No. 16-6680

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARNETIA JOYCE ROBINSON,

Plaintiff-Appellant,

v.

THE FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation; MELVIN L. WATT, in his official capacity as Director of the Federal Housing Finance Agency; and THE DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

On Appeal from the United States District Court
For the Eastern District of Kentucky, No. 7:15-cv-109

BRIEF OF PLAINTIFF-APPELLANT ARNETIA JOYCE ROBINSON

Robert B. Craig
Taft Stettinius & Hollister LLP
1717 Dixie Highway
Suite 910
Covington, KY 41011
(859) 547-4300

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
(202) 220-9600

February 10, 2017

Counsel for Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-6680 Case Name: Robinson v. FHFA

Name of counsel: Charles J. Cooper

Pursuant to 6th Cir. R. 26.1, Arnetia Joyce Robinson
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No publicly owned corporation has a financial interest in this case by reason of insurance, a franchise agreement, or an indemnity agreement. If allowed to stand, the administrative action at issue here will render worthless all privately owned preferred and common stock issued by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). Accordingly, the financial interests of all non-governmental holders of those companies' stock could be indirectly affected by the outcome of this suit.

CERTIFICATE OF SERVICE

I certify that on February 10, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Charles J. Cooper
Charles J. Cooper

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTRODUCTION

This appeal challenges the government's 2012 expropriation and effective nationalization of two of America's largest and most profitable companies—Fannie Mae and Freddie Mac (the "Companies"). The agency actions at issue are unprecedented in American history and blatantly at odds with the governing statute. The acknowledged purpose of the government's action is to ensure that all existing net worth, and all future earnings, of these two publicly traded companies be transferred to the United States Treasury in perpetuity; that the Companies remain in financial comas until they finally are liquidated; and that all shareholders other than Treasury lose their entire investments and never receive an additional dime. In granting the agencies' motions to dismiss, the district court erased the well-established duties of a conservator and embraced the agencies' view that a conservator may, if it chooses, run its ward for the government's exclusive benefit and enrichment, at the expense of all other interested parties and completely shielded from judicial review. That decision upends the law of conservatorships, is erroneous, and should be reversed.

In August 2012, Fannie's and Freddie's conservator, the Federal Housing Finance Agency ("FHFA"), acquiesced in Treasury's plan to fundamentally change Treasury's securities from fixed-rate dividend preferred stock that would have entitled Treasury to approximately $19 billion in 2013, to stock that entitles Treasury to receive quarterly "dividend" payments equal to each Company's net worth. That unprecedented change—known as the Net Worth Sweep—netted Treasury an astonishing windfall of more than ***$100 billion in 2013 alone***. To date, Treasury has collected nearly $256 billion in dividends from the Companies—almost $69 billion more than Treasury disbursed to the Companies, and $125 billion more than it could have collected under the terms that governed Treasury's investment before the illegal change. And, despite these enormous "dividend" payments, Treasury claims a right to be paid the Companies' entire net worth *plus* an additional $189 billion—ahead of any of the Companies' public shareholders—upon the Companies' liquidation.

Plaintiff filed suit under the Administrative Procedure Act ("APA") seeking to set aside the Net Worth Sweep. The Complaint alleges that, in entering into the Net Worth Sweep, FHFA and Treasury ("the Agencies") exceeded their respective powers under the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (July 20, 2008) ("HERA"), and that Treasury acted arbitrarily and capriciously. The district court held that the Agencies had authority to enter into the Net Worth Sweep under HERA, and that HERA shielded Treasury from claims that its actions were arbitrary and capricious. That decision should be reversed.

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

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

Third, the district court adopted an erroneous reading of a statutory provision that restricts judicial review of FHFA's actions as conservator by holding that this provision also barred Plaintiff's claim that *Treasury* violated the APA's prohibition on arbitrary and capricious agency action. In view of the strong presumption in favor of the reviewability of agency action, the district court's ruling cannot be sustained.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff respectfully requests oral argument. This appeal has major implications for the future of Fannie and Freddie and presents important legal questions, including whether a federal conservator may operate the financial institutions under its care for the exclusive benefit of the federal government.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. Plaintiff has standing because the Net Worth Sweep "aggrieved" her by eliminating the value of her stock. The district court entered final judgment as to all claims in favor of the defendant federal agencies and Director Watt on September 26, 2016, Judgment, RE 64, PageID# 1389,[1] and Plaintiff filed a timely notice of appeal on November 14, 2016, Notice of Appeal, RE 65, PageID# 1390. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether FHFA exceeded its statutory authority as conservator under HERA

[1] In accordance with 6th Cir. R. 28(a)(1), all record materials are cited to the relevant ECF PageID #, rather than the page number of the underlying document.

by assenting to the Net Worth Sweep under which the Companies must transfer all of their net assets and future profits to Treasury and are prohibited from retaining capital, thus guaranteeing that they can never resume normal business operations.

2. Whether Treasury exceeded its authority under HERA and violated the APA by entering into the Net Worth Sweep in 2012, when HERA expressly permitted Treasury after December 31, 2009, only "to hold [or] exercise any rights received in connection with, or sell, any obligations or securities [it had already] purchased."

3. Whether 12 U.S.C. § 4617(f), which forbids court actions that would "restrain or affect the exercise of powers or functions of [FHFA] as a conservator," bars Plaintiff's claim that Treasury violated its own obligations under the APA by arbitrarily and capriciously imposing the Net Worth Sweep.

STATEMENT OF THE CASE

A. Fannie and Freddie Are Forced into Conservatorship.

Fannie and Freddie are two of the world's largest privately owned financial institutions. They insure trillions of dollars of mortgages and provide essential liquidity to the residential mortgage market. The Companies operate for profit, and their debt and equity securities are privately owned and publicly traded. Plaintiff owns Fannie and Freddie common stock. Plaintiff's Amended Complaint, RE 15 at PageID# 124–25, ¶¶ 34–36 ("Compl.").

As mortgage insurers, Fannie and Freddie are designed to generate ample cash to cover their operating expenses. Unlike the nation's largest banks, the Companies also took a relatively conservative approach to investing in mortgages during the national run up in home prices from 2004 to 2007. For both reasons, the Companies remained in a comparatively strong financial condition during the ensuing financial crisis and were at all times capable of meeting their obligations to insureds and creditors and of absorbing any losses they might reasonably incur as a result of the financial downturn. *See id.* at 111, 125, ¶¶ 3, 38–39.

Treasury nevertheless implemented a deliberate strategy to seize the Companies and operate them for its exclusive benefit. Despite prior statements assuring investors that the Companies were in sound financial shape, FHFA forced the Companies into conservatorship, at Treasury's urging, on September 6, 2008. *Id.* at 128, ¶ 46. FHFA stated that under HERA the purpose of the conservatorship was to restore confidence in and stabilize the Companies with the objective of returning them to normal business operations. *Id.* at 127, ¶ 43. As FHFA publicly confirmed, conservatorship is necessarily temporary, and FHFA may act as conservator for the Companies only until they are stabilized. *Id.* at 129, ¶ 48. Neither Company was experiencing a liquidity crisis or a short-term fall in operating revenue at the time. *Id.* at 111, 125, 140 ¶¶ 3, 38, 74.

B. FHFA and Treasury Enter into the Purchase Agreements.

Treasury then exercised its temporary authority under HERA to enter agreements with FHFA to purchase equity in the Companies ("Preferred Stock Purchase Agreements" or "PSPAs"). *Id.* at 130–31, ¶¶ 50–52. The PSPAs created a new class of securities with very favorable terms to the Government, known as Senior Preferred Stock ("Government Stock"). Treasury received $1 billion of Government Stock in each Company and warrants to purchase 79.9% of each Company's common stock at a nominal price. *Id.* at 131, ¶¶ 54–55. Treasury's equity in each Company had an initial liquidation preference of $1 billion. *Id.* at 131, ¶ 55. The PSPAs allowed the Companies to draw up to $100 billion each from Treasury as needed to avoid a negative net worth—an amount that was subsequently increased to allow the Companies to draw unlimited sums from Treasury until the end of 2012, and thereafter capped at the amount drawn from 2010 through 2012, plus $200 billion per Company. *Id.* at 135–36, ¶¶ 66–68. Treasury's liquidation preference increases by one dollar for each dollar the Companies draw. If the Companies liquidate, Treasury is entitled to recover its entire liquidation preference before any other shareholder receives anything. *Id.* at 131, ¶ 55.

The PSPAs required the Companies to pay quarterly dividends on the outstanding liquidation preference. These dividends could be paid in cash, at an annual rate of 10%, or in kind, at an annual rate of 12%, by adding to the liquidation preference the amount of dividends due—an option Treasury and the Companies repeatedly acknowledged. *See id*. at 132–34, ¶¶ 56–59.

The PSPAs also provided for the Companies to pay Treasury a quarterly market-based periodic commitment fee beginning in 2010. *Id.* at 134, ¶ 62. Prior to the Net Worth Sweep, Treasury consistently waived this fee, and in any event it could only be set with the agreement of the Companies and at a market rate. *Id.* at 155, ¶ 102. Freddie forecasted its "sensitivity" to imposition of the periodic commitment fee beginning in 2013 at $0.4 billion per year. *Id.* As with the dividends on Treasury's senior preferred stock, the PSPAs expressly authorized the Companies to pay any periodic commitment fee charged in kind rather than in cash. *Id.* at 135, ¶ 62.

