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ORAL ARGUMENT SCHEDULED FOR APRIL 15, 2016

Nos. 14-5243 (L), 14-5254 (con.), 14-5260 (con.), 14-5262 (con.)

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

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal From The United States District Court
For The District Of Columbia

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GLOSSARY

Institutional Plaintiffs	Appellants Perry Capital LLC, Arrowood Indemnity Co., *et al.*, and Fairholme Funds Inc., *et al.*
HERA	The Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654
FDIA	Federal Deposit Insurance Act
FDIC	Federal Deposit Insurance Corporation
FHFA	Federal Housing Finance Agency
The Net Worth Sweep, or the Third Amendment	The Third Amendment to the Senior Preferred Stock Purchase Agreements between the United States Department of the Treasury and the Federal Housing Finance Agency, as conservator to the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, dated August 17, 2012, and the declaration and payment of dividends pursuant to the Third Amendment beginning on January 1, 2013
Treasury	United States Department of the Treasury

INTRODUCTION

The Federal Housing Finance Agency ("FHFA") and the Department of the Treasury may exercise only the powers that Congress gave them, and their actions are limited by the obligations that Congress imposed. Both agencies exceeded their authority—to the government's immense profit—at the expense of Fannie Mae and Freddie Mac's shareholders, including the Institutional Plaintiffs. The Net Worth Sweep Amendment should be vacated.

The Housing and Economic Recovery Act of 2008 ("HERA") permitted FHFA to take control of Fannie Mae and Freddie Mac (the "Companies") as their conservator, but—like conservators under the common law and other congressionally-established financial regulatory regimes—obligated FHFA to preserve and conserve the Companies' assets and to work to rehabilitate them to a sound and solvent condition. For Treasury's part, the statute granted Treasury authority to purchase securities from the Companies, but after 2009, permitted Treasury only to exercise rights it had received in connection with those purchases.

As of January 2016, Treasury has stripped more than $241 billion from the Companies—$54 billion more than Treasury put into them. The Companies received no credit for those payments against Treasury's $189 billion liquidation preference, and Treasury will take in more every quarter that the Net Worth Sweep persists. As a result, the Companies—the entities that FHFA as conservator is bound to try to rehabilitate to a sound and solvent condition—are held captive in a financial limbo, too undercapitalized to operate independently and too essential to the markets to liquidate.

Seeking to perpetuate its windfall, Treasury—but not FHFA—argues that Section 4617(b)(2)(A) of HERA bars derivative claims and therefore precludes Institutional Plaintiffs' APA claims. But the Net Worth Sweep's elimination of Plaintiffs' ability to receive dividends and recover on their liquidation preferences are injuries Plaintiffs suffer *directly* as holders of the Companies' preferred stock; they are not injuries suffered by the Companies. And HERA does not—because it could not—provide that FHFA as conservator "succeed[s] to" shareholders' direct claims against the government that authored their injuries; that would be a taking.

Section 4617(f) of HERA also does not preclude this lawsuit. That provision prohibits only suits that would restrain FHFA's exercise of its conservatorship powers. Plaintiffs' APA claim against FHFA turns on whether the Net Worth Sweep was a valid act of conservatorship or, if not, was void *ab initio*. That question does not implicate Section 4617(f). As FHFA recognizes in its regulations, HERA requires a conservator to preserve and conserve the Companies' assets and to work to rehabilitate the Companies to a sound and solvent condition. Contrary to FHFA's newly minted position (contradicting those regulations), these are not merely suggestions from Capitol Hill that FHFA is free to ignore. Decades of FDIC practice and centuries of common law demonstrate that these obligations define what a conservator *is*.

The Net Worth Sweep is antithetical to these statutory commands. Treasury attempts to reconcile the Net Worth Sweep with HERA by claiming the Sweep was necessary to avert a "downward spiral," in which the Companies would borrow from, and eventually exhaust, Treasury's funding commitment to pay ever-larger cash dividends to Treasury. This narrative—to which FHFA evidently no longer subscribes—cannot be credited. REDACTED the agencies knew the Companies were about to become immensely profitable and that there was no danger—much less an imminent one—of exhausting Treasury's funding commitment. Indeed, there was no obligation for the Companies to pay dividends in cash *at all*. Instead, the Companies were authorized, in their sole discretion, to pay dividends "in-kind" by increasing Treasury's liquidation preference. FHFA *chose* to have the Companies draw from Treasury to pay dividends in cash. Thus, if there ever existed a threat of a "downward spiral," it was a threat of FHFA's own making.

Treasury, too, grossly exceeded its statutory authority. That agency seeks to hide behind FHFA, arguing that vacating Treasury's illegal action would "restrain or affect" FHFA's conservatorship powers in violation of Section 4617(f). But a provision precluding certain actions against *FHFA* cannot be read to preclude adjudication of APA claims against *Treasury*. This Court is empowered to restrain actions of Treasury in excess of its statutory authority, and the Net Worth Sweep cannot be justified by reference to Treasury's residual authority to exercise rights received in connection with its preferred securities. Indeed, the Net Worth Sweep so transformed the securities' terms that the transaction amounted to a purchase of new securities—executed long after Treasury's purchasing authority had expired. And even if Treasury had authority to enter into the Net Worth Sweep, that could not justify the arbitrary and capricious process that led to it.

Finally, the agencies abjectly failed to meet their obligations to produce the full and complete administrative record reflecting the decisionmaking process that led to the Net Worth Sweep. That itself warrants vacatur and a remand for further proceedings. The administrative record is essential to the evaluation of whether FHFA was acting within its statutory authority as conservator. That is why, in the court below, both agencies repeatedly cited that record to support their "death spiral" narrative—REDACTED

Institutional Plaintiffs are entitled to have their claims considered in view of the true and complete record of the agencies' decisionmaking—not an obviously incomplete "document compilation" engineered for litigation.

