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 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

SUPPLEMENTAL 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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

---

* Authorities upon which Institutional Plaintiffs chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes
(continued)

Regulations

Other Authorities

GLOSSARY

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

Institutional Plaintiffs respectfully submit this supplemental brief in response to the Court's invitation to the parties to brief whether 12 U.S.C. § 4623(d) deprives courts of jurisdiction over Plaintiffs' challenges to the Net Worth Sweep.

Section 4623(d) is not implicated here because the Net Worth Sweep is not a "classification or action of the Director" of FHFA. 12 U.S.C. § 4623(d). As FHFA previously has explained, Section 4623(d) applies to "FHFA['s actions] in its regulatory capacity." Defs.' Mot. to Dismiss at 26, *California ex rel. Harris v. FHFA*, No. 10-CV-3084 (N.D. Cal. Aug. 26, 2011) (Dkt. 49); *see* Oral Arg. Tr. 69 (Apr. 15, 2016) (Section 4623(d) applies "when the Agency is regulator") ("Tr.") (Ex. A).

As all parties to this litigation have agreed from the very beginning, and as FHFA itself acknowledged at oral argument, the Net Worth Sweep was an act that FHFA, the "Agency," purportedly took "in its capacity as conservator" of Fannie Mae and Freddie Mac. Tr. 74. The "Director" as regulator cannot contract for the Companies. Judicial review of the actions of the *Agency* as *conservator* is addressed by 12 U.S.C. § 4617(f)—not Section 4623(d), which concerns actions of the *Director* as *regulator*. Indeed, until last Friday, FHFA had *never* suggested that Section 4623(d) bars review of an action of the Agency as conservator. Section 4623(d) simply has no role to play here.

FHFA has attempted to muddy the waters by linking the Net Worth Sweep to the 2008 decision to suspend the Companies' capital requirements. But regardless

of whether that separate decision is subject to Section 4623(d) (and it is not), vacating the Net Worth Sweep would not affect it. FHFA's suspension of capital classifications was distinct from its decision to strip the Companies of their capital. Plaintiffs are simply seeking to restore the terms that governed the first four years of FHFA's "new capital paradigm."

I. Section 4623(d) Does Not Apply To FHFA's Agreement On Behalf Of The Companies, As Their Conservator, To The Net Worth Sweep.

The text of Section 4623, the structure of Subchapter II of Chapter 46 of Title 12, and the history of those provisions all demonstrate that Section 4623 does not apply to actions undertaken by FHFA purportedly as conservator.

A. Chapter 46 of Title 12 concerns "Government Sponsored Enterprises." Section 4511 establishes FHFA and provides that "[t]he *Director* shall have general regulatory authority over" Fannie Mae and Freddie Mac. 12 U.S.C. § 4511(a)-(b) (emphasis added); *see also id.* § 4502(9) (defining "Director"); *id.* § 4502(20) (defining "regulated entity"). The duties of the Director include "oversee[ing] the prudential operations" of the Companies and "ensur[ing] that . . . each [Company] operates in a safe and sound manner, including maintenance of adequate capital." *Id.* § 4513(a)(1)(A)-(B).

Subchapter II is entitled, "Required Capital Levels For Regulated Entities, Special Enforcement Powers, And Reviews Of Assets And Liabilities." This subchapter was enacted in 1992 as part of the Federal Housing Enterprises Financial

Safety and Soundness Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (the "Safety and Soundness Act"). Except for HERA's replacement of the conservatorship provisions, *compare* 12 U.S.C. § 4617 *with* Safety and Soundness Act §§ 1369, 1369A, 1369B, 106 Stat. 3981-85, and its substitution of FHFA for the now-defunct Office of Federal Housing Enterprise Oversight ("OFHEO"), Subchapter II's provisions are largely unchanged from the 1992 enactment. It requires the Director (then of OFHEO, now of FHFA) to "establish risk-based capital requirements . . . to ensure that the enterprises operate in a safe and sound manner, maintaining sufficient capital and reserves to support the risks that arise in the operations and management of the enterprises." 12 U.S.C. § 4611(a)(1). Sections 4612 and 4613 establish a statutory "minimum capital level for each enterprise," *id.* § 4612(a), as well as a "critical capital level," *id.* § 4613(a). Section 4614 requires "the Director" to "classify the enterprises" as either "adequately capitalized," "undercapitalized," "significantly undercapitalized," or "critically undercapitalized." *Id.* § 4614(a).

Classification as undercapitalized or significantly undercapitalized subjects a Company to a suite of supervisory actions by the Director, such as restrictions on capital distributions and requirements to acquire new capital. *See* 12 U.S.C. §§ 4615-4616. Classification by the Director as critically undercapitalized subjects a Company to discretionary appointment (by the Director) of the *Agency* as conservator or receiver of the Company. *See* 12 U.S.C. § 4617(a)(3)(K).

Because the Director's capital classification can have such serious consequences, Section 4623 provides for judicial review "of a classification under section 4614 . . . or a discretionary supervisory action" by petition for review in this Court. 12 U.S.C. § 4623(a). This Court may set aside the classification or supervisory action of the Director if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with applicable laws." *Id.* § 4623(b). Section 4623(d) provides that, "[*e*]*xcept as provided in* [*Section 4623*], no court shall have jurisdiction to affect . . . any classification or action of the Director . . . or set aside such classification or action." *Id.* § 4623(d) (emphasis added).[1] The upshot of Section 4623(d) is that a capital classification or supervisory action of the Director can be reviewed only by petition for review in this Court under the standard set forth above.

B. In contrast to the regulator's role of policing the Companies' capitalization, the Safety and Soundness Act also allowed OFHEO to appoint a conservator for the Companies in specified circumstances in order to rehabilitate them to a sound and solvent condition. *See* Safety and Soundness Act § 1369, 106 Stat. at 3918. And as Section 4617(f) does today, the Safety and Soundness Act provided that "no court may . . . restrain or affect the exercise of powers or functions" of the conservator. *Id.* § 1369(b)(4), 106 Stat. 3982-83. Thus, since 1992, Subchapter II has

[1] Section 4623(d) exempts the Director's appointment of the Agency as conservator or receiver, which is reviewable under Section 4617(a)(5).

included separate limitations on judicial review for (1) capital classifications and related supervisory actions, *see* 12 U.S.C. § 4623(d), and (2) the exercise of powers or functions of the Agency as conservator, *see id.* § 4617(f).[2]

C. The text of the statute reinforces that FHFA's actions as regulator stand apart from its actions as conservator, and that different limitations on judicial review apply. The "classification[s] or action[s]" implicated by Section 4623(d) are actions "of the *Director*." 12 U.S.C. § 4623(d) (emphasis added). This follows from the statute's charge to "the Director" to "classify the enterprises" and to take supervisory actions. *Id.* §§ 4614-4616. But only "the *Agency*" may be appointed "as conservator," and exercise the statutory powers of a conservator. *Id.* § 4617(a)(1), (2), (b)(2) (emphasis added). Accordingly, in cabining judicial review of the actions of a conservator, Section 4617(f) asks whether the action is one that seeks to restrain the "powers or functions of the Agency as a conservator." *Id.* § 4617(f).

Indeed, if Section 4623(d) applied to challenges to acts undertaken by the Agency as conservator in the manner counsel for FHFA recently suggested, that actually would substantially *broaden* the scope of judicial review of conservatorship actions. While the parties here generally agree that under Section 4617(f), a chal-

[2] Subject to the exception that a court can review FHFA's actions that are beyond the scope or in excess of its powers as conservator. *Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013); *Leon Cnty. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012).

lenger is limited to arguing that the conservator exceeded its statutory authority, *see Nat'l Trust for Historic Pres. v. FDIC*, 21 F.3d 469, 471 (D.C. Cir. 1994) (Wald., J., concurring); *Cnty. of Sonoma*, 710 F.3d at 992, if Section 4623 applied, a conservator's actions could be set aside if they were "arbitrary, capricious, or an abuse of discretion." 12 U.S.C. § 4623(b). This would bring Section 4617(f) and Section 4623 into irreconcilable conflict, a result this Court should strain to avoid. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("A court must therefore interpret the statute . . . [to] fit, if possible, all parts into an harmonious whole." (citation omitted)). On the other hand, if Section 4617(f) and Section 4623 each addresses a different category of agency action, the statutory scheme works harmoniously. That undoubtedly is why FHFA itself has acknowledged that Section 4623(d) applies only to "FHFA['s actions] in its regulatory capacity." Defs.' Mot. to Dismiss at 26, *California ex rel. Harris*, No. 10-CV-3084.

D. The Net Worth Sweep plainly is not a "classification or action of the Director" subject to the provisions of Section 4623. When FHFA agreed to the Net Worth Sweep, it purportedly did so—in its own words—on behalf of the Companies as their "duly appointed conservator," J.A.2394, 2402, and it signed the amendment to the stock agreements on behalf of each Company "by Federal Housing Finance Agency, its Conservator." J.A.4017, 4025; *see also* Tr. 74 (Net Worth Sweep "was authorized by the Federal Housing Finance Agency in its capacity as conservator").

Moreover, the Net Worth Sweep self-evidently is not a "classification under section 4614." 12 U.S.C. § 4623(a). Nor could it be seriously contended that the Net Worth Sweep otherwise is an "action of the Director under this subchapter." *Id.* § 4623(d). The term "action" in Section 4623(d) clearly refers to the supervisory actions that the Director is authorized under Sections 4615 and 4616 to take after classifying an enterprise as undercapitalized. When setting forth the scope of judicial review, the statute references "discretionary supervisory action taken . . . by the Director." 12 U.S.C. § 4623(a). To read "action" in Section 4623(d) to encompass actions of FHFA beyond the system of capital classifications and supervisory actions set forth in Sections 4614, 4615, and 4616, would both divorce that word from the context established in Section 4623(a) and also violate the familiar interpretive principle that a "word is known by the company it keeps." *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015). Here, the "neighboring word" "classification" gives "action" in Section 4623(d) "more precise content," *id.* (quoting *United States v. Williams*, 553 U. S. 285, 294 (2008)), making clear that the other "action[s] of the Director" implicated by Section 4623(d) are the supervisory actions associated with capital classifications issued by the Director under Section 4614.

II. FHFA's Suggestion That Section 4623(d) Bars Challenges To Its "New Capital Paradigm" Lacks Merit.

At oral argument, in response to the Court's inquiry about whether Section 4623(d) was implicated in this case, counsel for FHFA suggested that because

Plaintiffs have challenged the Net Worth Sweep on the ground, *inter alia*, that it compels "these institutions to operate with as little as zero capital," the Plaintiffs were challenging an "action by the Agency as regulator to establish a new capital paradigm for the duration of the conservatorships." Tr. 69, 70. While it was the Agency acting in its role as conservator that entered into the Net Worth Sweep, it was "the Agency as regulator," counsel argued, that "authorized this new capital paradigm," under which the "capital tests" required by Section 4614 "were off the boards for the indefinite future," and the Agency instead would rely on Treasury's commitment as a stand-in for the Companies' adequate capitalization. Tr. 74. Plaintiffs' challenge to the Net Worth Sweep, FHFA urged, would "effectively set aside that regulatory decision by the Agency" to blindly trust that Treasury would "satisfy any capital requirement we as regulators believe is necessary." Tr. 75.

This argument fails on every level. *First*, Plaintiffs have not challenged FHFA's 2008 suspension of capital classifications. And vacatur of the Net Worth Sweep, assuming it resulted in the Companies' retention of earnings and accumulation of capital, would not have the effect of re-imposing the classifications FHFA suspended. The Companies' accumulation of capital hardly would undermine FHFA's determination that the presence of Treasury's commitment rendered capital tests unnecessary. To the contrary, the accumulation of billions of capital in the Companies would provide a substantial buffer against further draws from Treasury,

strengthening Treasury's funding commitment and (on FHFA's logic) further diminishing the need for capital testing.

Second, FHFA's 2008 decision to suspend capital classifications was not a decision of the "Agency as regulator" at all. Tr. 74. As FHFA's own regulations show, its authority to suspend capital classifications is derived from its "[p]owers as conservator." 12 C.F.R. § 1237.3(c). And, as one might expect from a conservator, in announcing that suspension in 2008, the Agency did not suggest that Treasury's funding commitment rendered capital levels irrelevant. *FHFA did not consider Treasury's commitment to be capital*. The PSPAs themselves expressly exclude "the Commitment" from the Companies' "total assets," J.A. 539, and the statutory definitions of the Companies' capital do not encompass Treasury's commitment, *see* 12 U.S.C. § 4502(7), (23). FHFA accordingly pledged to "closely monitor" the Companies' capital levels and directed the Companies' "to focus on managing to a positive stockholder's equity." FHFA, FHFA Announces Suspension of Capital Classifications During Conservatorship (Oct. 9, 2008), http://tinyurl.com/jlu4lty.

Third, and most fundamentally, "zero capital," which is the designed and inevitable result of the Net Worth Sweep, is *not* a "new capital paradigm." It means, as FHFA elsewhere has admitted, that the Companies are right now "effectively balance-sheet insolvent." Defs.' Mot. to Dismiss at 19, *Samuels v. FHFA*, No. 1:13-22399-Civ (S.D. Fla. Dec. 6, 2013) (Dkt. 38). Indeed, FHFA's Director him-

self recently acknowledged that the Companies' "lack of capital" is their "most serious risk." Melvin L. Watt, Dir. FHFA, Prepared Remarks at the Bipartisan Policy Center (Feb. 18, 2016), http://tinyurl.com/jryfjzq.

FHFA's decision to permanently consign the Companies' to a "zero capital" position, was not, as FHFA's counsel so recently imagined, an action of "the Agency as regulator." Tr. 74. Rather, as FHFA's counsel admitted, the Net Worth Sweep was an action taken "by the Federal Housing Finance Agency in its capacity as conservator." *Id.* That is alone a sufficient basis to conclude that Section 4623(d) does not apply to Plaintiffs' challenges.[3]

CONCLUSION

Section 4623(d) is not applicable to this action. For the foregoing reasons and for the reasons set forth in Institutional Plaintiffs' briefing, this Court should reverse the judgment below and vacate the Net Worth Sweep or, in the alternative, remand for further proceedings.

[3] Even if Section 4623(d) applied here, the Supreme Court allows for judicial review of agency action—even if otherwise precluded by Congress—if the agency exceeds its delegated powers or has "facially" violated its statute. *Dart v. United States*, 848 F.2d 217, 221-22 (D.C. Cir. 1988). That is consistent with longstanding precedent that agencies bear a "'heavy burden" to overcome the "strong presumption" in favor of judicial review. *Id.* at 221 (citation omitted).

Dated: April 22, 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. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and this Court's oral Order during the April 15, 2016 oral argument, I hereby certify that this brief complies with the page limitation because the text of the brief is not in excess of 10 pages, excluding the parts 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: April 22, 2016

/s/ Theodore B. Olson

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2016, I electronically filed the foregoing Supplemental 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

David L. Wales
BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP
1285 Avenue of the Americas
New York, N.Y. 10019
Telephone: 212-554-1409
Facsimile: 212-554-1444

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

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

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

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
1919 M Street, N.W.,
Suite 470 Washington, D.C. 20036
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
555 12th Street, N.W.
Washington, D.C. 20004
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: April 22, 2016

/s/ Theodore B. Olson

EXHIBIT A

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, Appellant,	:	
v.	:	No. 14-5243, et al.
JACOB J. LEW, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF THE TREASURY, ET AL., Appellees.	:	

Friday, April 15, 2016
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES BROWN AND MILLETT, AND SENIOR CIRCUIT JUDGE GINSBURG

APPEARANCES:

ON BEHALF OF THE APPELLANT:
THEODORE B. OLSON, ESQ.
HAMISH P.M. HUME, ESQ.

ON BEHALF OF THE APPELLEES:
HOWARD N. CAYNE, ESQ.
MARK B. STERN, ESQ.

C O N T E N T S

P R O C E E D I N G S

THE CLERK: Case number 14-5243, et al., Perry Capital LLC, for and on Behalf of Investment Funds for which it Acts as Investment Manager, Appellant v. Jacob J. Lew, in his Official Capacity as the Secretary of the Department of the Treasury, et al.. Mr. Olson, the Institute for Institutional Plaintiffs Perry Capital, LLC, et al.; Mr. Hume for Class Plaintiffs; Mr. Cayne for FHFA; and Mr. Stern for Jacob J. Lew.

JUDGE BROWN: Good morning, Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON, ESQ.

ON BEHALF OF THE INSTITUTIONAL PLAINTIFFS PERRY CAPITAL LLC, ET AL.

MR. OLSON: Good morning, Your Honor, may it please the Court. The net worth sweep which is at the center of this case was a massive, we submit lawless government expropriation of Fanny Mae and Freddie Mac, two publicly held companies pretending to act as a conservator, which is required by law, to conserve and preserve the assets, and rehabilitate these companies to a sound and solvent condition. The net worth sweep, and the name really says it all, net worth sweep systematically drained these entities of all value, leaving in its wake two unsolved, unsound, and insolvent zombies, a golden goose for the Treasury, and utterly worthless for the individuals and

institutions who in good faith invested in them. If private individuals, we submit, had done this to public companies what the United States Government has done here, the SEC, the Justice Department would be investigating and perhaps prosecuting.

In September of 2008 the FHFA named itself the Conservator of Fannie and Freddie, under the statute pursuant to which it acted it was required to preserve the assets, conserve the situation of those companies, and put each in a sound and solvent condition, and rehabilitate them, that is in the statute pursuant to which the FHFA purported to act. And in its regulations, which have been cited in the brief, the Agency describes the primary objective, the essential function, and the statutory charge of a Conservator is to keep the enterprise going, and bring it back to life to the extent that it needs resuscitation. A Conservator is under the statute, under the regulations, under the same statute the FDIA that governs the FDIC, and decades of tradition and common law a conservator is a trustee for the assets of its ward. It has responsibility to retain the rights of the institution that it's protecting, and when this conservatorship was created the FHFA put out a press release with questions and answers describing what its role would be, this is at pages 2441 through 2443 of the Joint Appendix, it answers these same

questions about conserving and preserving, and sound and solvent, and under a conservatorship it says the company is not liquidated, there are no plans to liquidate the company, and a stockholder's rights, the company, the stockholders will retain their financial worth in the institution. Then a few years later on August 17, 2012 the net worth sweep was announced, and it did exactly the opposite of what a conservator is responsible by law, tradition, and regulation to do, it basically decided to wipe out all the value of Fannie and Freddie and make them wards of the State.

