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

BRIEF FOR THE TREASURY DEPARTMENT

CHAD A. READLER
Acting Assistant Attorney General

CARLTON S. SHIER, IV
Acting United States Attorney

MARK B. STERN
(202) 514-5089
ABBY C. WRIGHT
(202) 514-0664
GERARD SINZDAK
(202) 514-0718
Attorneys, Appellate Staff
Civil Division, Room 7242
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulation:

Other Authorities:

INTRODUCTION

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

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

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

FHFA and Treasury amended the purchase agreements three times. The first amendment doubled Treasury's $100 billion per enterprise funding commitment. By December 2009, however, it appeared that even the $400 billion commitment might be insufficient. The second amendment thus permitted the enterprises to draw unlimited amounts from Treasury to cure any quarterly net-worth deficits through 2012. At the end of 2012, however, Treasury's commitment would be fixed and future draws would reduce the remaining funding available. As of August 2012, the enterprises had drawn $187.5 billion from Treasury to prevent their insolvency.

Between 2009 and 2011, the amount due in dividends to Treasury often exceeded the enterprises' earnings, requiring them to draw on Treasury's funding commitment to meet their dividend obligations. Through the first quarter of 2012, the GSEs collectively had drawn over $26 billion from Treasury to pay dividends. Those draws increased Treasury's liquidation preference and the enterprises' future dividend obligations, obligations that threatened to deplete the remaining commitment after it became fixed at the end of 2012. The Third Amendment ended this threat by replacing the fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth exceeds a capital buffer.

2. Plaintiff does not dispute that Treasury's ongoing commitment is vital to the enterprises or that the Third Amendment ended the practice of drawing on the

commitment to pay dividends. She nevertheless asserts that that the Third Amendment was unlawful and seeks injunctive and declaratory relief.

Two separate HERA provisions independently bar plaintiff's challenges to FHFA's and Treasury's decision to enter into the Third Amendment. First, HERA's sweeping anti-injunction provision, 12 U.S.C. § 4617(f), precludes a court from taking "any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." Every court to consider the question has held that § 4617(f) bars the statutory claims Robinson raises here. As the D.C. Circuit explained in reaching that conclusion, "[s]ection 4617(f) prohibits [a court] from wielding [its] equitable relief to second-guess either the dividend-allocating terms that FHFA negotiated on behalf of the Companies, or FHFA's business judgment that the Third Amendment better balances the interests of all parties involved, including the taxpaying public, than earlier approaches had." *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1095 (D.C. Cir. 2017); *see also id.* at 1087 ("The plain statutory text draws a sharp line in the sand against litigative interference—through judicial injunctions, declaratory judgements, or other equitable relief—with FHFA's statutorily permitted actions as conservator or receiver."). As the D.C. Circuit and other courts have also recognized, a litigant cannot evade the anti-injunction bar by naming Treasury as well as FHFA as a defendant. An injunction against either party would "restrain or affect" the exercise of the conservator's powers.

Second, under the statute, FHFA as conservator succeeded to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder[.]" This provision "plainly transfers to the FHFA the shareholders' ability to bring derivative suits on behalf of [the enterprises]." *Perry Capital,* 848 F.3d at 1104. Plaintiff's APA claims assert injury to the enterprises; she suffers her alleged injury derivatively as a shareholder; and her actions fall squarely within the transfer-of-shareholder-rights provision.

Plaintiff's claims against Treasury would fail even if they were not barred by HERA. Treasury did not violate the time limits on its authority to purchase new securities from the enterprises when it agreed to the Third Amendment. As the district court found, Treasury did not purchase new securities from the enterprises when it entered into the Third Amendment. Rather, Treasury and FHFA agreed to a change in payment and other contractual terms. Treasury had ample authority to agree to such a change.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. RE15, PageID#123. On September 26, 2016, the district court entered judgment granting the defendants' motions to dismiss. RE64, PageID#1389; RE63, PageID#1388. Plaintiff timely filed a notice of appeal on November 14, 2016. RE65, PageID#1390. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

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

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

STATEMENT OF THE CASE

A. Fannie Mae and Freddie Mac

Congress created Fannie Mae and Freddie Mac to, among other things, "promote access to mortgage credit throughout the Nation . . . by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." 12 U.S.C. § 1716(4). These government-sponsored enterprises provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. The enterprises finance these purchases by borrowing money in the credit markets and by packaging many of the loans they buy into mortgage-backed securities, which they sell to investors. *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1080 (D.C. Cir. 2017).

Although Fannie Mae and Freddie Mac are private, publicly traded companies, they have long benefited from the perception that the federal government would honor their obligations should the enterprises experience financial difficulties. *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 215 (D.D.C. 2014). This perception has allowed the enterprises to obtain credit, to purchase mortgages, and to make guarantees at lower prices than would otherwise be possible. *Id.*

B. The 2008 Housing Crisis and HERA

With the 2008 collapse of the housing market, Fannie Mae and Freddie Mac experienced overwhelming losses due to a dramatic increase in default rates on residential mortgages. *Perry Capital*, 848 F.3d at 1080; *see also DeKalb County v. FHFA*, 741 F.3d 795, 798 (7th Cir. 2013) (From 1995 through the early 2000s, the enterprises "bought risky mortgages and got caught up in the housing bubble; and when the bubble burst found [themselves] owning an immense inventory of defaulted and overvalued subprime mortgages."). At the time, the enterprises owned or guaranteed over $5 trillion of residential mortgage assets, representing nearly half the United States mortgage market. RE15, PageID#111; *Perry Capital*, 848 F.3d at 1080. Their failure would have had a catastrophic impact on the national housing market and economy.

The enterprises lost more in 2008 ($108 billion) than they had earned in the past 37 years combined ($95 billion). Office of Inspector General (OIG), FHFA, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 5 (Mar. 20, 2013).[1] As a result, the enterprises faced capital shortfalls. *Perry Capital*, 848 F.3d at 1080, 1082; *see also* OIG, FHFA, *White Paper: FHFA-OIG's Current Assessment of*

[1] https://www.fhfaoig.gov/Content/Files/WPR-2013-002_2.pdf

FHFA's Conservatorships of Fannie Mae and Freddie Mac 11 (Mar. 28, 2012) (*OIG Report*).[2] Private investors were unwilling to provide Fannie Mae and Freddie Mac with the capital they needed to weather their losses and avoid receivership and liquidation. *Perry Capital*, 848 F.3d at 1082.

In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654. The legislation created FHFA as an independent agency to supervise and regulate the enterprises, and granted FHFA the authority to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a). FHFA's authority to appoint itself conservator or receiver is generally discretionary, *id.* § 4617(a)(2), but it must place the enterprises into receivership if it determines that the enterprises' assets have been worth less than their obligations for 60 calendar days, *id.* § 4617(a)(4).

HERA provides that FHFA, as conservator or receiver, "immediately succeed[s] to—(i) all rights, titles, powers, and privileges of the [enterprises] and of any stockholder, officer, or director of such [enterprises] with respect to the [enterprises.]" 12 U.S.C. § 4617(b)(2)(A)(i). The legislation authorizes FHFA, as conservator, to "take such action as may be—(i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]."

[2] https://www.fhfaoig.gov/Content/Files/WPR-2012-001.pdf

Id. § 4617(b)(2)(D). HERA also permits a conservator to take actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the GSEs. *Id.* § 4617(a)(2). HERA further states that FHFA, when acting as conservator, may exercise its statutory authority in a manner "which the Agency determines is in the best interests of the regulated entity or the Agency." *Id.* § 4617(b)(2)(J)(ii). Finally, HERA contains an anti-injunction provision, which provides that "[e]xcept as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." *Id.* § 4617(f).

Recognizing that an enormous commitment of taxpayer funds could be required, Congress also amended the enterprises' charters to authorize Treasury to "purchase any obligations and other securities issued by" the enterprises and "exercise any rights received in connection with such purchases." 12 U.S.C. §§ 1455(*l*)(1)(A), (2)(A), 1719(g)(1)(A), (B). Treasury's authority to purchase securities issued by the enterprises expired on December 31, 2009; its authority to exercise any rights received in connection with past purchases has no expiration date. *Id.* §§ 1455(*l*)(4), 1719(g)(4).

