ORAL ARGUMENT SCHEDULED FOR APRIL 15, 2016

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

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

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

FINAL OPENING BRIEF FOR INSTITUTIONAL PLAINTIFFS

Charles J. Cooper
David H. Thompson
Peter A. Patterson
Brian W. Barnes
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: 202.220.9600
Facsimile: 202.220.9601

Counsel for Appellants Fairholme Funds, Inc., et al.

Theodore B. Olson
Douglas R. Cox
Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

Counsel for Appellant Perry Capital LLC

[*Additional Appearances on Inside Cover*]

Drew W. Marrocco
DENTONS US LLP
1301 K Street, N.W.,
Suite 600, East Tower
Washington, D.C. 20005
Telephone: 202.408.6400
Facsimile: 202.408.6399

Michael H. Barr
Richard M. Zuckerman
Sandra Hauser
DENTONS US LLP
1221 Avenue of the Americas
New York, N.Y. 10020
Telephone: 212.768.6700
Facsimile: 212.768.6800

Counsel for Appellants Arrowood Indemnity Co., et al.

Janet M. Weiss
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, N.Y. 10166
Telephone: 212.351.3988
Facsimile: 212.351.5234

Counsel for Appellant Perry Capital LLC

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI CURIAE

Appellants are Perry Capital LLC, Fairholme Funds, Inc., The Fairholme Fund, Berkley Insurance Company, Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, Preferred Employers Insurance Company, Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited, American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin, and Mary Meiya Liao.

Appellees are the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the United Department of the Treasury, Jacob J. Lew, Melvin L. Watt, and the Federal Housing Finance Agency.

II. RULINGS UNDER REVIEW

Appellants seek review of: (1) the Memorandum Opinion entered on September 30, 2014, by the United States District Court for the District of Columbia (Lamberth, J.); (2) the Order Granting Defendants' Motions to Dismiss and Denying Plaintiffs' Cross-Motion for Summary Judgment entered on

September 30, 2014, by the United States District Court for the District of Columbia (Lamberth, J.); (3) the Order Denying Plaintiffs' Motion for Supplementation of the Administrative Record, Limited Discovery, Suspension of Briefing on the Defendants' Dispositive Motions, and a Status Conference entered on September 30, 2014, by the United States District Court for the District of Columbia (Lamberth, J.).

III. RELATED CASES

This case has not previously been before this Court. Counsel is aware of the following ongoing, related cases in the District of Columbia, involving certain of the same Defendants and arising out of the same government action challenged here. The *Fairholme*, *Arrowood*, and *In re Fannie Mae/Freddie Mac* appeals listed below (Nos. 14-5254, 14-5260 & 14-5262) have been consolidated with this appeal (No. 14-5243) by order of the Court.

- *Fairholme Funds, Inc. v. Federal Housing Finance Agency*, No. 14-5254 (D.C. Cir.);
- *Arrowood Indemnity, Inc. v. Federal National Mortgage Association*, No. 14-5260 (D.C. Cir.);
- *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action*, No. 14-5262 (D.C. Cir.);
- *Fairholme Funds, Inc. v. United States*, No. 1:13-cv-465-MMS (Fed. Cl.);

- *Cacciapalle v. United States*, No. 1:13-cv-466-MMS (Fed. Cl.);
- *Fisher v. United States*, No. 1:13-cv-608-MMS (Fed. Cl.);
- *Washington Federal v. United States*, No. 1:13-cv-385-MMS (Fed. Cl.); and
- *Rafter, et al. v. United States*, No. 1:14-cv-740-MMS (Fed. Cl.).

TABLE OF CONTENTS

Page

INTRODUCTION 1

JURISDICTIONAL STATEMENT 5

STATUTES...5

STATEMENT OF ISSUES 5

STATEMENT OF FACTS 6

A. Fannie Mae And Freddie Mac...6

B. The Housing And Economic Recovery Act Of 2008. 7

C. FHFA Places Fannie Mae And Freddie Mac Into Conservatorship...9

D. Treasury Amends The Purchase Agreements Twice Before The Expiration Of Its Statutory Authority On December 31, 2009. 13

E. The Companies Regain Profitability. 14

F. Treasury And FHFA "Amend" Treasury's Stock In 2012 To Expropriate The Rights Of Public Shareholders And Seize All Of The Companies' Net Worth. 15

G. Appellants Challenge Treasury's And FHFA's Unlawful Actions...19

SUMMARY OF ARGUMENT 22

STANDARD OF REVIEW 25

ARGUMENT 26

I. THE DISTRICT COURT'S RULING ERRONEOUSLY IGNORED THE FIDUCIARY FUNCTIONS OF CONSERVATORSHIP, WHICH REQUIRE CONSERVATORS TO PROTECT AND REHABILITATE ENTITIES UNDER THEIR CARE. 26

A. Section 4617(f) Does Not Prohibit Claims That FHFA Exceeded Its Statutory Authority As Conservator. 27

TABLE OF CONTENTS *(continued)*

Page

B. Conservators Are Well-Established As Fiduciaries In Federal Statutes, Case Law, And Historical Practice. 29

C. The Net Worth Sweep Exceeded FHFA's Statutory Authority As Conservator. 34

II. TREASURY LACKED AUTHORITY TO ADOPT THE NET WORTH SWEEP. 48

A. Treasury Exceeded Its Authority Under HERA By Acting After Its Authority Expired. 49

B. Treasury's Decision To Execute The Net Worth Sweep Was Arbitrary And Capricious. 61

III. THE DISTRICT COURT IMPROPERLY ADJUDICATED APPELLANTS' CLAIMS ON THE BASIS OF PLAINLY DEFICIENT ADMINISTRATIVE RECORDS. 68

A. The District Court Relied On Patently Incomplete Administrative Records. 69

B. The District Court Improperly Relied On Facts Outside Of The Complaint Without Affording Appellants An Opportunity To Present Evidence. 74

CONCLUSION 78

TABLE OF AUTHORITIES

Page(s)

Cases

7547 Corp. v. Parker & Parsley Dev. Partners, L.P.,
38 F.3d 211 (5th Cir. 1994) 59

Abrahamson v. Fleschner,
568 F.2d 862 (2d Cir. 1978) 59

Allen v. Utley,
No. 88-cv-545, 1988 WL 90105 (D.D.C. Aug. 19, 1988) 30

* *Am. Bar Ass'n v. FTC*,
430 F.3d 457 (D.C. Cir. 2005)....................50

Am. Bioscience v. Thompson,
243 F.3d 579 (D.C. Cir. 2001)....................69

Am. Library Ass'n v. FCC,
406 F.3d 689 (D.C. Cir. 2005)....................49

AT&T Info. Sys. v. Gen. Serv. Admin.,
810 F.2d 1233 (D.C. Cir. 1987)....................71

Bicknell v. Cent. Hanover Bank & Trust Co.,
6 N.Y.S.2d 704 (Sup. Ct. 1938)....................32

Carpenter v. Pac. Mut. Life Ins. Co. of Cal.,
74 P.2d 761 (Cal. 1937)....................32

Cnty. of Los Angeles v. Shalala,
192 F.3d 1005 (D.C. Cir. 1999)....................64

* *Cnty. of Sonoma v. FHFA*,
710 F.3d 987 (9th Cir. 2013) 27

Coal. for Underground Expansion v. Mineta,
333 F.3d 133 (D.C. Cir. 2003)....................74

---

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

TABLE OF AUTHORITIES *(continued)*

Cases *(continued)*

Page(s)

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990)....................73

Davis Trust Co. v. Hardee,
85 F.2d 571 (D.C. Cir. 1936)....................31

Del E. Webb McQueen Dev. Corp. v. RTC,
69 F.3d 355 (9th Cir. 1995)....................32

Dickson v. Sec'y of Def.,
68 F.3d 1396 (D.C. Cir. 1995)....................64

ECCO Plains, LLC v. United States,
728 F.3d 1190 (10th Cir. 2013)....................63

El Paso Natural Gas Co. v. United States,
750 F.3d 863 (D.C. Cir. 2014)....................25

Ferguson v. Forstmann,
25 F.2d 47 (3d Cir. 1928)....................30

Gelles v. TDA Indus., Inc.,
44 F.3d 102 (2d Cir. 1994)....................58

Gerber v. Norton,
294 F.3d 173 (D.C. Cir. 2002)....................25

* *Golden Pacific Bancorp v. FDIC*,
273 F.3d 509 (2d Cir. 2001)....................32

Gross v. Rell,
40 A.3d 240 (Conn. 2012)....................31

Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.,
302 F.3d 18 (2d Cir. 2002)....................51

Henry v. United States,
396 F. Supp. 1300 (D.D.C. 1975)....................30

TABLE OF AUTHORITIES *(continued)*

Cases *(continued)*

Page(s)

Herbert v. Nat'l Acad. of Scis.,
974 F.2d 192 (D.C. Cir. 1992).. 74, 75

IMS, P.C. v. Alvarez,
129 F.3d 618 (D.C. Cir. 1997)...69

In re Guardianship of Christiansen,
248 Cal. App. 2d 398 (Ct. App. 1st Dist. 1967)...................................31

In re Koretzky's Estate,
86 A.2d 238 (N.J. 1951) 31, 43

* *In re Kosmadakes*,
444 F.2d 999 (D.C. Cir. 1971)...30

Int'l Union, United Auto., Aerospace & Ag. v. NLRB,
765 F.2d 175 (D.C. Cir. 1985)...53

Jama v. Immigration & Customs Enforcement,
543 U.S. 335 (2005)..63

James Madison Ltd. v. Ludwig,
82 F.3d 1085 (D.C. Cir. 1996)...26

Kerns v. United States,
585 F.3d 187 (4th Cir. 2009) 75

Keys v. Wolfe,
709 F.2d 413 (5th Cir. 1983) 59, 60

Kucana v. Holder,
558 U.S. 233 (2010)..62

La. Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986)..50

Land v. Dollar,
300 U.S. 731 (1947)..75

TABLE OF AUTHORITIES *(continued)*

Cases *(continued)*

Page(s)

* *Leon Cnty. v. FHFA*,
700 F.3d 1273 (11th Cir. 2012) 27

* *Mach Mining, LLC v. EEOC*,
135 S. Ct. 1645 (2015)..62

Marcum v. Salazar,
751 F. Supp. 2d 74 (D.D.C. 2010)..69

McAllister v. RTC,
201 F.3d 570 (5th Cir. 2000) 36

* *MCI Telecomms. Corp v. AT&T Co.*,
512 U.S. 218 (1994)..58

Nat'l Trust for Historic Pres. v. FDIC,
21 F.3d 469 (D.C. Cir. 1994).. 27, 28

Nat'l Trust for Historic Pres. v. FDIC,
995 F.2d 238 (D.C. Cir. 1993)..63

Neblett v. Carpenter,
305 U.S. 297 (1938)..32

* *Occidental Petroleum Corp. v. SEC*,
873 F.2d 325 (D.C. Cir. 1989)..69

Reno v. Catholic Soc. Servs., Inc.,
509 U.S. 43 (1993)..63

RTC v. CedarMinn Bldg. Ltd. P'ship,
956 F.2d 1446 (8th Cir. 1992) 31

RTC v. United Trust Fund, Inc.,
57 F.3d 1025 (11th Cir. 1995) 33, 47

Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.,
29 F.3d 655 (D.C. Cir. 1994)..50

TABLE OF AUTHORITIES *(continued)*

Cases *(continued)*

Page(s)

SEC v. Nat'l Sec., Inc.,
393 U.S. 453 (1969) 57, 59

Sharpe v. FDIC,
126 F.3d 1147 (9th Cir. 1997) 27

Smith v. City of Jackson,
544 U.S. 228 (2005) 51

Suess v. FDIC,
770 F. Supp. 2d 32 (D.D.C. 2011) 32

Taniguchi v. Kan Pac. Saipan, Ltd.,
132 S. Ct. 1997 (2012) 30

Tenn. Gas Pipeline Co. v. FERC,
926 F.2d 1206 (D.C. Cir. 1991) 44

Town of Babylon v. FHFA,
699 F.3d 221 (2d Cir. 2012) 27

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 52

United States v. Petty Motor Co.,
327 U.S. 372 (1946) 53

Walter O. Boswell Mem'l Hosp. v. Heckler,
749 F.2d 788 (D.C. Cir. 1984) 64

Statutes

5 U.S.C. § 706 26

* 12 U.S.C. § 1455 8

12 U.S.C. § 1717 30

TABLE OF AUTHORITIES *(continued)*

Statutes *(continued)*

Page(s)

* 12 U.S.C. § 1719 .... 8, 9, 14, 24, 49, 55

12 U.S.C. § 1821 .... 29, 32, 33, 35, 63

12 U.S.C. § 1831f 32

12 U.S.C. § 1831*o* 35

12 U.S.C. § 4502 .... 35, 41

12 U.S.C. § 4511 7

12 U.S.C. § 4614 35

* 12 U.S.C. § 4617(a) 7, 21, 22, 28, 33, 37, 38, 44

* 12 U.S.C. § 4617(b) 8, 22, 28, 29, 33, 34, 36, 37, 42, 43, 46, 47

12 U.S.C. § 4617(c) 37

12 U.S.C. § 4617(f) 20, 27, 61

12 U.S.C. § 5216 51

12 U.S.C. § 5230 51

15 U.S.C. § 78j 58

26 U.S.C. § 931 30

26 U.S.C. § 7701 30

Rules & Regulations

12 C.F.R. § 217.10 35

12 C.F.R. § 217.20(b) 35, 41

TABLE OF AUTHORITIES *(continued)*

Rules & Regulations *(continued)*

Page(s)

12 C.F.R. pt. 3, app. A 7

12 C.F.R. pt. 30, app. A 35

* 26 C.F.R. § 1.1001-3 59

* 76 Fed. Reg. 35,724 (June 20, 2011) 28, 35, 38, 42, 46

Rev. Rul. 56-564, 1956-2 C.B. 216, 1956 WL 10781 59

Rev. Rul. 81-160, 1981-1 C.B. 312, 1981 WL 165898 11

Other Authorities

Barclays US Corporate High Yield Index 67

Basel Comm. on Banking Supervision, *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems* (2010) 35

Black's Law Dictionary (10th ed. 2014) 53, 56

* Mark A. Calabria, *The Resolution of Systemically Important Financial Institutions: Lessons from Fannie and Freddie* (Cato Inst., Working Paper No. 25/CMFA No. 1, 2015) 33

Cong. Budget Office, *CBO's Estimate of Cost of the Administration's Proposal to Authorize Federal Financial Assistance for the Government-Sponsored Enterprises for Housing* (2008) 34, 41

E. Allen Farnsworth, *Farnsworth on Contracts* (3d ed. 2004) 53

FHFA, 2012 Report to Congress (2013) 45

Fletcher Cyclopedia of the Law of Corporations (2011 rev. vol.) 60

Folk on the Delaware General Corporation Law 60

TABLE OF AUTHORITIES *(continued)*

Other Authorities *(continued)*

Page(s)

