ORAL ARGUMENT HELD ON 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 advisor,

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

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* INVESTORS UNITE IN SUPPORT OF APPELLANTS FOR REVERSAL

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April 22, 2016

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GLOSSARY

The Companies	Federal National Mortgage Association (a.k.a. Fannie Mae) and Federal Home Loan Mortgage Corporation (a.k.a. Freddie Mac)
HERA	The Housing and Economic Recovery Act of 2008
FDIA	Federal Deposit Insurance Act
FDIC	Federal Deposit Insurance Corporation
FHFA	Federal Housing Finance Agency
The Net Worth Sweep	The Third Amendment to the Senior Preferred Stock Purchase Agreements between Treasury and FHFA as conservator of the Companies, dated August 17, 2012

INTEREST OF THE *AMICUS CURIAE*

Investors Unite previously submitted an *amicus curiae* brief in these consolidated appeals. *See* Amicus Curiae Br. of Investors Unite in Supp. of Appellants for Reversal (July 6, 2015) ("IU Br."). Investors Unite is a broad coalition of more than 1,100 private investors in the government-sponsored enterprises Fannie Mae and Freddie Mac (the "Companies") who have a common interest in these cases. *Id.* at 1-3.

In its initial brief, Investors Unite provided the Court with relevant legislative and administrative background in support of Appellants' argument that, in agreeing to the "Net Worth Sweep," the Federal Housing Finance Agency ("FHFA") acted outside its statutory conservatorship authority under the Housing and Economic Recovery Act of 2008 ("HERA") because, *inter alia*, such action is contrary to FHFA's duty to preserve and conserve assets and take steps to return the Companies to a sound and solvent condition. *Id.* at 4-7, 20-22.

At the April 15, 2016 oral argument, the Court inquired whether a statutory provision that none of the parties or *amici* had previously addressed—12 U.S.C. § 4623(d)—presents a jurisdictional bar to Appellants' claims in these cases. Section 4623(d) provides:

> Except as provided in this section, no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or effectiveness of any classification or action of the Director under this subchapter (other than

> appointment of a conservator under section 4616 or 4617 of this title . . .) or to review, modify, suspend, terminate, or set aside such classification or action.

In response, counsel for FHFA argued that this section precludes Appellants' claims because they somehow implicate a capital "classification or action" of FHFA's Director, citing a decision of the Fifth Circuit involving the Federal Deposit Insurance Corporation ("FDIC"): *FDIC v. Bank of Coushatta*, 930 F.2d 1122 (5th Cir. 1991). *See* Tr. of Apr. 15, 2016 Oral Arg. ("Tr.") at 68-75.

Investors Unite and its counsel, who served at the FDIC for more than 21 years, including most recently as General Counsel, respectfully submit this supplemental *amicus curiae* brief to address the text and structure of Section 4623(d) as it relates to HERA's conservatorship provisions in light of the legislative and administrative background against which HERA was enacted.

ARGUMENT

Contrary to FHFA's counsel's argument at oral argument, Section 4623(d) has no application to Appellants' claims for at least three reasons.

1. These Cases Involve Actions By The Conservator, And Do Not Involve Actions Subject to Section 4623, Which Is Limited to Supervisory "Classifications" or "Actions"

First, the FHFA action that is being challenged by Appellants in these cases—the decision by FHFA, as conservator, to cause the Companies to enter into the Net Worth Sweep and continue the conservatorships under the Net Worth Sweep—is not a "*classification or action of the Director* under this subchapter."

12 U.S.C. § 4623(d) (emphasis added). Section 4623 addresses the availability of review for classic supervisory decisions regarding capital "classifications"—whether the Companies are adequately capitalized, undercapitalized, significantly undercapitalized, or critically undercapitalized. This review process, and associated jurisdictional bar, have nothing whatsoever to do with the challenges to the actions of FHFA in its capacity as conservator currently before this Court.

There is a fundamental distinction between FHFA's role as supervisor, in which it is responsible for oversight and examination, and its role as conservator or receiver, in which it is responsible to "preserve and conserve" or resolve the Companies, respectively. Section 4617 was enacted in 2008 as part of HERA to create an additional set of powers—and roles—for FHFA as conservator or receiver, distinct from its supervisory powers and duties set forth in the rest of Chapter 46. As described in Investors Unite's prior *amicus* brief, those conservatorship and receivership powers were intentionally made virtually identical to the FDIC's conservatorship and receivership powers in the Federal Deposit Insurance Act ("FDIA"). IU Br. at 17-20.

The FDIA has consistently been interpreted to give the FDIC dual, but distinct, supervisory and conservatorship/receivership roles. *See, e.g.*, *Resolution Tr. Corp. v. Nernberg*, 3 F.3d 62, 66 n.2 (3d Cir. 1993) (RTC, like FDIC, is empowered to act in three separate capacities—as regulator, conservator or

receiver); *Texas Am. Bancshares, Inc. v. Clarke*, 954 F.2d 329, 335 (5th Cir. 1992) ("[t]he separateness of these dual identities of the FDIC has been well respected by federal courts").

