Nos. 14-5243, 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 Secretary of the Treasury, et al.

Defendants-Appellees.

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

FINAL BRIEF FOR THE TREASURY DEPARTMENT

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
ABBY C. WRIGHT
GERARD SINZDAK
Attorneys, Appellate Staff
Civil Division, Room 7242
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-0718

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel:

A. Parties and Amici

The plaintiffs below and appellants 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.

Defendants below and appellees here are the 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); 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 Director of the Federal Housing Finance Agency (14-5243, 14-5254, 14-5260); Federal National Mortgage Association (14-5260, 14-5262); and Federal Home Loan Mortgage Corporation (14-5260, 14-5262).

There were no amici or intervenors in the district court. Amici in this Court are National Black Chamber of Commerce; Timothy Howard; Independent Community Bankers of America; Association of Mortgage Investors; William M. Isaac; Robert H. Hartheimer; 60 Plus Association, Inc.; Center for Individual Freedom; Investors Unite; Louise Rafter; Josephine Rattien; Stephen Pattien; Pershing Square Capital Management, LP; and Jonathan R Macey.

B. Rulings Under Review

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' motion to dismiss, and (2) the Order Denying Plaintiff-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. The district court's memorandum opinion and order is available on Westlaw. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. Sep. 30, 2014); J.A.316.

C. Related Cases

This case was not previously before this Court or any court other than the district court. Counsel is aware of no related cases within the meaning of D.C. Cir. R. 28(a)(1)(C).

There are multiple cases involving similar issues and parties pending in the Court of Federal Claims: *Washington Federal v. United States*, No. 13-385C; *Fairholme Funds, Inc. v. United States*, No. 13- 465C; *Cacciapalle v. United States*, No. 13-466C; *American European Insurance Co. v. United States*, No. 13-496C; *Arrowood Indemnity Co. v. United States*, No. 13-698C; *Dennis v. United States*, No. 13-542C; *Fisher v. United States*, No. 13-608C; *Reid v. United States*, No. 14-152C; and *Rafter v. United States*, No. 14-740C. *Cacciapalle, American European Insurance, and Dennis* have been consolidated, and *Cacciapalle* has been designated as a putative class action.

In addition, cases raising similar issues are currently pending in the United States District Court. *Saxton v. FHFA*, No. 15-cv-47 (N.D. Iowa); *Jacobs v. FHFA*, No. 15-cv-708 (D. Del.); *Robinson v. FHFA*, No. 7:15-cv109 (E.D. Ky.).

s/ Gerard Sinzdak
Gerard Sinzdak

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES

GLOSSARY

INTRODUCTION 1

STATEMENT OF JURISDICTION 4

STATEMENT OF THE ISSUES 4

STATUTES AND REGULATIONS 5

STATEMENT OF THE CASE 5

A. Fannie Mae and Freddie Mac 5

B. The 2008 Housing Crisis and HERA 6

C. Conservatorship and the Preferred Stock Purchase Agreements 8

D. The Third Amendment 10

E. District Court Proceedings 12

SUMMARY OF ARGUMENT 14

STANDARD OF REVIEW 15

ARGUMENT 16

I. HERA Bars Plaintiffs' Challenge To The Third Amendment 16

A. HERA's Shareholder-Rights Provision Bars Plaintiffs' Claims 16

1. Plaintiffs' claims are derivative claims 16

2. The "fiduciary" exception cited by plaintiffs has no applicability here 20

3. There is no conflict-of-interest exception to HERA's bar on derivative suits and there is, in any event, no conflict 22

B. HERA's Anti-Injunction Provision Independently Bars Plaintiffs' Claims 26

1. The anti-injunction provision effects "a sweeping ouster" of judicial authority to grant equitable remedies 26

2. FHFA acted within the scope of its statutory authority when it agreed to the Third Amendment 28

3. HERA's anti-injunction provision applies to plaintiffs' claims against Treasury 36

II. Plaintiffs' APA Claims Against Treasury, Which Are Barred By HERA, Also Fail On The Merits 38

A. Treasury Did Not Exceed Its Authority Under HERA When It Entered Into The Third Amendment, And Its Actions Are Committed To Agency Discretion By Law 38

1. The Third Amendment was not a "purchase" of securities 38

2. The Third Amendment did not exceed Treasury's authority 41

B. Treasury Did Not Act Arbitrarily Or Capriciously When It Agreed to the Third Amendment 44

III. The Class Plaintiffs' Claims Against Treasury, Which Are Barred By HERA, Are Also Without Merit 50

A. Even Assuming That Jurisdiction over Such a Claim Existed, Plaintiffs' Fiduciary-Duty Claim Is Without Basis 50

1. Treasury did not owe a fiduciary duty to the GSEs or their shareholders 50

2. Plaintiffs have no contractual claims against Treasury 53

B. There Is No Takings Claim Before This Court 53

IV. Neither the District Court Nor This Court Need Supplement The Administrative Record 55

CONCLUSION 58

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Cases: **Page(s):**

American Wildlands v. Kempthorne,
530 F.3d 991 (D.C. Cir. 2008) 16

Americas Mining Corp. v. Theriault,
51 A.3d 1213 (Del. 2012) 20

Ameristar Fin. Servicing Co. v. United States,
75 Fed. Cl. 807 (2007) 35

Bank of America Nat'l Ass'n v. Colonial Bank,
604 F.3d 1239 (11th Cir. 2010) 26, 27

Bell Atlantic Telephone Cos. v. FCC,
24 F.3d 1441 (D.C. Cir. 1994) 54

Camp v. Pitts,
411 U.S. 138 (1973) 57

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 56

Cowin v. Bresler,
741 F.2d 410 (D.C. Cir. 1984) 18

Delta Sav. Bank v. United States,
265 F.3d 1017 (9th Cir. 2001) 22, 23, 24, 25

Dittmer Props., L.P. v. FDIC,
708 F.3d 1011 (8th Cir. 2013) 36

Dole Food Co. v. Patrickson,
538 U.S. 468 (2003) 16

Ecco Plains, LLC v. United States,
728 F.3d 1190 (2013) 37

* Authorities upon which we chiefly rely are marked with asterisks.

Feldman v. Cutaia,
951 A.2d 727 (Del. 2008) 18

First Annapolis Bancorp, Inc. v. United States,
644 F.3d 1367 (Fed. Cir. 2011)..16

First Hartford Corp. Pension Plan & Trust v. United States,
194 F.3d 1279 (Fed. Cir. 1999)..22, 24, 25

**Freeman v. FDIC*,
56 F.3d 1394 (D.C. Cir. 1995) 4, 26, 27

Gentile v. Rossette,
906 A.2d 91 (Del. 2006) 18, 20

Griffith v. FLRA,
842 F.2d 487 (D.C. Cir. 1988) 27, 44

**Hindes v. FDIC*,
137 F.3d 148 (3d Cir. 1998) 36

In re AOV Indus.,
797 F.2d 1004 (D.C. Cir. 1986) 56

In re Sea-Land Corp. S'holders Litig.,
1987 WL 11283 (Del. Ch. May 22, 1987) 51

International Ladies' Garment Workers' Union v. Donovan,
722 F.2d 795 (D.C. Cir. 1983) 45

International Union, UAW v. NLRB,
765 F.2d 175 (D.C. Cir. 1985) 43

Isquith ex rel. Isquith v. Caremark Int'l, Inc.,
136 F.3d 531 (7th Cir. 1998)...39, 40

Ivanhoe Partners v. Newmont Mining Corp.,
535 A.2d 1334 (Del. 1987) 50

Jacobson v. AEG Capital Corp.,
50 F.3d 1493 (9th Cir. 1995)..40, 41

Kamen v. Kemper Fin. Servs., Inc.,
500 U.S. 90 (1991) 17, 23

Katz v. Gerardi,
655 F.3d 1212 (10th Cir. 2011) 40

**Kellmer v. Raines*,
674 F.3d 848 (D.C. Cir. 2012) 3, 14, 16, 22

Labovitz v. Washington Times Corp.,
172 F.3d 897 (D.C. Cir. 1999) 17, 18, 19

Leon Cnty v. FHFA,
700 F.3d 1273 (11th Cir. 2012) 29

Mach Mining, LLC v. EEOC,
135 S. Ct. 1645 (2015) 37

Melcher v. FCC,
134 F.3d 1143 (D.C. Cir. 1998) 44

Michel v. Anderson,
14 F.3d 623 (D.C. Cir. 1994) 54

**National Trust for Historic Preservation v. FDIC*:
995 F.2d 238 (D.C. Cir. 1993) 37
21 F.3d 469 (D.C. Cir. 1994) 26, 27

North Haven Bd. of Ed. v. Bell,
456 U.S. 512 (1982) 30

Nuvio Corp. v. FCC,
473 F.3d 302 (D.C. Cir. 2006) 45

Odyssey Partners, LP v. Fleming Cos., Inc.,
1996 WL 422377 (Del. Ch. July 24, 1996) 51

Pareto v. FDIC,
139 F.3d 696 (9th Cir. 1998) 18, 21

Public Serv. Co. of New Hampshire v. Hudson Light & Power Dep't,
938 F.2d 338 (1st Cir. 1991) 43

Qwest Corp v. FCC,
482 F.3d 471 (D.C. Cir. 2007) 26

Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n,
324 F.3d 726 (D.C. Cir. 2003) 15

Remora Invs., LLC v. Orr,
673 S.E.2d 845 (Va. 2009)...21

Rempfer v. Sharfstein,
583 F.3d 860 (D.C. Cir. 2009) 44, 56

Rifkin v. Bear Stearns & Co.,
248 F.3d 628 (7th Cir. 2001)...17

Robinson v. Ada S. McKinley Cmty. Servs.,
19 F.3d 359 (7th Cir. 1994) 39

Singleton v. Wulff,
428 U.S. 106 (1976) 56

Starr Int'l Co. v. Fed. Reserve Bank of N.Y.,
906 F. Supp. 2d 202 (S.D.N.Y. 2012), *aff'd*,
742 F.3d 37 (2d Cir. Nov. 16, 2014)..50, 51, 53

Strougo v. Bassini,
282 F.3d 162 (2d Cir. 2002) 17

Superior Vison Servs. v. ReliaStar Life Ins. Co.,
2006 WL 2521426 (Del. Ch. Aug. 25, 2006) 51

Telematics Int'l, Inc. v. NEMLC Leasing Corp.,
967 F.2d 703 (1st Cir. 1992) 36

**Tooley v. Donaldson, Lufkin & Jenrette, Inc.*,
845 A.2d 1031 (Del. 2004) 17, 18, 19

Town of Babylon v. FHFA,
699 F.3d 221 (2d Cir. 2012) 26, 29

United States v. Petty Motor Co.,
327 U.S. 372 (1946) 43

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 54, 55

United States ex rel. Work v. Boutwell,
3 MacArth. 172 (D.C. 1879) 25

Weinberger v. UOP, Inc.,
457 A.2d 701 (Del. 1983) 51, 52

Statutes:

Consolidated Appropriations Act, 2016,
Pub. L. No. 114-113, 129 Stat. 2242 (2015) 29, 30, 31, 32, 42

Federal Tort Claims Act:
28 U.S.C. § 2675 50
28 U.S.C. § 2680(a) 50
28 U.S.C. § 2680(h) 50
28 U.S.C. § 2680(i) 50

Housing and Economic Recovery Act of 2008,
Pub. L. No. 110-289, 122 Stat. 2654 6

Little Tucker Act:
28 U.S.C. § 1346 (Little Tucker Act) 53

5 U.S.C. § 701(a)(2) 45

*12 U.S.C. § 1455(*l*)(1)(A) 1, 7, 38

12 U.S.C. § 1455(*l*)(2)(A) 7, 38

12 U.S.C. § 1455(*l*)(2)(D) 38, 39

12 U.S.C. § 1455(*l*)(3) 42

*12 U.S.C. § 1455(*l*)(4) 8, 38

12 U.S.C. § 1716(4) 5

*12 U.S.C. § 1719(g)(1)(A) 1, 7, 38

12 U.S.C. § 1719(g)(1)(B) 7
12 U.S.C. § 1719(g)(1)(C) 52
12 U.S.C. § 1719(g)(2)(A) 38, 42
12 U.S.C. § 1719(g)(2)(D) 38
12 U.S.C. § 1719(g)(3) 42
*12 U.S.C. § 1719(g)(4) 8, 38
12 U.S.C. § 1821(j) 26, 37
12 U.S.C. § 4511 ....1, 6
12 U.S.C. § 4511(a) 25
12 U.S.C. § 4617(a) 1, 6
*12 U.S.C. § 4617(a)(2) 6, 7, 28, 31, 34, 35
12 U.S.C. § 4617(a)(4) 7, 33
12 U.S.C. § 4617(a)(7) 57
*12 U.S.C. § 4617(b)(2)(A)(i) 7, 13, 14, 16, 21, 22, 23, 24
12 U.S.C. § 4617(b)(2)(B) 28, 29
*12 U.S.C. § 4617(b)(2)(D) 7, 28, 29, 30, 34
12 U.S.C. § 4617(b)(2)(G) 28, 29
12 U.S.C. § 4617(b)(2)(J)(ii) 52
12 U.S.C. § 4617(b)(2)(K)(i) 24
*12 U.S.C. § 4617(f) 3, 7, 12, 14, 24, 26, 35, 36
28 U.S.C. § 1291 4
28 U.S.C. § 1295 54