Gov't Accountability Office, GAO-09-782, *Fannie Mae & Freddie Mac's Analysis of Options for Revising the Housing Enterprises' Long-term Structures* (2009) 12

Kevin M. Keyes, *New York University Annual Institute on Federal Taxation* 10

* Michael Krimminger & Mark Calabria, *The Conservatorships of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles* (Jan. 29, 2015) 33

OED Online 30, 53, 56

Office of Mgmt. & Budget, *Fiscal Year 2016 Analytical Perspectives of the U.S. Government* (2015) 18, 42

Statement of Edward J. DeMarco Before the U.S. Senate Comm. on Banking, Hous. & Urban Affairs (Apr. 18, 2013) 45

Statement of Melvin L. Watt Before the U.S. House of Representatives Comm. on Fin. Servs. (Jan. 27, 2015) 36

U.C.C. § 1-201 56

Unif. Guardianship & Protective Proceeding Act § 5-411(c) (2010) 43

N. Eric Weiss, Cong. Research Serv., RL34661, *Fannie Mae's and Freddie Mac's Financial Problems* (2012) 40

GLOSSARY

2012 Press Release	Press release from the United States Department of the Treasury entitled, "Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac," dated August 17, 2012
Agencies	The Federal Housing Finance Agency and the United States Department of the Treasury
APA	The Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*
The Companies	Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac")
The Institutional Plaintiffs	Appellants Perry Capital LLC, Arrowood Indemnity Co., *et al.*, and Fairholme Funds Inc., *et al.*
HERA	The Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654
FDIA	Federal Deposit Insurance Act
FDIC	Federal Deposit Insurance Corporation
FHFA	Federal Housing Finance Agency
The First Amendment	The First Amendment to the Senior Preferred Stock Purchase Agreements between the United States Department of the Treasury and the Federal Housing Finance Agency, as conservator to the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, dated May 6, 2009
The Net Worth Sweep, or the Third Amendment	The Third Amendment to the Senior Preferred Stock Purchase Agreements between the United States Department of the Treasury and the Federal Housing Finance Agency, as conservator to the Federal

	National Mortgage Association and the Federal Home Loan Mortgage Corporation, dated August 17, 2012, and the declaration of dividends pursuant to the Third Amendment beginning on January 1, 2013
The Required Considerations	The factors that the United States Department of the Treasury is required to consider pursuant to HERA prior to any exercise of its authority to purchase securities issued by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, 12 U.S.C. §§ 1455(*l*)(1)(C), 1719(g)(1)(C)
The Required Findings	The findings that the United States Department of the Treasury is required to make pursuant to HERA prior to any exercise of its authority to purchase securities issued by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, 12 U.S.C. §§ 1455(*l*)(1)(B), 1719(g)(1)(B)
The Second Amendment	The Second Amendment to the Senior Preferred Stock Purchase Agreements between the United States Department of the Treasury and the Federal Housing Finance Agency, as conservator to the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, dated December 24, 2009
Treasury	United States Department of the Treasury
Treasury January 2011 Strategic Options Memorandum	Memorandum from Jeffrey A. Goldstein, dated January 4, 2011

INTRODUCTION

This appeal challenges the government's 2012 expropriation and effective nationalization of two of America's largest and most profitable companies—Fannie Mae and Freddie Mac. The agency actions at issue are unprecedented in American history and blatantly at odds with the governing statute. The acknowledged purpose of the government's action is to ensure that all existing net worth, and all future earnings, of these two publicly traded companies be transferred to the United States Treasury in perpetuity; that the Companies remain in financial comas until they finally are liquidated; and that no shareholder other than Treasury ever receives an additional dime. In granting the agencies' motions to dismiss, the district court erased the well-established duties of a conservator and embraced the agencies' view that a conservator may, if it chooses, run its ward for the government's exclusive benefit and enrichment, at the expense of all other interested parties and completely shielded from judicial review. That decision upends the law of conservatorships, is erroneous, and should be reversed.

To be clear, this action does not challenge the government's decisions made during the financial crisis of 2008, the decision to place Fannie Mae and Freddie Mac in conservatorship, or the terms of Treasury's 2008 financial support for the Companies. Rather, it challenges the agencies' decisions in 2012 (when both Fannie Mae and Freddie Mac had returned to sustained profitability) to transform

radically the terms of Treasury's investment—terms on which investors relied when they invested in the Companies' recovery—in a way that robbed shareholders of their equity interest in the Companies.

In August 2012, Fannie Mae's and Freddie Mac's conservator, the Federal Housing Finance Agency, acquiesced in Treasury's plan to fundamentally change Treasury's securities from fixed-rate dividend preferred stock that would have entitled Treasury to approximately $19 billion in 2013, to stock that entitles Treasury to receive quarterly "dividend" payments equal to each Company's net worth. That unprecedented change—known as the Net Worth Sweep—netted Treasury an astonishing windfall of more than ***$100 billion in 2013 alone***. To date, Treasury has collected $230 billion in dividends from the Companies—$43 billion more than Treasury disbursed to the Companies, and $128 billion more than it could have collected under the terms that governed Treasury's investment before the illegal change. And, despite these enormous "dividend" payments, Treasury claims to retain its right to be paid an additional $189 billion—ahead of any of the Companies' public shareholders—upon the Companies' liquidation.

Appellants filed suit under the Administrative Procedure Act seeking to set aside the Net Worth Sweep. Appellants alleged that, in entering into the Net Worth Sweep, FHFA and Treasury each exceeded its authority under the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654

("HERA"), and acted arbitrarily and capriciously. After declaring the administrative record "irrelevant," the district court held that the agencies had authority to enter into the Net Worth Sweep under HERA, and that HERA shielded both agencies from any review of whether their conduct otherwise satisfied the requirements of the APA.

That decision should be reversed for at least three reasons.

First, the Net Worth Sweep utterly disregards the boundaries that Congress in HERA placed on FHFA's powers as conservator. Consistent with the fiduciary obligations of conservators at common law and with the FDIC statute on which HERA was modeled, Congress in HERA charged FHFA with the duty to "preserve and conserve" the Companies' assets and to "rehabilitate" the Companies to a "sound and solvent" condition. The Net Worth Sweep, however, does the opposite: It depletes the Companies' assets and pushes them to the brink of insolvency every quarter. As Treasury explained when it announced the Net Worth Sweep, it does this precisely so that the Companies ***cannot*** "rebuild capital, [or] return to the market in their prior form." The Net Worth Sweep thus is irreconcilable with—indeed, it is antithetical to—the fiduciary duties Congress imposed on FHFA as conservator and should be vacated. Nowhere did HERA authorize the *de facto* nationalization of the Companies, and FHFA did not have authority to enter into an agreement to that end.

Second, HERA cut off Treasury's ability to purchase the Companies' securities at the end of 2009, and after that date authorized Treasury ***only*** "to hold, exercise any rights received in connection with, or sell, any obligations or securities [it had] purchased." Yet, the Net Worth Sweep was plainly not a "right" that Treasury's securities allowed it to "exercise." Rather, Treasury's exchange of fixed-rate-dividend preferred stock for securities that entitle the holder to *all* of the issuer's net worth is so transformative—both in terms of its economics and its effect on other shareholders—that it is effectively the acquisition of a new security. Accordingly, it was explicitly prohibited after 2009.

Third, the district court resolved factual disputes at the motion-to-dismiss phase based on clearly deficient administrative records. FHFA did not even purport to submit an administrative record, but rather proffered a "Document Compilation" that attempted to substitute a misleading declaration drafted for purposes of litigation for the administrative record reflecting the agency's actual decisionmaking. Treasury's record was and is demonstrably incomplete. Appellants are entitled to have their claims evaluated against the complete administrative records, and, at a minimum, this case should be remanded to the district court for that purpose.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. Appellants have standing because the Net Worth Sweep aggrieved them by eliminating the value of their preferred stock.

Appellants filed a timely notice of appeal on October 2, 2014. J.A.373.[1] This Court has jurisdiction under 28 U.S.C. § 1291.

STATUTES

The Addendum reproduces pertinent statutes.

STATEMENT OF ISSUES

1. Whether FHFA exceeded its statutory authority as conservator under HERA by assenting to the Net Worth Sweep under which the Companies must transfer all of their net assets to Treasury and are prohibited from retaining capital, in service of the goal of eliminating the Companies.

2. Whether Treasury exceeded its authority under HERA and violated the APA by entering into the Net Worth Sweep in 2012, when HERA expressly permitted Treasury after December 31, 2009, only "to hold [or] exercise any rights

---

[1] Citations herein are as follows (docket citations refer to No. 13-cv-1025 unless otherwise indicated): "Op." - Memorandum Opinion dated Sept. 30, 2014 (J.A.316-67); "F####" - FHFA's "Document Compilation" (J.A.2418-4044); "T####" - Treasury's Administrative Record (J.A.454-2417).

received in connection with, or sell, any obligations or securities [it had already] purchased," or by imposing the Net Worth Sweep based on outdated data without adequately examining reasonable alternatives.

3. Whether the district court erred by dismissing Appellants' claims over their objections that the administrative records produced by each agency were demonstrably incomplete and misleading.

STATEMENT OF FACTS

A. Fannie Mae And Freddie Mac.

Fannie Mae and Freddie Mac (collectively, the "Companies") are federally chartered financial institutions. Congress created Fannie Mae in 1938 and privatized it in 1968. Congress chartered Freddie Mac in 1970 and privatized it in 1989. Although Fannie Mae and Freddie Mac are still called "Government Sponsored Enterprises," or "GSEs," the Companies have been privately owned from the dates of privatization until 2008.

The government encouraged private investment in the Companies' preferred stock, representing as late as July 2008—only two months before FHFA placed the Companies into conservatorship—that the Companies were extraordinarily safe investments. CNBC, *Fannie, Freddie Adequately Capitalized: Lockhart* (July 8, 2008), http://www.cnbc.com/id/25584136 (the Companies met regulators' "highest criteria" for capitalization). Federal policy reinforced this rhetoric. The Office of

the Comptroller of the Currency permitted banks to carry the Companies' preferred stock at 20% risk weighting—the same as applied to municipal bonds, 12 C.F.R. pt. 3, app. A, § 3(a)(2)(ix)—as compared to 100% for other companies' stock, enabling banks to hold less capital if they owned the Companies' stock. OCC, Interpretative Letter No. 964 (May 2003), http://www.occ.gov/static/interpretations-and-precedents/may03/int964.pdf. The Companies issued 41 different series of preferred stock, several of which Institutional Plaintiffs own.[2]

B. The Housing And Economic Recovery Act Of 2008.

In mid-2008, in response to the financial crisis, Congress changed the regulatory framework governing the Companies in two significant ways.

First, Congress installed FHFA as the Companies' new regulator. 12 U.S.C. § 4511. Under certain circumstances, Congress also authorized FHFA to act as either a "conservator" or a "receiver" for the Companies. *See id.* § 4617(a)(1), (3). Notably, FHFA cannot simultaneously act as conservator and receiver. *See id.* § 4617(a)(4)(D).

In accordance with the well-established meaning of "conservator" and "receiver," Congress granted FHFA specific powers and articulated specific

---

[2] Perry Capital purchased its preferred stock as early as November 16, 2010. Neus Decl. ¶¶ 3-4 (Dkt. 37-2). Arrowood Indemnity acquired its preferred stock prior to September 6, 2008. Beatty Decl. ¶ 3 (Dkt. 37-5).

limitations on those powers. As a conservator, FHFA may only "take such action as may be—(i) necessary to put the [Companies] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [Companies] and preserve and conserve the assets of the property of the [Companies]." *Id.* § 4617(b)(2)(D). But if FHFA takes the steps necessary to act as a receiver, HERA grants it the "additional" power to "place the [Companies] in liquidation." *Id.* § 4617(b)(2)(E). As receiver, FHFA also must establish a claims procedure pursuant to the statutory priority scheme established by HERA. *Id.* § 4617(b)(3)-(4).

Second, Congress granted Treasury "*temporary* authority" to recapitalize the Companies by purchasing their "obligations or other securities." *Id.* §§ 1455(*l*)(1)(A) (Fannie Mae), 1719(g)(1)(A) (Freddie Mac) (emphasis added).[3] Before making such purchases, Congress required the Treasury Secretary to "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." *Id.* § 1719(g)(1)(B) (the "Required Findings"). In addition, Congress mandated that Treasury "take into consideration" six factors, including: (i) "[t]he [Companies'] plan[s] for the orderly resumption of private

[3] Sections 1455(*l*) and 1719(g) are identical.

market funding or capital market access," and (ii) "[t]he need to maintain the Corporation[s'] status[es] as . . . private shareholder-owned compan[ies]." *Id.* § 1719(g)(1)(C) (the "Required Considerations"). Treasury's temporary authority expired on December 31, 2009. *Id.* § 1719(g)(4). After that date, HERA authorized Treasury only "to hold, exercise any rights received in connection with, or sell, any obligations or securities purchased." *Id.* § 1719(g)(2)(D).

C. FHFA Places Fannie Mae And Freddie Mac Into Conservatorship.

On September 6, 2008, FHFA, with the consent of the board of directors of each of the Companies, placed the Companies into conservatorship. FHFA's Director described conservatorship as a temporary measure "to put [the Companies] in a sound and solvent condition" and "return[ ] the entities to normal business operations." J.A.2433, J.A.2441-42; J.A.533, J.A.537.

The next day, Treasury exercised its temporary authority to purchase a new class of senior preferred stock in the Companies ("Treasury's Stock"). Under the Preferred Stock Purchase Agreements ("Purchase Agreements"), each quarter, both Companies could draw funds from Treasury, up to a total of $100 billion, to ensure that their assets equaled their liabilities ("Treasury's Commitment"). J.A.471, J.A.473, J.A.505, J.A.507 (§ 2.2). In exchange, Treasury received 1 million shares in each Company with four principal rights:

First, Treasury received a senior liquidation preference of at least $1,000 per share—$1 billion total—for each Company, which would increase dollar-for-dollar when a Company drew from Treasury. J.A.543, J.A.566; J.A.2449, J.A.2463 (§§ 3.1, 3.3). In the event of a liquidation of the Companies, the full amount of Treasury's liquidation preference would be paid before any other shareholder.

Second, Treasury received the right to a quarterly dividend that the Companies could pay in one of two ways. They could pay in cash at a rate of 10% of Treasury's liquidation preference. Or they could conserve their cash and pay "in kind" by increasing the liquidation preference by 12%. J.A.486, J.A.520-21 (§ 2(c)), J.A.1846, J.A.1907. This payment-in-kind option is an important protection for issuers because it allows companies facing financial uncertainty to pay dividends or interest without depleting their cash reserves. *See* 49-21 Kevin M. Keyes, *New York University Annual Institute on Federal Taxation* § 21.02[5]. Because Treasury's Stock did not limit the duration of the payment-in-kind option, the Companies could indefinitely satisfy their dividend obligations without paying cash.