JUDGE GINSBURG: What was the stock selling for at that point?

MR. OLSON: The price of the stock?

JUDGE GINSBURG: Yes.

MR. OLSON: I don't know the answer to that. I don't know, I'm not even sure whether it's in the briefs, and I'm not sure I would argue that it wouldn't be relevant. The institutions unquestionably had been in difficult straits, but the record is now clear, and it is, has been clear for quite some time that the entities have turned the corner and were moving towards a profitable position. What --

JUDGE MILLETT: Well, is that accurate? You're talking about 2013, my understanding is that they've either, their profits have gone down markedly and that at least

Freddie Mac has been losing money again, is that accurate or inaccurate?

MR. OLSON: What I understand the case to be is that the institutions are because of the deferred tax assets that have been put in place that the entities have both produced and returned to the Treasury over $50 billion of the amounts that the Treasury has put into it --

JUDGE MILLETT: No, there was a big amount of money in 2013 that 2014, 2015 after those tax credits were taken out of the picture they've been back in this position where the amount of profits that they're making may or may not fluctuate above or below the amount of dividend that they would owe to Treasury each year, and in fact, Freddie Mac lost money in the third quarter of 2015.

MR. OLSON: The dividends could have been paid in kind, which is something that the, our opponents overlook, that would increase the liquidation preference, but it would have preserved the capital of the institution.

JUDGE MILLETT: Well, surely that decision whether to require dividends in cash or in kind is exactly the type of judgment that's going to be conferred on the Agency's conservator that we could superintend, would you agree with that?

MR. OLSON: Well, but what we're talking about here is the --

JUDGE MILLETT: But would you agree that we certainly couldn't say, we couldn't say the conservator erred and enjoined them, or a declaratory judgment, they should have done a liquidation rather than preference rather than cash.

MR. OLSON: We submit that what they were is making a mistake because they were assuming because of the 10 percent cash dividend that that would impair the capital of the institutions, and would drive them further towards insolvency.

JUDGE MILLETT: I guess I'm going to try one more --

JUDGE GINSBURG: Well, they were inferring that from --

MR. OLSON: Whereas that was not, that was not necessary.

JUDGE GINSBURG: They were inferring that from the pattern of continued losses, and I think twice maybe more times in which the GSEs borrowed the money simply to pay it back as a dividend, right?

MR. OLSON: Well, the payment of the 10 percent dividend did not have to be done, not a cash dividend.

JUDGE GINSBURG: I understand that, but --

MR. OLSON: Could have been done --

JUDGE GINSBURG: -- Judge Millett just covered

that with you, that's true, but that's a discretionary decision that's hardly our role --

MR. OLSON: But if it --

JUDGE GINSBURG: -- to second guess.

MR. OLSON: If that discretionary decision was being used to act in a way that a conservator does not act, then there is the right of this Court under the APA, and other circumstances to take judicial review of the fact that the statute required the conservator to do one set of things, and the net worth sweep does precisely the opposite.

JUDGE MILLETT: All right.

JUDGE GINSBURG: Take you back. You made reference to the potential realization of the tax benefits, now, it's not entirely clear to me, it looks like the tax benefit here is essentially a loss carried forward, is that right?

MR. OLSON: Yes --

JUDGE GINSBURG: Okay. Okay.

MR. OLSON: -- that's one way to put it.

JUDGE GINSBURG: Okay. So, if the Agency, if the GSEs are going to continue to realize losses they will not happen to be in a position to get the benefit of the carry forward --

MR. OLSON: Well, that's only a benefit up to a point, what the Government did was prevent the agencies, the

entities from utilizing that --

JUDGE GINSBURG: I understand that. So, I want to put ourselves in the position of the FHFA prior to, just prior to the Third Amendment, and at that point as I understand it the GSEs have been pretty consistently losing money, the prospect of realizing anything on the tax credits because there will be profitable quarters in the projected future, is looking like 2013, 2014, somewhere in that range, there's a handwritten note on a document suggesting, a Treasury document suggesting that, right?

MR. OLSON: Well, the record is fairly substantial, especially in conjunction with the recently unsealed documents that were made available --

JUDGE GINSBURG: Right, right.

MR. OLSON: -- to us just recently that the former ex-CFO McFarland of Fannie specifically said there was likelihood of $50 billion --

JUDGE GINSBURG: Yes.

MR. OLSON: -- profits at the --

JUDGE GINSBURG: Okay.

MR. OLSON: -- end of the year. The testimony is that the corner had been turned because the housing market had been turned, and at that point --

JUDGE GINSBURG: That was the GSEs estimate, not Treasury's. Treasury had a very pessimistic view of this

throughout the whole period.

MR. OLSON: That is -- the record pretty much was the Grant Thornton, which was an expert for --

JUDGE GINSBURG: Right.

MR. OLSON: -- the Treasury Department --

JUDGE GINSBURG: They had that, they had that before them.

MR. OLSON: -- said the corner has been turned. What we submit --

JUDGE GINSBURG: Well, Grant Thornton, wait a minute, Grant Thornton gave them a very pessimistic outlook for the long term.

MR. OLSON: But during that, right immediately around the time, these documents make it clear that at the time, shortly before the decision was made, which was made in 2012, in August, McFarland said that she gives the report to the Treasury Department, says the corner has been turned, there's a profitable prospect ahead, and at that --

JUDGE GINSBURG: She actually -- let me quote her on that, because she didn't say I said it, she said I would have said that, right? She's trying to recall what happened at this meeting some couple of years earlier. She said well, I would have mentioned that.

MR. OLSON: Well, I think the record is more clear than that, Judge Ginsburg, and I think what the record

supports the proposition that the Treasury at that point seeing what other people were being able to see, including investors, that these institutions have turned the corner, and if they had been not eliminated from the possibility of ever being solvent by a net worth sweep that that was, that the institutions had turned profitable --

JUDGE MILLETT: Well, I think what you're talking about seeing is there's a short-term and a long-term problem, and there were competing views it looks like within --

JUDGE GINSBURG: Right.

JUDGE MILLETT: -- the Government about what these prospects were, and reality has confirmed that, and a lot of what folks were talking about was the short term profits that would be made when they carried forward and were able to take advantage of that tax benefit, which is done, it expired at this point, and they now, the concern as a conservator was if you have this cycle of drawing money to pay dividends right, you know, from the right pocket and putting it back into the left pocket it was going to increase --

MR. OLSON: Well, this is not what a --

JUDGE MILLETT: -- continue the problem.

MR. OLSON: -- this is not what a conservator is required by law to do, and the Treasury --

JUDGE MILLETT: It's not that it's required by law, it's a conservator permitted by law to say the scheme that is in place under the PSPAs and the First and Second Amendment isn't going to work in the long-term, it's only going to increase the amount of money that they owe, they're going to keep, like I said, taking money, borrowing money just to pay us back money, and instead, we need to come up with a new solution, and that new solution says you will give us all those profits whatever they are, if they're zero we get nothing for the money that we're loaning you and the risk that we're exposed to. And if they're --

MR. OLSON: I want to make --

JUDGE MILLETT: -- less than our $19 billion dividend we will have to suffer that loss, but if it's more we will get the benefit of it, what's not, how is that not within the discretion of a conservator?

MR. OLSON: I want to answer that, I want to make sure that I reserve the time that I was hoping to reserve for rebuttal.

JUDGE MILLETT: You'll be fine.

MR. OLSON: The answer is that to the extent that the decision was made at that time, and we submit the decision was made at that time by the Treasury Department, we can use this to deal with our budget concerns, and that they at that point stopped being a conservator. The

Treasury Department's release -- and by the way, the FHA decision is supposed to be made without the supervision or direction of the Treasury Department. The announcements that were made at the time make it clear that the Treasury Department was directing whether the FHFA was doing at that time, they specifically said this is going to expedite the wind down of Freddie and Fannie, and we are going to now make sure that the institutions can be liquidated. So, what they were doing was changing --

JUDGE MILLETT: See, I think as I read the record it's more complicated and nuanced than that, and that is that an awful lot of folks both on Capitol Hill and within the Executive Branch think that we cannot go back to the pre-2008 situation here, but we, FHFA are not, we're not the ones to make that call, or is Treasury by itself, and so what we will do, we do not want to liquidate these two entities, that would be extraordinarily damaging to the economy --

MR. OLSON: So, we want to --

JUDGE MILLETT: -- we're going to hold them, we're going to hold them, and we're going to keep things in a stable condition until the policy makers make a decision.

MR. OLSON: This is not --

JUDGE MILLETT: What's wrong with that?

MR. OLSON: That's not sound and solvent. The

statute requires keeping institutions sound and solvent.

JUDGE MILLETT: It's sounding solvent, you told me they're making all this money, that sounds like the definition of sound and solvent.

MR. OLSON: Not if the conservator which is supposed to be acting as a trustee, a fiduciary to the entities decides I will take all of the profits and give it to the Treasury Department.

JUDGE MILLETT: Well, a fiduciary to whom, because this statute is different, it doesn't say a fiduciary to stockholders, it's a fiduciary serving the best interests of the entity or the agency.

MR. OLSON: No, I submit that that reference, which is under incidental powers in the statute itself, doesn't provide a conservator to act in its own best interests, or in the interests of --

JUDGE MILLETT: Well, what does it mean? What does it mean if it doesn't say they can't take something in the interests of the agency?

MR. OLSON: Well, it can, and are incidental --

JUDGE MILLETT: I think the FDIC has the same language.

MR. OLSON: Well, that would swallow up all the responsibilities that conservators have had for centuries --

JUDGE GINSBURG: Well, it does, this is a statute

that reads out the fiduciary duty by that provision.

MR. OLSON: I submit that it does not, Judge Ginsburg, and I think that would be an error. If the Court came to the conclusion that that reference, an incident powers, which is also in the FDIA, would allow the conservator who is supposed to bring according to the statute conserve and preserve and sound and solvent, and rehabilitate the agency --

JUDGE GINSBURG: Suppose the --

MR. OLSON: -- it would swallow up all those words.

JUDGE GINSBURG: Suppose the FDIA is facing a troubled bank of enormous proportions, one of the largest banks in the country, and it says we could, we're acting as conservator here, we could perform the ordinary duties of a conservator, but it would so impair the reserves of the FDIC that it would be a danger to all of the insured depositors around the country, and so, we're going to act to a degree in our own interests, rather than solely in the interest of the troubled institution?

MR. OLSON: At that point I think if you read the statute as a whole, and if you look at the way the FDIA and the FDIC have operated all these many years there's a choice then to decide to move to a position of a receivership, and then wind down the entity, which is what Treasury said it

was going to do.

JUDGE GINSBURG: Well, that's right, and they're still, in their capacity as conservator they haven't yet pulled the trigger as a liquidator, right?

MR. OLSON: Well, they're pulling the trigger --

JUDGE GINSBURG: As a receiver.

MR. OLSON: -- but they're not admitting it, and they're still supposed to be acting as a conservator, and then they decide no, we're going to take --

JUDGE GINSBURG: Just go back, I have your point, just go back a moment to what Judge Millett was saying about the somewhat conflicting views of the long-term outlook, I think there was consensus that there would be a lot of fluctuation, volatility over any period of time for the GSEs, but the, what's the date of the Third Amendment, the 17th?

MR. OLSON: August 17 --

JUDGE GINSBURG: Seventeenth.

MR. OLSON: -- 2012.

JUDGE GINSBURG: Okay. So, on the eighth, I think it's the eighth of August, the two GSEs, the ninth, issued, one's on the eighth, one's on the ninth, they're 10-Qs, right? And the 10-Qs say we do not expect to generate net income or comprehensive income in excess of our annual dividend obligation to the Treasury over the long term. We

also expect that over time our dividend obligation to Treasury will increasingly drive our future draws under the senior preferred stock purchase agreement. So, the week before, whatever it is, 10 days before the trigger is pulled both of the GSEs go out with their 10-Qs and say we have no future.

MR. OLSON: And at the same time, and this is reinforced by the documents that were recently unsealed, that there were projections because of the deferred tax assets, and the availability they were soon to be released would make a completely different picture. It's not a coincidence, we submit --

JUDGE MILLETT: A completely different picture for how long?

MR. OLSON: For the foreseeable future. This was --

JUDGE MILLETT: Not the foreseeable future, for 2012/2013.

MR. OLSON: Well, the proof is in the pudding.

JUDGE GINSBURG: Are you talking about the McFarland statement?

MR. OLSON: These entities have returned $50 billion to the Treasury more than the Treasury put into these institutions. And the other thing is that what was done at the net worth sweep --

JUDGE GINSBURG: No, that's doesn't follow, it doesn't necessarily mean more, it's just $50 billion --

MR. OLSON: In excess.

JUDGE GINSBURG: -- toward the commitment, towards paying down the commitment.

MR. OLSON: The commitment, this -- the amount that has been returned exceeds by $50 billion.

JUDGE GINSBURG: As of now, is that what you're saying?

MR. OLSON: That's --

JUDGE GINSBURG: As of now?

MR. OLSON: -- $58 billion, I think.

JUDGE GINSBURG: Okay. So, that's post record, but fair enough. Okay.

MR. OLSON: Yes. I think that it is in --

JUDGE GINSBURG: All right. But the only optimistic scenario here is what McFarland relays, correct?

MR. OLSON: No, I believe that if you look at the Ugoletti deposition, the Jeff Foster who was a Treasury official --

JUDGE GINSBURG: Ugoletti takes us to a very interesting point. Are you still maintaining that the record was inadequate before the District Court?

MR. OLSON: Absolutely, the record was inadequate, it was not only inadequate, it was misleading, it was

incomplete.

JUDGE GINSBURG: So, you want to basically invoke *Overton Park*?

MR. OLSON: Yes.

JUDGE GINSBURG: Okay.

MR. OLSON: *Overton Park* requires a full and complete administrative record, we did not --

JUDGE GINSBURG: Is that your opening salvo?

MR. OLSON: Pardon me?

JUDGE GINSBURG: Is that your first argument and first preference here?

MR. OLSON: No, our first, our preference is that this Court recognize that what was done in August of 2012 was directly contrary to the responsibilities of the Agency acting at the direction of the Treasury which was against the statute.

JUDGE GINSBURG: I don't see how that's consistent with saying the record's inadequate.

MR. OLSON: Well, we have learned enough to know that, where the record was nonetheless inaccurate we, we're learning more things --

JUDGE GINSBURG: I think what's happened is that with what we've learned is that there was another view somewhere out there.

MR. OLSON: And the view, as the picture started

to become rosier, and as the deferred tax assets became available to be released to change the financial condition the Treasury Department --

JUDGE GINSBURG: Well, that was after --

MR. OLSON: -- said instead of --

JUDGE GINSBURG: That was after the Third Amendment.

MR. OLSON: -- rehabilitating the companies we will take --

JUDGE GINSBURG: Okay.

MR. OLSON: -- all of their net worth in perpetuity and make it impossible for them to be rehabilitated.

JUDGE GINSBURG: So, you would like, though, to depose Ugoletti, right?

MR. OLSON: Pardon?

JUDGE GINSBURG: You would like to depose Ugoletti?

MR. OLSON: Well, of course we would, and --

JUDGE GINSBURG: And you'd like the notes of meetings, and you'd like the e-mail traffic?

MR. OLSON: We would like the administrative record to be complete, but in addition to that we believe that there is enough in this record to show that what the FHFA did at that time was not justified pursuant to the

reasons that they gave, the downward spiral had stopped.

JUDGE GINSBURG: Okay, but if the record's incomplete, completing the record may reverse that inference that you just suggest we drop.

MR. OLSON: Well, at minimum we're in -- I agree that at minimum we're entitled to a complete administrative record, not just somebody's summary of administrative record, and that's *Overton Park*, and other decisions of this Court. But there is enough to know --

JUDGE MILLETT: Well, the reason they didn't do the ordinary record here is they said that it's just, APA review is injunctive and declaratory, and that's in the teeth of 4617(f), we can't have that, so what's the point of bringing the record forward? I think that's their explanation.

MR. OLSON: Well, that is what they're saying, but the *County of Sonoma* case specifically says that when the conservator acts beyond and contrary to its responsibilities as a conservator then 4617 does not preclude review.

JUDGE MILLETT: Right. And so what exactly is the test we're supposed to apply for acting beyond their authority as conservator? It can't be violated the --

MR. OLSON: Right.

JUDGE MILLETT: -- statute of the APA or it would be a pointless provision. You have to show --

MR. OLSON: Well, it also would be --

JUDGE MILLETT: -- success to get an injunction.

MR. OLSON: -- a provision that would eliminate any judicial review, the courts have --

JUDGE MILLETT: So, what is your definition? What is the standard?

MR. OLSON: Our definition is when they're not acting as a conservator, if you're buying and selling assets, operating the business in a way designed to rehabilitate, then you're acting as a conservator, but you're not acting as a --

JUDGE MILLETT: So, what action did they do here that -- let me give you a hypothetical. If there had been no deferred tax asset issue, and so as it turned out Fannie Mae and Freddie Mac never made at any time between 2008 and the present, or 2012 when the Third Amendment came in, in the present never made a profit --

MR. OLSON: Well, when you --

JUDGE MILLETT: -- if they adopted the Third Amendment and there were no profits, so all they did was protect Fannie Mae and Freddie Mac from more and more debt, would that be consistent with being a conservator?

MR. OLSON: No, it would not be consistent with being a conservator because --

JUDGE MILLETT: Why would it not?