C. Conservatorship and the Preferred Stock Purchase Agreements

FHFA placed the enterprises in conservatorship on September 6, 2008. *Perry Capital*, 848 F.3d at 1082; RE15, PageID#112. One day later, Treasury purchased senior preferred stock in each entity. RE63, PageID#1375; *Perry Capital*, 848 F.3d at 1082. Under the Preferred Stock Purchase Agreements (Purchase Agreements), Treasury committed to provide up to $100 billion in taxpayer funds to each enterprise to maintain their solvency by ensuring that their assets were at least equal to their liabilities. *Id.*

The Purchase Agreements entitled Treasury to four principal contractual rights. RE22-2, PageID#320-347. First, Treasury received preferred stock with a senior liquidation preference of $1 billion for each enterprise plus a dollar-for-dollar increase each time the enterprises drew upon Treasury's funding commitment. RE22-2, PageID#325-326.[3] Second, Treasury was entitled to quarterly dividends equal to 10% of Treasury's total liquidation preference. RE22-3, PageID#350. Third, Treasury received warrants to acquire up to 79.9% of the enterprises' common stock at a nominal price. RE22-2, PageID#323, 325. Fourth, beginning in 2010, Treasury would be entitled to a periodic commitment fee that was intended "to fully compensate [Treasury] for the support provided by the ongoing [c]ommitment." RE22-2, PageID#325. Treasury could waive the commitment fee for one year at a time based on adverse conditions in the United States mortgage market. *Id.*[4]

---

[3] "A liquidation preference is a priority right to receive distributions from the [enterprises'] assets in the event they are dissolved." *Perry Capital*, 70 F. Supp. 3d at 216 n.6.

[4] The periodic commitment fee was to be set every five years by mutual agreement between FHFA and Treasury, after consultation with the Chairman of the

Treasury's initial funding commitment soon appeared to be inadequate. In May 2009, FHFA and Treasury agreed to double Treasury's funding commitment from $100 billion to $200 billion for each enterprise. RE22-4, PageID#368, 374; *Perry Capital*, 848 F.3d at 1082.

In December 2009, in the face of ongoing losses, it appeared that even the $200 billion per enterprise funding commitment might be insufficient. Treasury and FHFA therefore amended the Purchase Agreements for a second time to allow the enterprises to draw unlimited amounts from Treasury to cure net-worth deficits until the end of 2012, at which point Treasury's funding commitment would be fixed. RE22-4, PageID#368-379.

As of June 30, 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment, making Treasury's liquidation preference $189.5 billion, including the initial $1 billion senior liquidation preference for each enterprise. RE15, PageID#170; *Perry Capital*, 848 F.3d at 1082. Under the terms of the original Purchase Agreements, the enterprises' dividend obligations to Treasury were thus nearly $19 billion per year.

Federal Reserve. RE22-2, PageID#325. It was to be "determined with reference to the market value of the [c]ommitment as then in effect." *Id.* Because Treasury has never required the enterprises to pay the fee (which was indefinitely suspended under the Third Amendment), the amount of the fee has never been set. RE15, PageID#134-135.

Between 2009 and 2011, the enterprises could not pay these substantial dividend obligations out of their earnings. *Perry Capital*, 848 F.3d at 1079, 1083. The enterprises thus drew on Treasury's funding commitment to meet those obligations. *Id.* at 1079. Through the first quarter of 2012, Fannie Mae had drawn $19.4 billion and Freddie Mac had drawn $7 billion, just to pay the dividends they owed Treasury. RE15, PageID#139; *Perry Capital*, 70 F. Supp. 3d at 218. Those draws increased Treasury's liquidation preference, thus increasing the amount of dividends the enterprises owed. As their SEC filings reflect, the enterprises anticipated that they would not be able to pay their 10% dividends to Treasury without drawing on Treasury's funding commitment in the future. *See* Fannie Mae, 2012 Q2 Quarterly Report (Fannie Mae 10-Q) (Aug. 8, 2012) at 12; Freddie Mac, 2012 Q2 Quarterly Report (Freddie Mac 10-Q) (Aug. 7, 2012) at 10; *Perry Capital*, 848 F.3d at 1093. Indeed, the $11.7 billion Fannie Mae owed annually was more than the enterprise had made in any year of its existence. *See* Fannie Mae 10-Q at 4. The $7.2 billion that Freddie Mac owed annually was more than it had made in all but one year. Freddie Mac 10-Q at 8.

D. The Third Amendment

To break this cycle, Treasury and FHFA agreed to modify the Purchase Agreements for a third time. This "Third Amendment," entered into on August 17, 2012, replaced the previous fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth for the quarter exceeds a capital buffer. (The capital buffer, initially set at $3 billion, gradually declines over time, reaching zero in 2018). RE22-5, PageID#381-396; *Perry Capital*, 848 F.3d at 1083. Under the Third Amendment, the amount of the enterprises' dividend obligations thus depends on whether the enterprises have a positive net worth during a particular quarter, rather than being fixed at 10% of Treasury's existing liquidation preference. If the enterprises have a negative net worth, they pay no dividend.[5]

At the time of the Third Amendment, Treasury anticipated that the amount of money it would receive under the new dividend formula would be materially equivalent to what it would have received under the 10% dividend formula. In fact, Treasury received less in dividends in 2015 ($15.8 billion) and 2016 ($14.6 billion) than it would have under the original 10% dividend ($18.9 billion). FHFA, *Table 2: Dividends on Enterprise Draws from Treasury*;[6] *see also Perry Capital*, 848 F.3d at 1083. In 2013 and 2014, however, the enterprises' net worth was substantially higher than expected. The increase in net worth was due in part to a rebound in housing prices and, more importantly, to non-recurring events, including the enterprises' one-time recognition of deferred tax assets that they had previously written off. OIG, FHFA, *The Continued Profitability of Fannie Mae and Freddie Mac Is Not Assured* 7-8 (Mar. 18,

[5] Treasury also agreed to suspend the periodic commitment fee it was owed under the original Purchase Agreements for as long as the variable dividend was in place. RE22-5, PageID#385, 393.

[6] https://www.fhfa.gov/DataTools/Downloads/Documents/Market-Data/Table_2.pdf

2015).[7] Through the end of 2016, Treasury has received $255 billion in cumulative dividends from the enterprises, in return for its $187.5 billion investment and ongoing commitment. FHFA, *Table 2: Dividends on Enterprise Draws from Treasury*.

E. District Court Proceedings

Plaintiff Arnetia Robinson, a Fannie Mae and Freddie Mac shareholder, filed this suit against FHFA and Treasury, alleging that the Third Amendment violated the Administrative Procedure Act (APA) and seeking an injunction setting the amendment aside. RE15, PageID#171-178. Robinson alleges that FHFA and Treasury exceeded their authority under HERA when they agreed to the Third Amendment and that Treasury's decision-making with respect to the Third Amendment was arbitrary and capricious. RE15, PageID#173-79.

Treasury and FHFA moved to dismiss the suit, arguing that HERA's anti-injunction provision, 12 U.S.C. § 4617(f), and its transfer-of-shareholder-rights provision, *id.* § 4617(b)(2)(A)(i), each independently bar Robinson's APA claims.

The district court granted the motions to dismiss, relying on HERA's anti-injunction provision, 12 U.S.C. § 4617(f). RE63, PageID#1388. The court recognized that § 4617(f) effects "a sweeping ouster" of a court's authority to grant equitable relief that would affect actions taken by FHFA in its role as conservator.

[7] http://www.fhfaoig.gov/Content/Files/WPR-2015-001.pdf.

RE63, PageID#1379. Because such equitable relief was the only relief Robinson sought, the court reasoned, her claims were barred. *Id.*

The court noted that a narrow exception to § 4617(f)'s bar exists where a plaintiff can show that FHFA acted beyond statutory or constitutional bounds. RE63, PageID#1379. But Robinson had failed to make that showing, the court concluded. RE63, PageID#1382-1388. Through HERA's conservatorship provisions, Congress granted FHFA statutory authority of "extraordinary breadth," the court noted, "likely due to [HERA's] enactment during an unprecedented crisis in the housing market." RE63, PageID#1385. The Third Amendment was "clearly authorized" by that broad grant of authority. RE63, PageID#1388.

Regarding Robinson's claims against Treasury, the court ruled that she could not circumvent the anti-injunction bar by suing Treasury as FHFA's contractual counterparty. RE63, PageID#1380. The court also rejected Robinson's argument that Treasury violated HERA by purchasing new securities in the enterprises after Treasury's authority to make such purchases expired on December 31, 2009. RE63, PageID#1381 (citing 12 U.S.C. § 1719(g)(4)). The Third Amendment did not involve a "purchase" of new securities, the court concluded; it simply "represented a new formula of divided compensation for a $200 billion-plus investment Treasury had already made." *Id.*

SUMMARY OF ARGUMENT

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

First, HERA's anti-injunction provision, 12 U.S.C. § 4617(f), precludes a court from taking "any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." The district court correctly held (like every other court to consider the question) that Robinson's APA claims—which ask this Court to enjoin the Third Amendment—fit squarely within § 4617(f)'s bar. The district court also correctly concluded that Robinson cannot evade the anti-injunction bar by naming Treasury as a defendant. An injunction against either Treasury or FHFA would "restrain or affect" the exercise of the conservator's powers.