Third, Treasury received rights to exercise warrants allowing it to purchase up to 79.9% of the Companies' common stock at a nominal price. J.A.473, J.A.507.

Fourth, Treasury received a right to impose market-based periodic commitment fees beginning in 2010. J.A.475, J.A.509. Commitment fees generally entitle the holder to a periodic payment equal to a percentage of the unused portion of a loan commitment. *See* Rev. Rul. 81-160, 1981-1 C.B. 312, 1981 WL 165898, *available at* http://www.charitableplanning.com/document/676176. Here, applying normal commercial practice, the percentage applicable to Treasury's periodic commitment fee would be "determined with reference to the market value" of the remaining amount of Treasury's Commitment. J.A.475, J.A.509 (§ 3.2(b)).[4]

Before purchasing Treasury's Stock, Treasury complied with HERA by analyzing the Required Considerations and making the Required Findings. J.A.454-58.

The agencies emphasized that Treasury's purchase and FHFA's conservatorship did not nationalize the Companies, and that the Companies' equity structures remained intact. Then-Treasury Secretary Henry Paulson explained that "conservatorship does not eliminate the outstanding preferred stock." J.A.2439; *see also* J.A.458 ("Conservatorship preserves the status and claims of the preferred

---

[4] Treasury has never obliged the Companies to pay a periodic commitment fee.

and common shareholders.”). FHFA similarly confirmed that the Companies' public shareholders would “continue to retain all rights in the stock's financial worth; as such worth is determined by the market.” J.A.2443. Preservation of the existing capital structure forestalled any accounting obligation to consolidate the Companies' trillions of dollars of debt onto the federal balance sheet. *See* Gov't Accountability Office, GAO-09-782, *Fannie Mae & Freddie Mac's Analysis of Options for Revising the Housing Enterprises' Long-term Structures* 18 (2009), *available at* http://www.gao.gov/assets/300/295025.pdf.

Soon after FHFA took the Companies into conservatorship, the Companies, whose long-term assets and liabilities are sensitive to market prices, incurred substantial non-cash losses because FHFA required the Companies to mark down assets and to increase reserves for potential future losses. Among these non-cash losses were write-downs of deferred tax assets—tax deductions that offset the Companies' income and are carried forward for use in future years—because the Companies (under FHFA's conservatorship) concluded at that time that it was “more likely than not” that they would not generate sufficient taxable income to use their accumulated tax deductions in the near future. J.A.2784, J.A.2961; *see also* Statement of Financial Accounting Standards 109 (1992).

These non-cash accounting losses left the Companies with negative net worth, requiring the Companies to make several substantial draws against

Treasury's Commitment. By the end of 2009, the Companies had drawn a total of $125.9 billion—$75.2 billion for Fannie Mae and $50.7 billion for Freddie Mac. J.A.2411.

D. Treasury Amends The Purchase Agreements Twice Before The Expiration Of Its Statutory Authority On December 31, 2009.

In 2009, Treasury and FHFA twice amended the Purchase Agreements. On May 6, 2009, Treasury and FHFA adopted the First Amendment, in which Treasury agreed to increase its Commitment—from $100 billion to $200 billion for each Company. *See*, *e.g.*, J.A.588-92. Before executing the amendment, Treasury made the Congressionally Required Findings based on the Required Considerations. J.A.586-87.

On December 24, 2009—the eve of the expiration of Treasury's temporary authority—Treasury and FHFA agreed to a Second Amendment. J.A.607-612, J.A.613-18. As Treasury acknowledged, "after December 31," Treasury's "ability to make further changes to the [Purchase Agreements] . . . is constrained." J.A.595.

In the Second Amendment, Treasury agreed to amend its securities to allow the Companies to draw unlimited sums from Treasury until the end of 2012, and thereafter to cap the commitment at the amount drawn from 2010 through 2012, plus $200 billion per Company. J.A.596. As it did before executing the First Amendment, Treasury addressed the Required Considerations and made the

Required Findings. J.A.606. In so doing, Treasury maintained that the Companies could eventually "emerge from conservatorship to resume independent operations" and again recognized that "[c]onservatorship *preserves the status and claims of the preferred and common shareholders*." J.A.602 (emphasis added).

Treasury's temporary authority under Section 1719(g) ended on December 31, 2009. 12 U.S.C. § 1719(g)(4).

E. The Companies Regain Profitability.

In 2010, the Companies stanched their losses as the economy improved. FHFA altered its 2010 projections of the Companies' finances, observing that the Companies' "actual results" "were substantially better than projected." J.A.660; J.A.2900.

FHFA's October 2011 projection predicted that, even under FHFA's worst-case scenario, Freddie Mac's draws on Treasury's Commitment would cease altogether by 2013. J.A.661; J.A.2901. For Fannie Mae, FHFA's positive and baseline scenarios projected that its annual draws would decline substantially; only FHFA's worst-case scenario projected that Fannie Mae would continue to make substantial draws on Treasury's Commitment. J.A.2902. Indeed, by late 2011, Treasury recognized that the Companies might have "positive net income after dividends." J.A.674.

The Companies' financial fortunes continued to improve in 2012. In the first quarter, Fannie Mae reported net income of $2.7 billion and Freddie Mac reported net income of $577 million. J.A.3185, J.A.3379. FHFA's April 2012 report on the Companies' finances noted that their performance exceeded FHFA's most optimistic projections. *See* J.A.1931, J.A.1945; J.A.3153, J.A.3167, J.A.3173. Each Company's performance further improved in the second quarter, as Fannie Mae and Freddie Mac reported net income of $5.1 billion and $3.0 billion respectively, outearning Treasury's 10% cash dividend. J.A.3596, J.A.3845-46.

The Companies' restored profitability increased the likelihood that the Companies would generate sufficient income to use their written-down deferred tax assets, which by 2012, stood at $34.7 billion for Freddie Mac and $64.1 billion for Fannie Mae. J.A.2299, J.A.1019. The Companies accordingly recognized a portion of their deferred tax assets in the first half of 2012. *See* J.A.2299; Freddie Mac 2012 10-K, at 194 (Feb. 28, 2013); Fannie Mae 2012 10-K, at 5, F-54, F-56 (Apr. 3, 2013).

F. Treasury And FHFA "Amend" Treasury's Stock In 2012 To Expropriate The Rights Of Public Shareholders And Seize All Of The Companies' Net Worth.

Despite the improving financial outlook for the Companies—or perhaps because of it—Treasury changed course. An internal memorandum reveals that

sometime before December 2010—after Treasury's authority under HERA had ended—the Administration embarked upon a policy of "ensur[ing] [that] existing common equity holders *will not have access to any positive earnings from the [Companies] in the future*." J.A.620 (emphasis added).

In keeping with that secret policy, on August 17, 2012—less than two weeks after the Companies released their second quarter earnings reports (both profitable)—Treasury and FHFA decided to fundamentally alter the nature of Treasury's Stock. Treasury and FHFA replaced the fixed-rate dividend with a sweep of each Company's net worth every quarter above an initial capital reserve of $3 billion that declines to zero by 2018. *See* J.A.2397, J.A.2405; J.A.4013, J.A.4021 (§ 3).

The Net Worth Sweep created a boon for Treasury. Because the Net Worth Sweep entitled Treasury not merely to the Companies' increasingly positive cash flow, but also the value of their net assets, Treasury would benefit handsomely when the Companies reversed the tens of billions of dollars of non-cash accounting losses incurred in the early years of the conservatorship. And because all payments under the Net Worth Sweep would be characterized as dividends, none of these payments would reduce Treasury's liquidation preference or redeem Treasury's Stock: In the event of liquidation, Treasury would still be entitled to $189 billion ahead of any other shareholder; and because the Companies would not

be able to retain earnings, there never would be net assets in excess of Treasury's $189 billion preference.

Treasury and FHFA provided contradictory justifications for the Net Worth Sweep. On the one hand, the agencies claimed that the Net Worth Sweep was needed to avert a "downward spiral," in which the Companies would have depleted Treasury's Commitment in order to pay ever-increasing cash dividends back to Treasury. Press Release, Dep't of Treasury, Treasury Dep't Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012), *available at* http://www.treasury.gov/press-center/pressreleases/Pages/tg1684.aspx ("2012 Press Release").

On the other hand, Treasury and FHFA asserted that the Net Worth Sweep would expedite the Administration's policy to "ultimately wind down both" Companies. J.A.634; 2012 Press Release. Treasury explained that the Net Worth Sweep reflected the Administration's commitment to "ultimately wind down" the Companies: The Companies "w[ould] not be allowed to retain profits, rebuild capital, and return to the market in their prior form." 2012 Press Release; *see also* J.A.624, J.A.635 (White Paper). FHFA justified the Net Worth Sweep as "fully captur[ing] financial benefits for taxpayers." J.A.4026.

The Net Worth Sweep turned the Companies into cash cows for Treasury. Largely as a result of write-ups (under FHFA's supervision) of the deferred tax

assets the Companies had written down (also under FHFA's watch) in 2009 and 2010, Fannie Mae and Freddie Mac were spectacularly profitable in 2013, posting cumulative net income of $84.0 billion and $51.6 billion, respectively. Fannie Mae 2013 10-K, at 2 (Feb. 21, 2014); Freddie Mac 2013 10-K, at 1 (Feb. 27, 2014). Because these accounting decisions increased the Companies' net worth, Treasury immediately received a $130 billion "dividend" in 2013—$110 billion more than it would have collected prior to the Net Worth Sweep. J.A.2412. The trend continued in 2014 as the Companies paid dividends to Treasury of approximately $40 billion. FHFA, Treasury & Federal Reserve Purchase Programs for GSE and Mortgage-Related Securities 3 (May 8, 2015), http://www.fhfa.gov/DataTools/Downloads/Documents/Market-Data/CurrentMarketData_2015-05-08.pdf.

From 2008 to the end of 2014, the Companies paid Treasury $225.4 billion—*119%* of Treasury's still-existing $189 billion liquidation preference. Office of Mgmt. & Budget, *Fiscal Year 2016 Analytical Perspectives of the U.S. Government* 307 (2015), *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/spec.pdf ("OMB Analysis"). The OMB Analysis estimates that Treasury will strip an additional $153.3 billion of capital from the Companies over the next decade. *Id.*

These massive influxes of cash began to arrive just when the government was confronting the statutory debt ceiling and accompanying political deadlock. Jody Shenn & Ian Katz, *Fannie Mae Profit May Swell Treasury Coffers as Debt Limit Looms*, Bloomberg (Apr. 8, 2013), http://www.bloomberg.com/news/articles/2013-04-08/fannie-mae-profit-may-swell-treasury-coffers-as-debt-limit-looms.

G. Appellants Challenge Treasury's And FHFA's Unlawful Actions.

In July 2013, Appellants challenged the Net Worth Sweep's legality under the APA and other causes of action. Appellants Perry Capital LLC, Fairholme Funds Inc., and Arrowood Indemnity Co. brought APA claims for injunctive relief; Appellants Fairholme, Arrowood, and the Class Plaintiffs sought damages and injunctive relief for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty.

On December 17, 2013, Treasury filed its administrative record. FHFA claimed it had no obligation to create an administrative record and submitted a non-compliant "Document Compilation" instead. Dkt. 27 at 2.

On January 17, 2014, Treasury and FHFA each moved to dismiss the complaints for lack of jurisdiction and for failure to state a claim, and, in the alternative, moved for summary judgment. Perry Capital, Fairholme, and Arrowood cross-moved for summary judgment on the APA claims.

In February, before Appellants filed their opposition papers, Fairholme moved to supplement the administrative records and to allow limited discovery, *see* No. 13-1053, Dkt. 32 (D.D.C. Feb. 12, 2014), because of FHFA's failure to certify that its "document compilation" was an administrative record as required by the APA, and the lack of internal documentation in Treasury's administrative record regarding the decision to adopt the Net Worth Sweep. Perry Capital separately moved to supplement the administrative record after the public release of a 2011 presentation to Treasury concerning the capitalization of the Companies that was not included in the administrative record. Dkt. 49.

On September 30, 2014, the district court granted the agencies' motions to dismiss, denied Appellants' cross-motion for summary judgment, J.A.368-70, and denied as moot the motions to supplement the Record, J.A.371-72. The district court held that HERA's provision prohibiting courts from "restrain[ing] or affect[ing] the exercise of powers or functions of [FHFA] as a conservator or a receiver," 12 U.S.C. § 4617(f), barred all claims seeking equitable relief against Treasury and FHFA.

The court acknowledged FHFA could be enjoined if it exceeded its statutory conservatorship authority under HERA, but held that FHFA had not done so. The court held that FHFA's failure to produce an administrative record was "irrelevant," J.A.336, because FHFA's "justifications," "explanations," and

"rationale" did not bear on whether it exceeded its statutorily prescribed powers as conservator. J.A.336-37. The court also held that FHFA could only breach its obligation to "preserve and conserve" the Companies' assets and to "rehabilitate" them to a "sound and solvent" condition if it placed the Companies in "*de facto* liquidation." J.A.338. It concluded that FHFA had not done so, based on its finding that "the [Companies] maintain an operational mortgage finance businesses and are, once again, profitable." J.A.340.

The court also rejected Fairholme's claim that FHFA violated 12 U.S.C. § 4617(a)(7), which bars FHFA from being "subject to the direction or supervision of any other agency . . . in the exercise of the rights, powers, and privileges of the Agency." The court held that the incomplete administrative records did not contain "objective facts" that could support a "reasonable inference" of Treasury's dominance over FHFA. J.A.338.

The district court also held that Treasury did not exceed its authority under HERA's "termination of authority" provision. That provision requires that Treasury's temporary authority under HERA "shall expire on December 31, 2009," except for "authority to hold, exercise any rights received in connection with, or sell . . . securities purchased." The district court held that this exception also permits Treasury after 2009 to engage in "other non-security purchasing activities" not specifically permitted in HERA, such as amending the securities by "mutual

assent." J.A.332. HERA's termination of authority "is irrelevant," the court held, "as long as the Third Amendment did not constitute a purchase of new securities." *Id.* Because Treasury did not "provid[e] an additional funding commitment or receiv[e] new securities" when it acquired the Net Worth Sweep, the court concluded that its activity did not run afoul of the termination of authority. J.A.334. Instead, the transaction merely "amended the compensation structure of [Treasury's] investment." *Id.*

Finally, the court ruled that HERA's limitation on judicial review of FHFA's actions, as conservator, barred Appellants' claims that Treasury acted arbitrarily and capriciously. The court held that HERA's limitation on judicial review of "the powers or functions of [FHFA] as conservator or receiver" "may be logically extended" to FHFA's contractual "counterparty" in "litigation concerning a contract signed by FHFA pursuant to its powers as conservator." J.A.331.

Having dismissed all of Appellants' claims, the district court denied the outstanding motions to supplement the record as moot. J.A.371-72.

