservator had authority to execute the PSPAs at their inception—which Plaintiffs do not dispute—the Conservator likewise has ongoing authority to modify the PSPAs in a manner the Conservator determines, in its unreviewable judgment, to be "in the best interests of the [Enterprises] or the Agency." 12 U.S.C. § 4617(b)(2)(J)(ii).

Moreover, just enacted federal legislation, the Consolidated Appropriations

Act, 2016 (the "Act"), provides Congressional support for the conclusion that the statutory powers invested in FHFA and Treasury under HERA authorized them to execute the Third Amendment. H.R. 2029, 114th Cong. § 702, Tit. VII, Div. O (enacted Dec. 18, 2015). Specifically, Section 702 of the Act amends certain aspects of the PSPAs, leaving other aspects intact. *Id.* § 702(b). Under HERA and the PSPAs, Treasury had unfettered authority to sell or otherwise dispose of its preferred shares in the Enterprises. The Act limits that authority, barring Treasury from disposing of its preferred stock until 2018. *Id.* However, the Act otherwise leaves in effect Treasury's rights under the Third Amendment to the PSPAs, including specifically the net worth dividend. *Id.*

The fact that Congress circumscribed Treasury's authority in one area—the right to sell the shares—but left its entitlement to the net worth dividend intact, demonstrates that the scope of the Conservator's and Treasury's powers includes the authority to execute the Third Amendment. As the Supreme Court has held, where "an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982) (internal quotation marks and citation omitted); *see also Goncalves v. Reno*, 144 F.3d 110, 133 (1st Cir. 1998) (where Congress amended a

criminal statute in several respects but did not address an agency's recent interpretation of the statute's retroactivity, despite Congress's presumptive awareness of this interpretation, Congress's selective amendment of the statute provides a "significant clue[] to congressional intent").

There can be no doubt that the PSPAs, including each of the three amendments thereto, have "been fully brought to the attention of . . . Congress." *N. Haven Bd. of Ed.*, 456 U.S. at 535. Indeed, in the Act, Congress expressly referenced the revisions to the PSPAs that became effective on August 17, 2012 by virtue of the Third Amendment in the "Definitions" provision of the just enacted Section 702(a). And Treasury has reported to Congress about the Enterprises' fulfillment of its payment obligations under the PSPAs. *See, e.g.*, 12 U.S.C. §1455(*l*)(1)(D).

Moreover, officials of both FHFA and Treasury have testified before Congress about the operation and effect of the net worth dividend,[4] and specifically about whether the then proposed "Jumpstart the GSE" reform legislation, ultimately adopted as part of the Consolidated Appropriations Act, would affect the PSPAs, which by that time already had been amended to include the net worth

[4] *See, e.g.*, *Sustainable Hous. Fin.: An Update from the Dir. of the Fed. Hous. Fin. Agency: Hearing Before the Comm. on Fin. Servs.*, 114th Cong. 21-22 (2015) (statement of Melvin Watt), https://goo.gl/BWKay4.

dividend.[5] Specifically, on April 18, 2013, a Senate Banking Committee member asked Acting Director of FHFA DeMarco how the proposed legislation would affect the PSPAs. Mr. DeMarco explained that the then proposed legislation would not affect the operation of the Conservatorships under the PSPAs as revised by the Third Amendment, or the continued payments to Treasury for the benefit of taxpayers:

> [It] does not have any effect on the current state of conservatorship or the terms of the Preferred Stock Purchase Agreements (PSPAs). The bill will ensure that the returns on investment that the taxpayers funded through the PSPAs with each Enterprise continue to benefit the taxpayers . . . ."[6]

Finally, Congress is also aware of the Third Amendment litigation.[7] Thus, when it enacted the Consolidated Appropriations Act, Congress was fully informed regarding the PSPAs, the net worth dividend, and the litigation surrounding it.

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[5] *Oversight of Fed. Hous. Fin. Agency: Evaluating FHFA as Regulator and Conservator: Hearing Before the Comm. on Banking, Hous., and Urban Affairs*, 113th Cong. 56-57 (2013) (statement of Edward DeMarco), https://goo.gl/2w6awm.

[6] *Id.*

[7] In a speech on the Senate floor prior to passage of the Act, Senator Corker rejected as "totally inappropriate" the recapitalization and release of the Enterprises, noting that passage of this legislation "put[s] to bed the idea that returning to the status quo is an option." 161 Cong. Rec. S8760-61 (daily ed. Dec. 17, 2015) (statement of Sen. Corker). Senator Corker recognized "that the hedge funds still have claims to deal with in court" noting that the now just-passed legislation "does not prejudice those claims" *Id.* at S8760. *See also* S8857 (daily ed. Dec. 18, 2015) (statement of Sen. Brown) (explaining that the provision does not "have any effect on the court cases … currently underway challenging the validity of the Third Amendment). The new legislation does not directly address Plaintiffs' claims, which will rise or fall based on existing law. As explained above, however, the just-passed legislation supports the conclusion that Congress views the net worth dividend as within the statutory authority of the agencies. *See N. Haven Bd. Of Ed.* 456 U.S. at 535.

Congress considered whether the Act would affect the Third Amendment, was assured that the Third Amendment would not be disturbed, and enacted the statute. In these circumstances, passage of the Act, which temporarily overrides a discrete provision of the PSPAs while preserving the net worth dividend, serves as congressional support for the conclusion that the Third Amendment was within the statutory authority of the Conservator and Treasury, and therefore plaintiffs' challenge to the net worth dividend is precluded by § 4617(f). *See N. Haven Bd. of Ed.*, 456 U.S. at 535.

C. Plaintiffs' Arguments Against Application of Section 4617(f) Must Be Rejected

1. Section 4617(b) Grants the Conservator Broad Powers; It Does Not Establish Duties Owed to Shareholders

Plaintiffs seek to convert the broad permissive authority that HERA grants the Conservator (in Section 4617(b)) into a mandate that the Conservator act in a particular way, and by this alchemy penetrate the shield of jurisdiction-withdrawal provided by Section 4617(f). Plaintiffs want to create judicially enforceable "duties," "requirements," and standards where none exist. *See, e.g.*, Inst. Br. at 33. Neither the language nor purpose of HERA permits this. The relevant sections of HERA plainly confer powers on the Conservator; they do not impose obligations to shareholders. Moreover, Plaintiffs' unsupported interpretation of 4617(b) would exponentially expand—rather than limit—judicial review, directly contrary to the

purpose of HERA and its jurisdiction-withdrawal provision. *King v. Burwell,* 135 S. Ct. 2480, 2493 (2015) ("We cannot interpret federal statutes to negate their own stated purposes.") (citation omitted); *see also Wagner v. FEC*, 717 F.3d 1007, 1014 (D.C. Cir. 2013) (rejecting statutory interpretation that would render "illusory" the "purpose underlying" a statutory provision and noting that "[a]n interpretation should be chosen as will effect [a statute's] purpose, rather than one which defeats it") (citation omitted).

a. By Its Unequivocal Language Section 4617(b) Grants Permissive Powers

Plaintiffs' argument rests heavily on the assertion that "HERA *requires*" the Conservator to take actions demanded by plaintiffs in furtherance of the Conservator's authority to "preserve and conserve" Enterprise assets, to put the Enterprises in a "sound and solvent condition" and to "rehabilitat[e]" them. Inst. Br. at 22 (emphasis added). This language of mandatory obligation permeates Plaintiffs' briefs. *See id.* at 20, 22, 26, 27, 36, 41, 43, 44. Yet it is nowhere to be found in HERA.

Instead, HERA uses *permissive*—not mandatory—language to describe the Conservator's powers. In particular:

- "The Agency *may*, as conservator or receiver…preserve and conserve the assets and property of the [Enterprises]." 12 U.S.C. § 4617(b)(2)(B)(iv) (emphasis added).

- "The Agency *may*, as conservator or receiver…operate the [Enterprises] and conduct all business of the [Enterprises]." *Id*. (emphasis added).

- "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." *Id*. § 4617(b)(2)(D) (emphasis added).