MR. OLSON: -- it wasn't an act towards rehabilitating the entities, they --

JUDGE MILLETT: It was stopping the hemorrhaging, if they were just going to keep, imagine they just keep losing money, or if they get profits that are less than the $19 billion they owe --

MR. OLSON: They made it impossible, they made it impossible, Your Honor, for these entities to operate. If you can imagine in the private sector taking a corporation that for, or a bank for which you have responsibility to rehabilitate, to keep it sound and solvent, then issue a decree saying I'm going to take all of your profits and give them to my uncle, or to give them to my friend, and so you can't operate in that normal way, we're going to, we're going to --

JUDGE MILLETT: Yes, but we have a different statute here that let's --

JUDGE BROWN: But --

JUDGE MILLETT: I'm sorry.

JUDGE BROWN: I'm sorry. I was just going to say Judge Millett is asking a hypothetical.

MR. OLSON: Yes, I know.

JUDGE BROWN: And the hypothetical is let's assume that when Treasury gave up its right to dividends the entities were not profitable. So, in fact, they would have

been getting nothing because there were no net profits.

MR. OLSON: They would still have had the right, Judge Brown, of providing that dividend in kind, which would have increased the liquidation preference, but it would have preserved the capital of the entities.

JUDGE BROWN: Yes. No, but we're assuming that they did the Third Amendment, it just wasn't successful, that is to say they gave up their right to the dividend and simply said we're going to take whatever is generated as net profit to these entities, but nothing was generated. And the question is, in other words, does the argument that they were not acting as a proper conservator depend on the fact that they were in fact profitable?

MR. OLSON: It depends -- no, it doesn't. It depends upon whether the actions taken were calculated, and had the purpose of keeping the institutions in a sound and solvent condition, and were intended to rehabilitate the entities. What was intended --

JUDGE MILLETT: And so if they knew they were going to keep --

MR. OLSON: -- and the Treasury --

JUDGE MILLETT: I'm sorry, if they knew they were going to keep, or they expected they were going to keep either losing money or having profits that were going to fall short of the dividends owed, if that was their

understanding how could it not be consistent with managing, or trying to get it into some sound and solvent situation to say you don't have to pay the dividends --

MR. OLSON: You cannot --

JUDGE MILLETT: -- just give us what you can --

MR. OLSON: You can never get --

JUDGE MILLETT: -- give us what you can --

MR. OLSON: -- into a sound and solvent situation if every nickel of profit you make is given to someone else. You cannot possibly, yet --

JUDGE GINSBURG: No, that's clearly true. Go ahead.

MR. OLSON: Pardon?

JUDGE GINSBURG: I think that's clearly true.

MR. OLSON: And the Treasury specifically said --

JUDGE GINSBURG: But they could avoid further spiraling down, right?

MR. OLSON: Well, the record I think suggests that the downward spiral, the death spiral, whatever they've called it, is not justified by the record. We haven't explored all of that, but basically, the Treasury said itself at the time of August of 2012 we're going to make sure that the tax payers get everything, and the stockholders get nothing. That was their intention. Their intention was --

JUDGE GINSBURG: And they said in compensation for --

MR. OLSON: -- to wind it down --

JUDGE GINSBURG: -- in compensation for the risk we've taken.

MR. OLSON: But that was not being acting as a conservator. If they could have decided, if they had to move to a position of liquidating, you know, to a receivership, which is also permitted by these statutes, by this same statute that we're talking about, you could move to a receivership which is essentially what they did, but they would then have to pay attention to the rights of stockholders and creditors.

JUDGE GINSBURG: This press release you're talking about, that's from the Treasury, right?

MR. OLSON: Yes.

JUDGE GINSBURG: They're a creditor. What's the difference what the creditor says about what the conservator is doing?

MR. OLSON: The Treasury is saying what it is doing as participating with the FHFA as implementing the net worth sweep.

JUDGE GINSBURG: Did the conservator ever say this?

MR. OLSON: Pardon me?

JUDGE GINSBURG: Did the conservator say this, or just the Treasury?

MR. OLSON: It's other documents that the conservator is saying it's the same thing, and the Treasury is saying we and the FHFA are doing these things.

JUDGE GINSBURG: That's the --

MR. OLSON: This is one government --

JUDGE GINSBURG: So, Treasury is saying that? The conservator is the FHFA, doesn't it say that?

MR. OLSON: And the conservator has done X, which is inconsistent with being or any reasonable interpretation --

JUDGE GINSBURG: Okay.

MR. OLSON: -- of what conservators do, and --

JUDGE GINSBURG: Okay, but --

MR. OLSON: -- it is doing it in -- the --

JUDGE GINSBURG: But you attribute it to both of them, this intention, stated intention to wind down.

MR. OLSON: This is a motion to dismiss that Judge Lamberth granted. The allegations of the complaint must be taken as true. We believe that to the extent that we have a record it demonstrates that the FHFA and the Treasury Department were doing this together, they saying it that they're doing it together, those allegations must be taken as true, the Judge decided, the District Court decided with

all due respect that he decided various different things with respect to purpose and other evidentiary things that were not in the record, decided those in favor of the Government, rendered its judgment and dismissed the complaint, which without providing an administrative record.

JUDGE GINSBURG: Let me ask you a question --

JUDGE BROWN: Well, let me --

JUDGE GINSBURG: -- am I -- I'm sorry, go ahead.

JUDGE BROWN: Sorry. I wanted to ask you about something that the District Court does here, which is to say that these roles, conservator and receiver, are not hermetically sealed in that they can sort of flow one into the other, obviously, you don't agree with that, but my question is what is it in the statute that you think precludes that kind of morphing from one to the other?

MR. OLSON: Well, I think that you can become, you can decide that the role no longer is appropriate as a conservator, and then you must be a receiver.

JUDGE BROWN: Okay.

MR. OLSON: But the receiver, if you're acting as a receiver you can't just say we're doing it and then not respond to the responsibilities in the statute. The statute specifically says in Section J acting, all powers specifically granted to conservators or receivers, respectively. The powers of a receiver are antithetical to

the powers of a conservator. When you're acting as a receiver you have a responsibility to stockholders, to creditors to behave in a certain way, to provide certain notices, to recognize certain obligations, and to deal with it in a certain way. So, you can change --

JUDGE MILLETT: Well, when you say that, I guess I want to be precise, what exactly is it that your clients would get if a court were to declare the FHFA as having been a subroset (phonetic sp.) receiver since the Third Amendment, what would they get that they don't have?

MR. OLSON: The net worth sweep is an invalid, arbitrary, capricious, lawless administrative action under the APA --

JUDGE MILLETT: Is it lawless as -- would it be lawless if done as a receiver but not a conservator?

MR. OLSON: They would have to, well, they would have to behave in a different way, they can't --

JUDGE MILLETT: Well, I know, and that's what I'm asking you, I'm asking you is the relief you want here an injunction undoing the Third Amendment and sending all these hundreds of billions of dollars back to Fannie Mae and Freddie Mac --

MR. OLSON: Well, see --

JUDGE MILLETT: -- or, I really want to finish this, or is it a declaration that as of the Third Amendment

they were actually a receiver and you needed notice?

MR. OLSON: No. That action under those circumstances when it was acting in its role as a conservator was against the law, it was against --

JUDGE MILLETT: Was it against the law, or was it that they should have shifted, they should have -- they could have done it, could they have done it as a receiver if they said we're taking this into receivership, here we go, and given you your notice could they have done it, or would it have been unlawful as receivers?

MR. OLSON: They would have had to go through certain steps articulated in the statute, they did not do that, Judge Millett, what they have to do, you can't just say okay, I wanted to do it under some other statute and so that's okay.

JUDGE MILLETT: Well, no it's the same statute, let's be clear about that. What I'm hypothesizing here is that the mistake is not, as you would say, doing this as a conservator because you can't do with a mistake is they said we're doing it as a receivership, but what they failed to do was the notice and statutory requirements, so as a remedy of them that it's unlawful for a receiver to do this as well, or is it just that there's some notice and procedural requirements that should have been undertaken?

MR. OLSON: Not just notice and procedural

requirements, recognition of the assets, recognition of the rights, recognition of property rights of creditors and stockholders, and that sort of thing. So, you can't just say well, they should have done it as a receiver, but what the --

JUDGE MILLETT: So, they couldn't have done it as a receiver, either?

MR. OLSON: -- net worth sweep is not the act of a receiver, it might have been something because they wanted to wind down the entities, that they could have transited into the other level of responsibility and complied with the laws and requirements there, they did not do that. What we're seeking --

JUDGE MILLETT: What about creating a limited life entity?

MR. OLSON: Well, that's a different type --

JUDGE MILLETT: No, but he does a receiver and you kind of keep the company going for a couple of years, and, again, I know that doesn't fit the model of what happened here, but they surely would have the authority to have done that.

MR. OLSON: It does not fit the model, it is not what those statutory provisions were intended to do, and we addressed that in the reply brief.

JUDGE MILLETT: So, just what is the remedy that

you want here for this?

MR. OLSON: The remedy is that what the, the remedy that the APA provides, the action of the net worth sweep in August of 2012 was illegal, not justified by the statute, arbitrary, capricious, and inconsistent with what they were telling the world that they were actually doing, and therefore it has to be set aside. Now, the details of how --

JUDGE MILLETT: And how -- not details, what happens if one sets aside the Third Amendment, what happens?

MR. OLSON: The implementation of that decision is obviously something that the District Court would have to work out, and that's why I said details, I mean, they're important details.

JUDGE MILLETT: Well, your clients must have something to, I mean, they have to have standing, so they must think there's some remedy they would get out of this, what's the remedy --

MR. OLSON: Yes, we -- the remedy is --

JUDGE MILLETT: -- that they're going to get?

MR. OLSON: -- that once the net worth sweep is set aside the financial circumstances of these people that invested in this company believing the statements that the Government was giving them about we won't liquidate, as a conservator we don't intend to liquidate. Those

representations that people in the marketplace relied upon, they're entitled to the fulfillment of those rights that they had at that time, when the Government acted arbitrarily, illegally beyond its powers that has to be taken away, and we have to go back to that point. And to the extent that there are aspects of the implementation of that to be worked out that's why we have District Courts to do that sort of thing. But what this Court's responsibility, I submit, is to recognize that what happened at that time in August of 2012 was beyond the power of the FHFA under the statutes pursuant to which it was operating, it was supposed to be operating, and it said it was operating. It was illegal, it was unlawful.

JUDGE MILLETT: And what you say makes it -- just I want to be crystal clear, what they violated, you say, is the requirement that they manage it, and progress it toward a sound and solvent condition?

MR. OLSON: And preserve and conserve the assets and rehabilitate the entity. This is not something I'm making up --

JUDGE MILLETT: Is rehabilitate the --

MR. OLSON: -- it's in the statute.

JUDGE MILLETT: Is, where's rehabilitate?

MR. OLSON: Rehabilitate the agency to a sound and solvent condition. This is not something that I've come up

with, this is in the statute, it's in the regulations that the Agency itself has put out, it's in the statement of what the Agency said it was going to do when it --

JUDGE MILLETT: I'm sorry, I'm -- yes.

MR. OLSON: -- took this step back in 2008, and did everything that was --

JUDGE MILLETT: I'm sorry, but I'm --

MR. OLSON: -- directly --

JUDGE MILLETT: Sorry, I just want to make sure, because I do want to make sure I've got it right. Where it says that they have a -- I take it you mean by rehabilitate is to make it profitable again for private investors?

MR. OLSON: Well, A(2)(B), A(b)(2), rather, (d), powers of a conservator, the agency shall take such actions that may be necessary to put the regulated entity in a sound and solvent condition, that's (i), little, and then small (i)(2), appropriate to carry out the business of the regulated entity, and preserve and conserve the assets and the property --

JUDGE MILLETT: Right.

MR. OLSON: -- of the regulated entity. That --

JUDGE MILLETT: And if they thought, again, this is hypothetical, I'm not fighting with your record materials, if they thought there were not going to be any profits were have to stop the hemorrhaging, we have to stop

the hemorrhaging, there's never going to be enough profits we think in the foreseeable future to pay the dividends, and so they do the Third Amendment on that basis, would that not count --

MR. OLSON: The Third Amendment was, this is another part of the record and the brief and the arguments, there was essentially a stock purchased, they went from being a creditor to a holder of all of the common stock by having the ability to take all of the assets. That ability to do that was restricted under HERA, H-E-R-A, the statute to end at the end of 2009. What they did in 2012 was inconsistent with that limitation on their authority.

JUDGE MILLETT: That's your purchase argument, I want to stay focused --

MR. OLSON: But to answer your --

JUDGE MILLETT: -- I want to -- that's your argument about the sunset provision, right? That's what you're talking about is your, your argument about Treasury violating the sunset provision, that's --

MR. OLSON: Yes.

JUDGE MILLETT: Right. I still want to get back on (2)(d) here, A(2)(d), and that is if they thought that there weren't going to be any profits, or maybe there'd be a blip for one year for tax credits, but that going forward it was going to be hemorrhaging with that could you take these

measures --

MR. OLSON: No --

JUDGE MILLETT: -- and would that constitute, as sound and solvent as this thing can be by stopping the hemorrhaging and carrying on the business and conserving the assets by stopping the hemorrhaging.

MR. OLSON: No, they weren't stopping the hemorrhage --

JUDGE MILLETT: If they were in my hypothetical, my hypothetical, not --

MR. OLSON: But your hypothetical makes up facts that are directly contrary to the record. The hemorrhaging --

JUDGE MILLETT: That's what hypotheticals do.

MR. OLSON: The hemorrhaging was --

JUDGE MILLETT: That's what hypotheticals do. Come on. I want to know when you talk about what it means to keep something in a sound and solvent condition, and conserving the assets, if they don't think there's going to be a pattern of profits, and there's going to be more hemorrhaging than profits could they take a step like this? I know you say that isn't this case and that's the problem here, and the record, you have your record arguments about that, but could it ever be consistent with a conservator's duties under the statute to stop the hemorrhaging by saying

just give us whatever you can pay each year, we won't demand more than whatever you can pay?

MR. OLSON: No. My answer to that is that they would at that point decided to wind down the entity, which is what they said they did in August of 2012. They've made the step to wind down the entity, at that point they should have said we were wrong acting as a conservator, which by the way the facts suggests it was working, but we, yes, under your hypothetical they could say we were wrong, we now want to wind down the entity, which is what they said they were doing with the net worth sweep, and we're going to have to move to the provisions in the same statute that provide for a receivership and liquidation of the company. That's what they said in 2008 they weren't going to do as a conservator.

JUDGE MILLETT: Okay. Just to be clear, so if your -- just to make sure I understand this, your position is if they made this determination that we can't, they're just never going to get to a point of consistent profits then they can't conserve it anymore, that once they've made that judgment they have to go to receivership --

MR. OLSON: They have --

JUDGE MILLETT: -- is that what I hear you saying?

MR. OLSON: Yes, that's the other authority that the FHFA has under this provision of the laws of the United

States. They can act as a conservator, or they can act as a receiver. Being a receiver is not a conservator; being a conservator is not a receiver. If they had decided under that hypothetical that that was something that needed to be done they had to move into another pattern, operate under the procedures of the statute to give them powers of receiver, and give rights to other people that are affected by that decision. They didn't do that, they didn't do that.

JUDGE GINSBURG: So, throughout this period and when the Third Amendment was entered into as I recall the combined portfolios of the two GSEs was roughly $5 trillion, is that right? Yes. So, suppose that a supplemented record would reveal that the Treasury and the FHFA were of the view that there's no way to liquidate a $5 trillion portfolio, all of the possible purchasers of pieces of this portfolio could not muster $5 trillion, so we're going to have to wind it down till we get to a stage where it's practical to liquidate, and that will happen assuming they don't make profits that no one expects them to make, that will happen with this sweep, at least that way it'll happen within a few years and then we'll be able to liquidate.

MR. OLSON: What I think you're asking me then what should they have done under our theory?

JUDGE GINSBURG: And indeed, what they did do wouldn't have a benign explanation.

MR. OLSON: Well, the --

JUDGE GINSBURG: A lawful explanation.

MR. OLSON: I submit that the record supports the proposition, the record that we have so far supports the proposition that they saw the pot at the end of the, pot of gold at the end of the rainbow, they decided we're going to take that away from the stockholders and we're going to give it to the Treasury Department because we have a budget deficit, and this is going to be a big help, the record --

JUDGE GINSBURG: Well, the only person who saw a pot at the, of gold at the end of the rainbow was possibly Ms. McFarland.

MR. OLSON: Well, it wasn't just Ms. --

JUDGE GINSBURG: The 10-Qs don't say it.

MR. OLSON: And it is supported by what happened subsequently to that.

JUDGE GINSBURG: That can't reflect what their --

MR. OLSON: Well, well --

JUDGE GINSBURG: -- motivation was.

MR. OLSON: -- if we're speculating about the future we, and the record does support that, and the $58 billion that I mentioned is subsequent to that, but it was, part of the record does support that there was a point which the amount coming into the Treasury exceeded the amount that the Treasury had put into the GSEs.

JUDGE GINSBURG: Sometime after the Third Amendment.

MR. OLSON: Yes, but based upon what you could see, based upon the 10Ks that were at the end of the year, and so forth, the information was available, people saw that the housing market had turned around by then, by 2012, things had changed enormously, and we believe --

JUDGE GINSBURG: Well, not so much that there was unanimity, we still had the, the 10-Qs, we had the Grant Thornton report, all of that, which was September of 2011, at least the date will work, but the report was done March, or June of 2012.

MR. OLSON: Well, what you -- what the --

JUDGE GINSBURG: But so, before the District Court when you were seeking to supplement the administrative record, as I recall one of your arguments was, and maybe your principle argument was we need to know why, what their explanation is for why they did, so the District Judge said their motivation is not relevant --

MR. OLSON: Yes.

JUDGE GINSBURG: -- to the question of whether they conformed to the law or did not.

MR. OLSON: Yes.

JUDGE GINSBURG: You said it is relevant.

MR. OLSON: Yes.

JUDGE GINSBURG: And so, if we fully explore that, if you get an opportunity fully to explore that I'm saying isn't it possible that one of the things one could turn up is an entirely lawful explanation? Because --

MR. OLSON: I don't believe it's going to happen.

JUDGE GINSBURG: -- liquidation at that scale was not practical, and that only by winding it down to a practical scale could they ever appoint themselves receiver.

MR. OLSON: I don't believe that that's what we'll find out, Your Honor. But you said is it possible, I suppose it's possible, but that's what happens when we're both speculating about what's in a record that had been denied to us.