SUMMARY OF ARGUMENT

1. HERA requires FHFA as conservator to "preserve and conserve the assets and property of the regulated entity," to "put the regulated entity in a sound and solvent condition," and to "rehabilitat[e]" it. 12 U.S.C. § 4617(a)(2), (b)(2)(D). These statutory requirements are consistent with the well-established

understanding that a conservator is a fiduciary to the entity in conservatorship. The Net Worth Sweep flouts FHFA's obligations as conservator.

The Net Worth Sweep does not put the Companies in a "sound and solvent condition." Soundness and solvency requires financial institutions—subject to both interest rate and underwriting risk—to build capital sufficient to operate independently and withstand financial downturns. The Net Worth Sweep makes that impossible. Nor does the Net Worth Sweep "preserve and conserve" the Companies' "assets and property," as the Net Worth Sweep has transferred to Treasury over $128 billion more than the Companies' pre-Net Worth Sweep obligations with no corresponding benefit to the Companies. And instead of "rehabilitating" the Companies, the stated purpose of the Net Worth Sweep is to wind them down—and until they are wound down, to operate them for the exclusive benefit of Treasury. That FHFA's purpose was to wind down the Companies, rather than to rehabilitate them, requires the conclusion that FHFA acted far outside of its statutorily authorized role of conservator.

Rather than address these arguments, the district court began its analysis by declaring FHFA's purposes or rationale to be irrelevant to the question whether FHFA exceeded its statutory authority. That analysis was erroneous because FHFA's rationales inform whether a challenged action can be characterized as rehabilitating a conservatee to a sound and solvent condition. And rather than

analyze whether the Net Worth Sweep had preserved and conserved the Companies assets, or placed them in a sound and solvent condition, the district court instead concluded that a conservator fulfills its statutory mission so long as its ward is not in "*de facto*" liquidation. This construction is flatly contrary to the governing statute and would vest conservators with literally boundless authority—authority even to transfer wards' assets as gifts. No authority supports this conception and, indeed, not even the government has advocated a position so extreme. That the Companies currently are producing profits—for Treasury and Treasury only—does not mean FHFA, in acquiescing to the Net Worth Sweep, has acted within its statutory authority to operate as a conservator, an independent fiduciary. for the Companies.

2. Treasury similarly exceeded its statutory authority under HERA and violated the APA. After December 31, 2009, HERA limited Treasury's authority to holding Treasury's Stock, exercising rights received in connection with its purchases of Treasury's Stock, and selling Treasury's Stock. *See* 12 U.S.C. § 1719(g)(2)(D), (g)(4). That limited grant of authority does not include authority to engage in "other non-security-purchasing activities." J.A.332. Treasury therefore lacked authority to amend the compensation structure of its investment to the detriment of every other shareholder. Indeed, that amendment was so

transformative—and the exchange for value so plain—that it can only be regarded as the purchase of a brand-new security expressly prohibited by HERA.

HERA's limitation on judicial review does not bar Appellants' arbitrary-and-capricious APA claim against Treasury. Both the presumption in favor of judicial review and case law interpreting the FDIC's analogous jurisdictional provision confirm that such limitation does not block claims against third parties, like Treasury, that contract with FHFA. Moreover, the agency action plainly fails the APA's standards. Treasury's action was predicated on a false notion of a "downward spiral" that was based on outdated and selective data. And Treasury's deficient administrative record shows no consideration of obvious alternatives—such as paying dividends in kind rather than in cash—or explanations for their rejection.

3. Finally, the district court erred by resolving factual disputes at the motion to dismiss phase, even though the administrative records were patently incomplete. And contrary to the district court's conclusion, FHFA's administrative record is not "irrelevant." At the very least, this case must be remanded to require the agencies to supplement the administrative records.

STANDARD OF REVIEW

This appeal, from a district court ruling in an APA case, is reviewed de novo. *Gerber v. Norton*, 294 F.3d 173, 178 (D.C. Cir. 2002). Under the APA, this

Court "shall hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations" or is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) & (C).

The Court also reviews de novo the district court's dismissal of a complaint for lack of subject matter jurisdiction. *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 874 (D.C. Cir. 2014). The denial of a motion to supplement the record is reviewed for abuse of discretion, and district courts are "requir[ed] . . . to supplement the administrative record" where "the agency deliberately or negligently excluded documents that may have been adverse to its decision." *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996).

ARGUMENT

I. THE DISTRICT COURT'S RULING ERRONEOUSLY IGNORED THE FIDUCIARY FUNCTIONS OF CONSERVATORSHIP, WHICH REQUIRE CONSERVATORS TO PROTECT AND REHABILITATE ENTITIES UNDER THEIR CARE.

Consistent with the established understanding of a conservator as a fiduciary, HERA requires FHFA as conservator to act independently to conserve and preserve the Companies' assets, to put the Companies in a sound and solvent condition, and to rehabilitate them. The Net Worth Sweep did none of these things—it unnecessarily transferred more than $128 billion to Treasury, destabilized the Companies, and made it impossible for the Companies to resume

independent operations. As a result, the district court erred in concluding that HERA's jurisdictional provision, 12 U.S.C. § 4617(f), precluded Appellants' APA claims.

A. Section 4617(f) Does Not Prohibit Claims That FHFA Exceeded Its Statutory Authority As Conservator.

As the district court acknowledged, Section 4617(f) permits judicial review of FHFA's actions "if the agency 'has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions.'" J.A.327-28 (quoting *Nat'l Trust for Historic Pres. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring)); *see also Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997) (explaining FIRREA's analogous limitation of judicial review). The prohibition on judicial review in other circumstances prevents second-guessing of the business judgments of the conservator and enables the conservator to take decisive actions to protect the conservatee's financial health. *See Town of Babylon v. FHFA*, 699 F.3d 221, 227 (2d Cir. 2012). But the provision "is inapplicable when FHFA acts beyond the scope of its conservator power." *Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013).

This Court must assess for itself whether FHFA exceeded its authority as conservator, rather than simply accept FHFA's characterization. *Leon Cnty. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012) ("FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp."). FHFA's

actions must fall within Section 4617's limits, which obliges FHFA to "preserve and conserve" the Companies' assets and "rehabilitate" them to "a sound and solvent condition." 12 U.S.C. § 4617(a), (b)(2)(D); *see also* 76 Fed. Reg. 35,724, 35,727 (June 20, 2011).

Though it recognized that it had jurisdiction—and, therefore, the obligation—to adjudicate Institutional Plaintiffs' claims that the Net Worth Sweep exceeded FHFA's conservatorship authority, the district court did not address whether the Net Worth Sweep was "'beyond . . . [FHFA's] statutorily prescribed . . . functions," J.A.327 (quoting *Nat'l Trust for Historic Pres.*, 21 F.3d at 472 (Wald, J., concurring)), to "preserve and conserve" the Companies' assets and to rehabilitate them to "a sound and solvent condition." 12 U.S.C. § 4617(b)(2)(D). And the court reasoned that Section 4617(f) prohibited it from "evaluat[ing] FHFA's rationale for entering into to the [Net Worth Sweep]." J.A.336. The district court thus deemed FHFA's failure to "produc[e] the full administrative record" "[i]rrelevant," and limited its inquiry to whether the Net Worth Sweep "*actually* resulted in a *de facto* receivership" regardless of whether the Net Worth Sweep complied with HERA's explicit statutory commands. *Id.*

In blinding itself to FHFA's rationales and truncating its analysis of FHFA's adherence to its statutory functions, the district court went seriously astray. HERA defines FHFA's "powers as conservator" by reference to what is "*necessary* to put

the [Companies] in a sound and solvent condition" and "*appropriate* to . . . preserve and conserve the [Companies'] assets." 12 U.S.C. § 4617(b)(2)(D) (emphases added). To determine whether FHFA's actions are "necessary" or "appropriate" to achieve its statutory goals generally requires analysis of whether the agency actually was attempting to further those aims. And that is why FHFA advanced the belated, litigation-driven declaration of Mario Ugoletti portraying the Net Worth Sweep as necessary to maintain the Companies' operations. *See* J.A.2418-27.

But even if FHFA's actual rationales somehow were off limits in this APA case—and nothing in Section 4617(f) suggests that they should be—the district court still should have analyzed whether *any* rationale consistent with the undisputed facts and the administrative record could have reconciled the Net Worth Sweep with FHFA's statutory mission. The district court erred in avoiding that inquiry and asking only whether the Net Worth Sweep effected a "*de facto* liquidation." This Court thus must determine whether FHFA's entry into the Net Worth Sweep exceeded the powers that Congress granted FHFA as conservator.

B. Conservators Are Well-Established As Fiduciaries In Federal Statutes, Case Law, And Historical Practice.

When Congress authorized FHFA to act as conservator, it was not writing on a blank slate. Congress lifted HERA's conservatorship standards verbatim from the Federal Deposit Insurance Act ("FDIA"), *see* 12 U.S.C. § 1821(d)(2)(D),

which itself incorporated a long history of fiduciary supervision and rehabilitation of troubled entities under common law. Congress is presumed to be aware of the common law meaning and historical interpretation of the statutory terms it chooses. *See Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012).

As far back as the 15th Century, conservators were "appointed to protect the legal interests and rights of a particular organization or group." OED Online (conservator, *n.*) (last accessed June 26, 2015). Common law—particularly in the probate context—reflects this practice, making clear that conservators act as fiduciaries or trustees to the conservatee. *In re Kosmadakes*, 444 F.2d 999, 1004 (D.C. Cir. 1971) (applying fiduciary standards to a conservator); *Henry v. United States*, 396 F. Supp. 1300, 1301 (D.D.C. 1975) (noting that a conservator has a "special fiduciary position"); *Allen v. Utley*, No. 88-cv-545, 1988 WL 90105, at *1 (D.D.C. Aug. 19, 1988) (referring to a conservator as a trustee).

Federal law has similarly recognized the fiduciary role of a conservator. *Ferguson v. Forstmann*, 25 F.2d 47, 48 (3d Cir. 1928) (defining "'fiduciary' as 'a guardian, trustee . . . *conservator*, or any person acting in any fiduciary capacity'" (emphasis added) (quoting 26 U.S.C. § 931(b) (1926), now *id.* § 7701(a)(6))); *see also* 12 U.S.C. § 1717(c)(1) (statute creating Fannie Mae discussing "trusts, receiverships, conservatorships, liquidating or other agencies, *or other fiduciary and representative undertakings and activities*" (emphasis added)).

As a fiduciary, a conservator must "manage the conservatee's estate *for the benefit of the conservatee*" and not for its own benefit or that of a third party. *Gross v. Rell*, 40 A.3d 240, 252 (Conn. 2012) (emphasis added). Like any other trustee, conservators cannot expropriate their wards' assets to a third party absent a corresponding benefit for the ward. *See In re Guardianship of Christiansen*, 248 Cal. App. 2d 398, 407 (Ct. App. 1st Dist. 1967) ("'Neither a general guardian nor a court has the power to dispose of a ward's property by way of gift.'"); *In re Koretzky's Estate*, 86 A.2d 238, 247 (N.J. 1951) (a trustee "cannot make a gift of property in his care unless the gift is authorized by the instrument appointing him").

Federal and state lawmakers have applied this historical understanding of conservatorship to the resolution of failed and failing financial institutions. Cases interpreting early federal banking statutes describe conservators as operating for the benefit of the institution, explaining that conservatorship should be used when there is "a prospect that the [entity] . . . might . . . later reopen and resume its corporate functions." *Davis Trust Co. v. Hardee*, 85 F.2d 571, 572 (D.C. Cir. 1936); *see also RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1453-54 (8th Cir. 1992) ("At least as early as the 1930s, it was recognized that the purpose of a conservator was to maintain the institution as an ongoing concern."). And under state law, a "bank conservator's 'duties are to *conserve the assets* of the bank for

the purpose of rehabilitation.'" *Bicknell v. Cent. Hanover Bank & Trust Co.*, 6 N.Y.S.2d 704, 705 (Sup. Ct.) (emphasis added), *aff'd* 8 N.Y.S.2d 668 (App. Div. 1938) (Michigan law); *see also Carpenter v. Pac. Mut. Life Ins. Co. of Cal.*, 74 P.2d 761, 775 (Cal. 1937) (regulator "must attempt to rehabilitate the business of the company as conservator"), *aff'd sub. nom. Neblett v. Carpenter*, 305 U.S. 297 (1938).

In accordance with this historical practice, the FDIA requires the FDIC, when it acts as conservator, to "preserve and conserve [an institution's] assets" and to operate them in a "sound and solvent" manner. 12 U.S.C. § 1821(d)(2)(D). And when the FDIC takes control of a financial institution as conservator or receiver, it acts as a fiduciary. *Golden Pacific Bancorp v. FDIC*, 273 F.3d 509, 519 (2d Cir. 2001) ("A receivership is, of course, a type of fiduciary relationship . . . ."); *Suess v. FDIC*, 770 F. Supp. 2d 32, 38 (D.D.C. 2011) ("[A]s Receiver, the FDIC also has a fiduciary responsibility to its shareholders."); *see also* 12 U.S.C. § 1831f(d)(3) (requiring the FDIC to determine that certain actions are "consistent with the conservator's fiduciary duty to minimize the institution's losses" before taking such actions). And when the FDIC or the Resolution Trust Corporation (whose conservatorships were governed by the same statute) acts as conservator, it "operates an institution with the hope that it might someday be rehabilitated." *Del E. Webb McQueen Dev. Corp. v. RTC*, 69 F.3d 355, 361 (9th

Cir. 1995); *see also RTC v. United Trust Fund, Inc.*, 57 F.3d 1025, 1033 (11th Cir. 1995) ("The conservator's mission is to conserve assets which often involves continuing an ongoing business. The receiver's mission is to shut a business down and sell off its assets."). When the FDIC needs to inject funds into an entity for which it is acting as conservator, the FDIC generally seeks to recover only its cost of financing plus interest equal to "less than [1 percentage point] above the Treasury bill rate." Michael Krimminger & Mark Calabria, *The Conservatorships of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles* 31 (Jan. 29, 2015) (citing *Managing the Crisis: The FDIC and RTC Experience* 572).

Against this backdrop, Congress borrowed language from the FDIA to establish the governing standards for FHFA's conservatorship of the Companies. *Compare* 12 U.S.C. § 4617(b)(2)(D) (HERA), *with* 12 U.S.C. § 1821(d)(2)(D); *see also* Mark A. Calabria, *The Resolution of Systemically Important Financial Institutions: Lessons from Fannie and Freddie* (Cato Inst., Working Paper No. 25/CMFA No. 1, 2015). Just as when the FDIC acts as conservator, FHFA as conservator has fiduciary obligations to "preserve and conserve" the assets of the Companies, and to "rehabilitat[e]" them to a "sound and solvent condition." 12 U.S.C. § 4617(a)(2), (b)(2)(D).

C. The Net Worth Sweep Exceeded FHFA's Statutory Authority As Conservator.

The Net Worth Sweep contravenes FHFA's fiduciary and statutory obligations to place the Companies in a sound and solvent condition, preserve and conserve their assets, and rehabilitate them to normal business operations: It ensures that the Companies operate at the edge of insolvency and will never resume independent business operations, while transferring the entirety of their net assets to Treasury.