The Government Stock diluted, but did not eliminate, the economic interests of the Companies' private shareholders. The warrants to purchase 79.9% of the Companies' common stock gave Treasury "upside" via participation in the Companies' profitability, but this upside would be *shared* with private shareholders. *See id.* at 131, ¶ 54. As FHFA's Director assured Congress shortly after imposing the conservatorship, the Companies' "shareholders are still in place," and "common shareholders have an economic interest in the companies," which "going forward . . . may [have] some value." *Id*. at 129, ¶ 47.

C. Despite Improper and Unwarranted Accounting Decisions that Increased the Companies' Draws from Treasury, the Companies Return to Sustained Profitability.

Under FHFA's supervision, the Companies were forced to dramatically write down the value of their assets and to incur substantial non-cash accounting losses in the form of loan loss provisions and write-offs of deferred tax assets.[2] Tens of billions of dollars of these accounting adjustments were based on FHFA's wildly pessimistic assumptions about potential future losses and were wholly unwarranted. By June 2012, the Agencies had forced Fannie and Freddie to draw $161 billion from Treasury to make up for the balance-sheet deficits caused by these accounting decisions, even though there was no indication that the Companies' actual cash expenses could not be met by their cash receipts. The Companies drew $26 billion more to pay dividends to Treasury. Because (i) the Companies were forced to draw funds from Treasury that were not needed to continue operations, (ii) the PSPAs did not permit the Companies to redeem the Government Stock or pay down the liquidation preference, and (iii) the PSPAs tied the Companies' dividend obligations to the size of the outstanding liquidation preference, the dividends owed to Treasury were artificially—and permanently—inflated with each additional draw. *See id.* at

[2] Loan loss reserves reduce reported net worth to reflect anticipated future losses. *Id.* at 137 ¶ 71. Deferred tax assets are used to reduce taxable income on future earnings. The book value of a tax asset depends on the likelihood that the corporation will earn sufficient income to use the tax asset. *Id.* at 137, ¶ 70.

136–39, 170, ¶¶ 69–73, 133.

As a result of these transactions, Treasury's liquidation preference swelled to $189 billion. But based on the Companies' performance in the second quarter of 2012, it was apparent that the Companies' private shares still had value. The Companies were thriving, paying cash dividends on the Government Stock without drawing additional capital from Treasury. *See id.* at 115, ¶ 12. And based on the improving housing market and the high quality of the newer loans backed by the Companies, the Agencies knew the Companies would enjoy stable profitability for the foreseeable future. *Id.* at 141, ¶ 76. For example, minutes of a July 2012 Fannie management meeting indicating that the Company was entering a period of "golden years" of earnings were circulated broadly within FHFA, including to Acting Director Edward DeMarco, and projections attached to those minutes showed that Fannie expected its cumulative dividend payments to Treasury to exceed its total draws under the PSPAs by 2020 and that over $115 billion of Treasury's commitment would remain available after 2022. Similar projections were shared with Treasury. *Id*. at 143, ¶ 82.

The Agencies also knew that the Companies would soon reverse many of the non-cash accounting losses previously imposed upon them. Indeed, at an August 9, 2012 meeting, just eight days before the Net Worth Sweep was imposed, Fannie's Chief Financial Officer told senior Treasury officials that release of the valuation allowance on Fannie's deferred tax assets was likely in mid-2013 and would generate profits in the range of $50 billion—a prediction that proved remarkably accurate. *See id*. at 147–48, ¶ 86. This $50 billion reversal was not included in the projections from the month before. Treasury was keenly interested in the deferred tax assets; indeed, it had discussed them with its financial consultant as early as May 2012, and a key item on Treasury's agenda for the August 9 meeting was how quickly Fannie forecasted releasing its reserves. *See id*. at 145, 147 ¶¶ 84, 86.

D. Defendants Impose the Net Worth Sweep, Thereby Expropriating Plaintiff's Investment in the Companies.

By August 2012, the Agencies fully understood that the Companies were on the precipice of generating huge profits, far in excess of the dividends owed on the Government Stock. *See id*. at 140–49, ¶¶ 74–89. Treasury, moreover, had secretly resolved "to ensure existing common equity holders will not have access to any positive earnings from the [Companies] in the future." *Id*. at 164, ¶ 119. Therefore, on August 17, 2012, just days after the Companies announced their robust second quarter earnings, the Agencies imposed the Net Worth Sweep to ensure, as Treasury put it, that "every dollar of earnings that Fannie Mae and Freddie Mac generate will benefit taxpayers." *Id*. at 164, ¶ 118. The Agencies thus nationalized the Companies and expropriated not just their future earnings but also their retained capital, thereby depriving the private shareholders of all of their economic rights.

The government has claimed, both publicly and before the courts, that the Net

Worth Sweep was necessary to prevent the Companies from falling into a purported "death spiral" in which the Companies' increasing dividend obligations to Treasury would consume Treasury's remaining funding commitment. *See id*. at 117, ¶ 15. But, as explained above, at all times prior to the Net Worth Sweep, the PSPAs permitted the Companies to pay dividends in kind—they were never required to pay cash dividends, let alone to do so by drawing on Treasury's funding commitment.

More important, the government's "death spiral" narrative cannot be squared with internal government documents and testimony obtained through discovery in other litigation. As summarized above, this evidence reveals that the Net Worth Sweep was imposed *after* the Companies had returned to stable profitability, and *just days after* Treasury learned that they were on the verge of reporting tens of billions of dollars in profits that would far exceed their existing dividend obligations. Indeed, the *same day* that Fannie's Chief Financial Officer told senior Treasury officials that Fannie anticipated making accounting adjustments that would cause it to report an additional $50 billion in profits within the next year, an FHFA official wrote that Treasury was making a "renewed push" to impose the Net Worth Sweep. *Id.* at 120, ¶ 22.

The available evidence thus makes clear that the Net Worth Sweep was adopted not out of concern that the Companies would earn too little, but rather out of concern that the Companies would earn *too much* and complicate the

Administration's plans to hold them in perpetual conservatorship and to prevent their private shareholders from recouping their investment principal, let alone any return on that investment. Indeed, an internal Treasury document finalized the day before the sweep was announced specifically identified the Companies' "improving operating performance" and the "potential for near-term earnings to *exceed* the 10% dividend" as support for the Net Worth Sweep. *Id.* at 150, ¶ 92 (emphasis added). And after the Net Worth Sweep was finalized, a senior White House advisor involved in that process wrote to a Treasury official that "we've closed off [the] possibility that [Fannie and Freddie] ever[ ] go (pretend) private again." *Id.* at 151, ¶ 93 (alterations in original). Edward DeMarco, FHFA's then-Acting Director, likewise testified that he had no intention of allowing the Companies to emerge from conservatorship under what he viewed as flawed charters. *Id.* at 153, ¶ 97.

As the Agencies expected, the Net Worth Sweep has resulted in massive and unprecedented payments to the government. From the fourth quarter of 2012, the first fiscal quarter subject to the Net Worth Sweep, through the fourth quarter of 2016, the most recently reported fiscal quarter, the Companies generated over $200 billion in comprehensive income. But rather than using these profits to prudently build capital reserves and prepare to exit conservatorship, the Companies have instead been forced to pay these profits as "dividends" to Treasury—approximately $125 billion more than Treasury would have received under the original PSPAs. *See*

FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, http://goo.gl/vHl8V0. Altogether, Treasury has recouped nearly $69 billion *more* than it disbursed to the Companies. Yet Treasury insists that the outstanding liquidation preference remains firmly fixed at $189 billion and that it has the right to all of the Companies' net worth *in perpetuity*.

E. Plaintiff Challenges FHFA's and Treasury's Unlawful Actions.

On October 23, 2015, Plaintiff filed suit under the APA, alleging that the Net Worth Sweep violated FHFA's and Treasury's statutory duties under HERA and that Treasury's decision to impose the Net Worth Sweep was arbitrary and capricious. Plaintiff's counsel subsequently obtained access to materials produced in related litigation in the Court of Federal Claims and amended her complaint to incorporate evidence documenting the purpose and effect of the Net Worth Sweep. Defendants moved to dismiss Plaintiff's complaint, and the district court granted Defendants' motions on September 9, 2016. Memorandum Opinion & Order, RE 63, PageID# 1374 ("Op.").

The district court acknowledged that FHFA could be enjoined if it exceeded its statutory conservatorship authority notwithstanding HERA's provision prohibiting courts from "restrain[ing] or affect[ing] the exercise of powers or functions of [FHFA] as a conservator or a receiver." 12 U.S.C. § 4617(f); *see* Op., RE 63, PageID# 1379. However, the district court concluded that HERA does not require FHFA to preserve and conserve the Companies' assets when it acts as conservator or prevent FHFA as conservator from winding down the Companies. *Id.* at 1384–88. The district court also ruled that as a shareholder in the Companies, Plaintiff lacked prudential standing to allege that FHFA impermissibly submitted itself to Treasury's direction when it consented to the Net Worth Sweep. *Id.* at 1382–84.