Second, HERA provided that FHFA, as conservator or receiver, would "immediately succeed" to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder[]" with respect to the enterprises and their assets. 12 U.S.C. § 4617(b)(2)(A)(i). This provision "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits on behalf of the Companies." *Perry Capital*, 848 F.3d at 1104. Robinson asserts that the Third Amendment deprived the enterprises of capital; the relief she seeks would require transfer of funds to the enterprises and would allegedly result in future increases in the enterprises' capital. Robinson's claims are thus quintessentially derivative claims and fall squarely within the transfer-of-shareholder-rights provision.

2. Robinson's claims against Treasury would fail even were they not barred by HERA. Treasury did not violate the time limits on its authority to purchase new securities from the enterprises when it agreed to the Third Amendment. Treasury obtained no new shares and obligated no additional funds. Treasury acted well within its authority when it altered the compensation structure of the securities Treasury already owned.

STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss de novo. *Trustees of Resilient Floor Decorators Ins. Fund v. A & M Installations, Inc.*, 395 F.3d 244, 247-48 (6th Cir. 2005).

ARGUMENT

I. HERA's Anti-Injunction Provision Bars Robinson's Claims.

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

Robinson's claims are barred by 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator" of the GSEs. As the D.C. Circuit recently explained, HERA's anti-injunction provision, like its FIRREA analogue, "effect[s] a sweeping ouster of courts' power to grant equitable remedies" to parties challenging actions taken by FHFA as conservator. *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1087 (D.C. Cir. 2017) (quoting *Freeman v. FDIC,* 56 F.3d 1394, 1399 (D.C. Cir. 1995)); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1329 (6th Cir. 1993) (Under FIRREA's anti-injunction provision, district court's lack jurisdiction to enter an order that would "limit [the Resolution Trust Corporation's] exercise of power as a receiver . . . [or] as a conservator"); *National Trust for Historic Pres. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring) (FIRREA anti-injunction provision "bar[s] a court from acting in virtually all circumstances."); *see also Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012) (Section 4617(f) "excludes judicial review of 'the exercise of powers or functions' given to the FHFA as a conservator.").

Judicial review is available under § 4617(f), if at all, only in the rare case where FHFA acts beyond statutory or constitutional bounds. *See Freeman*, 56 F.3d at 1398. To establish that FHFA acted *ultra vires* and thus fit within § 4617(f)'s narrow exception, Robinson must show that the agency's action was "manifestly beyond the realm of its delegated authority." *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enf't*, 20 F.3d 1418, 1424 (6th Cir. 1994); *Greater Detroit Res. Recovery Auth. v. EPA*, 916 F.2d 317, 323 (6th Cir. 1990) ("[I]t must be shown that the action of the agency was a patent violation of its authority."). Such a showing can be made "only in 'extreme situations.'" *Friends of Crystal River v. EPA*, 35 F.3d 1073, 1079 n.13 (6th Cir. 1994); *see also Bank of Am. v. Colonial Bank*, 604 F.3d 1239,1243 (11th Cir. 2010) (Section 1821(j) "has been interpreted broadly to bar judicial intervention whenever the FDIC is acting in its capacity as a receiver or conservator, even if it violates its own procedures or behaves unlawfully in doing so.") (citing cases).

For the reasons explained below, Robinson falls far short of making the showing necessary to circumvent § 4617(f)'s broad bar. At root, Robinson's challenge boils down to a disagreement over the manner in which FHFA executed its duties as conservator of the GSEs. In Robinson's view, FHFA restructured the enterprises' dividend obligations to Treasury when it did not need to do so, entered into a financially reckless deal, and failed to prioritize the build-up of capital, even if that option would have increased the risk of depleting Treasury's funding commitment. As numerous courts have held, section 4617(f) prohibits precisely such "second-guess[ing]" of "FHFA's business judgment that the Third Amendment better balances the interests of all parties involved." *Perry Capital*, 848 F.3d at 1095; *see also id.* at 1088-89 (Although the stockholders "no doubt disagree about the necessity and fiscal wisdom of the Third Amendment[,]. . . Congress could not have been clearer about leaving those hard operational calls to FHFA's managerial judgment."); *County of Sonoma v. FHFA*, 710 F.3d 987, 993 (9th Cir. 2013) ("[I]t is not our place to substitute our judgment for FHFA's."); *Bank of America*, 604 F.3d at 1244 (FIRREA's anti-injunction provision barred claim that FDIC unlawfully sold assets belonging to the plaintiff, because claim was merely an allegation of "FDIC's improper performance of its legitimate receivership functions").

Moreover, as the district court and other courts have recognized, the applicability of the HERA bar does not depend, as Robinson suggests, on the rationale for actions taken by FHFA as conservator of the enterprises. RE63, PageID#1385; *see also Perry Capital*, 848 F.3d at 1093 ("[F]or purposes of applying Section 4617(f)'s strict limitation on judicial relief, allegations of motives are neither here nor there," because nothing in HERA "hinges FHFA's exercise of its conservatorship discretion on particular motivations."); *see also* FHFA Br. 27-29.[8]

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

1. Far from engaging in *ultra vires* conduct, FHFA acted well within the scope of its statutory powers when it entered into the Third Amendment. HERA "endows FHFA with extraordinarily broad flexibility to carry out its role as conservator." *Perry Capital*, 848 F.3d at 1087. In keeping with that broad and flexible endowment, the statute grants FHFA an array of powers when acting as conservator. These include the power to "take over the assets of and operate [the GSEs]," to "conduct all

---

[8] Robinson quotes *Leon County v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012), for the proposition that "a court 'must consider *all* relevant factors,' including [an] action's 'subject matter, *its purpose*, [and] its outcome' " when deciding whether an action by FHFA is reviewable. Pl.Br. 20. But the question presented in *Leon County* was whether FHFA had taken a particular action in its role as regulator of the enterprises (whose actions are reviewable) or in its role as conservator of the enterprises (whose actions are unreviewable). *See Leon Cty.*, 700 F.3d at 1276-78. The Eleventh Circuit's suggestion that an action's purpose is relevant to determining whether FHFA was acting as a regulator or as a conservator has no application here, where the parties do not dispute that FHFA agreed to the Third Amendment in its capacity as conservator.

business of the regulated entit[ies]," to "preserve and conserve the assets and property of the [enterprises]," and to "transfer or sell any asset or liability of the regulated entity." 12 U.S.C. § 4617(b)(2)(B),(G). More generally, FHFA has the authority, as a conservator, to "take such action as may be necessary to put the regulated entity in a sound and solvent condition" and to undertake any action "appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." *Id.* § 4617(b)(2)(D). It may take these actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the GSEs. *Id.* § 4617(a)(2). And when exercising these powers, FHFA is empowered to take actions that it determines are "in the best interests of the regulated entit[ies] *or the Agency*." *Id.* § 4617(b)(2)(J)(ii) (emphasis added).

"FHFA's execution of the Third Amendment falls squarely within its statutory authority to '[o]perate the [Companies],' 12 U.S.C. § 4617(b)(2)(B); to 'reorganiz[e]' their affairs, *id.* § 4617(a)(2); and to 'take such action as may be * * * appropriate to carry on the[ir] business,' *id.* § 4617(b)(2)(D)(ii)." *Perry Capital*, 848 F.3d at 1088. By entering into the Third Amendment, FHFA took an action it deemed appropriate to "preserve and conserve" a crucial "asset[]" (or "property") of the GSEs: the unused portion of Treasury's funding commitment. At the time of the Third Amendment in 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment. *See supra* p. 10. Between 2009 and 2011, the enterprises drew over $25 billion from the commitment to pay the 10% dividends they owed Treasury. *See supra* p. 11.

These draws increased Treasury's liquidation preference, which in turn increased the amount of dividends the enterprises owed; they also threatened to diminish Treasury's remaining commitment, which became fixed at the end of 2012.

