No. 17-1727

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS SAXTON; IDA SAXTON; BRADLEY PAYNTER,

Plaintiffs-Appellants

v.

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; UNITED STATES DEPARTMENT OF TREASURY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA (No. 1:15-cv-0047)

BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF THE CASE

This appeal challenges the government's 2012 expropriation and effective nationalization of two of America's largest and most profitable companies—Fannie Mae and Freddie Mac (the "Companies"). In August 2012, Fannie's and Freddie's conservator, the Federal Housing Finance Agency ("FHFA"), acquiesced in Treasury's plan to fundamentally change Treasury's securities from fixed-rate dividend preferred stock that would have entitled Treasury to receive approximately $19 billion in 2013, to stock that entitles Treasury to receive quarterly "dividend" payments equal to each Company's net worth, less a small and diminishing capital buffer. That change—known as the Net Worth Sweep—netted Treasury an astonishing windfall of more than ***$100 billion in 2013 alone***, has forced the Companies to operate with almost no capital and in an inherently unsound condition, and nullifies the investments of all shareholders other than Treasury.

For decades, federal conservators have exercised powers under statutory schemes indistinguishable from the one at issue here. Yet, no conservator has ever before been permitted to operate its ward for the exclusive benefit of the federal government. The Net Worth Sweep is an unprecedented expropriation of private property that Congress did not authorize and that must not stand.

In view of the important and complex issues this appeal presents, Plaintiffs request that the Court allocate 20 minutes to each side for oral argument.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. Plaintiffs have standing because the Net Worth Sweep "aggrieved" them by usurping the economic bundle rights associated with their securities and eliminating the value of their stock. The district court entered final judgment as to all claims in favor of the Defendants on March 27, 2017, and Plaintiffs filed a timely notice of appeal on March 31, 2017. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether FHFA exceeded its statutory authority as conservator under HERA by assenting to the Net Worth Sweep under which the Companies must transfer all of their net assets and future profits to Treasury and have been prohibited from retaining capital, thus guaranteeing that they can never resume normal business operations. *RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446 (8th Cir. 1992); 12 U.S.C. § 4617(b)(2)(D).

2. Whether 12 U.S.C. § 4617(f), which forbids court actions that would "restrain or affect the exercise of powers or functions of [FHFA] as a conservator," bars Plaintiffs' claim that Treasury violated its own obligations under HERA and the APA by imposing the Net Worth Sweep. *281-300 Joint Venture v. Onion*, 938 F.2d 35 (5th Cir. 1991).

3. Whether the Companies' shareholders fit within the zone of interests

protected by 12 U.S.C. § 4617(a)(7), which forbids FHFA from subjecting itself to the control or direction of another federal agency. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012).

4. Whether 12 U.S.C. § 4617(b)(2)(A) transfers Plaintiffs' APA claims to FHFA during conservatorship. *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279 (Fed. Cir. 1999); *Delta Sav. Bank v. United States*, 265 F.3d 1017 (9th Cir. 2001).

STATEMENT OF THE CASE

A. Fannie and Freddie Are Forced into Conservatorship.

Fannie and Freddie are two of the world's largest privately owned insurance companies. They insure trillions of dollars of mortgages and provide essential liquidity to the residential mortgage market. The Companies operate for profit, and their securities are privately owned and publicly traded. Plaintiffs own Fannie and Freddie stock. JA31 ¶¶ 37-38.

As mortgage insurers, Fannie and Freddie are designed to generate ample cash to cover their operating expenses. Unlike the nation's largest banks, the Companies also took a relatively conservative approach to investing in mortgages during the national run up in home prices from 2004 to 2007. For both reasons, the Companies remained in a comparatively strong financial condition during the ensuing financial crisis and were at all times capable of meeting their obligations to insureds and creditors and of absorbing any losses they might reasonably incur as a result of the financial downturn. *See* JA18, 32-33 ¶¶ 3, 40-41.

Treasury nevertheless implemented a deliberate strategy to seize the Companies and operate them for its exclusive benefit. Despite prior statements assuring investors that the Companies were in sound financial shape, FHFA forced the Companies into conservatorship, at Treasury's urging, on September 6, 2008. JA35 ¶ 48. FHFA stated that under HERA the purpose of the conservatorship was to restore confidence in and stabilize the Companies with the objective of returning them to normal business operations. JA34 ¶ 45. As FHFA publicly confirmed, conservatorship is necessarily temporary, and FHFA may act as conservator for the Companies only until they are stabilized. JA36 ¶ 50. Neither Company was experiencing a liquidity crisis or a short-term fall in operating revenue at the time. JA18, 32, 46 ¶¶ 3, 40, 75.

B. FHFA and Treasury Enter into the Purchase Agreements.

Treasury then exercised its temporary authority under HERA to enter agreements with FHFA to purchase equity in the Companies ("Preferred Stock Purchase Agreements" or "PSPAs"). JA36-37 ¶¶ 52-55. The PSPAs created a new class of securities with very favorable terms to the Government, known as Senior Preferred Stock ("Government Stock"). Treasury received $1 billion of Government Stock in each Company and warrants to purchase 79.9% of each Company's common stock at a nominal price. JA38 ¶¶ 56-57. Treasury's equity in each Company had an initial liquidation preference of $1 billion. JA38 ¶ 58.[1] The PSPAs allowed the Companies to draw up to $100 billion each from Treasury as needed to avoid a negative net worth—an amount that was subsequently increased to allow the Companies to draw unlimited sums from Treasury until the end of 2012, and thereafter capped at the amount drawn from 2010 through 2012, plus $200 billion per Company. JA41-42 ¶¶ 67-69. Treasury's liquidation preference increases by one dollar for each dollar the Companies draw.

The PSPAs required the Companies to pay quarterly dividends on the outstanding liquidation preference. These dividends could be paid in cash, at an annual rate of 10%, or in kind, at an annual rate of 12%, by adding to the liquidation preference the amount of dividends due—an option Treasury and the Companies repeatedly acknowledged. *See* JA38-40 ¶¶ 59-62.

The PSPAs also provided for the Companies to pay Treasury a quarterly market-based periodic commitment fee beginning in 2010. JA40 ¶ 63. Prior to the Net Worth Sweep, Treasury consistently waived this fee, and in any event it could only be set with the agreement of the Companies and at a market rate. JA59-60 ¶ 100.

[1] If the Companies liquidate, Treasury's liquidation preference entitles it to receive the sum specified before more junior preferred and common shareholders receive anything.

Freddie forecasted its "sensitivity" to imposition of the periodic commitment fee beginning in 2013 at $0.4 billion per year. *Id.*

The Government Stock diluted, but did not eliminate, the economic interests of the Companies' private shareholders. The warrants to purchase 79.9% of the Companies' common stock gave Treasury "upside" via participation in the Companies' profitability, but this upside would be *shared* with private shareholders. *See* JA38 ¶ 57. As FHFA's Director assured Congress shortly after imposing the conservatorship, the Companies' "shareholders are still in place," and "both the preferred and common shareholders have an economic interest in the companies," which "going forward . . . may [have] some value." JA35-36 ¶ 49.

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

Under FHFA's supervision, the Companies were forced to dramatically write down the value of their assets and to incur substantial non-cash accounting losses in the form of loan loss reserves and write-offs of deferred tax assets.[2] Tens of billions of dollars of these accounting adjustments were based on FHFA's wildly pessimistic assumptions about potential future losses and were wholly unwarranted. By June

[2] Loan loss reserves reduce reported net worth to reflect anticipated future losses. JA43 ¶ 72. Deferred tax assets are used to reduce taxable income on future earnings. The book value of a tax asset depends on the likelihood that the corporation will earn sufficient income to use the tax asset. JA42-43 ¶ 71.