28 U.S.C. § 1331 4

28 U.S.C. § 1332(d)(2)(A) 4

28 U.S.C. § 1346(b) 50

Regulation:

26 C.F.R. § 1.1001-3..41

Rule:

Fed. R. Evid. 201(b) 57

Other Authorities:

Black's Law Dictionary (10th ed. 2014) 43

E. Allan Farnsworth, *Farnsworth on Contracts* (3d ed. 2004) 40

FDIC Resolutions Handbook 35

Fed. Home Loan Mortg. Corp. (Freddie Mac):
2012 10K, http://www.freddiemac.com/investors/er/pdf/
10k_022813.pdf...47
2015 3Q 10Q, http://hsprod.investis.com/site/irwizard/fre/ir.jsp?
page=sec_item_new&ipage=10553810&DSEQ=&SEQ=&SQDESC= 35

Fed. Nat'l Mortg. Ass'n (Fannie Mae):
2012 10K, http://www.fanniemae.com/resources/file/ir/pdf/
quarterly-annual-results/2012/10k_2012.pdf 48
2015 3Q 10Q, http://www.fanniemae.com/resources/file/ir/pdf/
quarterly-annual-results/2015/q32015.pdf 35

Office of the Inspector General, FHFA:
The Continued Profitability of Fannie Mae and Freddie Mac Is Not Assured,
http://www.fhfaoig.gov/Content/Files/WPR-2015-001.pdf................................11
Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements
(Mar. 20, 2013) 47

7C Charles Alan Wright & Arthur R. Miller,
Federal Practice and Procedure (3d ed. 2015)..17

GLOSSARY

Cl.Pls.Br.	Brief of Class Plaintiffs
Dkt.	District Court Docket in No. 13-cv-1025
Fannie Mae	Federal National Mortgage Association
FDIC	Federal Deposit Insurance Corporation
FHFA	Federal Housing Finance Agency
FIRREA	Financial Institutions Reform, Recovery, and Enforcement Act of 1989
Freddie Mac	Federal Home Loan Mortgage Corporation
GSEs	Government-Sponsored Enterprises—*i.e.*, Fannie Mae and Freddie Mac
HERA	Housing and Economic Recovery Act of 2008
Inst.Pls.Br.	Brief of Institutional Plaintiffs
IRS	Internal Revenue Service
J.A.	Joint Appendix
Purchase Agreements	Preferred Stock Purchase Agreements between FHFA and Treasury
SEC	Securities and Exchange Commission
Third Amendment	Third Amendment to the Preferred Stock Purchase Agreements
TR	Treasury's Administrative Record

INTRODUCTION

1. By September 2008, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) found themselves on the brink of insolvency. At that time, the two government-sponsored enterprises (GSEs or enterprises) owned or guaranteed over $5 trillion of residential mortgage assets, representing nearly half the United States mortgage market. TR85(J.A.528); TR3812(J.A.1878).

To avert the catastrophic impact on the housing market that would result from the collapse of the enterprises, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), which created the Federal Housing Finance Agency (FHFA) and empowered it to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a). Congress recognized that federal assistance of vast proportions could be required, and authorized the Treasury Department to "purchase any obligations and other securities issued by" the enterprises. 12 U.S.C. §§ 1455(*l*)(1)(A), 1719(g)(1)(A).

After FHFA placed the enterprises into conservatorship, Treasury immediately purchased preferred stock in each entity and committed to provide up to $100 billion in taxpayer funds to each enterprise to avoid insolvency. As part of its compensation, Treasury received a senior liquidation preference of $1 billion for each enterprise, which would increase dollar-for-dollar each time the enterprises drew upon Treasury's funding commitment. Treasury also received dividends equal to 10% of its existing

liquidation preference, paid quarterly, and an entitlement to a periodic commitment fee intended to compensate taxpayers for their ongoing commitment.

FHFA and Treasury amended the purchase agreements three times. The first amendment doubled Treasury's $100 billion per enterprise funding commitment. Dkt.51, at 6(J.A.321). By December 2009, however, it appeared that even the $400 billion commitment might be insufficient. TR177(J.A.595). The second amendment thus permitted the enterprises to draw unlimited amounts from Treasury to cure any quarterly net worth deficits through 2012. At the end of 2012, however, Treasury's commitment would be fixed and future draws would reduce the remaining funding available.

As of August 2012, the enterprises had drawn $187.5 billion from Treasury to prevent their insolvency. Under the terms of the original Purchase Agreements, the enterprises' dividend obligations were $18.95 billion per year. Because this amount exceeded the enterprises' earnings, they were forced to draw on Treasury's funding commitment to meet their dividend obligations: through the first quarter of 2012, the enterprises collectively had drawn over $26 billion from Treasury to pay dividends. Those draws increased Treasury's liquidation preference and the enterprises' future dividend obligations, obligations that threatened to deplete the remaining commitment after it became fixed at the end of 2012. The Third Amendment ended this threat by replacing the fixed dividend obligation with a requirement that the

enterprises pay, as a dividend, the amount, if any, by which their net worth exceeds a capital buffer.

2. Plaintiffs do not dispute that the massive influx of taxpayer money rescued the enterprises from insolvency or that the Third Amendment ended the practice of drawing on the Treasury commitment to pay dividends. They nevertheless assert that that the Third Amendment was unlawful and seek injunctive, declaratory, and monetary relief.

Two separate HERA provisions bar plaintiffs' challenges to FHFA's and Treasury's decision to enter into the Third Amendment. First, under the statute, the conservator succeeded to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder[.]" This provision "plainly transfers shareholders' ability to bring derivative suits—a 'right[], title[], power[], [or] privilege[]'—to FHFA." *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012). Plaintiffs' claims assert injury to the enterprises; plaintiffs suffer their alleged injury derivatively as shareholders; and their actions fall squarely within the transfer-of-shareholder-rights provision.

Second, HERA's sweeping anti-injunction provision, 12 U.S.C. § 4617(f), independently precludes a court from taking "any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." As this Court held in interpreting the nearly identical language of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), the anti-injunction provision "does indeed effect a sweeping ouster of courts' power to grant equitable

remedies." *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995). The district court correctly held that plaintiffs cannot evade the anti-injunction bar by naming Treasury as well as FHFA as a defendant. An injunction against either party would "restrain or affect" the exercise of the conservator's powers.

Plaintiffs' claims against Treasury would fail even if they were not barred by HERA. Treasury did not violate the time limits on its authority to purchase new securities from the enterprises when it agreed to the Third Amendment. Similarly, Treasury's decision to enter into the Third Amendment was a reasonable exercise of its powers under HERA.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331; 1332(d)(2)(A). (J.A.73-74). On September 30, 2014, the district court granted the defendants' motions to dismiss. Dkt.51(J.A.316). Plaintiffs timely filed notices of appeal on October 2, 2014, and October 15, 2014. (J.A.373, 451). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether plaintiffs' claims are barred by HERA's transfer-of-shareholder-rights and anti-injunction provisions.

2. Whether plaintiffs' claims against Treasury would fail as a matter of law even if they were not barred by HERA.

STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Fannie Mae and Freddie Mac

Congress created Fannie Mae and Freddie Mac to, among other things, "promote access to mortgage credit throughout the Nation . . . by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." 12 U.S.C. § 1716(4); Dkt.51, at 3(J.A.318). These government-sponsored enterprises provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. The enterprises finance these purchases by borrowing money in the credit markets and by packaging many of the loans they buy into mortgage-backed securities, which they sell to investors. Dkt.51, at 3-4(J.A.318-19).

Although Fannie Mae and Freddie Mac are private, publicly-traded companies, they have long benefited from the perception that the federal government would honor their obligations should the enterprises experience financial difficulties. Dkt.51, at 4(J.A.319). This perception has allowed the enterprises to obtain credit, to purchase mortgages, and to make guarantees at lower prices than would otherwise be possible. *Id.*; TR213(J.A.630).

B. The 2008 Housing Crisis and HERA

With the 2008 collapse of the housing market, Fannie Mae and Freddie Mac experienced overwhelming losses due to a dramatic increase in default rates on residential mortgages. The enterprises owned or guaranteed over $5 trillion of residential mortgage assets, representing nearly half the United States mortgage market. TR85(J.A.528); TR3812(J.A.1878). Their failure would have had a catastrophic impact on the national housing market and economy.

The enterprises lost more in 2008 ($108 billion) than they had earned in the past 37 years combined ($95 billion). TR3814(J.A.1880). As a result, the enterprises faced capital shortfalls. TR212(J.A.629); TR3809(J.A.1875); Dkt.51, at 4(J.A.319). Private investors were unwilling to provide Fannie Mae and Freddie Mac with the capital they needed to weather their losses and avoid receivership and liquidation. Dkt.51, at 5(J.A.320).

In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654. Dkt.51, at 4(J.A.319). The legislation created FHFA as an independent agency to supervise and regulate the enterprises, and granted FHFA the authority to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a); Dkt.51, at 4-5(J.A.319-20). FHFA's authority to appoint itself conservator or receiver is generally discretionary, 12 U.S.C. § 4617(a)(2), but it must place the enterprises into receivership if it determines that the

enterprises' assets have been worth less than their obligations for 60 calendar days, *id.* § 4617(a)(4).

HERA provides that FHFA, as conservator or receiver, "immediately succeed[s] to—(i) all rights, titles, powers, and privileges of the [enterprises] and of any stockholder, officer, or director of such [enterprises] with respect to the [enterprises.]" 12 U.S.C. § 4617(b)(2)(A)(i). The legislation authorizes FHFA, as conservator, to "take such action as may be (i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]." *Id.* § 4617(b)(2)(D). HERA also permits a conservator to take actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the GSEs. *Id.* § 4617(a)(2). Finally, HERA contains an anti-injunction provision, which provides that "[e]xcept 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 [FHFA] as a conservator or a receiver." *Id.* § 4617(f); *see* Dkt.51, at 5(J.A.320).

Recognizing that an enormous commitment of taxpayer funds could be required, Congress also amended the enterprises' charters to authorize Treasury to "purchase any obligations and other securities issued by" the enterprises and "exercise any rights received in connection with such purchases." 12 U.S.C. §§ 1455(*l*)(1)(A), (2)(A), 1719(g)(1)(A), (1)(B). Treasury's authority to purchase securities issued by the

enterprises expired on December 31, 2009; its authority to exercise any rights received in connection with past purchases has no expiration date. *Id.* §§ 1455(*l*)(4), 1719(g)(4).

C. Conservatorship and the Preferred Stock Purchase Agreements

FHFA placed the enterprises in conservatorship on September 6, 2008. Dkt.51, at 5(J.A.320). One day later, Treasury purchased senior preferred stock in each entity. *Id.* Under the Preferred Stock Purchase Agreements (Purchase Agreements), Treasury committed to provide up to $100 billion in taxpayer funds to each enterprise to maintain their solvency by ensuring that their assets were at least equal to their liabilities. Dkt.51, at 6(J.A.321).