ARGUMENT

I. THE COURT SHOULD NOT ACCEPT THE AGENCIES' MISLEADING ACCOUNT OF THE RELEVANT FACTS.

For litigants who claim that the facts of this case do not matter, Treasury and FHFA devote a remarkable portion of their briefs to explaining their version of events. The agencies' factual account is inconsistent not only with the allegations in Plaintiffs' complaints, but also with information absent from the administrative record but that now is before the Court through Fairholme's pending motion for judicial notice. The Court should not decide this case on the basis of the government's assertions of fact, particularly now that those assertions have been demonstrated to be inaccurate.

Treasury asserts that it acted "[t]o break [the] cycle" of the Companies drawing on Treasury funds to pay dividends and that it "anticipated that the amount of money it would receive under the new dividend formula would be 'materially equivalent' to what it would have received under the 10% dividend formula." Treasury Br. 10-11. But the financial projections that Treasury cites were nearly a year old when the Net Worth Sweep was imposed. *See* Mot. for Judicial Notice ("MJN") 12. REDACTED [redacted]

REDACTED [redacted][1] It is thus apparent that the agencies knew the Net Worth Sweep would result in a windfall for the federal government.

REDACTED [redacted]

Administrative law depends on agencies being forthright about the reasons for their decisions, which is why agencies are required to produce the complete record of their decisionmaking. The materials now before the Court show that the agencies have not satisfied that threshold requirement for validation of agency action.

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[1] REDACTED [redacted] the sworn declaration FHFA submitted to the district court, which claimed that "neither the Conservator nor Treasury envisioned at the time of the [Net Worth Sweep] that Fannie Mae's valuation allowance on its deferred tax assets would be reversed in early 2013, resulting in a sudden and substantial increase in Fannie Mae's net worth," Ugoletti Decl. ¶ 20, FHFA 0009-10. REDACTED [redacted]

II. INSTITUTIONAL PLAINTIFFS HAVE STANDING TO CHALLENGE THE NET WORTH SWEEP.

The APA permits individuals or entities to seek judicial intervention when they are "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. Neither agency contests that Institutional Plaintiffs are aggrieved by the Net Worth Sweep: By transferring the Companies' future net worth to Treasury in perpetuity, the Net Worth Sweep guarantees that Institutional Plaintiffs will never receive the benefit of their $25 per-share liquidation preferences and are precluded from receiving dividends under their preferred stock.

Treasury (but not FHFA) nonetheless argues that HERA's succession-of-rights provision—which provides that FHFA "shall, as conservator ... immediately succeed to … all rights, titles, powers, and privileges ... of any stockholder ... with respect to the [Companies] and the assets of the [Companies]," 12 U.S.C. § 4617(b)(2)(A)—prohibits this Court from adjudicating Institutional Plaintiffs' APA claims. Treasury Br. 16-25. Treasury errs.

Under Section 4617(b)(2)(A), the conservator succeeds to shareholders' rights only "with respect to the [Companies]"; it does not succeed to shareholders' own rights under their stock certificates. This provision thus bars (at most) only shareholder derivative claims on the Companies' behalf; it does not prohibit shareholders from seeking relief for direct injuries. *See* Class Pls.' Reply Part I. And Plaintiffs' APA claims unquestionably are direct claims, brought in accordance with a federal statute, to redress injuries the Institutional Plaintiffs directly have suffered. As the Delaware Supreme Court has explained, "shareholders are harmed, uniquely and individually" where an insider is "overpa[id]" out of corporate funds because it "extract[s] from the public shareholders ... a portion of the economic value" of their shares. *Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006).[2] The Net Worth Sweep facilitated such an "extraction" of the Companies' funds and eliminated the prospect that Institutional Plaintiffs might ever benefit from their liquidation preferences or dividend rights. That the Net Worth Sweep *also* harmed the Companies is irrelevant because shareholders with direct injuries may sue "even if the corporation's rights are also implicated." *Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331 (1990).[3]

That Institutional Plaintiffs seek an equitable remedy vacating the Net Worth Sweep does not transform their direct claims into derivative claims. *See* Treasury Br. 18-19. "[C]ourts have been more prepared to permit the plaintiff to characterize

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[2] *See also Gatz v. Ponsoldt*, 925 A.2d 1265, 1280-81 (Del. 2007); *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 330-32 (Del. 1993); *In re El Paso Pipeline Partners, LP*, 2015 WL 7758609, at *28 (Del. Ch. Dec. 2, 2015).

[3] Fairholme's fiduciary-duty claim is direct for the same reasons. Treasury asserts that Virginia law bars direct shareholder suits for breaches of fiduciary duty, Treasury Br. 21 n.5, but the case Treasury cites acknowledged the possibility that Virginia would adopt Delaware law on this issue. Fairholme's contract-based claims likewise are direct. *See NAF Holdings v. Li & Fung (Trading), Ltd.*, 118 A.3d 175, 176 (Del. 2015).

[an] action as direct when the plaintiff is seeking only injunctive or prospective relief," *Grimes v. Donald*, 673 A.2d 1207, 1213 (Del. 1996), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000), especially when that relief seeks to unwind the transaction that harmed the plaintiff, *see, e.g.*, *Grayson v. Imagination Station, Inc.*, 2010 WL 3221951, at *6 (Del. Ch. Aug. 16, 2010); *Gatz v. Ponsoldt*, 2004 WL 3029868, at *8 (Del. Ch. Nov. 5, 2004).

And Treasury has no answer to the point that shareholders of an entity in conservatorship retain the right to bring derivative claims (which the APA claims are not) where, as here, the conservator has a "manifest conflict of interest." *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012) (citing *First Hartford Sav. Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999)); *see also* Class Pls.' Br. 23-34; Class Pls.' Reply Part I.

III. FHFA EXCEEDED ITS STATUTORY AUTHORITY WHEN IT AGREED TO THE NET WORTH SWEEP.

The APA authorizes courts to "set aside agency action ... in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C). HERA charged FHFA with rehabilitating the Companies to a sound and solvent condition. 12 U.S.C. § 4617(a)(2), (b)(2)(D)(i). But instead FHFA caused the Companies to give to Treasury nearly $130 billion more than they would have paid Treasury under the

10% cash dividend, forever prohibited from recapitalizing, with Treasury's $189 billion liquidation preference unchanged.[4] These actions self-evidently did not preserve or conserve the Companies' assets, nor are they even arguably consistent with rehabilitating the Companies to a sound and solvent condition. Rather, FHFA's stated purpose in entering into the Net Worth Sweep was to prevent the Companies from ever being rehabilitated to a sound and solvent condition, thereby fostering a housing finance system without Fannie and Freddie. That might have been a valid policy choice for Congress to make, but it is not one that HERA permits FHFA as conservator to make: HERA gave no warrant to FHFA as conservator to put the Companies on a path to elimination.