2012, the Agencies had forced Fannie and Freddie to draw $161 billion from Treasury to make up for the paper losses caused by these accounting decisions, even though there was no indication that the Companies' actual cash expenses could not be met by their cash receipts. The Companies drew $26 billion more to pay dividends to Treasury. Because (i) the Companies were forced to draw funds from Treasury that were not needed to continue operations, (ii) the PSPAs did not permit the Companies to redeem the Government Stock or pay down the liquidation preference, and (iii) the PSPAs tied the Companies' dividend obligations to the size of the outstanding liquidation preference, the dividends owed to Treasury were artificially—and permanently—inflated with each additional draw. *See* JA42-45, 73 ¶¶ 70-74, 131.

As a result of these transactions, Treasury's liquidation preference swelled to $189 billion. But based on the Companies' performance in the second quarter of 2012, it was apparent that the Companies' private shares still had value. The Companies were thriving, paying cash dividends on the Government Stock without drawing additional capital from Treasury. *See* JA22-23 ¶ 12. And based on the improving housing market and the high quality of the newer loans backed by the Companies, the Agencies knew the Companies would enjoy stable profitability for the foreseeable future and thus would begin to rebuild significant amounts of capital. JA47-48 ¶¶ 77-78. For example, minutes of a July 2012 Fannie management meeting indicating that the Company was entering a period of "golden years" of earnings were circulated broadly within FHFA, and projections attached to those minutes showed that Fannie expected its cumulative dividend payments to Treasury to exceed its total draws by 2020 and that over $115 billion of Treasury's commitment would remain available after 2022. Similar projections were shared with Treasury less than two weeks before the Net Worth Sweep. JA49-50, 51 ¶¶ 82, 84.

The Agencies also knew that the Companies would soon reverse many of the non-cash accounting losses previously imposed upon them. Indeed, at an August 9, 2012 meeting, just eight days before the Net Worth Sweep was imposed, Fannie's Chief Financial Officer told senior Treasury officials that release of the valuation allowance on Fannie's deferred tax assets would likely occur in mid-2013 and would generate profits in the range of $50 billion—a prediction that proved remarkably accurate. *See* JA51 ¶ 83. This $50 billion reversal was not included in the projections from the month before. Treasury was keenly interested in the deferred tax assets, which would have catalyzed the Companies' capital rebuilding process; indeed, it had discussions of the deferred tax assets with its financial consultant as early as May 2012, and a key item on Treasury's agenda for the August 9 meeting was how quickly Fannie forecasted releasing its reserves. *See* JA48-49, 51 ¶¶ 81, 83.

D. Defendants Impose the Net Worth Sweep, Thereby Expropriating Plaintiffs' Investments in the Companies.

By August 2012, the Agencies fully understood that the Companies were on the precipice of generating huge profits, far in excess of the dividends owed on the Government Stock. *See* JA46-55 ¶¶ 75-89. Treasury, moreover, had secretly resolved "to ensure existing common equity holders will not have access to any positive earnings from the [Companies] in the future." JA68 ¶ 118. Therefore, on August 17, 2012, just days after the Companies announced robust second quarter earnings indicating that they had earned more than enough to pay Treasury's dividends without making a draw from the funding commitment, the Agencies imposed the Net Worth Sweep to ensure, as Treasury put it, that "every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers." JA67-68 ¶ 117. The Net Worth Sweep accomplishes this objective by replacing the prior dividend structure with one that requires Fannie and Freddie to pay Treasury their entire net worth on a quarterly basis, minus a small capital buffer that started at $3 billion and steadily decreases until it reaches $0 in 2018.[3] The Agencies thus nationalized the Companies and expropriated not just their future earnings but also their retained capital, thereby depriving the private shareholders of

[3] The Net Worth Sweep agreement also suspended operation of the periodic commitment fee, but, as explained above, the fee had consistently been waived and was projected to be a relatively modest amount in any event.

all of their economic rights.

The government has claimed, both publicly and before the courts, that the Net Worth Sweep was necessary to prevent the Companies from falling into a purported "death spiral" in which the Companies' increasing dividend obligations to Treasury would consume Treasury's remaining funding commitment. *See* JA24 ¶ 15. But, as explained above, at all times prior to the Net Worth Sweep, the PSPAs permitted the Companies to pay dividends in kind—they were never required to pay cash dividends, let alone to do so by drawing on Treasury's funding commitment.

More important, the government's "death spiral" narrative cannot be squared with internal government documents and testimony obtained through discovery in other litigation. As summarized above, this evidence reveals that the Net Worth Sweep was imposed *after* the Companies had returned to stable profitability, and *just days after* Treasury learned that they were on the verge of reporting tens of billions of dollars in profits that would far exceed their existing dividend obligations. Indeed, the *same day* that Fannie's Chief Financial Officer told senior Treasury officials that Fannie anticipated making accounting adjustments that would cause it to report an additional $50 billion in profits within the next year, an FHFA official wrote that Treasury was making a "renewed push" to impose the Net Worth Sweep. JA24-27 ¶¶ 16-20.

The available evidence thus makes clear that the Net Worth Sweep was adopted not out of concern that the Companies would earn too little, but rather out of concern that the Companies would earn *too much* and complicate the Administration's plans to shackle them in perpetual conservatorship and to prevent their private shareholders from recouping their investment principal, let alone any return on that investment. Indeed, an internal Treasury document finalized the day before the sweep was announced specifically identified the Companies' "improving operating performance" and the "potential for near-term earnings to *exceed* the 10% dividend" as support for the Net Worth Sweep. JA55-56 ¶ 91 (emphasis added). And after the Net Worth Sweep was finalized, a senior White House advisor involved in that process wrote to a Treasury official that "we've closed off [the] possibility that [Fannie and Freddie] ever[ ] go (pretend) private again." JA56 ¶ 92. Edward DeMarco, FHFA's then-Acting Director, likewise testified that he had no intention of allowing the Companies to emerge from conservatorship under what he viewed as flawed charters, disavowing his statutory obligations specified in HERA. JA57 ¶ 95.

As the Agencies expected, the Net Worth Sweep has resulted in massive and unprecedented payments to the government. From the fourth quarter of 2012, the first fiscal quarter subject to the Net Worth Sweep, through the first quarter of 2017, the Companies generated over $214 billion in comprehensive income. But rather than using that income to prudently build capital reserves and prepare to exit conservatorship, the Companies have instead been forced to pay substantially all of it as "dividends" to Treasury—approximately $130 billion more than Treasury would have received under the original PSPAs. *See* FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, https://goo.gl/vHl8V0. Altogether, Treasury will soon have recouped over $83 billion *more* than it disbursed to the Companies. Yet, Treasury insists that the outstanding liquidation preference remains firmly fixed at $189 billion and that it has the right to all of the Companies' net worth *in perpetuity*.

E. Plaintiffs Challenge FHFA's and Treasury's Unlawful Actions.

On May 28, 2015, Plaintiffs filed suit under the APA, alleging that the Net Worth Sweep violated FHFA's and Treasury's statutory duties under HERA and that Treasury's decision to impose the Net Worth Sweep was arbitrary and capricious. Plaintiffs' counsel subsequently obtained access to materials produced in related litigation in the Court of Federal Claims and amended the complaint to incorporate evidence documenting the purpose and effect of the Net Worth Sweep. Defendants moved to dismiss the amended complaint, and the district court granted Defendants' motions on March 27, 2017.

