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

REPLY BRIEF OF PLAINTIFF-APPELLANT ARNETIA JOYCE ROBINSON

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I. Section 4617(f) Does Not Bar Judicial Review Because the Net Worth Sweep Is Antithetical to FHFA's Statutory Mission as Conservator.

A. FHFA's Conservatorship Mission Is To Preserve and Conserve the Companies' Assets and To Restore Them to a Sound and Solvent Condition.

"[A]s conservator," FHFA's mission is to "put the [Companies] in a sound and solvent condition" and "to carry on [their] business . . . and preserve and conserve [their] assets and property." 12 U.S.C. § 4617(b)(2)(D). This rehabilitative mission—and, indeed, HERA's use of the word "conservator"—draws on a "long history of fiduciary conservatorships at common law." *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1121 (D.C. Cir. 2017) (Brown, J., dissenting); *see also RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1453-54 (8th Cir. 1992); Opening Br. 25-26. "At common law, 'conservators' were appointed to protect the legal interests of those unable to protect themselves." *Perry Capital*, 848 F.3d at 1122 (Brown, J., dissenting). Whatever the scope of FHFA's conservatorship powers in other respects, it plainly exceeds its powers and cannot benefit from Section 4617(f)'s restriction on judicial review when it gratuitously abandons this core statutory mission.

B. FHFA's Pursuit of Its Statutory Mission Is Mandatory.

Defendants contend that FHFA's pursuit of the conservatorship mission specified in Section 4617(b)(2)(D) is optional, but the arguments advanced by

Defendants and adopted by the *Perry Capital* majority are unpersuasive.

a. Like the *Perry Capital* majority, Defendants heavily rely on Section 4617(b)(2)(D)'s use of the word "may." *See Perry Capital*, 848 F.3d at 1087-89. But Congress's use of "may" in this provision "is best understood as a simple concession to the practical reality that a conservator may not always succeed in rehabilitating its ward," and it does not leave FHFA as conservator free to "affirmatively sabotage the Companies' recovery." *Id.* at 1118 n.1 (Brown, J., dissenting). Moreover, Section 4617(b)(2)(D) is a limited delegation of authority to FHFA, and the fact that FHFA "may" work to further the mission of a traditional conservator specified in that provision means that FHFA *may not* take actions that are antithetical to that mission and its delegated power to preserve and conserve assets. *See* Opening Br. 27; *New York v. FERC*, 535 U.S. 1, 18 (2002) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). Section 4617(b)(2)(D) "mark[s] the bounds of FHFA's conservator . . . powers," and FHFA may not take any action that goes beyond or conflicts with these powers. *Perry Capital*, 848 F.3d at 1118 (Brown, J., dissenting).

Consistent with this reading of HERA, FHFA has continued even after the Net Worth Sweep to refer to its "conservatorship *mandate* to preserve and conserve the [Companies'] assets." Statement of Edward J. DeMarco Before the U.S. S. Comm. on Banking, Housing and Urban Affairs 3 (Apr. 18, 2013) (emphasis added), goo.gl/QI7V44. Indeed, outside of the context of litigation FHFA has repeatedly and consistently evinced an understanding that its pursuit of the mission set out in Section 4617(b)(2)(D) is mandatory. *See, e.g.*, FHFA, A STRATEGIC PLAN FOR ENTERPRISE CONSERVATORSHIPS 9 (Feb. 21, 2012), https://goo.gl/iU652E (referring to "the *mandate* to restore the Enterprises to a sound and solvent condition" (emphasis added)); Plaintiff's Amended Complaint, RE 15, PageID# 127, ¶ 43 ("Compl.") ("The statutory role of FHFA as conservator *requires* FHFA to take actions to preserve and conserve the assets of the Enterprises and restore them to safety and soundness." (emphasis added) (quoting FHFA 2009 Annual Report to Congress)); *id.* (referring to the " 'preserve and conserve' mandate" (quoting 2012 FHFA Strategic Plan)); 76 Fed. Reg. 35,724, 35,727 (June 20, 2011) ("[T]he Conservator is *charged* with rehabilitating the regulated entity." (emphasis added)).