A. HERA Does Not Prohibit Suits Against FHFA Alleging That FHFA Exceeded Its Powers As Conservator.

As Treasury concedes (at 26), Section 4617(f) "is inapplicable when FHFA acts beyond the scope of its conservator power," *Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013). Plaintiffs' APA claims that FHFA exceeded its statutory authority thus are open to judicial review.

FHFA argues that it is operating within its authority as conservator whenever it "enter[s] into contracts on behalf of the [Companies]," and "transfer[s] or sell[s]

[4] Treasury & Federal Reserve Purchase Programs for GSE & Mortgage-Related Securities 2-3 (Dec. 31, 2015), http://www.fhfa.gov/DataTools/Downloads/Documents/Market-Data/Current_Market_Data-2015-12-31.pdf.

any ... asset or liability." FHFA Br. 24. On FHFA's view, so long as its transaction is of a *type* that HERA authorizes a conservator to undertake (*e.g.*, transfer of an asset), it does not matter whether that transaction comports with what FHFA itself has described as the "statutory mission" of the HERA conservator (*i.e.*, to "preserve and conserve" the Companies' assets so that the Companies might be "rehabilitate[d]" to a "sound and solvent condition"). FHFA Br. 24-25.

This understanding of FHFA's statutory obligations as conservator is radical, wrong, and dangerous. If it were correct, FHFA could give all of the Companies' assets to FHFA's director and, simply because the gifts were transfers of assets, they would be deemed valid acts of a conservator and immune from judicial review. Similarly, *any* contract FHFA entered into on the Companies' behalf—even if it were a contract to sell all of their assets (*i.e.*, to liquidate them)—would be a valid conservatorship action simply because it was a contract.

But Congress did not grant FHFA such unbounded authority. Instead, when it enacted HERA, Congress required that FHFA act as a "*conservator*," 12 U.S.C. § 4617(b)(2)(B)—a term with deep roots in the common law, which confirms that the role is one of a *fiduciary*. *See* Opening Br. 30-31; 60 Plus Br. 11-12.[5] Congress was aware of the "cluster of ideas ... attached" to this common law term when it selected it. *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000). And Congress knew of the decades-long history and practice of FDIC conservatorships when it borrowed language from the FDIC's governing statute to further describe FHFA's duties as conservator. Investors Unite Br. 17. Indeed, their respective statutory charges as conservator are substantially identical. *Compare* 12 U.S.C. § 4617(b)(2)(D), *with* 12 U.S.C. § 1821(d)(2)(D).

FHFA argues that this well-established understanding of the role of a conservator should be dismissed as "pre-HERA [] law," FHFA Br. 35, and that HERA instead should be construed without reference to the understanding of conservatorships that Congress undoubtedly had in mind when it incorporated language from the Fedearl Deposit Insurance Act ("FDIA") into HERA. It suggests that, quite unlike the FDIA, which long has been recognized as establishing mandatory duties, *see*, *e.g.*, *RTC v. Walde*, 18 F.3d 943, 944 (D.C. Cir. 1994)

[5] FHFA's cite to *Kellmer*, 674 F.3d at 850, misses the mark. FHFA Br. 35. In considering whether plaintiffs could maintain derivative actions on the Companies' behalf, the court found that the plain text of Section 4617(b)(2)(A)(i) displaced the common law. *Id.* Here, Institutional Plaintiffs do not invoke the common law to displace HERA's text, but to illuminate its use of the term "conservator."

(conservator "is to preserve and conserve ... assets and property") (citation omitted); *RTC v. United Trust Fund, Inc.*, 57 F.3d 1025, 1033 (11th Cir. 1995) ("The conservator's mission is to conserve assets ...."), HERA's identical use of "may" demonstrates that, as conservator, FHFA, uniquely, has no duty to preserve or conserve assets or to rehabilitate its charges to a sound and solvent condition. *Contra Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law," and to have "adopte[d] that interpretation").

But the presumption that the word "may" "implies some degree of discretion," can be "defeated by ... obvious inferences from the structure and purpose of the statute." *United States v. Rodgers*, 461 U.S. 677, 707 (1983). Here, in addition to HERA's ancestry, FHFA's reading of "may" is inconsistent with the statutory design, which, like virtually all grants of agency power, constitutes a limited delegation of authority from Congress. That Congress, in describing FHFA's "powers as conservator," spelled out that the conservator "may" "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," means that FHFA does not have other powers as conservator. *See Michigan v. EPA*, 268 F.3d

1075, 1082 (D.C. Cir. 2001) (finding that "Congress has not delegated authority to the agency to act beyond these [enumerated] statutory parameters"). And similarly, in describing a conservator's power to operate the Companies, that Congress listed five things that FHFA "may" do, 12 U.S.C. § 4617(b)(2)(B), means FHFA may not operate the Companies in any other manner, much less in a manner at war with the directive inherent in Congress's grant of conservatorship authority.

That HERA instead imposes obligations that the conservator must observe is confirmed by FHFA's own notice-and-comment regulations concerning the "conduct of conservatorships." 12 U.S.C. § 4617(b)(1). Those regulations make clear that preserving and conserving assets and rehabilitating the Companies to a sound and solvent condition are not mere suggestions, but rather constitute FHFA's central statutory mission. For example, FHFA explained:

- "As one of *the primary objectives of conservatorship* of a regulated entity would be restoring that regulated entity to a sound and solvent condition, allowing capital distributions to deplete the entity's conservatorship assets would be inconsistent with *the agency's statutory goals*, as they would result in removing capital at a time when *the Conservator is charged with rehabilitating* the regulated entity."
- "FHFA has a *statutory charge* to work to restore a regulated entity in conservatorship to a sound and solvent condition ...."
- "[T]he *essential function* of a conservator is to preserve and conserve the institution's assets ...."