JUDGE GINSBURG: Exactly right. Exactly right. So, the question of motivation could cut either way here, it might not be irrelevant.

MR. OLSON: It certainly is relevant with respect to whether an entity is operating in a fiduciary capacity as a conservator, because a conservator has, and the --

JUDGE GINSBURG: Yes --

MR. OLSON: -- agency --

JUDGE GINSBURG: -- motivation is relevant to that you're saying?

MR. OLSON: Yes.

JUDGE GINSBURG: Yes. Yes. Okay.

MR. OLSON: Yes.

JUDGE GINSBURG: The District Judge disagreed with that.

MR. OLSON: Yes.

JUDGE GINSBURG: You have constructed one, and I've constructed another scenario in which it is relevant.

MR. OLSON: Yes.

JUDGE GINSBURG: Okay.

MR. OLSON: Yes. I agree with that.

JUDGE GINSBURG: I don't know why we should go any further than that.

MR. OLSON: Well, perhaps. I think that you have enough, and I'll, I think I've taxed your patience, Judge Brown, so I will sit down.

JUDGE GINSBURG: That's not what I meant, but I, but --

MR. OLSON: I think you have enough to decide that the net worth sweep was not what it was said to be, and it was not consistent with acting as a conservator. I think you have enough. But at minimum we're entitled to have a record that we can try this, and we're entitled to have a District Court decision that accepts as true the allegations of the complaint so that we can go forward.

JUDGE BROWN: Thank you.

ORAL ARGUMENT OF HAMISH P.M. HUME, ESQ.

ON BEHALF OF THE CLASS PLAINTIFFS

MR. HUME: Good morning, Your Honors, may it please the Court. This is Hamish Hume from Boies, Schiller & Flexner representing the Class of private preferred and common shareholders of Fannie and Freddie. Your Honors, the Class advances claims of breach of contract, breach of fiduciary duty, common law claims.

We've just heard a lot about a very important APA claim, but our claims are not APA claims. I would urge the Court to free itself from the confines of the APA in considering our common law claims, because we are not limited to the concept of an administrative record, or the concept of whether the Agency acted reasonably within the confines of the statute. The question --

JUDGE MILLETT: How can fiduciary duty claims, common law fiduciary duty claims survive a statute that first assigns all titles, power, and privileges, and rights of stockholders to FHFA, and provides that any actions the Agency, can be taken by the Agency if they determine it to be the in the best interests of the regulated entity or the Agency, how can a common law fiduciary claim survive that?

MR. HUME: Well, let me answer that first with a derivative claim, and then the direct claim, if I might. With respect to a derivative fiduciary duty claim there are two courts of appeal, the Federal Circuit and the Ninth

Circuit that both held that the identical statute in FIRREA allowed a derivative claim because of the manifest conflict of interest, when there's a manifest conflict of interest between the conservator and whoever it's being asked to sue. That was well established from 1999 onwards, and it was no small decision, it led to a whole slew of cases in the *Winstar* litigation worth billions of dollars in which private shareholders were permitted to pursue both derivative and direct claims, because the *First Hartford* (phonetic sp.) decision didn't just allow the derivative claim when there was a manifest conflict, but also allowed shareholders to pursue a direct claim at page 1288 to 1289 of that Federal Circuit decision. And it was a huge deal, it led to these *Winstar* cases that went on and on and on, seeking billions of dollars, and collecting billions of dollars from the Government, Congress knew that when it enacted HERA, and it enacted the identical statute in HERA knowing that. And on page 27 of our opening brief we cite two decisions of this Court, *City of Donaire* (phonetic sp.) *v. FAA*, and *Gordon v. Capitol Police*, both of which say unequivocally that when Congress adopts a statute that's identical in wording to a prior statute, and that's been interpreted by the courts, that generally indicates that Congress adopted the judicial interpretation. Our friends, the Defendants, the Appellees, never respond to those cases,

they say nothing about them. In fact, the FHFA embraces that concept in its brief, and says in trying to argue with the APA case says that Congress has blessed the Third Amendment because it enacted the Consolidated Appropriations Act of 2016, which sort of talked about the Third Amendment, talked about where the money would be spent, and didn't say anything bad about the Third Amendment, so they embraced the proposition that Congress knows what's going on, and when Congress adopts an identical statute it embraces what the courts have said about it, and the courts have said where there's a manifest conflict of interest then you can bring --

JUDGE MILLETT: Two courts have said. Two courts have said.

MR. HUME: Two courts have said that --

JUDGE MILLETT: Two courts have said.

MR. HUME: -- and no court has rejected it other than Judge Lamberth below. So --

JUDGE MILLETT: I'm just trying to figure out how, what the conflict of interest is when they're entitled to act in the Agency's best interests, as much --

MR. HUME: Well, first of all --

JUDGE MILLETT: -- as the entities and the whole point of shareholder derivatives is deemed to be a conflict of interest, I just don't understand how it works.

MR. HUME: Judge Millett, I'm glad you asked that question, because one error in Judge Lamberth's reasoning that I don't think we, I clearly identified in our briefs it is absolutely not correct to say that the exception swallows the rule here, it is absolutely not correct to say that derivative suits only exist when there's a conflict of interest. This Court's decision in *Kellmer* is a perfect illustration, it was a derivative case in which there was no conflict of interest, it's just that the company chose in its decision, in its business judgment that it wasn't worth suing Franklin Raines and the other officers, the shareholders disagreed. It wasn't a conflict of interest, let alone a manifest inescapable conflict of interest, just a difference of judgment, that's why the derivative claim generally exists.

So, there are lots of instances in which derivative claims couldn't be brought by shareholders and would be the decision of the conservator. But when you're asking the conservator to sue itself you have gone through the looking glass into a world of absurdity if you say that shareholders cannot bring that claim, and that's what the *First Hartford* --

JUDGE MILLETT: But it's okay to make a decision in the interest of itself.

MR. HUME: I'm sorry, Judge Millett?

JUDGE MILLETT: When the Agency is the conservator, and the Agency can make a decision in the interests of the Agency then it's okay. It seems to me the statute is saying that's not a conflict of interest.

MR. HUME: The statute --

JUDGE MILLETT: If they take actions as long as they're in the best interests of the entity, or the Agency. And so, then to sue on the grounds that well, they won't sue because they made a decision in the best interests of themselves, the Agency doesn't seem to grapple with how these two sections intersect.

MR. HUME: I don't think it's possible to read the statute as conferring on the FHFA the authority to decide whether or not to sue itself for violating fiduciary duties. It says, the succession provision says that the FHFA as conservator succeeds to the rights, powers, and privileges of the company with respect to the regulated entities and its assets. I would submit that the textual -- I think, Judge Millett, maybe what you're asking is where in the statute can I attach this notion of a manifest conflict of interest exception, and I would suggest the word conservator may be the place to put it because if they're not acting as a, if the question is whether they violated their fiduciary duties then the real question is whether they can sit as judge and jury over that claim. I would concede that the

statute doesn't talk about an exception, and the courts have read it in, in fact, *First Hartford* doesn't really even talk about it as an exception, it simply says there's no way Congress could have intended that if there's a manifest conflict of interest, then the derivative claim is possible.

And I think that the backdrop to that is a constitutional avoidance doctrine, because you can't read the statute to do something that would be an obvious due process violation, there's a whole string of Supreme Court cases going back to the 1920s --

JUDGE MILLETT: Due process isn't taking of property? Due process taking --

MR. HUME: Yes, and, but also the inability to advance your own claim, and I think if, I would refer the Court to the Plaintiff's --

JUDGE MILLETT: Well, I don't see what -- the inability to advance your own claim if it's not your own claim is not --

MR. HUME: Fair enough.

JUDGE MILLETT: -- a due process problem unless the argument is that they took your claim, which is --

MR. HUME: Yes.

JUDGE MILLETT: -- back to taking of property, right? So, that's the only constitutional --

MR. HUME: I think for the derivative claim that

constitutional avoidance issue may depend in part on whether there's also a direct claim that could be brought. All I'm saying is I think the courts have suggested there may be a due process issue, as well, in the *First Hartford* case. If I could --

JUDGE MILLETT: And then on the --

MR. HUME: If I could just --

JUDGE GINSBURG: Are you a party to the takings case in the claims court?

MR. HUME: Yes, I am.

JUDGE MILLETT: Well, your direct claim, I just didn't see you raising that below in the District Court.

MR. HUME: Yes, I understand --

JUDGE MILLETT: Can you tell me where you did?

MR. HUME: I think, all I would say is this, Judge Millett, in count seven of our complaint we did refer to a fiduciary duty to shareholders four different times.

JUDGE MILLETT: I'm sorry. Yes. Yes. Fiduciary duty to shareholders.

MR. HUME: Yes. I would concede that the clarity with which we pled a direct claim, and the clarity with which we briefed it left something to be desired, but did allege --

JUDGE MILLETT: No, but you can tell me where you raised it not so clearly.

MR. HUME: Your Honor, I think it's paragraphs 377, it's in, if you look at count seven of our complaint you will see a reference four different times, I can give you the exact cites if you would like.

JUDGE GINSBURG: Four references to what?

MR. HUME: To, in paragraph 176, 177, and 180, twice in 176 --

JUDGE MILLETT: I'm sorry, which page of the J.A. are you on? I'm sorry.

MR. HUME: This is, I don't have the J.A. cite, but it's in our third amended complaint. But before I delay you too long I'm simply saying that we say fiduciary owed to the shareholders four different times in those three paragraphs. We briefed a derivative claim. We would submit two things, Your Honors, on our direct fiduciary breach claim, first, under the lenient notice pleadings, maybe three things, first under notice pleading I think we said enough; second, that's especially true in light of the fact that the Delaware courts in the *Gatz* case and the *Gentile* case, which are both cited repeatedly in our briefs and other briefs, have recognized that in some situations a fiduciary breach claim can be both direct and derivative, modifying to some degree the *Tully* decision, and that's exactly --

JUDGE MILLETT: Did you brief this to the District

Court? So, you -- it's not in your complaint, did you brief it to the District Court?

MR. HUME: We did not.

JUDGE GINSBURG: Did you brief this as a separate matter as you have here, the claim that the net worth sweep violates, pardon me, that there was a breach of the implied covenant of good faith?

MR. HUME: Yes.

JUDGE GINSBURG: You did brief that?

MR. HUME: Yes, and I'd like to turn to the --

JUDGE GINSBURG: If successful that would be fully adequate to, for the relief that you would claim as a fiduciary.

MR. HUME: I think that's probably correct, Judge Ginsburg, there are --

JUDGE GINSBURG: So, the argument would be that okay, they have dual loyalties here, unlike an ordinary fiduciary, unlike a Delaware fiduciary, but like the FDIC, and they have to administer that inherent conflict in good faith.

MR. HUME: Absolutely. And in fact, if I could, if I may just finish the questions on the direct claim, Judge Millett, this Court does have the authority, its discretion rarely exercised to allow us to amend, to add a direct claim, and the citation for that is *DKT Memorial Fund*

v. Agency for International Development, 810 F.2d 1236 at 1239. If the Court thinks it's necessary after full consideration that we amend, we ask to amend, but it may not be because our think our breach of contract claim, or breach of implied covenant claim clearly must survive and the decision will be reversed.

In considering our contract claims, Your Honors, we would urge the Court to look at the substance, the basic economic substance of what happened, and not accept the highly formalistic argument of the Defendant/Appellees, and respectfully of the District Court below.

Here's the basic economic substance of what happened, under the original PSPA, the Treasury Department had senior preferred stock entitling it to get a couple of 10 percent every year on the full amount of its investment, plus an extra $2 billion. It also had a right to buy 80 percent of the common stock of these two companies for a nominal price, and everyone keeps saying a nominal price, I looked it up and if my math is correct the nominal price is about $10,000 to $15,000 for 80 percent of Fannie and Freddie. That stock's worth --

JUDGE GINSBURG: Do you know what the market value was at the time?

MR. HUME: I know that the preferred stock, the junior preferred stock, I know that the preferred stock

before the Third Amendment was trading at about just over $2 billion, between $2 and $3 billion market cap. I don't know --

JUDGE GINSBURG: About 15 cents a share.

MR. HUME: I don't know the per share price, and I don't know if from September of '08, but I'm confident it was more than $15,000. And I'm very confident that in a liquidation it would have been worth more than that.

But in any event, the original structure was that, which is revealing first of all in showing the Treasury was a stockholder, all the stuff you're hearing about there are no stockholders, stockholders have nothing, stockholders are gone, they're wiped off the face of the planet, it's not true at all. The Treasury is a stockholder, they put in their agreement a choice of law clause, a venue clause, where they're going to litigate, they're a stockholder, they have rights as a stockholder, they can litigate as a stockholder, they're entitled to dividends as a stockholder. First preferred senior, 10 percent, then 80 percent of the common, that is clearly saying that if, if the companies make enough money to pay dividends in excess of 10 percent, and if they decide to do so they first have to pay the junior preferred, whose total cumulative dividend if paid, there are different coupon rates, but it's a total face amount of $35 billion, their coupon would maybe be some are

at five percent, some are at eight percent, at seven percent it would maybe be $2.7 billion. Okay? Then if Treasury wanted more it can take the $10,000 or $15,000 by 80 percent of the common and get 80 percent of it in the rest of the dividends. So, here's what happened, the companies did become profitable, Susan McFarland did think that $50 billion tax, preferred tax would be reversed, and sorry, but I read the August 9th, 2012 projections differently than the Court, I would urge the Court to look at them, they were conservative compared to what happened, but they were still optimistic. Those two documents submitted with the seven --

JUDGE GINSBURG: Wait a minute. When you say August 9 documents --

MR. HUME: There's an August 9, 2012 projection, and an August 11, 2012 projection.

JUDGE GINSBURG: Are these the 10-Qs, or are these something else?

MR. HUME: No, they're internal Fannie projections, and they show a projection of when the dividends will exceed the draws, in 2019 for one enterprise and 2020 for the other. Now, it turned out --

JUDGE GINSBURG: Namely when?

MR. HUME: I'm sorry?

JUDGE GINSBURG: You said it shows when they would exceed, when was that? What are they projecting?

MR. HUME: The projection was made in, right before the Third Amendment.

JUDGE GINSBURG: Yes. And projected?

MR. HUME: Projected that they're going to have gotten more money back than they put in in dividends alone.

JUDGE GINSBURG: By?

MR. HUME: By 2019 or 2020. So, they're not projecting a death spiral, they're projecting a recovering Fannie and Freddie that are going to be hugely profitable. Now, they underestimated how profitable, but they knew they were going to be profitable.

JUDGE GINSBURG: Just to one's point, these documents are, are these the recently unsealed documents?

MR. HUME: That's correct. And I have them, unfortunately, by the exhibit numbers they were given in the Court of Federal Claims where they were Exhibits G and H, but basically, that means they were the fifth and sixth of the seven documents in order. They had different exhibit numbers from the --

JUDGE GINSBURG: Do you have dates on them?

MR. HUME: What's that?

JUDGE GINSBURG: Do you have the dates on them?

MR. HUME: Yes, the first one is August 9th, 2012, and the second is August 11th, 2012.

JUDGE GINSBURG: So, the August 9, 2012 document

is Fannie Mae's projection, right?

MR. HUME: That's right.

JUDGE GINSBURG: And the 11th is what?

MR. HUME: It's an e-mail from David Benson of Fannie to somebody at Treasury really sending the same projections.

JUDGE GINSBURG: Okay. So, they're -- and Freddie is not --

MR. HUME: But they --

JUDGE GINSBURG: -- in this picture?

MR. HUME: Freddie is in it. I don't know why it's coming from Fannie only, but the projections are for Freddie, as well, they're just a page with both projections.

JUDGE GINSBURG: Okay.

MR. HUME: In fact, Freddie has better projections, they're destined to have returned more money than any money drawn down by 2019. Now, here's what actually happened, then, so --

JUDGE MILLETT: Virginia law for Freddie Mac, though, is different than Delaware law, right?

MR. HUME: I'm sorry, Judge Millett, I --

JUDGE MILLETT: Isn't Virginia law different than Delaware law for Freddie Mac?

MR. HUME: I don't think it's different in any material respect here, and I haven't heard the Defendants

argue that it is.

JUDGE MILLETT: I thought that's why this was coming at us from Fannie Mae, because that's where you had precedent and you didn't have it from, for Freddie Mac in Virginia, am I wrong?

MR. HUME: I don't -- I'm sorry, I don't --

JUDGE MILLETT: Okay.

MR. HUME: -- understand the question. The projections were coming from Fannie, it's true that Freddie is subject to Virginia law and Fannie is subject to Delaware law.

JUDGE MILLETT: And are they the same for purposes of contract claims, implied covenants claims, and fiduciary duty claims, direct and indirect?

MR. HUME: Yes, I think -- yes, I think they are the same for contract and implied covenant. I am not aware of a difference with those respects. On fiduciary duty Virginia may be a little tougher on the direct fiduciary duty claim than Delaware.

JUDGE MILLETT: And then -- I'm sorry, were you done answering Judge --

MR. HUME: Well, if I --

JUDGE MILLETT: I want to let you finish answering him and then I have another question.

MR. HUME: If I might, I would like to just finish

sort of the presentation of the core substance of what happened because I've explained the original structure --

JUDGE MILLETT: Well, then I want to get back, if that's what you're doing, on the contract. You don't challenge the PSPAs?

MR. HUME: That's correct.

JUDGE MILLETT: And do the PSPAs provide that the entities could not make any distributions of capital otherwise until Treasury stock was paid off?

MR. HUME: No, I don't think they say that you can't make a distribution until the stock is paid off. It says it can't make a redemption, it can't make a redemption of the Treasury stock until the stock is paid off.

JUDGE MILLETT: What I have is the enterprise isn't -- tell me if I'm wrong, from J.A. 2451, they may not declare or pay any dividend, preferred or otherwise, or make any other distribution by reduction of capital or otherwise, whether in cash, property, securities, or a combination thereof, other than to Treasury, until Treasury is paid off, am I misunderstanding that?