The Purchase Agreements entitled Treasury to four principal contractual rights. Dkt.51, at 6(J.A.321). First, Treasury received preferred stock with a senior liquidation preference of $1 billion for each enterprise plus a dollar-for-dollar increase each time the enterprises drew upon Treasury's funding commitment. *Id.*[1] Second, Treasury was entitled to dividends equal to 10% of Treasury's total liquidation preference, paid quarterly. *Id.* Third, Treasury received warrants to acquire up to 79.9% of the enterprises' common stock at a nominal price. Dkt.51, at 6-7(J.A.321-22). Fourth, beginning in 2010, Treasury would be entitled to a periodic commitment fee that was intended "to fully compensate [Treasury] for the support provided by the ongoing [c]ommitment." Dkt.51, at 7(J.A.322). Treasury could waive the

[1] "A liquidation preference is a priority right to receive distributions from the [enterprises'] assets in the event they are dissolved." Dkt.51, at 6 n.7(J.A.321).

commitment fee for one year at a time based on adverse conditions in the United States mortgage market. *Id.*[2]

Treasury's initial funding commitment soon appeared to be inadequate. In May 2009 FHFA and Treasury agreed to double Treasury's funding commitment from $100 billion to $200 billion for each enterprise. TR162(J.A.585); Dkt.51, at 6(J.A.321).

In December 2009, in the face of ongoing losses, it appeared that even the $200 billion per enterprise funding commitment might be insufficient. TR177-78(J.A.595-96). Treasury and FHFA therefore amended the Purchase Agreements for a second time to allow the enterprises to draw unlimited amounts from Treasury to cure net worth deficits until the end of 2012, at which point Treasury's funding commitment would be fixed. TR177-78(J.A.595-96), 190-91(J.A.608-09), 96-97(J.A.539-40); Dkt.51, at 6(J.A.321).

As of June 30, 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment, TR4351(J.A.2411), making Treasury's liquidation preference $189.5 billion, including the initial $1 billion senior liquidation preference for each enterprise. Dkt.51, at 7(J.A.322). Under the terms of the original Purchase Agreements, the enterprises' dividend obligations to Treasury were thus nearly $19

---

[2] The periodic commitment fee was to be set every five years by mutual agreement between FHFA and Treasury, after consultation with the Chairman of the Federal Reserve. Dkt.51, at 7(J.A.322). It was to be "determined with reference to the market value of the [c]ommitment then in effect." *Id.* Because Treasury has never required FHFA to pay the fee (which was indefinitely suspended under the Third Amendment), the amount of the fee has never been set. TR2358(J.A.673).

billion per year, with Fannie Mae owing Treasury $11.7 billion and Freddie Mac owing $7.2 billion. Dkt.51, at 7-8(J.A.322-23); TR4351-52(J.A.2411-12).

Between 2009 and 2011, the enterprises could not pay these substantial dividend obligations out of their annual earnings. The $11.7 billion Fannie Mae owed was more than the enterprise had made in any year of its existence. TR3911(J.A.1975). The $7.2 billion that Freddie Mac owed was more than it had made in any but one year. TR4094(J.A.2158). The enterprises thus drew on Treasury's funding commitment to meet those obligations. Through the first quarter of 2012, Fannie Mae had drawn $19.4 billion and Freddie Mac had drawn $7 billion, just to pay the dividends they owed Treasury. TR3784, 3845(J.A.1911). Those draws increased Treasury's liquidation preference, thus increasing the amount of dividends the enterprises owed. As their SEC filings reflect, the enterprises anticipated that they would not be able to pay their 10% dividends to Treasury without drawing on Treasury's funding commitment. *See* TR3919(J.A.1983); TR4096 (J.A.2160).

D. The Third Amendment

To break this cycle, Treasury and FHFA agreed to modify the Purchase Agreements for a third time. TR4334-49(J.A.2394-409); Dkt.51, at 8(J.A.323). This "Third Amendment," entered into on August 17, 2012, replaced the previous fixed dividend obligation with a requirement that the enterprises pay, as a dividend, the amount, if any, by which their net worth for the quarter exceeds a capital buffer. (The capital buffer, initially set at $3 billion, gradually declines over time, reaching zero in

2018). TR4337(J.A.2397), TR4345(J.A.2405); Dkt.51, at 8(J.A.323). Under the Third Amendment, the amount of the enterprises' dividend obligations thus depends on whether the enterprises have a positive net worth during a particular quarter, rather than being fixed at 10% of Treasury's existing liquidation preference. If the enterprises have a negative net worth, they pay no dividend.[3]

At the time of the Third Amendment, Treasury 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. TR3801-02(J.A.1867-68); TR3836(J.A.1902), 3862(J.A.1928). In 2013, however, the enterprises' net worth was substantially higher than expected. The increase in net worth was due in part to a rebound in housing prices and, more importantly, to non-recurring events, including the enterprises' one-time recognition of deferred tax assets that they had previously written off. OIG, FHFA, *The Continued Profitability of Fannie Mae and Freddie Mac Is Not Assured* 7-8, http://www.fhfaoig.gov/Content/Files/WPR-2015-001.pdf. Through the end of 2013, Treasury had received $185 billion in cumulative dividends from the enterprises. TR4351-52(J.A.2411-12); Dkt.51, at 9(J.A.324).

[3] Treasury also agreed to suspend the periodic commitment fee it was owed under the original Purchase Agreements for as long as the variable dividend was in place. TR4338(J.A.2398), 4346(J.A.2406); Dkt.51, at 7(J.A.322).

E. District Court Proceedings

Institutional and individual shareholders of the enterprises filed multiple lawsuits challenging the Third Amendment in the district court. They asserted claims under the Administrative Procedure Act (APA), alleging that the Third Amendment exceeded FHFA's and Treasury's authority and was arbitrary and capricious. They also asserted claims for breach of contract regarding allegedly promised dividends and liquidation preferences; claims for breach of the implied covenant of good faith and fair dealing; claims for breach of fiduciary duty; and a claim for an unconstitutional taking. Dkt.51, at 9-10 (J.A.324-25).

The district court granted the defendants' motions to dismiss all of plaintiffs' claims, relying largely on HERA's anti-injunction and transfer-of-shareholder-rights provisions. The court ruled that plaintiffs could not circumvent the anti-injunction bar by suing Treasury as FHFA's contractual counterparty, Dkt.51, at 15-16(J.A.330-31), or by inviting the court to engage in review of FHFA's motives or justifications for entering into the Third Amendment. *Id.* at 21-22(J.A.336-37). Such an inquiry "would render the anti-injunction provision hollow, disregarding Congress' express intention to divest the Court of jurisdiction to restrain FHFA's 'exercise of [its] powers or functions' under HERA." *Id.* at 22(J.A.337) (quoting 12 U.S.C. § 4617(f)). The court explained that it "need not look further than the current state of the [enterprises] to find that FHFA has acted within its broad statutory authority as conservator." *Id.* at 24(J.A.339). "Four years ago, on the brink of collapse, the

[enterprises] went into conservatorship under the authority of FHFA." *Id.* "Today, both [enterprises] continue to operate, and have now regained profitability." *Id.* The court concluded that "plaintiffs plead no facts demonstrating that FHFA has exceeded its statutory authority as conservator." *Id.* at 26(J.A.341).

The court held that plaintiffs' claims for monetary relief were barred by HERA's transfer-of-shareholder-rights provision, rejecting plaintiffs' argument that § 4617(b)(2)(A)(i) includes an implicit "conflict of interest" exception that permits shareholders to bring suit when FHFA faces a purported conflict of interest. Dkt.51, at 27-28(J.A.342-43). Such an exception would be at odds with the statute's "unambiguous text" and with Congress's intent to "prohibit[] courts from interfering with the exercise of [FHFA's conservator] powers." *Id.* at 28(J.A.343). The court further concluded that, in any event, no conflict of interest existed between FHFA and Treasury, two separate government agencies with "no operational or managerial overlap" and no "common genesis." *Id.* at 30-32(J.A.345-47).

The district court also dismissed class plaintiffs' takings claim, concluding that it lacked jurisdiction under the Tucker Act to entertain the claim and that the claim lacked merit in any event. Dkt.51, at 41-51(J.A.356-66). Class plaintiffs have not appealed the district court's dismissal of their takings claim. Cl.Pls.Br. 12 n.6.

SUMMARY OF ARGUMENT

1. In authorizing the expenditure of taxpayer money to rescue Fannie Mae and Freddie Mac, Congress enacted two provisions that bar challenges to the actions of the conservator or receiver.

First, HERA provided that FHFA, as conservator or receiver, would "immediately succeed" to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder[]" with respect to the enterprises and their assets. 12 U.S.C. § 4617(b)(2)(A)(i). This provision "plainly transfers shareholders' ability to bring derivative suits—a 'right[], title[], power[], [or] privilege'—to FHFA." *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012). Plaintiffs assert that the Third Amendment deprived the enterprises of capital; the relief they seek would require transfer of funds to the enterprises and would allegedly result in a future increase in the enterprises' capital. Plaintiffs' claims are thus quintessentially derivative claims and fall squarely within the transfer-of-shareholder-rights provision.

Second, HERA's anti-injunction provision, 12 U.S.C. § 4617(f), precludes a court from taking "any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." The district court correctly held that plaintiffs cannot evade the anti-injunction bar by naming Treasury as well as FHFA as a defendant. An injunction against either party would "restrain or affect" the exercise of the conservator's powers.

2. Plaintiffs' claims against Treasury would fail even were they not barred. Treasury did not violate the time limits on its authority to purchase new securities from the enterprises when it agreed to the Third Amendment. Treasury obtained no new shares and obligated no additional funds. The district court correctly explained that Treasury acted well within its authority when it altered the compensation structure of the securities Treasury already owned. Dkt.51, at 19(J.A.334).

Plaintiffs' claim that Treasury acted arbitrarily and capriciously would similarly fail. Entering into the Third Amendment was a reasonable exercise of Treasury's powers under HERA. The Amendment sought to halt a cycle in which the enterprises drew on Treasury's commitment to meet their existing dividend obligations, thereby increasing their future dividend obligations and threatening to deplete the remaining commitment. Plaintiffs urge that Treasury should have relied on different data or considered alternatives that they deem preferable. But plaintiffs identify no basis on which a court could properly second-guess Treasury's judgment as to the appropriate means of addressing the ongoing ramifications of the taxpayer rescue of the enterprises.

STANDARD OF REVIEW

This Court reviews a district court's order granting a motion to dismiss de novo. *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003). It reviews a district court's denial of a request to supplement the

administrative record for abuse of discretion. *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008).

ARGUMENT

I. HERA Bars Plaintiffs' Challenge To The Third Amendment.

A. HERA's Shareholder-Rights Provision Bars Plaintiffs' Claims.

HERA's transfer-of-shareholder-rights provision, 12 U.S.C. § 4617(b)(2)(A)(i), provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . 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." This Court has explained that "[t]his language plainly transfers shareholders ability to bring derivative suits—a 'right[], title[], power[], [or] privilege'—to FHFA." *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012).

1. Plaintiffs' claims are derivative claims.

a. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Thus, legal harms committed against a corporation give rise to claims belonging to the corporation itself, and shareholder suits seeking to enforce those claims are derivative. *See, e.g.*, *First Annapolis Bancorp, Inc. v. United States*, 644 F.3d 1367, 1373 (Fed. Cir.

2011). In a derivative suit, any recovery flows to the corporate treasury; in a direct suit, it flows to the individual plaintiff-shareholders.

The determination whether a federal-law claim is direct or derivative is governed by federal law. *See* Wright & Miller, *Federal Practice and Procedure* § 1821; *cf. Rifkin v. Bear Stearns & Co.*, 248 F.3d 628, 631 (7th Cir. 2001) ("[S]tanding to bring a federal claim in federal court is exclusively a question of federal law."). Where standing turns on the "allocation of governing power within [a] corporation," however, federal law often looks to state-law principles. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991); *see, e.g.*, *Strougo v. Bassini*, 282 F.3d 162, 167-69 (2d Cir. 2002) (applying state law in addressing shareholder standing under Investment Company Act).

The principles for distinguishing direct from derivative claims are well-established and consistent across federal and state law. The analysis is governed by two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004); *see also Labovitz v. Washington Times Corp.,* 172 F.3d 897, 901 (D.C. Cir. 1999) ("Claims based on injury to the corporation, however, are derivative in nature and any damages suffered are owed to the corporation."). A claim is "direct" when "the duty breached was owed to the stockholder" and the shareholder "can prevail without showing an injury to the

corporation." *Tooley*, 845 A.2d at 1039. A claim is "derivative" if the harm to the shareholder is the byproduct of some injury to the corporate body as a whole. *Id.*

"Where all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature." *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008); *see also, e.g.*, *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006) ("In the eyes of the law, such equal 'injury' to the shares . . . is not viewed as, or equated with, harm to specific shareholders individually."). Decisions in this Circuit have adhered to that principle. *See Cowin v. Bresler*, 741 F.2d 410, 414 (D.C. Cir. 1984); *Labovitz*, 172 F.3d at 904**.**

This Court has recognized, moreover, that "claims that [defendants] caused the company to enter into a series of 'unfair' transactions that have 'involved self-dealing' and 'diverting assets' are fundamentally claims belonging to the corporation and to [shareholders] only derivatively." *Cowin*, 741 F.2d at 416; *see also Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) ("Pareto's allegations—that the directors breached their duties of care and loyalty by failing to safeguard Barbary Coast's assets and equity, mismanaging its operations, [and] improperly placing it into voluntary receivership . . . describe a direct injury to the bank, not the individual stockholders.").

b. Plaintiffs ask that the Third Amendment be declared invalid and enjoined, so that future increases in net worth would be retained by the enterprises, and also request that the dividends Treasury has already received be returned to the GSEs.