The Third Amendment ended this cycle and reduced the risk that the enterprises would exhaust Treasury's commitment prematurely. By reducing the risk that Treasury's capital commitment would be dissipated by dividend obligations, the Third Amendment ensured that the enterprises would remain solvent for the foreseeable future and provided certainty to the financial markets from which the enterprises raise funds. *See Perry Capital*, 848 F.3d at 1088 (noting that the Third Amendment ensured the enterprises "ongoing access to vital yet hard-to-come-by capital"). As the D.C. Circuit explained, "[s]uch management of Fannie's and Freddie's assets, debt load, and contractual dividend obligations during their ongoing business operation sits at the core of FHFA's conservatorship function." *Perry Capital*, 848 F.3d at 1086; *see also Town of Babylon*, 699 F.3d at 227 (taking "protective measures against perceived risks is squarely within FHFA's powers as a conservator"); *Leon Cty. v. FHFA*, 700 F.3d 1273, 1279 (11th Cir. 2012) (same).

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

Senior Preferred Stock Purchase Agreement, dated September 26, 2008, as such Agreement has been amended on May 6, 2009, December 24, 2009, and August 17, 2012, respectively, and as such Agreement may be further amended and restated." *Id.* § 702(a)(2)(A). The legislation provides that "until at least January 1, 2018, the Secretary may not sell, transfer, relinquish, liquidate, divest, or otherwise dispose of any outstanding shares of senior preferred stock acquired pursuant" to the agreement "unless Congress has passed and the President has signed into law legislation that includes a specific instruction to the Secretary regarding the sale, transfer, relinquishment, liquidation, divestiture, or other disposition of the senior preferred stock so acquired." *Id.* § 702(b). Congress amended the law fully aware of the Third Amendment and the agency's interpretation of its statutory authority. Because Congress took no steps to halt the agency action, "presumably the legislative intent has been correctly discerned." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982).

2. Robinson argues that "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 purposes of rehabilitating them." Pl.Br. 17. Robinson further asserts courts have the authority to review whether the Third Amendment was "'necessary' [and] 'appropriate' to achieve" these purported statutory requirements, Pl.Br. 20 (quoting 12 U.S.C. § 4617(b)(2)(D)), and she claims that the Third Amendment does not contribute to the GSEs' solvency, conserve or preserve their assets, or promote their rehabilitation. Pl.Br. 21-41.

Robinson is wrong on all counts. As both the district court and the D.C. Circuit emphasized, HERA does not impose the mandatory duties on FHFA that Robinson posits. RE63, PageID#1386-1387; *Perry Capital*, 848 F.3d at 1087-90. In describing FHFA's powers and authorities as conservator, HERA uses the permissive "may." Thus, HERA provides that FHFA "*may*, as conservator, take such action as may be . . . necessary to put the regulated entity in a sound and solvent condition; and . . . appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. §4617(b)(2)(D) (emphasis added); *see also* 12 U.S.C. § 4617(b)(2)(B)(iv) (FHFA "*may*, as conservator or receiver . . . preserve and conserve the assets and property of the regulated entity.") (emphasis added).

"The statute is thus framed in terms of expansive grants of permissive, discretionary authority for FHFA to exercise as the 'Agency determines is in the best interests of the regulated entity or the Agency.' " *Perry Capital*, 848 F.3d at 1088 (quoting 12 U.S.C. § 4617(b)(2)(J)). Nothing in the Act compels FHFA to preserve and conserve the enterprises' assets above all other considerations or to return the GSEs to a privately-funded model. *See Perry Capital*, 848 F.3d at 1088 ("Entirely absent from the Recovery Act's text is any mandate, command, or directive to build up capital for the financial benefit of the Companies' stockholders.").

In any event, even assuming a judicial role in evaluating whether a particular action in fact promotes the GSEs' solvency, conserves their assets, or rehabilitates them, the Third Amendment advances all of those goals. Much of Robinson's argument to the contrary rests on the mistaken premise that FHFA is under an obligation to return the enterprises to the same state that existed prior to the conservatorship. *See, e.g.*, Pl.Br. 30 (FHFA must return the GSEs to "normal, private companies."). But nothing in HERA mandates that FHFA prioritize returning the enterprises to their pre-crisis form. *See Perry Capital*, 848 F.3d at 1093-94 ("[N]othing in [HERA] mandated that FHFA takes steps to return Fannie Mae and Freddie Mac at the first sign of financial improvement to the old economic model that got them into so much trouble in the first place."). To the contrary, HERA authorizes FHFA, as conservator, to make significant changes to the enterprises' operations. *See, e.g.*, 12 U.S.C. § 4617(a)(2) (stating that FHFA may "be appointed conservator or receiver for the purpose of *reorganizing*, *rehabilitating*, or *winding up* the affairs of a [GSE]") (emphasis added); *see also Perry Capital*, 848 F.3d at 1090-91 ("FHFA's textual authority to reorganize and rehabilitate the Companies, in other words, forecloses any argument that [HERA] made the *status quo ante* a statutorily compelled end game.").

The enterprises were on the precipice of failure in 2008, and Congress did not require that the conservator return the GSEs to the hands of private shareholders without significant changes to their structure and operations: a point underscored by congressional legislation preventing Treasury from selling its preferred stock in the

GSEs for two years. Consolidated Appropriations Act, 2016, § 702(b). The legislation includes a "Sense of Congress" provision declaring that "[i]t is the Sense of Congress that Congress should pass and the President should sign into law legislation determining the future of Fannie Mae and Freddie Mac, and that notwithstanding the expiration of subsection (b), the Secretary should not sell, transfer, relinquish, liquidate, divest, or otherwise dispose of any outstanding shares of senior preferred stock acquired pursuant to the Senior Preferred Stock Purchase Agreement until such legislation is enacted." *Id.* § 702(c).[9]

Robinson is mistaken when she contends that the Third Amendment leaves the enterprises on "the brink of insolvency," thus violating FHFA's alleged duty to ensure the GSEs' soundness and solvency. Pl.Br. 3, 28-31. As explained above, the Third Amendment arrested the draws-to-pay-dividends cycle that threatened to erode Treasury's unused funding commitment. *See supra* pp. 11-12, 20-21. By preserving those funds, the Third Amendment ensured that the GSEs would have sufficient funds to cover any near-term losses, to weather another housing-market downturn,

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

and to maintain market confidence. Treasury's commitment has been crucial in ensuring that the GSEs have sufficient funds to pay their debts and avoid mandatory receivership under HERA. *See* 12 U.S.C. § 4617(a)(4). Thus, contrary to Robinson's contention, the Third Amendment helps ensure the GSEs' financial stability and solvency. *See Perry Capital*, 848 F.3d at 1091 (The Third Amendment "ensures continued access to vital capital.").

Robinson does not dispute that Treasury's ongoing commitment is vital to the enterprises' continuing operation. Rather, Robinson argues (Pl.Br. 30-31) that FHFA could have preserved Treasury's commitment in another way (*i.e.*, by paying Treasury's dividends in-kind, Pl.Br. 30), that the Third Amendment may ultimately make draws on the Commitment more, not less, likely, *id.*, and that the Third Amendment caused the enterprises to incur additional debts in 2013, *id.* at 31. But it is just such difficult operational calls and predictive judgments that Congress entrusted FHFA to make, free of second-guessing by shareholders and courts.

For similar reasons, Robinson is mistaken in asserting that the Third Amendment did not "preserve and conserve" the enterprises' assets. Pl.Br. 29, 38-39. Not only did the Third Amendment help preserve and conserve Treasury's funding commitment, but it also relieved the enterprises of their obligation to pay a fixed 10% cash dividend to Treasury, an obligation that would have cost the GSEs at least $19 billion per year, regardless of their profitability. *See supra* p. 10. Under the Third Amendment, Treasury receives a dividend only if the enterprises make money. By forgoing a fixed dividend, Treasury thus incurred a risk of non-payment, to the benefit of the GSEs. Treasury also agreed to waive the periodic commitment fee as long as the variable dividend is in place. In short, the Third Amendment was structured to, among other things, preserve the enterprises' assets and avoid increasing their debts in years (such as 2015 and 2016) when the GSEs earned less than the $19 billion they otherwise would have owed Treasury. *See Perry Capital*, 848 F.3d at 1092 (Through the Third Amendment, the GSEs obtained "continued access to necessary capital free of the preexisting risk of accumulating more debt simply to pay dividends to Treasury.").