1. FHFA Has Not Placed The Companies In A Sound And Solvent Condition.

To be "sound and solvent," 12 U.S.C. § 4617(b)(2)(D), an entity must have capital sufficient to allow it to operate independently as a going concern. Cong. Budget Office, *CBO's Estimate of Cost of the Administration's Proposal to Authorize Federal Financial Assistance for the Government-Sponsored Enterprises for Housing* 3 (2008) ("2008 CBO Estimate"). By prohibiting the Companies from retaining *any* capital, the Net Worth Sweep renders soundness and solvency impossible, and FHFA therefore exceeded its statutory authority as conservator.

Equity capital is "an important measure of a firm's soundness" because it "represents the ability of a firm to absorb losses and pay off creditors without external assistance." 2008 CBO Estimate at 3. Financial regulators throughout the world recognize that financial institutions must have equity capitalization adequate

to withstand downturns in the economy. *See*, *e.g.*, Basel Comm. on Banking Supervision, *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems* 2 (2010). Federal regulators therefore oblige financial institutions to hold minimum levels of capital—far above 0%—which include not only common stock or other residual capital, but also retained earnings. *See* 12 C.F.R. § 217.10(a)(1) (obliging regulated institutions to maintain a "common equity tier 1 capital ratio of 4.5 percent" of risk-weighted assets); *id.* § 217.20(b)(2) (defining "common equity tier 1 capital" to include "[r]etained earnings"). Similarly, federal safety and soundness guidelines make clear that banks must "ensure that earnings are sufficient to maintain adequate capital and reserves." Interagency Guidelines Establishing Standards for Safety and Soundness, 12 C.F.R. pt. 30, app. A, ¶ II.H. That is why, under the FDIA, when a bank is "critically undercapitalized," 12 U.S.C. § 1821(c)(5)(L)(i), it is placed into receivership if steps are not immediately taken to restore capital to adequate levels, *id.* § 1831*o*(h)(3)(C). And HERA itself requires the Companies to retain a minimum amount of "core capital." *See* 12 U.S.C. § 4502(7); *id.* § 4614(a)(1).

FHFA has conceded that "one of the primary objectives of conservatorship" is "restoring that regulated entity to a sound and solvent condition." 76 Fed. Reg. at 35,727. For this reason, FHFA acknowledges that "allowing capital

distributions to *deplete the entity's conservatorship assets* would be inconsistent with the agency's *statutory goals* . . . ." *Id.* (emphases added).

But that is precisely what the Net Worth Sweep does. It terminates the Companies' ability to pay dividends in kind (i.e., without cash) and instead requires the Companies to distribute nearly all of their capital—and by 2018, *all* of their capital—to Treasury. And it does so with the explicit purpose of ensuring that the Companies cannot operate independently in the future. 2012 Press Release ("[T]he [Companies] will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form."). This action contravenes a conservator's obligation "to restore a financially troubled institution to solvency." *McAllister v. RTC*, 201 F.3d 570, 579 (5th Cir. 2000).

FHFA does not deny the Net Worth Sweep's effect. Elsewhere, it has acknowledged that "[t]he Enterprises are effectively balance-sheet insolvent, a textbook illustration of financial instability." Defs.' Mot. to Dismiss 19, *Samuels v. FHFA*, No. 1:13-22399-Civ (S.D. Fla. Dec. 6, 2013) (Dkt. 38). FHFA's Director similarly informed Congress that the Companies' inability to retain capital is a "significant challenge[]." Statement of Melvin L. Watt Before the H. Comm. on Fin. Servs. 3 (Jan. 27, 2015). Yet in the proceedings below, the district court, FHFA, and Treasury asserted several reasons why the Net Worth Sweep makes the

Companies "sound and solvent." J.A.339-40; Dkt. 32 at 21-26; Dkt. 31-1 at 27-28. All lack merit.

a. The district court incorrectly concluded that FHFA acted as a conservator simply because the Companies are operating and currently profitable. J.A.339-40. The statute does not require conservators to establish "profitability," but to take necessary action to "put the [Companies] in a sound and solvent condition." 12 U.S.C. § 4617(b)(2)(D)(i). Even if the Companies remain profitable, FHFA's decision to sweep those profits—and any additional net worth—to Treasury nullifies any benefit to the Companies of their renewed profitability, contrary to the goals of soundness and solvency.

b. The district court suggested that the Net Worth Sweep could be part of "a fluid progression from conservatorship to receivership" permissible under HERA. J.A.340 n.20. But in HERA Congress authorized FHFA to act "as conservator or receiver," 12 U.S.C. § 4617(a); whichever choice FHFA made had corresponding limits and obligations imposed by Congress. If FHFA distributed the Companies' assets to Treasury as part of a "progression" towards liquidation, FHFA was statutorily required to formally become a receiver and comply with the statutory notice and priority requirements, neither of which FHFA has done. *See* 12 U.S.C. § 4617(a)(4)(D), (b)(2)(E), (b)(3), (c).

That FHFA can "be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity," 12 U.S.C. § 4617(a)(2), does not imbue FHFA with power *as conservator* to wind up the Companies' affairs. HERA assigns that function only to a properly designated *receiver*. *Id.* § 4617(b)(3)(B) ("The receiver, in any case involving the *liquidation or winding up* of the affairs of a closed regulated entity . . . ." (emphasis added)). Indeed, FHFA has acknowledged that "a conservator's goal" is not to liquidate, but rather "to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition." 76 Fed. Reg. at 35,730-31. Allowing a conservator to wind up the affairs of its charge is at war with its obligation to "rehabilitate" and would chart a path for a faithless conservator to avoid the procedural protections for claimants set forth in HERA's receivership provisions. And this reading conversely would allow FHFA as receiver to take up a mission of "rehabilitation," notwithstanding the receiver's obligation to liquidate the entity. Receivership is distinct from conservatorship, but the district court's truncated analysis improperly conflates the two roles. FHFA is indisputably a conservator here and cannot override Congress's mandate by assuming a receiver's different powers.

c. FHFA and Treasury argued below—and the district court accepted—that by giving away the Companies' net worth in perpetuity, the Net Worth Sweep

supported the Companies' soundness and solvency because it prevented a "downward spiral." Dkt. 32 at 3-4, 21-25; Dkt. 31-1 at 5, 27-28. According to the agencies, the Companies could not afford to pay Treasury's 10% cash dividend in the future and therefore would need to draw on Treasury's limited Commitment to pay the dividend. Because those draws would increase Treasury's liquidation preference, they would in turn increase the purportedly unaffordable cash dividend and hasten the exhaustion of Treasury's Commitment. This argument fails.

First, the Companies had no obligation to pay the cash dividends. At the outset, Treasury's Stock entitled Treasury to a cash dividend *only* "if declared by the [Companies'] Board of Directors." J.A.485 (§ 2(a)). And, even if declared, Treasury's Stock allowed the Companies to choose indefinitely whether to pay a 10% cash dividend or a 12% "in-kind" dividend by increasing Treasury's liquidation preference. *See* J.A.486 (§ 2(b)-(c)). Exercising this in-kind option would have resolved any purported "downward spiral"—in-kind dividends would not have required the Companies to draw from Treasury, and Treasury would have been compensated by an increased liquidation preference.

The district court erroneously concluded that the Companies were not free to pay Treasury's dividend in kind. *See* J.A.321 n.7. Noting that the in-kind dividend arises if the Companies "shall have for any reason *failed to pay dividends in cash in a timely manner as required by this Certificate*," J.A.322 n.7 (quoting

J.A.486) (emphasis added by district court), the district court stated that the 12% in-kind payment was a "penalty" rather than a "right," and thus not "merely a matter of choice." *Id.*

Whether the in-kind payment is a "penalty" or a "right" is irrelevant. The stock agreements granted the Companies exceptionally broad license to pay dividends in kind without limiting how many times, or for how long. That is why, a week before Treasury and FHFA agreed to the Net Worth Sweep, the Congressional Research Service explicitly noted that a "GSE lacking the funds to pay the [10%] cash dividend could pay the 12% dividend in additional senior preferred stock." N. Eric Weiss, Cong. Research Serv., RL34661, *Fannie Mae's and Freddie Mac's Financial Problems* 5-6 (2012), *available at* http://www.fas.org/sgp/crs/misc/RL34661.pdf. Indeed, Treasury's presentations explaining the Net Worth Sweep characterize the pre-Net-Worth-Sweep dividend rate as "Cash 10%; if elected to be paid in kind ('PIK') 12%." J.A.1846, J.A.1907. FHFA thus could have solved the purported "downward spiral" without changing Treasury's Stock at all. Payments in kind would not have harmed the Companies: they would conserve cash *and* the remainder of Treasury's Commitment.

Second, extending the lifespan of Treasury's Commitment cannot contribute to soundness and solvency because the Commitment is a mere commitment to inject preferred equity, it is not an asset nor does it qualify as capital. The

Purchase Agreements themselves make clear that the remaining amount of Treasury's Commitment cannot be counted among the Companies' assets. *See* J.A.2445 ("total assets" defined to "exclud[e] the Commitment and any unfunded amounts thereof"). Neither federal capital requirements nor the Companies' "core capital" levels required by HERA qualify Treasury's Commitment as capital. *See supra* 34-35; *see also* 12 C.F.R. § 217.20(b) (defining "common equity tier 1 capital" without reference to capital commitments); 12 U.S.C. § 4502(7) (HERA). This treatment is consistent with the Congressional Budget Office's view that capital allows companies "to absorb losses and pay off creditors *without external assistance*," 2008 CBO Estimate at 3, which Treasury's Commitment surely does not allow.

Third, the "downward spiral" narrative also is wrong because Treasury's Commitment was not in danger of exhaustion when FHFA adopted the Net Worth Sweep. By 2012, the Companies had stanched their losses and posted profits well in excess of Treasury's 10% cash dividend. Indeed, the agencies' internal presentations demonstrated that Freddie Mac was never expected to come close to depleting Treasury's Commitment—even under the government's most pessimistic projections. *See* J.A.1916 ($102.6 billion in Treasury Commitment remaining in 2023 under "Downside Case"). And Fannie Mae would never exhaust funding under Treasury's base case, and even under the pessimistic scenario it would

exhaust funding only in 2021 (and even then only assuming neither company ever elected to pay dividends in kind). *See* J.A.1913-14. The agencies' own data thus demonstrated that there was no real chance of a "downward spiral" even if the Companies opted to pay cash dividends, which they had no obligation to do.

2. The Net Worth Sweep's Transfer Of Billions Of Dollars Of Profits To Treasury Does Not "Preserve And Conserve" The Companies' Assets.

HERA also requires that FHFA "preserve and conserve" the Companies' assets. 12 U.S.C. § 4617(b)(2)(D). FHFA admits that the mandate to "preserve and conserve" assets requires it to scrutinize carefully "any particular expenditure out of the conservatorship estate." 76 Fed. Reg. at 35,727.

The Net Worth Sweep is utterly incompatible with this statutory requirement. In just its first year, 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. And, even though the Companies have repaid Treasury's investment in full plus $43 billion, FHFA will have the Companies pay an additional $153 billion to Treasury over the next decade, and Treasury's liquidation preference will remain unchanged at $189 billion. *See* OMB Analysis at 307. Granting Treasury such a windfall does not "preserve and conserve" the Companies' assets.

FHFA contends that the Net Worth Sweep was authorized by HERA's provision permitting FHFA "as conservator or receiver [to] transfer or sell any asset or liability" of the Companies. 12 U.S.C. § 4617(b)(2)(G). FHFA is wrong. The power to transfer assets is necessarily limited by the fiduciary nature of conservatorships—HERA itself authorizes FHFA to transfer assets only if it is acting "as conservator." *Id*. A conservator cannot make a gift without court approval, *see* Unif. Guardianship & Protective Proceeding Act § 5-411(c) (2010), and trustees cannot give gifts unless explicitly authorized, *In re Koretzky's Estate*, 86 A.2d at 247. Yet FHFA's view would permit a conservator to give away the assets of *any* federally regulated financial institution placed into conservatorship—not just the Companies—without being subject to judicial review.

This assertion of boundless authority to transfer assets would allow FHFA to violate HERA's limitations on a conservator's powers. It is undisputed that as conservator, FHFA cannot liquidate the Companies. 12 U.S.C. § 4617(b)(2)(E). But, at its core, liquidation is simply a massive transfer of assets. Under FHFA's theory that the mere fact that FHFA has transferred an asset is "dispositive" as to the legality of FHFA's conduct as conservator, FHFA Reply 6 (Dkt. 42), FHFA would necessarily have the authority to liquidate the Companies. That is not, and cannot be, the law. FHFA's authority to transfer assets is limited by its obligation

to "preserve and conserve" the Companies' assets, a test that the Net Worth Sweep plainly fails.

3. Prohibiting The Companies From Retaining Capital Violates HERA's Requirement To Rehabilitate The Companies.

HERA requires that FHFA "rehabilitate" the Companies with a view to returning them to private operations. 12 U.S.C. § 4617(a)(2), (b)(2)(D). Treasury itself recognized that "the path laid out under HERA" requires the Companies to "exit conservatorship as private companies" after they are "allowed to recapitalize." Mem. from Jeffrey A. Goldstein 4 (Jan. 4, 2011), http://www.insidesources.com/wp-content/uploads/2015/04/DOT-1.4.2011.pdf ("Treasury January 2011 Strategic Options Memorandum"). This statutory duty is in keeping with the well-established rehabilitation function of conservatorships generally. Indeed, FHFA's original stated goal was to comply with this statutory requirement and return the Companies to "normal business operations." J.A.2433. FHFA also agreed to the original Purchase Agreements, and First and Second Amendments, in order to "enhance the probability" of "resum[ing] independent operations." J.A.602.

But the Net Worth Sweep guarantees the opposite outcome: It deprives Fannie and Freddie of their "future income flows," which represent a company's "fundamental value." *Tenn. Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1208 n.2

(D.C. Cir. 1991). By doing so, it intentionally dooms the Companies forever to remain under government control, unable to redeem Treasury's liquidation preference, and unable to "return to the market in their prior form." 2012 Press Release.

Far from rehabilitation, the government emphasized that the Net Worth Sweep's purpose was to wind down the Companies and prepare for "a housing industry . . . without Fannie Mae and Freddie Mac." FHFA, 2012 Report to Congress 13 (2013), *available at* http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2012_AnnualReportToCongress_508.pdf. FHFA's acting director told Congress that the Net Worth Sweep was part of the Administration's changed policy of "wind[ing] down the [Companies]" and "reinforce[d] the notion that the [Companies] will not be building capital as a potential step to regaining their former corporate status." Statement of Edward J. DeMarco Before the S. Comm. on Banking, Hous. & Urban Affairs 3 (Apr. 18, 2013), http://fhfa.gov/webfiles/25114/ DeMarcoSenateBankingTestimony41813.pdf; *see also* 2012 Press Release. Engaging in the Net Worth Sweep to destroy, rather than rehabilitate, the Companies is an explicit repudiation of FHFA's statutory duty. By winding down the Companies through the Net Worth Sweep, rather than by placing them in receivership, FHFA circumvented the statutory scheme that would have applied in liquidation.

a. The district court largely ignored FHFA's statutory obligation to rehabilitate the Companies, and instead analyzed whether the Companies were in *de facto* liquidation—a theory advanced by no party below. The district court found that there was no *de facto* liquidation because "both GSEs continue to operate, and have now regained profitability" and, therefore, "FHFA ha[d] acted within its broad statutory authority as a conservator." J.A.339.