Such an order would not benefit plaintiffs directly. The relief sought, in plaintiffs' view, would enrich the enterprises and therefore make plaintiffs' rights in the enterprises more valuable. Similarly, the harm that plaintiffs allege—the assertedly improper transfer of the GSEs' net worth to Treasury—was suffered by the corporation. *See, e.g.*, Inst.Pls.Br. 26 (arguing that the net worth sweep "unnecessarily transferred more than $128 billion to Treasury, destabilized the *Companies*, and made it impossible for *the Companies* to resume independent operations.") (emphasis added); *id.* at 42 ("the Net Worth Sweep siphoned an extra $110 billion of the Companies' assets to Treasury—assets that should have been retained to build a capital buffer"); Cl.Pls.Br. 8 ("As a result of this 'Net Worth Sweep,' the Companies would be left with no funds to redeem Treasury's Government Stock, or to distribute to private shareholders—whether by dividend, redemption, or liquidation distribution."); *id.* at 13, 16 (describing the "Net Worth Sweep" as an "[i]nherently [u]nfair, [s]elf-[d]ealing [t]ransaction" that "gratuitously gave away assets of the Companies").

That the Third Amendment will allegedly cause plaintiffs indirect harm as shareholders, such as a decline in the value of their shares or a reduced likelihood of future dividends or liquidation payouts, does not transform their claims into direct claims. *See, e.g.*, *Labovitz*, 172 F.3d at 904 ("[T]he loss [plaintiffs] suffered in share value is a derivative harm."); *Tooley*, 845 A.2d at 1037 (A claim is derivative where "the *indirect* injury to the stockholders arising out of the harm to the corporation comes about solely by virtue of their stockholdings.").

2. The "fiduciary" exception cited by plaintiffs has no applicability here.

Claims that a majority shareholder breached a fiduciary duty to minority shareholders with respect to a corporate transaction are typically derivative claims. *See, e.g.*, *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1218 (Del. 2012) (claim that controlling shareholder and the corporation's director breached a fiduciary duty to minority shareholders by causing the corporation to pay an "unfair price" for an asset was a derivative claim). Class plaintiffs seek to rely, however, (Cl.Pls.Br. 21-23) on a narrow Delaware law exception for cases in which "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile*, 906 A.2d at 100. To the extent that "the harm resulting from the overpayment is not confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares," those minority shareholders may bring a direct claim to recover for that additional quantum of harm. *Id.* That claim is actionable based on the controlling shareholder's "breach of fiduciary duty" to the plaintiffs. *Id.* at 99-100, 103.[4]

[4] In district court, the institutional plaintiffs similarly argued that their APA claims are direct claims. Dkt.38, at 24-25 (S.A.55).

As explained *infra* Pt. III.A, Treasury was not a controlling shareholder and did not owe a fiduciary duty to the GSEs' shareholders. Moreover, even if Treasury could be deemed a controlling shareholder, the exception would be inapplicable. The Third Amendment did not result in the issuance of additional shares of GSE stock, let alone "excessive" shares. Nor did the Third Amendment alter the percentage of GSE shares outstanding that Treasury owns or decrease the percentage owned by private investors. The Third Amendment altered the way Treasury's dividends are calculated; it did not alter Treasury's voting rights (Treasury has none) or its ownership stake in the GSEs.[5]

Moreover, even if plaintiffs' claims could plausibly be characterized as direct, they would still be barred by § 4617(b)(2)(A)(i), which transfers "all" stockholder "rights, titles, powers, and privileges" to FHFA. That transfer includes the "right" to bring any lawsuit with respect to the assets of the GSEs that depends on a shareholder's status as a shareholder. *See Pareto*, 139 F.3d at 700 ("Congress also covered privileges just to be sure that nothing was missed . . . Congress has transferred everything it could to the [conservator]."). All of class plaintiffs' claims against Treasury and FHFA depend upon their shareholder status and assert a claim

[5] Moreover, Virginia law, which class plaintiffs allege applies to Freddie Mac, does not permit direct suits by individual shareholders for alleged breaches of fiduciary duty. *Remora Invs., LLC v. Orr,* 673 S.E.2d 845, 848 (Va. 2009).

on the assets of the GSEs. Section 4617(b)(2)(A)(i) divested them of the right to bring such claims.

3. There is no conflict-of-interest exception to HERA's bar on derivative suits and there is, in any event, no conflict.

a. The district court correctly concluded that HERA's transfer-of-shareholder-rights provision does not include an implicit "conflict-of-interest" exception that allows shareholders to bring derivative claims when FHFA, acting as conservator, is allegedly unwilling to bring suit due to a purported conflict of interest. Dkt.51, at 27-30(J.A.342-45). The statute by its terms admits of no exceptions. *See also Kellmer*, 674 F.3d at 851 ("Congress . . . transferred everything it could to the [conservator]" through § 4617(b)(2)(A)(i)). Moreover, as the district court explained, creating a judicial conflict-of-interest exception would be inconsistent with the purpose of HERA's transfer-of-rights provision. Dkt.51, at 29-30(J.A.344-45).

The two courts of appeals that have recognized a conflict-of-interest exception to FIRREA's analogous provision have done so on the ground that a receiver facing a conflict of interest might be "unable or unwilling to [file suit on behalf of a corporation], despite it being in the best interests of the corporation." *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999) (conflict arose because the Federal Deposit Insurance Corporation [FDIC] would have had to sue itself); *see also Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021-22

(9th Cir. 2001) (FDIC would have had to sue the Office of Thrift Supervision, an "interrelated agenc[y] with overlapping personnel, structures, and responsibilities").

But it is precisely to address such concerns that courts in some circumstances have permitted derivative suits. *See Kamen*, 500 U.S. at 95 ("[T]he purpose of the derivative action was to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers") (internal quotation marks omitted). Through HERA, Congress precluded such actions. As the district court reasoned, "[h]ow . . . 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?" Dkt.51, at 29-30(J.A.344-45).

It would be particularly illogical to conclude that Congress permitted derivative suits challenging FHFA's transactions with Treasury. When it enacted HERA, Congress anticipated that FHFA would turn to Treasury for essential capital, and authorized Treasury to invest in the enterprises. If Congress intended FHFA's dealings with Treasury to be subject to challenge by shareholders, it would have expressly granted shareholders that right. Instead, it transferred "*all* rights, titles, powers, and privileges" of the GSEs' shareholders to FHFA. 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added).

In contrast, in a provision relied on by the class plaintiffs, HERA provided for shareholders' participation in the statutory claims process in the event of the

enterprises' liquidation. Cl.Pls.Br. 30-31 (citing 12 U.S.C. § 4617(b)(2)(K)(i)). That Congress expressly granted certain rights to shareholders during a receivership underscores that Congress did not intend shareholders to retain any rights during a conservatorship.

The conflict-of-interest exception adopted by the Ninth Circuit in *Delta Savings* and the Federal Circuit in *First Hartford* is inapt for an additional reason. In both cases, the conduct challenged by the plaintiff shareholders occurred before the relevant federal regulator was appointed receiver. *See Delta Savings*, 265 F.3d at 1019-20; *First Hartford*, 194 F.3d at 1283-84. By contrast, plaintiffs here challenge actions taken by FHFA during the conservatorship, in its role as conservator. It is precisely such actions that Congress took pains to shield from second-guessing by shareholders and courts. *See* 12 U.S.C. §§ 4617(b)(2)(A)(i), 4617(f). Extending the implicit conflict-of-interest exception adopted in *Delta Savings* and *First Hartford* to the suits plaintiffs have brought here would run counter to HERA's basic design.

b. Even assuming that a conflict-of-interest exception could apply to HERA's bar on derivative suits, no such conflict exists here. Class plaintiffs allege that a conflict exists because FHFA and Treasury "collaborated to create the Third Amendment[.]" Cl.Pls.Br. 33. But the fact that FHFA and Treasury made an agreement that plaintiffs believe to be unlawful does not establish a conflict of interest. If it did, every transaction FHFA entered would be subject to challenge by shareholders, because FHFA and the counterparty to the transaction would qualify as

alleged "joint tortfeasors." *Id.* Even the two courts that have adopted the conflict-of-interest exception have rejected such a far-reaching rule. *See First Hartford*, 194 F.3d at 1295 (emphasizing that the conflict-of-interest exception will apply "only . . . in a very narrow range of circumstances"); *Delta Savings*, 265 F.3d at 1023 ("We do not suggest that the FDIC-as-receiver is faced with a disqualifying conflict every time a bank-in-receivership is asked to sue another federal agency."). Class plaintiffs' conclusory assertion that "FHFA and Treasury ***are*** interrelated agencies with overlapping responsibilities, managerial overlap, and a common genesis" fails to advance their claim. Cl.Pls.Br. 34. FHFA and Treasury operate independently of one another and have no "managerial and operational overlap." *Delta Savings*, 265 F.3d at 1022; *see* Dkt.51, at 31(J.A.346). Nor do they have a common genesis: FHFA was created by HERA as an "independent agency," 12 U.S.C. § 4511(a), Treasury by the 1789 "[A]ct to [E]stablish the Treasury Department," *see United States ex rel. Work v. Boutwell*, 3 MacArth. 172 (D.C. 1879). Also, in contrast to the circumstances in *Delta Savings*, 265 F.3d at 1023, FHFA, not Treasury, made the determination to place the enterprises in conservatorships.

B. HERA's Anti-Injunction Provision Independently Bars Plaintiffs' Claims.

1. The anti-injunction provision effects "a sweeping ouster" of judicial authority to grant equitable remedies.

Plaintiffs' actions are independently barred by 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator" of the GSEs. Like its FIRREA analogue, *see* 12 U.S.C. § 1821(j), HERA's anti-injunction provision "effect[s] a sweeping ouster of courts' power to grant equitable remedies" to parties challenging actions taken by FHFA as conservator. *Freeman v. FDIC,* 56 F.3d 1394, 1399 (D.C. Cir. 1995) (interpreting FIRREA's equivalent anti-injunction provision); *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring) (FIRREA anti-injunction provision "bar[s] a court from acting in virtually all circumstances."); *see also Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012) (Section 4617(f) "excludes judicial review of 'the exercise of powers or functions' given to the FHFA as conservator."); *Bank of America Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010).

Judicial review is available under § 4617(f) only in the rare case where FHFA acts beyond statutory or constitutional bounds. *Freeman*, 56 F.3d at 1398. To establish that FHFA acted *ultra vires* and thus fit within § 4617(f)'s narrow exception, plaintiffs must show that the agency acted "patently in excess of [its] authority," *Qwest Corp v. FCC*, 482 F.3d 471, 476 (D.C. Cir. 2007), "disregarded a specific and

unambiguous statutory directive," or "violated some specific command," *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988). "Garden-variety errors of law or fact are not enough." *Id.*; *see also Bank of America*, 604 F.3d at 1243 (Section 1821(j) "has been interpreted broadly to bar judicial intervention whenever the FDIC is acting in its capacity as a receiver or conservator, even if it violates its own procedures or behaves unlawfully in doing so.") (citing cases).

At root, plaintiffs' challenge boils down to a disagreement over the manner in which FHFA executed its duties as conservator of the GSEs. In plaintiffs' view, FHFA restructured the enterprises' payment obligations to Treasury when it did not need to do so and failed to prioritize the build-up of capital, even if that option would have increased the risk of depleting Treasury's funding commitment. But claims that FHFA acted improperly as conservator fall within the scope of HERA's anti-injunction provision. *See, e.g.*, *Freeman*, 56 F.3d at 1399 (FIRREA's anti-injunction provision barred suit challenging FDIC's allegedly unlawful foreclosure); *National Trust*, 21 F.3d at 473 (Wald, J. concurring) (Section 1821(j) barred suit alleging that FDIC's sale of a building violated the National Historic Preservation Act); *Bank of America*, 604 F.3d at 1244 (FIRREA's anti-injunction provision barred claim that FDIC unlawfully sold assets belonging to plaintiff, because claim was merely an allegation of "FDIC's improper performance of its legitimate receivership functions"). As the district court recognized, the applicability of the HERA bar does not depend,

as plaintiffs suggest, on the rationale for actions taken by FHFA as conservator of the enterprises. Dkt.51, at 21(J.A.336).