Robinson's assertion (Pl.Br. 30) that the Third Amendment violates the conservator's statutory duty to "rehabilitate" the GSEs fares no better. As discussed *supra* pp. 24-25, HERA does not, as Robinson suggests, require FHFA to rehabilitate the companies to their prior form (Pl.Br. 15, 30), without regard to the enactment of structural changes to ensure their long-term viability. Neither 12 U.S.C. § 4617(a)(2) nor § 4617(b)(2)(D), the two provisions on which Robinson principally relies, suggest that FHFA must act with the aim of returning the entities to "private companies." A conservator can stabilize or rehabilitate a troubled financial institution with an eye towards returning it to its former status. But it can also rehabilitate an entity to ready it for reorganization or liquidation. *See, e.g.*, *Ameristar Fin. Servicing Co. v. United States*, 75 Fed. Cl. 807, 808 n.3 (2007) (describing a conservator as "operat[ing] a troubled financial institution in an effort to conserve, manage, and protect the troubled institution's assets until the institution has stabilized or has been closed by the chartering authority"); *FDIC Resolutions Handbook* 91 (glossary) (same); *see also* 12 U.S.C. § 4617(a)(2) (stating that FHFA may be appointed conservator to reorganize, rehabilitate, or wind up a GSE's affairs); *Perry Capital*, 848 F.3d at 1093 ("Undertaking permissible conservatorship measures even with a receivership [in] mind would not be out of statutory bounds.").

Moreover, Robinson's allegations that FHFA has failed "to restore [the enterprises] to viability," Pl.Br. 22, to return them "to the transaction of [their] business," *id.* at 23, or to rehabilitate them to "going concern[s]," *id.* at 24, do not withstand the briefest scrutiny. More than four years removed from the Third Amendment, the GSEs are going concerns with combined assets of more than $5 trillion. Fannie Mae 2016 10-K, at 55; Freddie Mac 2016 10-K, at 11. "During that time, Fannie and Freddie, among other things, collectively purchased at least 11 million mortgages on single-family owner-occupied properties, and Fannie issued over $1.5 trillion in single-family mortgage-backed securities." *Perry Capital*, 848 F.3d at 1083. The Third Amendment thus was not, as Robinson suggests (Pl.Br. 32), a *de facto* liquidation or tantamount to "placing [the GSEs] into receivership."[10]

---

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

3. The district court correctly dismissed Robinson's claim that FHFA violated 12 U.S.C. § 4617(a)(7) when it entered into the Third Amendment. Section 4617(a)(7) provides that "[w]hen acting as conservator or receiver, [FHFA] shall not be subject to the direction or supervision of any other agency." As the court concluded, Robinson lacks standing to press an APA claim based on § 4617(a)(7), because she does not fall within the zone of interests § 4617(a)(7) was designed to protect. RE63, PageID#1383-84; *see Courtney v. Smith*, 297 F.3d 455, 461 (6th Cir. 2002) (To bring suit under the APA, a plaintiff must show that "the interest that [she] seeks to protect is 'arguably within the zone of interests to be protected or regulated by the statute . . . in question.' "); *see also* FHFA Br. 44-48.

Section 4617(a)(7) was not designed to protect the interests of shareholders. Rather, "the clear purpose of the requirement is to provide a preemption defense *for FHFA* in its role as conservator." RE63, PageID#1383. It is thus FHFA's interests that § 4617(a)(7) safeguards. Moreover, it is clear that Congress did not "intend[] for [shareholders] to be relied upon to challenge agency disregard of the law." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984). As discussed *infra* Part II, Congress specified that, upon the commencement of the conservatorships, FHFA "immediately succeed[ed]" to "all rights, titles, powers, and privileges" of the GSEs' shareholders, without exception. 12 U.S.C. § 4617(b)(2)(A)(i). Had Congress intended shareholders to vindicate § 4617(a)(7), it would have reserved them the right to do so. It did not.

In any event, Robinson's claim that FHFA violated § 4617(a)(7) when it entered into the Third Amendment fails as a matter of law. Robinson's allegation that FHFA acted "at the insistence and direction of Treasury" is based solely "on information and belief." RE15, PageID#114, ¶ 11 (Am. Compl.); *see also* RE15, PageID#121-22, ¶¶ 24-25; RE15, PageID#161, ¶ 114; RE15, PageID#171, ¶ 135. Such "conclusory allegations" "contribute nothing to the sufficiency of a complaint" and do not support a plausible claim for relief. *16630 Southfield Ltd. P'ship v. Flagstar Bank*, 727 F.3d 502, 504 (6th Cir. 2013); *see also Perry Capital*, 848 F.3d at 1091 n.9 (rejecting identical claim). As FHFA's vigorous, years-long defense of the Third Amendment suggests, FHFA entered into the Third Amendment of its own volition.

C. HERA's anti-injunction provision applies to Robinson's claims against Treasury.

Section 4617(f) does not permit Robinson to seek to enjoin FHFA's actions by naming Treasury as a defendant. As the D.C. Circuit observed, "the effect of any injunction or declaratory judgment aimed at Treasury's adoption of the Third Amendment would have just as direct and immediate an effect as if the injunction operated directly on FHFA." *Perry Capital*, 848 F.3d at 1096; *see also* RE63, PageID#1380. Such an injunction against FHFA's contractual counterparty would thus run afoul of § 4617(f)'s prohibition on judicial relief that would "restrain or affect" FHFA's exercise of its conservatorship powers.

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

The presumption favoring judicial review of agency action, which Robinson cites in arguing that Treasury's actions are reviewable here (Pl.Br. 50-52), does not aid her argument. That presumption "is rebuttable: It fails when a statute's language or structure demonstrates that Congress" intended to preclude review. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). Here, § 4617(f) expressly precludes judicial review of agency actions where such review would "restrain or affect"

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

Robinson's reliance on the Fifth Circuit's decision in *281-300 Joint Venture v. Onion*, 938 F.2d 35, 38 (5th Cir. 1991), is similarly misplaced. *See* Pl.Br. 52. The plaintiff in *Joint Venture* challenged two separate actions: (1) a determination by the Federal Home Loan Bank Board that the claims of unsecured creditors of a failed bank were worthless; and (2) a foreclosure sale executed by the Resolution Trust Corporation, acting as conservator for the failed bank. 938 F.2d at 38-39. The Fifth Circuit concluded that the first challenge was prudentially moot, and the second was barred by § 4617(f)'s FIRREA analogue. *Id.* The plaintiff in *Joint Venture* did not seek to enjoin the Resolution Trust Corporation's contractual counterparty. Nor is there any indication that the plaintiff's claims against the Bank Board, which the court dismissed on threshold grounds, would have in any way restrained or affected the Resolution Trust Corporation's actions as conservator. *Id.* at 38. In short, the Fifth Circuit in *Joint Venture* had no occasion to address the situation presented here, where Robinson's "claims against [an agency] are integrally and inextricably interwoven with FHFA's conduct as conservator." *Perry Capital*, 848 F.3d at 1097.

II. HERA's Shareholder-Rights Provision Independently Bars Robinson's Claims.

Although the district court did not need to reach the question, Robinson's claims against Treasury and FHFA are independently barred by HERA's transfer-of-shareholder-rights provision, 12 U.S.C. § 4617(b)(2)(A)(i). That provision provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." *Id.* This provision "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits." *Perry Capital*, 848 F.3d at 1104 (quoting *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012)). Because Robinson's APA claims are derivative claims, they are barred.

A. Robinson's claims are derivative claims.

1. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Thus, legal harms committed against a corporation give rise to claims belonging to the corporation itself, and shareholder suits seeking to enforce those claims are derivative. *See, e.g.*, *First Annapolis Bancorp, Inc. v. United States*, 644 F.3d 1367, 1373 (Fed. Cir. 2011). In a derivative suit, any recovery flows to the corporate treasury; in a direct suit, it flows to the individual plaintiff-shareholder.

The determination whether a federal-law claim is direct or derivative is governed by federal law. *See* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1821 (2017); *cf. Rifkin v. Bear Stearns & Co.*, 248 F.3d 628, 631 (7th Cir. 2001) ("[S]tanding to bring a federal claim in federal court is exclusively a question of federal law."). Where standing turns on the "allocation of governing power within [a] corporation," however, federal law often looks to state-law principles. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991).

The principles for distinguishing direct from derivative claims are well established and consistent across federal and state law. The analysis is governed by two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004); *see also Gaff v. FDIC*, 814 F.2d 311, 315 (6th Cir. 1987) ("A suit for damages arising from an injury to the corporation can only be brought by the corporation itself or by a shareholder derivatively if the corporation fails to act, . . . since only the corporation has an action for wrongs committed against it."). A claim is "direct" when "the duty breached was owed to the stockholder" and the stockholder "can prevail without showing an injury to the corporation." *Tooley*, 845 A.2d at 1039. A claim is "derivative" if the harm to the shareholder is the byproduct of some injury to the corporate body as a whole. *Id.*

"Where all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature." *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008); *see also, e.g.*, *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006) ("In the eyes of the law, such equal 'injury' to the shares . . . is not viewed as, or equated with, harm to specific shareholders individually."). Decisions in this Circuit have adhered to that principle. *See Gaff*, 814 F.2d at 315; *Warren v. Manufacturers Nat'l Bank*, 759 F.2d 542, 544 (6th Cir. 1985).