But even if the Court agrees with the *Perry Capital* majority that Section 4617(b)(2)(D) places no limits on FHFA's conduct because it uses the word "may," a separate provision of HERA says that "[i]n exercising any right, power, privilege, or authority as conservator . . . in connection with any sale or disposition of assets of a regulated entity . . . , the agency *shall* conduct its operations in a manner which . . . maximizes the net present value return from the sale or disposition of such assets." 12 U.S.C. § 4617(b)(11)(E) (emphasis added). Despite making much of HERA's varying uses of the words "may" and "shall," the *Perry Capital* majority appears to have overlooked this provision, which by its plain terms imposes on FHFA a mandatory obligation that the Net Worth Sweep did not satisfy. *See RTC v. Diamond*, 45 F.3d 665, 674 (2d Cir. 1995) (RTC is "required" to comply with identical provision of FIRREA); *Arkansas State Bank Comm'r v. RTC*, 911 F.2d 161, 168 (8th Cir. 1990) (statute "commands" that conservator or receiver comply with this provision).

b. The *Perry Capital* majority also relied on FHFA's "[i]ncidental power[ ] . . . as conservator or receiver" 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); *see Perry Capital*, 848 F.3d at 1089, 1094. But this incidental power and the other powers FHFA invokes are expressly reserved to FHFA "*as conservator or receiver*"—terms that have a well-established common law meaning. Supreme Court precedent "requires *an affirmative act by Congress* . . . to authorize departure from a common law definition," *id.* at 1123 (Brown, J., dissenting) (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *see also, e.g.*, *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013), and Congress's conferral of authority that is "incidental" to others specifically enumerated does not satisfy this requirement.[1] Thus, while the incidental powers provision may allow FHFA to

[1] For similar reasons, FHFA's pursuit of its conservatorship mission is not optional because it is empowered to "[o]perate" the Companies, and to "carry on"

consider its own interests *as conservator* when deciding what actions to take, it does not allow FHFA to abandon its conservatorship mission in pursuit of other, unrelated interests it may have, such as its Director's desire to harness the Companies' substantial net worth (i.e., all contributed capital, retained earnings, and annual profits) to reduce the federal deficit.

In all events, there is nothing in the Complaint to support the conclusion that FHFA ever "determine[d]" that the Net Worth Sweep was "in the best interests of the [Companies] or the Agency." 12 U.S.C. § 4617(b)(2)(J)(ii). To the contrary, the Net Worth Sweep was adopted to promote the interests of Treasury—not those of the Companies or FHFA as conservator. *See* Compl., RE 15, PageID# 165, ¶ 121. When FHFA agreed to the Net Worth Sweep, it fully understood that doing so would gratuitously and permanently dissipate the Companies' assets, thus forever placing the Companies in an unsound condition and making it impossible for FHFA to achieve its conservatorship mission. *Id.*, PageID# 143-44, 149, ¶¶ 82-83, 90. Indeed, FHFA's Director has described the Companies' lack of capital due to the Net Worth Sweep as a "serious risk" because it leaves the Companies with "no ability to weather quarterly losses." *Prepared Remarks of Melvin L. Watt at the Bipartisan*

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and "conduct" their business. 12 U.S.C. § 4617(b)(2)(B), (b)(2)(D), (b)(2)(J). These statutory powers are given to FHFA "as conservator," and therefore must be exercised in a manner consistent with the core conservatorship mission specified in Section 4617(b)(2)(D).

Policy Center, FHFA (Feb. 18, 2016), https://goo.gl/3NmgYN. Contrary to the *Perry Capital* majority's assumption, FHFA's "interests" as conservator do not include giving away the Companies' assets or otherwise abandoning pursuit of its statutory mission.

c. That FHFA may not abandon its conservatorship mission in favor of giving away the Companies' assets to a single, favored investor is confirmed by the fact that HERA sets out a specific order of priorities and procedures FHFA must follow when winding down the Companies and distributing their assets during receivership. *See* Opening Br. 32, 36. Congress plainly did not intend to authorize FHFA to evade the substantive and procedural protections HERA affords the Companies' stakeholders by winding down the Companies during conservatorship. *Cf. Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017) (explaining that "we would expect to see some affirmative indication of intent" if Congress meant to authorize "a backdoor means" of altering statutory order of priorities in bankruptcy). Congress's failure to specify an order of priorities for distributing assets during conservatorship reflects its understanding that as conservator FHFA's mission is to preserve and conserve the Companies' assets rather than to wind them down. *Cf.* 76 Fed. Reg. at 35,727 ("As one of the primary objectives of conservatorship of a regulated entity would be restoring that regulated entity to a sound and solvent condition, allowing capital distributions to deplete the entity's conservatorship assets would be inconsistent with the agency's statutory goals, as they would result in removing capital at a time when the Conservator is charged with rehabilitating the regulated entity.").