The district court erred. The absence of a *de facto* liquidation is not dispositive of whether FHFA acted within its authority as conservator. HERA, regulations, precedent, and historical practice provide clear limits on a conservator's authority that have nothing to do with *de facto* liquidation. FHFA's own regulations interpreting HERA are particularly clear on this point: "the Conservator is charged with rehabilitating the regulated entity," 76 Fed. Reg. at 35,727; "the essential function of a conservator is to preserve and conserve the institution's assets," *id.*; and "one of the primary objectives of conservatorship of a regulated entity would be restoring that regulated entity to a sound and solvent condition," *id.* Whether the Net Worth Sweep constitutes a *de facto* liquidation is irrelevant in determining the court's jurisdiction in light of Section 4617: The only relevant issue is whether FHFA's acts were consistent with conservatorship. Authorizing conservators to transact freely with the Companies' assets so long as a

"*de facto* liquidation" is avoided would greatly expand a conservator's authority beyond what Congress intended.

b. The district court also erroneously declared irrelevant "FHFA's underlying motives or opinions" in executing the Net Worth Sweep, and instead limited its analysis "to *what* the Third Amendment entails, rather than *why* FHFA agreed to the Third Amendment." J.A.336-37. By refusing to consider the conservator's self-proclaimed intent, the district court erased a principal distinction between conservators and receivers: While a few statutory powers are reserved to conservators alone or receivers alone, many powers (like transferring assets) are granted to both. *See* 12 U.S.C. § 4617(b)(2)(A)-(C), (G)-(J). When exercising common powers, conservators distinguish themselves from receivers by their "distinct missions": The conservator must aim to "conserve assets," while the receiver must "shut a business down and sell off its assets." *United Trust Fund*, 57 F.3d at 1033. Had it considered FHFA's intent, the district court would have found that FHFA adopted the Net Worth Sweep to implement Treasury's goal "ultimately [to] wind [the Companies] down" by prohibiting them from "retain[ing] profits, rebuild[ing] capital, and return[ing] to the market in their prior form." 2012 Press Release. That is clearly inconsistent with FHFA's mission as conservator to rehabilitate the Companies.

* * *

The Net Worth Sweep simply cannot be reconciled with FHFA's limited authority as a conservator and overriding fiduciary obligations to place the Companies in a sound and solvent condition, to preserve and conserve their assets, and to rehabilitate them. The district court ignored the express limits Congress placed on FHFA's authority as conservator, referring to them only obliquely in a footnote. *See* J.A.340 n.20. By inventing a novel theory of conservatorship, the district court demonstrably changed the function of conservators in ways that are unlawful and unprecedented; overrode Congressional limits on FHFA's powers; and licensed conservators such as the FDIC to run roughshod over conservatees' interests.[5]

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

Even if this Court concludes that Section 4617(f) bars Appellants' claims against FHFA, the Net Worth Sweep still must be vacated on the separate ground that Treasury exceeded its authority under HERA and acted arbitrarily and capriciously in violation of the APA.

---

[5] Because Section 4617(f) does not bar Appellants' claims, the district court's dismissal of Fairholme's claims for equitable relief against FHFA for breach of fiduciary duty must also be reversed. *See* J.A.341 n.24.

A. Treasury Exceeded Its Authority Under HERA By Acting After Its Authority Expired.

HERA granted Treasury authority "to purchase any obligations and other securities issued by the [Companies]," but provided that those powers would expire on December 31, 2009. 12 U.S.C. § 1719(g)(1)(A), (g)(4). Thereafter, HERA limited Treasury's authority to "hold[ing], exercis[ing] any rights received in connection with, or sell[ing]" the Companies' securities. *Id.* § 1719(g)(2)(D). Despite this narrow range of post-2009 authorized activity, the district court held that HERA prohibited only the purchase of securities after 2009. The court further held that the exchange of obligations in the Net Worth Sweep "amendment" was not a purchase of securities. The district court misconstrued both HERA and the Net Worth Sweep.[6]

1. After 2009, HERA Permitted Treasury Only To Sell, Hold, Or Exercise Rights Received In Connection With Its Purchase Of Treasury's Stock.

The district court incorrectly enlarged Treasury's post-2009 authority. "[L]ike other federal agencies," Treasury "'literally has no power to act . . . unless and until Congress confers power upon it.'" *Am. Library Ass'n v. FCC*, 406 F.3d

---

[6] Although the agencies argued below that Section 4617(f) also barred all claims against Treasury, the district court correctly acknowledged that it had jurisdiction to address Appellants' claims that Treasury exceeded its statutory authority.

689, 698 (D.C. Cir. 2005) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

Here, Congress authorized Treasury "to purchase any obligations and other securities issued by the [Companies]." 12 U.S.C. § 1719(g)(1)(A). But Congress provided in Section 1719(g)(4) that this authority "shall expire December 31, 2009." The only relevant exception provides: "The authority of [Treasury] to hold, exercise any rights received in connection with, or sell, any obligations or securities purchased is not subject to the [sunset] provisions of paragraph (4)." 12 U.S.C. § 1719(g)(2)(D).

Without identifying any other source of authority for Treasury's actions, the district court concluded that "the existence of [Section 1719(g)(2)(D)] does not therefore preclude *other* non-security-purchasing activities otherwise permitted under an already agreed-upon, pre-2010 investment contract with the GSEs." J.A.332 (emphasis added). In concluding that Treasury had authority to engage in activities "other" than those authorized by Congress in Section 1719(g), the district court contravened core canons of statutory construction and, once again, exceeded even Treasury's arguments below.

First, this analysis contravenes settled law against implying grants of authority from Congress's failure to deny explicitly such power. *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc); *Am.*

Bar Ass'n v. FTC, 430 F.3d 457, 468-69 (D.C. Cir. 2005). The district court failed to point to *any* statutory provision authorizing "other" activities after 2009; none exists.

Second, if Congress intended to provide a broader statutory exemption to the 2009 sunset, Congress would have included language to that effect, as it did in the Troubled Asset Relief Program ("TARP"), which was enacted mere months after HERA. *See Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005) (plurality) ("[W]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended the text to have the same meaning . . . ."). TARP, like HERA, placed a sunset on Treasury's authority to purchase assets. 12 U.S.C. § 5230(a). And TARP, like HERA, gave Treasury perpetual authority to "exercise any rights received in connection with troubled assets purchased." 12 U.S.C. § 5216(a). However, TARP, *unlike* HERA, gave Treasury the additional perpetual authority to "manage" troubled assets, *id.* § 5216(b), which includes authority to engage in "common transactions in dealing with a pool of assets" such as amending the terms of those assets. *See Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 302 F.3d 18, 28 (2d Cir. 2002). If Congress intended to give Treasury broader authority under HERA, it would have done so, but it did not.

Third, the district court's imagined authority for Treasury to engage in "other non-security purchasing activities" would render the statutory exemptions from the sunset for "hold[ing]," "sell[ing]," or "exercis[ing] any rights" unnecessary surplusage. Congress does not enact superfluous statutory provisions, and courts should not "treat statutory terms as surplusage in any setting." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

2. The Net Worth Sweep Was Not An Exercise Of A Right That Treasury Received In Connection With Its Purchase Of Treasury's Stock.

After December 31, 2009, Treasury only had authority to hold, sell, or exercise rights it received in connection with its prior purchases of the Companies' securities. Because the adoption of the Net Worth Sweep plainly was not an act of "holding" or "selling" Treasury's Stock, the Net Worth Sweep can be defended only as an exercise of a right received in connection with those securities. It is not.

In the district court, Treasury argued that Section 6.3 of the Purchase Agreements, which provides that "[t]his Agreement may be waived or amended solely by a writing executed by both of the parties hereto," J.A.480, gave Treasury a "right to amend" Treasury's Stock, and that the Net Worth Sweep was the valid exercise of that right. Dkt. 31-1 at 39-40. The district court did not address this argument, validating Treasury's action instead on the court's own theory that

Treasury had implied authority to engage in non-security purchasing actions. Treasury's contention, however, also is meritless.

Treasury's purported "right to amend" is not a "right" that it can "exercise." A "right" to act means "[a] legal, equitable, or moral entitlement to do something." OED Online (right, *n.*) (last accessed June 26, 2015). Similarly, "exercise"—in context of contracts—means "[t]o implement the terms of; to execute," as in to "exercise the option to buy the commodities." *Black's Law Dictionary* 693 (10th ed. 2014). A party has a contractual "right" when it "can initiate legal proceedings that will result in coercing" the other party to act. 1 E. Allen Farnsworth, *Farnsworth on Contracts* § 3.4, at 205 n.3 (3d ed. 2004). Definitionally, a contractual "right" is an entitlement to certain performance from the counter-party, and it is "exercised" through unilateral action that does not require negotiation or mutual assent. By contrast, an arrangement that depends on "mutual consent" is not a right at all. *See United States v. Petty Motor Co.*, 327 U.S. 372, 380 n.9 (1946) (an agreement that depends on the parties' subsequent "mutual consent" "does not add to their rights"); *see also Int'l Union, United Auto., Aerospace & Ag. v. NLRB*, 765 F.2d 175, 183 (D.C. Cir. 1985) ("[I]f an employer is not acting on a claim of right under the contract . . . it may not institute changes . . . without the consent of the union."). Because Treasury could not unilaterally require FHFA to

agree to the Net Worth Sweep, Treasury's decision to adopt the Net Worth Sweep was not an "exercise" of a "right."

Indeed, Treasury's so-called "right to amend" is vastly different than the actual rights that Treasury received in the Purchase Agreements. The most significant example is the common-stock warrant, which grants Treasury a unilateral right to purchase up to 79.9% of the Companies' common stock at a nominal price. J.A.494, J.A.496. Exercising this right does not require negotiation or further mutual assent; Treasury can purchase this common stock simply by presenting the Companies with a "Notice of Exercise" that identifies the number of shares it wishes to purchase. J.A.503. Treasury could not adopt the Net Worth Sweep through such a process—it needed FHFA's assent on behalf of the Companies—and thus Treasury did not have a *right* to change the terms of its agreement with FHFA to create the Net Worth Sweep.[7]

---

[7] In fact, in his declaration for FHFA's document compilation, Mario Ugoletti, who "participated in the creation and implementation of the [Purchase Agreements]" when he was at Treasury, and now is FHFA's "primary liaison with Treasury concerning the [Purchase Agreements]," J.A.2419, described the "expansive bundle of rights and entitlements" the Purchase Agreements provided to Treasury, J.A.2421. Tellingly, Mr. Ugoletti's declaration makes no mention of a "right to amend" the Purchase Agreements.

Treasury's decision to adopt the Net Worth Sweep was not an exercise of a right it received when it purchased Treasury's Stock, therefore Treasury had no authority to enter into it, and it must be vacated.

3. The Net Worth Sweep Constituted A Purchase Of New Securities Or Obligations.

The Net Worth Sweep exceeded Treasury's authority for the additional reason that it constituted a purchase of new securities or obligations after Treasury's purchasing authority expired on December 31, 2009. The district court disagreed, and concluded that the Net Worth Sweep was not a "purchase" of new securities because Treasury did not "provid[e] an additional funding commitment or receiv[e] new securities from the [Companies] as consideration for its [Sweep] Amendment to the already existing [Purchase Agreements]." J.A.333-34.

Yet, when Treasury entered into the Second Amendment to the Purchase Agreements in 2009, it recognized that "amend[ing] the terms of the Original Agreement" triggered the requirement applicable to "any use of [purchasing] authority" to make certain "emergency" determinations, including HERA's Required Findings based on the Required Considerations. J.A.605-06; *see also* 12 U.S.C. § 1719(g)(1)(B) (requiring a "determination" "[i]n connection with any use of [Treasury's purchasing] authority").

And even a cursory review of the differences between Treasury's Stock before and after the Net Worth Sweep shows that they are different securities:

Pre-Net Worth Sweep	**Post-Net Worth Sweep**
10% cash dividend	Cash dividend equal to the Companies' net worth
Companies may elect to pay dividend in kind forever	No in-kind option; the Companies can only pay in cash
Annual cash dividend before the Net Worth Sweep = $18.9 billion	2013 cash dividend = $130 billion
Companies can retain capital to withstand periodic downturns	Companies cannot retain capital
Treasury's liquidation preference could be repaid, allowing payments to other shareholders	Payments under Net Worth Sweep not credited to payment of Treasury's liquidation preference, precluding payments to other shareholders

The Net Worth Sweep wrought a fundamental change to the nature of Treasury's investment—far more substantial than any previous change to Treasury's Stock—and thus gave rise to a new security, at a time when Treasury's statutory authority to purchase new securities had plainly lapsed under HERA's clear terms.

a. The Net Worth Sweep Satisfies The Ordinary Meaning Of "Purchase."

The Net Worth Sweep was a "purchase" under that term's ordinary meaning. The Oxford English Dictionary defines "purchase" as "[t]o acquire in exchange for payment in money or an equivalent; to buy," OED Online (purchase, *v.*) (last accessed June 26, 2015); the Uniform Commercial Code defines that term as "any other voluntary transaction creating an interest in property," U.C.C. § 1-201(b)(29); and *Black's Law Dictionary*, defines "purchaser" to mean "one who

obtains property for money or *other valuable consideration*," *Black's Law Dictionary*, *supra*, 1430 (emphasis added).

The Net Worth Sweep clearly meets these definitions of "purchase." FHFA stated below that the Net Worth Sweep "transfer[red] an Enterprise asset—potential future profits—to Treasury in exchange for relief from an obligation—10% dividends." Dkt. 32 at 27. Purchases are not confined to cash. *See SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 467 (1969). The Companies sold Treasury a new obligation—to hand over their net worth each quarter—by canceling the Companies' fixed-dividend obligations. This 2012 transfer of obligations was clearly a "purchase"—albeit an exceedingly one-sided transaction—to which Treasury lacked authority to agree.