"[T]he most natural reading" of such statutory language "is the one that is most obvious: 'may' is permissive rather than obligatory." *Baptist Mem'l Hosp. v. Sebelius*, 603 F.3d 57, 63 (D.C. Cir. 2010).

"[W]hen a statute uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory." *Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C. Cir. 2011) (internal quotation marks omitted). HERA uses both "may" and "shall" in different contexts. With respect to duties, for example, HERA provides that the Conservator "shall" maintain a full accounting. 12 U.S.C. § 4617(b)(14).[8] With respect to powers, however, HERA uses the permissive "may." This choice of language reflects Congress's desire to give the Conservator plenary powers to operate the Enterprises without interference or restraint.

[8] *See also, e.g.*, 12 U.S.C. § 4617(b)(2)(H) (Conservator or receiver "shall…pay all valid obligations of the regulated entity."); 12 U.S.C. § 4617(b)(2)(E) (Receiver "shall place the regulated entity in liquidation."); 12 U.S.C. § 4617(d)(2) (Conservator or receiver "shall determine" whether to exercise repudiation rights.).

b. Plaintiffs' Interpretation that Section 4617(b) Sets Forth Statutory "Obligations" Would Negate Jurisdiction-Withdrawal

Under Plaintiffs' theory of the case, so long as they allege that the Conservator did not comply with one of its supposed "statutory requirement[s]"—for example, to "preserve and conserve" Enterprise assets (*id*. at 22)—then the Court must exercise jurisdiction to assess the merits of the Conservator's decision to execute the Third Amendment ***in order to determine*** whether Section 4617(f) bars their claims. Relatedly, Plaintiffs argue that the Court has jurisdiction whenever the Conservator is alleged to have acted with bad intent. For instance, Plaintiffs assert jurisdiction based on their allegations that FHFA had improper motives for the Third Amendment, including to "enrich" Treasury, "nationalize" the Enterprises, or "wind down" the Enterprises. Inst. Br. 46-47; *see also* Class Compl. ¶ 18 (JA __); Perry Compl. ¶ 14 (JA __).

Accepting the notion that Section 4617(b) creates obligations and permits courts to evaluate the effectiveness of the Conservator's decisions or the purity of its motives would turn the jurisdiction-withdrawal provision on its head. Instead of limiting jurisdiction, Plaintiffs would expand it in virtually all instances, permitting litigants to circumvent the jurisdictional bar of HERA simply by including boilerplate allegations of failure to comply with supposed statutory "requirements," or acting with bad intent or improper motives.

As the District Court held, basing jurisdiction on an allegation that a conservator did not "preserve and conserve assets" (*i.e.*, did a bad job) or undertook its so-called duties with an improper purpose (*i.e.*, had a bad motive) would "render . . . hollow" HERA's jurisdiction-withdrawal provision. Dkt.51, at 22 (JA__). It would invite litigants and courts to second-guess the reasonableness and effectiveness of, and motives behind, the Conservator's conduct ***first***, in order to determine whether that conduct is subject to judicial review. This is the exact opposite of what the statute says and Congress intended; it would "negate [HERA's] stated purposes," *King*, 135 S. Ct. at 2493, to "immunize" Conservator action "from outside second-guessing." *Nat'l Trust*, 995 F.2d at 240.[9]

Thus, the district court correctly held that HERA "narrows the Court's jurisdictional analysis to ***what*** the Third Amendment entails, rather than ***why*** FHFA executed the Third Amendment." Dkt.51, at 21 (JA__) (emphasis added). "FHFA's underlying motives or opinions" concerning the Third Amendment "do not matter for the purposes of § 4617(f)." Dkt.51, at 22 (JA__) ("[Plaintiffs] ask

[9] *See also In re Landmark Land Co.*, 973 F.2d 283, 288-90 (4th Cir. 1992) (applying Section 1821(j) to bar challenge to action allegedly taken for conservator's "own benefit" and to other interested parties' detriment); *Hindes v. FDIC*, 137 F.3d 148, 153, 172 (3d Cir. 1998) (same, barring challenge to actions allegedly part of "conspiracy with state officials to close the bank"); *Sinclair v. Hawke*, 314 F.3d 934, 938, 942 (8th Cir. 2003) (holding that "comprehensive statutory regime" including Section 1821(j) barred claims alleging OCC took actions, including the appointment of receiver, "for retaliatory and vindictive purposes"); *Darden v. RTC*, No. Civ A. 393CV13-D-D, 1995 WL 1945486, at *2-3 (N.D. Miss. June 25, 1995) (barring claim that receiver improperly favored its employee's bid over unaffiliated party's bid).

the Court, directly or indirectly, to evaluate FHFA's rationale for entering into the Third Amendment—a request that contravenes § 4617(f).") (citing *Leon Cty.*, 816 F. Supp. 2d at 1208, *aff'd*, 700 F.3d 1273). Whether the Third Amendment was executed to prevent a "downward spiral of dividend payments, increase payments to Treasury, or keep the GSEs in a holding pattern" is irrelevant to the Section 4617(f) analysis. Dkt.51, at 22 (JA__); *see also Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n. 6 (S.D. Iowa 2015) (dismissing materially identical claims, stating "it is not the role of this Court to wade into the merits or motives of FHFA and Treasury's actions—rather the Court is limited to reviewing those actions on their face and determining if they were permissible under the authority granted by HERA").

2. HERA Alone Defines the Conservator's Powers and Functions; State Law Fiduciary Duties or Other Alleged "Historical" Understandings of Conservatorship Do Not Constrain the Conservator

Plaintiffs also attempt to limit the Conservator's statutory powers and functions, and subject them to judicial review by overlaying an array of fiduciary duties arising under various state laws—arguing that an alleged breach of those duties renders Section 4617(f) inapplicable. *See* Inst. Br. at 3, 22, 26, 29-33, 47. Plaintiffs are wrong.

Plaintiffs ask the Court to *begin* its analysis of the Conservator's statutory powers with a historical review (as "far back as the 15th Century") of various

states' common law—"particularly in the probate context"—as it existed long before enactment of HERA, *see* Inst. Br. at 29-33, and to assume Congress effected a wholesale importation of that body of inapposite common law into the text of the federal statute, *id*., all without textual support from HERA.

This Court has expressly rejected a similar attempt to overlay pre-HERA common law principles as a limit on the Conservator's authority. In *Kellmer*, shareholders of Fannie Mae sought to avoid the plain meaning of HERA by "delving deep into pre-HERA common law and expounding HERA's legislative history." *Kellmer*, 674 F. 3d at 850. This Court refused, saying "to resolve this issue, we need only heed Professor Frankfurter's timeless advice: "(1) Read the statute; (2) read the statute; (3) read the statute!" *Id*. Nowhere in HERA does Congress impose on the Conservator the duties, fiduciary or otherwise, imagined by Plaintiffs; rather, HERA transfers all shareholder rights and privileges to the Conservator. *See* 12 U.S.C. § 4617(b)(2)(A)(i).

Plaintiffs argue that Delaware fiduciary-duty law "prohibits" the Conservator from "consider[ing] or represent[ing]" any interests "other than the best interests of [the Enterprises] and [their] stockholders in making a business decision." Class Br. at 19 (quoting Del. L. of Corp. and Bus. Org. § 4.16R, 2006 WL 2450303). But HERA directly contradicts this supposed prohibition by authorizing the Conservator to exercise its powers and functions "in the best

interests of [the Enterprises] ***or the Agency***." 12 U.S.C. § 4617(b)(2)(J)(ii) (emphasis added). Thus, HERA expressly permits the Conservator to consider its own best interests—including, for example, to promote the public interest, stability in the housing markets, and consistency and fiscal conservatism in the operation of the Enterprises. In any event, all rights and interests of the shareholders are now held by the Conservator. *See infra* Sec. II.

Plaintiffs' effort to import state guardianship law from the probate context—which prohibits certain asset transfers without authorization (Inst. Br. at 42) — cannot be reconciled with the plain text which authorizes the Conservator to "transfer or sell any asset" of the Enterprises "***without*** any approval, assignment, or consent." 12 U.S.C. § 4617(b)(2)(G) (emphasis added).

