UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

J. PATRICK COLLINS, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Civil Action No. 4:16-CV-03113

DEFENDANTS' RESPONSE TO PLAINTIFFS' SURREPLY CONCERNING THE D.C. CIRCUIT'S *PERRY CAPITAL* DECISION

In *Perry Capital v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. 2017), the D.C. Circuit affirmed the district court's dismissal of APA claims materially identical to Plaintiffs' APA claims. In its 74-page opinion, the D.C. Circuit thoroughly examined the allegations, closely analyzed the relevant statutory text, and held that 12 U.S.C. § 4617(f) bars such claims—just as *every* other court to consider such claims has done to date.[1]

I. The Court Should Not Follow Judge Brown's Dissent in *Perry Capital*.

In response, Plaintiffs primarily argue that the dissenting opinion of Judge Janice Rogers Brown is "more persuasive." Plaintiffs' Sur-reply Concerning the D.C. Circuit's *Perry Capital* Decision, 1 (Doc. # 45) ("Surreply"). Not so. Judge Brown's dissent is flawed and misinterprets the governing statute. In particular, the dissent relies primarily on the notion that the Conservator's broad statutory powers are actually judicially-enforceable *requirements*, and that litigants can sue the Conservator to police compliance with those purported requirements, notwithstanding the jurisdictional bar of Section 4617(f). This is incorrect because HERA grants the Conservator broad, *permissive* powers—not mandatory obligations that can be "compel[led] . . . in any judicially enforceable sense." *Perry Capital*, 848 F.3d at 1088; *see also id*. at 1087-90. To adopt Judge Brown's approach would expose the Conservator to a flood of litigation aimed at

[1] In the last several weeks, two more courts have followed *Perry Capital* and dismissed virtually identical shareholder challenges to the Third Amendment as barred by (*inter alia*) Section 4617(f). *See Saxton v. FHFA*, --- F. Supp. 3d ----, 2017 WL 1148279 (Mar. 27, 2017); *Roberts v. FHFA*, --- F. Supp. 3d ----, 2017 WL 1049841 (N.D. Ill. Mar. 20, 2017). These two decisions follow the four prior decisions that have likewise held such claims barred by Section 4617(f). *See Perry Capital*, 848 F.3d 1072 (affirming *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 224 (D.D.C. 2014)); *Robinson v. FHFA*, --- 2017 WL ----, 2016 WL 4726555 (Sept. 9, 2016); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015).

second-guessing the Conservator's operational decisions—precisely what Congress prohibited through its enactment of Section 4617(f).

Judge Brown's dissent attempts erroneously to import alleged common law conservatorship principles that may be applicable in the probate or guardianship context. *See Perry Capital*, 848 F.2d at 1121-22 (Brown, J., dissenting) (asserting Congress "baked in" to HERA a "long history of fiduciary conservatorships" from "the probate context"); *see* Surreply 2-4. But in a prior decision, Judge Brown herself recognized that HERA's plain language controls over any allegedly contrary common law principles. *See Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012) (criticizing shareholders for "delving deep into pre-HERA common law" and stating "we need only heed Professor Frankfurter's timeless advice: '(1) Read the statute; (2) read the statute; (3) read the statute!'") (citation omitted).

Nowhere in HERA did Congress impose on the Conservator the types of duties imagined by Plaintiffs and Judge Brown's dissent. Rather Congress gave the Conservator powers greater than—and inconsistent with—the powers allegedly held by common law conservators; this authority precludes Plaintiffs' attempt to engraft such concepts onto HERA. *See Morissette v. United States*, 342 U.S. 246, 263 (1952) (common law meanings presumed only in the "absence of contrary direction"); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (common law meanings presumed only "when a statutory purpose to the contrary is evident"). In particular, HERA provides that the Conservator may act in a manner the Conservator "determines is in the best interests of [the Enterprises] or the Agency." 12 USC § 4617(b)(2)(J)(ii). Even

Judge Brown's dissent recognized that HERA thus "permits FHFA to engage in self-dealing transactions" and to "act in *its own interests* to protect both the Companies *and the taxpayers* from whom the Agency was ultimately forced to borrow." 848 F.3d at 1123 (emphases added). These statutory powers are "otherwise inconsistent with the conservator role." *Id*. Thus, the D.C. Circuit rightly rejected "the dissenting opinion's supposition that Congress intended FHFA to be nothing more than a common-law conservator," observing that "FHFA is not your grandparents' conservator." *Id*. at 1094; *see also Robinson v. FHFA*, No. 7:15cv109, 2016 WL 4726555 (E.D. Ky. Sept. 9, 2016) (rejecting the argument that "FHFA owes fiduciary duties to the GSE shareholders").