The *Perry Capital* majority rejected this argument, reasoning that there is no "rigid boundary between the conservator and receiver roles." *Perry Capital*, 848 F.3d at 1091. But other courts have "refuse[d] to adopt such a cavalier attitude about the distinction in roles between the conservator and receiver" and emphasized "the care Congress took to delineate those duties, rights, and powers the Corporation could pursue only in its capacity as receiver, or only in its capacity as conservator, but not both," *CedarMinn*, 956 F.2d at 1452, 1454; *McAllister v. RTC*, 201 F.3d 570, 578 (5th Cir. 2000); *see also Perry Capital*, 848 F.3d at 1119, 1123 (Brown, J., dissenting). Congress authorized FHFA to act "as conservator *or* receiver," 12 U.S.C. § 4617(a) (emphasis added), and this Court should not follow the *Perry Capital* majority in erasing the important distinction between those roles.[2]

d. Troublingly, the *Perry Capital* majority's conclusion that FHFA need not pursue the ends of a traditional conservator—and, indeed, may effectively do with the Companies whatever it wants—raises grave doubts about Section 4617's

[2] FHFA's argument that as receiver it need not wind up the Companies because it can replace them with a limited-life regulated entity ("LLRE") overlooks the fact that HERA requires that FHFA "wind up the affairs" of any LLRE within five years. 12 U.S.C. § 4617(i)(6); *see* FHFA Br. 40.

constitutionality under the nondelegation doctrine. Virtually every provision in HERA that discusses the conservator's responsibilities begins with the word "may," and if that word makes everything that follows optional, there is nothing left in the statute instructing FHFA as to how it should exercise its discretion as conservator. A statute that provides "literally no guidance for the exercise of discretion" is unconstitutional, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 474 (2001), and the *Perry Capital* majority's interpretation causes HERA to run afoul of that important principle.

The Supreme Court has repeatedly given "narrow constructions to statutory delegations that might otherwise" violate the nondelegation doctrine. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989). In *Fahey v. Mallonee*, 332 U.S. 245, 250-53 (1947), for example, a statute did not specify the criteria a bank regulator should use when deciding whether to place banks into conservatorship. In rejecting a nondelegation challenge to this statutory scheme, the *Fahey* Court interpreted the statute as implicitly adopting the "many precedents [that] have crystallized into well-known and generally acceptable standards" for the appointment of conservators. *Id.* at 250. While *Fahey* read background principles of conservatorship *into* a statute to *avoid* a nondelegation problem, Defendants ask this Court to do the opposite—reading the word "may" to nullify the mission actually specified in the statute and thus leaving the conservator with no guidance from Congress as to how it should exercise its powers. This constitutional flaw in the statute as interpreted by the *Perry Capital* majority is made even more problematic by Section 4617(f)'s restriction on judicial review. *See United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994). The Court should avoid these constitutional problems by declining to follow the *Perry Capital* majority's decision to "erase[ ] any outer limit to FHFA's statutory powers." *Perry Capital*, 848 F.3d at 1123 (Brown, J., dissenting).

C. The Conduct Alleged in the Complaint Is Antithetical to FHFA's Statutory Mission.

Rather than "conserving and preserving" the Companies' assets, the Net Worth Sweep requires the Companies to distribute the net value of those assets to a single shareholder—Treasury—every quarter. And rather than rehabilitating the Companies and placing them in a "sound and solvent condition," the Net Worth Sweep gratuitously forces the Companies to forever operate on the brink of insolvency by forbidding them from retaining capital. Contrary to FHFA's assertions, these flaws in the Net Worth Sweep are more fundamental than mere objections that the conservator acted from a "bad motive" or did a "bad job." FHFA Br. 29. Rather, the Net Worth Sweep constitutes a wholesale and permanent *abandonment* of FHFA's core conservatorship mission.

Unable to reconcile the actions alleged in the Complaint with FHFA's conservatorship mission, Defendants urge this Court to affirm the district court's grant of their motions to dismiss on the basis of a different factual narrative. As the following examples illustrate, many of Defendants' arguments amount to nothing more than a brazen attempt to change the factual predicate for this appeal[3]:

Defendants' Assertion	Complaint's Allegation
"The enterprises were on the precipice of failure in 2008 . . . ." Treas. Br. 24.	"Neither Company was in danger of insolvency" in 2008, and both were able "to easily pay their debts and retained billions of dollars of capital that could be used to cover any future losses." Compl., RE 15, PageID# 125, ¶ 38.
"Had Treasury not cured each and every one of the post-conservatorship net-worth deficiencies reported by the Enterprises, one or both of the Enterprises would have been immediately forced into mandatory receivership and liquidation." FHFA Br. 9.	"[T]he 'losses' Fannie and Freddie experienced under conservatorship were driven primarily by temporary and overly pessimistic accounting decisions" made by Defendants, and the Companies' actual losses "were never so severe that they would have had a negative net worth." Compl., RE 15, PageID# 140, ¶ 74.
Prior to the Net Worth Sweep, dividend payments "threatened to diminish Treasury's remaining commitment." Treas. Br. 21.	When the Net Worth Sweep was announced, Defendants knew that the Companies "would generate earnings well in excess of the Companies' dividend obligations to Treasury for the foreseeable future." Compl., RE 15, PageID# 148, ¶ 88.
The Net Worth Sweep "relieved the enterprises of their obligation to pay a fixed 10% cash dividend to Treasury." Treas. Br. 26.	The Companies "never were required to pay a cash dividend to Treasury but rather had the discretion to pay dividends in kind." Compl., RE 15, PageID# 132, ¶ 56.
The Net Worth Sweep "helps ensure the GSEs' financial stability and solvency." Treas. Br. 26.	"[T]he Net Worth Sweep's reduction and eventual elimination of the Companies' capital reserves *increases*

[3] In seeking to bolster their disputed factual claims with quotations from the *Perry Capital* majority opinion, Defendants only demonstrate that the allegations in the Complaint make this appeal distinguishable from *Perry Capital*.

	the likelihood" that the Companies will need additional money from Treasury, and "[b]ut for the Net Worth Sweep Fannie and Freddie would have nearly $130 billion of additional capital to cushion them from any future downturn." Compl., RE 15, PageID# 160, ¶¶ 110, 111.

As allegations in the Complaint confirm, the Net Worth Sweep is "plainly antithetical" to FHFA's conservatorship mission because it "affirmatively sabotage[s]" the goals that FHFA is required to pursue. *Perry Capital*, 848 F.3d at 1118 n.1, 1125 (Brown, J., dissenting). Not even the *Perry Capital* majority went so far as to rule that the Net Worth Sweep actually somehow preserved and conserved the Companies' assets, and at this stage of the litigation the Court is obliged to accept Plaintiff's allegations to the contrary.[4]

[4] Defendants are wrong when they suggest that a 2016 appropriations rider ratified the Net Worth Sweep. When interpreting a federal statute, the actions of subsequent Congresses have "little probative value because a post-enactment legislative body has no special insight regarding the intent of a past legislative body." *Laborers' Local 265 Pension Fund v. iShares Tr.*, 769 F.3d 399, 409 (6th Cir. 2014); *see also Solid Waste Agency of N. Cook Cty. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001) (emphasizing need for "extreme care" before crediting arguments that Congress acquiesced in an agency's decision by failing to overturn it). Notably, several Senators—including Senator Corker, the driving force behind this provision—expressly stated that the Act "does not prejudice" Plaintiff's claims or "have any effect on the court cases . . . challenging the validity of the [Net Worth Sweep]." 161 CONG. REC. S8857 (daily ed. Dec. 18, 2015) (statement of Sen. Brown); *see* 161 CONG. REC. S8760 (daily ed. Dec. 17, 2015) (statement of Sen. Corker).

D. Plaintiff May Sue To Enjoin FHFA from Agreeing to the Net Worth Sweep at Treasury's Direction.

As Defendants' cases acknowledge, the zone of interests test focuses "not on those who Congress intended to benefit, but on those who in practice can be expected to police the interests that the statute protects." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998). Defendants thus answer the wrong question when they assert that Plaintiff cannot sue because Section 4617(a)(7) "protects *the Conservator* from state and federal encroachment." FHFA Br. 43; *see* Treas. Br. 29. At an absolute minimum, Section 4617(a)(7) ensures that the conservatorships are not hijacked by another federal agency to further policy objectives that are inconsistent with FHFA's conservatorship mission. *See* Opening Br. 40-41. That is precisely the interest Plaintiff's claim would vindicate, and the expansive zone of interests test requires no more.[5]

Defendants also argue that the Complaint's allegations are insufficient to assert a violation of Section 4617(a)(7). But the Complaint specifically describes evidence that Treasury has exerted significant influence over FHFA throughout the

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[5] FHFA further argues that "a financial interest in the enforcement of a statutory provision does not confer prudential standing." FHFA Br. 45. But in a variety of contexts, the Supreme Court has held that plaintiffs whose interest in a case was financial satisfied the zone of interests requirement. *E.g.*, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2211-12 (2012); *National Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 497-99 (1998). The cases FHFA cites are not to the contrary.

conservatorships, Compl., RE 15, PageID# 161-62, ¶ 114, and that both agencies had specific knowledge that the Net Worth Sweep would result in a massive windfall for Treasury without any corresponding benefit for the Companies, *id.*, PageID# 140-50, ¶¶ 74-91. Only a conservator that has given up the will to exercise its independent judgment could have agreed to forfeit so much under the circumstances, thus abandoning its statutory mission.