The district court acknowledged that FHFA could be enjoined if it exceeded its statutory conservatorship authority notwithstanding HERA's provision prohibiting courts from "restrain[ing] or affect[ing] the exercise of powers or functions of [FHFA] as a conservator or a receiver." 12 U.S.C. § 4617(f); *see* JA106. The district court, however, concluded that HERA does not require FHFA to preserve and conserve the Companies' assets when it acts as conservator or prevent FHFA as conservator from winding down the Companies. JA105-106. The district court also ruled that Section 4617(f) bars Plaintiffs' claims against Treasury, JA108-109, and that Plaintiffs lacked prudential standing to allege that FHFA impermissibly submitted itself to Treasury's direction when it consented to the Net Worth Sweep. JA106-108. Plaintiffs filed a timely notice of appeal on March 31, 2017.

SUMMARY OF ARGUMENT

HERA does not bar equitable relief when FHFA exceeds its conservatorship powers, and the Net Worth Sweep "affirmatively sabotage[s]" FHFA's statutory charge to preserve and conserve the Companies' assets, place them in a safe and sound condition, and return them to normal business operations. *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1118 n.1 (D.C. Cir. 2017) (Brown, J., dissenting). Consistent with the fiduciary obligations of conservators at common law and with the FDIC statute upon which HERA was modeled, Congress in HERA required FHFA to seek to "preserve and conserve" the Companies' assets and "rehabilitat[e]" them to a "sound and solvent" condition. 12 U.S.C. § 4617(b)(2)(D), (a)(2). The Net Worth Sweep, however, does the opposite: It depletes the Companies' assets and pushes them to the brink of insolvency every quarter. As Treasury explained when it announced the Net Worth Sweep, it does this precisely so that the Companies ***cannot*** "rebuild capital, [or] return to the market in their prior form." The Net Worth Sweep thus is irreconcilable with—indeed, it is antithetical to—the duties Congress imposed on FHFA as conservator.

But even if 12 U.S.C. § 4617(f) foreclosed Plaintiffs' claims against FHFA, the district court was wrong to conclude that this provision likewise bars Plaintiffs' claims that *Treasury* violated *its own* obligations under HERA and the APA. Courts apply a strong presumption in favor of the reviewability of administrative actions, and nothing in HERA speaks with the clarity required to bar judicial review of actions by federal agencies other than FHFA.

The district court also erred in concluding that Plaintiffs do not fit within the zone of interests protected by 12 U.S.C. § 4617(a)(7), which requires that FHFA act independently from other federal agencies. As stakeholders in the Companies, Plaintiffs have a strong interest in the integrity of the conservatorships, and that is easily enough to satisfy the forgiving zone of interests test.

Finally, in this suit Plaintiffs seek to vindicate their own rights under the APA—not those of the Companies—and it follows that their claims were not transferred to FHFA during conservatorship under 12 U.S.C. § 4617(b)(2)(B). Moreover, even if Plaintiffs' claims were derivative, they would still be entitled to press them in light of FHFA's manifest conflict of interest when deciding whether to sue itself or a closely related federal agency.

STANDARD OF REVIEW

The district court's decision to grant a motion to dismiss is reviewed de novo. *Dunbar v. Wells Fargo Bank*, 709 F.3d 1254, 1256 (8th Cir. 2013).

ARGUMENT

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

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

HERA bars equitable relief that would "restrain or affect the exercise of powers or functions of [FHFA] as conservator." 12 U.S.C. § 4617(f). This Court has interpreted 12 U.S.C. § 1821(j)—the provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") on which Section 4617(f) was modeled—as applying only when "the challenged action is within the [conservator's] power or function." *Dittmer Props., LP v. FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013). It was likewise common ground between the majority and dissenting opinions in *Perry Capital* that Section 4617(f) does not apply in cases in which FHFA exceeds its "statutory conservatorship powers." *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1087 (D.C. Cir. 2017); *id.* at 1119-20 (Brown, J., dissenting).

Importantly, a federal conservator or receiver "cannot evade judicial scrutiny" under Section 4617(f) or its predecessors "by merely labeling its actions with a conservator stamp." *Leon Cty. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012); *see also County of Sonoma v. FHFA*, 710 F.3d 987, 994 (9th Cir. 2013). Thus, in *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997), the Ninth Circuit allowed claims for equitable relief against a receiver and held Section 1821(j) inapplicable where "the FDIC as receiver" had "assert[ed] authority beyond that granted to it as a receiver" by breaching a contract without statutory authorization. *See Bank of Manhattan, NA v. FDIC*, 778 F.3d 1133, 1136-37 (9th Cir. 2015) (reaffirming *Sharpe*). Similarly, in *Coit Independence Joint Venture v. Federal Savings & Loan Insurance Corp.*, the Supreme Court held that the analogous provision in FIRREA's predecessor permitted judicial review where a federal receiver purported to adjudicate a claim the statute did not authorize it to resolve. 489 U.S. 561, 572-79 (1989).

Thus, the central question for purposes of Plaintiffs' claims against FHFA is whether HERA authorized FHFA as conservator to siphon all of the Companies' net assets and future profits to Treasury when both Defendant agencies knew that the Companies were on the verge of reporting the largest profits in their history. HERA did not.

B. The Net Worth Sweep Is Antithetical to FHFA's Statutory Mission as Conservator.

1. FHFA's Conservatorship Mission Is To Preserve and Conserve the Companies' Assets While Operating Them in a Sound and Solvent Manner.

HERA provides that FHFA "may, as conservator, take such action as may be—(i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D). Interpreting materially identical language in FIRREA, this Court has said that a conservator's "mission[ ]" is "to take action necessary to restore the failed [financial institution] to a solvent position and 'to carry on the business of the institution and preserve and conserve the assets and property of the institution.' " *RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1453 (8th Cir. 1992) (quoting 12 U.S.C. § 1821(d)(2)(D)). Numerous other courts agree. *See, e.g.*, *Elmco Props., Inc. v. Second Nat'l Fed. Sav. Ass'n*, 94 F.3d 914, 922 (4th Cir. 1996) ("[A] conservator's function is to restore the bank's solvency and preserve its assets."); *RTC v. United Tr. Fund, Inc.*, 57 F.3d 1025, 1033 (11th Cir. 1995) (favorably citing *CedarMinn* and explaining that "[t]he conservator's mission is to conserve assets"); *1185 Ave. of the Americas Assocs. v. RTC*, 22 F.3d 494, 497 (2d Cir. 1994) ("A conservator . . . is empowered to take action to restore the thrift to a solvent position and to carry on the business of the institution.") (quotation marks omitted).

FHFA has repeatedly expressed the same understanding of its statutory mission. For example, FHFA has stated that "[t]he purpose of conservatorship is to preserve and conserve each company's assets and property and to put the companies in a sound and solvent condition." JA33-34 ¶ 44; *see also* JA33-34 ¶¶ 44-45 (collecting similar additional statements). FHFA's regulations explain that "the essential function of a conservator is to preserve and conserve the institution's assets" and that "[a] conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition." Conservatorship and Receivership, 76 Fed. Reg. 35,724, 35,727, 35,730 (June 20, 2011). The FDIC—on whose statutory conservatorship powers the relevant provisions of HERA were modeled—likewise understands that "[a] conservatorship is designed to operate the institution for a period of time in order to return the institution to a sound and solvent operation." FDIC, MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE 216 (1998), https://goo.gl/qjIjTh.