76 Fed. Reg. 35,724, 35,725-27 (June 20, 2011) (emphases added). Indeed, FHFA continued to refer to "the conservatorship *mandate* to preserve and conserve the

[Companies'] assets" even after it entered the Net Worth Sweep. Statement of Edward J. DeMarco Before the U.S. Senate Comm. on Banking, Housing and Urban Affairs 3 (Apr. 18, 2013) (emphasis added) ("DeMarco Statement"), *available at* http://tinyurl.com/jfmjrzt.

For decades, it has been well-established that a bank conservator's "*duties* are to conserve the assets of the bank for the purpose of rehabilitation." *Bicknell v. Cent. Hanover Bank & Trust Co.*, 6 N.Y.S.2d 704, 705 (Sup. Ct. 1938) (emphasis added), *aff'd* 8 N.Y.S.2d 668 (App. Div. 1938); *see also* Opening Br. 32-33. The FDIC continued this practice and has "consistently interpreted its statutory mandate ... to place institutions in a 'sound and solvent condition' to mean that the FDIC must return the institution to full compliance with all regulatory capital, liquidity, and other prudential standards." Investors Unite Br. 17-19. HERA accordingly must be construed as imposing on FHFA as conservator the obligation—not merely the option—of managing the Companies in conformance with what FHFA itself describes as a conservator's statutory mission: to preserve and conserve assets and to rehabilitate the Companies to a sound and solvent condition.

B. The Net Worth Sweep Exceeded FHFA's Powers As Conservator.

The Net Worth Sweep is manifestly contrary to FHFA's conservatorship obligations. Opening Br. 33-48. It has resulted in mammoth "capital distributions" that dwarf by orders of magnitude those FHFA concluded would be contrary to

FHFA's "statutory charge" and the conservator's "essential function." 76 Fed. Reg. at 35,725. It ensures that the Companies never will have capital sufficient to "absorb losses and pay off creditors without external assistance" and thus never again will be in a "sound and solvent condition." *See* Cong. Budget Office, *CBO's Estimate of Cost of the Administration's Proposal to Authorize Federal Financial Assistance for the Government-Sponsored Enterprises for Housing* 3 (2008) ("2008 CBO Estimate"). Far from "preserv[ing] and conserv[ing]" the Companies' assets, the Net Worth Sweep transfers all of their net assets to Treasury in perpetuity. And it certainly does not aim to rehabilitate the Companies, as its purpose was to create a "housing industry ... without Fannie Mae and Freddie Mac." FHFA, 2012 Report to Congress 13 (2013), *available at* http://www.fhfa.gov/AboutUs/Reports/Report Documents/2012_AnnualReportToCongress_508.pdf.

The agencies' strained attempts to reconcile the Net Worth Sweep with FHFA's conservatorship authority lack merit.

1. The Net Worth Sweep Cannot Be Justified As Necessary To Forestall A "Downward Spiral."

Treasury argues that the Net Worth Sweep "'preserv[ed] and conserve[d]' a crucial 'asset[]' ... : the unused portion of Treasury's funding commitment," Treasury Br. 28, by eliminating the possibility that the Companies would again be required to draw on Treasury's commitment to pay Treasury's cash dividends.[6]

This argument fails because the Companies *never* were required to pay a cash dividend and *always* had the option under the Purchase Agreements to pay dividends "in-kind" (by increasing Treasury's liquidation preference in an amount equal to the dividend). T0033; Opening Br. 38-40. Neither Treasury nor FHFA defend the district court's erroneous conclusion that the Companies could not use the in-kind option because it was a "penalty." *See* Op. 6-7 n.7. Treasury's only counterargument (FHFA says nothing) is that paying in-kind would have "obliged the enterprises to pay dividends that accrue at a higher rate [of 12%]," rather than the 10% rate if the Companies paid in cash. Treasury Br. 48. This is true, but it misses the point.

That the Companies had a payment-in-kind option (which is a common feature of securities of leveraged companies because it allows such a company to

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[6] Treasury says "[n]o basis exists" for the argument that acting to preserve Treasury's funding commitment does not preserve an "asset" of the Companies (Treasury Br. 33), yet the Purchase Agreements explicitly state that Treasury's funding commitment is not among the Companies' "total assets." Opening Br. 40 (quoting F0129).

preserve liquidity in an uncertain economic environment[7]) meant that the problem FHFA was allegedly solving—cash dividends depleting Treasury's funding commitment—was wholly illusory. The Companies *never* had to pay dividends in cash, so there never was a need to deplete Treasury's funding commitment to pay them. Exercising the payment-in-kind option would have conserved the Companies' assets and capital and thus would have accorded with the statutory obligations of the conservator. And it would have "cost" the Companies only an increase in Treasury's liquidation preference, which, by definition, would become relevant only if the Companies were *liquidated*. To achieve the same preservation of Treasury's funding commitment, the Net Worth Sweep takes from the Companies *all* of their capital in perpetuity and destroys permanently their "ability ... to absorb losses and pay off creditors without external assistance," which is to say, their "soundness." 2008 CBO Estimate at 3.[8]

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[7] *See* Lenny J. Ajzenman, *PIK Toggle: Not So Kind During the Downturn* 5, Moody's (Dec. 8, 2010) (explaining that "the [payment-in-kind] option can conserve liquidity in an uncertain economic environment"); Joy Ferguson, *IFR-PIK Toggle Not So Kind During Downturn – Moody's*, Reuters (Dec. 9, 2010), http://www.reuters.com/article/pik-toggles-moodys-idUSN09220 90420101209.

[8] Treasury also argues that the Net Worth-Sweep preserved the Companies' assets because it "waive[d] the periodic commitment fee." Treasury Br. 34. But, as with the dividend, the Companies always had the option to pay that fee in-kind. *See* T0022; T0192.