With respect to Plaintiff's claims against Treasury, the district court held that the Net Worth Sweep did not constitute an impermissible "purchase" of securities by Treasury after its authority to make such purchases had expired. *Id.* at 1380–81. The district court further ruled that Section 4617(f) forecloses consideration of Plaintiff's arbitrary and capricious claim against Treasury notwithstanding the strong presumption in favor of judicial review of agency action. *Id.* at 1380.

The district court entered judgment in favor of Defendants on September 26, 2016, Judgment, RE 64, PageID# 1389, and Plaintiff thereafter filed a timely notice of appeal, Notice of Appeal, RE 65, PageID# 1390.

SUMMARY OF ARGUMENT

1. HERA requires FHFA as conservator to "preserve and conserve the assets and property of the regulated entity," and to "put the regulated entity in a sound and solvent condition" for the purpose of "rehabilitat[ing]" it. 12 U.S.C. § 4617(a)(2), (b)(2)(D). The Net Worth Sweep flouts these statutory obligations.

The Net Worth Sweep does not put the Companies in a "sound and solvent condition." Soundness and solvency requires financial institutions—subject to both interest rate and underwriting risk—to build capital sufficient to operate independently and withstand financial downturns. The Net Worth Sweep makes that impossible. Nor does the Net Worth Sweep "preserve and conserve" the Companies' "assets and property," as the Net Worth Sweep has transferred to Treasury $125 billion more than the Companies' pre-Net Worth Sweep obligations with no corresponding benefit to the Companies. And instead of "rehabilitating" the Companies, the stated purpose of the Net Worth Sweep is to wind them down—and until they are wound down, to operate them for the exclusive benefit of Treasury. That FHFA's purpose was to wind down the Companies, rather than to rehabilitate them, requires the conclusion that FHFA acted far outside of its statutorily authorized role of conservator.

2. Treasury similarly exceeded its statutory authority under HERA and violated the APA. After December 31, 2009, HERA limited Treasury's authority to holding, exercising rights received in connection with, or selling its previously acquired investment in the Companies. *See* 12 U.S.C. § 1719(g)(2)(D), (g)(4). Treasury lacked authority to amend the compensation structure of its investment to the detriment of every other shareholder. Indeed, that amendment was so

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

HERA's limitation on judicial review does not bar Plaintiff's arbitrary-and-capricious APA claim against Treasury. Both the presumption in favor of judicial review and caselaw interpreting the analogous provision of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") confirm that this provision does not block claims against third party federal agencies, like Treasury, that contract with FHFA.

STANDARD OF REVIEW

This appeal, from a district court ruling in an APA case, is reviewed de novo. *Latin Americans for Soc. & Econ. Dev. v. Federal Highway Admin.*, 756 F.3d 447, 462 (6th Cir. 2014). The Court also reviews de novo the district court's dismissal of a complaint for lack of subject matter jurisdiction. *Milby v. MCMC LLC*, 844 F.3d 606, 609 (6th Cir. 2016).

ARGUMENT

I. FHFA Exceeded Its Conservatorship Powers by Agreeing to the Net Worth Sweep.

HERA requires FHFA as conservator to act independently to conserve and preserve the Companies' assets and to put the Companies in a sound and solvent condition, for the purpose of rehabilitating them. The Net Worth Sweep did none of these things—it unnecessarily transferred $125 billion to Treasury, destabilized the

Companies, and made it impossible for the Companies to resume independent operations. As a result, the district court erred in concluding that HERA's jurisdictional provision, 12 U.S.C. § 4617(f), precluded Plaintiff's APA claims.

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

1. As the district court acknowledged, Section 4617(f) is inapplicable when FHFA acts "beyond the scope of its conservator power." Op., RE 63, PageID# 1379; *see County of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013); *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997). Courts uniformly agree on this point. *See Leon Cty. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012); *Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012); *Suero v. Federal Home Loan Mortg. Corp.*, 123 F. Supp. 3d 162, 174 (D. Mass. 2015). Indeed, even the district court opinion in *Perry Capital v. Lew*, upon which the district court in this case heavily relied, acknowledged that Section 4617(f) does not bar relief if FHFA " 'has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions.' " 70 F. Supp. 3d 208, 220 (D.D.C. 2014) (quoting *National Tr. for Historic Pres. in United States v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994)). Thus, "FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp." *Leon County*, 700 F.3d at 1278; *see also County of Sonoma*, 710 F.3d at 994.

These interpretations mirror the uniform judicial treatment of 12 U.S.C.

§ 1821(j), the virtually identical provision of FIRREA on which Section 4617(f) was modeled. *Sharpe* is illustrative. In that case the Ninth Circuit allowed claims for equitable relief and held Section 1821(j) inapplicable where "the FDIC as receiver" had "assert[ed] authority beyond that granted to it as a receiver" by breaching a contract without statutory authorization. 126 F.3d at 1155; *see also Bank of Manhattan, NA v. FDIC*, 778 F.3d 1133, 1136–37 (9th Cir. 2015); *Chemical Futures & Options, Inc. v. RTC*, 832 F. Supp. 1188, 1192–93 (N.D. Ill. 1993).

This interpretation, in turn, tracks the Supreme Court's interpretation of Section 1821(j)'s predecessor, 12 U.S.C. § 1464(d)(6)(C). *See* H.R. REP. NO. 101-54, at 130 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86. In *Coit Independence Joint Venture v. Federal Savings & Loan Insurance Corp.*, the Court held that this provision posed no obstacle to judicial review where a federal receiver purported to adjudicate a claim the statute did not authorize it to adjudicate. 489 U.S. 561, 572–79 (1989).

2. Though it recognized that it had jurisdiction—and, therefore, the obligation—to adjudicate Plaintiff's claim that the Net Worth Sweep exceeded FHFA's conservatorship authority, the district court reasoned that Section 4617(f) limited its inquiry to "*what* the Third Amendment entails, rather than *why* FHFA executed the Third Amendment." Op., RE 63, PageID# 1385 (quoting *Perry Capital*, 70 F. Supp. 3d at 226). In blinding itself to FHFA's rationales, the district court went

astray. HERA states that FHFA may "be appointed conservator or receiver for the *purpose* of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2) (emphasis added). Thus, the statute itself requires an examination of the purpose of FHFA's conduct. And HERA defines FHFA's "powers as conservator" by reference to what is "*necessary* to put the [Companies] in a sound and solvent condition" and "*appropriate* to . . . preserve and conserve the [Companies'] assets." *Id.* § 4617(b)(2)(D) (emphases added). To determine whether FHFA's actions are "necessary" or "appropriate" to achieve its statutorily prescribed rehabilitative goals generally requires analysis of what the agency is trying to achieve. Accordingly, as the Eleventh Circuit has explained, when deciding whether FHFA acted within its statutory powers, a court "must consider *all* relevant factors," including the action's "subject matter, *its purpose*, [and] its outcome," *Leon County*, 700 F.3d at 1278 (emphasis added); *see also Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 100 (D. Mass. 2014) ("[P]urpose, rather than labels, determines whether the FHFA in any given instance is acting . . . as a conservator.").

By refusing to consider the conservator's self-proclaimed purpose, the district court erased a principal distinction between conservators and receivers: While a few statutory powers are reserved to conservators alone or receivers alone, many powers (like transferring assets) are granted to both. *See* 12 U.S.C. § 4617(b)(2)(A)–(C), (G)–(J). When exercising common powers, conservators distinguish themselves from receivers by their "distinct missions": the conservator must aim to "conserve assets," while the receiver must "shut a business down and sell off its assets." *RTC v. United Tr. Fund*, 57 F.3d 1025, 1033 (11th Cir. 1995). To decide whether the Net Worth Sweep qualifies as an exercise of FHFA's conservatorship powers, the Court must ask whether FHFA's aims were consistent with its conservatorship mission.

But even if FHFA's actual rationales somehow were off limits in this APA case—and nothing in Section 4617(f) suggests that they should be—the district court still should have analyzed whether *any* rationale consistent with the allegations in the Complaint could have reconciled the Net Worth Sweep with FHFA's statutory mission. Such an analysis demonstrates, contrary to the district court's conclusions, that the *what* of the Net Worth Sweep is facially irreconcilable with FHFA's responsibilities as conservator, notwithstanding *why* it was adopted.

B. The Net Worth Sweep Violates FHFA's Core Statutory Mandate as Conservator.

1. As Conservator FHFA Is Charged with Seeking to Preserve and Conserve the Companies' Assets While Operating Them in a Sound and Solvent Manner.

HERA requires FHFA, when acting as conservator, to "preserve and conserve the [Companies'] assets and property," 12 U.S.C. § 4617(b)(2)(D)(ii), and to "put the [Companies] in a sound and solvent condition," *id.* § 4617(b)(2)(D)(i). This express statutory mandate is reinforced by Congress's use of the word "conservator," for it is well established that when Congress enacts a statute using "a well-established term," courts presume that it "intended the term to be construed in accordance with pre-existing . . . interpretations." *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). "Conservator" is one such "well-established term," familiar to anyone even remotely acquainted with financial regulation. As the Congressional Research Service has explained, "[a] conservator is appointed to operate the institution, conserve its resources, and restore it to viability." DAVID H. CARPENTER & M. MAUREEN MURPHY, CONG. RESEARCH SERV., RL34657, FINANCIAL INSTITUTION INSOLVENCY: FEDERAL AUTHORITY OVER FANNIE MAE, FREDDIE MAC, AND DEPOSITORY INSTITUTIONS 5 (2008), https://goo.gl/mgFwQr.