Moreover, "claims that [defendants] caused the company to enter into a series of 'unfair' transactions that have 'involved self-dealing' and 'diverting assets' are fundamentally claims belonging to the corporation and to [shareholders] only derivatively." *Cowin v. Bresler*, 741 F.2d 410, 416 (D.C. Cir. 1984); *see also Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) ("Pareto's allegations—that the directors breached their duties of care and loyalty by failing to safeguard Barbary Coast's assets and equity, mismanaging its operations, [and] improperly placing it into voluntary receivership . . . describe a direct injury to the bank, not the individual stockholders.").

2. Robinson asks that the Third Amendment be declared invalid and enjoined, so that future increases in net worth would be retained by the enterprises, and also requests that the dividends Treasury has already received be returned to the GSEs. RE15, PageID#178-179.

Such an order would not benefit Robinson directly. The relief sought would enrich the enterprises and therefore make Robinson's rights in the enterprises more valuable. Similarly, the harm that Robinson alleges—the assertedly improper transfer of the GSEs' net worth to Treasury—was suffered by the corporation. *See, e.g.*, Pl.Br. 3 (arguing that the Third Amendment "depletes the *Companies'* assets and pushes them to the brink of insolvency") (emphasis added); Pl.Br. 16 ("[T]he 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*.") (emphases added); Pl.Br. 30 ("[T]oday 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.'"); Pl.Br. 37 (the Third Amendment "involve[s] self-dealing [and] waste").

That the Third Amendment will allegedly cause Robinson indirect harm as a shareholder, such as a decline in the value of her shares or a reduced likelihood of future dividends or liquidation payouts, does not transform her claims into direct claims. *See, e.g.*, *Warren*, 759 F.2d at 544 ("[D]iminution in value of the corporate assets is insufficient direct harm to give the shareholder standing to sue in his own right."); *Gaff*, 814 F.2d at 318 ("Gaff primarily claims that his shares in the failed bank became totally worthless as a result of the defendants' conduct. . . . [A] diminution in the value of stock is merely indirect harm to a shareholder and does not bestow upon a shareholder the standing to bring a direct cause of action."); *Tooley*, 845 A.2d at 1037

(A claim is derivative where "the *indirect* injury to the stockholders arising out of the harm to the corporation comes about solely by virtue of their stockholdings.").

3. Robinson argued below that her APA claims are direct, not derivative, because the APA "provides a cause of action for individuals 'adversely affected or aggrieved by agency action,' 5 U.S.C. § 702, and [she] clearly meets this standard." RE30, PageID#622-23. This argument fundamentally misunderstands the distinction between direct and derivative suits. As explained above, whether a plaintiff's claim is direct or derivative turns on the nature of the plaintiff's harm and the relief sought. *See supra* pp. 34-35. Thus, if a plaintiff is adversely affected by agency action only indirectly (*i.e.*, as a result of harm to the corporation) and seeks relief that accrues to the corporation, as is the case here, her APA claim is derivative.

This Court's decision in *Warren,* which rejected the same argument presented here, is illustrative. Citing the provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) that provides a cause of action to "[a]ny person injured in his business or property by reason of" a RICO violation, 18 U.S.C. § 1964(c), the plaintiff shareholder in *Warren* contended that he had a direct cause of action under § 1964(c) because he had been harmed as a shareholder when the company whose stock he owned was defrauded. *Warren*, 759 F.2d at 544. Rejecting that argument, the Court emphasized that "[i]n his capacity as a shareholder of Paragon, any injury [the plaintiff] incurred was actually one sustained by the corporation." *Id.* Accordingly, the Court held, his claim was "derivative" and "must be brought in the name of the corporation." *Id.*; *see also Bixler v. Foster*, 596 F.3d 751, 758-59 (10th Cir. 2010) (noting that the court of appeals have "uniform[ly]" held that shareholder claims under § 1964(c) are "derivative" and that "corporate shareholders do not have standing to sue under [§ 1964(c)] for alleged injuries to the corporation").

Moreover, to the extent the APA grants a cause of action to an aggrieved party, it does so only where no "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). As explained *supra* pp. 33-36, HERA's transfer-of-shareholder-rights provision bars shareholders from bringing suits that seek to remedy harms that shareholders experience only derivatively and would, in any event, preclude an APA action.

B. The "fiduciary" exception cited by Robinson in the district court has no applicability here.

Claims that a majority shareholder breached a fiduciary duty to minority shareholders with respect to a corporate transaction are typically derivative claims. *See, e.g.*, *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1218 (Del. 2012) (claim that controlling shareholder and the corporation's directors breached a fiduciary duty to minority shareholders by causing the corporation to pay an "unfair price" for an asset was a derivative claim). Delaware law has recognized a narrow exception to that rule for cases in which "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile*, 906 A.2d at 100. To the extent that "the harm resulting from the overpayment is not confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares," those minority shareholders may bring a direct claim to recover for that additional quantum of harm. *Id.* The Delaware Supreme Court has emphasized "that the extraction of solely economic value from the minority by a controlling stockholder" does not alone constitute "direct injury" under *Gentile*; a dilution of voting rights is also required. *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016). A *Gentile* claim is actionable based on the controlling shareholder's "breach of fiduciary duty" to the plaintiff. 906 A.2d at 99-100, 103.

In the district court, Robinson argued that her claims are direct under the narrow *Gentile* exception, because Treasury was a controlling shareholder and the Third Amendment "constituted an unlawful 'extraction from [Plaintiff], and a redistribution to [Treasury,] the controlling shareholder, of . . . the economic value' of her stock." RE30, PageID#628 (quoting *Gentile*, 906 A.2d at 100). Robinson's argument is wrong in several respects.

The premise of Robinson's argument is incorrect: Treasury was not a controlling shareholder and did not owe a fiduciary duty to the GSEs' shareholders. A controlling shareholder of a corporation either owns a majority of the corporation's voting shares, or it exercises "actual control" over the corporation's affairs. *Starr Int'l*

Co. v. Federal Reserve Bank of N.Y., 906 F. Supp. 2d 202, 221-25 (S.D.N.Y. 2012), *aff'd*, 742 F.3d 37 (2d Cir. 2014); *see also Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987). Treasury is not and has never been a majority shareholder, nor does it have voting rights in the GSEs. Its rights as a senior preferred shareholder are entirely contractual. Even "a significant shareholder, who exercises a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take, does not become, without more, a controlling shareholder for that particular purpose." *Superior Vison Servs. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426, at *5 (Del. Ch. Aug. 25, 2006); *see also Starr*, 906 F. Supp. 2d at 221-25. Moreover, HERA's requirements that Treasury act to "protect the taxpayer," 12 U.S.C. § 1719(g)(1)(B)(iii), and consider the "need for preferences or priorities regarding payments to the Government," *id.* § 1719(g)(1)(C)(i), negates Robinson's suggestion that Treasury owed common-law fiduciary duties to the GSEs' shareholders. *See* RE63, PageID#1380 n.3.

Even if Treasury could be deemed a controlling shareholder, the exception would be inapplicable. Robinson asserted below only that Treasury extracted the economic value of her shares. Her amended complaint is devoid of any allegation that the Third Amendment also diluted her voting rights, for good reason. The Third Amendment altered the way Treasury's dividends are calculated; it did not alter Treasury's voting rights (Treasury has none) or its ownership stake in the GSEs. *Cf. Perry Capital*, 848 F.3d at 1109 (concluding that the Third Amendment did not alter the shareholders' voting rights). Because "the extraction of solely economic value from the minority by a controlling stockholder" without a corresponding dilution in voting rights is not sufficient to state a claim under *Gentile*, Robinson's reliance on the *Gentile* exception necessarily fails. *See El Paso Pipeline*, 152 A.3d at 1264.

The *Gentile* exception is also inapplicable because the Third Amendment did not result in the issuance of additional shares of GSE stock, let alone "excessive" shares. Nor did the Third Amendment alter the percentage of GSE shares outstanding that Treasury owns or decrease the percentage owned by private investors. In short, Treasury and FHFA's agreement to the Third Amendment is far removed from the circumstances present in *Gentile*.

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

1. In a further attempt to evade HERA's bar on derivative suits, Robinson argued below that there exists an implicit "conflict-of-interest" exception to HERA's transfer-of-shareholder-rights provision that would allow shareholders to bring derivative claims when FHFA, acting as conservator, is allegedly unwilling to bring suit due to a purported conflict of interest. RE30, PageID#631-35. Robinson is barred by issue preclusion from advancing her argument that HERA's succession provision includes a conflict-of-interest exception, and that argument is without merit in any event.