2. FHFA acted within the scope of its statutory authority when it agreed to the Third Amendment.

a. Far from engaging in *ultra vires* conduct, FHFA acted well within the scope of its statutory powers when it entered into the Third Amendment. HERA grants FHFA an array of powers when acting as conservator. These include the power to "take over the assets of and operate [the GSEs]," to "conduct all business of the regulated entit[ies]," to "preserve and conserve the assets and property of the [enterprises]," and to "transfer or sell any asset or liability of the regulated entity." 12 U.S.C. § 4617(b)(2)(B),(G). More generally, FHFA has the authority, as a conservator, to "take such action as may be necessary to put the regulated entity in a sound and solvent condition" and to undertake any action "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). It may take these actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the GSEs. *Id.* § 4617(a)(2).

By entering into the Third Amendment, FHFA took an action it deemed necessary and appropriate to "preserve and conserve" a crucial "asset[]" (or "property") of the GSEs: the unused portion of Treasury's funding commitment. This action fits squarely within the statutory authority of a conservator.

At the time of the Third Amendment in 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment. TR4351(J.A.2411). Between 2009 and 2011, the enterprises drew over $25 billion from the commitment to pay the 10% dividends they owed Treasury. TR3784(J.A.1850). These draws increased Treasury's liquidation preference, which in turn increased the amount of dividends the enterprises owed; they also threatened to diminish Treasury's remaining commitment, which became fixed at the end of 2012.

The Third Amendment ended this cycle and reduced the risk that the enterprises would exhaust Treasury's commitment. By reducing the risk that Treasury's capital commitment would be dissipated by dividend obligations, the Third Amendment ensured that the enterprises would remain solvent for the foreseeable future and provided certainty to the financial markets from which the enterprises raise funds. Taking such action was well within FHFA's authority as conservator. *See* 12 U.S.C. § 4617(b)(2)(B), (D), (G); *see also, e.g.*, *Town of Babylon*, 699 F.3d at 227 (the taking of "protective measures against perceived risks is squarely within FHFA's powers as a conservator"); *Leon Cnty v. FHFA*, 700 F.3d 1273, 1279 (11th Cir. 2012) (same).

Indeed, recent legislation confirms that FHFA was acting within its statutory authority when it entered into the Third Amendment. In section 702 of the Consolidated Appropriations Act 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015), Congress legislated with respect to the Senior Preferred Stock Purchase Agreement

between Treasury and the enterprises, which it defined as "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." *Id.* § 702(a)(2)(A). The legislation provides that "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 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." *Id.* § 702(b). Congress amended the law fully aware of the Third Amendment and the agency's interpretation of its statutory authority. Because Congress took no steps to halt the agency action, "presumably the legislative intent has been correctly discerned." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982).

b. Plaintiffs mistakenly argue that a court has the authority to review whether the Third Amendment was "'*necessary* to put the [Companies] in a sound and solvent condition' and '*appropriate* to . . . preserve and conserve the [Companies'] assets,'" Inst.Pls.Br. 28-29 (quoting 12 U.S.C. § 4617(b)(2)(D)), and they further assert that the Third Amendment does not contribute to the GSEs' solvency, conserve or preserve

their assets, or promote their rehabilitation. Inst.Pls.Br. 33-48. Plaintiffs are wrong on all counts.

Even assuming a judicial role in evaluating whether a particular action in fact promotes the GSEs' solvency, conserves their assets, or rehabilitates them, the Third Amendment advances all of those goals. Much of plaintiffs' argument to the contrary rests on the mistaken premise that FHFA is under an obligation to return the enterprises to the same state that existed prior to the conservatorship. But nothing in HERA mandates that FHFA prioritize returning the enterprises to their pre-crisis form. To the contrary, HERA authorizes FHFA, as conservator, to make significant changes to the enterprises' operations. *See, e.g.*, 12 U.S.C. § 4617(a)(2) (stating that FHFA may "be appointed conservator or receiver for the purpose of *reorganizing*, *rehabilitating*, or *winding up* the affairs of a [GSE]") (emphasis added). The enterprises were on the precipice of failure in 2008, and Congress did not require that the conservator return the GSEs to the hands of private shareholders without significant changes to their capital structure and operations: a point underscored by Congress's recent legislation preventing Treasury from selling its preferred stock in the GSEs for two years. Consolidated Appropriations Act of 2016, § 702(b) (signed into law Dec. 18, 2015). The legislation includes a "Sense of Congress" provision declaring that "[i]t 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."[6] *Id.* § 702(c).

Plaintiffs are mistaken when they contend that the Third Amendment leaves the enterprises on "the edge of insolvency," thus violating FHFA's alleged duty to ensure the GSEs' soundness. Inst.Pls.Br. 33-41. As explained above, the Third Amendment arrested the draws-to-pay-dividends cycle that threatened to erode Treasury's unused funding commitment. *See supra* pp. 9-11. By preserving those funds, the Third Amendment ensured that the GSEs would have sufficient funds to cover any near-term losses, to weather another housing market downturn, and to maintain market confidence. Thus, contrary to plaintiffs' contention, the Third Amendment helps ensure the GSEs' financial stability.

Plaintiffs do not dispute that the Third Amendment helped to preserve Treasury's commitment. *See* Inst.Pls.Br. 34-41. Rather, they declare (Inst.Pls.Br. 40) that "extending the lifespan of Treasury's Commitment cannot contribute to

[6] Although the matter has no bearing on the disposition of this suit, plaintiffs' discussion creates the mistaken impression that undoing the Third Amendment would responsibly permit the return of the GSEs to their pre-conservatorship form. That discussion disregards the size and nature of the GSEs' portfolio of mortgage assets, and the amount of capital that would be required to end the conservatorship and Treasury's commitment without structural alterations. For a helpful discussion see http://www.urban.org/sites/default/files/2000229-privatizing-fannie-and-freddie.pdf (estimating that even under highly optimistic scenarios, it would take the GSEs 18 years to adequately recapitalize).

soundness and solvency because the Commitment . . . is not an asset nor does it qualify as capital." No basis exists for this assertion. Treasury's commitment has been crucial in ensuring that the GSEs have sufficient funds to pay their debts and avoid mandatory receivership under HERA. *See* 12 U.S.C. § 4617(a)(4). Preserving the Commitment directly promotes the enterprises' solvency, regardless of how the commitment is treated on their balance sheets.

Plaintiffs also argue (Inst.Pls.Br. 41) that the Commitment was not in danger of exhaustion when FHFA agreed to the Third Amendment. Nothing in HERA requires a conservator to delay action until a key asset is threatened with imminent exhaustion. At the time of the Third Amendment, Treasury projected that the fixed dividends the enterprises owed under the original Purchase Agreements would substantially reduce and possibly eliminate Treasury's funding commitment over the next ten years. *See*, *e.g.*, TR3784-90 (J.A.1850-56); TR3889-94(J.A.1953-58). Market participants concurred with these projections and shared Treasury's concerns regarding the effect an erosion of Treasury's commitment would have on the enterprises' viability. *See* TR1894(J.A.655) (Moody's report) (stating that "dividends on the US Treasury's senior preferred stock will eliminate Fannie Mae's contingent capital by 2019 and Freddie Mac's by 2022" and noting that this would lead to a substantial reduction in the enterprises' credit ratings); TR3252-53(J.A.1566-67) (Deutsche Bank report).

For similar reasons, plaintiffs are mistaken in asserting that the Third Amendment did not "preserve and conserve" the enterprises' assets. Inst.Pls.Br. 41-43. Plaintiffs' characterization of the Third Amendment as a "gift" to Treasury does not bear the briefest scrutiny. Inst.Pls.Br. 43. As a result of the Third Amendment, the enterprises were released from their obligation to pay a fixed 10% cash dividend, an obligation that would have cost the GSEs at least $19 billion per year, regardless of their profitability. *See supra* p. 10. Under the Third Amendment, Treasury receives a dividend only if the enterprises make money. By forgoing a fixed dividend, Treasury thus incurred a risk of non-payment, to the benefit of the GSEs. Treasury also agreed to waive the periodic commitment fee as long as the variable dividend is in place. In short, as plaintiffs themselves recognize elsewhere, the Third Amendment involved an "exchange of value" between Treasury and FHFA. Inst.Pls.Br. 57.

Plaintiffs' assertion (Inst.Pls.Br. 43-47) that the Third Amendment violates the conservator's statutory duty to "rehabilitate" the GSEs fares no better. As discussed, *see supra* pp. 31-32, HERA does not, as plaintiffs suggest, "require[] that FHFA 'rehabilitate' the Companies with a view to returning them to private operations," (Inst.Pls.Br. 44), without regard to the enactment of structural changes to ensure their long-term viability. Neither 12 U.S.C. § 4617(a)(2) nor 12 U.S.C. § 4617(b)(2)(D), the two provisions on which plaintiffs principally rely, suggest that FHFA must act with the aim of returning the entities to "private operations." A conservator can stabilize or rehabilitate a troubled financial institution with an eye towards returning it to its

former status. But it can also rehabilitate an entity to ready it for reorganization or liquidation. *See, e.g.*, *Ameristar Fin. Servicing Co. v. United States*, 75 Fed. Cl. 807, 808 n.3 (2007) (describing a conservator as "operat[ing] a troubled financial institution in an effort to conserve, manage, and protect the troubled institution's assets until the institution has stabilized or has been closed by the chartering authority"); FDIC Resoultions Handbook 91 (glossary) (same); *see also* 12 U.S.C. § 4617(a)(2) (stating that FHFA may be appointed conservator to reorganize, rehabilitate, or wind up a GSE's affairs).

Plaintiffs are thus quite wrong to insist (Inst.Pls.Br. 37-38) that entering into the Third Amendment was the act of a receiver and, as discussed, it was certainly not a *de facto* liquidation. To the contrary, the GSEs remain operational entities with combined assets of more than $5 trillion. Fannie Mae 2015 3Q 10-Q, at 77; Freddie Mac 2015 3Q 10-Q, at 78.[7] As the district court recognized, "the facts, as stated in the plaintiffs' pleadings, belie the individual plaintiffs' claims of *de facto* liquidation." Dkt.51, at 24(J.A.339).

---

[7] Section 4617(f) bars courts from taking any action that would affect or restrain FHFA's exercise of its powers as "conservator *or a receiver*." 12 U.S.C. § 4617(f) (emphasis added). Thus, the district court would have lacked jurisdiction to grant the equitable relief that plaintiffs seek—an order declaring the Third Amendment invalid and injunction setting it aside—even if FHFA had acted as a receiver, not as a conservator, when it agreed to the Third Amendment.

3. HERA's anti-injunction provision applies to plaintiffs' claims against Treasury.

Section 4617(f), HERA's anti-injunction provision, does not permit plaintiffs to seek to enjoin FHFA's actions by naming Treasury as a defendant. As the district court observed, "there can be little doubt that enjoining Treasury from partaking in the Third Amendment would restrain FHFA's uncontested authority to determine how to conserve the viability of the GSEs." Dkt.51, at 16(J.A.331).

Courts applying FIRREA's analogous anti-injunction provision have reached the same common-sense conclusion, holding that the provision "precludes a court order against a third party which would affect the FDIC as receiver, particularly where the relief would have the same practical result as an order directed against the FDIC in that capacity." *Hindes v. FDIC*, 137 F.3d 148, 160-61 (3d Cir. 1998); *see also Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013) ("Even though the FDIC has apparently already sold the note in question, if plaintiffs such as Dittmer are allowed to attack the validity of a failed institution's assets by suing the remote purchaser, such actions would certainly restrain or affect the FDIC's powers to deal with the property it is charged with disbursing."); *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992) ("Permitting Telematics to attach the certificate of deposit, if that attachment were effective against the FDIC, would have the same effect, from the FDIC's perspective, as directly enjoining the FDIC from attaching the asset. In

either event, the district court would restrain or affect the FDIC in the exercise of its powers as receiver.").