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

A. Section 4617(f) Does Not Prohibit Claims Against Treasury.

The *Perry Capital* majority ruled that Section 4617(f) applies to APA claims against Treasury because Treasury's imposition of the Net Worth Sweep is "integrally and inextricably interwoven with FHFA's conduct as conservator." *Perry Capital*, 848 F.3d at 1097. But the question is whether enjoining Treasury from violating HERA would "restrain or affect the exercise" of FHFA's conservatorship "powers or functions," 12 U.S.C. § 4617(f), and unilaterally amending the PSPAs is not among FHFA's "powers or functions." Insisting that Treasury comply with *its own* legal obligations when deciding whether to consent to a change to the PSPAs no more restrains *FHFA's* conservatorship powers than would Treasury refusing to agree in the first place. The more sweeping interpretation of Section 4617(f) adopted in *Perry Capital* is especially anomalous in light of Defendants' acknowledgement that FHFA may be enjoined from exceeding its conservatorship powers under

HERA. Surely Congress did not intend for Section 4617(f) to bar claims that Treasury exceeded its authority under HERA when similar claims against the conservator itself may go forward.

The FIRREA cases invoked by Treasury do not support a different conclusion. *See* Treas. Br. 31. In none of those cases was the "third party" another federal agency subject to the presumption in favor of judicial review, and none of the cases involved a claim that the third party had violated a provision of federal law unrelated to the conduct of the receivership. Despite Treasury's attempts to distinguish *281-300 Joint Venture v. Onion*, 938 F.2d 35, 38 (5th Cir. 1991) on its facts, it remains the only FIRREA case cited by either party to touch on the reviewability of the decisions of a third-party federal agency that violates *its own* obligations in connection with a conservatorship or receivership.

B. Treasury Exceeded Its Statutory Authority.

1. Treasury concedes that, after 2009, HERA prohibited it from purchasing any new securities from the Companies. Treas. Br. 47. Treasury violated this prohibition because the Net Worth Sweep constitutes a purchase of new securities under both the ordinary meaning of "purchase" and the fundamental-change doctrine. Opening Br. 43-47.

Treasury cannot deny the transformative nature of the Net Worth Sweep. The change did not merely "alter[ ] the compensation structure of the securities," Treas.

Br. 48 (quotation marks omitted); it changed the nature and relationship of Treasury's securities to the Companies' entire capital structure—including all other equity securities—in a structural way that forecloses any possibility that those other securities could have value. Whereas before the Treasury had a preferred stock instrument with a coupon that was fixed at either 10% in cash or 12% in kind, coupled with a warrant to purchase 79.9% of the common stock at a nominal price, now the Treasury effectively controls 100% of *all* the Companies' stock—preferred and common—by claiming 100% of the Companies' *net worth* in perpetuity.

It is precisely to prevent such evasion of legal obligations relating to purchases that courts and Treasury itself apply the fundamental change doctrine. Treasury says the doctrine is "dubious," Treas. Br. 49, but the cases Treasury cites do not call into question the principle—recognized across a variety of securities law doctrines and by Treasury's own IRS regulations—that an amendment to the most basic terms of an investment should be treated as the sale of a new security. Dicta in *Isquith ex rel. Isquith v. Caremark Int'l, Inc.*, 136 F.3d 531, 534 (7th Cir. 1998), and *Katz v. Gerardi*, 655 F.3d 1212, 1221 (10th Cir. 2011), merely suggest that *Rule 10b-5* does not protect minority shareholders from having their investments altered without their consent. Treasury's further arguments against application of the fundamental change doctrine likewise rely on the limited reach of Rule 10b-5, not the scope of the doctrine itself.

2. Irrespective of whether the Net Worth Sweep is considered a "purchase," Treasury exceeded its authority because it did not "exercise [a] right[ ] received in connection with" its original acquisition of the securities when it agreed with FHFA to modify the securities to include the Net Worth Sweep. 12 U.S.C. § 1719(g)(2)(D).

A "right" is a legal entitlement, and a contractual right allows one party to compel its counterparty to perform. *See* Opening Br. 47-50. While the PSPAs contained several such rights—including warrants for Treasury to purchase up to 79.9% of the Companies' common stock—Treasury had no "right" to compel FHFA to agree to the Net Worth Sweep. *Cf.* 12 U.S.C. § 4617(a)(7).