The district court nevertheless held the Net Worth Sweep was not a purchase because Treasury did not increase its funding commitment. J.A.333-34. But the existence of a funding commitment is not determinative of whether there is a purchase under Section 1719(g). Treasury could have purchased securities with no funding commitment at all. The touchstone of a purchase is an exchange of value. Here, Treasury acquired the Companies' future net assets in exchange for cancellation of its right to a fixed dividend and commitment fee. The transfer of a fixed dividend obligation worth $19 billion per year in exchange for the Companies' net assets (worth $110 billion more in the first year alone) most

certainly constitutes a new investment in the Companies—Treasury now essentially owns 100% of the Companies' equity value. Treasury's decision to exchange its fixed dividend for the Companies' equity value—certainly "valuable consideration"—was thus a "purchase" prohibited by HERA.

b. The Net Worth Sweep Modified Treasury's Stock To Such A Degree That The Net Worth Sweep Constitutes A Purchase Of New Securities.

The district court concluded (and Treasury contended) that, rather than a prohibited purchase, the Net Worth Sweep was a mere modification creating "a new formula of dividend compensation." J.A.334. But the word "'[m]odify'" "connotes moderate change." *MCI Telecomms. Corp v. AT&T Co.*, 512 U.S. 218, 228 (1994). The Net Worth Sweep, which increased payments to Treasury by $110 billion in 2013 alone, was far from a "moderate" change.

The securities laws and Treasury's own IRS regulations recognize that amendments that fundamentally change a security's nature create a new security, and that this transformation is a purchase. Section 10(b) of the Securities Exchange Act of 1934 prohibits fraud "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b). When deciding whether plaintiffs have either purchased or sold securities, courts ask whether there is "'such significant change in the nature of the investment or in the investment risks as to amount to a new investment.'" *Gelles v. TDA Indus., Inc.*, 44 F.3d 102, 104 (2d Cir. 1994) (quoting

Abrahamson v. Fleschner, 568 F.2d 862, 868 (2d Cir. 1978)). This analysis requires assessing the "economic reality of [a] transaction," *Keys v. Wolfe*, 709 F.2d 413, 417 (5th Cir. 1983), including the investment's altered risk profile, *see 7547 Corp. v. Parker & Parsley Dev. Partners, L.P.*, 38 F.3d 211, 229 (5th Cir. 1994) (plaintiff exchanged "units in a financially solvent limited partnership" for stock in a financially unstable corporation). Holders of a fundamentally changed security are considered purchasers of new securities. *Nat'l Sec., Inc.*, 393 U.S. at 467.

Treasury's taxation regulations similarly recognize that a major change to a security is a purchase. Normally, the IRS taxes assets when sold. To prevent tax evasion, IRS regulations provide that "a significant modification of a debt instrument . . . results in an exchange of the original debt instrument for a modified instrument." 26 C.F.R. § 1.1001-3(b). A modification is "significant" if it alters the security's annual yield by "1/4 of one percent" or "5 percent of the annual yield of the unmodified instrument," or if it converts debt into equity. *Id.* § 1.1001-3(e)(1), (2)(ii), (5)(i). Indeed, the IRS has held that an amendment changing the value of preferred stock to "equal the net worth of [a] corporation" "constitutes, in substance, . . . new preferred stock." Rev. Rul. 56-564, 1956-2 C.B. 216, 1956 WL 10781.

The Net Worth Sweep's change to the Treasury Stock's fixed dividend gave Treasury a new security. Under the "economic reality of the transaction," *Keys*, 709 F.2d at 417, the Net Worth Sweep generated more than $110 billion in additional dividends during 2013 alone. And Treasury's annual yield soared from 10% of the liquidation preference to almost 70% of the preference—many multiples of the IRS's threshold.

The Net Worth Sweep also fundamentally transformed Treasury's fixed-dividend preferred stock effectively into unlimited-upside common stock. *See* 26 C.F.R. § 1.1001-3(e)(5)(i) (exchange where "modification . . . results in an instrument or property right that is not debt"). Preferred shares "generally give the holder a claim to a fixed dividend that must be satisfied before any dividend is paid on common shares. . . . In contrast to common shares, preferred shares do not provide an unlimited claim on the corporation's residual earnings." 11 *Fletcher Cyclopedia of the Law of Corporations* § 5283, at 464 (2011 rev. vol.). Under the Net Worth Sweep, by contrast, Treasury takes all of the Companies' net worth—their "residual earnings." Indeed, having effectively wiped out the Companies' remaining equity (which is owned by Institutional Plaintiffs and other public shareholders) pursuant to Administration "policy," J.A.620, there is effectively no longer any lower-ranked equity over which Treasury's stock could take "priority." *See Folk on the Delaware General Corporation Law* § 151.04 (2015). Because the

Net Worth Sweep in substance changed debt-like preferred stock into common stock, it constituted a purchase of new securities.

* * *

Treasury lacked authority to execute the Net Worth Sweep. At the time, Treasury did not purport to exercise a right it had received in connection with the Purchase Agreements—its only remaining post-2009 authority. Nor did the Net Worth Sweep merely "modify" the Purchase Agreements. The Net Worth Sweep rewrote the Purchase Agreements in a way that effectively nationalized the Companies. Treasury lacked the authority to do that after 2009, and this Court should vacate Treasury's *ultra vires* conduct.

B. Treasury's Decision To Execute The Net Worth Sweep Was Arbitrary And Capricious.

The district court refused to address Appellants' claims that Treasury acted arbitrarily and capriciously in violation of the APA, concluding that HERA's limitation of judicial review, which prohibits courts from taking action to "restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver," 12 U.S.C. § 4617(f), barred all such claims. That conclusion was erroneous; Section 4617(f) does not apply to agencies other than FHFA. And Treasury's decision to impose the Net Worth Sweep plainly fails the APA's standards for reasoned decisionmaking.

1. The District Court Had Jurisdiction To Adjudicate Arbitrary And Capricious Claims Against Treasury.

There is a "'strong presumption' favoring judicial review of administrative action," *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015), and courts require "clear and convincing evidence to dislodge the presumption." *Kucana v. Holder*, 558 U.S. 233, 251-52 (2010) (internal quotation marks omitted). Even "[w]hen a statute is 'reasonably susceptible to divergent interpretation,'" courts "'adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.'" *Id.* at 251 (citation omitted).

The question here is whether Section 4617(f)'s limitation on claims against FHFA bars Appellants' arbitrary-and-capricious claims against Treasury. The district court held that "HERA's anti-injunction provision may be logically extended" to such claims because Treasury's decision to impose the Net Worth Sweep was "interdependent, contractual conduct" "directly connected to FHFA's activities as a conservator." J.A.330, 331. But the district court pointed to no evidence—much less the clear and convincing evidence required to dislodge the presumption of reviewability of agency action—that Congress intended to preclude any claims against Treasury. Even though HERA specifically contemplates that both FHFA and Treasury would be taking action with respect to the Companies, Congress chose to circumscribe judicial review of certain actions *only as to FHFA*;

Section 4617(f) contains no prohibition on claims against Treasury. Such "silence" cannot be construed "as a denial of authority to an aggrieved person to seek appropriate relief in the federal courts." *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993).

Indeed, 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. *Ecco Plains, LLC v. United States*, 728 F.3d 1190, 1202 n.17 (10th Cir. 2013) ("This statute only applies . . . against FDIC."), *cert. denied sub nom. High Plains Cattle Co. v. United States*, 134 S. Ct. 1034 (2014); *see also Nat'l Trust for Historic Pres. v. FDIC*, 995 F.2d 238, 241 (D.C. Cir. 1993) (per curiam) (noting "[t]he prohibition against restraining the FDIC"), *as modified on other grounds*, 21 F.3d 469 (D.C. Cir. 1994) (per curiam). There is no basis to interpret Section 4617(f) to protect Treasury's actions from judicial review. *Cf. Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends

to apply" especially "when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").[8]

2. Treasury Acted Arbitrarily and Capriciously.

Treasury acted arbitrarily and capriciously in entering into the Net Worth Sweep. To satisfy the APA's requirement of reasoned decision-making, an agency must articulate "'a rational connection between the facts found and the choice made.'" *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404 (D.C. Cir. 1995) (citation omitted). This standard requires agencies to support their decisions with the best available data, *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1020-23 (D.C. Cir. 1999), and to "consider reasonably obvious alternative rules and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 797 (D.C. Cir. 1984) (internal quotation marks and alteration omitted). Treasury satisfied none of these requirements and thus violated the APA.

First, Treasury's asserted reason for the Net Worth Sweep was based on flawed and stale data. Treasury claimed that the Companies were in a "downward

[8] The district court suggested that Appellants' APA claims against Treasury challenged "conduct . . . that is required under a contract" between Treasury and FHFA. J.A.330. That is incorrect. Appellants challenge Treasury's decision to enter into the Net Worth Sweep. Nothing in the Purchase Agreements even remotely "required" that action by Treasury.

spiral" and soon would exhaust Treasury's Commitment in order to pay Treasury's cash dividend. But the only allegedly supportive data in the administrative record were projections by the accounting firm Grant Thornton that relied on FHFA's October 2011 forecasts showing that the Companies' future profits would not cover Treasury's 10% cash dividend. J.A.1848, J.A.1852, J.A.1964. Strangely, there were no projections from the Companies themselves or their auditors in the administrative record, and no projections of any kind from 2012. That is important because, by June 2012, the Companies had outperformed even FHFA's most optimistic projections, *see* J.A.1945; J.A.4043, and the Companies' public financial statements reveal that they were profitable in the first two quarters of 2012. *See* J.A.1974 (Fannie Mae 2Q 10-Q); J.A.2151 (Freddie Mac 2Q 10-Q). None of Treasury's presentations incorporated this new data. *See* J.A.1841-68, J.A.1899-1928, J.A.1947-58, J.A.1959-67. Treasury's assertion that the Companies were in a "downward spiral" was thus based on FHFA projections that, by the time the Net Worth Sweep was adopted in August 2012, had been proven unduly pessimistic and false.

What is more, Treasury's assessment of the Companies' financial condition entirely ignored the Companies' tens of billions of dollars in deferred tax assets, which in the first half of 2012 already were being recognized. *See* J.A.1708 (Freddie Mac Q1 2012 10-Q (May 3, 2012)); J.A.2299 (Freddie Mac recognized

$989 million in deferred tax assets in the first half of 2012). A 2011 presentation by the Blackstone Group to Treasury—inexplicably omitted from Treasury's administrative record—noted that the Companies' "[i]ncreased capitalization of tax attributes" would allow them to "build-up" capital and thus reduce the likelihood of further draws from Treasury. S.A.36. As far as Treasury's administrative record reveals, the agency did not consider these tax assets at all in analyzing whether the Companies likely would exhaust Treasury's Commitment. However, once the Net Worth Sweep became effective, Treasury nearly immediately collected approximately $100 billion as a direct result of the Companies' write-up of those assets.

Even assuming the truth of Treasury's stated (but inadequately supported) hypothesis that the Companies were at risk of exhausting Treasury's Commitment, Treasury apparently failed to consider at least two obvious alternative solutions to that problem: First, Treasury could have suggested to FHFA that the Companies pay Treasury the dividends due under the Purchase Agreements in kind, as the Agreements permitted, rather than in cash. Payments in kind would have permitted the Companies to conserve their cash and would have eliminated any need to draw further from Treasury's Commitment to pay cash dividends to Treasury. *See* J.A.486, J.A.520-21 (§ 2(c)), J.A.1907. Treasury's administrative

record contains no discussion of this alternative, and no explanation for its rejection, even though it was permitted by the Purchase Agreements themselves.

Second, assuming, as Treasury claims, it had authority to amend the terms of its investments after 2009, it could have refinanced, reduced, or waived its dividend in a way that diminished or eliminated the need to draw down on Treasury's Commitment. *See* J.A.1589 (Moody's presentation identifying "[l]ower preferred dividends" as an "[a]lternative[ ] to reverse GSE capital deficits"); J.A.1567 (Deutsche Bank suggesting amending the Purchase Agreements to "defer or reduce the dividend"). Indeed, the Treasury January 2011 Strategic Options Memorandum suggested a "[c]ut in dividend" as a first step towards privatizing the Companies. Treasury January 2011 Strategic Options Memorandum at 4. This solution would have been consistent with the general reduction in interest rates from the financial crisis. *See* Barclays US Corporate High Yield Index (Sept. 5, 2008: 11.63%; Aug. 16, 2012: 6.87%). Treasury's administrative record contains no explanation for its rejection of these obvious alternatives; it seemingly considered only the Net Worth Sweep. *See* J.A.1841-68, J.A.1899-1928, J.A.1947-58, J.A.1959-67 (presentations considering only variations on the Net Worth Sweep). Treasury has not satisfied the APA's requirement of reasoned

decision-making, and the Net Worth Sweep transaction accordingly must be vacated.[9]

III. THE DISTRICT COURT IMPROPERLY ADJUDICATED APPELLANTS' CLAIMS ON THE BASIS OF PLAINLY DEFICIENT ADMINISTRATIVE RECORDS.

The district court also committed two separate procedural errors, each of which independently requires that the decision below be vacated. First, the district court, over Appellants' objections, relied on administrative records that were demonstrably incomplete and, at least in part, false. The district court then compounded that error by resolving, at the motion to dismiss phase, factual disputes going to the court's jurisdiction without giving Appellants the opportunity to contest the completeness of the record pertinent to those disputes or to present evidence in support of jurisdiction. Appellants are entitled, at least, to have their APA claims evaluated against each agency's complete administrative record.

---

[9] Vacating the Net Worth Sweep necessarily would require some action by the agencies to restore the Companies to the position they would have occupied had the Net Worth Sweep not occurred. The precise mechanics of that process can be resolved by the district court on remand. One possible resolution would be for Treasury and FHFA to agree, pursuant to the Purchase Agreements, to allow the excess funds (over and above the pre-Net Worth Sweep 10% cash dividend) paid to Treasury under the Net Worth Sweep to be credited retroactively on a quarterly basis as a partial redemption of Treasury's liquidation preference. If that happened today, approximately $152.6 billion would be treated as redeemed, and Treasury would have $36.9 billion remaining on the liquidation preference on which it could continue to collect fixed-rate dividends and would still retain its warrants to purchase 79.9% of the Companies' common stock.

A. The District Court Relied On Patently Incomplete Administrative Records.

An administrative record must include "neither more nor less than what was before the agency at the time it made its decision." *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010) (citing *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997)). Appellants established below that the agencies' administrative records were incomplete, and the district court accordingly erred when it nonetheless adjudicated the cases on the basis of those records.

Treasury's record was exposed as incomplete when a June 13, 2011 presentation to Treasury from the Blackstone Group, addressing options for recapitalizing the Companies, became public. Perry Capital brought this to the attention of the district court in a motion to supplement the administrative record. Dkt. 49 at 2. The district court should have ordered Treasury to review its files to ensure production of its entire administrative record. *See Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 346-47 (D.C. Cir. 1989). But the district court dismissed Appellants' claims against Treasury without any explanation why Treasury's record was complete despite the obvious omission, or why the claims could be dismissed based on an incomplete administrative record. This was reversible error. *See Am. Bioscience v. Thompson*, 243 F.3d 579, 581-83 (D.C. Cir. 2001) (remanding and holding that "before assessing [plaintiff's] probability

of success on the merits, [the district court] should have required the FDA to file the administrative record").