Disregarding this authority, plaintiffs mistakenly assert that "courts have recognized that the limitation on judicial review on which Section 4617(f) is modeled, 12 U.S.C. § 1821(j), bars only claims against the FDIC as conservator or receiver, and not claims against third parties." Inst.Pls.Br. 63. The two cases on which they rely recognized no such limitation. In *Ecco Plains, LLC v. United States*, 728 F.3d 1190, 1202 n.17 (2013), the Tenth Circuit observed, in a footnote, that § 1821(j) "only applies to a claim for injunctive relief against FDIC," whereas the plaintiffs in the case were seeking money damages against the United States. The court of appeals declined to consider whether § 1821(j) might nonetheless bar the claim, having concluded that it lacked jurisdiction over the plaintiffs' suit for other reasons. *See id.* This Court's decision in *National Trust for Historic Preservation v. FDIC*, 995 F.2d 238, 241 (1993) (per curiam), involved a suit seeking to enjoin the actions of the FDIC. The Court had no occasion to consider the applicability of § 1821(j) to claims against FDIC's counterparties.

The presumption in favor of judicial review cited by plaintiffs (Inst.Pls.Br. 62) does not advance their argument. That presumption "is rebuttable: It fails when a statute's language or structure demonstrates that Congress" intended to preclude review. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). Section 4617(f) expressly precludes judicial review of agency actions where such review would

"restrain or affect" FHFA's exercise of its conservatorship powers. Because an order invalidating Treasury's decision to enter the Third Amendment would do just that, the presumption favoring reviewability is overcome.

II. Plaintiffs' APA Claims Against Treasury, Which Are Barred By HERA, Also Fail On The Merits.

For the reasons explained above, the district court correctly concluded that it lacked jurisdiction over plaintiffs' claims against Treasury as well as those against FHFA. Plaintiffs' APA claims against Treasury would also fail on the merits.

A. Treasury Did Not Exceed Its Authority Under HERA When It Entered Into The Third Amendment, and Its Actions Are Committed to Agency Discretion By Law.

1. The Third Amendment was not a "purchase" of securities.

HERA vested Treasury with the authority "to purchase any obligations and other securities" issued by Freddie Mae and Freddie Mac, "on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine." 12 U.S.C. §§ 1719(g)(1)(A), 1455(*l*)(1)(A). HERA further granted Treasury the authority to, "at any time, exercise any rights received in connection with such purchases." 12 U.S.C. § 1719(g)(2)(A); *id.* § 1455(*l*)(2)(A). Treasury may also "hold" or "sell" any securities it acquires. *Id.* § 1719(g)(2)(D); *id.* § 1455(*l*)(2)(D).

Treasury's authority to purchase new securities from the enterprises expired on December 31, 2009. 12 U.S.C. § 1719(g)(4); *id.* § 1455(*l*)(4). Its authority to "exercise

any rights received in connection" with earlier purchases, as well as its authority to hold or sell securities, did not. *See Id.* § 1719(g)(2)(D); *id.* § 1455(*l*)(2)(D).

The district court correctly rejected plaintiffs' assertion that the Third Amendment was a "purchase" of new "securities." Treasury obtained no new shares of the enterprises' stock as a result of the Third Amendment. *See Isqutih ex rel. Isquith v. Caremark Int'l, Inc.*, 136 F.3d 531, 534 (7th Cir. 1998) (plaintiffs did not "purchase or sell securities" where they "did not buy or sell shares" in the relevant companies). Treasury did not commit any additional funds to the enterprises in the Third Amendment. As the district court explained, the Third Amendment merely altered "the compensation structure" of the securities Treasury already owned. Dk#51, at 19(J.A.334). In exchange for waiving the periodic commitment fee and its entitlement to a dividend equal to 10% of its liquidation preference, Treasury agreed to accept a dividend equal to the enterprises' variable net worth, if any.

Plaintiffs correctly note that the Third Amendment involved an exchange of value: FHFA "transferred an Enterprise asset—potential future profits—to Treasury in exchange for relief from an obligation—10% dividends." Inst.Pls.Br. 57. They err, however, in inferring that the Third Amendment therefore must have effected a purchase of securities. Plaintiffs declare that "[t]he touchstone of a purchase is an exchange of value." *Id.* at 57. But an "exchange of value" is also the touchstone of a valid contract amendment. *See, e.g.*, *Robinson v. Ada S. McKinley Cmty. Servs.*, 19 F.3d 359, 364 (7th Cir. 1994) ("A valid modification requires an offer, acceptance, and

consideration."); *Farnsworth on Contracts* § 4.21, p. 524 (3d ed. 2004). And, as the district court recognized, HERA's sunset provision only bars Treasury's purchase of obligations or securities issued by the GSEs. Dkt.51 at 17. It does not bar other contract amendments. Implying such a restriction would be particularly anomalous when the amendment plainly falls within Treasury's authority to "hold" or "sell" the securities it owns or to "exercise" previously secured rights.

In the absence of an actual purchase of securities, plaintiffs are left to argue that the Third Amendment should be treated as a purchase of new securities because it "fundamentally change[d]" Treasury's senior preferred stock. Inst.Pls.Br. 58. The "fundamental change" doctrine, adopted in some securities-fraud cases is an "esoteric and dubious judge-made doctrine" whose ongoing validity has been questioned. *Isquith*, 136 F.3d at 535-36 ("[W]e very much doubt that the doctrine retains any validity in any class of case."). Some courts of appeals have expressly declined to adopt it, *see Katz v. Gerardi*, 655 F.3d 1212, 1221 (10th Cir. 2011), and even those which have accepted it have acknowledged that it "does not cut a wide swath," *Jacobson v. AEG Capital Corp.*, 50 F.3d 1493, 1499 (9th Cir. 1995). It is implausible that Congress intended to incorporate such an "esoteric and dubious" doctrine into HERA's definition of "purchase."

In any event, the doctrine is inapplicable on its own terms. It applies "where a defendant's fraud results in a fundamental change in the nature of the plaintiff's investment without the plaintiff's consent." *Katz*, 655 F.3d at 1221; *Jacobson*, 50 F.3d

at 1499 (The fundamental change doctrine is a "narrow" doctrine that applies to "shareholders who, without any say, find themselves fraudulently forced-out of their securities."). No plaintiff claims that the Third Amendment was the product of fraud. Treasury and FHFA bargained for the changes that were made to the original Purchase Agreements, and FHFA freely agreed to those changes.[8]

2. The Third Amendment did not exceed Treasury's authority.

Plaintiffs alternatively argue that the Third Amendment exceeded Treasury's authority even if it did not constitute a purchase of new securities, urging that it falls outside the powers granted by HERA. Inst.Pls.Br. 48.

This argument is difficult to fathom. Congress provided Treasury with broad authority, which it restricted in one respect by ending Treasury's authority to purchase new securities on December 31, 2009. It did not freeze the parties' contract terms as of that date and preclude Treasury and FHFA from altering their compensation arrangements as appropriate. Like parties to any contract, Treasury and FHFA had the power to modify the terms of their contract. Indeed, Congress recognized

---

[8] Plaintiffs also cite (Inst.Pls.Br. 59) an Internal Revenue Service tax regulation, 26 C.F.R. § 1.1001-3, which address the circumstances in which "modification of the terms of a debt instrument" qualifies as an "exchange" of property, such that any financial gain resulting from the modification must be declared as income. Plaintiffs provide no reason to believe that Congress intended the word "purchase" to be read synonymously with the word "exchange," as used by the IRS in a tax regulation addressing debt instruments.

Treasury's inherent authority to modify the terms of its purchase contracts in HERA and expressly funded such modifications, providing 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 at the time of such purchase, modification, or exercise." *See* 12 U.S.C. § 1719(g)(3); *id.* § 1455(*l*)(3). And Congress has continued to recognize Treasury's ongoing authority to amend the Purchase Agreement. *See* Consolidated Appropriations Act of 2016, § 702(a)(2)(A) (enacted Dec. 18, 2015) (defining "Senior Preferred Stock Purchase Agreement" as "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)."

Even assuming, moreover, that it were necessary that Treasury modify the Purchase Agreements through the "exercise" of a reserved contractual "right," that requirement was satisfied here. When it entered into the Third Amendment, Treasury "exercise[d] [the] right[]," 12 U.S.C. § 1719(g)(2)(A)—explicitly conferred by the original Preferred Stock Purchase Agreements in 2008—to amend those contracts. *See* TR27-28(J.A.480-81) ("This Agreement may be waived or amended solely by a writing executed by both of the parties hereto."); TR61-62(J.A.514-15)(same). That Treasury exercised its right to amend jointly with FHFA makes it no less the exercise

of a right. A contract confers a "right" to be "exercised" even when the right is to be exercised jointly. *See, e.g., Public Serv. Co. of New Hampshire v. Hudson Light & Power Dep't*, 938 F.2d 338, 345, 347 (1st Cir. 1991) (rejecting "attempt by appellants . . . to impede [one party's] exercise of its exclusive contract right to enter into an agreement with [the counterparty] to modify the Sellback Agreement.").[9] A right, as plaintiffs assert, is a "legal, equitable, or moral entitlement to do something," Inst.Pls.Br. 53, and to "exercise" means to "make use of; to put into action" or "[t]o implement the terms of." *Black's Law Dictionary* 916 (10th ed. 2014). When Treasury and FHFA agreed to the Third Amendment, they "ma[d]e use of" their "legal . . . entitlement" to amend the original Purchase Agreements.

In sum, HERA authorized Treasury to agree to the Third Amendment. And, insofar as plaintiffs seek to bring their claims within an exception to HERA's anti-

[9] Plaintiffs cite two cases for the assertion that "an arrangement that depends on 'mutual consent' is not a right at all," Inst.Pls.Br. 53, both of which are inapposite. *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), was a takings case that concerned the amount of just compensation the government owed to tenants of a property that the government had appropriated. The Supreme Court determined that the tenants were entitled to damages equal to the value of the remainder of their lease. *Id.* at 380. In a footnote, the Court noted that plaintiffs were not entitled to damages based on the expected renewal of their leases, even though the building's landlord had often extended their leases through "mutual consent." *Id.* 380 n.9. It was the terms of the lease, not the parties' informal expectations, that delineated the tenants' "rights" to compensation. *Id.* *International Union, UAW v. NLRB*, 765 F.2d 175, 183 (D.C. Cir. 1985), applied the rule that an employer must obtain a union's consent before taking an action that is a mandatory subject of bargaining, unless the employer has reserved the right to act unilaterally in its contract with the union. *UAW* does not suggest that a contract right that is exercised mutually is not a right the parties possess.

injunction provision on the basis of *ultra vires* action, they have signally failed to meet their burden of showing that Treasury "patently" misconstrued HERA or violated "a specific and unambiguous statutory directive." *Griffith*, 842 F.2d at 493.

B. Treasury Did Not Act Arbitrarily or Capriciously When It Agreed to the Third Amendment.

Plaintiffs' claim that the Third Amendment was not the product of reasoned decisionmaking would likewise fail even if it were subject to APA review. *See* Inst.Pls.Br. 64-65. In an APA suit, "[t]he entire case on review is a question of law," and a court's review "is based on the agency record and limited to determining whether the agency acted arbitrarily or capriciously." *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009).

Treasury's decision to enter into the Third Amendment was "supported by substantial evidence and based upon a consideration of the relevant factors[.]" *Melcher v. FCC*, 134 F.3d 1143, 1152 (D.C. Cir. 1998). As discussed, the primary purpose of the Third Amendment was to forestall the dissipation of Treasury's funding commitment and thereby reduce the risk that the GSEs would become insolvent. *See supra* pp. 9-11. As a result of the dividend requirements in the original Purchase Agreements, the GSEs drew funds from Treasury's commitment to pay Treasury the dividends owed. Each draw increased the amount of dividends due in future quarters, making it still more difficult for the GSEs to meet their obligations under the agreements. This cycle threatened to deplete Treasury's commitment. Treasury

entered into the Third Amendment to protect the unused portion of Treasury's funding commitment from further draws to pay dividends.

Plaintiffs argue that Treasury knew or should have known that the GSEs would soon become more profitable and would be able to recognize deferred tax assets on a one-time basis, making the Third Amendment less urgent.

Even apart from HERA's preclusion of judicial review, discretionary determinations of this kind are committed to agency discretion by law. *See* 5 U.S.C. § 701(a)(2). And even when judicial review is available, courts are reluctant to second-guess predictive judgments within an agency's expertise. *See*, *e.g.*, *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821 (D.C. Cir. 1983) ("[P]redictive judgments about areas that are within the agency's field of discretion and expertise" are entitled to "particularly deferential" treatment.); *see also Nuvio Corp. v. FCC*, 473 F.3d 302, 306-07 (D.C. Cir. 2006).