Indeed, HERA itself shows that agreeing to amend or modify a contract is distinct from exercising a right under that contract. Section 1719(g)(3) refers to "funds expended for the purchase of, or *modifications* to, obligations and securities, or the *exercise of any rights* received in connection with such purchases." (emphases added). "[E]xercis[ing] any rights" thus cannot include "modifications," otherwise HERA's reference to modifications would be superfluous.[6]

Public Service Co. of New Hampshire v. Hudson Light & Power Department, 938 F.2d 338 (1st Cir. 1991), is not to the contrary. The court there held that because

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[6] Treasury attempts to find in Section 1719(g)(3)'s reference to "modifications" an "inherent authority" to amend the PSPAs, Treas. Br. 50-51, but Congress did not include "modifications" within the limited exception to the 2009 sunset provision, *see* 12 U.S.C. § 1719(g)(2)(D).

the appellants were not third-party beneficiaries to a bilateral contract, they could not impede the contracting parties' "exclusive right to modify the [agreement] at any time." *Id.* at 343. Thus, *Public Service* addresses only a "joint[ly]" exercisable—not unilateral—ability to modify a contract, which is possessed by all natural persons and business associations as part of the right to contract. *See* 11 *Williston on Contracts* § 31:5 (4th ed. 2014). The power to join with its counterparty to modify the contract—a background feature of contract law—is not a *"right"* that Treasury "*received* in connection with its purchase" of stock.

III. HERA's Succession Clause Does Not Strip Plaintiff of Her Ability To Sue To Vindicate Her Personal Rights Under the APA.

Defendants ask the Court to affirm on the theory that Plaintiff's APA claims cannot go forward during conservatorship due to HERA's succession clause, 12 U.S.C. § 4617(b)(2)(A). Notably, the *Perry Capital* court did not embrace this argument even though it was pressed by Treasury and, had it been accepted, would have obviated the divided panel's need to prepare lengthy competing opinions on the meaning of Section 4617(f). This is a complex issue that the district court did not reach, and this Court should not address it in the first instance. In all events, Defendants' arguments are meritless.

A. The Succession Clause Does Not Bar Direct Claims.

"No federal court has read" Section 4617(b)(2) or the analogous provision of FIRREA to transfer *direct*—as opposed to derivative—shareholder claims to the conservator or receiver. *See Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014). As the *Perry Capital* court recently explained, to do so would be contrary to the statute's plain meaning, which terminates shareholder rights "against the assets or charter of the regulated entity" only during receivership. *Perry Capital*, 848 F.3d at 1105 (quoting 12 U.S.C. § 4617(b)(2)(K)(i)). FHFA's interpretation would also "pose the question whether . . . stockholders would be entitled to compensation for a taking" when conservatorship is imposed, and the Seventh Circuit accordingly rejected it on constitutional avoidance grounds. *Levin*, 763 F.3d at 672. Numerous other courts have likewise held that shareholders may pursue direct claims during conservatorship or receivership. *See Barnes v. Harris*, 783 F.3d 1185, 1193, 1195 (10th Cir. 2015); *In re Beach First Nat'l Bancshares, Inc.*, 702 F.3d 772, 778, 780 (4th Cir. 2012); *Lubin v. Skow*, 382 F. App'x 866, 870-71 (11th Cir. 2010). The district court decision in *Pagliara v. Federal Home Loan Mortgage Corp.*, 203 F. Supp. 3d 678, 687 (E.D. Va. 2016), concerned whether a shareholder may inspect the Companies' books and records during conservatorship—"a completely different question" from the one presented here.

B. Plaintiff's Claims Are Direct, Not Derivative.

Whether a shareholder's claims are claims "with respect to" the Companies within the meaning of Section 4617(b)(2)(A) is ultimately a question of federal law, and in answering that question courts look to the distinction between direct and derivative claims. *See, e.g.*, *Perry Capital*, 848 F.3d at 1105. The closely related shareholder standing rule—one of "the prudential requirements of the standing doctrine"—"generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." *Franchise Tax Bd. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990). "There is, however, an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated." *Id.*; *see Cooper v. McBeath*, 11 F.3d 547, 551-52 (5th Cir. 1994). As with other applications of third-party standing doctrine, determining whether a litigant has a sufficiently direct, personal interest to obviate the need to sue derivatively is "closely related to the question whether a person in the litigant's position would have a right of action on the claim." *Department of Labor v. Triplett*, 494 U.S. 715, 721 n.** (1990).