But even more fundamentally, even with the cash dividend in place, Treasury's funding commitment was not in danger of being exhausted when the agencies agreed to the Net Worth Sweep. *Contra* Treasury Br. 33. Treasury's record shows that Freddie would still have more than $100 billion remaining by 2023, and, even under Treasury's most pessimistic scenarios, Fannie would not exhaust its funding commitment until 2021. T3850, T3847-T3848. And, [redacted] REDACTED [redacted]. *See supra* Part I.

2. FHFA As Conservator Lacks Authority To Wind Down The Companies.

FHFA argues that the Net Worth Sweep "does not wind down" or "wind up" the Companies at all and that, in any event, it has the authority to do so as conservator. FHFA Br. 39-42. FHFA errs at each turn.

The Net Worth Sweep winds down the Companies by design. FHFA admitted as much in its 2012 report to Congress, writing that the Net Worth Sweep was part of FHFA's plan to "wind [the Companies] down" and thereby create a "housing industry ... without Fannie Mae and Freddie Mac." FHFA, 2012 Report to Congress 13 (2013); *see also* DeMarco Statement at 3 (The Net Worth Sweep steers FHFA toward its goal of "wind[ing] down the [Companies].").

FHFA's argument that it has the authority as conservator to "wind up" the Companies is equally meritless. FHFA concedes that it cannot liquidate the Companies, but argues that winding up is "different" than liquidation. FHFA Br. 40. However, to "wind up" and to "liquidate" are synonymous; the very definition of "liquidate" is to "'[w]ind up'" the affairs of a "company or firm." OED Online (liquidate, v.) (last accessed Jan. 3, 2016). That explains why HERA uses the two terms interchangeably. *See*, *e.g.*, 12 U.S.C. § 4617(b)(3)(B) ("The receiver, in any case involving the liquidation or winding up of the affairs of a closed regulated entity, shall ... publish a notice ....").

In response, FHFA points to the general statement that FHFA may "be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity," 12 U.S.C. § 4617(a)(2), and argues that conservators and receivers alike may "reorganiz[e], rehabilitat[e], or wind[] up" the Companies. But FHFA as *receiver* clearly could not "rehabilitat[e]" the Companies. *See* Opening Br. 37-38. Conservators and receivers have distinct roles and powers—the conservator works to rehabilitate; the receiver liquidates. Opening Br. 46-47; Investors Unite Br. 18 n.13.[9]

Of course, to say that the conservator lacks authority to wind up the Companies does not mean it must or should "return the enterprises to the same state that existed prior to the conservatorship." Treasury Br. 31. Prior to the conservatorship, the agencies purported to determine that the Companies were in an unsound financial condition. While Congress acknowledged "[t]he need to maintain [each] corporation's status as a private shareholder-owned company," 12 U.S.C. § 1719(g)(1)(C)(v), it granted the conservator latitude to operate the Companies in ways that further its "statutory charge" of "restor[ing] a regulated entity in conservatorship to a sound and solvent condition." 76 Fed. Reg. at 35,727. But that latitude was not so great as to allow FHFA, as *conservator*, to extinguish for all time Fannie or Freddie's ability to conserve assets or achieve solvency. To terminate Fannie or Freddie, FHFA had to follow HERA's distinct path for receivership, including its numerous protections for stakeholders. FHFA's view that it has power

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[9] FHFA counters that a receiver may "'rehabilitat[e]' the business and operations of the [Companies] by creating a limited-life regulated entity." FHFA Br. 41. Yet the section addressing limited-life entities nowhere mentions "rehabilitation." Instead, those entities act as a bridge between the Companies and liquidation and must be wound down within two years. 12 U.S.C. § 4617(i)(6).

as conservator to "wind up" or "wind down" the Companies cannot be reconciled with Congress's decision to include in HERA a comprehensive plan for their receivership and liquidation.

3. The Appropriations Act Did Not Ratify The Net Worth Sweep.

FHFA and Treasury also argue that the Consolidated Appropriations Act of 2016, H.R. 2029, 114th Cong. § 702 (2015) (the "Appropriations Act"), implicitly approves the Net Worth Sweep because that statute "circumscribed Treasury's authority in one area—the right to sell the [Treasury Stock]—but left [the Net Worth Sweep] intact." FHFA Br. 26-29; *see also* Treasury Br. 29-30. The agencies err.

Later legislation is a "hazardous basis for inferring the intent" of Congress in enacting prior legislation. *Russello v. United States*, 464 U.S. 16, 26 (1983). This is particularly true where, as here, the amendment is both an appropriations act presumed not to alter substantive law, *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000), and an isolated amendment that cannot be understood to ratify all preceding agency interpretations, *see Alexander v. Sandoval*, 532 U.S. 275, 292 (2001).

Here, by prohibiting Treasury from selling its preferred stock in the Companies until 2018, the Appropriations Act does nothing to ratify the Net Worth Sweep or otherwise affect this litigation. In fact, its chief sponsor, Senator Corker—stated that it "does not prejudice those claims." 161 Cong. Rec. S8760 (daily ed. Dec. 17, 2015) (statement of Sen. Corker); *see also* 161 Cong. Rec. S8857 (daily ed. Dec. 18, 2015) (statement of Sen. Brown) (explaining that the legislation does not "have any effect on the court cases ... challenging the validity of the [Net Worth Sweep]"). There accordingly is no basis in the text or legislative history of the Appropriations Act to support the strained inference the government asks this Court to draw.

* * *

Both Treasury and FHFA argue that Plaintiffs' allegations "boil[] down to a disagreement over the manner in which FHFA executed its duties as conservator," Treasury Br. 27, or simply that FHFA "did a bad job," FHFA Br. 33. Not so. A "bad job" implies that FHFA intended to discharge its statutory duties to preserve and conserve assets and to rehabilitate the Companies to a sound and solvent state, but that its actions ultimately failed. But, when entering into the Net Worth Sweep, FHFA understood and intended that the Sweep would convey the entirety of the Companies' future net worth in a self-dealing transaction that would render rehabilitation or long-term solvency impossible. These are *features* of the Net Worth Sweep, not unexpected results. And these features are facially irreconcilable with FHFA's statutory authority. *See Cnty. of Sonoma*, 710 F.3d at 992.