Courts and regulators have emphasized that a conservator's purpose is to revive a troubled entity. The Seventh Circuit, for example, has explained that "a conservator . . . tries to return" its ward "to solvency, rather than liquidating it," *DeKalb Cty. v. FHFA*, 741 F.3d 795, 798 (7th Cir. 2013), and other courts uniformly agree.[3] The FDIC—on whose statutory conservatorship powers the relevant

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[3] *See, e.g.*, *Delaware Cty. v. FHFA*, 747 F.3d 215, 219 (3d Cir. 2014); *Elmco Props., Inc. v. Second Nat'l Fed. Sav. Ass'n*, 94 F.3d 914, 922 (4th Cir. 1996) ("[A] conservator's function is to restore the bank's solvency and preserve its assets."); *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1090 (D.C. Cir. 1996) ("The principal difference between a conservator and receiver is that a conservator may operate and dispose of a bank as a going concern, while a receiver has the power to liquidate and wind up the affairs of an institution."); *Del E. Webb McQueen Dev. Corp. v. RTC*, 69 F.3d 355, 361 (9th Cir. 1995) (A conservator "operates an institution with the hope that it might someday be rehabilitated," while a receiver "liquidates an institution and distributes its proceeds to creditors."); *United Trust*

provisions of HERA were modeled—likewise understands that "[a] conservatorship is designed to operate the institution for a period of time in order to return the institution to a sound and solvent operation." FDIC, MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE 216 (1998), *available for download at* https://goo.gl/qjIjTh. Commentators agree. *E.g.*, Donald Resseguie, *Banks & Thrifts: Government Enforcement & Receivership* § 11.01 (2013); *see also* 3 Michael P. Malloy, *Banking Law and Regulation* § 11.3.4.2 (2011) (a conservatorship's "basic statutory assumption is that the institution may well return to the transaction of its business").

Indeed, FHFA itself has repeatedly expressed the same view. For example, FHFA has stated that "[t]he purpose of conservatorship is to preserve and conserve each company's assets and property and to put the companies in a sound and solvent condition." Compl., RE 15, PageID# 127, ¶ 42; *see also id.* at 127, ¶¶ 43–44; Letter from Edward DeMarco, Acting Director, FHFA, to Senators at 1 (Nov. 10, 2011), http://goo.gl/hbBe25 ("By law, the conservatorships are intended to rehabilitate

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Fund, Inc., 57 F.3d at 1033 ("The conservator's mission is to conserve assets which often involves continuing an ongoing business," while "[t]he receiver's mission is to shut a business down and sell off its assets."); *1185 Ave. of the Americas Assocs. v. RTC*, 22 F.3d 494, 497 (2d Cir. 1994) ("A conservator . . . is empowered to take action to restore the thrift to a solvent position and to carry on the business of the institution.") (quotation marks omitted); *RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1453–54 (8th Cir. 1992) ("The conservator's mission is to conduct an institution as an ongoing business" while restoring it "to a solvent position.").

[Fannie and Freddie] as private firms."). FHFA's regulations explain that "the essential function of a conservator is to preserve and conserve the institution's assets" and that "[a] conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition." Conservatorship and Receivership, 76 Fed. Reg. 35,724, 35,727, 35,730 (June 20, 2011). FHFA continued to refer to "the conservatorship *mandate* to preserve and conserve the [Companies'] assets" even after it entered the Net Worth Sweep. Statement of Edward J. DeMarco Before the U.S. S. Comm. on Banking, Housing and Urban Affairs 3 (Apr. 18, 2013) (emphasis added), *available at* goo.gl/QI7V44. An internal Treasury document from 2011 likewise recognized that "the path laid out under HERA" was for Fannie and Freddie to "becom[e] adequately capitalized" and "exit conservatorship as private companies." Compl., RE 15, PageID# 164, ¶ 119.

This defining purpose—rehabilitation to viability as a going concern with a view to the troubled institution's interests—informs the scope of a conservator's power. The Fifth Circuit has explained that "a conservator *only* has the power to take actions necessary to restore a financially troubled institution to solvency" and that it cannot "as a matter of law" take actions reserved to a receiver. *McAllister v. RTC*, 201 F.3d 570, 579 (5th Cir. 2000) (emphasis added). The Eighth Circuit reached the same conclusion in *Resolution Trust Corp. v. CedarMinn Building Limited*

Partnership, ruling that the RTC was not required to exercise its statutory authority to repudiate contracts immediately upon its appointment as conservator because this would put the conservator "in the untenable position of trying to operate the business as an ongoing concern with one hand, while at the same time calculating the . . . repudiation issue as if it were shutting the business down." 956 F.2d at 1454; *see also MBIA Ins. Corp. v. FDIC*, 816 F. Supp. 2d 81, 97 (D.D.C. 2011). Thus, when exercising its powers as conservator, FHFA must act consistent with the overarching purpose of rehabilitation and the need to conserve the assets of the estate for all stakeholders.

This understanding of FHFA's duties as conservator comports with a long history of conservators acting as fiduciaries for troubled institutions—a history of which Congress was fully aware when it enacted FIRREA and HERA. While the district court summarily rejected the notion that FHFA as conservator owes any fiduciary duties to the Companies or their shareholders, Op., RE 63, PageID# 1383 n.4, a host of authorities shows that conservators are normally understood to act as fiduciaries for the institutions under their care. *See United States v. Sanders*, 314 F.3d 236, 240 (6th Cir. 2002) (explaining that under Tennessee law "[t]he purpose of appointing a conservator is to preserve the estate of an incompetent or disabled person" and that "[a] conservator occupies a fiduciary position of trust of the highest and most sacred character" (quotation marks omitted)); *In re Kosmadakes*, 444 F.2d

999, 1004 (D.C. Cir. 1971) (applying fiduciary standards to a conservator); *Henry v. United States*, 396 F. Supp. 1300, 1301 (D.D.C. 1975) (noting that a conservator has a "special fiduciary position"); *see also Golden Pac. Bancorp v. FDIC*, 273 F.3d 509, 519 (2d Cir. 2001) ("A receivership is, of course, a type of fiduciary relationship . . . ."); *Crites, Inc. v. Prudential Ins. Co. of America*, 134 F.2d 925, 927 (6th Cir. 1943) ("Undoubtedly a receiver is a fiduciary . . . ."), *rev'd on other grounds*, 322 U.S. 408, 414 (1944) (observing that receiver "was bound to perform his delegated duties with the high degree of care demanded of a trustee or other similar fiduciary"); 12 U.S.C. § 1717(c)(1) (statute creating Fannie Mae discussing "trusts, receiverships, conservatorships, liquidating or other agencies, *or other fiduciary and representative undertakings and activities*" (emphasis added)).

The district court declined to follow the well-established understanding of the scope of a conservator's powers and duties, reasoning that "HERA's grant of authority to the FHFA exceeds the normal bounds of a conservatorship." Op., RE 63, PageID# 1385. But many of the cases cited above that articulate the traditional understanding of conservatorship concerned HERA or the very similar provisions of FIRREA on which HERA was modeled. *See supra* 22–23 & n.3. As those cases underscore, nothing in HERA or FIRREA suggests that Congress intended to depart from longstanding principles of conservatorship.

Neither is there any warrant for the district court's conclusion that HERA authorizes but does not require FHFA to conserve and preserve the Companies' assets. Op., RE 63, PageID# 1386. The district court's reasoning rested in large measure on HERA's use of the word "may" in the following provision: "The Agency may, as conservator, take such action as may be . . . appropriate to . . . preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D). But the presumption that the word "may" "implies some degree of discretion," can be "defeated by . . . obvious inferences from the structure and purpose of the statute." *United States v. Rodgers*, 461 U.S. 677, 706 (1983).

In addition to jettisoning the well-established meaning of the term "conservator," the district court's reading of "may" is inconsistent with the statutory design, which, like virtually all grants of agency power, constitutes a limited delegation of authority from Congress. That Congress, in describing FHFA's "powers as conservator," spelled out that the conservator "may" "take such action as may be (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity," means that FHFA does *not* have other powers as conservator. *See Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (finding that "Congress has not delegated authority to the agency to act beyond these [enumerated] statutory parameters"). And similarly, in describing a conservator's power to operate the Companies, that Congress listed certain things that FHFA "may" do, 12 U.S.C. § 4617(b)(2)(B), means FHFA may not operate the Companies in any other manner, much less in a manner at war with the directive inherent in Congress's grant of conservatorship authority. *See Halverson v. Slater*, 129 F.3d 180, 184–87 (D.C. Cir. 1997) (language that "Secretary may delegate" authority to specific entity prohibits delegation to another entity). Thus, contrary to the district court's analysis, when Congress provided in HERA that FHFA as conservator "may" "preserve and conserve" the Companies' assets while seeking to place them in a "sound and solvent" condition, it did not implicitly also authorize FHFA to condemn Fannie and Freddie to perpetual unsoundness through the dissipation of assets.