3. State Law Does Not Govern Dividends to Treasury, and Even If It Did, the Third Amendment Complies with State Law

One *amicus* claims that state law governs the Enterprises' dividend requirements, and that the Third Amendment violates Delaware and Virginia law because the variable dividend does not pay dividends at a "rate." CIF Amicus Br. at 12-15. This is wrong on both counts.

By regulation, state law applies to the Enterprises' corporate governance practices *only if* not inconsistent with federal law. 12 C.F.R. 1710.10(a), (b). Indeed, Congress has clearly delineated the limited instances when it wants state

law to apply to the Enterprises. *See, e.g.*, 12 U.S.C. § 1723a(c)(2) ("The corporation … shall be exempt from all taxation…imposed by any State…except that any real property of the corporation shall be subject to State…taxation….").

Further, the Treasury stock certificates provide that the terms of the certificates trump any contrary state law:

> This Certificate and the respective rights and obligations of the Company and the holders of the Senior Preferred Stock with respect to such Senior Preferred Stock ***shall be construed in accordance with and governed by the laws of the United States***, provided that the law of the [State of Delaware (Fannie) / Commonwealth of Virginia (Freddie)] shall serve as the federal rule of decision in all instances ***except where such law is inconsistent with the Company's enabling legislation, its public purposes or any provision of this Certificate***.

TR0115; 0148 (JA__) (Amended Treasury Stock Certificates, § 10(e)) (emphases added).[10]

Under this provision, federal law controls interpretation of the stock certificates and dividends thereunder. Delaware or Virginia law acts as the "federal rule of decision" *only if* there is no federal law on point with respect to a particular legal issue. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010) (state law applies only "where neither the

[10] Section 10(e) appears in both the original and amended Treasury Stock Certificates. *See* TR0038; 0072 (JA__) (Original Treasury Stock Certificates, § 10(e)).

Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one."). By further limitation, even in the absence of federal law, state law does *not* apply if it would contradict the Enterprises' enabling legislation, public purpose, or the Treasury stock certificate. TR0115; 0148 (JA__) (Amended Treasury Stock Certificates, § 10(e)).

Here, there is federal law on point. HERA is the controlling "law[] of the United States," so there is no need for the Court to look to Delaware or Virginia law. *Cf. Hanna v. Plumer*, 380 U.S. 460, 470 (1965) (state law does not displace federal law where federal law controls). HERA vests the Conservator with broad powers to operate the Enterprises, including to structure dividends. Plaintiffs' invitation to import state law to void or otherwise limit actions taken by the Conservator under HERA flatly contravenes federal law. Moreover, the Treasury Stock Certificates, which expressly trump any contrary state law, provide for the net worth dividend. *See* TR0109; 0143 (JA__) (Amended Treasury Stock Certificates, § 2).

Even though state law does not apply, the Third Amendment is valid under the Delaware General Corporation Law ("DGCL") and the Virginia Stock Corporation Act ("VSCA"). "The Delaware statutory scheme *does not . . . require any particular form of preference*. It allows private parties,"—*i.e.*, the Enterprises (as the issuing corporations) and Treasury (as the purchaser of the preferred

stock)—"to contract for preferences between themselves." *Shintom Co. v. Audiovox Corp.*, 888 A.2d 225, 230 (Del. 2005) (emphasis added). Likewise, Virginia law allows corporations to issue preferred shares that "[e]ntitle the holders" to dividends "*calculated in any manner*." *See* Va. Code Ann. § 13.1-638(C)(3) (emphasis added). And both states permit preferred dividend rates to be tied to outside factors that change over time (such as LIBOR rates) or the performance of the corporation itself (such as its net income for the quarter). *See* 8 Del. C. § 151(a); Va. Code Ann. § 13.1-638(D).

4. The Third Amendment Is Not an Unauthorized "Wind Down" of the Enterprises

Plaintiffs contend that the Third Amendment is an improper "wind down" of the Enterprises, and that such "wind down" power belongs exclusively to FHFA as receiver, not conservator. Inst. Br. 37-38. Further, Plaintiffs argue that HERA "requires that FHFA 'rehabilitate' the Companies with a view to returning them to private operations." *Id*. at 43. Plaintiffs are wrong.

First, the Third Amendment does not wind down the Enterprises. To the contrary—as the district court recognized—the Enterprises "maintain an operational mortgage finance business." Dkt.51, at 25 (JA__).

Second, although this Court need not reach the issue, the plain language of HERA authorizes FHFA acting as "conservator *or* receiver" to "wind[] up the affairs" of the Enterprises. 12 U.S.C. § 4617(a)(2) (emphasis added). Plaintiffs

pay only lip service to the text of the statute: they acknowledge that HERA permits FHFA to be appointed "conservator or receiver for the purpose of . . . winding up the affairs" of the Enterprises, but assert that HERA "does not imbue FHFA with power *as conservator* to wind up the Companies' affairs." Inst. Br. 37. Plaintiffs cannot re-write the statute as they see fit. "Congress [does] not use the phrase 'conservator or receiver' loosely." *1185 Ave. of Americas Assocs. v. RTC*, 22 F.3d 494, 497 (2d Cir. 1994). Indeed, by using this phrase, "it is clear that Congress intended the duty, right, or power to be enjoyed or exercised by *both* the conservator and the receiver." *RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1452 (8th Cir. 1992) (emphasis added).

Plaintiffs argue that HERA uses the terms "liquidation" and "winding up" synonymously, and because the Conservator is not permitted to do the former, it must not be permitted to do the latter. *See* Inst. Br. 37. But winding up is different than liquidation, and HERA expressly authorizes the Conservator to do so. 12 U.S.C. § 4617(a)(2).

Winding up includes a variety of prudential steps short of liquidation—including transferring Enterprise assets without approvals or consents, *id.* § 4617(b)(2)(G), and shrinking the Enterprises' operations to ensure their safety and soundness until an ultimate resolution is determined. As the district court explained, "[t]here surely can be a fluid progression from conservatorship to

receivership without violating HERA, and that progression could very well involve a conservator that acknowledges an ultimate goal of liquidation." Dkt.51, at 25 n.20 (JA__).

Additionally, Plaintiffs contend that FHFA's interpretation "would allow FHFA as receiver to take up a mission of 'rehabilitation,'" as opposed to liquidation. Inst. Br. 37-38. But this interpretation is consistent with HERA, which directs FHFA as receiver not only to liquidate Enterprise assets, but also to "rehabilitat[e]" the business and operations of the Enterprise by creating a limited-life regulated entity ("LLRE"). 12 U.S.C. § 4617(i). An LLRE "succeed[s] to the charter" of the Enterprise for which it is established and "thereafter operate[s] in accordance with, and subject to, such charter." *Id.* § 4617(i)(2)(A). An LLRE then rehabilitates and reorganizes the Enterprises through the selective transfer of assets and liabilities.

Finally, HERA simply does not "require[] that FHFA 'rehabilitate' the Companies with a view to returning them to private operations." Inst. Br. 43. HERA merely provides that FHFA "may, at the discretion of the Director, be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." *Id.* § 4617(a)(2). There is no mention, let alone requirement, of returning the Enterprises to "private operations," to the shareholders, or to their prior form. *See also supra* n. 7 (noting that

recapitalization and release of the Enterprises from conservatorship is inappropriate).

II. HERA's Succession Provision Bars Plaintiffs' Complaints

Plaintiffs' complaints are barred for the separate and independent reason that the Conservator succeeded by operation of law to "***all*** rights, titles, powers, and privileges" of the Enterprises and their shareholders. *Id.* § 4617(b)(2)(A)(i) (emphasis added). Plaintiffs' claims—whether considered derivative (which they are), or direct (as Plaintiffs wrongly contend) —depend on their "rights, titles, powers and privileges" as shareholders, all of which now reside with the Conservator. Accordingly, under HERA, Plaintiffs' claims are not theirs to bring; the Conservator has succeeded to them.