Substantial evidence considered by Treasury at the time of the Third Amendment supported its judgment that the dividend requirements contained in the original Purchase Agreements threatened to deplete its funding commitment. As discussed, by mid-2012, Fannie Mae was required to pay Treasury $11.7 billion annually, more money than it had ever made in a year. TR3911(J.A.1975). Freddie Mac owed Treasury $7.2 billion in annual dividends, an amount greater than it had earned in all but one year of its existence. TR4094(J.A.2158). In their SEC filings, the GSEs themselves cautioned that over time they would be unable to pay the 10%

dividends without taking additional draws. *See* TR3919(J.A.1983); TR4094(J.A.2158), 4096(J.A.2160).

Treasury's predictive judgments were based on a number of factors, including performance under the existing agreements, estimates of the GSEs' future earnings, the GSEs' historical financial record, the future path of housing prices, and overall macroeconomic and financial conditions. *See, e.g.*, TR3786(J.A.1852), TR3837(J.A.1903). Treasury's financial projections indicated that the GSEs would consume a sizable portion of Treasury's commitment over the next ten years, mostly to pay the dividends owed to Treasury. TR3784-90(J.A.1850-56), TR3845-50(J.A.1911-16), TR3888-94(J.A.1952-58). These projections further indicated that, under some scenarios, Fannie Mae could exhaust Treasury's commitment by as early as 2019. TR3888(J.A.1952). Market participants shared this view and, like Treasury, recognized that a reduction in Treasury's commitment would threaten GSE solvency and creditworthiness. *See* TR1894(J.A.655) (Moody's report); TR3252-53(J.A.1566-67) (Deutsche Bank report).

Plaintiffs assert that Treasury reviewed "flawed and stale data" (Inst.Pls.Br. 64) when it relied on projections from October 2011 that did not reflect the fact that the enterprises were profitable in the first two quarters of 2012. *Id.* Plaintiffs cite no authority for the proposition that a federal agency acts arbitrarily and capriciously when it makes decisions based on data through the fourth quarter of the previous year. In any event, the projections on which Treasury relied assumed that the

enterprises would become profitable as early as 2012 and no later than 2014. *See* TR3787-90(J.A.1853-56), 3889-94(J.A.1953-58). That the enterprises earned modest profits in the first two quarters of 2012 was not inconsistent with Treasury's analysis or with its view that such profitability was unlikely to eliminate the need to draw from the Treasury commitment in future years. Indeed, the enterprises themselves acknowledged as much in the August 2012 quarterly SEC filings that plaintiffs cite. *See* Inst.Pls.Br. 64-66; TR4094(J.A.2158), TR3919(J.A.1983).

Plaintiffs' claim that Treasury failed to accord sufficient weight to the enterprises' "deferred tax assets" is similarly wide of the mark. As a document cited by plaintiffs in the district court indicated, the enterprises could recognize the deferred tax assets, if at all, only on a "one-time" basis, and only upon a determination that the enterprises would generate sufficient taxable income to utilize the deferred tax assets. FHFA Office of Inspector General, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 15-17 (Mar. 20, 2013) (cited in Dkt.38, at 73) (S.A.57). As of February 2012, both enterprises had determined that it was more likely than not that they would not generate sufficient income to use their deferred tax assets. *See, e.g.*, TR2706(J.A.1020), TR2963(J.A.1277) (discussing the GSEs' conclusion through the end of 2011 that the deferred tax assets would not be realized). In fact, the GSEs were still of that view at the end of 2012, three months after the Third Amendment. *See* Freddie Mac 2012 10-K at 194 (Feb. 28, 2013) (stating that "as of December 31, 2012," Freddie Mac remained unable "to realize the

portion of [its] net deferred tax assets that [was] dependent upon the generation of future taxable income."); Fannie Mae 2012 10-K, at 5 (Apr. 3, 2013) ("[I]n evaluating the recovery of our deferred tax assets, as of December 31, 2012, we again determined that the negative evidence outweighed the positive evidence."). That the enterprises could experience a one-time gain at some unknown future date casts no doubt on the reasonableness of Treasury's decisionmaking.

Although they take issue with the urgency of the problem confronting Treasury in 2012, plaintiffs do not seriously dispute the threat of increased draws, leading to increased dividends, leading to increased draws. They urge, however, that Treasury failed to consider what they characterize as "obvious alternative solutions[.]" *See* Inst.Pls.Br. 65-66. They argue, for example, that Treasury could have curtailed the draws-to-pay-dividends cycle by allowing the enterprises to pay dividends in-kind, rather than in cash. The Purchase Agreements, however, required the enterprises to pay 10% dividends in cash and explicitly provided that when an enterprise "for any reason failed to pay dividends [at the 10% rate] in cash in a timely manner as required," dividends would begin to accrue at a higher 12% addition to Treasury's liquidation preference. *See* TR33(J.A.486) (§ 2(c)); TR67-68(J.A.520-21) (§ 2(c)); Dkt.51 at 6 n.7(J.A.321 n.7). These dividends would continue to be calculated at the higher 12% rate until the enterprise paid all cumulative dividends in cash, including those that had accumulated as additions to the liquidation preference. As discussed, the evidence available to Treasury in August 2012 indicated that the enterprises would

be unable to pay dividends at a 10% rate in most years. Obligating the enterprises to pay dividends that accrue at a higher rate was not an "obvious alternative solution[]" to the problem of depleting Treasury's funding commitment.

Plaintiffs alternatively suggest that Treasury should have "refinanced, reduced, or waived its dividends in a way that diminished or eliminated the need to draw down on Treasury's Commitment[.]" Inst.Pls.Br. 67. Plaintiffs' position is thus that Treasury should have placed the interests of the enterprises' private shareholders over those of taxpayers who invested billions of dollars in the enterprises to save them from insolvency, and ahead of the interests of the enterprises' creditors and holders of their mortgage-backed securities. Although plaintiffs might regard that alternative solution as desirable, Treasury did not act unreasonably or contrary to law in failing to recognize its attractions. Although plaintiffs take issue with the solution Treasury and FHFA adopted, the Third Amendment, in fact, "refinance[s]" Treasury's dividends "in a way that diminished or eliminated [the GSEs'] need to draw down on Treasury's Commitment." *Id.*

III. The Class Plaintiffs' Claims Against Treasury, Which Are Barred By HERA, Are Also Without Merit.

A. Even Assuming That Jurisdiction over Such a Claim Existed, Plaintiffs' Fiduciary-Duty Claim Is Without Basis.

1. Treasury did not owe a fiduciary duty to the GSEs or their shareholders.

Class plaintiffs mistakenly argue (Cl.Pls.Br. 18) that "Treasury was and is a controlling stockholder in each of the Companies, and therefore owes a fiduciary duty to the Companies and their minority private shareholders," which it allegedly breached. Plaintiffs do not identify a cognizable cause of action for this contention, which is, in any event, without basis.[10]

A controlling shareholder of a corporation either owns a majority of the corporation's voting shares, or it exercises "actual control" over the corporation's affairs. *Starr Int'l Co. v. Fed. Reserve Bank of N.Y.*, 906 F. Supp. 2d 202, 221-25 (S.D.N.Y. 2012), *aff'd*, 742 F.3d 37 (2d Cir. Nov. 16, 2014); *see also Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987). Treasury is not and has never

[10] In the district court, the class plaintiffs urged that their suit sounded in tort and that the court therefore had jurisdiction to entertain those claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). Dkt.33 (No. 13-1288), at 51 (S.A.53). They did not allege, however, that they filed an administrative claim with Treasury, a prerequisite for filing suit under the FTCA. 28 U.S.C. § 2675. Plaintiffs' claims would also be barred by several exceptions to the FTCA's waiver of immunity. *See* 28 U.S.C. § 2680(a), (h), (i). Plaintiffs do not urge a right to recover under the FTCA on appeal and have thus waived that argument.

been a majority shareholder, nor does it have voting rights in the GSEs. Its rights as a senior preferred shareholder are entirely contractual.

That Treasury holds warrants to purchase common stock and contractual rights of refusal over the issuance of stock or debt does not establish control of the enterprises. The mere "potential ability to exercise control" does not suffice to create a fiduciary duty; the plaintiff must instead plead and show "the actual exercise of that ability." *In re Sea-Land Corp. S'holders Litig.*, 1987 WL 11283, at *5 (Del. Ch. May 22, 1987) (unpublished). Even "a significant shareholder, who exercises a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take, does not become, without more, a controlling shareholder for that particular purpose." *Superior Vison Servs. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426, at *5 (Del. Ch. Aug. 25, 2006); *see also Starr*, 906 F. Supp. 2d at 221-25.

Relying on a single unpublished Delaware lower-court decision, plaintiffs assert that the potential to exercise stock rights creates a duty as a controlling shareholder. *See* Cl.Pls.Br. 18. That decision—*Odyssey Partners, LP v. Fleming Cos., Inc.*, 1996 WL 422377 (Del. Ch. July 24, 1996)—did not purport to resolve whether the defendant had ever been a controlling shareholder. Indeed, it explicitly noted that the defendant "warmly denies that it ever was a controlling shareholder of Holdings. It asserts that it never exercised the voting power it acquired in 1995 and never otherwise controlled the Holdings board. This dispute is essentially factual and not resolvable at this stage." *Id.* at *3, n.1.

Plaintiffs' claim would fail in any event because the duty of loyalty applies only when a controlling shareholder stands on both sides of a transaction and dictates its terms. *See Weinberger v. UOP, Inc.,* 457 A.2d 701, 710 (Del. 1983). The Third Amendment was an agreement between Treasury and FHFA, acting as conservator of the GSEs. Plaintiffs chastise the district court for "overlook[ing] the fact that Treasury and FHFA were deeply 'interrelated' in their decision to execute the Third Amendment." Cl.Pls.Br. 33. Treasury and FHFA were, of course, interrelated insofar as they were parties to the agreements that rescued the enterprises from collapse and were attempting to deal with the ongoing obligations of the original agreements. But those circumstances did not make Treasury a controlling shareholder that owed special duties to the other shareholders of Fannie Mae and Freddie Mac.

HERA could not, moreover, properly be read to incorporate a fiduciary duty that would require Treasury to place the interests of shareholders above those of the taxpayers. HERA imposes no fiduciary duties on Treasury; instead, it transfers shareholder rights and privileges to FHFA, and authorizes FHFA to act "in the best interests of [the enterprises] or the Agency." 12 U.S.C. § 4617(b)(2)(J)(ii).

Treasury's duty under HERA is to assist in stabilizing the housing market and to protect taxpayers. *See* 12 U.S.C. § 1719(g)(1)(C) (directing Treasury to consider several factors "to protect the taxpayers" before exercising its purchase authority). The imposition of common-law fiduciary obligations on Treasury would upset the balance of policy considerations underlying Congress's authorization to extend funds

to rescue the enterprises. *Cf. Starr*, 742 F.3d at 42 (affirming dismissal of breach-of-fiduciary-duty claims against the Federal Reserve Bank of New York, and holding that federal law preempted asserted fiduciary duty under Delaware law).

2. Plaintiffs have no contractual claims against Treasury.

Class plaintiffs also assert a breach-of-contract claim, based on the rights they claim adhered in their stock certificates. It appears that plaintiffs assert this claim only against FHFA, since Treasury has no contractual relationship with the GSEs' shareholders. *See* Cl.Pls.Br. 34-35 (describing contractual relationship between shareholders and the enterprises). In any event, the district court correctly held that these claims are meritless. Dkt.51, at 32-41(J.A.347-56). The class plaintiffs raise two sets of alleged contractual rights: liquidation preferences and rights to dividends. Cl.Pls.Br. 35-39. As the district court explained, the liquidation preference claims are not ripe because "the GSEs owe a liquidation preference payment to a preferred shareholder only during liquidation." Dkt.51, at 34(J.A.349). The dividend claims likewise fail because "[t]he 'right' to dividends to which the plaintiffs refer throughout their briefs, then, is, in actuality, wholly dependent upon the discretion of the GSEs' board of directors." Dkt.51, at 37(J.A.352).