MR. HUME: I think Treasury has the right to consent to it. I think that's -- Treasury has to consent to any dividend that is paid.

JUDGE MILLETT: And they haven't done that.

MR. HUME: They haven't done that.

JUDGE MILLETT: So, but how does this affect your contract claim to dividends?

MR. HUME: It makes it contingent.

JUDGE MILLETT: Huh?

MR. HUME: It simply makes it contingent because, listen, here's what -- all dividend rights are contingent, in fact, even if you read the senior preferred stock agreement the Treasury's dividend rights were contingent on the board declaring them, all dividends in the private stock market.

JUDGE MILLETT: And Congress has now declared, passed a law that they can't pay these dividends either, correct?

MR. HUME: No, I'm not aware of --

JUDGE MILLETT: They can't even pay --

MR. HUME: No, no.

JUDGE MILLETT: The 2016 Act prevents them from paying back Treasury --

MR. HUME: No.

JUDGE MILLETT: Treasury can't even sell its stock or have it satisfied, correct?

MR. HUME: No, the 2016 statute does not say that they cannot pay dividends to private shareholders.

JUDGE MILLETT: No, no. No. You have this provision that says you've got to pay Treasury, you've got

to buy Treasury off first, and then the 2016 Act says Treasury, you can't sell anything, and so I'm trying to figure out how those together leave you with much of any contract claim. It seems it's less than contingent at this point. But if I'm misunderstanding please tell me.

MR. HUME: Well, I'm not sure I'm understanding the relevance of the Appropriations Act. What we're saying is that the basic substance of what happened here is that in the three years after the Third Amendment dividends were paid from the enterprises to Treasury of $130 billion, okay? If dividends had been paid pursuant to the original agreement, 10 percent would have gone as senior preferred stock to the Treasury, and -- sorry, and the 130 is in excess of the 10 percent, so the 130 dividends that would have been paid at most, again, we don't know the exact amount of the preferred dividend, but it would have been somewhere between six and nine, let's call it seven and a half, the remainder, 122 or so, would have been divided 80/20 between the common, so Treasury still would have gotten $100 billion of the 130, they just didn't want to give the private shareholders anything, so they leapfrogged, there are mandatory dividend rights in the contracts.

And by the way, Judge Millett, if there's something in that Appropriations Act that's inconsistent then it would be a breach. But the mandatory dividends

rights say you cannot pay anyone junior to us, the junior preferred say don't pay anyone junior to us until you pay us, and that's exactly what the Third Amendment did, it gave $130 billion to the Treasury beyond its senior preferred dividend, some of that had to come to the junior preferred. Then the common have a provision in their contract that says you have to pay us ratably with any stock that's equal to us, well, their stock is by definition equal to the common stock the Treasury would have gotten, so they should have gotten paid. That's the substance of what happened, and their answer to it is, and it's rather galling, there's no breach of contract because the written terms of the share certificates of the private shareholders have not been altered. Well, thanks a lot, we still have a piece of paper with the same words on it, but the words are being completely disregarded. The words say you're not going to pay a dividend more than the 10 percent senior preferred to the Treasury without paying us first, and people invested on that. Then they went and said through another, just basically asserted through an amendment, they could have done it through a bylaw, it doesn't matter, it's a breach either way no matter how they do it they said we're going to pay dividends to Treasury beyond its 10 percent, hundreds of billions of dollars beyond its 10 percent, without paying you first, even though your contract says that you have to

get paid first, that's a breach. And it's also a breach for the common not to pay them ratably.

In addition, if you look at the substance of all that, there's no way to contest the fact that they materially, adversely harm the interests of these private shareholders without giving them a vote, and their contracts entitle them to a two-thirds vote for any such change.

Again, especially when there's an implied covenant claim, the Delaware and Virginia courts would look at substance and not get caught up in formalisms. And I think what you're going to hear from the Defendants is a lot of formalism. It should be substance, not form that governs this case, and there are cases that say that, I would refer the Court to the *Winston v. Mandor* Delaware case on page six of our reply brief, and another case, *Price v. State Farm*, 2013 Delaware Superior Lexus 102 explicitly says that when there's an applied covenant claim Delaware courts look at substance over form.

JUDGE MILLETT: How does applied covenant work, though, when you've got, when they can take interest, actions in the interest of the agency, as well as the entity? Are there cases that tell us how us how that would work?

MR. HUME: Well, that's what I was trying to say at the beginning, that whether the actions were taken in a

good faith effort to help the enterprises, and help the agency, or help the tax payer, they still have an implied covenant to respect the terms of their contracts that they assumed with the private shareholders. And so, this whole issue of motive that the Court was asking Mr. Olson about --

JUDGE MILLETT: Yes, but this case isn't, and albeit another context where the Supreme Court has explained that when the United States has a fiduciary duty, that fiduciary duty is infused with its right to acts as sovereign, and acting in its sovereign interests is consistent with its fiduciary duties, the fiduciary duty for governmental entities is just not the same as it might be for a private fiduciary.

MR. HUME: Yes, we encountered --

JUDGE MILLETT: And so --

MR. HUME: -- that in the *Starr* case in the Second Circuit, but there's a big difference here, the FHFA has vigorously asserted, or the Department of Justice has asserted on its behalf that it is not the Government. In the Court of Federal Claims takings case, which Judge --

JUDGE MILLETT: Well, but I bet you disagree with it.

MR. HUME: Well, we're saying --

JUDGE MILLETT: Yes. Yes.

MR. HUME: -- we're saying, yes, we are saying

that they are the Government, and this was --

JUDGE MILLETT: Okay.

MR. HUME: -- two Government agencies colluding, but they can't have it both ways, okay, they can't say we're not the Government, you can't sure us for takings --

JUDGE MILLETT: Nor can you.

MR. HUME: -- but over here in District Court --

JUDGE MILLETT: Right, but you can't have it both ways, either, so if we're going to assume --

MR. HUME: I'm pretty sure if I get it one way I'll win.

JUDGE MILLETT: Well, that's what I'm asking you is if you, on an applied --

MR. HUME: I only need one way to win.

JUDGE MILLETT: So --

MR. HUME: They need to have it both ways for me not to win.

JUDGE MILLETT: -- if they are the United States for these purposes a federal agency for these purposes, and can take actions in the interest of the agency, and the interest of the United States is sovereign then how could there be a breach of the implied covenant of good faith on this contract --

MR. HUME: Well, I think, you know what I think at most --

JUDGE MILLETT: -- when it's all conditional rights on Treasury's decisions anyhow?

MR. HUME: At most what that would lead to, Judge, and they haven't really argued this, but at most what that would leave you, Judge Millett, is that we'd have to bring this implied covenant and breach of contract case in the Court of Federal Claims, that's the most it would mean, because there's plenty of cases in the Court of Federal Claims with implied covenant claims. The United States Government can breach a contract and be sued for money, and it can breach the implied covenant, that happens in the Court of Federal Claims. So, I think the line of questioning you have simply says, is about which court I need to go to.

JUDGE MILLETT: And so, since you think the United States, and then does that mean you agree the contract claims should be here?

MR. HUME: No, because they haven't claimed immunity, and we --

JUDGE MILLETT: Well, that would be jurisdictional.

MR. HUME: The Court did have jurisdiction over, because they didn't claim any immunity, and they're not the Government.

JUDGE MILLETT: If they are the United States then

you're alleging a breach of contract with the United States then they, as you seem to be arguing in the Court of Federal Claims, then the contract claims need to be there, too.

MR. HUME: We explained in the very first two pages of our complaint in this case, in the original complaint that to some degree, to the extent we're suing FHFA we're doing it as an alternative claim. The system set up by Congress requires the -- normally an alternative claim would be in the same case, the system created by Congress requires us to do it this way, that if you agree you're the Government it's a taking, if you're going to try to say you're not the Government then we have to be in District Court. And by the way, if you are the Government we may have more claims in the Court of Federal Claims.

And I would keep in mind, also, that our breach of contract claims, I don't want to be read, I don't want the record to reflect that I've conceded too readily that the Defendants on the FHFA side here are governmental because Fannie and Freddie still exist, the FHFA is their conservator, it runs them, but Fannie and Freddie are private entities, they are still getting sued in District Courts around the country, and I think the balance of the case law is that they don't get to assert immunity. So, those two entities are still liable for breach of contract, and I don't actually envision any scenario in which we have

to sue them in the Court of Federal Claims, so I think our claims against them really do belong in District Court not just as an alternative claim, but because Fannie and Freddie are not the Government. The FHFA is a Government agency, but the entities it's running are not.

JUDGE GINSBURG: The Government isn't a Delaware corporation, amazing.

MR. HUME: We're not -- not yet. Given its exceptional money-making abilities it might decide to issue stock, I don't know. But the -- we're not suing the Treasury for -- well, we are suing the Treasury for breach of fiduciary duty, but we're not suing them for breach of contract.

JUDGE BROWN: All right.

MR. HUME: Thank you very much, Your Honor.

JUDGE BROWN: Thank you, Mr. Hume.

JUDGE GINSBURG: Can we take a break?

JUDGE BROWN: Excuse me. We're going to, the Court is going to take a brief recess before the Government starts. Thank you.

JUDGE GINSBURG: We may or may not be back.

(Whereupon, a brief recess was taken.)

MR. CAYNE: May I proceed?

JUDGE BROWN: Yes.

ORAL ARGUMENT OF HOWARD N. CAYNE, ESQ.

ON BEHALF OF THE FHFA

MR. CAYNE: May it please the Court, Howard Cayne for Federal Housing Finance Agency, Fannie Mae, and Freddie Mac. Your Honors, Judge Lamberth's decision should be affirmed actually now based on a notice we were provided by the Court earlier today for three independent reasons, first, a statutory jurisdictional bar precludes review of Plaintiff's claim, in addition to the bar laid out in our statute, Your Honors, the statute reference in the Court notice to Counsel also fully precludes each and every claim in this matter seeking relief, Your Honors.

JUDGE GINSBURG: So, you overlooked a dispositive jurisdictional bar to this case?

MR. CAYNE: I'm sorry, Your Honor?

JUDGE GINSBURG: You overlooked a dispositive judicial --

MR. CAYNE: Your Honor --

JUDGE GINSBURG: I mean, a jurisdictional bar?

MR. CAYNE: Your Honor, as is many litigations this case morphed over time.

JUDGE GINSBURG: More morphing.

MR. CAYNE: And I would, I said to my colleagues I applauded the member of the Panel, or the Clerk who saw this, but it just supplements what we have said, because let me just get to --

JUDGE GINSBURG: So, you're saying the equitable, pardon me, the Third Amendment, that's what we're talking about, right, the Third Amendment was a discretionary supervisory action?

MR. CAYNE: No, Your Honor, let me --

JUDGE GINSBURG: Okay, go ahead.

MR. CAYNE: -- tell, say to the Court, and this is what wasn't so clear in the complaints, but as the case has developed and we heard this morning, Plaintiffs essentially allege that the FHFA is violating all sorts of rules, laws, regulations, safe and sound banking practices by allowing these institutions to operate with as little as zero capital, that is the point that this statute gets to, Your Honor, because as you Court will know from the statute, it says that the, if the Agency as regulator, and again, Your Honor, when we filed out papers we were focusing on the conservatorship allegations in the complaints, but when the Agency is regulator, reclassifies or changes capital classification, that might be challenge, but beyond that anything relating to a changed capital classification according to the statute is not subject, it may not be affected in any way by an order of any court. So, what we have here at the outset in 2008 at the time the institutions were put into conservatorship, a new capital paradigm was established, and that capital paradigm said as long, by the

Director of the Agency as regulator, and that capital paradigm said as long as these institutions are not forced into mandatory receivership they may operate. And the new paradigm was rather than requiring them to maintain eight percent, five percent, six percent capital, whatever the standard was as a normal banking institution, it was determined that as long as the Treasury commitment was out there ready to come in to cure any insolvency, which as the Court knows if the institutions were insolvent for more than 60 days the Agency would have been forced to place them into mandatory receivership, so the new paradigm was we'll have the 100, 200, eventually Treasury committed to 467 billion, nearly a half a trillion dollars to support these enterprises, and the regulator made the regulatory decision that we will, the Agency will allow that to satisfy capital standards. So, again, this, it was not challenged at the time, and so what the statute says is that this action by the Agency as regulator to establish a new capital paradigm for the duration of the conservatorships may not be affected by injunction or otherwise in any manner, it's similar to the banking cite in here, and the banking cite is 12 U.S.C. 1818(i), no court may effect by injunction or otherwise a cease and desist order that has been issued. What was happening there, and there's case law on this, this provision essentially parrots what are called on the banking

landscape capital directives. Capital directives were first enacted by Congress in 1983 pursuant to the International Lending Supervision Act of 1983. And what a capital directives -- and it was issued, Your Honors, in response to a Fifth Circuit decision, the Fifth Circuit back in 1983 in a case called *Comptroller Currency v. First National Bank of Bel Aire* ruled that the Comptroller's cease and desist order requiring the bank to increase its capital was not supported by substantial evidence. And to overrule that decision the Congress enacted what are called capital directives, and capital directives provide that the agencies, the comptroller, the FDIC, the Fed, the NCUA, I believe, can require institutions to maintain whatever capital level they deem appropriate under the circumstances, and this was the key point, those determinations are subject to no judicial review. In 1990 that point that they were subject to no judicial review was challenged in the Fifth Circuit in a case called *FDIC v. Bank of Coushatta*, reported at 930 F.2d 1122, and on a three-judge Fifth Circuit panel including the esteemed Judge John Minor Wisdom, the Court ruled that the statute comported with due process. There's a lengthy analysis, and the statute, the capital directive statute at issue there that provided no judicial review to banks, when the agencies changed, increased, decreased their capital guidelines was not subject to judicial review. Your Honors,

that is precisely what is implicated by the statute that the Court has referenced.

JUDGE MILLETT: And so your view here is that they're challenging this what you call capital paradigm of, that was created here of, in the Third Amendment getting rid of obligations that the GSEs had under the prior amendments, and the PSPAs and replacing them with this just pay us whatever you can each month, that's a new capital paradigm decision by the Director?

MR. CAYNE: No, what I'm referring to, Your Honor, is the, it's throughout their briefs, it came up in my esteemed colleague Mr. Olson's presentation many times that we, the Agency is driving these institutions out of business. It's allegedly not allowing them to grow capital, it's keeping them at zero, how can that be? Well, the reason that can be is the paradigm, the new capital program that never has been challenged that was established in 2008 sets precisely that, an action was taken by the Director at that time, in September, 2008, that said going forward the normal capital classifications, whatever the percentage was, I don't recall, three, four, five, six, seven, eight percent no longer applied. Instead, we're going to have this new paradigm, and the new paradigm is, and we all have to understand, much of the presentation by my colleagues, it's like we're dealing with this fabulously successful financial

institution, and the shareholders are being stripped of their rights. Well, what we're dealing with are institutions which we all recall that in 2008 were on the verge of insolvency, and they were threatened with receivership, which would have had massively adverse consequences on the national mortgage markets, so Congress passed special legislation, and this legislation, getting, and I apologize for just skipping a bit, but this legislation is with respect to the matters that we hear about, conflicts. This legislation was actually included in the charter acts, the charter act of Fannie Mae, the charter act of Freddie Mac, so this is both federal law, and this is in the governing corporate instruments of these institutions, this ability, authority of Treasury to infuse massive amounts of tax payer dollars, and so what we have in this --

JUDGE MILLETT: Well, so their argument is as I understand it is that the paradigm that you had was in 2008 and going forward to, up to and through the Third Amendment the Director's decision was no way do we want this going into mandatory receivership, no way do we want that happening, we must prevent that from happening, we do not want receivership because of the enormous consequences that would have for the economy, the Treasury, hook up the hose and we're going to have the money running in and do whatever

we have to avoid, we can to, whatever we have to do to avoid receivership, is that --

MR. CAYNE: Yes.

JUDGE MILLETT: And that was their decision, the Director's decision as conservator, that's what was going on here?

MR. CAYNE: That was the, the agreement, Your Honor, was executed between the enterprises, so it was, the enterprises and Treasury, so it was authorized by the Federal Housing Finance Agency in its capacity as conservator. And getting back to Judge Ginsburg's question, that's why our briefs rely on the withdrawal of jurisdiction that would apply or bar a court from effecting the operations of a conservator.

With respect to the Court's inquiry to Counsel this morning, the 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 had applied to these enterprises were off the boards for the indefinite future, for the duration of the conservatorship. Instead, as I said, the Agency as regulator in that capacity authorized this new capital paradigm, which is Treasury, the conservator on behalf of the enterprises will enter into an agreement with the Department of Treasury pursuant to which the Department will

commit literally hundreds of billions of tax dollars to the infusion and to the support of these enterprises, and that will satisfy any capital requirement we as regulators believe is necessary. And my points simply with respect to the Court's inquiry is the whole range of relief being sought by Plaintiffs here were granted, but directly contradict, undermine, effectively set aside that regulatory decision by the Agency. What, just one specific, what my esteemed colleague Mr. Olson is asking for is that the Court issue some type of relief to force these enterprises to increase their capital to some arbitrary level. Well, again, that may happen or not, but it's not consistent with the action taken by the Director which focuses on keeping these entities in business, and the Court had, there was much back and forth in the context of fiduciary powers, fiduciary interest relating to the statutory provision that the Agency as conservator now can take action in the best interests of the enterprises, or in the best interests of the Agency.

If I may submit, what that means is these are very unique creatures, they are, as the Court has noted, massive financial institutions, but these are not comparable to standalone banks, or standalone savings and loans, because Congress had a more fundamental purpose, Congress' purpose in enacting and authorizing these financial institutions

wasn't just to have two more banks, it was to provide support to facilitate the operation of the national mortgage markets, that was a policy decision by Congress. Congress considered it absolutely essential that those markets operate, and they operate efficiently, and that was the purpose for these enterprises.