A. Under *Kellmer*, HERA Bars All Shareholder Derivative Claims

Upon its appointment, the Conservator "immediately succeed[ed] to…***all rights, titles, powers, and privileges*** of the [Enterprises], and ***of any stockholder***, officer, or director ***of [the Enterprises]*** with respect to the [Enterprises] and the assets of the [Enterprises]." *Id.* § 4617(b)(2)(A) (emphases added). This Court has held that the succession provision of HERA "***plainly transfers shareholders' ability to bring derivative suits—a 'right[ ], title[ ], power[ ], [or] privilege[ ]'—to FHFA***," *Kellmer*, 674 F.3d at 850 (emphasis added) (alterations in original), and that Congress intended to "***transfer[] everything it could to the [conservator]***" and

to ensure "that nothing was missed." *Id.* at 851 (quoting *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir. 1998)) (emphasis added) (first alteration added).[11]

Here, the district court correctly applied the plain statutory text and this Court's ruling in *Kellmer* to hold that HERA bars Plaintiffs' common-law claims. Dkt.51, at 27 (JA__). Plaintiffs nonetheless contend that the district court erred in two ways: First, the Class Plaintiffs (but not the Institutional Plaintiffs) maintain that *one* of their claims against *one* of the Enterprises is both derivative and direct, and thus is not governed by *Kellmer*. Second, Plaintiffs argue for a conflict-of-interest exception to the statute that would enable the shareholders to pursue their claims. Plaintiffs are wrong on both counts.

B. The Class Plaintiffs' Fiduciary Duty Claim Is Derivative, Not Direct, and Thus *Kellmer* Applies

The Class Plaintiffs argue that the district court erred by considering their fiduciary duty claim as "solely derivative." Class Br. 21. The Class Plaintiffs maintain that, "with respect to the Fannie Mae Third Amendment" (but not the Freddie Mac Third Amendment), they asserted a fiduciary-duty claim that is

[11] Other courts are in accord. *See La. Mun. Police Emps. Ret. Sys.*, 434 F. App'x at 191 (affirming substitution of the Conservator in place of shareholder derivative plaintiffs because the "the plain meaning of the statute is that *all* rights previously held by Freddie Mac's stockholders, including the right to sue derivatively, now belong exclusively to the [FHFA]") (citation omitted); *Esther Sadowsky Testamentary Trust v. Syron*, 639 F. Supp. 2d 347, 351 (S.D.N.Y. 2009) (similar).

simultaneously derivative (addressing alleged harm to Fannie Mae) and direct (addressing alleged harm to shareholders). Class Br. 22. This is incorrect.[12]

As an initial matter, Class Plaintiffs waived any argument that their breach of fiduciary duty claim is direct (or both derivative and direct) by failing to make it before the district court. *See United States v. Stover*, 329 F.3d 859, 872 (D.C. Cir. 2003). In fact, Class Plaintiffs' complaint repeatedly alleges that their fiduciary-duty claim is "derivative," Class Compl. ¶¶ 3, 134, 138 (JA __),[13] and they *conceded* below that their fiduciary duty claim was "derivative," not direct. *See* Class Op. at 32-35 (JA __). Because Class Plaintiffs never argued to the district court that their fiduciary duty claim was direct (or both derivative and direct), and in fact argued the opposite, Class Plaintiffs waived the argument.

[12] No party challenges the district court's rulings that (a) the Institutional Plaintiffs' breach of fiduciary duty claims were derivative (Dkt.51, at n.24 (JA__)); and (b) all Plaintiffs' contract and implied covenant claims were derivative (Dkt.51, at 35 n.39, 40 n.45 (JA__)). Thus, but for Class Plaintiffs' breach of fiduciary duty claim as to Fannie Mae, *all* of Plaintiffs' common law claims have been finally determined to be derivative. Any attempt by Plaintiffs to challenge those rulings for the first time in their reply briefs would be improper. *See Ihebereme v. Capital One, N.A.*, 573 F. App'x 2, 3 (D.C. Cir. 2014) ("declin[ing] to consider appellant's arguments, raised for the first time on appeal in his reply brief").

[13] *See also, e.g*. Class Compl. ¶ 3 (JA__) ("This is also a *derivative action* brought by [the Class] Plaintiffs *on behalf of Fannie Mae*…for breach of fiduciary duty.") (emphasis added); *id*. ¶ 27 ("[T]his action also seeks [relief] derivatively on behalf of Fannie Mae" for alleged breach of fiduciary duty.); *id*. ¶ 129 ("With respect to Count VII hereof, Plaintiffs bring action derivatively on behalf of and for the benefit of Fannie Mae… [for] the breaches of fiduciary duty alleged herein."); *id*. ¶ 134 (describing breach of fiduciary duty as "the derivative claim alleged herein"); *id*. ¶ 138 (describing "*the derivative claim* for breach of fiduciary duty") (emphasis added).

In all events, Class Plaintiffs' breach of fiduciary duty claim is derivative, not direct, under the two-prong test set out in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).[14]

The first *Tooley* prong requires the Court to consider "who suffered the alleged harm (the corporation or the suing stockholders, individually)." *Id.* at 1033. In analyzing this prong, courts consider whether the shareholder's alleged injury is "independent of any alleged injury to the corporation," and whether the shareholder "can prevail *without* showing an injury to the corporation." *Id.* at 1039 (emphasis added). Here, Plaintiffs *specifically allege* injury to the corporation, framing their fiduciary-duty claim as being brought "derivatively on behalf and for the benefit of Fannie Mae *to redress injuries suffered by Fannie Mae*." Class Compl. ¶ 129 (emphasis added) (JA __).[15] Although Class Plaintiffs allege that the Third Amendment resulted in the decrease or loss of value in their stock, this is a prototypical derivative claim—a decline in stock value ***deriving*** from a decline in

[14] Pursuant to their bylaws and 12 C.F.R. § 1710.10(a)-(b), Fannie Mae follows Delaware law (http://goo.gl/JTbjrt), and Freddie Mac follows Virginia law (http://goo.gl/lXAl6k), but only to the extent those laws are not inconsistent with federal law. Here, FHFA assumes that the principles for distinguishing between direct and derivative claims are consistent across federal and state law.

[15] *See also* Class Compl. ¶ 92 (alleging Third Amendment "clearly harms, rather than promotes, the soundness and solvency of the Companies") (JA __); *id*. ¶ 182 (alleging "Fannie Mae suffered damages" as a result of the alleged breach of fiduciary duty"); *id*. ¶ 181 (alleging the Third Amendment "constituted waste" of the Enterprises' assets). "[C]laims of waste are classically derivative . . . ." *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 771 (Del. 2006).

value of the company. *See Tooley*, 845 A.2d at 1037; *Protas v. Cavanagh*, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012).

Class Plaintiffs' fiduciary duty claim also fails the second prong of the *Tooley* test, by which a claim is direct only if the relief sought "flows directly to the stockholders, not to the corporation." *Tooley*, 845 A.2d at 1036; *see also Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC*, 922 A.2d 1169, 1179 (Del. Ch. 2006) (claim is direct only where "no relief flows to the corporation"). Class Plaintiffs demand relief in the form of "compensatory damages and disgorgement *in favor of Fannie Mae*"—not the shareholders—as a result of the alleged breach of fiduciary duty. Class Compl. at Prayer for Relief ¶ 5 (JA __). Because such relief flows first and foremost to Fannie Mae, the claim is derivative.

Class Plaintiffs assert in conclusory fashion that they "have a right to bring the fiduciary duty claim as a direct claim." Class Br. 22. But the cases they cite—in particular, *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006)—reflect a "narrow exception" under Delaware law in which a corporate transaction may give rise to both direct and derivative claims. *Halpert v. Zhang*, No. CV 12-1339, 2015 WL 1530819, at *3 n.1 (D. Del. Apr. 1, 2015). And that exception applies only where (a) the company issues excessive shares (not cash) to a third party controlling shareholder without receiving assets of commensurate value in return, and (b) the share issuance increases that shareholder's voting power to the detriment of the

minority shareholders. *See Gentile*, 906 A.2d at 99-100. Neither of these elements is present here: the Third Amendment did not result in the issuance of any additional shares to Treasury or affect the voting rights of non-Treasury shareholders.[16]

C. Under HERA, the Conservator Also Succeeded to Stockholder Rights to Direct Claims

Even if Class Plaintiffs' fiduciary duty claim were direct, HERA would bar it in light of the Conservator's succession to "all" shareholder rights. 12 U.S.C. § 4617(b)(2)(A)(i). The statutory text contains no exception for direct claims, and the existence of another express exception—namely, one permitting shareholders to prosecute claims they might have to liquidation proceeds following appointment of a receiver (*id*. § 4617(b)(2)(K)(i))—prohibits the creation of any implicit exceptions. *See United States v. Johnson*, 529 U.S. 53, 58 (2000).