The deficiency of FHFA's record—and the district court's error with respect to it—is even more manifest. FHFA refused to certify that its "Document Compilation" was an administrative record at all. *See* Dkt. 49 at 1. FHFA argued that its document compilation included all the materials that "were before it" and "were directly or indirectly considered," *see* Dkt. 42 at 52 (internal quotation marks omitted), but that cannot possibly be true. As conservator of the Companies, FHFA affirmed to Treasury that it "attend[ed] management committee meetings, board meetings, committee meetings leading to public financial reports," and provided "detailed review of quarterly and annual SEC filings." Office of Inspector Gen., FHFA, EVL-2012-006, *FHFA's Certifications for the Preferred Stock Purchase Agreements* 18 (2012) ("OIG Report"). Yet, FHFA's document compilation includes *no* presentations or other documents provided to it in connection with any of the meetings it attended. FHFA's compilation also lacks *any* projections of the Companies' future financial performance provided to FHFA—documents that surely would have had to be considered to conclude, as FHFA claims it did, that the Companies were in a "downward spiral."

In place of contemporaneous documents, FHFA proffered a post-hoc declaration by a FHFA official, Mario Ugoletti, as the factual basis for FHFA's

assertion that the Companies' dividend obligations to Treasury had trapped the Companies in a "downward spiral" that would exhaust Treasury's Commitment. F0006-F0008 (¶¶ 11-17). And to rebut the claim that restoration of the Companies' deferred tax assets would eliminate the need for future draws from Treasury (suggested, among other places, in the omitted 2011 Blackstone Group presentation to Treasury), this declaration asserts that, by August 2012, "the Conservator and the [Companies] had not yet begun to discuss whether or when the [Companies] would be able to recognize any value to their deferred tax assets." J.A.2426-27 (¶ 20). This post-hoc declaration cannot permissibly supplement (much less substitute for) the agency's actual administrative record. *See AT&T Info. Sys., Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) ("[W]e have repeatedly applied [the rule against supplementing the agency record] to bar introduction of litigation affidavits to supplement the administrative record.").

Substitution of a post-hoc declaration is particularly inappropriate here because of its untrue assertion that FHFA did not consider the Companies' multi-billion-dollar deferred tax assets: The Companies reviewed their deferred tax assets every quarter, J.A.1207, and, as noted above, FHFA provided "detailed review of quarterly and annual SEC filings." OIG Report at 18. FHFA thus undoubtedly knew in the first half of 2012—that is, before August 2012—that Freddie Mac decreased its deferred tax assets valuation allowance by nearly $1

billion and reported that fact in the quarterly SEC filing that FHFA oversaw. J.A.3744. In this respect, the document compilation FHFA provided is not only incomplete, it appears affirmatively misleading.[10]

The district court attempted to sidestep these deficiencies in FHFA's "document compilation" by declaring FHFA's administrative record "[i]rrelevant" to the inquiry whether FHFA exceeded its statutory authority as conservator. J.A.336; *see also* J.A.337 ("FHFA's underlying motives or opinions . . . do not matter for purposes of § 4617(f)."). But "why" FHFA agreed to the Net Worth Sweep very much informs whether it was acting within its statutory authority as conservator, which requires the agency to "preserve and conserve" assets to "rehabilitate" the Companies to a "sound and solvent" condition. 12 U.S.C. § 4617(b)(2)(D). FHFA conceded as much when it proffered the Ugoletti Declaration in an attempt to explain *why* it had undertaken an action that transferred more than $100 billion to Treasury and structurally precludes the

---

[10] In connection with its case pending against the government in the Court of Federal Claims, Fairholme deposed Mr. Ugoletti. Like all the discovery in that case, the deposition is under seal, but Fairholme recently filed a motion to unseal that deposition "because Mr. Ugoletti's testimony calls into question evidence submitted by FHFA in the district court" here. *See* Pls.' Mot. 9, *Fairholme Funds, Inc. v. United States*, No. 13-465 (Fed. Cl. June 25, 2015) (Dkt. 168).

Companies from ever returning to a "sound and solvent" condition. By closing its eyes to the agencies' rationales, the district court intentionally blinded itself to critical components of the central inquiry—whether the Net Worth Sweep fulfills FHFA's fiduciary mandate to rehabilitate the Companies. It plainly does not, for the effect of the Net Worth Sweep is to guarantee that the Companies cannot retain the capital they would need to resume normal business operations. Even if the Court ignores the Net Worth Sweep's stated aims and looks only at its effects on the Companies, those consequences are sufficient to justify setting aside the Net Worth Sweep since they ensure that the Companies' assets will not be preserved and that the Companies will not be operated in a sound and solvent manner.

But the agencies' rationales do "matter," and, accordingly, so do the records of the agencies' decisionmaking. The district court's contrary conclusion is an error of law and therefore a *per se* abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990). That is all the more true here because the burden of supplementing the records here would have been (and still would be) minimal given that both agencies are reviewing and producing (under seal) hundreds of thousands of documents in connection with Fairholme's case against the United States in the Court of Federal Claims. *See* Order, *Fairholme Funds, Inc. v. United States*, No. 13-465 (Fed. Cl. Feb. 26, 2014) (Dkt. 32). The district

court erred in proceeding to adjudicate this case without ordering supplementation of the record. The decision below therefore must be vacated.

B. The District Court Improperly Relied On Facts Outside Of The Complaint Without Affording Appellants An Opportunity To Present Evidence.

The district court improperly relied on the agencies' incomplete and misleading administrative records to resolve factual issues going to the court's jurisdiction without providing Appellants an opportunity to challenge the factual predicate of the agencies' contentions that the district court lacked jurisdiction. The court repeatedly relied on those "irrelevant" records to make numerous factual determinations against Appellants. In doing so, the court trampled on important procedural protections, and gave this Court an independent basis to vacate the district court's decision.

When ruling on a Rule 12(b)(1) motion to dismiss, a court may resolve the motion in one of two ways: (1) it may "'dispose of [the motion] on the complaint standing alone,'" or (2) it "'may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (citation omitted). If the court considers the record, as it indisputably did here, it must permit the non-moving party to present evidence to prove jurisdiction. *Herbert v.*

Nat'l Acad. of Scis., 974 F.2d 192, 198 (D.C. Cir. 1992). Moreover, when jurisdictional facts alleged are inseparable from facts central to the merits, *see, e.g.*, *Land v. Dollar*, 300 U.S. 731, 735 (1947), the court "should usually defer its jurisdictional decision until the merits are heard," *Herbert*, 974 F.2d at 198, because "the defendant has challenged not only the court's jurisdiction but also the existence of the plaintiff's cause of action," *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009).

The district court failed this standard. Appellants' claims were intertwined with the jurisdictional question: If the Net Worth Sweep exceeded FHFA's authority, then the district court had *both* jurisdiction *and* grounds to grant judgment for Appellants. In finding that it had no jurisdiction over Appellants' APA claims, the district court repeatedly relied on facts outside the complaints to resolve disputes over facts at the core of Appellants' claims that the agencies violated HERA. For example, in the course of rejecting Appellants' claim that Treasury exceeded its statutory authority, the district court credited FHFA's assertion that it "executed the [Net Worth Sweep] to ameliorate the existential challenge of paying the dividends it *already* owed," rather than to enrich Treasury. J.A.334. Yet, whether the agencies genuinely believed such an "existential challenge" actually existed was one of the most hotly disputed factual issues in the case.

Even more egregiously, the district court rejected out of hand Fairholme's well-pleaded allegation, J.A.122, 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). J.A.38. Treasury's administrative record indicates that Treasury—not FHFA—was the driving force behind the massively one-sided Net Worth Sweep, *see* J.A.1841-68, J.A.1899-1928, J.A.1947-58, J.A.1959-67, and that it was *Treasury*'s "[p]roposed solution" to the Companies' supposed financial problems, *see* T3901. And FHFA's own "Strategic Plan" for the conservatorship emphasized its erroneous conclusion that HERA's mandate to preserve and conserve "directs FHFA to minimize losses on behalf of taxpayers," or, in other words, to operate the Companies for the benefit of Treasury. J.A.3136. Yet the district court flatly ruled that there was no "reasonable inference" that FHFA acted at Treasury's direction in agreeing to the Net Worth Sweep. J.A.338.

The district court concluded that "the administrative record provided by Treasury" did not "hint[] at coercion actionable under § 4617(a)(7)," *id.*, but it made no mention of the inadequate document compilation produced by FHFA. FHFA's "document compilation" includes no documents reflecting any independent analysis by FHFA of the Net Worth Sweep's effects, or any attempt by FHFA to negotiate a more favorable deal on the Companies' behalf. The Net Worth Sweep was an utterly one-sided deal that achieved Treasury's goal "to

ensure existing common equity holders will not have access to any positive earnings from the GSEs in the future," J.A.620, while purporting to do nothing more for the Companies than relieve them of the obligation to pay cash dividends they were not required to declare in the first place. Those facts provide a reasonable inference that Treasury was calling the shots, contrary to Congress's express instructions.[11]

In any event, before making factual findings on the central issues in the case (both as to jurisdiction and the merits) the district court was obligated to permit Appellants an opportunity to develop and present evidence relevant to the jurisdictional inquiry. The agencies' failure to produce complete administrative records cannot be the predicate for a finding that there are inadequate objective facts to support a claim that the agencies exceeded their authority under the statute. Before their claims were dismissed based on gerrymandered facts outside the

---

[11] In Fairholme's takings case in the Court of Federal Claims, the court held that Fairholme's allegation that FHFA was acting at the direction of Treasury (and therefore was part of the United States rather than an independent conservator) was sufficiently weighty to warrant discovery. Order 3, *Fairholme Funds, Inc. v. United States*, No. 13-465 (Fed. Cl. Feb. 26, 2014) (Dkt. 32). The agencies have produced a large volume of documents addressing whether FHFA acted at Treasury's direction in executing the Net Worth Sweep—none of which are included in the administrative record and all of which, as of this writing, remain under seal. *See* Def.'s Response 2*, Fairholme Funds, Inc. v. United States*, No. 13-465 (Fed. Cl. May 18, 2015) (Dkt. 154).

complaints, Appellants should have been permitted discovery—as Fairholme had requested, *see* Mem. of Law in Supp. of Mot. to Supplementation of the Administrative Records, No. 13-1053 (D.D.C. Feb. 12, 2014) (Dkt. 32)—or, at least, an opportunity to review the *complete* administrative record of the agencies. The district court's failure to do so requires vacatur of the decision below.

CONCLUSION

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

Dated: March 8, 2016

Respectfully submitted,

/s/ Theodore B. Olson

Janet M. Weiss
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, N.Y. 10166
Telephone: 212.351.3988
Facsimile: 212.351.5234

Theodore B. Olson
Douglas R. Cox
Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

Counsel for Appellant Perry Capital LLC

Drew W. Marrocco
DENTONS US LLP
1301 K Street, N.W.,
Suite 600, East Tower
Washington, D.C. 20005
Telephone: 202.408.6400
Facsimile: 202.408.6399

Michael H. Barr
Richard M. Zuckerman
Sandra Hauser
DENTONS US LLP
1221 Avenue of the Americas
New York, N.Y. 10020
Telephone: 212.768.6700
Facsimile: 212.768.6800

Counsel for Appellants Arrowood Indemnity Co., et al.

Charles J. Cooper
David H. Thompson
Peter A. Patterson
Brian W. Barnes
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: 202.220.9600
Facsimile: 202.220.9601

Counsel for Appellants Fairholme Funds, Inc., et al.

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

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 16,991 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

Dated: March 8, 2016

/s/ Theodore B. Olson

ADDENDUM OF PERTINENT AUTHORITIES

5 U.S.C. § 706

§ 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

. . . .

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

. . . .

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

12 U.S.C. § 1455

§ 1455 Secondary market operations

. . . .

(*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.

. . . .

(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.

. . . .

(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

. . . .

(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.

12 U.S.C. § 1719

§ 1719. Obligations and securities of the Corporation

. . . .

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

(1) Authority to purchase

(A) General authority

In addition to the authority [to purchase obligations] 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.

. . . .

(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.

. . . .

(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

. . . .

(4) Termination of authority

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

12 U.S.C. § 1821

§ 1821 Insurance Funds

. . . .

(j) Limitation on court action

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

12 U.S.C. § 4617

§ 4617 Authority over critically undercapitalized regulated entities

(a) Appointment of the Agency as conservator or receiver

(1) In general

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

(2) Discretionary appointment

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

. . . .

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

. . . .

(2) General powers

. . . .

(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.

. . . .

(3) Authority of receiver to determine claims

. . . .

(B) Notice requirements

The receiver, in any case involving the liquidation or winding up of the affairs of a closed regulated entity, shall—

(i) promptly publish a notice to the creditors of the regulated entity to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the date of publication of such notice; and

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

. . . .

(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.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2016, I electronically filed the foregoing Final Opening Brief for Institutional Plaintiffs with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Service was accomplished on the following parties via the Court's CM/ECF system:

Hamish P.M. Hume
BOISE, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, N.W.
Suite 800
Washington, D.C. 20015
Telephone: 202-237-2727
Facsimile: 202-237-6131

Blair A. Nicholas
David R. Kaplan
BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Telephone: 858-793-0070
Facsimile: 858-793-0323

Geoffrey C. Jarvis
Michael J. Barr
GRANT & EISENHOFER, PA
123 Justison Street
Wilmington, DE 19801
Telephone: 302-622-7000
Facsimile: 302-622-7100

David L. Wales
BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP
1251 Avenue of the Americas
New York, N.Y. 10020
Telephone: 212-554-1409
Facsimile: 212-554-1444

Jay W. Eisenhofer
GRANT & EISENHOFER, PA
485 Lexington Avenue
New York, N.Y. 10017
Telephone: 646-722-8500
Facsimile: 646-722-8501

Lee D. Rudy
Eric L. Zagar
Matthew A. Goldstein
KESSLER TOPAZ MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
Telephone: 610-667-7706
Facsimile: 610-667-7056

Interim Co-Lead Class Counsel for Class Plaintiffs

Mark B. Stern
Alisa B. Klein
Abby Christine Wright
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Telephone: 202-514-2000

Counsel for the U.S. Department of the Treasury and Secretary Jacob J. Lew

Paul D. Clement
Zachary Hudson
BANCROFT PLLC
500 New Jersey Ave., N.W.
Seventh Floor
Washington, D.C. 20001
Telephone: 202-234-0090
Facsimile: 202-234-2806

Counsel for Appellee Federal National Mortgage Association

Howard N. Cayne
Asim Varma
David B. Bergman
ARNOLD & PORTER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Telephone: 202-942-5000
Facsimile: 202-942-5999

Counsel for Defendants Federal Housing Finance Agency and Director Melvin L. Watt

Michael J. Ciatti
Graciela Maria Rodriguez
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: 202-626-5508
Facsimile: 202-626-3737

Counsel for Appellee Federal Home Loan Mortgage Corp.

Dated: March 8, 2016

/s/ Theodore B. Olson