This understanding of FHFA's statutory mission is reinforced by Congress's use of the word "conservator," for it is well established that when Congress enacts a statute using "a well-established term," courts presume that it "intended the term to be construed in accordance with pre-existing . . . interpretations." *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). "Conservator" is one such "well-established term," familiar to anyone even remotely acquainted with financial regulation. As the

Congressional Research Service has explained, "[a] conservator is appointed to operate the institution, conserve its resources, and restore it to viability." DAVID H. CARPENTER & M. MAUREEN MURPHY, CONGRESSIONAL RESEARCH SERV., RL34657, FINANCIAL INSTITUTION INSOLVENCY: FEDERAL AUTHORITY OVER FANNIE MAE, FREDDIE MAC, AND DEPOSITORY INSTITUTIONS 5 (2008), https://goo.gl/mgFwQr.

HERA's use of the word "conservator" thus draws on "the long history of fiduciary conservatorships at common law." *Perry Capital*, 848 F.3d at 1121 (Brown, J., dissenting); *see also CedarMinn*, 956 F.2d at 1453-54 (construing scope of conservatorship powers under FIRREA in light of historical practices of conservators and receivers and explaining that FIRREA conservatorship powers "parallel" those granted conservators under prior statutes). As Judge Brown explained in a passage of her dissent that cited this Court's decision in *CedarMinn*, "[a]t common law, 'conservators' were appointed to protect the legal interests of those unable to protect themselves," and that mission forbids the conservator "from acting for the benefit of the conservator . . . or a third party." *Perry Capital*, 848 F.3d at 1122 (Brown, J., dissenting); *see also Gamble v. Daniel*, 39 F.2d 447, 452 (8th Cir. 1930) (describing "conservator" as a "fiduciary"); 12 U.S.C. § 1717(c)(1) (statute creating Fannie Mae discussing "trusts, receiverships, conservatorships, liquidating or other agencies, *or other fiduciary and representative undertakings and activities*" (emphasis added)); *Crites, Inc. v. Prudential Ins. Co. of America*, 322

U.S. 408, 414 (1944) (receiver "was bound to perform his delegated duties with the high degree of care demanded of a trustee or other similar fiduciary").

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

As Judge Brown correctly explained in her *Perry Capital* dissent, Section 4617(b)(2)(D) "mark[s] the bounds of FHFA's conservator . . . powers," and actions by FHFA that go beyond or conflict with these powers may be enjoined. *Perry Capital*, 848 F.3d at 1118. The district court disagreed, concluding that as conservator FHFA has "permissive, discretionary authority" to pursue a traditional conservator's mission but is not required to do so. JA105 (quoting *Perry Capital*, 848 F.3d at 1088). This was error.

a. Like the *Perry Capital* majority, the district court heavily relied on Section 4617(b)(2)(D)'s use of the word "may." JA105; *see Perry Capital*, 848 F.3d at 1087-89. But as Judge Brown correctly reasoned, 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). Contrary to the district court's assertion, this reading of Section 4617(b)(2)(D) does not require the conservator to "*achieve* certain goals," JA105 (emphasis added), but merely mandates that the conservator act in a way that is consistent with its overarching statutory mission to preserve and conserve the Companies' assets and return them to a sound and solvent condition.

Moreover, the assumption that the word "may" "implies some degree of discretion," can be "defeated by . . . obvious inferences from the structure and purpose of the statute." *United States v. Rodgers*, 461 U.S. 677, 706 (1983). In addition to jettisoning the well-established meaning of the term "conservator," treating Section 4617(b)(2)(D) as optional would lead to the anomalous result that FHFA would be free to decide as conservator whether to place the Companies in a sound condition and rebuild capital even though one of FHFA's "principal duties" as regulator is "to ensure that . . . each regulated entity operates in a safe and sound manner, including maintenance of adequate capital." 12 U.S.C. § 4513(a)(1)(B).

The district court's interpretation is also inconsistent with the statutory design, which, like virtually all grants of agency power, constitutes a limited delegation of authority from Congress. That Congress, in describing FHFA's "[p]owers as conservator" in Section 4617(b)(2)(D), spelled out what the conservator "may" do means that FHFA may *not* do anything else. *See 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."); *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (finding that "Congress has not delegated authority to the agency to act beyond these [enumerated] statutory parameters"); *Halverson v. Slater*, 129 F.3d 180, 184-87 (D.C. Cir. 1997) (language that "Secretary may delegate" authority to specific entity prohibits delegation to another entity). Consistent with this reading of HERA, the Fifth Circuit has explained that under the parallel provision of FIRREA "a conservator *only* has the power to take actions necessary to restore a financially troubled institution to solvency." *McAllister v. RTC*, 201 F.3d 570, 579 (5th Cir. 2000) (emphasis added).

Despite the arguments of FHFA's outside counsel in this case, it is clear that FHFA itself understands pursuit of its statutory mission to be mandatory. Not long after Plaintiffs noticed their appeal, FHFA's Director said in sworn testimony that FHFA's "statutory mandates obligate" it to "[c]onserve and preserve the assets of the Enterprises while they are in conservatorship." Statement of Melvin L. Watt, Director, FHFA, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (May 11, 2017), https://goo.gl/dUC0oj. A few days later, Director Watt reiterated that his agency has "statutory obligations to operate the [Companies] in a safe and sound manner." Prepared Remarks of Melvin L. Watt, Director, FHFA, at American Mortgage Conference (May 18, 2017), https://goo.gl/tZKnFK. Director Watt's predecessor likewise told Congress that FHFA has a "conservatorship *mandate* to preserve and conserve the [Companies'] assets." Statement of Edward J. DeMarco Before the U.S. Senate Comm. on Banking, Housing and Urban Affairs 3 (Apr. 18, 2013) (emphasis added), https://goo.gl/QI7V44. Indeed, outside of the context of litigation, FHFA has repeatedly and consistently evinced an understanding that Section 4617(b)(2)(D) is mandatory. *See*, *e.g.*, JA34 ¶ 45 ("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)); 75 Fed. Reg. 39,462, 39,469 (July 9, 2010) (acknowledging "the Conservator's *mandate* to put the regulated entity in a sound and solvent condition and to preserve and conserve the assets and property of the regulated entity" (emphasis added)); FHFA STRATEGIC PLAN: FISCAL YEARS 2015-2019 at 5, 14 (Nov. 21, 2014), https://goo.gl/MdZ6TB ("FHFA, acting as conservator and regulator, must follow the *mandates* assigned to it by statute . . . . FHFA's authority as both conservator and regulator of the Enterprises is based upon *statutory mandates* enacted by Congress to ensure a liquid, efficient, competitive, and resilient national housing finance market, ensure safe and sound Enterprise operations, as well as to preserve and conserve their assets.").

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. *See Perry Capital*, 848 F.3d at 1088. Before the district court in this case, FHFA strenuously argued that the Net Worth Sweep was justified as a "transfer" of the Companies' "assets" under 12 U.S.C. § 4617(b)(2)(G). FHFA Brief in Support of Motion to Dismiss at 23 (Mar. 18, 2016), Doc. 76-1. With FHFA having thus conceded that the Net Worth Sweep constitutes a "disposition of assets" held by the Companies, judicial review is available to determine whether FHFA complied with its mandatory obligation to "conduct its operations in a manner which . . . maximizes the net present value return" on the Companies' assets. 12 U.S.C. § 4617(b)(11)(E); *see Arkansas State Bank Comm'r v. RTC*, 911 F.2d 161, 168 (8th Cir. 1990) (explaining that identical language in FIRREA "commands" that conservator or receiver "maximize the return and minimize the losses on resolving failed thrifts"); *RTC v. Diamond*, 45 F.3d 665, 674 (2d Cir. 1995) ("Congress *required* that RTC conduct its operations in a manner which maximizes the net present value return from the sale or other disposition of thrift assets." (emphasis added) (quotation marks omitted)). For similar reasons, FHFA's giveaway to Treasury cannot be reconciled with HERA's mandate that the conservator "ensure[ ] adequate competition and fair and consistent treatment of offerors" when it disposes of the Companies' assets. 12 U.S.C. § 4617(b)(11)(E)(iii).

b. The district court and 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) (emphasis added); JA105; *see Perry Capital*, 848 F.3d at 1089, 1094. But as the italicized language makes clear, this incidental power is limited to actions otherwise authorized by HERA and thus may not be exercised in a manner that is at odds with FHFA's core conservatorship mission to preserve and conserve the Companies' assets.