Levin v. Miller, 763 F.3d 667 (7th Cir. 2014), which addressed the analogous succession language in § 1821(d)(2)(A)(i), is not to the contrary. The question whether § 1821(d)(2)(A)(i) extends to direct claims was not litigated in that case, but the concurring judge nonetheless explained that the plain text of § 1821(d)(2)(A)(i) applies to direct claims, noting that the language "rights . . . of

[16] *See Innovative Therapies, Inc. v. Meents*, No. CIV.A. 12-3309, 2013 WL 2919983, at *5 (D. Md. June 12, 2013) (declining to apply *Gentile* exception); *Protas*, 2012 WL 1580969 at *6; *Nikoonahad v. Greenspun Corp.*, No. C09-02242, 2010 WL 1268124, at *5 (N.D. Cal. Mar. 31, 2010).

any stockholder" lacks meaning if § 1821(d)(2)(A)(i) is limited to derivative claims, given the FDIC's succession to "all rights" of the institution itself. *Id.* at 673 (Hamilton, J., concurring). Because the Conservator already can pursue derivative claims belonging to the Enterprises, the statutory phrase "rights … of any stockholder" only has meaning if it encompasses direct claims arising from shareholders' interests in the Enterprises. Accordingly, "[t]he doctrine that statutes should not be construed to render language mere surplusage…weighs in favor of a broader reach that could include direct claims." *Id.* (Hamilton, J., concurring).

Thus, although the Court need not reach this issue because all of Plaintiffs' common-law claims are derivative, the Conservator has also succeeded to stockholders' direct claims.

D. There Is No "Conflict-of-Interest" Exception to HERA's Bar on Shareholder Claims

Class Plaintiffs attempt to avoid the bar on shareholder claims during conservatorship by arguing that a "conflict-of-interest" exception should be judicially created for HERA, notwithstanding its complete absence from the statute. The district court correctly rejected this argument as seeking "an *implicit* end-run around FHFA's conservatorship authority by means of the shareholder derivative suits that the statute explicitly bars." Dkt.51, at 28-29 (JA__).

Plaintiffs rely upon two decisions that created an exception in very limited circumstances for FDIC receiverships—not conservatorships. Class Br. at 25-26

(discussing *First Hartford Corp. Pension Plan & Trust v. United States,* 194 F.3d 1279, 1295–96 (Fed. Cir. 1999) and *Delta Sav. Bank v. United States,* 265 F.3d 1017, 1021-23 (9th Cir. 2001)). But those cases are outliers that are inapplicable here, and their limited holdings should not be expanded. Moreover, analyzing *First Hartford* and *Delta Savings* on their own terms makes clear that those cases were—as the district court recognized—wrongly decided.

1. *First Hartford* and *Delta Savings* Are Inapplicable

First Hartford and *Delta Savings* are, by their own acknowledgment, exceptional cases limited to their facts. *See First Hartford*, 194 F.3d at 1295 ("[O]ur holding is limited to the situation here," and "[w]e neither infer nor express an opinion on the standing of derivative plaintiffs in other circumstances."); *see also Gail C. Sweeney Estate Marital Tr. v. U.S. Treasury Dep't*, 68 F. Supp. 3d 116, 123 n.9 (D.D.C. 2014) (describing *Delta Savings* as "a significant expansion of what . . . *First Hartford* expressly warned was supposed to be a 'very narrow' holding").[17] Those facts are not present here; Plaintiffs' complaints simply do not allege the kind of conflict-of-interest found in either case.

First, contrary to Class Plaintiffs' repeated assertions, *First Hartford* and

[17] Class Plaintiffs cite *Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59 (D.C. Cir. 1988) (Class Br. 26)—a pre-FIRREA, pre-HERA, and pre-*Kellmer* decision—but that case does not support Plaintiffs' argument. In *Gaubert*, the derivative shareholders sought to contest the appointment of a receiver pursuant to 12 U.S.C. § 1464(d)(6)(A)—a provision that specifically authorized the company to bring such actions within a specified timeframe. 863 F.2d at 67-68.

Delta Savings created a conflict-of-interest exception only in the context of failed banking institutions in *receivership*, not conservatorship. In those receivership cases, the shareholders' contingent right to a distribution from the failed institution's liquidation arguably had ripened—a circumstance not presented here. *See infra* Sec. III.B. Indeed, HERA makes clear that, upon appointment of the receiver, shareholders gain the ability to assert claims based on their contingent rights through the administrative and judicial claims process. 12 U.S.C. § 4617(b)(2)(K)(i). Shareholders have no such rights during conservatorship. *See id.* § 4617(b)(2)(A).

Further, as the district court recognized, applying a conflict-of-interest exception "makes still less sense in the conservatorship context, where FHFA enjoys even greater power free from judicial intervention" than in receivership. Dkt.51, at 30 n.30 (JA__). As the district court explained, whereas courts have a role with respect to "issues brought by outside shareholders" in receivership (*i.e.*, they are involved in the process of adjudicating shareholder claims), Congress eliminated shareholder involvement in conservatorship operations. *Id.* (citing 12 U.S.C. § 4617(b)(5), (6)).

Second, *First Hartford* and *Delta Savings* are distinguishable because they involved actions of the federal regulator that allegedly contributed to the imposition of receivership. *See First Hartford*, 194 F.3d at 1283-84, 1295

(concluding FDIC receiver should not control breach-of-contract claim where FDIC's regulatory rulemaking both triggered appointment of the receiver and breached a contract); *Delta Savings*, 265 F.3d at 1019-20 (concluding FDIC receiver should not control claims based on alleged pre-receivership discrimination by OTS when OTS put the bank into receivership after it became the target of discrimination investigations).

Here, Plaintiffs do not seek to vindicate any claims that arose before conservatorship. Rather, Plaintiffs make claims based on actions that allegedly occurred *during* conservatorship, after all shareholder rights were transferred to the Conservator. Thus, their claims do not implicate the unusual considerations underlying *First Hartford* and *Delta Savings*.

2. *First Hartford* and *Delta Savings* Were Wrongly Decided

The district court correctly held that it would be wrong to create a conflict-of-interest exception to HERA, which broadly transfers ***all*** shareholder rights, titles, powers, and privileges. "Because statutory language represents the clearest indication of Congressional intent . . . we must presume that Congress meant precisely what it said." *NPR v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001).

Moreover, creating a judicial exception to HERA would be especially inappropriate because Congress already "considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529

U.S. 53, 58 (2000). FIRREA, like HERA, allows shareholders to prosecute certain claims during receivership by following specific procedures, which is an exception to the statutory rule that conservators and receivers succeed to shareholder rights. *See* 12 U.S.C. §§ 1821(d)(3)-(6), 4617(b)(3)-(6). The existence of this lone, express exception precludes judicial exceptions, including one for "conflict-of-interest."

Further, the rationale behind the conflict-of-interest exception is inapposite here. In *First Hartford*, the court relied heavily on the traditional derivative litigation concept, rooted in common law, that shareholders may bring suit on behalf of the corporation "when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation." *First Hartford*, 194 F.3d at 1295 (discussing *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 95 (1991)). But HERA's succession provision *eliminates* the distinction between shareholder interests on the one hand, and officer and director interests on the other; the conservator succeeds to *all* such interests and is alone empowered to determine what is in the "best interests" of the Enterprises. *See* 12 U.S.C. § 4617(b)(2)(J)(ii).