The doctrine of issue preclusion bars Robinson from arguing that HERA's transfer-of-shareholder-rights provision includes an implicit conflict-of-interest exception. Issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). And a judgment rendered in a shareholder derivative suit precludes subsequent litigation of that issue by the corporation and its shareholders. *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) ("Furthermore, in shareholder derivative actions arising under Fed.R.Civ.P. 23.1, parties and their privies include the corporation and all nonparty shareholders."); *Cramer v. General Tel. & Elecs. Corp.*, 582 F.2d 259, 267 (3rd Cir. 1978) ("Although different shareholders brought the two actions, the actual plaintiff on whose behalf the claims were brought is the identical corporation."); *United States v. LTV Corp.*, 746 F.2d 51, 53 n.5 (D.C. Cir. 1984).

The question whether HERA's transfer-of-shareholder-rights provision includes a conflict-of-interest exception was litigated and resolved against Robinson and all GSE shareholders in *Perry Capital v. Lew*, 70 F. Supp. 3d 208, 229-30 (D.D.C. 2014). Addressing various derivative claims brought by GSE shareholders, the district court in *Perry Capital* concluded that (1) HERA's transfer-of-shareholder-rights provision bars derivative suits; and (2) no conflict-of-interest exception to that provision exists. *Id.* Those conclusions, both of which were necessary to the court's dismissal of the relevant derivative claims, were affirmed by the court of appeals. *See Perry Capital*, 848 F.3d at 1106 ("We therefore conclude the Succession Clause does not permit shareholders to bring derivative suits on behalf of the Companies even where the FHFA will not bring a derivative suit due to a conflict of interest."). It is irrelevant that the derivative claims that the court addressed in *Perry Capital* were not derivative APA claims. Issue preclusion applies "even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892. Because the issue whether § 4617(b)(2)(A)(i) includes a conflict-of-interest exception was fully litigated and decided on the merits against GSE shareholders in previous derivative litigation, Robinson cannot relitigate it in pursuit of her derivative claims here.

Robinson's arguments in favor of a conflict-of-interest exception lack merit in any event. HERA's transfer-of-shareholder-rights provision by its terms admits of no exceptions. *See also Kellmer*, 674 F.3d at 851 ("Congress has transferred everything it could to the [conservator]" through § 4617(b)(2)(A)(i).).

Moreover, as the D.C. Circuit recognized in *Perry Capital*, creating a judicial conflict-of-interest exception would be inconsistent with the purpose of HERA's transfer-of-rights provision. *Perry Capital*, 848 F.3d at 1106. The two courts of appeals that have recognized a conflict-of-interest exception to FIRREA's analogous provision did so on the ground that a receiver facing a conflict of interest might be "unable or unwilling to [file suit on a corporation's behalf], despite it being in the best interests of the corporation." *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999) (conflict arose because the Federal Deposit Insurance Corporation [FDIC] would have had to sue itself); *see also Delta Savings Bank v. United States*, 265 F.3d 1017, 1021-22 (9th Cir. 2001) (FDIC would have had to sue the Office of Thrift Supervision, an "interrelated agenc[y] with overlapping personnel, structures, and responsibilities").

But it is precisely to address such concerns that courts in some circumstances have permitted derivative suits. *See Kamen*, 500 U.S. at 95 ("[T]he purpose of the derivative action was to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers."). Through HERA, Congress precluded such actions. "[I]t makes little sense to base an exception to the rule against derivative suits in the Succession Clause on the purpose of the derivative suit mechanism." *Perry Capital*, 848 F.3d at 1106.

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

In contrast, HERA provided for shareholders' participation in the statutory claims process in the event of the enterprises' liquidation. 12 U.S.C. § 4617(b)(2)(K)(i)). That Congress expressly granted certain rights to shareholders during a receivership underscores that Congress did not intend shareholders to retain any rights during a conservatorship.

The conflict-of-interest exception adopted by the Ninth Circuit in *Delta Savings* and the Federal Circuit in *First Hartford* is inapt for an additional reason. In both cases, the conduct challenged by the plaintiff shareholders occurred before the relevant federal regulator was appointed receiver. *See Delta Savings*, 265 F.3d at 1019-21; *First Hartford*, 194 F.3d at 1283-84. By contrast, Robinson challenges action taken by FHFA during the conservatorship, in its role as conservator. It is precisely such actions that Congress took pains to shield from second-guessing by shareholders and courts. *See* 12 U.S.C. § 4617(b)(2)(A)(i), (f). Extending the implicit conflict-of-interest exception adopted in *Delta Savings* and *First Hartford* to Robinson's suit would run counter to HERA's basic design.

2. Even assuming that a conflict-of-interest exception could apply to HERA's bar on derivative suits, no such conflict exists here. In the district court, Robinson alleged that a conflict exists because the Third Amendment was "a joint FHFA-Treasury initiative." RE30, PageID#634. But the fact that FHFA and Treasury made an agreement that Robinson believes to be unlawful does not establish a conflict of interest. If it did, every transaction FHFA entered could be challenged by shareholders. Even the two courts that have adopted the conflict-of-interest exception have rejected such a far-reaching rule. *See First Hartford*, 194 F.3d at 1295 (emphasizing that the conflict-of-interest exception will apply "only . . . in a very narrow range of circumstances"); *Delta Savings*, 265 F.3d at 1023 ("We do not suggest that the FDIC-as-receiver is faced with a disqualifying conflict every time a bank-in-receivership is asked to sue another federal agency.").

Robinson's conclusory assertion that FHFA and Treasury are "closely related entities" fails to advance her claim. RE30, PageID#635 n.23.[11] FHFA and Treasury operate independently of one another. *See Perry Capital*, 70 F. Supp. 3d at 232-33. They do not have a common genesis: FHFA was created by HERA as an "independent agency," 12 U.S.C. § 4511(a); Treasury by the 1789 "[A]ct to [E]stablish the Treasury Department," *see United States ex rel. Work v. Boutwell*, 3 MacArth. 172 (D.C. 1879). And, in contrast to the circumstances in *Delta Savings*, 265 F.3d at 1023, FHFA, not Treasury, made the determination to place the enterprises in conservatorships.

---

[11] Robinson's allegation "on information and belief" that Treasury compelled FHFA to enter into the Third Amendment is entitled to no weight and thus cannot support a finding that FHFA suffered from a disabling conflict of interest. *See 16630 Southfield Ltd.*, 727 F.3d at 504; *supra* p. 30.

III. Robinson's Claim That Treasury Exceeded Its Authority Under HERA, Which Is Barred, Also Fails On The Merits.

For the reasons explained above, the district court lacked jurisdiction over Robinson's APA claims against Treasury as well as those against FHFA. Robinson's claim that Treasury exceeded its authority under HERA would also fail on the merits.

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

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

Treasury's authority to purchase new securities from the enterprises expired on December 31, 2009. 12 U.S.C. § 1719(g)(4); *id.* § 1455(*l*)(4). Its authority to "exercise any rights received in connection" with earlier purchases, as well as its authority to hold or sell securities, did not. *See id.* § 1719(g)(2)(D); *id.* § 1455(*l*)(2)(D).

The district court correctly rejected Robinson's assertion that the Third Amendment was a "purchase" of new "securities." RE63, PageID#1380-81. Treasury obtained no new shares of the enterprises' stock as a result of the Third Amendment. *See Isquith ex rel. Isquith v. Caremark Int'l, Inc.*, 136 F.3d 531, 534 (7th Cir.

1998) (plaintiffs did not "purchase or sell securities" where they "did not buy or sell shares" in the relevant companies). Treasury did not commit any additional funds to the enterprises in the Third Amendment. As the district court explained, the Third Amendment merely altered "the compensation structure" of the securities Treasury already owned. RE63, PageID#1381 (quoting *Perry Capital*, 70 F. Supp. 3d at 224). In exchange for waiving the periodic commitment fee and its entitlement to a dividend equal to 10% of its liquidation preference, Treasury agreed to accept a dividend equal to the enterprises' variable net worth, if any.

Robinson correctly notes that the Third Amendment involved an exchange of value: FHFA "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." Pl.Br. 43. She errs, however, in inferring that the Third Amendment therefore must have effected a purchase of securities. Robinson declares that "[t]he touchstone of a purchase is an *exchange of value*." Pl.Br. 44. But an "exchange of value" is also the touchstone of a valid contract amendment. *See*, *e.g.*, *Robinson v. Ada S. McKinley Cmty. Servs.*, 19 F.3d 359, 364 (7th Cir. 1994) ("A valid modification requires an offer, acceptance, and consideration."); 1 *Farnsworth on Contracts* § 4.21, p. 524 (3d ed. 2004). And HERA's sunset provision only bars Treasury's purchase of obligations or securities issued by the GSEs. It does not bar other contract amendments. Implying such a restriction would be particularly anomalous when the amendment plainly falls within Treasury's authority to "hold" or "sell" the securities it owns or to "exercise" previously secured rights.