IV. TREASURY LACKED AUTHORITY TO ADOPT THE NET WORTH SWEEP.

This Court independently must vacate the Net Worth Sweep because Treasury exceeded its authority under HERA and acted arbitrarily and capriciously when it agreed to the Net Worth Sweep.

A. Section 4617(f) Does Not Prohibit Claims Against Treasury.

In an effort to immunize its own actions from judicial review, Treasury also invokes Section 4617(f), arguing that it bars any challenge to any action Treasury might take in conjunction with FHFA as conservator. This is an audacious argument; if it were adopted, Treasury could resume purchases of the Companies' securities notwithstanding the expiration of its purchasing authority, and, simply because such purchases were agreed to by the conservator, there could be no judicial review of Treasury's concededly unlawful actions. This argument lacks merit.

To conclude that Section 4617(f) prohibits Plaintiffs' claims that Treasury violated HERA's sunset provision, this Court must find "clear and convincing evidence to dislodge the presumption" "favoring judicial review of administrative action." *Kucana v. Holder*, 558 U.S. 233, 251-52 (2010) (citation omitted). But the text of Section 4617(f) suggests nothing of the sort. Rather, Congress circumscribed judicial review of certain actions *only as to FHFA*—it did not address, much less prohibit, claims against Treasury. Congress's "silence" cannot be construed "as a denial of authority ... to seek appropriate relief." *See Reno v. Catholic Soc. Servs.,* *Inc.*, 509 U.S. 43, 56 (1993) (citation omitted). And there is nothing in the structure or history of the statute that even remotely suggests that Congress intended to allow Treasury to render HERA's sunset provision inert simply by agreeing with FHFA to do so.

The cases invoked by Treasury, each decided under FIRREA's analogous bar, 12 U.S.C. § 1821(j), cannot fill the gap. Treasury Br. 35-37. In none of those cases was there a claim that the "third party" violated a provision of federal law unrelated to the conduct of a receivership, and thus in none of those cases did a court hold that Section 1812(j) barred claims that a third-party's transaction with FHFA violated federal law. In *Dittmer Properties, L.P. v. FDIC*, 708 F.3d 1011, 1018 (8th Cir. 2013), the plaintiffs brought the same claim for declaratory and injunctive relief (that a defaulted loan was void and could not be enforced) against both the FDIC as receiver and the entity that later purchased the loan. In *Telematics International, Inc. v. NEMLC Leasing Corp.*, there was no "third party" involved at all; the First Circuit held that, just as Section 1821(j) barred Telematics' claim for an injunction prohibiting the FDIC from foreclosing on a certificate of deposit, so, too, did it bar a claim that Telematics itself could attach the certificate, which "would have the same effect ... as directly enjoining the FDIC from attaching the asset." 967 F.2d 703, 707 (1st Cir. 1992). And in *Hindes v. FDIC*, 137 F.3d 148 (3d Cir. 1998), the "third party" was the *FDIC itself*; the plaintiff challenged FDIC-Corporate's predicate finding of unsoundness that led to the receivership at issue. The Third Circuit concluded the claim was barred because "the requested relief ... effectively would throw into question every act of FDIC-Receiver." *Id.* at 161. But the Third Circuit also cautioned that "[w]e do not suggest we would reach the same result" where "an order against a third party would be of little consequence to [FDIC] overall functioning as receiver." *Id.* Holding Treasury to the limits Congress imposed on its authority does not remotely affect FHFA's "overall functioning as [conservator]."

B. Treasury Exceeded Its Statutory Authority.

"[I]t is beyond cavil that an agency's power is no greater than that delegated to it by Congress." *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (citation omitted). Treasury contends that HERA granted it "broad authority" that was "restricted in one respect by ending Treasury's authority to purchase new securities on December 31, 2009." Treasury Br. 41. But HERA's sunset provision ended Treasury's authority as to much more than that "one respect." After 2009, Congress authorized Treasury *only* to "hold, exercise any rights received in connection with, or sell, any obligations or securities purchased." 12 U.S.C. § 1719(g)(2)(D).[10]

1. Treasury Does Not Have "Inherent Authority" To Modify The Terms Of Securities Acquired Under HERA.

Faced with HERA's clear sunset provision, Treasury claims that it also retains "inherent authority to modify the terms of its purchase contracts." Treasury Br. 41. This is a truly startling assertion of executive power and how it possibly could be squared with the well-established principle that agency authority is delegated by Congress, Treasury never says. Certainly it is not supported by the appropriation provision of HERA that Treasury invokes. *See* Treasury Br. 41-42. Section 1719(g)(3) of HERA provides that "[a]ny funds expended for the purchase of, or *modifications* to, obligations and securities, or the *exercise of any rights* received in connection with such purchases under this subsection shall be deemed appropriated ...." (emphasis added). Although Congress evidently anticipated that

[10] HERA's drafters intended for Treasury's involvement "to be temporary." Michael Krimminger & Mark A. Calabria, *The Conservatorships of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles* 20 (Cato Working Paper Feb. 9, 2015).

Treasury might wish to modify the terms of its contracts, Congress did not include that activity within the exception to the 2009 sunset of Treasury's authority.[11]

2. Treasury Did Not Exercise A Right It Received In Connection With Its Purchase Of The Treasury Stock.

With no inherent authority to modify the securities after 2009, Treasury exceeded its authority unless Treasury "exercise[d] [a] right [] received in connection with" its purchase of the securities when it agreed with FHFA to modify Treasury's securities to include the Net Worth Sweep. 12 U.S.C. § 1719(g)(2)(D). Treasury did not.