This interpretation is reinforced by the fact that the incidental power is expressly granted 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," *Perry Capital*, 848 F.3d at 1123 (Brown, J., dissenting) (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *see also, e.g., Universal Health Servs. v. United States*, 136 S. Ct. 1989, 1999 (2016); *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 come close to satisfying that requirement, *cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819) ("[A] great substantive and independent power . . . cannot be implied as incidental to other powers, or used as a means of executing them."); *First Nat'l Bank v. Taylor*, 907 F.2d 775, 778 (8th Cir. 1990) (observing that statute that gives nationally chartered banks "incidental powers" extends only to actions "closely related to an express power").[4] Thus, while the incidental powers provision may allow FHFA to take its own interests *as conservator* into account 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 earnings and assets 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* JA69 ¶ 120. When FHFA agreed to the

[4] 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" and "conduct" their business. 12 U.S.C. §§ 4617(b)(2)(B), (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 provided in Section 4617(b)(2)(D). *See FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1057-58 (N.D. Ill. 2013) ("As conservator, FHFA has broad powers to operate Fannie and Freddie and do what it sees fit to '*preserve and conserve [their] assets.*' ") (emphasis added) (quoting 12 U.S.C. § 4617(c)(2), (b)(2)(D)(ii)); *cf. Leon County*, 700 F.3d at 1278-79; *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 100 (D. Mass. 2014).

Net Worth Sweep, it fully understood that doing so would needlessly 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. JA51-55 ¶¶ 84-90. 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 Policy Center (Feb. 18, 2016), https://goo.gl/3NmgYN. More recently, Director Watt testified that "[l]ike any business, the Enterprises need some kind of buffer to shield against short-term operating losses" and highlighted that the lack of any capital buffer "is especially irresponsible" because it "could erode investor confidence . . . stifle liquidity in the mortgage-backed securities market and could increase the cost of mortgage credit for borrowers." Statement of Melvin L. Watt, https://goo.gl/dUC0oj. This is a stark acknowledgement of the deleterious nature of the Net Worth Sweep. Contrary to the *Perry Capital* majority's assumption, FHFA's "interests" as conservator do not include giving away the Companies' assets or otherwise abandoning its statutory mission.

c. Troublingly, the *Perry Capital* majority's sweeping 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 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 adopted "narrow constructions to statutory delegations that might otherwise" violate the nondelegation doctrine. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989); *see South Dakota v. United States Dep't of Interior*, 423 F.3d 790, 795 (8th Cir. 2005). 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, the *Perry Capital* majority did 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) (observing that the availability of judicial review "is a factor weighing in favor of upholding a statute against a nondelegation challenge"). 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).

3. The Net Worth Sweep Guarantees that FHFA Cannot Achieve Its Statutory Mission as Conservator.

Rather than "conserving and preserving" the Companies' assets, the Net Worth Sweep has caused the Companies to turn over the entire net value of those assets to a single shareholder—Treasury—every quarter. And rather than placing the Companies in a "sound and solvent condition," the Net Worth Sweep has needlessly forced the Companies to operate on the brink of insolvency by preventing them from retaining capital. Contrary to the district court's assertions, these flaws in the Net Worth Sweep are more fundamental than mere objections to the "wisdom" of FHFA's decision. JA106. Rather, the Net Worth Sweep constitutes a wholesale and permanent *abandonment* of FHFA's core conservatorship mission.

It is beyond cavil that the Net Worth Sweep depletes the Companies' capital, a consequence that FHFA's regulations rightly declare "inconsistent with [its] statutory goals." 76 Fed. Reg. at 35,727. Rather than allow the Companies to retain and build up their capital, the Net Worth Sweep siphons off every dollar belonging to the Companies into Treasury's coffers, precluding them from strengthening along with the improving housing market. Indeed, Treasury made clear in publicly announcing the Net Worth Sweep that its purpose was to prevent the Companies from "retain[ing] profits" or "rebuild[ing] capital." JA67-68 ¶ 117. The Net Worth Sweep is thus antithetical to FHFA's mission to "preserve and conserve the assets and property" of the Companies. 12 U.S.C. § 4617(b)(2)(D)(ii).

This permanent dissipation of capital also violates FHFA's obligation to seek to "put the [Companies] in a sound and solvent condition." *Id.* § 4617(b)(2)(D)(i). As FHFA has acknowledged, capital reserves are a critical aspect of soundness and solvency. *See* JA64-65 ¶ 111; *see also* JA58 ¶ 97. Capital is the standard by which "soundness" is measured by federal regulators of all financial institutions. Such reserves serve as a buffer against the inevitable vicissitudes of the economic cycle that affect all financial institutions. Institutions with sufficient capital are deemed safe, and those without are deemed unsound.

Further exacerbating this dissipation of the Companies' capital, the Net Worth Sweep has also caused the Companies to needlessly incur tens of billions of dollars in additional debt to finance dividends to Treasury. Because many of the Companies' assets are valued based on assumptions about future financial performance or fluctuating market prices, increases in the Companies' net worth do not necessarily reflect increased cash on hand. Recognizing deferred tax assets, for example, is an accounting decision that does not generate any cash. A cash dividend based solely on net worth may thus require financing through new borrowing. Indeed, the Companies incurred substantial additional debt in 2013 in order to pay cash dividends to Treasury under the Net Worth Sweep. *See* JA71 ¶¶ 124-25. Ordering the Companies to weaken their financial position by paying debt-financed dividends when they are in conservatorship is financially reckless and at war with FHFA's conservatorship mission. Private management of an undercapitalized financial institution would never be allowed to borrow tens of billions of dollars to pay a discretionary dividend.

Like the *Perry Capital* majority, the district court discounted these points by characterizing the Net Worth Sweep as "ensuring ongoing access to vital yet hard-to-come-by capital" by ending the circular practice of borrowing money from Treasury to pay dividends. JA106 (quoting *Perry Capital*, 848 F.3d at 1088). This erroneous defense of the Net Worth Sweep contradicts the allegations in the Complaint. But for the Net Worth Sweep, the Companies would today have approximately $130 billion in capital that they have instead turned over to Treasury. *See* FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, https://goo.gl/vHl8V0. The Defendants were fully aware that the Net Worth Sweep would have this effect on the Companies' finances. JA46-55 ¶¶ 75-89. Without the $130 billion in capital the Companies have transferred to Treasury due to the Net Worth Sweep, they are *more*, not less, likely to need to draw on Treasury's commitment in the future. This is perverse. Moreover, the original terms of Treasury's stock posed no threat to the funding commitment because the Companies always had the ability to pay Treasury's dividends in kind, and doing so would not have reduced the funding commitment. The Defendants have repeatedly acknowledged the viability of the payment in kind option outside of litigation. *See* JA39 ¶ 60 (quoting June 2012 Treasury presentation to SEC that stated that dividend rate would increase to 12% "if elected to be paid in kind"); *see also* JA38-40 ¶¶ 59-62.