2. The Net Worth Sweep Cannot Be Reconciled with FHFA's Statutory Conservatorship Mission to Preserve and Conserve the Companies' Assets and Place Them in a Sound and Solvent Condition.

The Net Worth Sweep contravenes FHFA's obligations under HERA and its regulations to preserve and conserve the Companies' assets and rehabilitate the Companies by putting them in a sound and solvent condition. Indeed, the inevitable effects of the Net Worth Sweep are so patently at odds with FHFA's core conservatorship mission that the Court need not consider its purpose to conclude that it is unlawful and may be enjoined notwithstanding Section 4617(f).

First, the Net Worth Sweep depletes the Companies' capital, a consequence that FHFA's regulations rightly declare "inconsistent with [its] statutory goals." 76 Fed. Reg. at 35,727. Rather than allow the Companies to retain and build up their capital, the Net Worth Sweep siphons off every dollar belonging to the Companies into Treasury's coffers, precluding them from strengthening along with the improving housing market. Indeed, Treasury made clear in publicly announcing the Net Worth Sweep that its purpose was to prevent the Companies from "retain[ing] profits" or "rebuild[ing] capital." Compl., RE 15, PageID# 164, ¶ 118. The Net Worth Sweep is thus antithetical to FHFA's duty to "preserve and conserve the assets and property" of the Companies. 12 U.S.C. § 4617(b)(2)(D)(ii).

The Net Worth Sweep's depletion of the Companies' capital also violates FHFA's obligation to "put the [Companies] in a sound and solvent condition." *Id.* § 4617(b)(2)(D)(i). As FHFA has acknowledged, capital reserves are a critical aspect of soundness and solvency. *See* Compl., RE 15, PageID# 161, ¶ 113. Such reserves serve as a buffer against the inevitable vicissitudes of the economic cycle that affect all financial institutions. Institutions with sufficient capital are deemed safe, and those without are deemed unsound.

Any defense of the Net Worth Sweep as having *improved* the Companies' capital position by preserving Treasury's funding commitment would impermissibly contradict the factual allegations in the Complaint and blink reality. But for the Net Worth Sweep, the Companies would have approximately $125 billion in capital that they have instead been forced to turn over to Treasury. *See* FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, http://goo.gl/vHl8V0. Without this capital, the Companies are *more*, not less, likely to need to draw on Treasury's commitment in the future. In all events, the original terms of Treasury's stock posed no threat to the funding commitment because the Companies always had the ability to pay Treasury's dividends in kind, and doing so would not have reduced the funding commitment. The Defendants have repeatedly acknowledged the viability of the payment in kind option outside of litigation. *See* Compl., RE 15, PageID# 132–34, ¶¶ 57–59. The Companies were likewise authorized to pay in kind any commitment fee that Treasury might have charged. *See id.* at 135, ¶ 62.

Second, the Net Worth Sweep guarantees that the Companies will never resume "normal business operations." "Normal" companies recovering from financial distress save their profits to withstand the next downturn. But today the Companies cannot operate as normal, private companies because the Net Worth Sweep depletes every dollar of their net worth, depriving them of the "future income flows" that represent a company's "fundamental value." *Tennessee Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1208 n.2 (D.C. Cir. 1991). FHFA has clearly and impermissibly abandoned its conservatorship duty to "rehabilitate" the Companies. *See* 76 Fed. Reg. at 35,727, 35,730.

Third, the Net Worth Sweep has caused the Companies to incur tens of billions of dollars in additional debt to finance dividends. Because many of the Companies' assets are valued based on assumptions about future financial performance or fluctuating market prices, increases in the Companies' net worth do not necessarily reflect increased cash on hand. Recognizing deferred tax assets, for example, is an accounting decision that does not generate any cash. A cash dividend based solely on net worth may thus require financing through new borrowing. Indeed, the Companies incurred substantial additional debt in 2013 in order to pay cash dividends under the Net Worth Sweep. *See* Compl., RE 15, PageID# 168, ¶¶ 126–27. Ordering the Companies to pay debt-financed dividends when they are in conservatorship is financially reckless and at war with FHFA's statutory mandates to "preserve and conserve" the Companies' assets, 12 U.S.C. § 4617(b)(2)(D)(ii), and to place them in a "sound and solvent" condition, *id.* § 4617(b)(2)(D)(i).

C. The Net Worth Sweep Impermissibly Seeks to Wind Down the Companies During Conservatorship.

The avowed purpose and indisputable effect of the Net Worth Sweep is to "expedite the wind down of Fannie Mae and Freddie Mac" and to ensure that these two companies "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." Compl., RE 15, PageID# 164, ¶ 118 (quoting Treasury Net Worth Sweep Press Release); *see also id.* at 151, 153, 165, ¶¶ 93, 97, 121. FHFA exceeded its conservatorship powers by taking this step toward the Companies' wind down without first placing them into receivership, for "only receivers have the power to liquidate a failed [financial institution]." *McAllister*, 201 F.3d at 578; *see CedarMinn*, 956 F.2d at 1454 (emphasizing the "distinction in the roles between conservator and receiver" under FIRREA).

The district court rejected this argument, reasoning that the Net Worth Sweep could be part of "a fluid progression from conservatorship to receivership" permissible under HERA. Op., RE 63, PageID# 1388 (quoting *Perry Capital*, 70 F. Supp. 3d at 246). But in HERA Congress authorized FHFA to act "as conservator *or* receiver," 12 U.S.C. § 4617(a) (emphasis added); whichever choice FHFA made had corresponding limits and obligations imposed by Congress. Troublingly, by allowing FHFA to wind down the Companies and distribute their assets during conservatorship, the district court's contrary reading of HERA provides a mechanism by which FHFA can effect an end run around the statute's procedures for resolving claims against the Companies during liquidation. *See* 12 U.S.C. § 4617(b)(3)–(9), (c). These procedures ensure that receivers "fairly adjudicat[e] claims against failed financial institutions," *Whatley v. RTC*, 32 F.3d 905, 909–10 (5th Cir. 1994), and may be constitutionally required to afford due process, *see Greater Slidell Auto Auction, Inc. v. American Bank & Tr. Co. of Baton Rouge*, 32 F.3d 939, 942 (5th Cir. 1994); *Freeman v. FDIC*, 56 F.3d 1394, 1403 n.2 (D.C. Cir. 1995); *Elmco*, 94 F.3d at 922. Congress plainly did not intend to authorize FHFA to wind down the Companies during conservatorship and thereby evade the procedures the statute otherwise requires FHFA to follow during liquidation.

To be sure, Section 4617(a)(2) states that FHFA may "be appointed conservator *or* receiver for the purpose of *reorganizing*, *rehabilitating*, or *winding up* the affairs of a [regulated entity]." But this provision cannot plausibly be read to suggest that all of the powers it articulates belong to both conservators and receivers. After all, "the words of a statute must be read in their context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see also King v. Burwell*, 135 S. Ct. 2480, 2487 (2015). HERA, caselaw, commentators, and dictionaries all use "liquidation" and "wind up" synonymously.[4] Liquidation is exclusively the province of a receiver, as both HERA's text and FHFA's regulations provide. *See* 12 U.S.C. § 4617(b)(2)(E); 12 C.F.R. § 1237.3(b). And given that liquidating the Companies is beyond FHFA's powers as conservator, it follows that "winding [them] up" also

[4] For example, HERA imposes specific requirements on FHFA when it initiates "the *liquidation* or *winding up* of the [Companies'] affairs." 12 U.S.C. § 4617(b)(3)(B) (emphasis added). Caselaw holds that the purpose of a receivership is "to expeditiously 'wind up the affairs of failed banks.' " *Freeman*, 56 F.3d at 1401 (quoting *Local 2 v. FDIC*, 962 F.2d 63, 64 (D.C. Cir. 1992)). Treatises explain that receivers "liquidate the institution and wind up its affairs." Resseguie, *supra*, § 11.01. Dictionaries define "liquidation" and "winding up" virtually synonymously. *Compare* BLACK'S LAW DICTIONARY 1738 (10th ed. 2014) (winding up: "The process of settling accounts and liquidating assets in anticipation of a partnership's or a corporation's dissolution."), *with* OXFORD ENGLISH DICTIONARY ONLINE (Dec. 2013) (liquidation, n.: "The action or process of winding up the affairs of a company").

exceeds these powers.

Further, if FHFA as conservator has all three powers listed in Section 4617(a)(2)—"reorganizing, rehabilitating, [and] winding up"—it follows that FHFA as receiver must have them all as well. But that cannot be, as even FHFA explains that as receiver it "shall place the [Companies] in liquidation," leaving no room to rehabilitate them. 12 C.F.R. § 1237.3(b) (quoting 12 U.S.C. § 4617(b)(2)(E)). Section 4617(a)(2) is thus best read as a general, introductory provision that summarizes the authorities collectively granted to FHFA as conservator and receiver, while the following provisions of the statute specify which authorities FHFA may exercise in a particular capacity. HERA's structure further supports this interpretation. *See* 12 U.S.C. § 4617(a) ("Appointment of the Agency as conservator or receiver"); *id*. § 4617(b) ("Powers and duties of the Agency as conservator or receiver"); *id*. § 4617(b)(2)(D) ("Powers as conservator"); *id*. § 4617(b)(2)(E) ("Additional powers as receiver").