In the absence of an actual purchase of securities, Robinson is left to argue that the Third Amendment should be treated as a purchase of new securities because it "fundamentally change[d]" Treasury's senior preferred stock. Pl.Br. 44. The "fundamental change" doctrine, adopted in some securities-fraud cases, is an "esoteric and dubious judge-made doctrine" whose ongoing validity has been questioned. *Isquith*, 136 F.3d at 535-36 ("[W]e very much doubt that the doctrine retains any validity in any class of case."). Some courts of appeals have expressly declined to adopt it, *see Katz v. Gerardi*, 655 F.3d 1212, 1221 (10th Cir. 2011), and even those which have accepted it have acknowledged that it "does not cut a wide swath," *Jacobson v. AEG Capital Corp.*, 50 F.3d 1493, 1499 (9th Cir. 1995). It is implausible that Congress intended to incorporate such an "esoteric and dubious" doctrine into HERA's definition of "purchase."

In any event, the doctrine is inapplicable on its own terms. It applies "where a defendant's fraud results in a fundamental change in the nature of the plaintiff's investment without the plaintiff's consent." *Katz*, 655 F.3d at 1221; *Jacobson*, 50 F.3d at 1499 (The fundamental change doctrine is a "narrow" doctrine that applies to "shareholders who, without any say, find themselves fraudulently forced-out of their securities."). Robinson does not claim that the Third Amendment was the product of fraud. Treasury and FHFA bargained for the changes that were made to the original Purchase Agreements, and FHFA freely agreed to those changes.[12]

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

Robinson alternatively argues that the Third Amendment exceeded Treasury's authority even if it did not constitute a purchase of new securities, urging that it falls outside the powers granted by HERA. Pl.Br. 47-50.

This argument is difficult to fathom. Congress provided Treasury with broad authority, which it restricted in one respect by ending Treasury's authority to purchase new securities on December 31, 2009. It did not freeze the parties' contract terms as of that date and preclude Treasury and FHFA from altering their compensation arrangements as appropriate. Like parties to any contract, Treasury and FHFA had the power to modify the terms of their contract. Indeed, Congress recognized Treasury's inherent authority to modify the terms of its purchase contracts in HERA and expressly funded such modifications, providing that "[a]ny funds expended for

[12] Robinson also cites (Pl.Br. 45-46) an IRS tax regulation, 26 C.F.R. § 1.1001-3, which address the circumstances in which "modification of the terms of a debt instrument" qualifies as an "exchange" of property, such that any financial gain resulting from the modification must be declared as income. Robinson provides no reason to believe that Congress intended the word "purchase" to be read synonymously with the word "exchange," as used by the IRS in a tax regulation addressing debt instruments. Robinson likewise provides no grounds for her suggestion (Pl.Br. 45) that, in drafting HERA's sunset provision, Congress had a 1976 SEC no-action letter, a 1936 letter from the SEC's general counsel, or a 1938 district court decision in mind.

the purchase of, or modifications to, obligations and securities, or the exercise of any rights received in connection with such purchases under this subsection shall be deemed appropriated at the time of such purchase, modification, or exercise." *See* 12 U.S.C. § 1719(g)(3); *id.* § 1455(*l*)(3). And Congress has continued to recognize Treasury's ongoing authority to amend the Purchase Agreement. *See* Consolidated Appropriations Act, 2016, § 702(a)(2)(A),(B) (defining "Senior Preferred Stock Purchase Agreement" as "the Amended and Restated Senior Preferred Stock Purchase Agreement, dated September 26, 2008, as such Agreement has been amended on May 6, 2009, December 24, 2009, and August 17, 2012, respectively, and as such Agreement may be further amended and restated, entered into between the Department of the Treasury and each enterprise, as applicable").

Even assuming, moreover, that it were necessary that Treasury modify the Purchase Agreements through the "exercise" of a reserved contractual "right," that requirement was satisfied here. When it entered into the Third Amendment, Treasury "exercise[d] [the] right[]," 12 U.S.C. § 1719(g)(2)(A)—explicitly conferred by the original Preferred Stock Purchase Agreements in 2008—to amend those contracts. *See* RE22-2, PageID#331 ("This Agreement may be waived or amended solely by a writing executed by both of the parties hereto."); RE22-2, PageID#345 (same). That Treasury exercised its right to amend jointly with FHFA makes it no less the exercise of a right. A contract confers a "right" to be "exercised" even when the right is to be exercised jointly. *See, e.g., Public Serv. Co. of New Hampshire v. Hudson Light & Power*

Dep't, 938 F.2d 338, 345, 347 (1st Cir. 1991) (rejecting "attempt by appellants . . . to impede [one party's] exercise of its exclusive contractual right to enter into an agreement with [the counterparty] to modify the Sellback Agreement.").[13] A right, as Robinson asserts, is a "legal, equitable, or moral entitlement to do something," Pl.Br. 48, and to "exercise" means to "make use of; to put into action" or "[t]o implement the terms of." *Black's Law Dictionary* 693 (10th ed. 2014). When Treasury and FHFA agreed to the Third Amendment, they "ma[d]e use of" their "legal . . . entitlement" to amend the original Purchase Agreements.

In sum, HERA authorized Treasury to agree to the Third Amendment. And, insofar as Robinson seeks to bring her claims within an exception to HERA's anti-injunction provision on the basis of *ultra vires* action, she has signally failed to meet her

[13] Robinson cites two cases for the assertion that "an arrangement that depends on 'mutual consent' is not a right at all," Pl.Br. 49, both of which are inapposite. *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), was a takings case that concerned the amount of just compensation the government owed to tenants of a property that the government had appropriated. The Supreme Court determined that the tenants were entitled to damages equal to the value of the remainder of their lease. *Id.* at 380. In a footnote, the Court noted that plaintiffs were not entitled to damages based on the expected renewal of their leases, even though the building's landlord had often extended their leases through "mutual consent." *Id.* at 380 n.9. It was the terms of the lease, not the parties' informal expectations, that delineated the tenants' "rights" to compensation. *Id.* *International Union, UAW v. NLRB*, 765 F.2d 175, 183 (D.C. Cir. 1985), applied the rule that an employer must obtain a union's consent before taking an action that is a mandatory subject of bargaining, unless the employer has reserved the right to act unilaterally in its contract with the union. *UAW* does not suggest that a contract right that is exercised mutually is not a right the parties possess.

burden of showing that Treasury "manifestly" misconstrued HERA and violated "a specific statutory prohibition." *Southern Ohio Coal*, 20 F.3d at 1423-24.

CONCLUSION

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

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

CARLTON S. SHIER, IV
Acting United States Attorney

/s/ Gerard Sinzdak
MARK B. STERN
ABBY C. WRIGHT
GERARD SINZDAK
(202) 514-0718
Attorneys, Appellate Staff
Civil Division, Room 7252
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

APRIL 2017

CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,991 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Gerard Sinzdak
Gerard Sinzdak
Counsel for Treasury
gerard.j.sinzdak@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2017, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

Robinson's counsel are registered CM/ECF users who are served by the Notice of Docket Activity generated by the appellate CM/ECF system.

/s/ Gerard Sinzdak
Gerard Sinzdak
Counsel for Treasury
gerard.j.sinzdak@usdoj.gov

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS
6th Cir. Rule 30(g)(1)

The Department of the Treasury hereby designates the following portions of the district court record for this Court's consideration:

Record Entry No.	Description	PageID Range
15	Amended Complaint	110-179
22-1	Treasury's Memorandum in Support of its Motion to Dismiss	271-318
22-2	Exhibit A to Treasury's Motion to Dismiss—Amended Stock Purchase Agreement	319-347
22-3	Exhibit B to Treasury's Motion to Dismiss—Certificate of Designation of Terms	348-366
22-4	Exhibit C to Treasury's Motion to Dismiss—Second Amendment to Purchase Agreements	367-379
22-5	Exhibit D to Treasury's Motion to Dismiss—Third Amendment to Purchase Agreements	380-396
30	Plaintiff's Response in Opposition to Defendants' Motion to Dismiss	547-639
63	Memorandum Opinion & Order	1374-1388
64	Judgment	1389
65	Notice of Appeal	1390