The district court rightly rejected the proffered exception, explaining:

> [T]he existence of a rule against shareholder derivative suits, § 4617(b)(2)(A)(i) [recognized in *Kellmer*], indicates that courts cannot use the *rationale* for why derivative suits are available

> to shareholders as a legal tool—including the conflict of interest rationale—to carve out an *exception* to that prohibition. Derivative suits largely exist so that shareholders can protect a corporation from those who run it—and HERA takes the right to such suits away from shareholders. How, then, can a court base the exception to a rule barring shareholder derivative suits on the purpose of the 'derivative suit mechanism' that rule seeks to bar? Such an exception would swallow the rule.

Dkt.51, at 29-30 (JA__).

Class Plaintiffs' hodgepodge of additional arguments in support of a conflict-of-interest exception are unpersuasive.

For example, Class Plaintiffs argue that the "structure" of HERA—permitting the shareholders to retain "rights to future distributions" and "the right to participate in a statutory claims process regarding the Companies' residual assets"—supports creation of a conflict-of-interest exception during conservatorship. Class Br. 30. They base this argument on *Branch v. FDIC*, 825 F. Supp. 384 (D. Mass. 1993), which—on its face—is squarely inconsistent with this Court's decision in *Kellmer*, 674 F.3d at 851 (rejecting plaintiffs' reliance on *Branch*[18] and holding that—notwithstanding the shareholders' contingent right in

[18] *See* Kellmer Br. at 35 n.24 (No. 09-5253) (filed May 26, 2011).

HERA to a residue of Enterprise assets—the Conservator alone holds the ability to pursue derivative claims on behalf of the Enterprises).[19]

Class Plaintiffs also argue for a conflict-of-interest exception because the provision of HERA by which shareholder rights are "terminated" in receivership, but not in conservatorship, supposedly suggests that conservatorship-shareholders have greater rights. Class Br. 31-32. Class Plaintiffs are wrong. During conservatorship, the Conservator "succeed[s] to all rights" of the shareholders. 12 U.S.C. § 4617(b)(2)(A)(i). Upon appointment of the receiver, HERA "terminate[s] all rights and claims" the shareholders may have against the Enterprises' assets, but allows shareholders to assert certain claims through the administrative and judicial claims process that occurs in receivership. *See id.* § 4617(b)(2)(K)(i); *id.* § 4617(b)(6). Successful shareholder claims are paid according to the priority scheme established by the statute. 12 U.S.C. § 4617(c). Thus, HERA specifies when and how shareholders may pursue any claims, and it does not allow them to do so during conservatorship.

III. Plaintiffs' Contract-Based Claims Fail as a Matter of Law

Plaintiffs' claims for breach of contract and the implied covenant of good

[19] Other courts have rejected the *Branch* approach as well. *See, e.g.*, *Pareto*, 139 F.3d at 701; *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 797 (E.D. Va. 2009), *aff'd sub nom. La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. 2011); *First Hartford Corp. Pension Plan & Trust v. United States*, 42 Fed. Cl. 599, 614 (1998), *aff'd in pertinent part*, 194 F.3d 1279 (Fed. Cir. 1999).

faith and fair dealing "undeniably [relate to actions] taken by FHFA." Dkt.51, at 33 (JA__). The district court correctly dismissed these claims for lack of ripeness and failure to state a claim. Dkt.51, at 33-41 (JA__).

Before reaching these points, however, it is important to note that the district court also dismissed all such claims on a second, independently dispositive ground—namely, that Plaintiffs' contract and implied covenant claims are derivative and thus barred by HERA's succession provision, 12 U.S.C. § 4617(b)(2)(A)(i). Dkt.51, at 35 n.39, 40 n.45 (JA__). No Plaintiff appealed these alternative holdings. Accordingly, if this Court affirms the lower court's ruling that HERA bars all shareholder derivative claims during conservatorship (*see supra* Sec. II), then the Court need not reach whether these claims also fail for additional reasons. *See Williams v. Otis Elevator Co.*, 557 F. App'x 299, 303 (5th Cir. 2014) ("Where an appellant challenges only one of the district court's alternative holdings, the argument that the other alternative holding was in error is waived.").

A. Plaintiffs Cannot State a Claim Based on a Present or Absolute Right to Dividends Because No Such Right Exists

The district court correctly held that Plaintiffs' breach-of-contract claims for alleged loss of dividends—which supposedly derive from the terms of their stock

certificates with the GSEs[20]—fail to state a claim because Plaintiffs have no "present or absolute right to dividends." Dkt.51, at 37 (JA__). Thus, Plaintiffs "cannot state a claim for breach of contract specifically based on their alleged dividend entitlements." Dkt.51, at 39 (JA__). And for the same reason, Plaintiffs cannot state a claim for breach of the implied covenant of good faith and fair dealing. Dkt.51, at 40-41 (JA__).

The Third Amendment could not have nullified Plaintiffs' contractual rights to dividends, as Class Plaintiffs argue (Class Br. 35-36), because the terms of their certificates remain unchanged. Both before and after the Third Amendment, Plaintiffs' stock certificates provide for dividends "when, as and if declared by the Board of Directors," "in its sole discretion," and only after dividends owed to more senior preferred shareholders—like Treasury—have been paid.[21] *See, e.g.*, Fannie Mae, Cert. Design. for Series T Preferred Stock, § 2(a),(c),(d) (JA__); Freddie Mac, Cert. Design. for Series M Preferred Stock, § 2(a), (d), (e) (JA__).

Plaintiffs contend they have an enforceable right "to the possibility of discretionary dividend payments in the future" entitling them to monetary damages. Class Br. at 35, 36 n.18. This is wrong. Plaintiffs "have no right to

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[20] *See* Consol. Compl. ¶ 84-87, 143 (JA__); Fairholme Compl. ¶ 124 (JA__); Arrowood Compl. ¶¶ 92, 95-96, Prayer for Relief E (JA__).

[21] Contrary to Class Plaintiffs' argument (at 36), the Conservator's discretion to declare dividends, unlike that of a corporate board, is without limitation and is not subject to judicial review under HERA. *See* Sec. I, *supra*.

dividends until they are declared." *See Pa. Co. for Ins. on Lives & Granting Annuities v. Cox,* 199 A. 671, 673 (Del. 1938); *O'Brien v. Socony Mobil Oil Co.*, 152 S.E.2d 278, 285-86 (Va. 1967).

Plaintiffs are also wrong to argue that dividends have been paid to Treasury in violation of "the contractual priority rights of preferred shareholders and the contractual ratability rights of the common shareholders." Class Br. 38. This contention is premised on Plaintiffs' argument that the Third Amendment is invalid, and that payments of Treasury's dividend following the Third Amendment should therefore be considered "gratuit[ies]" in excess of Treasury's 10% coupon. *See* Class Br. 37-39 & n.19. As shown above, the Third Amendment was a valid exercise of the Conservator's powers, defeating Plaintiffs' argument in its tracks. Moreover, following the Third Amendment, the certificates for Treasury's Preferred Shares "expressly and clearly" preserve Treasury's senior-most dividend and liquidation rights. Dkt.51, at 40 n. 44 (JA__). Thus, Treasury, as a preferred shareholder ranking prior to Plaintiffs, received dividend payments that accorded with the Enterprises' capital structure; they were not "gratuities."

That Plaintiffs have no contractual right to dividends also dooms any claim for breach of the implied covenant of good faith and fair dealing, which is a narrow and extraordinary doctrine. "[W]hen the contract is unambiguous regarding a lack of contractual right, there cannot be a coinciding claim of breach of the implied

covenant of good faith and fair dealing." Dkt.51, at 39 (JA__). The "[e]xisting contract terms control," and Plaintiffs cannot use the implied covenant "to create a free-floating duty . . . unattached to the underlying legal document." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (internal quotation marks and citation omitted); *Rogers v. Deane*, 992 F. Supp. 2d 621, 633 (E.D. Va. 2014); *Frank Brunckhorst Co., LLC v. Coastal Atl., Inc.*, 542 F. Supp. 2d 452, 465 (E.D. Va. 2008).