The direct or derivative nature of Plaintiff's claims thus ultimately turns on whether Plaintiff is entitled to sue on behalf of herself and not the Companies under the APA's "generous review provisions." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395 (1987). She clearly is. The APA confers a cause of action on any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, thus sweeping away more demanding prudential standing requirements and giving *personal* rights to anyone who is "arguably within the zone of interests to be protected or regulated by the statute that he says was violated." *Patchak*, 132 S. Ct. at 2210; *see FAIC Sec., Inc. v. United States*, 768 F.2d 352, 357 (D.C. Cir. 1985) (Scalia, J.) (explaining that through the APA "Congress itself has pared back traditional prudential limitations" on standing). Litigants who themselves fall within the zone of interests have direct, personal rights under the APA and thus need not demonstrate third-party standing or comply with the procedural requirements for suing derivatively. *Cf. Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 (D.C. Cir. 1987) (Bork, J.); *FAIC*, 768 F.2d at 357.[7] Because Plaintiff's *personal* interests as a shareholder are easily within the zone of interests protected by HERA, she is not limited to challenging the Net Worth Sweep on the Companies' behalf. *See supra* at 12.

Treasury resists this argument and urges the Court to look to Delaware law to determine whether Plaintiff's claims are direct. Treas. Br. 34. But the Court should not lightly read state corporation law to limit Congress's sweeping conferral of standing in the APA. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)

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[7] Treasury's reliance on *Warren v. Manufacturers National Bank*, 759 F.2d 542 (6th Cir. 1985), a RICO case, is misplaced. While the APA relaxes prudential standing, RICO imposes *heightened* standing requirements. *See Liquidation Comm'n of Banco Intercontinental, SA v. Renta*, 530 F.3d 1339, 1350 n.14 (11th Cir. 2008); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 58 (2d Cir. 2004). In all events, a shareholder who is directly injured by racketeering activity is not required to sue derivatively. *Ceribelli v. Elghanayan*, 990 F.2d 62, 64-65 (2d Cir. 1993).

("gaps" in federal statutes should not be filled with state law that is "inconsistent with the federal policy underlying the cause of action"). In any event, Delaware courts tasked with deciding whether a claim is direct or derivative begin by looking to "the laws governing" the claim in question. *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1126 (Del. 2016). Where, as here, the substantive law that gives rise to a claim provides that the claim "belong[s] to the stockholder," the claim is direct without the need for any further inquiry. *Id.*

Treasury skips over this threshold issue in favor of applying the two-pronged test from *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004). But *Tooley* is not "a general statement requiring all claims, whether based on a tort, contract, or statutory cause of action (e.g., antitrust), to be brought derivatively whenever the corporation of which the plaintiff is a stockholder suffered the alleged harm." *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 (Del. 2015). "Rather, *Tooley* and its progeny deal with the narrow issue of whether a claim for breach of fiduciary duty or otherwise to enforce the corporation's own rights must be asserted derivatively or directly." *Citigroup*, 140 A.3d at 1127. Thus, "[b]efore evaluating a claim under *Tooley*," under Delaware law "a more important initial question has to be answered: does the plaintiff seek to bring a claim belonging to her personally or one belonging to the corporation itself?" *id.* (quotation marks omitted); *see Perry Capital*, 848 F.3d at 1108 (declining to apply *Tooley* for this reason). Because Plaintiff seeks to assert her personal rights under the APA, her claims are direct under Delaware law.

Even if the *Tooley* test did apply, Plaintiff's claims would still be direct. In this case, the basic harm for which Plaintiff seeks redress—the unlawful transfer of the entire value of her stock to a dominant shareholder, in violation of HERA and the APA—was suffered by Plaintiff directly. That injury "is not dependent on an injury to [either] corporation." *Tooley*, 845 A.2d at 1036. Indeed, even if the Net Worth Sweep had somehow benefitted the Companies, Plaintiff would still be directly injured. Delaware courts are "more prepared to permit the plaintiff to characterize the action as direct when the plaintiff is seeking only injunctive or prospective relief," as in this case. *Grimes v. Donald*, 673 A.2d 1207, 1213 (Del. 1996), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000); *see also Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007) (treating shareholder's claim as direct where plaintiff asked court to unwind transaction entered into by the corporation to the advantage of certain shareholders at the expense of others). Plaintiff's claims are direct under *Tooley* because, regardless of how a ruling in her favor would affect the Companies, such a ruling would properly restore the balance of value between Treasury's holdings and the other outstanding classes of stock.

C. Shareholders May Bring Derivative Claims Where the Conservator Has a Manifest Conflict of Interest.

Even if Plaintiff's APA claims were construed to be derivative, she could still assert them in light of FHFA's manifest conflict of interest.