These distinctions are reflected in adjudicatory routes under the FDIA for challenges to supervisory actions compared to challenges to conservatorship or receivership actions. The FDIA provides a separate appeals process to review material supervisory determinations, such as those that affect an institution's capital classification, that is totally distinct from the process for consideration of claims against a conservator or receiver. *See* 12 U.S.C. § 4806; FDIC Appeal Processes, FIL 113-2004 (Oct. 13, 2004). In contrast, challenges to the actions of the FDIC as conservator are not subject to the supervisory appeals process and may be adjudicated in court consistent with the fact that banks in conservatorship are open, operating banks.

As in the FDIA, the addition in HERA of conservatorship/receivership roles for FHFA likewise was intended to create a distinction between FHFA's supervisor/regulator roles and its new conservatorship/receivership roles. The text of Chapter 46 confirms this distinction. While the section enumerating FHFA's conservatorship powers, *id.* § 4617(b)(2)(D), falls within the same "subchapter" as Section 4623(d), Chapter 46 clearly distinguishes between FHFA's powers and duties *as conservator* and those of the *Director* in his supervisory role. *Compare*

id. § 4513(a) (duties of Director as regulator and supervisor) *with id.* § 4617(b)(2)(D) (duties of Agency as conservator). Section 4617, added by HERA, makes clear that conservatorship powers and duties apply only when FHFA is, in fact, acting as conservator. *Id.* § 4617(b)(2)(D).

Even the terminology used illustrates this distinction. When HERA confers powers and duties on the Director of FHFA in the supervisory role, it uses the term "Director" and thus makes clear that these powers and duties are distinct from those FHFA has in its conservatorship role. *See, e.g., id.* § 4614 ("For purposes of this subchapter, the Director shall classify the enterprises . . ."); *id.* § 4615(a)(1) ("The Director shall (A) closely monitor the condition of any undercapitalized regulated entity . . . . ."). *Compare id.* § 4617(a)(1) ("references to the conservator or receiver under this section are references to the Agency *acting as conservator or receiver*") (emphasis added).

Finally, like the FDIA, Chapter 46 provides a separate appeals process to review material supervisory determinations, such as those that affect an institution's capital classification, *id.* § 4623, that is totally distinct from the process for consideration of claims against a conservator or receiver.[1]

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[1] Challenges to actions of FHFA, as conservator, may be pursued under the normal jurisdictional grants subject only to the initial 45-day stay following appointment of a conservator provided in 12 U.S.C. § 4617(b)(10)(A)(i) and, if applicable, the limitation on injunctive relief in 12 U.S.C. § 4617(f).

It follows that the prohibition of judicial review of a "classification or action of the Director" in Section 4623(d) refers only to FHFA's supervisory actions and not to its actions as conservator. If the supervisory appeals process, and associated jurisdictional bar, provided by Section 4623 were intended to cover action by FHFA as conservator, the separate jurisdictional bar on which FHFA previously relied in these cases would be superfluous. *See id.* § 4617(f).

The inescapable conclusion of the text and structure of HERA, like that in the FDIA, is that Section 4623(d) does not preclude Appellants' challenge to the Net Worth Sweep.

2. Even If The Director's Decision To Suspend Capital Requirements During Conservatorship Was A "Classification Or Action . . . Under This Subchapter," It Is Entirely Separate From FHFA's Conservatorship Duties At Issue In These Cases

At the April 15, 2016 oral argument, counsel for FHFA erroneously suggested that because Appellants challenge FHFA's *conservatorship* decision to deplete, rather than preserve and conserve, the Companies' capital, their claims in effect challenge the Director's separate, *supervisory* decision to temporarily suspend capital requirements during the Companies' conservatorship.[2] Counsel for

[2] FHFA News Release, FHFA Announces Suspension of Capital Classification During Conservatorship (Oct. 9, 2008), http://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Suspension-of-Capital-Classifications-During-Conservatorship-and-Discloses-Minimum-and-RiskBased-Cap.aspx.

FHFA characterized that separate decision as a "classification"—effectively, setting the Companies' capital levels at zero:

> MR. CAYNE: . . . [T]he reason I'm referring to the FHFA as regulator is it was the FHFA as regulator that made the regulatory decision that going forward the capital tests that previously applied to these enterprises were off the boards for the indefinite future. . . . And my points simply with respect to the Court's inquiry is [if] the whole range of relief being sought by Plaintiffs here were granted, [it would] directly contradict, undermine, effectively set aside that regulatory decision by the Agency.

See Tr. at 74-75.