So, under circumstances such as 2008, now, whenever, the conservator may well determine well, I have a particular choice to make, I can run things to try to make this a profitable, more profitable, or I can run things to maximize the ability of the enterprise to facilitate the operation of those markets. Congress made the policy judgment to allow the conservator without interference by shareholders, with all respect, without interference by the judiciary to make that decision. And what we have here, getting back to what's being challenged, again, we have to look everything in the context, what is -- we have here are the shareholders are effectively asking this Court to override the conservator's judgment, and this is judgment Congress decided this is the agency, this is the expert, we want to rely on the agency, and the agency is conservator. The net effect of what is being asked of this Court is to second guess the decisions made by the conservator on how it will handle, marshal, administer this nearly half a trillion dollars of tax payer funds. And again, the record is clear,

and I'll refer to the statute in a moment, Congress put that money in clearly not to benefit shareholders of an institution that months later became insolvent, they put it in because the bottom had fallen out of the world, and the United States' national economy, and Congress believed, this is their, in their judgment that if the national mortgage market fails, becomes non-operational, that will just make a horrible situation so much worse, and that is why --

JUDGE MILLETT: Well, I think what they would say is what's happening here, or they have said is this situation what the FHFA is doing doesn't look like what conservators usually do, it doesn't look like they're getting it back in a solvent condition if it can never have a penny profit. And on the other hand, you're not, the liquidation hasn't started, you're sort of in this limbo on life support here, and trying to figure out how that fits into the statutory scheme as to what, because Congress did choose to call them conservators and distinguish conservators from receivers, so how do you deal with that?

MR. CAYNE: But, Your Honor, this, everything that's happening goes to really I'll call it the heartland, the heartland of the conservator's statutory powers. And there was a lot of discussion that conservators and receivers are polar opposites, they have a whole different set of powers and duties, that's just not the case. Except

for the fact that a receiver is authorized by statute to liquidate, the statutory powers of both are identical, you just have to look at the statute to see that, they both have the power to operate, just every term is the same except, then there's a follow up provision, additional powers of receiver, and it says the receiver can liquidate. But what we're having here --

JUDGE MILLETT: Well, the receiver has some other obligations, too, right? About notice.

MR. CAYNE: Well, in a liquidation, of course, Congress made an exception to the succession statute, because the succession statute applies both to the conservator and to the receiver, so in other words, in a conservatorship or in a receivership all the powers of the shareholders, the officers, the directors, anything over the assets, the powers, anything related to the institution for both a conservator and a receiver is by operation of law assigned to the conservator or the receiver upon the institution of any of those situations, the institution of a receivership, an institution of a conservatorship. As we point out in our briefs, when all of that is assigned to, transferred to, when the conservator succeeds to it there is no exception to that, the conservator succeeds to everything. But in contrast in receivership there is a single exception, and the single exception is in

receivership notwithstanding the fact that everything has also been transferred to the receiver, claimants against the institution, including shareholders, may file administrative claims pursuant to a comprehensive claim process established by the statute with ultimate review in the Federal Courts, and that really deals with many of the arguments about conflicts and looking for exceptions, Congress knew how to draw an exception on these statutes when it wanted. In receivership it did give an exception, and the exception was a claimant can file a claim in receivership. In conservatorship, which may lead or often leads to receivership, claims cannot be filed.

But, Your Honor, I apologize for digressing because the Court's question was about what is a conservator authorized to do, and there's a lot of papers filed, well, this doesn't look like any conservatorship any of the filers had ever seen, well, it's different because there have never institutions with, as the courts indicate, $5 trillion of assets that were becoming insolvent. And typically in the bank context an institution that is failing may sometimes be put in conservatorship to give the regulator a chance to determine can this business be saved. Sometimes it can, usually it can't, and when it can't then it goes to receivership. But there is nothing in the bank statutes or in our statute that says the regulator has to determine

within blank days, blank weeks, blank years how long the conservatorship will last. But when you go back to the underlying reason that motivated Congress to authorize these enterprises to empower them that we want to facilitate the operation of the national mortgage markets, then it's very understandable, then it's very consistent. These entities are being operated in conservatorship for the purpose of facilitating those markets. As the Court now knows, we have affirmative legislation from Congress that says at least through 2018 we want this status to stay, we don't want anything changed, we want these entities to remain in conservatorship until we, Congress, decide what the next step is. And that, Your Honor, refers, relates back to a question you asked earlier about statements made by Congress about what happens next, and then Congress also said even after 2018 please understand that it is the sense of Congress that this status should continue until we, Congress, get around to doing something about it.

And just another aspect of that, when you think about what Congress did there, Congress by statute essentially, directly mandated that the Department of Treasury continue to hold the shares it holds today at least under 2018. So, Congress is telling Treasury continue to hold the shares, these shares which are governed by the Third Amendment now until that date. To me, and I know they

put in a couple of statements from legislative history, you can't understand that provision without recognizing that Congress was in fact signing off on the current structure of the shares because we know from the regulators they thought the --

JUDGE MILLETT: Well, put that aside, what does the 2016 Act direction, how would that affect any remedy that's asked for in this case? Or not at all?

MR. CAYNE: I would suggest it, in and of itself, and I haven't spent extensive time evaluating this, but it certainly could be argued that, that we're not relying on it, but it certainly could be argued that the 2016 Act would bar this Court from making any change to the attributes of the shares held by Treasury because Congress has in a legislative act said Treasury, you must hold these shares as presently constituted, and if this Court --

JUDGE MILLETT: And when you say is presently --

MR. CAYNE: -- were to go back to the Second Amendment that's not what Congress told Treasury to hold.

JUDGE MILLETT: Well as presently constituted, does that mean those shares as presently constitute include a dividend equal to 100 percent of any profits, is that the theory, or is it that --

MR. CAYNE: No, that's --

JUDGE MILLETT: -- they've got their shares,

but --

MR. CAYNE: No, no, that --

JUDGE MILLETT: -- processes could still --

MR. CAYNE: -- a term of the shares because, again, we have to go back to the underlying agreements. The whole purpose is to --

JUDGE MILLETT: But how could that --

MR. CAYNE: -- keep the --

JUDGE MILLETT: -- be a term of the shares because they didn't buy any shares in 2016 --

MR. CAYNE: I'm sorry?

JUDGE MILLETT: -- or they didn't buy any, or their argument is they didn't acquire any new shares, so --

MR. CAYNE: No, no, no, and that's correct, there were no new shares --

JUDGE MILLETT: Right.

MR. CAYNE: -- but certain of the terms governing the shares changed, that's what the Third Amendment did, it changed some terms. And those terms, and the shares, the shares that Congress said that Treasury must hold were governed by the terms of the PSPAs, as amended by the First, Second, and Third Amendments, so that's what Congress had in front of it, that's what Congress told Treasury to hold.

And also, Your Honor, though, we hear lots of discussion that this was a takeaway, this is awful, this is

a seizure of assets, well, first, as I mentioned, on the legislation that's part of the charter act it required Treasury to make a three-step emergency determination before it agreed to infuse these funds, and that three-step determination required Treasury to consider market stability to prevent disruptions in the availability of mortgage finance, and to protect tax payers. That was it. It wasn't about protecting shareholders, and -- yes, Your Honor?

JUDGE BROWN: But that was Treasury, right? Which was --

MR. CAYNE: No, I'm just saying that --

JUDGE BROWN: -- lending its money, and Treasury was not the conservator as I understand it.

MR. CAYNE: That's correct, Your Honor.

JUDGE BROWN: Okay.

MR. CAYNE: But this is the provision that is in the charter act of the two enterprises, and it says Treasury may lend, infuse its money on such terms as Treasury directs, and it says that the enterprise, now the conservator, may agree to that. So --

JUDGE BROWN: Right. And what they first agreed to as I understand the Second Amendment, right, was that they would have dividends, and that they had a warrant to buy up to 80 percent of the common stock --

MR. CAYNE: And Your Honor --

JUDGE BROWN: -- is that correct? And so, presumably Treasury was acting under that mandate when it made the Second Amendment, right?

MR. CAYNE: That's correct. But Your Honor, if I may respectfully correct something the Court just said, and I'm not surprised the Court said it because it's consistent with the presentation of Plaintiffs, when you read, for example, the class action briefs you would think the original transaction was the exchange of one stream, the dividend that was $19 million, and that was, that is not the case. There was a second stream, it was called the periodic commitment fee --

JUDGE BROWN: Right.

MR. CAYNE: -- and that had been waived for three years, but the periodic commitment fee, which was a term included in the initial agreement, was sufficiently significant that subsequent to the enactment, subsequent to the execution of these agreements the United States Congress passed special legislation called the Pay It Back Act that provided any and every dollar ever paid pursuant to the periodic commitment fee must be directed to the pay down of the national debt. And I'm not standing here arguing to the Court would this have not been more than all the profits, it would have been less than all the profits, but it's something that Plaintiff should have presented. If you look

at the class action brief you'll see captions, Treasury was given the right, captions of their full sections, Treasury was granted the right for all, to all future profits for zero, no consideration. Well, that's just not true, there was the $19 million, and there was this periodic commitment fee, and if the Court were to look you'll see from 2010 through the time that the Third Amendment was signed there are a series of letters from the Department of the Treasury to the Federal Housing Finance Agency, each of which states, and again, this is inconsistent with any kind of profit grab going on, each of which states that due to the adverse economic circumstances of the national mortgage markets we, the Department of Treasury, waive for this quarter our right to a fee pursuant to the periodic commitment fee. And just to look at the terms of that fee it says, and this is right in the agreement, the periodic commitment fee was intended to compensate the tax payers for the market value of the remaining commitment by the Department of Treasury, and we hear a lot in the briefs and in the discussions this morning to the effect that well, everything's been paid back and more, and so this is all behind us, no, no, no, $189 billion into the two enterprises is what through today has been infused, but as of today, and into perpetuity until these conservatorships have wound down the United States Treasury remains obligated to infuse up to $258 billion to assure

that these institutions based on something that happens tomorrow, next week, next year, don't face receivership again. So, this periodic commitment fee that Class Plaintiffs ignore, not once do they mention it, it is supposed, if it was assessed --

JUDGE MILLETT: How much would that have been if it hadn't been waived, or going forward if you didn't have that abandoned in the Third Amendment how much would that have been?

MR. CAYNE: Your Honor, as I said, I have --

JUDGE MILLETT: How much were the ones that you waived?

MR. CAYNE: I'm sorry?

JUDGE MILLETT: How much were the commitment fees that were waived?

MR. CAYNE: No, all I -- the commitment fee has never been determined. All I'm saying is had the Third Amendment not been executed, Treasury was giving up not only the right to the $19 billion, it was giving up the right to the periodic commitment fee, which was under the terms of the agreement intended to reflect the value of this --

JUDGE MILLETT: No, I understand that, but does anyone have any sense of how much that would have been worth?

MR. CAYNE: The only sense I have, Your Honor, is

the fact that Congress passed the legislation indicates well, they thought it was worth, it was significant enough to pass special legislation to do. But to be clear, even if there wasn't a periodic commitment fee, there's nothing to examine in this transaction because the great bulk of the discussion between the Court and Counsel this morning had to do with well, what does this term mean, and was this a good deal or a bad deal? Well, I'll stipulate for this purpose let's just stipulate that it was a bad deal, and in retrospect something else should have been agreed to. But this is not an APA case under any arbitrary and capricious, or other standard, the only issue for this Court to resolve is whether the conservator exercised the power granted by Congress, and that in this case is a simple determination because the conservator exercised the power, the power to operate the institutions, the power to enter into contract, when it executed the original agreement in 2008, and that has never been challenged. And what are we dealing with her? We're dealing with an amendment --

JUDGE BROWN: Well, what if that's not actually the question here, what if the question is not whether the conservator exercised the power, but whether the power that they exercised was the power authorized by the statute, or whether they acted ultra vires --

MR. CAYNE: Right.

JUDGE BROWN: -- right?

MR. CAYNE: Yes, Your Honor, and the power that I'm suggesting that was exercised here was the power to operate the institutions, the determination was made that without these agreements the institutions couldn't operate at all because they do into mandatory receivership, and down the road as laid out in great detail in our colleagues' briefs from the Department of Justice, a determination was made that if we leave things as they are there may be a lot of periods --

JUDGE BROWN: Right.

MR. CAYNE: -- or some periods where the $19 billion dividend exceeds the amount of profits for that year, which will have the effect of reducing the Treasury commitment, and perhaps shorting the life, giving less backup support, and that was a, you know, a paradigm of a business judgment. The business judgment was made by the conservator that this new arrangement will better allow the preservation of the commitment. And for purposes of the Court's analysis I would, the Court should say well, that was clearly a wrong judgment, maybe the Second Amendment was better, maybe a Fourth Amendment with a different paradigm would be better, but that is the heartland of what Congress said, we are a power that we are investing in the conservator that we don't want to authorize third parties,

or shareholders, or courts to challenges, we want --

JUDGE BROWN: All right.

MR. CAYNE: -- this to operate as a business.

JUDGE BROWN: Mr. Cayne --

JUDGE GINSBURG: Mr. Cayne --

JUDGE BROWN: -- I think -- did you have a question?

JUDGE GINSBURG: Yes.

JUDGE BROWN: Okay.

JUDGE GINSBURG: When you started your argument I thought that you were saying that the only question before the Court, or the only one we need answer arises under 4623, okay? And I asked you whether this was a situation in which there had been a discretionary supervisory action, and I think you said no, this was a reclassification of the capital structure.

MR. CAYNE: I've spoken way too long and I forget most of what I've said already, Your Honor, but what I, the way I would answer your question now --

JUDGE GINSBURG: I've been trying to keep it in mind.

MR. CAYNE: Yes, what I would say now what it was is there used to be a capital system that said the enterprises had to have capital based on certain percentages and calculations --

JUDGE GINSBURG: Yes.

MR. CAYNE: -- and that system was eviscerated, eliminated as it applied to the enterprises in its totality, and instead there was a new system, and the new system was --

JUDGE GINSBURG: Yes, I think you used the word paradigm, right?

MR. CAYNE: Yes, it's a new paradigm. Yes.

JUDGE GINSBURG: Okay.

MR. CAYNE: Yes, Your Honor, I did. The new paradigm is a Treasury support.

JUDGE GINSBURG: But you raised that in connection or in response to the Court having asked you to address Section 4623.

MR. CAYNE: Yes, Your Honor.

JUDGE GINSBURG: Section 4623 contemplated, addresses two types of decisions, it says a regulated entry that is not classified as critically under-capitalized and is the subject of a classification change, that's one action; or of a discretionary supervisory action taken under this subchapter by the Director, that's the second one, all right? Now, I asked you if this was a discretionary supervisory action, and I thought you said it was a, because of this paradigm point it was a change in the classification with respect to its capital.

MR. CAYNE: Change in the system that applied to --

JUDGE GINSBURG: Okay, change in the system.

MR. CAYNE: -- the measuring -- yes.

JUDGE GINSBURG: But what the words are is the subject of a classification, okay? So, there seems to be in the statute a whole typology of classifications, adequate recapitalized, and then under-capitalized, and within that significantly under-capitalized, critically under-capitalized, okay?

MR. CAYNE: That's correct, Your Honor.

JUDGE GINSBURG: Was there a change?

MR. CAYNE: Yes, Your Honor, that entire system by virtue of the Director's action was set aside, there is an issuance by the Director that says this system doesn't apply.

JUDGE GINSBURG: Setting it aside is not making a change within the grid, it's moving off that grid, right?

MR. CAYNE: Well, I would say that it's before that change institution you have to comply with this, now you have to comply with --

JUDGE GINSBURG: Okay.

MR. CAYNE: -- that.

JUDGE GINSBURG: So, if it's not a change in this menu that's given here then it's a discretionary supervisory

action, those are the only two possibilities under 4623, if you think 4623 is a jurisdictional body.

MR. CAYNE: And Your Honor, I'm just at a slight disadvantage because I didn't know this was going to come up, I don't have that statute in front of me --

JUDGE GINSBURG: Well, you addressed it --

MR. CAYNE: But, right --

JUDGE GINSBURG: -- with some confidence when you started.

MR. CAYNE: But, right. Well, I read it before I walked in, Your Honor --

JUDGE GINSBURG: Would you like to read it again?

MR. CAYNE: -- on an iPhone. But may I?

JUDGE GINSBURG: Please.

MR. CAYNE: Thank you. Thank you, sir.

JUDGE GINSBURG: You're welcome.

MR. CAYNE: And --

JUDGE GINSBURG: If you ignore my marginal notes.

MR. CAYNE: I can't see anything. And what I'm looking at is --

JUDGE MILLETT: I think the question is whether this is an action of the Director under this subchapter within --

MR. CAYNE: Right.

JUDGE MILLETT: -- the meaning of 4623.

JUDGE GINSBURG: Supervised revision.

MR. CAYNE: Yes, and I'm just looking right now for the withdrawal language in the statute, Your Honor.

JUDGE MILLETT: It's in (d).

MR. CAYNE: D? Okay. So, it says the withdrawal, and this is where I was comparing to the withdrawal under the capital directives, and under the cease and desist proceedings for banking agencies where it says except as provided in this section no court shall have jurisdiction to effect by injunction or otherwise the issuance or effectiveness of any classification or action of the Director under this subchapter. And what I'm suggesting, Your Honor, is that the issuance of a directive saying capital classifications no longer apply during conservatorship was an action under 12 U.S.C. Section 4623 that the Court or any court has no jurisdiction to effect by injunction or otherwise.

JUDGE GINSBURG: But just to be clear, not because it was a change of classification, but because it was a supervisory action putting the whole classification scheme to one side.

MR. CAYNE: I wouldn't disagree with that statement --

JUDGE GINSBURG: Okay.

MR. CAYNE: -- Your Honor, yes.

JUDGE GINSBURG: Okay. Thank you. May I have the statute back? Thank you.

MR. CAYNE: Thank you very much. I should have been better prepared. I apologize.

JUDGE GINSBURG: Well, you didn't have much notice.

JUDGE BROWN: All right.

MR. CAYNE: But --

JUDGE MILLETT: I think if Counsel wants to submit supplemental briefs on that, that would be fine.

MR. CAYNE: Your Honor, we'd be obviously pleased to submit supplemental briefs, but we obviously think the answer is clear, but we'd be happy to document it in briefing if that would be useful.

JUDGE GINSBURG: It may become less clear on rebuttal.

JUDGE BROWN: All right.