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

The avowed purpose and indisputable effect of the Net Worth Sweep is to "expedite the wind down of Fannie Mae and Freddie Mac" and to ensure that these two companies "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." JA67-68 ¶ 117 (quoting Treasury Net Worth Sweep Press Release). As Acting FHFA Director DeMarco explained shortly after the Net Worth Sweep went into effect, it "reinforce[s] the notion that the [Companies] will not be building capital as a potential step to regaining their former corporate status." JA69 ¶ 120.

FHFA exceeded its conservatorship powers by taking this step toward the Companies' wind down without first placing them into receivership, for "only receivers have the power to liquidate a failed [financial institution]." *McAllister*, 201 F.3d at 578; *see CedarMinn*, 956 F.2d at 1454 (emphasizing the "distinction in the roles between conservator and receiver" under FIRREA and explaining that a conservator is required to "conduct an institution as an ongoing business"); *Perry Capital*, 848 F.3d at 1119, 1123 (Brown, J., dissenting).[5] FHFA thus impermissibly abandoned its conservatorship duty to "rehabilitate" the Companies. *See* 76 Fed. Reg. at 35,727, 35,730; *see also* JA68 ¶ 118 (quoting Treasury document acknowledging that "the path laid out under HERA" is for the Companies to "becom[e] adequately capitalized" and "exit conservatorship as private companies").

[5] *See also, e.g.*, *DeKalb Cty. v. FHFA*, 741 F.3d 795, 798 (7th Cir. 2013) (explaining that "a conservator . . . tries to return" its ward "to solvency, rather than liquidating it"); *Del E. Webb McQueen Dev. Corp. v. RTC*, 69 F.3d 355, 361 (9th Cir. 1995) (a conservator "operates an institution with the hope that it might someday be rehabilitated," while a receiver "liquidates an institution and distributes its proceeds to creditors."); *RTC v. United Trust Fund, Inc.*, 57 F.3d 1025, 1033 (11th Cir. 1995) ("The conservator's mission is to conserve assets which often involves continuing an ongoing business" while "[t]he receiver's mission is to shut a business down and sell off its assets.").

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 this Court has "refuse[d] to adopt such a cavalier attitude about the distinction in roles between the conservator and receiver," and in interpreting materially identical provisions of FIRREA 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. In HERA, Congress authorized FHFA to act "as conservator *or* receiver," 12 U.S.C. § 4617(a) (emphasis added); whichever choice FHFA made had corresponding limits and obligations imposed by Congress. Indeed, "[t]here is no such thing as a hybrid conservator-receiver capable of governing the Companies in any manner it chooses up to the very moment of liquidation." *Perry Capital*, 848 F.3d at 1119 (Brown, J., dissenting).

By allowing FHFA to wind down the Companies and distribute their assets to a favored stakeholder during conservatorship, the *Perry Capital* majority's contrary reading of HERA provides a mechanism by which FHFA could effect an end run around the statute's carefully delineated procedures for resolving claims against the Companies during liquidation. *See* 12 U.S.C. § 4617(b)(3)-(9), (c). For example, by winding down the Companies during conservatorship, FHFA could transfer the Companies' assets to shareholders or subordinated debtholders before paying general creditors, in direct contravention of 12 U.S.C. § 4617(c)(1). Congress plainly did not intend such a result, and the Supreme Court recently rejected a similar attempt to evade the statutory order of priorities in the bankruptcy context. *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).

The procedures FHFA must follow when winding up the Companies during receivership ensure that the receiver "fairly adjudicat[es] claims against failed financial institutions," *Whatley v. RTC*, 32 F.3d 905, 909-10 (5th Cir. 1994), and may well be constitutionally required to afford due process, *see Greater Slidell Auto Auction, Inc. v. American Bank & Tr. Co. of Baton Rouge*, 32 F.3d 939, 942 (5th Cir. 1994); *Freeman v. FDIC*, 56 F.3d 1394, 1403 n.2 (D.C. Cir. 1995); *Elmco*, 94 F.3d at 922. Congress did not authorize FHFA to wind down the Companies during conservatorship and thereby evade the procedures the statute otherwise requires FHFA to follow during liquidation. To the contrary, Congress's failure to specify wind up procedures or an order of priorities for the distribution of 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 35,724 ("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.").

To be sure, Section 4617(a)(2) states that FHFA may "be appointed conservator *or* receiver for the purpose of *reorganizing*, *rehabilitating*, or *winding up* the affairs of a [regulated entity]." But this provision cannot plausibly be read to suggest that all of the powers it articulates belong to both conservators and receivers. After all, "the words of a statute must be read in their context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). HERA, caselaw, commentators, and dictionaries all use "liquidation" and "wind up" synonymously.[6] Liquidation is exclusively the province of a receiver, as both HERA's text and FHFA's regulations provide. *See* 12 U.S.C. § 4617(b)(2)(E); 12 C.F.R. § 1237.3(b).

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

And given that liquidating the Companies is beyond FHFA's powers as conservator, it follows that "winding [them] up" also exceeds these powers.

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

II. Section 4617(f) Does Not Bar Plaintiffs' Claims that Treasury Exceeded Its Authority Under HERA.

Separate from their claims against FHFA, Plaintiffs claim that Treasury acted arbitrarily and capriciously by agreeing to the Net Worth Sweep and violated provisions of HERA that limit what Treasury may do with the Companies' securities after 2009. JA76-81 ¶¶ 142-62; 12 U.S.C. §§ 1455(*l*), 1719(g). The district court concluded that Section 4617(f) bars these claims, but Section 4617(f) does not apply to federal agencies other than FHFA.

There is a " 'strong presumption' favoring judicial review of administrative action," *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015), and "clear and convincing evidence" is required "to dislodge the presumption," *Kucana v. Holder*, 558 U.S. 233, 251-52 (2010) (quotation marks omitted). Even though HERA specifically contemplates that both FHFA and Treasury would take action with respect to the Companies, Congress chose to circumscribe judicial review *only as to FHFA*; Section 4617(f) contains no express prohibition on claims against Treasury. *See Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 341 (2005). HERA's "silence" with respect to Treasury cannot be construed as "a denial of authority to an aggrieved person to seek appropriate relief in the federal courts." *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993) (alteration omitted).

Far from the clear and convincing evidence required to displace the presumption in favor of the reviewability of Treasury's actions, HERA's text requires that the Secretary of the Treasury make specified findings and consider certain factors before purchasing the Companies' securities. 12 U.S.C. §§ 1455(*l*)(1)(B)-(C), 1719(g)(1)(B)-(C). HERA also strictly limits what Treasury may do with the Companies' securities after 2009. 12 U.S.C. §§ 1455(*l*)(4), 1719(g)(4). Congress plainly did not intend for these limits on Treasury's investment authority to be meaningless during conservatorship. To the contrary, HERA's legislative history shows that the temporal restrictions on Treasury's investment power were critical to the law's passage. *See Recent Developments in U.S. Financial Markets and Regulatory Responses to Them: Hearing Before the S. Comm. on Banking, Housing and Urban Dev.*, 110th Cong. 5, 11-12 (2008) (statements of Treasury Secretary Henry Paulson) (testifying in response to committee questioning that HERA would give "Treasury an 18-month temporary authority to purchase—only if necessary—equity in either of these two [Companies]" and that this was a "short-term" solution that would expire at "the end of 2009").

Without mentioning the presumption in favor of the reviewability of administrative action, the district court ruled that Section 4617(f) applies because Treasury's decision to impose the Net Worth Sweep is "integrally and inextricably interwoven with FHFA's conduct as conservator." JA109 (quoting *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." To the contrary, the Net Worth Sweep could have only been imposed with Treasury's consent. Insisting that Treasury comply with *its own* legal obligations when deciding whether to consent to a change to the

PSPAs no more restrains or affects *FHFA's* conservatorship powers than would Treasury refusing to agree to a modification in the first place.