A "right" is a legal entitlement, and a contractual right allows one party to compel its counterparty to perform. *See* Opening Br. 52-53. While the Purchase Agreements contained several such rights—including warrants for Treasury to purchase up to 79.9% of the Companies' common stock—Treasury had no "right" to compel FHFA to agree to the Net Worth Sweep. *Cf.* 12 U.S.C. § 4617(a)(7) ("When acting as conservator ... [FHFA] shall not be subject to the direction or supervision of any other agency ...."). Accordingly, no "right to amend" is mentioned in FHFA's

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[11] Treasury claims that Congress subsequently recognized Treasury's authority to enter into the Net Worth Sweep in the Appropriation Act's definition of "Senior Preferred Stock Purchase Agreement." Treasury Br. 42. A definition in an appropriations provision enacted seven years after HERA cannot possibly bear that interpretive weight, particularly given the Act's sponsor's statement that it would not affect this lawsuit at all. *See supra* part III.B.3.

recitation of the "comprehensive package of rights" that the Purchase Agreements granted Treasury. FHFA Br. 3.

Indeed, HERA itself shows that agreeing to amend or modify a contract is distinct from exercising a right under that contract. The provision that Treasury points to earlier in its brief—Section 1719(g)(3), Treasury Br. 41-42—refers to "funds expended for the purchase of, or *modifications* to, obligations and securities, or the *exercise of any rights* received in connection with such purchases." (emphasis added). "[E]xercis[ing] any rights" thus cannot include "modifications," otherwise HERA's reference to modifications would be superfluous. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

Public Services Co. of New Hampshire v. Hudson Light & Power Department, 938 F.2d 338 (1st Cir. 1991) (cited by Treasury Br. 42), is not to the contrary. The court there held that because the appellants were not third-party beneficiaries to a bilateral contract, they could not impede the contracting parties' "exclusive right to modify the [agreement] at any time." *Id.* at 343. Thus *Public Services* addresses only a "joint[ly]" exercisable—not unilateral—ability to modify a contract, which is possessed by all natural persons and business associations as part of the right to contract. *See* 11 *Williston on Contracts* § 31:5 (4th ed. 2014). The power to join with its counterparty to modify the contract—a background feature of contract law—is not a "*right*" that Treasury "*received* in connection with its purchase of [the Treasury stock]."

3. The Net Worth Sweep Was An Unlawful Purchase Of New Securities.

Even Treasury concedes that, after 2009, HERA prohibited Treasury from purchasing any new securities from the Companies. 12 U.S.C. § 1719(g)(1)(A), (g)(4); Treasury Br. 41. Treasury violated this prohibition because the Net Worth Sweep constitutes a purchase of new securities under both the ordinary meaning of "purchase" and the well-established fundamental-change doctrine.[12] Opening Br. 56-59.

Treasury asserts that the Net Worth Sweep was a garden-variety contractual modification. Treasury Br. 39. But Treasury cannot deny the transformative nature of the Net Worth Sweep. Before, the Companies could choose to pay all or part of the dividend in-kind by increasing Treasury's liquidation preference, and the Companies had a path to rebuild their balance sheets. After, the Companies must pay their entire net worth to Treasury and have no path to accumulate capital sufficient to operate independently. Before, Treasury was entitled to a fixed-rate dividend and other shareholders had the prospect of participating in profits exceeding that fixed amount. After, all economic value flows exclusively to

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[12] *See Gelles v. TDA Indus., Inc.*, 44 F.3d 102, 104 (2d Cir. 1994).

Treasury. *See* Opening Br. 66. This change did not merely "alter[] the compensation structure of the securities," Treasury Br. 15, it changed the relationship of Treasury's securities to the Companies' other equity securities in a structural way that forecloses any possibility that those other securities could have value. If this were permissible as a "modification," then so too would be a "modification" that required Treasury to increase the amount it paid for these securities, thereby "commit[ting] ... additional funds" to the Companies—a result that even Treasury concedes was forbidden after 2009. Treasury Br. 39.

It is precisely to prevent such evasion of legal obligations relating to purchases that courts and Treasury itself apply the fundamental change doctrine. Treasury now says the doctrine is "dubious," Treasury Br. 40, but the cases it cites cast no doubt on it. *Isquith ex rel. Isquith v. Caremark International, Inc.*, 136 F.3d 531 (7th Cir. 1998), had nothing to do with whether a fundamental change is a "purchase" of new securities, but rather concerned whether a spinoff constituted a "forced" purchase defeating reliance. *Id*. at 534-35. And there was no fundamental change because post-transaction the "class members owned the same proportion, carrying the same rights, of the same pool of assets." *Id*. at 536. *Katz v. Gerardi*, 655 F.3d 1212 (10th Cir. 2011), declined to apply the fundamental change doctrine only in the context of a claim under Section 12 of the Securities Act of 1933, which has a different and more restrictive purchaser requirement than Section 10(b) of the 1934 Act, from which the doctrine originated. *Id.* at 1221.

Tellingly, Treasury buries in a footnote, Treasury Br. 41 n.8, its response to its own taxation regulations that recognize that a substantial change to a security's terms is a purchase, *see* 26 C.F.R. § 1.1001-3; Opening Br. 58-59. Treasury says there is "no reason to believe Congress" intended "purchase" under HERA to be construed similarly to "exchange" under the IRS's regulations, Treasury Br. 41 n.8, but it cannot deny that the IRS would have treated this "modification" as an exchange for a new security, and thus a purchase. And Treasury suggests no reason why Congress would have excluded from its definition of "purchase" a transaction the IRS itself would regard as an exchange of value for a new security—which accords with the everyday understanding of the word "purchase."

C. Treasury Acted Arbitrarily And Capriciously.

The APA requires agencies to engage in reasoned decisionmaking. *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404 (D.C. Cir. 1995). Treasury was required to support its decision to enter the Net Worth Sweep using the best available data and to consider reasonably obvious alternatives to the Net Worth Sweep. Opening Br.

63-64. Treasury did neither, and the Net Worth Sweep should be vacated for those reasons alone.[13]

1. Treasury Relied On Stale Data, Even Though Current Data Was Available.

Treasury argues that the Net Worth Sweep responded to a downward spiral in which the Companies would soon exhaust Treasury's Commitment in order to pay Treasury's dividend. *E.g.*, Treasury Br. 44. But Treasury's "downward spiral in 2012" rationale is supported only by an already out-of-date October 2011 forecast from the accounting firm Grant Thornton, T3782, T3789, T3900, and ignores that, by the time of the Net Worth Sweep, the Companies were profitable, T3910, T4087, outperforming FHFA's most optimistic projections, *see* T3879; F4069, expecting to recognize tens of billions in deferred tax assets, Dkt. 49-2, Ex. A at 35, and indeed *had already recognized* a portion of their deferred tax assets in 2012, T4235. Treasury violated its obligation to engage in reasoned decisionmaking by ignoring this data. *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1020-23 (D.C. Cir. 1999).