MR. CAYNE: Unless there are any other questions --

JUDGE BROWN: Mr. Cayne --

MR. CAYNE: -- I will sit.

JUDGE BROWN: -- we think we understand your argument. Thank you.

MR. CAYNE: Thank you, Your Honor.

JUDGE BROWN: Mr. Stern.

ORAL ARGUMENT OF MARK B. STERN, ESQ.

ON BEHALF OF JACOB J. LEW

MR. STERN: May it please the Court. The Court's been very generous with its time this morning, and I am primarily here at this point to answer the questions that have been raised in the Court's mind by the briefs and the preceding colloquies. Obviously, sort of there's been lots of discussion in and out sort of what sort of the merits of some of these claims in the, to state the obvious the question that's presented by Judge Lamberth's opinion is whether the two critical provisions of HERA, the explicit bar on judicial review, and the transfer of rights provision bar these claims, and the Plaintiffs have advanced a number of theories for why this Court should imply an exception. And I think it's very important that this be sort of seen sort of, an interpreted in light of sort of the particulars of what was before Congress, because yes, this does come from FIRREA, yes the FIRREA case law is relevant, but this is also a very particular kind of instance which was going to be applied, like, and Congress understood what was going to be happening here, this is very different from the broad application of the judicial sort of removal of a general preclusion of review, sort of, in cases that are going to come up, sort of, you know, in a whole variety of unforeseen contexts. And what Congress knew in particular, whatever

the, sort of, ultimate scope of these provisions is the one thing that we know is that this was all enacted as part of Congress addressing institutions that are indisputably failing, and this was factorable here today. It all is the result of this legislation.

JUDGE GINSBURG: Well, Plaintiffs have suggested that there was some internal disagreement as to whether they were failing, and it wasn't undisputed.

MR. STERN: I'm sorry, Your Honor, I was referring to the original 2008 --

JUDGE GINSBURG: I'm sorry. Okay.

MR. STERN: -- which sort of just in terms of trying to understand what, how we should be interpreting these provisions. Because what Congress, one thing that Congress understood was that there was going to be sort of an enormous amount of tax payer money that was going to go into this at an enormous risk, I mean, looking back at a lot of the things that happened in 2008 it's easy to forget what it all looked like to regulators and Congress at the time, and the extent to which the Government was being criticized for putting gigantic amounts of money at risk with no guarantees of return. And one thing Congress understood was that there was going to be this massive infusion, and it was going to last for a long time. This Treasury commitment is crucial, and this also I think is undisputed, this Treasury

commitment that remains ongoing, and this is an ongoing risk to the tax payer, and that's out there. So, the question is when Congress says we're transferring all the rights of the shareholders in this institution to the conservator, and when it says there should be no action to restrain sort of the conduct of this conservator, did Congress mean for there to be room for claims that this was sort of a bad feel, this isn't really the way, you know, that a conservator acts, this sounds more like somebody who's thinking about putting sort of like the possibility of liquidation, so maybe that's sort of kind of a little bit more than we expected from a conservator. And that is not something that could possibly have been intended, nor can it possibly be the case that knowing the stakes that were involved in this that Congress would contemplate actions for rescission of agreements that were going to govern this. And one thing that we know is that Congress knew it was going to be keeping a weather eye on what was going on. And in 2015 Congress addressing all the circumstances that are presented here says, and addresses the purchase agreements as amended, and it notes like the Third Amendment as well as all the other amendments, and it says, tells Treasury you've got to hold on to your preferred stock, you can't sell it, and it's the sense of Congress that Congress should enact and the President should sign legislation to determine the fate of

Fannie Mae and Freddie Mac.

JUDGE GINSBURG: Okay, well --

JUDGE MILLETT: Well, how would you answer --

JUDGE GINSBURG: -- what -- if the Plaintiffs had all of the relief they're requesting would it entail the Treasury selling shares?

MR. STERN: No, we're not saying that -- I'm sort of pointing to that, Your Honor, just as a reflection of what it was that, like, where Congress fits into this. Congress is overseeing this, and --

JUDGE GINSBURG: Okay. But the Congress acts by enacting a statute, and Mr. Cayne and you both seem to want to avoid discussing the terms of the statute in any detail, and viewing this at 30,000 feet looking at the purpose in 2008 and so on, but we have to grapple with the terms of the statute, part of which was drafted from the FDIA, or through FIRREA, parts of which were tacked on for this occasion, and we're stuck with that.

MR. STERN: I couldn't agree more, Your Honor.

JUDGE GINSBURG: Okay. So, let's --

MR. STERN: If we look --

JUDGE GINSBURG: -- delve into it.

MR. STERN: Right. I mean, let's understand that the statute itself doesn't contain words that permit this to go forward, we have to imply exceptions, and in implying

that we're, like, it's based on a reliance of courts that implied exceptions under FIRREA. Now, whether or not Congress intended to incorporate those exceptions, sort of, that were judicially implied into this language, there's no indication that Congress did that, but as we've argued at length in our brief, if Congress did do that there is no ultra vires action --

JUDGE MILLETT: Well, why wouldn't it be ultra vires to say the one thing we know a conservator can't do is adopt a plan by which the companies, the regulated entities can never actually become solvent, they just will never have a penny in the bank account, it always goes over to your Treasury, how can that be, I think that's their argument, that can't be what a conservator does, and so that can't fall within 4617(f).

MR. STERN: I mean, I think that there are a couple of answers to that. I'll forget the second answer after I give my first one.

JUDGE GINSBURG: Well, then tell us the second one first.

MR. STERN: I think at this point I may have forgotten both of them, Your Honor. The, I mean, first the, when there's a reference to what a conservator can do, that, and I hate to sort of say we have to look to the nature of this statute, and this statute what we have is, the purpose

of this is to keep Fannie Mae and Freddie Mac performing the functions that they as government sponsored enterprises were supposed to be doing. And as Judge Lamberth said, look, they're not in liquidation, it's now been sort of, like, you know, three and a half, almost four years since the Third Amendment was entered into, and there's not been a liquidation, the enterprises are solvent, the capital, there, like, is the, and they can proceed this way because of the enormous, like, underlying commitment of tax payer money, and that's sort of one level of answer.

Another level of answer is that the situation, like, there are no good answers for exactly how to proceed, sort of, in this, and it's been Treasury's position, you know, for a long time that ultimately legislation, you know, is needed to deal with this, and indeed that was the sense of the Congress resolution, also. But it's not like there was sort of like, well, here's the terrific way of approaching it because one way of doing it was, like, Treasury going okay, let's, like, we want dividends, you know, let's do that, you know, that turned out to be for a long time fairly, sort of, not, sort of, good, the, you know, for all the reasons, you know, that, you know, we're discussed in the brief, and, you know, and there was, you know, that very severe spiral.

So, one answer is to go, and the parties could

have decided this, sort of, like, right at the beginning could go look, here's what, you know, we've put a lot of money on the line, we're going to waive our periodic commitment fee, we're also entitled to dividends, but we don't want to put you under, we don't want you making draw on the commitment, so what we'll do is it's unclear when and if and to what extent you're ever going to be making profits, but we will take that risk, and, you know, and maybe there will be quarters where we do like with Treasury and the tax payer, like *Noel*, you know, and then there will be others where we don't get anything at all. And that, they could have decided to do that right at the outset. And in fact, the way that it's played out is that yes, as it happened there was, like, a big spike, sort of, in 2013, sort of, in profitability, which was all but largely from the one time recognition of the tax deferred assets, goes down notably the next year, the year after that in 2015 would have been paying under the old dividend arrangement than they were paying under the Third Amendment, and you don't know what's going to happen. And this Treasury commitment, like, I mean, part of what the enterprises are paying for, even though we've waived the periodic commitment fee, is the enormous amount of money that has been sunk in, but the fact that there remains on the line sort of this $250 billion approximately of tax payer money that the

enterprises can draw on, and that is absolutely crucial to their existence. And this is what these review provisions, you know, which is what is at issue here, are designed to protect is no, we don't get to fight about exactly what the conservator thought was the best way of dealing with this very difficult situation, and to say well, you know, a really good conservator would have done something else, I think that what they did was entirely appropriate and sensible, but whether you agree or disagree with that, that goes right to the kinds of things that were meant to be protected, and don't fall into what anybody would sort of typically characterize sort of as ultra vires in the sense that there's an explicit statutory prohibition, and you stepped over that line. There's nothing like there here even alleged.

JUDGE GINSBURG: Well, the statute does have a limitation, I mean, the broad discretion of the FHFA here is to act as necessary and appropriate to conserve as conservator or as receiver, and the Plaintiffs came in saying that's not what happened, and you all produced an incomplete administrative record.

MR. STERN: Well, obviously we take issue with that idea that the administrative record was incomplete. But certainly what you can't --

JUDGE GINSBURG: Well, there are now things that

have been produced that were not submitted, right?

MR. STERN: I mean, Your Honor, you know, we rest in, like, in posing the motion to supplement I think we laid out our position on why it would not be appropriate, and, I mean, you know, and there are things like, you know, the statement of the CFO who says well, maybe I would have, you know, like I would have made a comment. Now, that statement is from like August, 2012, I believe that's the same CFO who signed the securities disclosure form that Your Honor was referring to that, like contained --

JUDGE GINSBURG: The 10-Q?

MR. STERN: Yes, the 10-Q. That, sort of, like, contained all the language, you know, that Your Honor read out loud. And regardless of what she says that, you know, she might have, like, said to somebody then, she was signing a form that went to the regulators, and that, the idea that, like, this wasn't the, sort of the record, you know, or the kind of thing that was supposed to be looked at, you know, as opposed to, like, statements that people make, you know, in discovery that are untested, that are their recollections about things that were said, I mean, like, that's really not the way that an administrative record could be put, should be put together. And that would sort of open up all kinds of administrative records, the claims that they should be supplemented.

JUDGE GINSBURG: Well, *Overton Park* does that, doesn't it?

MR. STERN: No, I don't think so, Your Honor. I mean, it's true that *Overton Park* says that if you really can't figure out what's going on in the case that the Agency explanation isn't adequate that you can remand to the Agency or request additional declarations from the Agency. And we could certainly put in additional declarations, but we think that what the Agency has said, like, is clear, and this is sort of a funny kind of APA case, because, remember, this is coming up in the context of a, sort of amendment to a purchase agreement. So, this is sort of like the issuance, like, of rule-making. So, you know, I think that, you know, it could be that exactly what one expects from an administrative record might vary.

JUDGE GINSBURG: You see, it goes beyond even what you said, though, Mr. Stern, it says the court may require the administrative officials who participate in the decision to give testimony explaining their actions.

MR. STERN: Yes, Your Honor, and there also, as Your Honor is aware, lots of decisions talking about not having, like, administrative officials call --

JUDGE GINSBURG: Well, the District Court doesn't --

MR. STERN: -- for a probing of the --

JUDGE GINSBURG: -- do that lightly, of course.

MR. STERN: No.

JUDGE GINSBURG: It's a last resort.

MR. STERN: And there's certainly no basis for doing it here, because if you, if, look, look, if everybody knew, which of course they didn't and couldn't, but if everybody knew in August of 2012 exactly what the pattern was going to be there would be, you know, for the next three years, you looked at it, you go well, okay, like, that's not, like, unlawful, you know, there's no basis for saying that there should be administrative review even if you assumed that everybody knew exactly what was going to happen.

JUDGE MILLETT: Well, they would say imagine if, assume the worst record, administrative record possible, and that is that it turns out everybody lined up saying woo-hoo, they're now solvent, and we think they're going to stay solvent for the next three or four years, let's take, let's have a new agreement here, and we're going to take all of that money and leave them not a penny to get back on their feet with, could a conservator do that? I've just taken the worst administrative record possible, would that prove their case that you weren't acting as a conservator?

MR. STERN: I mean, I think that a conservator could do that given the position, like, the extent to which,

like, the ongoing Treasury commitment, you know, is crucial, they could decide that, I mean, but you need to know, I mean, maybe there's some fact working in that hypothetical that is extremely problematic, but also, I mean, it should be clear, even, like, nothing that has been adduced, like, sort of would support that kind of claim, I mean, like, what Mr. Olson says, you know, when you asked is, like, would it make a, would it have made a difference, like, if everything had gone, like, south, like, in a big way, you know, for the next few years, and the answer was no. It was, you know, the -- it's a standalone, I mean, there's, you know, they've got two variance, one of them is well, you know, they should have known in 2012 that things were going to be better at least for awhile, but the more fundamental one is no, this is just a deal you can't do, doesn't matter how good, like, it's going to be, how much it's going to advance, sort of, like, sort of the interests of everybody involved in a very difficult and perhaps I always hate to say unique, but perhaps unique situation.

JUDGE GINSBURG: The administration took a position I think a year earlier, I think in 2011, that the GSE should be wound down, right? There's a white, you know, you know, a press release or something like that, but then comes the Third Amendment, and it's now concrete, we're going to wind down these GSEs, but we're not going to pull

the receivership trigger, which would, of course, have required, we're expecting the liquidation preferences of the Plaintiffs.

MR. STERN: Well, it's not a liquidation, and the statute, I mean, first of all, the statute specifically contemplates, like, the wind down as being a power that can be asserted, like, in the conservatorship, you know. But it's, like, what --

JUDGE GINSBURG: Does it? Where is that?

MR. STERN: It's in, it's 4617(a)(2), which allows the conservator as well as the receiver to take actions for the purposes of reorganizing, rehabilitating, or winding up the affairs of the GSEs.

JUDGE GINSBURG: Yes, well, as I read that, it's, the word respectively is implicit in there.

MR. STERN: I disagree, Your Honor, because there are a lot of powers that are set out specifically for the conservator and the receiver in the statute, this one doesn't make that. But I think more fundamentally there is, like what the, I believe that the Third Amendment talks about an acceleration of, like, the, of like of the enterprises reducing or retaining mortgage portfolios, and in that sense that's a kind of winding up. The, like, what you have in terms just of their ongoing functionality is not, like, in any sort of particular, sort of, like way,

it's winding up, what Treasury does think, you know, is that given the difficulties that are involved in sort of like a recapitalization of any conservatorship, and, you know, we've said this many times that legislation is appropriate. But --

JUDGE GINSBURG: But when the Third Amendment was announced the Treasury said we're going to wind this thing down, we're going to kill it, we're going to drive a stake through its heart, and we're going to salt the earth so it can never grow back.

MR. STERN: I don't remember that language.

JUDGE GINSBURG: Yes. You may be confusing it with Tortego (phonetic sp.). But that was the gist of it, we're not going to allow it to be recapitalized in any way, and we're going to look to a future in which the GSEs don't play a role.

MR. STERN: Well, I think what Treasury has said repeatedly is that it thinks that congressional action is appropriate, and we've discussed, like, the difficulties of recapital --

JUDGE GINSBURG: But defending the congressional action it has to live within the statute it's got.

MR. STERN: Yes, and it is. I mean, because the alternatives are not good ones, I mean, it's not, like, what they had wasn't a good alternative, I mean, that wasn't

doing well. What's happened now it's like they're all sort of things to deal with a very difficult situation, and --

JUDGE GINSBURG: Well, I think they had two alternatives to act as a conservator, which they didn't want to do, or to act as a receiver, and move towards liquidation.

MR. STERN: No, Your Honor, I don't think that this is a move towards liquidation, there has not been a liquidation, and again --

JUDGE GINSBURG: Well, they could move slowly considering the size of the portfolio --

MR. STERN: Well, but --

JUDGE GINSBURG: -- they would have to move slowly.

MR. STERN: -- and they could legitimately do that, like, if that's what they wanted to do, they could do that.

JUDGE MILLETT: So, if you're moving --

MR. STERN: There's nothing wrong with a conservator doing that.

JUDGE MILLETT: If you're in the moving stage, you're not yet liquidating, is that something conservators do, or can only a receiver do the moving to liquidation?

MR. STERN: You can move towards a, I mean, a conservator can properly go, you know, we're going to, like,

sort of that this isn't working, we're going, like, we need to set the stage for liquidation. I don't say that that is what's happening here at all, I have no reason to believe that that's the case. I'm just saying that a conservator could do that, and the statute specifically refers to rehabilitating, reorganizing, winding, and winding up, those are all things that you, like, even if it didn't say that --

JUDGE MILLETT: How would we know when winding up stop and liquidation begins?

MR. STERN: Because you see a liquidation. I mean, like, you know, right now this, like, these things, these enterprises are functioning, they're performing their statutory purpose, that's what that legislation was all about. And, like, the stockholders, like, you know, are not the people who Congress wanted to sort of, like, be able to come in --

JUDGE GINSBURG: All right. Okay.

MR. STERN: -- and sue, and that's all that this, like, case is about is do they get to come in and say I'm not happy with the way that you guys are dealing with this.

JUDGE GINSBURG: Let's say that it said that directly, the stockholders may not sue, okay? Shareholders may not sue. That surely means in their capacity as shareholders, right? Creditors can sue, right? Tradesmen can sue?

MR. STERN: Yes.

JUDGE GINSBURG: Okay. So, they've come in in part asserting what they say are direct claims, not derivative claims, right? Not in their capacity as a, not -- in other words, the succession clause succeeds their rights as shareholders, but their, which would be their derivative rights.

MR. STERN: Well, I mean, again, I mean, the language is, like, very broad, all rights, titles, powers, privileges of the regulated entity, of any stockholder, director with respect to the entity, and the assets of the regulated entity, I mean, that's really broad. But as we discuss in our brief, like, these are, I mean, these are quintessential derivative claims, what they're saying is that the conservator, like, isn't, like, minding the store --

JUDGE GINSBURG: Well, if it's a --

MR. STERN: -- like, in looking after the enterprises.

JUDGE GINSBURG: If it's a quintessential derivative claim then the relief accrues to the corporation and not to them, right?

MR. STERN: Yes.

JUDGE GINSBURG: And they want their liquidation preferences, that's not an asset of a corporation.

MR. STERN: Well, I mean, that's what they say, but what they want, I mean, yes, I mean, everybody wants money for themselves sooner or later, I mean, like, you know, that's always the feature.

JUDGE GINSBURG: But the question is whether they want it directly or through the corporation.