D. Giving Away the Companies' Assets and Future Profits Is Not Among FHFA's Statutory Powers as Conservator.

Even if the Court concludes that HERA does not require FHFA as conservator to seek to preserve and conserve the Companies' assets with the goal of rehabilitating them, the Net Worth Sweep cannot survive unless there is *some* affirmative statutory authorization for FHFA's actions. Otherwise the Net Worth Sweep would not qualify as an "exercise of [FHFA's conservatorship] powers or functions" and could be enjoined. *See* 12 U.S.C. § 4617(f). Contrary to the district court's decision and arguments advanced by FHFA in the proceedings below, nothing in HERA gave FHFA the power as conservator to agree to donate the Companies' net assets and future profits in perpetuity to Treasury.

1. The district court suggested that the Net Worth Sweep could be justified as an exercise of FHFA's "[i]ncidental power[ ]" to "take *any action authorized by this section*, which the Agency determines is in the best interests of the regulated entity or the Agency." 12 U.S.C. § 4617(b)(2)(J)(ii) (emphasis added); *see* Op., RE 63, PageID# 1387. As the italicized language makes clear, this incidental power is limited to actions otherwise authorized by HERA. Thus there is no basis for reading a broad, free-floating grant of authority into a provision that provides merely for the exercise of authority incidental to that expressly granted to FHFA elsewhere in the statute. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819) ("[A] great substantive and independent power . . . cannot be implied as incidental to other powers, or used as a means of executing them.").

2. The district court also implied that the Net Worth Sweep was an exercise of FHFA's power to " 'transfer or sell any asset' of the [Companies] 'without any approval, assignment, or consent.' " 12 U.S.C. § 4617(b)(2)(G); *see* Op., RE 63, PageID# 1387. But when FHFA transfers the Companies' assets, HERA specifically requires it to "maximize[ ] the net present value return" the Companies receive, 12

U.S.C. § 4617(b)(11)(E)(i), something that the Net Worth Sweep plainly did not do. HERA would raise grave constitutional concerns if it authorized FHFA to transfer private assets to the government in exchange for virtually nothing, as happened here. *See United States v. Security Indus. Bank*, 459 U.S. 70, 78–82 (1982) (construing statute narrowly to avoid takings difficulty).

Moreover, Section 4617(b)(2)(G) specifies that the agency may only transfer assets "*as conservator or receiver*." 12 U.S.C. § 4617(b)(2)(G) (emphasis added). FHFA was never appointed receiver, of course, and as conservator, FHFA is charged by HERA with rehabilitating the Companies, preserving and conserving their assets, and restoring them to soundness and solvency, as explained at length above. *See supra* at 21–28. As conservator, FHFA lacks the authority to "transfer assets" to *prevent*, rather than to *promote* its statutory mission.

Furthermore, reading HERA to confer on FHFA as conservator the power to undertake any transfers it chooses would allow the agency to completely ignore HERA's specific order of priorities for distributing assets during liquidation. *See* 12 U.S.C. § 4617(c). For example, during liquidation FHFA would be free to transfer the Companies' assets to subordinated debtholders before paying general creditors, in direct contravention of 12 U.S.C. § 4617(c)(1)(B). The Supreme Court rejected a construction of language in FIRREA's predecessor that would have made nonsense out of other provisions of the same Act, and an unbounded reading of HERA's transfer provision should similarly be rejected. *See Coit*, 489 U.S. at 573–74.

To be sure, courts have ruled in a handful of cases that FIRREA barred plaintiffs from suing receivers to enjoin specific transfers of assets. *See, e.g.*, *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1328–29 (6th Cir. 1993); *Courtney v. Halleran*, 485 F.3d 942, 949 (7th Cir. 2007); *Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696, 700–02 (D.C. Cir. 1997); *Gosnell v. FDIC*, 1991 WL 533637, at *5–*6 (W.D.N.Y. Feb. 4, 1991). But these cases involved *receivership* and thus did not implicate the issue here: whether FHFA may flout its mission as conservator to preserve Fannie's and Freddie's assets while restoring them to a sound financial condition by transferring all of their profits in perpetuity to another federal agency. Moreover, the transfers at issue in these cases were all routine exercises of a receiver's powers; none involved self-dealing or waste on the scale alleged here, let alone suggested that a federal conservator may transfer its ward's entire net worth to another entity, effectively nullifying HERA's specific distribution requirements as well as its statutory mandates as conservator. Nor do those cases suggest that conduct such as that at issue here would escape review. *See, e.g.*, *Gosnell*, 1991 WL 533637, at *6 (observing that receiver is not "wholly above the law" and that "truly ultra vires or arbitrary and capricious acts on its part may be enjoined").[5]

[5] These cases are inapposite for other reasons as well. For example, this Court's decision in *Ryan* addressed a transfer of assets to a bridge depository

3. Before the district court, FHFA also claimed that the Net Worth Sweep was within its statutory authority to "carry on the business" of Fannie and Freddie, to "operate" the Companies, and to "conduct all business of the [Companies]." 12 U.S.C. §§ 4617(b)(2)(B)(i), 4617(b)(2)(B)(iv), 4617(b)(2)(J)(ii)); *see* FHFA Brief in Support of Motion to Dismiss, RE 23-2, PageID# 422–24. But there is no support for the proposition that these specific statutory authorities give the conservator unlimited power to do with the Companies as it chooses without regard to its statutory mission. That is not the law, and "FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp." *Leon County*, 700 F.3d at 1278.

In all events, HERA expressly links FHFA's power as conservator to "carry on the business" of Fannie and Freddie with its duty to "preserve and conserve [their] assets and property." 12 U.S.C. § 4617(b)(2)(D); *see also FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1057–58 (N.D. Ill. 2013) ("As conservator, FHFA has broad powers to operate Fannie and Freddie and do what it sees fit *to 'preserve and*

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institution, a type of transfer that FIRREA explicitly authorizes. *See* 12 U.S.C. § 1821(n). Nothing in *Ryan* suggests that courts are powerless to enjoin transfers that HERA or FIRREA prohibit. And in *Courtney*, the FDIC as receiver entered into an agreement with a third party to pursue legal claims against another entity and divide the proceeds of any recovery. The Seventh Circuit held that the receiver's express statutory power to settle legal claims, "if it is to mean anything at all," must "operate independently" of any statutory priority distribution scheme. *Courtney*, 485 F.3d at 949. That ruling provides no support for the view that a conservator's power to transfer assets is unrestrained by the conservator's statutory mission.

conserve [their] assets.' ") (emphasis added) (quoting 12 U.S.C. § 4617(c)(2), (b)(2)(D)(ii)); *cf. Leon County*, 700 F.3d at 1278–79; *Massachusetts v. FHFA*, 54 F. Supp. 3d at 100. Far from preserving and conserving the Companies' assets, the Net Worth Sweep does the precise opposite, transferring their entire net worth to the Government.

E. Plaintiff Has Prudential Standing To Pursue Her Claim that FHFA Impermissibly Agreed to the Net Worth Sweep at Treasury's Direction.

To ensure that FHFA would exercise its best *independent* judgment in protecting the interests of *all* creditors and shareholders of the Companies, Congress mandated that FHFA as conservator "shall not be subject to the direction or supervision of any other agency of the United States." 12 U.S.C. § 4617(a)(7). The Complaint alleges that FHFA violated that provision of HERA by agreeing to the Net Worth Sweep at Treasury's explicit direction. Compl., RE 15, PageID# 114, 121–22, 161–63, ¶¶ 11, 24–25, 114–16. The district court did not reach the merits of this claim, concluding that Plaintiff lacked prudential standing because she does not fit within the zone of interests protected by Section 4617(a)(7). Op., RE 63, PageID# 1382–84. This was error.

As an initial matter, the district court never mentioned and clearly did not apply Supreme Court caselaw that requires courts to take a "lenient approach" when deciding whether a plaintiff satisfies the zone of interests test in an APA case.

Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1389 (2014). The Supreme Court has adopted this approach because Congress's "evident intent" when it enacted the APA was "to make agency action presumptively reviewable." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). Thus, in the APA context, the zone of interests requirement is "not meant to be especially demanding," and the Court has emphasized that it has often "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012). Despite these admonitions, the district court plainly did not give "the benefit of any doubt" to Plaintiff.

To decide whether Plaintiff's interests are "*arguably* within the zone of interests to be protected" by Section 4617(a)(7), the Court must first "discern the interests arguably to be protected" by that provision. *National Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 492 (1998) (alterations and quotation marks omitted). As the district court acknowledged, Section 4617(a)(7) protects, at a minimum, the interest in having FHFA "proceed[ ] independently" when it acts as conservator. Op., RE 63, PageID# 1384. Section 4617(a)(7) also arguably protects the Companies' shareholders from being deprived of their investments due to other administrative agencies' pursuit of policy objectives that are at odds with FHFA's statutory mission as conservator.[6] If Plaintiff's claim survives, it will vindicate both of these interests by protecting the integrity of the conservatorships from interference by Treasury aimed at impermissibly winding down the Companies and enriching the federal government. Accordingly, Plaintiff easily has prudential standing under a straightforward application of the zone of interests test.