1. Defendants contend that issue preclusion forecloses this argument because the D.C. Circuit rejected it in *Perry Capital*, but a prior judgment that other plaintiffs *lacked the capacity* to sue on behalf of the Companies cannot bind the Companies or shareholders who were not parties to the prior suit. *See* CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 1840 (a judgment "that is not on the merits but that relates to the representative's capacity to bring the suit . . . will not bar other stockholders from bringing a derivative action"). To be sure, there is a division of authority over this issue in the demand futility context. *Compare In re EZCORP Inc.*, 130 A.3d 934, 948 (Del. Ch. 2016), *with In re Sonus Networks*, 499 F.3d 47, 64 (1st Cir. 2007). *See generally California State Teachers' Ret. Sys. v. Alvarez*, 2017 WL 239364 (Del. Jan. 18, 2017) (unpublished). But the Supreme Court has held, partly for due process reasons, that where a putative class action is dismissed prior to certification, issue preclusion cannot bar an absent class member from relitigating the same issues in a subsequent suit. *Smith v. Bayer Corp.*, 564 U.S. 299, 314-18 (2011). In the same way here, due process does not permit the Companies and their absent shareholders to be bound by the *Perry Capital* court's ruling that the plaintiffs in that case could not sue on the Companies' behalf.

2. Before Congress enacted HERA, both the Federal and Ninth Circuits had interpreted 12 U.S.C. § 1821(d)(2)(A)(i), the provision of FIRREA on which HERA's succession clause was modeled, as permitting shareholders to maintain a derivative suit when the conservator or receiver has a manifest conflict of interest. *See First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1283 (Fed. Cir. 1999); *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1024 (9th Cir. 2001); *see also Suess v. United States*, 33 Fed. Cl. 89, 94-96 (1995); *Branch v. FDIC*, 825 F. Supp. 384, 404-05 (D. Mass. 1993). When Congress reenacted substantially the same language in HERA, it must be presumed to have adopted these consistent judicial constructions. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998).

In declining to follow *First Hartford* and *Delta Savings Bank* and dismissing derivative fiduciary duty claims, the *Perry Capital* majority concluded that "two circuit court decisions" are not enough to "settle the meaning of the existing statutory provision" such that Congress should be understood to have adopted the prior rulings when it reenacted the same language. 848 F.3d at 1106 (alterations omitted). But this and other courts have applied the canon under circumstances similar to those presented here. *See, e.g.*, *PDV Midwest Ref., LLC v. Armada Oil & Gas Co.*, 305 F.3d 498, 512 (6th Cir. 2002); *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1111 (8th Cir. 2016); *Elkimya v. Department of Homeland Sec.*, 484 F.3d 151, 154 (2d Cir. 2007). Moreover, in light of the importance of financial markets' "settled expectations" in this sensitive area and Congress's manifest intent to reassure investors by including in HERA conservatorship provisions modeled on the familiar provisions of FIRREA, *see Perry Capital*, 848 F.3d at 1127 (Brown, J., dissenting), prior constructions of FIRREA deserve particular weight.

In any event, *First Hartford* and *Delta Savings Bank* were correctly decided. Although the *Perry Capital* majority saw no ambiguity in the succession clause's meaning, another provision of HERA explicitly contemplates that during conservatorship a "regulated entity" may sue "for an order requiring the Agency to remove itself as conservator." 12 U.S.C. § 4617(a)(5)(A). Since FHFA controls the Companies during conservatorship and cannot sue itself, this provision would be meaningless if shareholders were unable to sue the conservator derivatively on behalf of the Companies when FHFA is conflicted. *See United States v. ICC*, 337 U.S. 426, 430 (1949) (recognizing the "general principle that no person may sue himself"). HERA's succession clause, moreover, does not purport to *eliminate* any shareholder rights but only provides that FHFA temporarily "succeed[s]" to them. *See* FHFA Br. 53 (conceding that "the succession clause does not *terminate* any rights upon conservatorship"). For this reason as well HERA should not be read as making FHFA the "successor" to rights it is powerless to exercise. *See Delta Savings*, 265 F.3d at 1024.

3. Treasury's argument that FHFA is not conflicted when deciding whether to permit the Companies to sue Treasury for entering into a contract that *FHFA signed* borders on the absurd. After all, the Treasury Secretary serves on a board that advises FHFA's director, 12 U.S.C. § 4513a(c), and HERA assigns the agencies complementary and closely related roles in the rehabilitation of the Companies. And FHFA's principal liaison to Treasury during negotiations over the Net Worth Sweep, Mario Ugoletti, was a former Treasury employee who participated in the creation of the original PSPAs while at Treasury. Compl., RE 15, PageID# 120, ¶ 21. FHFA "cannot be expected to objectively pursue lawsuits" against Treasury relating to the Net Worth Sweep, "even when it is in the best interest of [the Companies] to do so." *Delta Savings*, 265 F.3d at 1023.

CONCLUSION

The district court's judgment should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

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 6,497 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.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2017, I filed the foregoing Reply 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:

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