The dissent also attempts to brush away Congress's decision to use permissive language to describe the Conservator's powers. According to Judge Brown, this language is "best understood as a simple concession to the practical reality that a conservator may not always succeed in rehabilitating its ward." *Id*. at 1118 n.1. But this outcome-oriented approach finds no support in the statute or common sense. As the D.C. Circuit majority explained: "Even with the hypothesized addition of mandatory terms to the statute, the Act would at most command FHFA to take actions 'necessary to put the [Companies] in a sound and solvent condition' and 'appropriate to * * * preserve and conserve [their] assets.' 12 U.S.C. § 4617(b)(2)(D). FHFA's compliance thus would turn on its actions, not on their outcome." *Perry Capital*, 848 F.3d at 1090 n.8.[2]

[2] The dissent also asserts that a single provision of HERA—Section 4617(b)(2)(D)—"mark[s] the bounds" of FHFA's conservator powers. Surreply 2 (quoting *Perry Capital*, 848 F.3d at 1118). But this is obviously incorrect: "As a plain textual matter, the

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II. The Court Should Reject Plaintiffs' Other Arguments Against *Perry Capital*

Plaintiffs assert a hodgepodge of other arguments against *Perry Capital*, none of which are persuasive. First, though Plaintiffs raise no constitutional claims or challenges to HERA, Plaintiffs argue that *Perry Capital*'s approach "raises grave doubts about Section 4617's constitutionality under the nondelegation doctrine." Surreply 4. But the nondelegation doctrine addresses whether Congress improperly delegated *legislative* power to a federal agency (*see United States v. Mistretta*, 488 U.S. 361, 372 (1989)), and Plaintiffs are not challenging any purported legislative acts here. In all events, the nondelegation doctrine is rarely applied: "the Supreme Court has not struck down a statute on nondelegation grounds since 1935." *United States v. Whaley*, 577 F.3d 254, 263 (5th Cir. 2009). The test is whether Congress has provided an "intelligible principle" to guide the agency's regulations, and courts have regularly found very broad statutory delegations (including to act in the "public interest") to satisfy this standard. *Id.*[3] Here, Congress provided "intelligible principles" to guide FHFA's broad discretion. HERA states the "*purpose*" of FHFA's appointment as conservator is to "reorganiz[e], rehabilitat[e], or wind[] up the affairs" of the Enterprises. 12 U.S.C. 4617(a)(2).

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Recovery Act expressly provides FHFA many '[g]eneral powers' 'as conservator or receiver,' 12 U.S.C. § 4617(b)(2), that are not delineated in Section 4617(b)(2)(D) or (E)." *Id*. at 1089 (identifying other Conservator powers in HERA).

[3] *See, e.g., Yakus v. United States*, 321 U.S. 414 (1944) (upholding delegation to fix prices that are "generally fair and equitable"); *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (upholding delegation to regulate in the "public interest"); *Whaley*, 577 F.3d at 264 (upholding delegation to "protect the public from sex offenders"); *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1475 (D.C. Cir. 1998) (upholding delegation to act based on "compelling public interest").

Congress thus "empower[ed] FHFA to 'take such action' as may be necessary or appropriate to fulfill several goals," *Perry Capital*, 848 F.3d at 1089, including to "take such action as may be . . . appropriate to carry on the business of the regulated entit[ies] and preserve and conserve the[ir] assets and property." 12 U.S.C. § 4617(b)(2)(D)(ii). These statutory purposes and goals provide a sufficient "intelligible principle" to avoid any unconstitutional delegation. Moreover, that Section 4617(f) bars courts from *policing* the Conservator's application of these principles does not raise a nondelegation problem. *See United States v. Bozarov*, 974 F.2d 1037, 1038 (9th Cir. 1992) (rejecting nondelegation challenge of statute barring judicial review of agency action).[4]

Next, Plaintiffs take issue with the D.C. Circuit's conclusion that Section 4617(f) barred claims for equitable relief against Treasury. Because Treasury is not identified in the text of Section 4617(f), Plaintiffs argue that interpreting the provision to bar claims against Treasury would permit the Conservator to authorize, by contract, "another federal agency to violate its own separate obligations under the same statute." Surreply 6. This assertion appears to rest on the canon against absurd results, but Plaintiffs cannot satisfy the high threshold for applying that canon here. *See New Orleans Depot Servs. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384, 393 (5th Cir. 2013) ("[T]he first rule of statutory construction is that we may not ignore the plain language of a statute.").