MR. STERN: Right, and they want it, but they --

JUDGE GINSBURG: They say they want it directly.

MR. STERN: What they want is they're saying that the value of their shares, I mean, like, I mean, they don't, you know, they don't want this in liquidation, they don't want liquidation preferences, they want the value of their shares to go up, you know, they sort of, like, you know, at this point we're talking largely about speculators, and the idea of speculation is quite, you know, legitimate, you buy low, you try to sell high, they're going my shares would be, like, higher, you know. Fair enough. But Congress has also said you don't get to bring these lawsuits.

JUDGE GINSBURG: Well, they had a preexisting right to bring the lawsuit, the succession clause takes away something.

MR. STERN: Yes, it takes away.

JUDGE GINSBURG: But does it take away a direct claim? It doesn't take away a, just because a shareholder is a shareholder doesn't mean that his loss of rights as a

shareholder means his loss of rights in any other capacity. If he were also a tradesman he'd still retain his trade account.

MR. STERN: Yes. That's right. I mean, we're not -- but what we've got here is sort of something that's going sort of fundamentally to how the enterprises should be compensated, or how they should be compensating Treasury. I mean, and the claims are, like, are derivative of what they say is the harm to the enterprises, and again --

JUDGE GINSBURG: Well, that's a question of Delaware and Virginia law, correct?

MR. STERN: Well, I think it's, I mean, we've argued and I think correctly in our brief that this is a matter of federal law, but federal law, like, sort of, I don't think that there's a --

JUDGE MILLETT: Well, the complaint doesn't even ask, on their shareholder claims does not ask for damages to them, it asks for compensatory damages and disgorgement in favor of Fannie Mae. So, that sure sounds like they're not getting a recovery, correct?

MR. STERN: I think it's a derivative claim, Your Honor.

JUDGE MILLETT: All right.

JUDGE GINSBURG: Insofar as they want their liquidation preference they don't get, Fannie Mae doesn't

get anything.

MR. STERN: Yes, but the, look, again, that's like, like anything else that is sort of, you know, like a derivative of, like, sort of, like, harm, and it's also, like, so far away from being, like, a ripe claim, and what they, they don't want, I mean, the purpose of the relief that's being sought here, like, isn't to put, like, a directive to put this into liquidation so that they can realize their liquidation preferences, nobody wants that, I mean, that, that really, that really isn't what this lawsuit is about.

JUDGE GINSBURG: Well, what they do want is some sort of preservation of those liquidation preferences for when and if there's a liquidation, right? Which will have, as you said, an immediate effect on the price of their shares.

MR. STERN: Well, I mean, their liquidation preferences, like, haven't been, you know, taken away, I mean, what, you know, you know, what they've got, they've got, I mean --

JUDGE GINSBURG: What have they got?

MR. STERN: You know, look, here's what, what they have is a lot more than anybody would have had if not for these deals. I mean, like, you know, I mean, I realize, like, you know, I'm sort of beating a drum here, but, you

know, this is, I mean, in some respects, you know, like the shareholders are, like, the beneficiaries, and almost the incidental beneficiaries of a huge tax payer risk, you know, and what Congress was trying to do was to make sure that the, that the conservator and Treasury could take the steps that needed to be taken when everybody knew it was going to be a difficult time with an ongoing huge Treasury risk at issue. And we think that these things are really clear. And I thank you so much for your time.

JUDGE BROWN: Thank you. I know that no one had any time left because we used up all of your time, but we'll give you back three minutes for rebuttal.

ORAL ARGUMENT OF THEODORE B. OLSON, ESQ.

ON BEHALF OF THE INSTITUTIONAL PLAINTIFFS

PERRY CAPITAL LLC, ET AL.

MR. OLSON: Thank you, Your Honor. In the first place, this is who did it, what did they do, and why did they do it. We know that it was Treasury --

JUDGE GINSBURG: All in three minutes.

MR. OLSON: -- and FHFA working together, the record is replete with that, the statute precludes Treasury from supervising or directing what the FHFA does as with respect to its position as a conservator. Now, that is one violation of the statute, and there's a reason for that, because the FHFA is supposed to act as a fiduciary in its

capacity as a conservator, the Treasury would have separate interests, and it has the interest, and that's all over the record, too, of the tax payer. And so, that's what happened here, we saw the Treasury directing something that happened that they decided that was in the best interest of the tax payer, and there's plenty of the record that we have, probably more in the record that we don't have, that this was done to strip the stockholders of any residual value.

Now, when FHFA announced this in the first place on September 7, 2008 they answered this questionnaire, I referred to it before, 2443 in the Joint Appendix, the stockholders will continue to retain all rights in the stock's financial worth. Now, we find out that they didn't really intend that, or the Government didn't really intend that, but that what they also said on the same page, can the conservator determine to liquidate the company, answer, the conservator cannot make a determination to liquidate the company. Now, that is the FHFA determining or articulating what powers it has as a conservator under the statute that it administers.

Now, what we have is a shell game going on here, first of all, the Government decides that there's going to be a conservator and it has specific responsibilities and duties as a fiduciary acting as a conservator, it also then says well, we can act as a receiver at the same time, those

responsibilities, and those statutory duties are separate, and if you have, if you're acting as a conservator that is different than acting as a receiver.

What we know now, and I will summarize, that what the Government did acting together is decide that this was in its best interests of the tax payer, something that Congress might have decided to do, and by the way, the Appropriations Act, the record is quite clear, and we quote the supervising sponsor of that massive appropriations bill, it didn't validate or ratify what's going on here, and the sponsor specifically said so, but what has happened here is that the Government decided that it would bring these entities to a close, and it said that repeatedly, to liquidate them, and to make sure that they have no further value to the stockholders. They said, the FHFA said in the *Samuels* case that we quote in our briefs that they are net worth insolvent now.

The, the, since the, since this all took place there hasn't been a single dollar gone into these entities from the Treasury. The record is difficult for us to deal with because the Treasury Department talks about well, there may be some things in the record, but you really wouldn't be concerned about those things, the FHFA didn't even try to produce an administrative record, they did a --

JUDGE MILLETT: But you did say your --

MR. OLSON: -- they gave us a summary --
JUDGE MILLETT: You said your position would be the same whatever the record showed --
MR. OLSON: Well, it would -- we --
JUDGE MILLETT: -- on motivation, correct?
MR. OLSON: Well, we are entitled to an administrative record, and to the extent that we are entitled to that it should be remanded to the District Judge to insist on a record because --
JUDGE MILLETT: It's your position that --
MR. OLSON: -- we're entitled to know what happened and why it happened. But we're also saying --
MR. OLSON: But your position wouldn't change, right?
MR. OLSON: We're also saying, Judge Millett, because on the record that what we do have is we have the FHFA taking a position that it will be a conservator, we know they have said in their, it is said in the statute, it said in their regulation, it said in other things what they must do, which is to return the entity to a sound and solvent condition. We know that they haven't done that, we know that they have done the reverse of that. They've made it impossible. You can't have a conservator take all of the assets out of an entity. And the commitment, the Treasury commitment isn't an asset, they've said that themselves, not

under any standards is that an asset. It's a --

JUDGE BROWN: Mr. Cayne says that he will stipulate that maybe the Third Amendment was a bad deal, and so he says that's just a bad business judgment, so what's your response to that?

MR. OLSON: The response is that it might be a bad business judgment, and perhaps it was, but it was not the act of a conservator. And the power that the Government had is to make judgments with respect to the benefit of the conservator.

With respect to Section F, which we've talked about here, we referred to the *Leon* case, which specifically talks about the fact that the FHFA, which is an Eleventh Circuit decision in 2012, cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp, and this is on page 1278 of the Federal Reports. Moreover, if the FHFA were to act beyond the statutory or constitutional bounds in a manner that adversely impacted the rights of others, Section 4617(f) would not bar judicial oversight or review of the actions, because the position that they're taking now is that we can do anything we want, and we're immune from judicial scrutiny, that cannot be, and that is not what the statute says. Nor the other provisions --

JUDGE GINSBURG: I think we have that point. Did you have a succinct and devastating, and I emphasize

succinct, comment on 4623?

MR. OLSON: Yes.

JUDGE GINSBURG: The jurisdictional --

MR. OLSON: We believe it applies to those sections that are referred to there of 4614, 15, 16, 17, and the actions of, we have briefed it before.

JUDGE GINSBURG: You'll submit on that?

MR. OLSON: Well, we will be happy to submit, but we do not apply, we do not believe it remotely applies to this situation, and it is incomprehensible that this Agency never thought to raise what they now say at the suggestion of the Court that oh, this lawsuit should never have taken place whatsoever.

JUDGE GINSBURG: Yes, well Homer nodded.

MR. OLSON: They came to it late. At any rate, we think that the record needs to be developed, we have an absolute right under *Overton Park* to look into what the Government was doing, why it was doing it, the circumstances of its doing it, but that this is clear, that there, if you're going to act as a conservator, and the powers of the Government can't be in the best interests of the agency which would obliterate all the other provisions in the statute, the Agency when acting as a conservator may act in the interests of the agency fulfilling those responsibilities, but it doesn't rub out all the other

statutory provisions. And you look at their regulations in 76 C.F.R. which we've cited, the primary purpose is to preserve the entity, and return it to a sound and solvent condition.

JUDGE GINSBURG: Enough said.

JUDGE BROWN: Thank you.

ORAL ARGUMENT OF HAMISH P.M. HUME, ESQ.

ON BEHALF OF THE CLASS PLAINTIFFS

MR. HUME: Thank you, Your Honors. I'll be very brief. Mr. Cayne for the FHFA said that the shareholders have more rights in receivership than conservatorship, that is not only logically impossible, but irreconcilable with the statute. 4617B(2)(k)(i) says that it is the act of putting the entities into receivership, only receivership, that shall terminate the rights and claims of the shareholders arising out of their status as shareholders. That's the action, subject to their payment claims under C(1)(d), and other provision recognized there that it constrains, it's a limitation when it goes into receivership for shareholders. Before that they obviously have more rights, and it was acknowledged, Mr. Olson, J.A. 2443, I urge the Court to look at it. Mr. Lockhart, the Director of FHFA, or the, in their formal written answers say shareholders continue to retain all rights in the stock's financial worth. They retain rights in conservatorship to

the economic rights of their shares, they can still trade them, no one said anything that they can't trade, they can receive dividends if you're the Treasury anyway, a shareholder has rights in conservatorship.

JUDGE MILLETT: Do those rights change under the PSPAs or their First and Second Amendment?

MR. HUME: No.

JUDGE MILLETT: They didn't change at all?

MR. HUME: No, not that I'm aware of.

JUDGE MILLETT: Their order of payment?

MR. HUME: I don't think they changed, they were nullified in the Third Amendment. And Your Honor, to your question about the original deal on the prohibition on dividend without Treasury's consent, 5.1 it clearly says without Treasury's consent, it's not an absolute prohibition that would allow Treasury to consent, the reason we're not challenging that --

JUDGE MILLETT: All right. So, that's the right you had coming into the Third Amendment is no dividend without Treasury's consent, and you don't challenge that?

MR. HUME: The reason --

JUDGE MILLETT: That's what I was just asking about it changing.

MR. HUME: Yes. The reason we're not challenging the provision in the original PSPA that says no dividends

without Treasury's consent is that is not the thing that has caused us not to receive dividends.

JUDGE MILLETT: No, I understand, but what -- so, the stockholder interests by the time of the Third Amendment were that we have a right to a dividend after Treasury is paid with Treasury's consent?

MR. HUME: No, it doesn't say after Treasury has been paid, it just says with Treasury's consent. It's not different than any shareholder's right to a dividend, it's contingent on the people who control the company declaring a dividend, that's all it says. They have to declare it, and that's not what happened. The reason we're not challenging that is that's not the reason we didn't get a dividend.

Since I'm running out of time, they say we don't say anything about the periodic commitment fee, the reason we don't is they waived that it had no value, it was at best going to be based on a market value, so at best it creates a fact issue of what that would be. And I want to be careful --

JUDGE MILLETT: Wait, how can you say it had no value?

MR. HUME: Well, they never, they waived it every year --

JUDGE MILLETT: Well, they waived it, but that doesn't mean it doesn't have value --

MR. HUME: Fair enough.

JUDGE MILLETT: -- going forward.

MR. HUME: Then it may have had some potential value, and I want to be careful here because there's protected information that's with the Court that would address the issue. I would simply request that the Court look at Exhibit 34 to the Institutional Plaintiff's motion for judicial notice. It's a fact issue of what the value would have been, and it's our position it would have paled in comparison to the net worth sweep and the hundred billion dollars, and tens of billions of dollars they've swept over.

This debate, Your Honors, just if I could on the direct claims, when they say we have no rights, and then they said we have no direct claims, they've never said that before. Neither they nor the FDIC, no court, as Judge Easterbrook said, no court has ever held the FIRREA succession provision, or the HERA succession provision does that, and numerous courts have allowed it. And they --

JUDGE MILLETT: Well, they haven't said it because you didn't raise it, and your complaint doesn't seek any relief on it.

MR. HUME: No, no, no. No, no, no. Sorry, Judge Millett. We absolutely raised direct claims. Our breach of contract claims were unambiguously always --

JUDGE MILLETT: Okay. Breach of contract, okay.

MR. HUME: -- uniformly direct.

JUDGE MILLETT: I was distinguishing, because I was, you had shareholder claims that were derivative and direct, and then you, as I took your briefing you also had contract claims. So, what you're calling direct claims are the same as your contract claims?

MR. HUME: Our contract claims are direct claims.

JUDGE MILLETT: Yes.

MR. HUME: They have always been direct claims.

JUDGE MILLETT: Do you have any direct claims distinct from those?

MR. HUME: We litigated them as direct claims, they were analyzed as direct claims, and --

JUDGE GINSBURG: Because the contract in question is the certificate of the shares.

MR. HUME: Yes, it's --

JUDGE MILLETT: Right.

MR. HUME: -- a contract between me the shareholder and you the company. I'm the shareholder, I get to enforce the contract. It is a direct claim, look at page six of our reply brief, those kinds of claims are always analyzed under state law as direct claims. They didn't even argue this in the District Court, or in any other case, in *Kellmer*, in the *Barnes* case, see footnote --

JUDGE MILLETT: I just want to be, I just want to

make sure I'm crystal clear in understanding this --

MR. HUME: Yes.

JUDGE MILLETT: Is your direct claim, is that just another way of talking about your contract claims, or do you use a direct claim label to mean something in addition to your contract claims?

MR. HUME: No.

JUDGE MILLETT: I'm sorry?

MR. HUME: Let me try to be very clear. Our breach of contract claims are direct claims. I don't mean to suggest there's some other amorphous direct claim. Our breach of contract claims are all direct, breach of contract, breach of implied covenant. The only issue was whether we said enough for a direct fiduciary breach claim. And on that, I'll rest on what I said before, which is we think we said enough, if not, we ask the right to amend. But on breach of contract there's no ambiguity at all, those claims were brought --

JUDGE MILLETT: Right.

MR. HUME: -- only as direct claims --

JUDGE MILLETT: Right.

MR. HUME: -- and we asked for damages in paragraph seven of our prayer for relief, below what Your Honor just read, Judge Millett --

JUDGE MILLETT: Right.

MR. HUME: -- we asked for payment --

JUDGE MILLETT: For the contract claims, right.

MR. HUME: -- directly to the shareholders, directly, nothing new is through the companies. And that -- just to -- in the *Barnes* case, the *Leven* case, the *Kellmer* case, the FHFA or the FDIC, whichever it was didn't even try to intervene on behalf of the direct claims. They admitted through their conduct that direct claims belong to the shareholders. They never even took the position in any of those cases, please see the cases in footnote six on page four of our reply, and also what happened in *Kellmer*. And it does, to what we discussed earlier, it does raise a serious issue of constitutional doubt to even suggest the shareholders, whom they admit have economic rights and interests, don't have the ability to come to court to protect them, that raises serious constitutional issues as recognized by Judge Easterbrook in the *Leven* case, and the Plaintiffs in all *Winstar* case, and by Judge Edwards in the *Waterview* case, and in the, which is cited in the *Pershing Square* Amicus brief, which I --

JUDGE MILLETT: Did you raise --

MR. HUME: -- strongly commend the Court to look at, because it --

JUDGE MILLETT: Did you raise his constitutional doubt argument in your opening brief?

MR. HUME: Did we?

JUDGE MILLETT: In your opening brief? I didn't see it there.

MR. HUME: I don't know whether we did, but the *Pershing Square* Amicus brief raises it, and it's most applicable to the direct claims.

Finally, Your Honors, this whole debate about receivership, conservatorship, what on earth should we as a country do with these two entities? It's fascinating, but it's irrelevant to the simple fact that the private shareholders had contractual rights that were breached, and our friends at the FHFA said well, you didn't do anything to save, you didn't invest to help rescue this entity, I want the Court to know that of the $35 billion of preferred, $22 billion of it was invested in 2007 and '08 when it was clear that these entities were distressed, and that can be found in the record at FHFA 631 and 2062, the document in the District Court 24-10 at 302 and 560. $22 billion in those last two years. Who's going to want to -- and they invested on the strength of those certificates that said they got paid before any common, and that's what they've done is they've taken their common and just converted it up into their senior preferred in the Third Amendment. Who's going to want to invest in financially distressed entities that might go into conservatorship if you recognize the risk of

conservatorship, you know they have broad powers, but can they rescue, make one deal, four years later when the company is doing better just change the deal so they get all the money, no one will invest, it'll be terrible for tax payers and investors. Thank you.

JUDGE BROWN: All right. Thank you, Mr. Hume. The case will be submitted. Do we want supplemental briefing on 4623?

JUDGE GINSBURG: I think we should.

JUDGE MILLETT: If they want to submit, yes.

JUDGE BROWN: All right. We would like supplemental briefing on 4623, five pages.

JUDGE MILLETT: Five is plenty.

JUDGE GINSBURG: Five pages, seven day; 10 pages, seven days.

JUDGE BROWN: Okay. Ten pages, seven days. Thank you.

(Whereupon, at 12:27 p.m., the proceedings were concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Paula Underwood — April 20, 2016

DEPOSITION SERVICES, INC.