The more sweeping interpretation of Section 4617(f) embraced by the district court and the *Perry Capital* majority is especially anomalous in light of both courts' 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, as even the district court in *Perry Capital* understood. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 222 (D.D.C. 2014) (reasoning that Section 4617(f) bar would not apply when FHFA "signs a contract with another government entity that is acting beyond the scope of its HERA powers"). Notably, under Treasury's reading of the statute, no court could restrain it from openly purchasing new securities issued by the Companies in 2017 even though such purchases would blatantly violate HERA's sunset provision.

Dittmer Properties, LP v. FDIC, 708 F.3d 1011, 1017 (8th Cir. 2013), is not to the contrary. That case concerned claims against a *private* third party—not a federal agency other than the receiver—and thus did not implicate the presumption in favor of judicial review of administrative actions. The claim at issue in *Dittmer*, moreover, turned on the validity of debt held by a bank that was subsequently placed in receivership; the plaintiffs were at bottom attempting to enforce the legal obligations the receiver had inherited from its ward and later transferred to a third party. *See id.* at 1019 (claim "relate[d] to the act or omission of a failed banking institution"). In contrast, Plaintiffs' claims against Treasury seek to enforce Treasury's *own* obligations under HERA and the APA.

Rather than the claims at issue in *Dittmer*, Plaintiffs' claims against Treasury are most similar to the APA claims against the Federal Home Loan Bank Board that the Fifth Circuit said could go forward in *281-300 Joint Venture v. Onion*, 938 F.2d 35, 38 (5th Cir. 1991). In that case, the Bank Board determined that a failed financial institution did not have sufficient assets to pay unsecured creditors. Although the Fifth Circuit ruled that the plaintiff could not collaterally attack the Bank Board's determination by suing the federal conservator for its refusal to pay unsecured creditors, it nevertheless said that the Bank Board's determinations "are subject to review under the Administrative Procedure Act." *Id.*; *see also LNV Corp. v. Outsource Serv. Mgmt., LLC*, 2014 WL 834977, at *4 (D. Minn. Mar. 4, 2014). Accordingly, Section 4617(f) does not protect Treasury's actions from judicial review.

III. Plaintiffs Have Prudential Standing To Pursue Their Claim that FHFA Impermissibly Agreed to the Net Worth Sweep at Treasury's Direction.

To ensure that FHFA would exercise its best *independent* judgment in protecting the interests of *all* creditors and shareholders of the Companies, Congress mandated that FHFA as conservator "shall not be subject to the direction or supervision of any other agency of the United States." 12 U.S.C. § 4617(a)(7). The Complaint alleges that FHFA violated that provision by agreeing to the Net Worth Sweep at Treasury's direction. JA21-22, 28, 65-67 ¶¶ 11, 23, 112-15. The district court did not reach the merits of this claim because it erroneously concluded that Plaintiffs do not fit within the zone of interests protected by Section 4617(a)(7). JA106-108.

As an initial matter, the district court did not apply Supreme Court caselaw that requires courts to take a "lenient approach" when deciding whether a plaintiff satisfies the zone of interests test in an APA case. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014). The Supreme Court has adopted this approach because Congress's "evident intent" when it enacted the APA was "to make agency action presumptively reviewable." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). Thus, in the APA context, the zone of interests requirement is "not meant to be especially demanding," and the Supreme Court has emphasized that it has often "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012); *cf. Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017).

To decide whether Plaintiffs' interests are "*arguably* within the zone of interests to be protected" by Section 4617(a)(7), the Court must first "discern the interests arguably to be protected" by that provision. *National Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 492 (1998) (alterations and quotation marks omitted). As the district court acknowledged, Section 4617(a)(7) safeguards, at a minimum, the interest in "protect[ing] the integrity of FHFA's operations as conservator against outside influences." JA107. Section 4617(a)(7) also arguably protects the Companies' shareholders from being deprived of their investments due to other administrative agencies' pursuit of policy objectives that are at odds with FHFA's statutory mission as conservator. If Plaintiffs' claim survives, it will vindicate both of these interests by protecting the integrity of the conservatorships from interference by Treasury aimed at impermissibly winding down the Companies and unlawfully enriching the federal government. Accordingly, Plaintiffs have prudential standing under a straightforward application of the zone of interests test.

The district court nevertheless concluded that Plaintiffs cannot satisfy the zone of interests requirement because Section 4617(a)(7)'s purpose is "to preserve FHFA's interests, not those of GSE shareholders." JA108. But the Supreme Court has explained that the zone of interests test "do[es] not require any indication of congressional purpose to benefit the would-be plaintiff." *Pottawatomi Indians*, 132 S. Ct. at 2210 (quotation marks omitted). Plaintiffs' interests "are such that they in practice can be expected to police the interests that the statute protects," *Air Line*

Pilots Ass'n Int'l v. Trans States Airlines, LLC, 638 F.3d 572, 577 (8th Cir. 2011), and nothing more is required under the expansive zone of interests test.

IV. HERA's Succession Clause Does Not Strip Plaintiffs of Their Ability To Sue To Vindicate Their Personal Rights Under the APA.

As an alternative basis for its decision, the district court held that Plaintiffs' APA claims are derivative and that all derivative claims are transferred to FHFA during conservatorship by HERA's succession clause, which provides that as conservator FHFA "immediately succeed[s] to . . . all rights, titles, powers, and privileges . . . of any stockholder . . . with respect to" the Companies. 12 U.S.C. § 4617(b)(2)(A); *see* JA97-100, 110-111. 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). For the reasons explained below, the district court erred.

A. Plaintiffs' Claims Are Direct, Not Derivative.

1. Federal Law Gives Plaintiffs a Direct, Personal Interest in Their APA Claims.

Whether Plaintiffs' APA claims are claims "with respect to" the Companies within the meaning of Section 4617(b)(2)(A) is a question of federal law. Courts tasked with applying this provision and its FIRREA analogue have focused on the distinction between direct and derivative claims. *See, e.g.*, *Perry Capital*, 848 F.3d at 1105; *Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014). 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.*; *accord Heart of America Grain Inspection Serv. v. Missouri Dep't of Agric.*, 123 F.3d 1098, 1102 (8th Cir. 1997). 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 Plaintiffs' claims thus ultimately turns on whether Plaintiffs are entitled to sue on behalf of themselves and not the Companies under the APA's "generous review provisions." *Clarke*, 479 U.S. at 395. They clearly are. 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." *Pottawatomi Indians*, 132 S. Ct. at 2210 (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)); *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.

Plaintiffs' APA claims easily satisfy the zone of interests test. As shareholders, Plaintiffs have an economic interest in their investments in the Companies. And this interest is protected by HERA, as one of the principal purposes of conservatorship is to safeguard the interests of an entity's creditors and shareholders. *See, e.g.*, 12 U.S.C. §§ 4617(b)(2)(D), (b)(11)(E), (c)(1)(D).

Furthermore, even if shareholders were not within the zone of interests, federal law would still entitle them to sue given their "close relationship" with the Companies and the "hindrance to the [Companies'] ability to protect [their] own interests" where self-dealing by their conservator is concerned. *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004) (quotation marks omitted). HERA's succession clause does not overturn this bedrock principle of prudential standing.