[4] Plaintiffs' reliance on *Fahey v. Mallonee*, 332 U.S. 245, 250–53 (1947), is misplaced. Surreply 4-5. There, the Court rejected a nondelegation argument by reasoning that a banking regulator could set standards for the appointment of conservators and receivers by looking to historical banking supervision standards. *Fahey* does not require courts to import historical principles to override plain statutory text.

Rather than disabling courts from ordering relief directed at FHFA and only FHFA, the statutory text plainly states that courts can take no "action" that would "restrain"—or even "affect"—"the exercise of powers or functions of" FHFA as conservator. 12 U.S.C. § 4617(f). Plaintiffs here do not dispute, and therefore concede, that the equitable relief they seek against Treasury "would have just as direct and immediate an effect as if the injunction operated directly on FHFA." *Perry Capital*, 848 F.3d at 1096. Indeed, "[i]t takes two to tango, and undoing one side of the Third Amendment against Treasury necessarily affects FHFA, which is, after all, the other party to the Third Amendment." *Roberts*, 2017 WL 1049841, at *6; *see also Saxton*, 2017 WL 1148279 at *11. Because Plaintiffs' claims against Treasury seek relief that would "affect" the "exercise" of FHFA's powers or functions, they are barred under the plain language of Section 4617(f).[5]

Plaintiffs' premise, in any event, is unfounded. Every court to have considered the issue has held that the Third Amendment was a valid exercise of Treasury's rights received in connection with securities it had purchased before its purchase authority expired, *see* 12 U.S.C. 1455(1)(2)(A), (D); *id.* § 1719(g)(2)(A), (D), not a *new* purchase, as Plaintiffs contend. *See Roberts*, 2017 WL 1049841, at *8; *Robinson*, 2016 WL 4726555, at *4; *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 224 (D.D.C. 2014), *aff'd*

[5] *See also Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013) (recognizing the "substantial chilling effect" that such claims would have on the FDIC's performance of its statutory receivership powers); *Hindes v. FDIC*, 137 F.3d 148, 161 (3d Cir. 1998) (holding FIRREA's anti-injunction 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").

in part, rev'd in part sub nom. Perry Capital, 848 F.3d 1072 (D.C. Cir.). The initial purchase agreements gave Treasury (and FHFA) the right to amend the agreements at a later date. And the Third Amendment did not increase Treasury's funding commitment or entitle Treasury to new securities; rather, it merely substituted one dividend obligation for another. *See Roberts*, 2017 WL 1049841, at *8; *Robinson*, 2016 WL 4726555, at *4; *Perry Capital*, 70 F. Supp. 3d at 224. Thus, there is no basis for Plaintiffs' contention that applying Section 4617(f) to Treasury "makes the time limits Congress placed on Treasury's authority to invest in the Companies completely unenforceable." Surreply 6.

Finally, Plaintiffs complain that the *Perry Capital* decision is "peppered with assertions" about the state of the Enterprises in 2008 and the relative necessity of the original PSPAs. Surreply 7. But the D.C. Circuit did not rest its opinion on these background observations. The opinion rests squarely on the court's finding that FHFA had the authority to enter into the Third Amendment, regardless of the alleged reasons that it did so. *See Perry Capital*, 848 F.3d at 1093 ("[W]hether FHFA adopted the Third Amendment to arrest a 'debt spiral' . . . is not dispositive of FHFA's authority to adopt the Third Amendment. Nothing in [HERA] confines FHFA's conservatorship judgments to those measures that are driven by financial necessity"). Plaintiffs also do not dispute that they—like the plaintiffs in *Perry Capital*—do not challenge (and thus concede) the Conservator's ability to enter into the PSPAs in 2008, which fatally undermines Plaintiffs' argument that the Conservator lacked the power to amend that same agreement in the Third Amendment. *See id*. at 1095-96.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the parties to this action by serving a copy upon each party listed below on April 3, 2017, by the Electronic Filing System.

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