B. There Is No Takings Claim Before This Court.

The class plaintiffs have expressly abandoned their takings claims on appeal. Cl.Pls.Br. 12 n.6. As the district court correctly concluded, none of the claims before it were proper under the Little Tucker Act, 28 U.S.C. § 1346, because plaintiffs did

not provide a "clearly and adequately expressed" waiver of any claims over $10,000, the jurisdictional limit for the Act. Dkt.51, at 42-43(J.A.357-58). In any event, appeals of claims brought under the Little Tucker Act may only be brought in the Federal Circuit. 28 U.S.C. § 1295.[11]

Two amici nevertheless attempt to raise issues related to the abandoned takings claims, urging that the Court should interpret HERA to avoid an unconstitutional taking. Macey Amicus Br.; Rafter Amicus Br. This Court does not ordinarily consider arguments raised only by amici, *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994), and should certainly not do so in the clear absence of jurisdiction to consider a takings claim. The canon of constitutional avoidance does not authorize a court to consider constitutional questions it lacks the power to adjudicate—it is a method of *avoiding* constitutional questions. *Id.* at 629-30.[12] Amici's suggested analysis turns the doctrine of constitutional avoidance on its head.

---

[11] Some plaintiffs are simultaneously seeking relief in the Court of Federal Claims under a Takings Clause theory as part of a number of consolidated actions. *See, e.g., Fairholme Funds, Inc., et al. v. United States,* No. 13-465C (Fed. Cl.); *Cacciapalle, et al. v. United States,* No. 13-466C (Fed. Cl.).

[12] The Takings Clause rarely forms the basis for constitutional avoidance because it is violated only by an *uncompensated* taking of property. *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). Thus, "the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985). To justify application of the avoidance canon, class plaintiffs would need

Continued on next page.

Because there is no takings claim in this case, there is no occasion to engage in a detailed rebuttal of amici's contentions, which were properly rejected by the district court. If this Court were to consider any issues related to the abandoned takings claims, the district court's analysis demonstrates that such contentions are without merit. *See* Dkt.51, at 43-51(J.A.358-66).

IV. Neither the District Court Nor This Court Need Supplement The Administrative Record.

The district court did not abuse its discretion when it denied plaintiffs' motion to supplement the record; nor should this Court grant plaintiffs' motion to supplement the record in this Court. The principal issue on appeal is whether the district court correctly held that plaintiffs' attempts to set aside the Third Amendment are barred by HERA. The administrative record is irrelevant to that question, as the district court correctly concluded. Dkt.51, at 21-22 (J.A.336-37).

The applicability of HERA's jurisdictional bars does not depend on the rationale for actions taken by FHFA as conservator of the enterprises. As the district court observed, "[t]he extraordinary breadth of HERA's statutory grant to FHFA as a conservator or receiver for the [enterprises], likely due to the bill's enactment during an unprecedented crisis in the housing market, . . . coupled with the anti-injunction provision, narrows the Court's jurisdictional analysis to *what* the Third Amendment

---

to show "that there is an identifiable class of cases in which application of [the rule] will necessarily constitute a taking." *Id.* at 128 n.5.

entails, rather than *why* FHFA executed the Third Amendment." Dkt.51, at 21(J.A.336) (internal citation omitted). Nor do FHFA's or Treasury's motives matter with respect to the applicability of HERA's transfer-of-shareholder-rights' provision, a purely legal question that does not in any way turn on the character of or basis for FHFA's actions.

Institutional plaintiffs' claim that the district court improperly decided factual disputes against them also misunderstands the nature of judicial review in an APA case. In an APA case, "[t]he entire case on review is a question of law, and the complaint, properly read, actually presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action." *Rempfer*, 583 F.3d at 865 (quotation marks omitted). The district court's review "is based on the agency record and limited to determining whether the agency acted arbitrarily or capriciously." *Id.*

Moreover, even assuming the administrative record is relevant here, plaintiffs fall far short of establishing that Treasury's administrative record was incomplete. An agency's compilation of the record before it is entitled to a "presumption of regularity." *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 420 (1971). This suit is plainly not the "exception[al]" case in which supplementation of the record is necessary because "injustice might otherwise result." *In re AOV Indus.*, 797 F.2d 1004, 1012 (D.C. Cir. 1986) (citing *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)). The extra-record materials plaintiffs seek to introduce on appeal do not "go

to the heart" of the issues contested on appeal, but are instead irrelevant to the legal questions before this Court. *Id.* at 1013. And even when an administrative record is inadequate to permit effective judicial review, the appropriate course is to obtain supplemental information from the agency, not to engage in a de novo evaluation. *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973).[13]

Plaintiffs' request that this Court take judicial notice of the materials they identify in their motion to supplement underscores the inappropriateness of that motion. Even if the materials were relevant, they would not be subject to judicial notice. Both sides have engaged in discovery in a parallel lawsuit in the Court of Federal Claims and excerpts from that discovery do not constitute facts "not subject to reasonable dispute." Fed. R. Evid. 201(b). This Court is not the appropriate forum to resolve these factual disputes, and it would therefore be especially inappropriate for this Court to supplement the record with the identified materials.

---

[13] The institutional plaintiffs criticize the district court for "reject[ing] out of hand Fairholme's well-pleaded allegation . . . that, in agreeing to the Net Worth Sweep, FHFA was acting at the direction of Treasury in violation of 12 U.S.C. § 4617(a)(7)." Inst.Pls.Br. 76. But, as the district court explained, Fairholme's mere allegation that it was Treasury that first proposed the Third Amendment "do[es] not come close to [creating] a reasonable inference that 'FHFA considered itself bound to do whatever Treasury ordered.'" Dkt.51, at 23(J.A.338).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
ABBY C. WRIGHT
s/ *Gerard Sinzdak*
GERARD SINZDAK
Attorneys, Appellate Staff
Civil Division, Room 7242
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
(202) 514-0718
gerard.j.sinzdak@usdoj.gov

MARCH 2016

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,906 words according to the count of Microsoft Word.

s/ *Gerard Sinzdak*
Gerard Sinzdak
Counsel for the Treasury Department

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

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

s/ *Gerard Sinzdak*
Gerard Sinzdak
Counsel for the Treasury Department

ADDENDUM

TABLE OF CONTENTS

12 U.S.C. § 4617 (excerpts) A1

12 U.S.C. § 1455(*l*) A7

12 U.S.C. § 4617

(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.

(3) Grounds for discretionary appointment of conservator or receiver The grounds for appointing conservator or receiver for any regulated entity under paragraph (2) are as follows:

(A) Assets insufficient for obligations

The assets of the regulated entity are less than the obligations of the regulated entity to its creditors and others.

(B) Substantial dissipation Substantial dissipation of assets or earnings due to—

(i) any violation of any provision of Federal or State law; or

(ii) any unsafe or unsound practice.

(C) Unsafe or unsound condition

An unsafe or unsound condition to transact business.

(D) Cease and desist orders

Any willful violation of a cease and desist order that has become final.

(E) Concealment

Any concealment of the books, papers, records, or assets of the regulated entity, or any refusal to submit the books, papers, records, or affairs of the regulated entity, for inspection to any examiner or to any lawful agent of the Director.

(F) Inability to meet obligations

The regulated entity is likely to be unable to pay its obligations or meet the demands of its creditors in the normal course of business.

(G) Losses

The regulated entity has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the regulated entity to become adequately capitalized (as defined in section 4614(a)(1) of this title).

(H) Violations of law Any violation of any law or regulation, or any unsafe or unsound practice or condition that is likely to—

(i) cause insolvency or substantial dissipation of assets or earnings; or

(ii) weaken the condition of the regulated entity.

(I) Consent

The regulated entity, by resolution of its board of directors or its shareholders or members, consents to the appointment.

(J) Undercapitalization The regulated entity is undercapitalized or significantly undercapitalized (as defined in section 4614(a)(3) of this title), and—

(i) has no reasonable prospect of becoming adequately capitalized;

(ii) fails to become adequately capitalized, as required by—

(I) section 4615(a)(1) of this title with respect to a regulated entity; or

(II) section 4616(a)(1) of this title with respect to a significantly undercapitalized regulated entity;

(iii) fails to submit a capital restoration plan acceptable to the Agency within the time prescribed under section 4622 of this title; or

(iv) materially fails to implement a capital restoration plan submitted and accepted under section 4622 of this title.

(K) Critical undercapitalization

The regulated entity is critically undercapitalized, as defined in section 4614(a)(4) of this title.

(L) Money laundering

The Attorney General notifies the Director in writing that the regulated entity has been found guilty of a criminal offense under section 1956 or 1957 of title 18or section 5322 or 5324 of title 31.

(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.

(5) Judicial review

(A) In general

If the Agency is appointed conservator or receiver under this section, the regulated entity may, within 30 days of such appointment, bring an action in the United States district court for the judicial district in which the home office of such regulated entity is located, or in the United States District Court for the District of Columbia, for an order requiring the Agency to remove itself as conservator or receiver.

(B) Review

Upon the filing of an action under subparagraph (A), the court shall, upon the merits, dismiss such action or direct the Agency to remove itself as such conservator or receiver.

(6) Directors not liable for acquiescing in appointment of conservator or receiver

The members of the board of directors of a regulated entity shall not be liable to the shareholders or creditors of the regulated entity for acquiescing in or consenting in good faith to the appointment of the Agency as conservator or receiver for that regulated entity.

(7) Agency not subject to any other Federal agency

When acting as conservator or receiver, the Agency shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the Agency.

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

(1) Rulemaking authority of the agency

The Agency may prescribe such regulations as the Agency determines to be appropriate regarding the conduct of conservatorships or receiverships.

(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

(ii) title to the books, records, and assets of any other legal custodian of such regulated entity.

(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.

(C) Functions of officers, directors, and shareholders of a regulated entity

The Agency may, by regulation or order, provide for the exercise of any function by any stockholder, director, or officer of any regulated entity for which the Agency has been named 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.

(F) Organization of new enterprise

The Agency may, as receiver for an enterprise, organize a successor enterprise that will operate pursuant to subsection (i).

(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.

. . . .

(f)

(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.

. . . .

12 U.S.C. § 1455(*l*)

(l) Temporary authority of Treasury to purchase obligations and securities; conditions

(1) Authority to purchase

(A) General authority

In addition to the authority under subsection (c) of this section, the Secretary of the Treasury is authorized to purchase any obligations and other securities issued by the Corporation under any section of this chapter, on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine. Nothing in this subsection requires the Corporation to issue obligations or securities to the Secretary without mutual agreement between the Secretary and the Corporation. Nothing in this subsection permits or authorizes the Secretary, without the agreement of the Corporation, to engage in open market purchases of the common securities of the Corporation.

(B) Emergency determination required

In connection with any use of this authority, the Secretary must determine that such actions are necessary to--

(i) provide stability to the financial markets;

(ii) prevent disruptions in the availability of mortgage finance; and

(iii) protect the taxpayer.

(C) Considerations

To protect the taxpayers, the Secretary of the Treasury shall take into consideration the following in connection with exercising the authority contained in this paragraph:

(i) The need for preferences or priorities regarding payments to the Government.

(ii) Limits on maturity or disposition of obligations or securities to be purchased.

(iii) The Corporation's plan for the orderly resumption of private market funding or capital market access.

(iv) The probability of the Corporation fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the Corporation's status as a private shareholder-owned company.

(vi) Restrictions on the use of Corporation resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

(D) Reports to Congress

. . .

(2) Rights; sale of obligations and securities

(A) Exercise of rights

The Secretary of the Treasury may, at any time, exercise any rights received in connection with such purchases.

(B) Sale of obligation and securities

The Secretary of the Treasury may, at any time, subject to the terms of the security or otherwise upon terms and conditions and at prices determined by the Secretary, sell any obligation or security acquired by the Secretary under this subsection.

(C) Deficit reduction

The Secretary of the Treasury shall deposit in the General Fund of the Treasury any amounts received by the Secretary from the sale of any obligation acquired by the Secretary under this subsection, where such amounts shall be--

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

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

(D) Application of sunset to purchased obligations or securities

The authority of the Secretary of the Treasury to hold, exercise any rights received in connection with, or sell, any obligations or securities purchased is not subject to the provisions of paragraph (4).

(3) Funding

For the purpose of the authorities granted in this subsection, the Secretary of the Treasury may use the proceeds of the sale of any securities issued

under chapter 31 of Title 31, and the purposes for which securities may be issued under chapter 31 of Title 31 are extended to include such purchases and the exercise of any rights in connection with such purchases. Any 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 at the time of such purchase, modification, or exercise.

(4) Termination of authority

The authority under this subsection (l), with the exception of paragraphs (2) and (3) of this subsection, shall expire December 31, 2009.