Treasury contends that this radically improved performance "was unlikely to eliminate the need to draw from the Treasury commitment in future years."

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[13] Treasury erroneously contends that Institutional Plaintiffs really fault only Treasury's "predictive judgments." Treasury Br. 45. The arbitrary-and-capricious claims are based on Treasury's flawed decisionmaking process, rather than the judgment ultimately reached.

Treasury Br. 47. REDACTED [redacted]

Treasury also argues that it had no obligation to consider the Companies' sizeable deferred tax assets because the Companies did not believe they would be able to recognize such assets, and their one-time nature would not improve the Companies' ability to pay Treasury's dividends over the long term. Treasury Br. 47-48. But the Companies had already recognized a portion of their deferred tax assets, T4235, and Treasury knew that they likely soon would be fully recognized. Treasury received a presentation in 2011 noting that the Companies' "[i]ncreased capitalization of tax attributes"—*i.e.*, recognition of the deferred tax assets—would allow them to "build-up" capital and thus reduce the likelihood of further draws from Treasury. Dkt. 49-2, Ex. A at 35. REDACTED [redacted]

REDACTED [redacted]

Moreover, that the deferred tax assets could be recognized only once does not absolve Treasury of its admitted failure to consider them. Together the Companies recognized more than $74 billion—an amount sufficient by itself to have paid Treasury's 10% cash dividend for multiple years. *See* Fannie Mae News Release, May 9, 2013, http://goo.gl/G1xBTU ($50.6 billion); Freddie Mac News Release, November 7, 2013, http://goo.gl/Hytc3l ($23.9 billion). This massive financial breathing room should have factored into Treasury's evaluation of whether the Companies would soon exhaust Treasury's commitment. Indeed, were Treasury truly concerned about the size of the Companies' dividend payments, it could have allowed them to use the excess profits generated by the deferred tax assets to redeem part of Treasury's liquidation preference. It was paper losses like the write-down of the deferred tax assets, after all, that caused the Companies to draw from Treasury in the first place. *See* Howard Br. 17-26.

2. Treasury Failed To Consider Obvious Alternatives To The Net Worth Sweep.

Treasury also acted arbitrarily and capriciously by failing to consider two obvious alternatives that would have remedied the (nonexistent) downward spiral Treasury hypothesized.

First, the Companies could have paid their dividends in-kind rather than in cash. *See* Opening Br. 65-66. Treasury responds that the Purchase Agreements "required" the Companies to pay cash dividends, and, in any event, in-kind dividends would accrue at a higher rate (12%). Treasury Br. 48. This argument is nonsensical. Treasury officials acknowledged REDACTED [redacted] shortly before agreeing to the Net Worth Sweep that the Companies had the *option* of paying dividends in-kind. MJN (Exhibit 33, A490); T3841. And it certainly would have solved the purported problem of cash dividends depleting the funding commitment because the in-kind option meant the Companies never were required to pay in cash. REDACTED [redacted]

Second, because Treasury thought (incorrectly) that it had authority to amend the Purchase Agreements, it should have considered refinancing, reducing, or waiving its cash dividend, or, at the very least, allowing cash dividend payments to pay down Treasury's liquidation preference, thereby lowering future dividend payments. Opening Br. 66-67. Treasury disagrees, arguing that these options would "have placed the interests of the [Companies'] private shareholders over those of taxpayers." Treasury Br. 49. But the taxpayers' investment return was not the problem Treasury was purporting to solve; it was the supposed depletion of

Treasury's funding commitment. Reducing the Companies' dividend obligations plainly would have addressed *that* issue. Even if those options were not as profitable to the government, Treasury was required at least to consider them. There is no evidence in the record that Treasury did so, despite that this alternative was raised to Treasury multiple times. Opening Br. 66-67.

V. THE DISTRICT COURT IMPROPERLY ADJUDICATED INSTITUTIONAL PLAINTIFFS' APA CLAIMS ON THE BASIS OF DEFICIENT ADMINISTRATIVE RECORDS.

The agencies' arguments about the adequacy of their administrative records underscore the radical nature of their position: In order to rule in the agencies' favor, this Court must ignore the "character," "basis," and "rationale" for the agencies' actions. Treasury Br. 55. Regarding the need for supplementation of the administrative record, the agencies' briefs offer little that they did not already say in their oppositions to Fairholme's motion for judicial notice. For reasons explained in Fairholme's briefing, the existence of these materials is a proper subject of judicial notice. Fairholme Judicial Notice Reply 7-9. The agencies are mistaken when they argue that the district court did not consider their evidentiary submissions, and, in any event, this Court has its own independent obligation to consult a complete administrative record. *See* Fairholme Judicial Notice Reply 3-7.

Treasury, quoting *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009), acknowledges that in an APA suit "'[t]he entire case on review is a question of law'" and that even on a motion to dismiss "[t]he district court's review ... 'is *based on the agency record*.'" Treasury Br. 55-56 (emphasis added). But if the district court's decision was supposed to be "based on the agency record," it was reversible error for it to rule based on the agencies' demonstrably incomplete and misleading submissions while declaring the materials before it to be "irrelevant." Op. 21.

CONCLUSION

This Court should reverse the judgment below and remand with instructions to vacate the Net Worth Sweep.

Dated: February 2, 2016

Respectfully submitted,

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

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 8,450 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

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Dated: February 2, 2016

Douglas R. Cox

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2016, I caused the foregoing Initial Reply Brief for Institutional Plaintiffs to be filed under seal by hand with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit. Service was accomplished on the following parties, to the extent they are permitted to view documents under the applicable protective order, via email and overnight mail:

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Dated: February 2, 2016