The district court rejected the argument that Plaintiffs' claims are direct under federal law, reasoning that the direct or derivative nature of Plaintiffs' APA claims is a question of state law. JA97-98. But the Court should not lightly read state corporation law to limit Congress's sweeping conferral of standing in the APA and background principles of prudential standing. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("gaps" in federal statutes "bearing on the allocation of governing power within the corporation should be filled with state law 'unless . . . [its] application would be inconsistent with the federal policy underlying the cause of action.' ").

In any event, if state law is relevant, Delaware is the State to which this court should look for guidance,[7] and 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]

[7] Fannie's bylaws follow Delaware law, and Freddie's bylaws follow Virginia law. Fannie Mae Bylaws, Corporate Governance Practices & Procedures, art. 1, § 1.05, https://goo.gl/973DZI; Bylaws of the Federal Home Loan Mortgage Corporation, Corporate Governance Practices & Procedures & Governing Law, art. 11, § 11.3, https://goo.gl/lXAl6k. Although Virginia law is not well developed on this issue, Plaintiffs submit that Virginia courts would generally follow Delaware precedents. *U.S. Inspect Inc. v. McGreevy*, 2000 WL 33232337, at *4 (Va. Cir. Ct. Nov. 27, 2000) (unpublished).

to the stockholder," the claim is direct without the need for any further inquiry. *Id.*

The district court skipped over this threshold issue in favor of applying the two-pronged test set forth in *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), for "when a plaintiff asserts a claim based upon the plaintiff's own right . . . *Tooley* does not apply," *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1259 (Del. 2016); *accord Perry Capital*, 848 F.3d at 1108 (ruling that contract claims were direct because they "belong to" shareholders and therefore declining to "subject them to the two-part test set forth in *Tooley*"). Because Plaintiffs seek to assert their personal rights under the APA, their claims are direct under Delaware law.

2. Plaintiffs' Claims Are Direct Under *Tooley*.

Even if the *Tooley* test did apply to Plaintiffs' claims, those claims would still be direct. "[W]hether a stockholder's claim is derivative or direct" for purposes of *Tooley* turns "solely on the following 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*, 845 A.2d at 1033.

In analyzing the first question, courts consider "whether the stockholder has demonstrated that he or she has suffered an injury that is not dependent on an injury to the corporation." *Id*. at 1036. This analysis does not imply that a stockholder must show that the action which harmed his or her own interests did not also harm the corporation—to the contrary, some wrongs harm *both* the corporation and its stockholders directly and can be challenged through *either* derivative or direct actions. *See, e.g.*, *Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007); *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006). Rather, it means only that the stockholder must be able to prove his own injury *without regard to* whether the corporation was also harmed.

In this case, the basic harm for which Plaintiffs seek redress—the unlawful transfer of the entire value of their stock to a dominant shareholder, in violation of HERA and the APA—was suffered by Plaintiffs directly. While the Net Worth

Sweep also injured the Companies, the injury Plaintiffs suffered "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, Plaintiffs would still be directly injured because it eliminated the value of their investments. The gravamen of Plaintiffs' Complaint is not that the Net Worth Sweep has diminished Fannie's and Freddie's overall corporate profits and thus harmed all shareholders indirectly, but rather that it has improperly reallocated to a single, dominant shareholder the entire net worth and all future earnings those corporations generate, destroying minority shareholders' economic interest in the Companies.

The Delaware Supreme Court has expressly approved direct stockholder suits to redress the "improper extraction or expropriation, by the controlling shareholder, of economic value and voting power that belonged to the minority stockholders." *Gentile*, 906 A.2d at 102; *see also, e.g.*, *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 330-32 (Del. 1993); *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1052-54 (Del. Ch. 2015); *Gatz*, 925 A.2d at 1278, 1280-81. As the Delaware Supreme Court explained, although in such cases the corporation may "suffer[ ] harm (in the form of a diminution of its net worth), the minority shareholders also suffer[ ] a harm that [is] unique to them and independent of any injury to the corporation." *Gentile*, 906 A.2d at 103.

Citing the Delaware Supreme Court's decision in *El Paso Pipeline*, 152 A.3d

1248, the district court declined to apply this doctrine because the Complaint does not include allegations that Plaintiffs' "voting rights have been diluted." JA99. But unlike *El Paso Pipeline*, this is not a corporate overpayment case. Instead, this case involves a controlling shareholder coercing the Companies (through their conservator, FHFA) to amend its preferred shareholder agreement to expropriate 100% of the economic rights of all minority shareholders. Under these circumstances, and with the Companies operating under conservatorship, Delaware law's distinction between direct and derivative claims does not depend on the voting power of the minority stockholders.

Given that Plaintiffs' claims qualify as direct under the first prong of *Tooley*, "[t]he second prong of the analysis should logically follow." *Tooley*, 845 A.2d at 1036. This is most obvious when a plaintiff seeks injunctive relief rather than damages, for in such cases the only way to determine to whom the relief flows is to consider whose injury it remedies. Accordingly, "courts have been more prepared to permit the plaintiff to characterize the action as direct when the plaintiff is seeking only injunctive or prospective relief," as is the case here. *Grimes v. Donald*, 673 A.2d 1207, 1213 (Del. 1996), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000). For example, *Gatz v. Ponsoldt* held that a shareholder's claim was direct where the plaintiff asked the court to unwind a transaction entered into by the corporation to the advantage of certain shareholders at the expense of others. 2004 WL 3029868, at *7-*8 (Del. Ch. Nov. 5, 2004) (unpublished). Plaintiffs seek similar relief. However the requested relief would affect the Companies, Plaintiffs would benefit in a way that is unique and independent from the Companies, since the relief would restore the balance of value between Treasury's holdings and the other outstanding classes of stock.

B. Plaintiffs May Bring Even Derivative Claims Where, as Here, the Conservator Has a Manifest Conflict of Interest.

Even if Plaintiffs' APA claims were construed to be derivative, Plaintiffs could assert them in light of FHFA's manifest conflict of interest when deciding whether to sue itself and Treasury.

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 & Tr. 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, 405 (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. *Perry Capital*, 848 F.3d at 1106 (alterations omitted). But this Court's precedents are to the contrary. *See Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1111 (8th Cir. 2016) (reenactment of statutory language adopted previous interpretations by the Sixth and Second Circuits); *Stringer v. St. James R-1 Sch. Dist.*, 446 F.3d 799, 804 (8th Cir. 2006) (construing amendment to statute in light of prior First Circuit interpretation that was "[t]he only relevant authority"). Moreover, given 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 judicial constructions of FIRREA deserve particular weight when interpreting HERA.

In any event, *First Hartford* and *Delta Savings Bank* were correctly decided. Although the district court saw "no ambiguity in the [succession clause's] meaning," JA111, 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). Since FHFA controls the Companies during conservatorship and the Constitution would not permit FHFA to sue itself, this provision would be meaningless if shareholders could not sue the conservator derivatively on behalf of the Companies. *See United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 430 (1949) (recognizing the "general principle that no person may sue himself"); *SEC v. Federal Labor Relations Auth.*, 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring). HERA's succession clause, moreover, does not purport to *eliminate* any shareholder rights but only provides that FHFA temporarily "succeed[s]" to them. For this reason as well, HERA should not be read as making FHFA the "successor" to rights it cannot exercise. *See Delta Savings*, 265 F.3d at 1024; *cf. Kowalski*, 543 U.S. at 129-30 (there are "circumstances where it is necessary to grant a third party standing to assert the rights of another" due to inability of third party to vindicate its own rights).

CONCLUSION

This Court should reverse the district court's judgment.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 12,979 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

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As required by Eighth Cir. R. 28A(h), this brief and the addendum have been scanned for viruses and are virus-free.

/s/ Charles J. Cooper
Charles J. Cooper

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Charles J. Cooper
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