Counsel's argument not only confuses FHFA's role as supervisor and regulator with its separate role as conservator, but it confuses supervisory concepts. Section 4623 provides a supervisory appeal process covering "classifications" and "discretionary supervisory action." It does not provide an appeal process for the setting of a capital standard. Under Section 4614 (as referenced in Section 4623) the relevant "classification" is a determination that an institution should be reclassified as, e.g., "undercapitalized" when it would otherwise be "adequately capitalized" based on discretionary criteria relating to its improvident operations. *See* 12 U.S.C. § 4614(a) and (c). There is no authority to set capital standards lower than those established by regulation, though there is authority to increase capital standards. *See id.* § 4611 and 4612. As a result, and irrespective of the

Director's authority to suspend any capital standard, the action of suspending a capital standard is simply not governed by Section 4623.

More fundamentally, these cases do not involve a challenge to the "classification" or suspension of the Companies' capital requirements. Section 4623 is directed solely at adjudication of challenges to the Director's supervisory decisions. In contrast, these cases involve a challenge to FHFA's and Treasury's failure to comply with the duties imposed on FHFA as conservator. Those breaches are wholly independent of the Companies' capital classification.

Counsel's argument would lead to illogical and statutorily nonsensical results. Taken at face value, this argument would allow a supervisory judgment by the Director to bar any challenge by creditors of the Companies to the actions of FHFA in its separate roles as conservator or receiver. Under Section 4623, only the Companies can seek review of a capital classification or discretionary supervisory action. *Id.* § 4623(a). This is reasonable since Section 4623 only addresses challenges to a supervisory judgment. To extend the reach of that section to any challenge to FHFA's actions as conservator or receiver simply because there may be some relation to a supervisory decision would, perforce, render the remedies allowed for breaches of conservatorship duties, and the constraints on FHFA's conservatorship powers, meaningless.

Under Section 4617, the conservator has a duty to take actions to "put the regulated entity in a sound and solvent condition" and "preserve and conserve the assets and property of the regulated entity." *Id.* § 4617(b)(2)(D). Even if the Director set the capital classification of the Companies at zero,[3] that would not affect at all FHFA's duties as conservator to preserve and conserve assets and rebuild their capital. Since a capital classification by the Director sets a "minimum" threshold, there is nothing in that classification that prevents actions—including building reserves or capital—to put the Companies in a sound condition. *See id.* § 4614(a).

FHFA itself has recognized that there is no conflict between the suspension of capital requirements and the conservatorship duty to rebuild capital. When announcing the suspension, FHFA said it was, in its role as conservator, directing the Companies "to focus on managing to a positive stockholder's equity." FHFA News Release, *supra*.

3. *FDIC v. Bank of Coushatta* Is Inapposite

Finally, the decision cited by counsel for FHFA at the April 15, 2016 oral argument does not support its position that Section 4623(d) precludes these

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[3] In fact, the Director simply made the capital requirements "non-binding" during conservatorship. *See* FHFA News Release, *supra*. If this were a "classification" decision that zero capital constituted "adequate capitalization," then FHFA should have released the Companies from conservatorship immediately after such "classification." Of course, that is not what the Director did.

cases. In *FDIC v. Bank of Coushatta*, the Fifth Circuit held that there was no judicial review of "capital directives" issued by the FDIC pursuant to the International Lending Supervision Act of 1983. 930 F.2d at 1125-29. However, that case involved solely the FDIC as supervisor because the bank was not in conservatorship. *See id.* at 1124-25. That case is irrelevant to the question raised by the Court here.

Nor was this decision ever interpreted by the FDIC or the courts to stand for the principle that because supervisory capital directives are unreviewable, so too are any actions taken by the FDIC as conservator that affect the institution's capital. On the contrary, courts have interpreted the FDIA as permitting judicial adjudication of claims against the FDIC when it acts "beyond, or contrary to, its statutorily prescribed, constitutionally permitted, [conservatorship or receivership] powers or functions." *Nat'l Tr. for Historic Preservation v. FDIC*, 995 F.2d 239, 240 (D.C. Cir. 1993) (per curiam), *aff'd on reh'g*, 21 F.3d 469 (D.C. Cir. 1994). *See also Murphy v. FDIC*, 61 F.3d 34, 35, 41 (D.C. Cir. 1995) (allowing damages claim against the FDIC as receiver).

CONCLUSION

For these reasons, and those set forth in Investors Unite's first brief, the Court should exercise jurisdiction over Appellants' claims and reverse.

Dated: Washington, D.C.
April 22, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the page limitation for supplemental briefs set by the Court at the April 15, 2016 oral argument because it comprises ten pages. *See* Tr. at 129.

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

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I have served the Supplemental Brief of *amicus curiae* Investors Unite in Support of Appellants for Reversal by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

Dated: April 22, 2016

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