The district court rejected this line of argument and concluded that Plaintiff cannot satisfy the zone of interests requirement because "there is no indication that Section 4617(a)(7) itself seeks to protect the interests of [the Companies'] shareholders." Op., RE 63, PageID# 1383. But the Supreme Court has repeatedly explained that the zone of interests test "do[es] not require any indication of congressional purpose to benefit the would-be plaintiff." *Pottawatomi Indians*, 132 S. Ct. at 2210 (quotation marks omitted); *accord First Nat'l Bank & Trust Co.*, 522 U.S. at 492. And despite the district court's suggestions to the contrary, Op., RE 63, PageID# 1384, it would make little sense to conclude that Congress intended to allow only a non-independent FHFA to file suit when it forfeits its ability to make critical conservatorship decisions to another federal agency.

[6] The district court suggested that such interests are irrelevant insofar as they look beyond "the *particular provision* of law" at issue, Op., RE 63, PageID# 1383, but this Court "do[es] not look at [the provision at issue] in complete isolation" when applying the zone of interests test, *Patel v. United States Citizenship & Immigration Servs.*, 732 F.3d 633, 635 (6th Cir. 2013) (second alteration in original).

II. Treasury Lacked Authority To Impose the Net Worth Sweep.

Even if this Court concludes that Section 4617(f) bars Plaintiff's claims against FHFA, it should reverse the district court's decision dismissing Plaintiff's separate claims that Treasury violated HERA and acted arbitrarily and capriciously in violation of the APA.

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

HERA granted Treasury authority "to purchase any obligations and other securities issued by the [Companies]," but provided that this power would expire on December 31, 2009. 12 U.S.C. § 1719(g)(1)(A), (g)(4). Thereafter, HERA limited Treasury's authority to "hold[ing], exercis[ing] any rights received in connection with, or sell[ing]" the Companies' securities. *Id.* § 1719(g)(2)(D). Despite this narrow range of post-2009 authorized activity, the district court held that the exchange of obligations in the Net Worth Sweep was lawful because it did not constitute a "purchase" of securities. The district court misconstrued both HERA and the Net Worth Sweep.[7]

[7] Although Treasury argued below that Section 4617(f) also barred all claims against Treasury, the district court correctly acknowledged that it had jurisdiction to address Plaintiff's claims that Treasury exceeded its statutory authority. Op., RE 63, PageID# 1379–80 & n.1.

1. The Net Worth Sweep Constituted a Purchase of New Securities.

Treasury's authority to purchase the Companies' securities expired on December 31, 2009, and the Net Worth Sweep was a "purchase" under that term's ordinary meaning. The Oxford English Dictionary defines "purchase" as "[t]o acquire in exchange for payment in money or an equivalent; to buy," OED ONLINE (purchase, v.), the Uniform Commercial Code defines that term as "any other voluntary transaction creating an interest in property," U.C.C. § 1-201(b)(29), and Black's Law Dictionary defines "purchaser" to mean "one who obtains property for money or *other valuable consideration*," BLACK'S LAW DICTIONARY, *supra*, 1430 (emphasis added).

The Net Worth Sweep clearly meets these definitions of "purchase." FHFA stated below that the Net Worth Sweep "trad[ed] the Enterprises' annual fixed dividend and periodic commitment fee obligations in exchange for the payment of a variable dividend based on net worth." FHFA Brief in Support of Motion to Dismiss, RE 23-2, PageID# 423. Purchases are not confined to cash. *See SEC v. National Sec., Inc.*, 393 U.S. 453, 467 (1969). The Companies sold Treasury a new obligation—to hand over their net worth each quarter—in exchange for canceling the Companies' fixed-dividend obligations. This 2012 transfer of obligations was clearly a "purchase"—albeit an exceedingly one-sided transaction—to which Treasury lacked authority to agree.

The district court nevertheless held the Net Worth Sweep transaction was not a purchase because Treasury did not increase its funding commitment. Op., RE 63, PageID# 1381. But while an increased funding commitment certainly *suffices* to establish a purchase under Section 1719(g), it is not a *necessary* condition of such a purchase. Treasury could have purchased securities with no funding commitment at all. The touchstone of a purchase is an *exchange of value*. Here, Treasury acquired the Companies' future net assets in exchange for cancellation of its right to a fixed dividend and commitment fee. The transfer of a fixed dividend obligation worth $18.9 billion per year in exchange for the Companies' net worth and future earnings (a transaction that has netted Treasury $125 billion to date) most certainly constitutes a new investment in the Companies—Treasury now essentially owns 100% of the Companies' equity value. Indeed, the Government itself has argued in other litigation that "an 'interest in residual profits' is the defining feature of an equity interest in a corporation." Reply Brief for the United States at 24, *Starr Int'l Co. v. United States*, No. 2015-5103 (Fed. Cir. June 1, 2016), ECF No. 100.

An array of securities laws and Treasury's own IRS regulations recognize that "amendments" such as the Net Worth Sweep that fundamentally change a security's nature create a new security and that this transformation constitutes a purchase. Section 10(b) of the Securities Exchange Act of 1934 prohibits fraud "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b). When deciding whether plaintiffs have purchased or sold securities under this provision and Rule 10b-5, courts ask whether there is "such significant change in the nature of the investment or in the investment risks as to amount to a new investment." *Gelles v. TDA Indus., Inc.*, 44 F.3d 102, 104 (2d Cir. 1994). This analysis requires assessing the "economic reality of [a] transaction," *Keys v. Wolfe*, 709 F.2d 413, 417 (5th Cir. 1983), including the investment's altered risk profile, *see 7547 Corp. v. Parker & Parsley Dev. Partners, LP*, 38 F.3d 211, 229 (5th Cir. 1994). Holders of a fundamentally changed security are considered purchasers of new securities. *National Securities*, 393 U.S. at 467. The SEC has taken the same basic approach when interpreting Section 303 of the Trust Indenture Act, *see Allied-Carson Corp.*, SEC No-Action Letter, Fed. Sec. L. Rep. ¶ 80,434, 1976 WL 10614, at *2 (Mar. 12, 1976) (advising that an amendment that extends a bond's maturity and increases its interest rate qualifies as a "sale" of a new security under that statute), as well as Section 2(3) of the Securities Act, *see* General Counsel, SEC Release No. 33-929, 1936 WL 28873 (July 29, 1936) (explaining that a sale of a security would occur if holders of common stock agreed to forgo a cash dividend in exchange for a dividend in the form of common stock). Courts have interpreted the Public Utility Holding Company Act of 1935 in a similar manner. *SEC v. Associated Gas & Elec. Co.*, 24 F. Supp. 899, 903 (S.D.N.Y. 1938).

Treasury's tax regulations similarly recognize that a major change to a security is a purchase. Normally, the IRS taxes assets when sold. To prevent tax evasion, IRS regulations provide that "a significant modification of a debt instrument . . . results in an exchange of the original debt instrument for a modified instrument." 26 C.F.R. § 1.1001-3(b). A modification is "significant" if it alters the security's annual yield by "¼ of one percent" or "5 percent of the annual yield of the unmodified instrument," or if it converts debt into equity. *Id*. § 1.1001-3(e)(1), (2)(ii), (5)(i). In addition, the IRS has ruled that an amendment changing the value of preferred stock to "equal the net worth of [a] corporation" "constitutes, in substance, . . . new preferred stock." Rev. Rul. 56-564, 1956-2 C.B. 216, 1956 WL 10781.

The Net Worth Sweep's change to the Government Stock's fixed dividend gave Treasury a new and very different security. Under the "economic reality of the transaction," *Keys*, 709 F.2d at 417, the Net Worth Sweep generated $130 billion in dividends in 2013 alone, an increase of over $110 billion. And Treasury's annual yield the first year after the Net Worth Sweep went into effect soared from 10% of the liquidation preference to almost 70% of the preference—many multiples of the IRS's threshold.

The Net Worth Sweep also fundamentally transformed Treasury's fixed-dividend preferred stock effectively into unlimited-upside common stock. *See* 26 C.F.R. § 1.1001-3(e)(5)(i) (exchange where "modification . . . results in an instrument or property right that is not debt"). Preferred shares "generally give the holder a claim to a fixed dividend that must be satisfied before any dividend is paid on common shares . . . . In contrast to common shares, preferred shares do not provide an unlimited claim on the corporation's residual earnings." 11 *Fletcher Cyclopedia of the Law of Corporations* § 5283, at 464 (2011 rev. vol.). Under the Net Worth Sweep, by contrast, Treasury takes all of the Companies' net worth—their "residual earnings." Indeed, having effectively wiped out the Companies' remaining equity under the "Administration's commitment to ensure existing common equity holders will not have access to any positive earnings from the [Companies] in the future," Compl., RE 15, PageID# 164, ¶ 119, there is effectively no longer any lower-ranked equity over which Treasury's stock could take "priority." *See Folk on the Delaware General Corporation Law* § 151.04 (2015). Because the Net Worth Sweep in substance changed debt-like preferred stock into common stock, it constituted a purchase of new securities.