B. Plaintiffs' Claims Based on an Alleged Loss of Liquidation Preference Are Not Ripe

The district court correctly held that Plaintiffs' claims arising from the alleged loss of their contingent right to the residual value of the Enterprises in liquidation are not ripe. Dkt.51, at 33 (JA__). The ripeness doctrine prevents the "premature adjudication" of "abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). To determine ripeness, a court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Texas v. United States*, 523 U.S. 296, 301 (1998). The district court properly concluded that Plaintiffs lack liquidation-preference rights unless and until the Enterprises enter receivership, thus their claims are not ripe. Dkt.51, at 33-34 (JA__). Plaintiffs offer no reason to disturb the district court's well-reasoned opinion.

Under the terms of Appellants' certificates of designation, Plaintiffs may

receive a liquidation preference "only during liquidation." *See* Dkt.51, at 34 (JA__). This contingency has not occurred. In addition, Plaintiffs have not alleged a "certainly impending" injury if the Court waits until liquidation to adjudicate their liquidation-preference rights. *See Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999) ("[T]he ripeness requirement excludes cases not involving present injury.").

IV. The District Court Correctly Held FHFA's Document Compilation Irrelevant to the Resolution of Plaintiffs' Claims

Plaintiffs argue that the district court improperly "relied on" allegedly incomplete administrative records in dismissing Plaintiffs' claims, and request remand to permit discovery and purported completion of such records. Inst. Br. 67-72. Plaintiffs are wrong, and the district court did not abuse its discretion in denying Plaintiffs' motion to compel supplementation of the records.

As a threshold matter, FHFA, acting as Conservator, is not required to maintain or file an administrative record in the first instance. Indeed, an APA review of records is wholly unavailable where another "statute[] preclude[s] judicial review." 5 U.S.C. § 701(a)(1). HERA is such a statute. *See* 12 U.S.C. § 4617(f).

In addition, Treasury's administrative record and FHFA's document compilation played no role in the ruling now on appeal. The district court accepted Plaintiffs' allegations as true; it nevertheless dismissed the complaints based on

threshold legal issues—without reliance on the administrative record and document compilation—concluding that "HERA's unambiguous statutory provisions … compel[led] the dismissal of all of the plaintiffs' claims." Dkt.51, at 52 (JA__); *see also* Dkt.51, at 10-11 (JA__) ("[T]he complaint is construed liberally in the plaintiffs' favor," and the court "assume[s] the truth of all material factual allegations."). Indeed, the district court held the document compilation—submitted by FHFA only in support of its alternative motion for summary judgment—"irrelevant" to the court's decision to grant the motions to dismiss. Dkt.51, at 21 (JA__).

For these same reasons, Defendants oppose Plaintiffs' motion to supplement the record with materials from another case. FHFA Opp'n to Mot. for Judicial Notice, Doc. Number 1569025, at 7-13. Because the district court accepted Plaintiffs' allegations as true, supplementation can have no bearing on the issues presented, nor can it change the fact that Plaintiffs' claims fail as a matter of law.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Dated: December 21, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify as follows:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,979 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii);

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Times New Roman font.

Dated: December 21, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2015, I electronically filed the foregoing document with the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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ADDENDUM OF PERTINENT AUTHORITIES

12 U.S.C. § 1455 note (Pub. L. No. 111-203, Title XIII, § 1304(d), July 21, 2010, 124 Stat. 2134)

(d) REPAYMENT OF FEES.—Any periodic commitment fee or any other fee or assessment paid by the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation to the Secretary of the Treasury as a result of any preferred stock purchase agreement, mortgage-backed security purchase program, or any other program or activity authorized or carried out pursuant to the authorities granted to the Secretary of the Treasury under section 1117 of the Housing and Economic Recovery Act of 2008 *2135 (Public Law 110–289; 122 Stat. 2683), including any fee agreed to by contract between the Secretary and the Association or Corporation, shall be deposited in the General Fund of the Treasury where such amounts shall be—

(1) dedicated for the sole purpose of deficit reduction; and

(2) prohibited from use as an offset for other spending increases or revenue reductions.

12 U.S.C. § 4513

§ 4513. Duties and authorities of Director

(a) Duties

(1) Principal duties
The principal duties of the Director shall be--

(A) to oversee the prudential operations of each regulated entity; and

(B) to ensure that--

(i) each regulated entity operates in a safe and sound manner, including maintenance of adequate capital and internal controls;

(ii) the operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets (including activities relating to mortgages on

housing for low- and moderate-income families involving a reasonable economic return that may be less than the return earned on other activities);

(iii) each regulated entity complies with this chapter and the rules, regulations, guidelines, and orders issued under this chapter and the authorizing statutes;

(iv) each regulated entity carries out its statutory mission only through activities that are authorized under and consistent with this chapter and the authorizing statutes; and

(v) the activities of each regulated entity and the manner in which such regulated entity is operated are consistent with the public interest.

(2) Scope of authority
The authority of the Director shall include the authority--

(A) to review and, if warranted based on the principal duties described in paragraph (1), reject any acquisition or transfer of a controlling interest in a regulated entity; and

(B) to exercise such incidental powers as may be necessary or appropriate to fulfill the duties and responsibilities of the Director in the supervision and regulation of each regulated entity.
. . .

12 U.S.C. § 4617

§ 4617. Authority over critically undercapitalized regulated entities

(a) Appointment of the Agency as conservator or receiver

(1) In general
Notwithstanding any other provision of Federal or State law, the Director may appoint the Agency as conservator or receiver for a regulated entity in the manner provided under paragraph (2) or (4). All references to the conservator or receiver under this section are references to the Agency acting as conservator or receiver.

(2) Discretionary appointment
The Agency may, at the discretion of the Director, be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity.
. . .

(4) Mandatory receivership

(A) In general
The Director shall appoint the Agency as receiver for a regulated entity if the Director determines, in writing, that--

(i) the assets of the regulated entity are, and during the preceding 60 calendar days have been, less than the obligations of the regulated entity to its creditors and others; or

(ii) the regulated entity is not, and during the preceding 60 calendar days has not been, generally paying the debts of the regulated entity (other than debts that are the subject of a bona fide dispute) as such debts become due.

(B) Periodic determination required for critically undercapitalized regulated entity
If a regulated entity is critically undercapitalized, the Director shall make a determination, in writing, as to whether the regulated entity meets the criteria specified in clause (i) or (ii) of subparagraph (A)--

(i) not later than 30 calendar days after the regulated entity initially becomes critically undercapitalized; and

(ii) at least once during each succeeding 30-calendar day period.

(C) Determination not required if receivership already in place
Subparagraph (B) does not apply with respect to a regulated entity in any period during which the Agency serves as receiver for the regulated entity.

(D) Receivership terminates conservatorship

The appointment of the Agency as receiver of a regulated entity under this section shall immediately terminate any conservatorship established for the regulated entity under this chapter.

(b) Powers and duties of the Agency as conservator or receiver

. . .

(2) General powers

(A) Successor to regulated entity
The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to--

(i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity; and . . .

(B) Operate the regulated entity
The Agency may, as conservator or receiver--

(i) take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity;

(ii) collect all obligations and money due the regulated entity;

(iii) perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator or receiver;

(iv) preserve and conserve the assets and property of the regulated entity; and

(v) provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver.

…

(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.

(E) Additional powers as receiver
In any case in which the Agency is acting as receiver, the Agency shall place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity in such manner as the Agency deems appropriate, including through the sale of assets, the transfer of assets to a limited-life regulated entity established under subsection (i), or the exercise of any other rights or privileges granted to the Agency under this paragraph.
. . .

(G) Transfer or sale of assets and liabilities
The Agency may, as conservator or receiver, transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale.

(H) Payment of valid obligations
The Agency, as conservator or receiver, shall, to the extent of proceeds realized from the performance of contracts or sale of the assets of a regulated entity, pay all valid obligations of the regulated entity that are due and payable at the time of the appointment of the Agency as conservator or receiver, in accordance with the prescriptions and limitations of this section.
…

(J) Incidental powers

The Agency may, as conservator or receiver--

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this section, and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity or the Agency.

(K) Other provisions

(i) Shareholders and creditors of failed regulated entity
Notwithstanding any other provision of law, the appointment of the Agency as receiver for a regulated entity pursuant to paragraph (2) or (4) of subsection (a) and its succession, by operation of law, to the rights, titles, powers, and privileges described in subsection (b)(2)(A) shall terminate all rights and claims that the stockholders and creditors of the regulated entity may have against the assets or charter of the regulated entity or the Agency arising as a result of their status as stockholders or creditors, except for their right to payment, resolution, or other satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e).