2. The Net Worth Sweep Was Not an Exercise of a Right that Treasury Received in Connection with Its Purchase of Government Stock.

After December 31, 2009, HERA limited Treasury to "hold[ing]," "sell[ing]," or "exercis[ing] any rights" it had received in connection with its prior purchases of the Companies' securities. 12 U.S.C. § 1719(g)(2)(D). "[L]ike other federal agencies," Treasury " 'literally has no power to act . . . unless and until Congress confers power upon it.' " *American Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) (omission in original) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). The district court did not address whether the Net Worth Sweep falls within any of Treasury's limited authorities under HERA, and it does not. Thus, quite apart from whether the Net Worth Sweep constituted a prohibited "purchase" of securities after 2009, it exceeded Treasury's statutory authority and should be enjoined as contrary to law.

Because the adoption of the Net Worth Sweep plainly was not an act of "holding" or "selling" Government Stock, the Net Worth Sweep can be defended only as an exercise of a right received in connection with those securities. In the district court, Treasury argued that Section 6.3 of the Purchase Agreements, which provides that "[t]his Agreement may be waived or amended solely by a writing executed by both of the parties hereto," gave Treasury a "right to amend" the Government Stock, and that the Net Worth Sweep was the valid exercise of that right. Treasury Reply Brief in Support of Motion to Dismiss, RE 38, PageID# 787. This argument is meritless.

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

Indeed, Treasury's so-called "right to amend" is vastly different than the actual rights that Treasury received in the Purchase Agreements. The most significant example is the common-stock warrant, which grants Treasury a unilateral right to purchase up to 79.9% of the Companies' common stock at a nominal price. *See* Compl., RE 15, PageID# 131, ¶ 54. Exercising this right does not require negotiation or further mutual assent; Treasury can purchase this common stock simply by informing the Companies of the number of shares it wishes to purchase. Treasury could not adopt the Net Worth Sweep through such a process—it needed FHFA's assent on behalf of the Companies—and thus Treasury did not have a *right* to change the terms of its agreement with FHFA to create the Net Worth Sweep.

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

B. The District Court Had Jurisdiction To Adjudicate Plaintiff's Claim that Treasury's Decision To Impose the Net Worth Sweep Was Arbitrary and Capricious.

The district court dismissed Plaintiff's claim that Treasury acted arbitrarily and capriciously in violation of the APA, concluding that HERA's limitation of judicial review, which prohibits courts from taking action to "restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver," 12 U.S.C. § 4617(f), barred this claim. Op., RE 63, PageID# 1380. That conclusion was erroneous; Section 4617(f) does not apply to federal agencies other than FHFA.

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

The question here is whether Section 4617(f)'s limitation on claims against FHFA bars Plaintiff's arbitrary-and-capricious claim against Treasury. The district court held that it does because Section 4617(f) "applies generally to litigation concerning a contract signed by FHFA pursuant to its powers as a conservator." Op., RE 63, PageID# 1380. But the district court pointed to no evidence—much less the clear and convincing evidence required to dislodge the presumption of reviewability of agency action—that Congress intended to preclude any claims against Treasury. Even though HERA specifically contemplates that both FHFA and Treasury would be taking action with respect to the Companies, Congress chose to circumscribe judicial review of certain actions *only as to FHFA*; Section 4617(f) contains no prohibition on claims against Treasury. *See Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply" especially "when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."). HERA's "silence" with respect to judicial review of Treasury's actions cannot be construed as "a denial of authority to an aggrieved person to seek appropriate relief in the federal courts." *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993) (alteration omitted).

The district court based its contrary conclusion in part on the Eighth Circuit's decision in *Dittmer Properties, LP v. FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013). But that case concerned claims against a *private* third party—not a federal agency other than the federal receiver—and thus did not implicate the presumption in favor of judicial review of administrative actions. The claim at issue in *Dittmer*, moreover, turned on the validity of debt held by a bank that was subsequently placed in receivership; the plaintiffs were at bottom attempting to enforce the legal obligations the receiver had inherited from its ward and later transferred to a third party. In contrast, Plaintiff's claim against Treasury seeks to enforce Treasury's *own* obligations under the APA.

Rather than the claims at issue in *Dittmer*, Plaintiff's claims against Treasury are most similar to the APA claims against the Federal Home Loan Bank Board that the Fifth Circuit said could go forward in *281-300 Joint Venture v. Onion*, 938 F.2d 35, 38 (5th Cir. 1991). In that case, the Bank Board determined that a failed financial institution did not have sufficient assets to pay unsecured creditors. Although the Fifth Circuit ruled that the plaintiff could not collaterally attack the Bank Board's determination by suing the federal conservator for its refusal to pay unsecured creditors, it nevertheless said that the Bank Board's determinations "are subject to review under the Administrative Procedure Act." *Id.*; *see also Wilson v. First Gibraltar Bank*, 22 F.3d 1095, at *5 (5th Cir. 1994) (unpublished) (reiterating availability of APA review of Bank Board decision when financial institution is in receivership). Other courts have likewise concluded that FIRREA did not apply in circumstances similar to those at issue here. *See Stommel v. LNV Corp.*, 2014 WL 1340676, at *5 (D. Utah Apr. 4, 2014); *LNV Corp. v. Outsource Serv. Mgmt., LLC*, 2014 WL 834977, at *4 (D. Minn. Mar. 4, 2014). Accordingly, there is no basis to interpret Section 4617(f) to protect Treasury's actions from judicial review.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment.

Date: February 10, 2017

Respectfully submitted,

/s/ Charles J. Cooper

Robert B. Craig
Taft Stettinius & Hollister LLP
1717 Dixie Highway
Suite 910
Covington, KY 41011
(859) 547-4300
craigr@taftlaw.com

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
(202) 220-9600
ccooper@cooperkirk.com
dthompson@cooperkirk.com
ppatterson@cooperkirk.com
bbarnes@cooperkirk.com

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 12,833 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure and 6 Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Times New Roman font.

/s/ Charles J. Cooper
Charles J. Cooper

DOCUMENTS TO BE DESIGNATED

Record Entry No.	Description	Pages
15	Amended Complaint	110–179
23-2	FHFA Brief in Support of Motion to Dismiss	401–445
38	Treasury Reply Brief in Support of Motion to Dismiss	769–795
63	Memorandum Opinion & Order	1374–1388
64	Judgment	1389
65	Notice of Appeal	1390

RELEVANT STATUTES, REGULATIONS, AND RULES

12 U.S.C. § 1455

§ 1455 Secondary market operations

. . . .

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

(1) Authority to purchase

(A) General authority

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

(B) Emergency determination required

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

(i) provide stability to the financial markets;

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

(iii) protect the taxpayer.

(C) Considerations

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

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

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

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

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

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

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

. . . .

(2) Rights; sale of obligations and securities

(A) Exercise of rights

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

(B) Sale of obligation and securities

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

. . . .

(D) Application of sunset to purchased obligations or securities

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

(3) Funding

. . . .

(4) Termination of authority

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

12 U.S.C. § 1719

§ 1719. Obligations and securities of the Corporation

. . . .

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

(1) Authority to purchase

(A) General authority

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

(B) Emergency determination required

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

(i) provide stability to the financial markets;

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

(iii) protect the taxpayer.

(C) Considerations

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

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

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

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

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

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

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

. . . .

(2) Rights; sale of obligations and securities

(A) Exercise of rights

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

(B) Sale of obligation and securities

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

. . . .

(D) Application of sunset to purchased obligations or securities

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

(3) Funding

. . . .

(4) Termination of authority

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

12 U.S.C. § 1821

§ 1821 Insurance Funds

. . . .

(j) Limitation on court action

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

12 U.S.C. § 4617

§ 4617 Authority over critically undercapitalized regulated entities

(a) Appointment of the Agency as conservator or receiver

(1) In general

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

(2) Discretionary appointment

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

. . . .

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

. . . .

(2) General powers

. . . .

(D) Powers as conservator

The Agency may, as conservator, take such action as may be—

(i) necessary to put the regulated entity in a sound and solvent condition; and

(ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.

(E) Additional powers as receiver

In any case in which the Agency is acting as receiver, the Agency shall place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity in such manner as the Agency deems appropriate, including through the sale of assets, the transfer of assets to a limited-life regulated entity established under subsection (i), or the exercise of any other rights or privileges granted to the Agency under this paragraph.

. . . .

(3) Authority of receiver to determine claims

. . . .

(B) Notice requirements

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

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

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

. . . .

(f) Limitation on court action

Except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February, 2017, I filed the foregoing Opening Brief of Plaintiff-Appellant Arnetia Joyce Robinson with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered users:

Abby C. Wright
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Suite 7252
Washington, DC 20530

Gerard Sinzdak
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Suite 7242
Washington, DC 20016

Counsel for Department of the Treasury

Howard N. Cayne
David B. Bergman
Asim Varma
Arnold & Porter LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001

Counsel for FHFA and Melvin L. Watt

/S/ Charles J. Cooper
Charles J. Cooper