(ii) Assets of regulated entity
Notwithstanding any other provision of law, for purposes of this section, the charter of a regulated entity shall not be considered an asset of the regulated entity.

(3) Authority of receiver to determine claims

(A) In general
The Agency may, as receiver, determine claims in accordance with the requirements of this subsection and any regulations prescribed under paragraph (4).

(B) Notice requirements
The receiver, in any case involving the liquidation or winding up of the affairs of a closed regulated entity, shall--

(i) promptly publish a notice to the creditors of the regulated entity to present their claims, together with proof, to the

receiver by a date specified in the notice which shall be not less than 90 days after the date of publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the date of publication under clause (i).

(C) Mailing required
The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the books of the regulated entity--

(i) at the last address of the creditor appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the books of the regulated entity, within 30 days after the discovery of such name and address.

(4) Rulemaking authority relating to determination of claims
Subject to subsection (c), the Director may prescribe regulations regarding the allowance or disallowance of claims by the receiver and providing for administrative determination of claims and review of such determination.

(5) Procedures for determination of claims

(A) Determination period

(i) In general
Before the end of the 180-day period beginning on the date on which any claim against a regulated entity is filed with the Agency as receiver, the Agency shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

(ii) Extension of time
The period described in clause (i) may be extended by a written agreement between the claimant and the Agency.

(iii) Mailing of notice sufficient

The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to the last address of the claimant which appears--

(I) on the books of the regulated entity;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of the claim.

(iv) Contents of notice of disallowance
If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain--

(I) a statement of each reason for the disallowance; and

(II) the procedures available for obtaining agency review of the determination to disallow the claim or judicial determination of the claim.

(B) Allowance of proven claim
The receiver shall allow any claim received on or before the date specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

(C) Disallowance of claims filed after filing period
Claims filed after the date specified in the notice published under paragraph (3)(B)(i), or the date specified under paragraph (3)(C), shall be disallowed and such disallowance shall be final.

(D) Authority to disallow claims

(i) In general
The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver.

(ii) Payments to less than fully secured creditors

In the case of a claim of a creditor against a regulated entity which is secured by any property or other asset of such regulated entity, the receiver--

(I) may treat the portion of such claim which exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim against the regulated entity; and

(II) may not make any payment with respect to such unsecured portion of the claim, other than in connection with the disposition of all claims of unsecured creditors of the regulated entity.

(iii) Exceptions
No provision of this paragraph shall apply with respect to--

(I) any extension of credit from any Federal Reserve Bank, Federal Home Loan Bank, or the United States Treasury; or

(II) any security interest in the assets of the regulated entity securing any such extension of credit.

(E) No judicial review of determination pursuant to subparagraph (D)
No court may review the determination of the Agency under subparagraph (D) to disallow a claim.

(F) Legal effect of filing

(i) Statute of limitation tolled
For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions
Subject to paragraph (10), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the date of the appointment of the receiver, subject to the determination of claims by the receiver.

(6) Provision for judicial determination of claims

(A) In general
The claimant may file suit on a claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the principal place of business of the regulated entity is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim), before the end of the 60-day period beginning on the earlier of--

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a regulated entity for which the Agency is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i).

(B) Statute of limitations
A claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver), and such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim, if the claimant fails, before the end of the 60-day period described under subparagraph (A), to file suit on such claim (or continue an action commenced before the appointment of the receiver).
. . .

(14) Accounting and recordkeeping requirements

(A) In general
The Agency as conservator or receiver shall, consistent with the accounting and reporting practices and procedures established by the Agency, maintain a full accounting of each conservatorship and receivership or other disposition of a regulated entity in default.

(B) Annual accounting or report
With respect to each conservatorship or receivership, the Agency shall make an annual accounting or report available to the Board, the

Comptroller General of the United States, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives.

(C) Availability of reports
Any report prepared under subparagraph (B) shall be made available by the Agency upon request to any shareholder of a regulated entity or any member of the public.

(D) Recordkeeping requirement
After the end of the 6-year period beginning on the date on which the conservatorship or receivership is terminated by the Director, the Agency may destroy any records of such regulated entity which the Agency, in the discretion of the Agency, determines to be unnecessary, unless directed not to do so by a court of competent jurisdiction or governmental agency, or prohibited by law.
. . .

(c) Priority of expenses and unsecured claims

(1) In general
Unsecured claims against a regulated entity, or the receiver therefor, that are proven to the satisfaction of the receiver shall have priority in the following order:

(A) Administrative expenses of the receiver.

(B) Any other general or senior liability of the regulated entity (which is not a liability described under subparagraph (C) or (D).

(C) Any obligation subordinated to general creditors (which is not an obligation described under subparagraph (D)).

(D) Any obligation to shareholders or members arising as a result of their status as shareholder or members.

(2) Creditors similarly situated
All creditors that are similarly situated under paragraph (1) shall be treated in a similar manner, except that the receiver may take any action (including making payments) that does not comply with this subsection, if--

(A) the Director determines that such action is necessary to maximize the value of the assets of the regulated entity, to maximize the present value return from the sale or other disposition of the assets of the regulated entity, or to minimize the amount of any loss realized upon the sale or other disposition of the assets of the regulated entity; and

(B) all creditors that are similarly situated under paragraph (1) receive not less than the amount provided in subsection (e)(2).

(3) Definition
As used in this subsection, the term "administrative expenses of the receiver" includes--

(A) the actual, necessary costs and expenses incurred by the receiver in preserving the assets of a failed regulated entity or liquidating or otherwise resolving the affairs of a failed regulated entity; and

(B) any obligations that the receiver determines are necessary and appropriate to facilitate the smooth and orderly liquidation or other resolution of the regulated entity.

(d) Provisions relating to contracts entered into before appointment of conservator or receiver . . .

(2) Timing of repudiation

The conservator or receiver shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.
. . .

(f) Limitation on court action
Except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver.

H.R. 2029, 114th Cong. § 702, Tit. VII, Div. O (enacted Dec. 18, 2015)

SEC. 702. LIMITATIONS ON SALE OF PREFERRED STOCK.

(a) DEFINITIONS.—In this section:

(1) SECRETARY.—The term ''Secretary'' means the Secretary of the Treasury.

(2) SENIOR PREFERRED STOCK PURCHASE AGREEMENT.— The term ''Senior Preferred Stock Purchase Agreement'' means—

(A) the Amended and Restated Senior Preferred Stock Purchase Agreement, dated September 26, 2008, as such Agreement has been amended on May 6, 2009, December 24, 2009, and August 17, 2012, respectively, and as such Agreement may be further amended and restated, entered into between the Department of the Treasury and each enterprise, as applicable; and

(B) any provision of any certificate in connection with such Agreement creating or designating the terms, powers, preferences, privileges, limitations, or any other conditions of the Variable Liquidation Preference Senior Preferred Stock of an enterprise issued or sold pursuant to such Agreement.

(b) LIMITATIONS ON SALE OF PREFERRED STOCK.— Notwithstanding any other provision of law or any provision of the Senior Preferred Stock Purchase Agreement, until at least January 1, 2018, the Secretary may not sell, transfer, relinquish, liquidate, divest, or otherwise dispose of any outstanding shares of senior preferred stock acquired pursuant to the Senior Preferred Stock Purchase Agreement, unless Congress has passed and the President has signed into law legislation that includes a specific instruction to the Secretary regarding the sale, transfer, relinquishment, liquidation, divestiture, or other disposition of the senior preferred stock so acquired.

(c) SENSE OF CONGRESS.—It is the Sense of Congress that Congress should pass and the President should sign into law legislation determining the future of Fannie Mae and Freddie Mac, and that notwithstanding the expiration of subsection (b), the Secretary should not sell, transfer,

relinquish, liquidate, divest, or otherwise dispose of any outstanding shares of senior preferred stock acquired pursuant to the Senior Preferred Stock Purchase Agreement until such legislation is enacted.