No. 17-1727

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS SAXTON, IDA SAXTON, and BRADLEY PAYNTER,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Iowa, No. 15-cv-00047

BRIEF OF DEFENDANTS-APPELLEES THE FEDERAL HOUSING FINANCE AGENCY, AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC, AND FHFA DIRECTOR MELVIN L. WATT

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SUMMARY OF THE CASE

This appeal concerns one of many suits brought by shareholders of Fannie Mae and Freddie Mac challenging an agreement between the Federal Housing Finance Agency ("FHFA" or the "Conservator"), as Conservator for Fannie Mae and Freddie Mac (the "Enterprises" or "GSEs"), and the U.S. Department of Treasury. At issue is the agreement between FHFA and Treasury to amend, for a third time, the financing agreements by which Treasury provided the Enterprises a critical lifeline of hundreds of billions of taxpayer dollars. Plaintiffs challenge this so-called Third Amendment under the Administrative Procedure Act, and seek to vacate it and undo all dividend payments made to Treasury pursuant to it.

Every court that has considered such claims to date—including the D.C. Circuit—has dismissed them as barred by federal law. Here, the district court correctly held that two separate provisions of federal law—12 U.S.C. §§ 4617(f) and 4617(b)(2)(A)(i)—independently bar Plaintiffs' claims, each of which is an improper attempt to second-guess a business decision made by the Conservator. Indeed, Plaintiffs allege that decision was unwise, unnecessary, and too favorable to Treasury, while ignoring that Treasury was the only entity willing to invest the billions in capital the Enterprises needed, and remains obligated to do so.

FHFA and Melvin L. Watt ("the FHFA Defendants") agree with Plaintiffs and Treasury that 20 minutes per side is appropriate to present oral argument.

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INTRODUCTION

Plaintiffs are among the many Enterprise shareholders that have filed APA claims challenging the Third Amendment. Every court that has considered such shareholder claims over the last three years—including the D.C. Circuit and the district court—has dismissed them as barred by federal law. *See Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1086-1096 (D.C. Cir. 2017); *Collins v. FHFA*, --- F. Supp. 3d ----, 2017 WL 2255564 (S.D. Tex. May 22, 2017); *Roberts v. FHFA*, --- F. Supp. 3d ---, 2017 WL 1049841, at *7-8 (N.D. Ill. Mar. 20, 2017); *Robinson v. FHFA*, --- F. Supp. 3d ----, 2016 WL 4726555 (E.D. Ky. Sept. 9, 2016); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015); *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 222 (D.D.C. 2014), *aff'd in relevant part*, 848 F.3d 1072 (D.C. Cir. 2017); *see also* Add. 16-24.[1]

These courts got it right. Under HERA, courts are not permitted to enjoin the Conservator's exercise of its conservatorship functions, which necessarily includes decisions to enter into and amend funding agreements made on behalf of the Enterprises. In this appeal, Plaintiffs rehash the same failed arguments correctly rejected by each of these courts, and this latest group of Enterprise

[1] Three of these decisions are pending on appeal: *Collins* in the Fifth Circuit (No. 17-20364), *Roberts* in the Seventh Circuit (No. 17-1880), and *Robinson* in the Sixth Circuit (No. 16-6680). Further, while two rehearing petitions have been filed in *Perry Capital* (D.C. Cir. No. 14-5253 (lead)), both pertain to issues applicable only to common law claims not presented here.

shareholders provides no basis for a different resolution of the same claims here. This Court should affirm.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the claims pursuant to 28 U.S.C. § 1331. The court entered judgment in favor of defendants on March 27, 2017. Add. 26.[2] Plaintiffs timely noticed their appeal on March 31, 2017. JA15. This Court accordingly has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether 12 U.S.C. § 4617(f)—which mandates that "no court may take any action to restrain or affect the exercise of [FHFA's] powers or functions" as Conservator of Fannie Mae and Freddie Mac—bars Plaintiffs' claims seeking to enjoin the Conservator's decision to amend the funding agreements between the Enterprises and Treasury through the Third Amendment. *See Perry Capital v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. 2017).

II. Whether 12 U.S.C. § 4617(b)(2)(A)(i)—which provides that FHFA as Conservator succeeds to "all rights, titles, powers, and privileges" of the Enterprises and their stockholders—bars Plaintiffs' claims, which purport to

[2] Citations to "Add. ___" refer to the Addendum filed by Plaintiffs, which contains the district court's order below. Citations to "JA___" refer to the Joint Appendix filed by Plaintiffs.

exercise Plaintiffs' asserted rights as stockholders. *See Perry Capital*, 848 F.3d at 1072; *Kellmer v. Raines*, 674 F.3d 848 (D.C. Cir. 2012).

STATEMENT OF THE CASE

A. Fannie Mae, Freddie Mac, and Their Importance to the National Economy

Fannie Mae and Freddie Mac are government-sponsored enterprises, chartered by Congress to provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders to facilitate the ability of those lenders to make additional loans. JA18. The Enterprises, which own or guarantee trillions of dollars of residential mortgages and mortgage-backed securities, have played a key role in housing finance and the U.S. economy. *Id.*

Throughout the first half of 2008, the GSEs suffered multi-billion dollar losses on their mortgage portfolios and guarantees, as the housing market collapsed and homeowners defaulted on mortgages at accelerating rates. JA32. On July 30, 2008, responding to the "systemic danger that a Fannie Mae or Freddie Mac collapse posed to the already fragile national economy," Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, § 1101, 122 Stat. 2654, 2661 (codified at 12 U.S.C. § 4511 *et seq.*). *Id.*; *see also* JA33. HERA created FHFA, an independent federal agency, to supervise and regulate Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. 12 U.S.C. §§ 4501 *et seq.*; *see also* JA30. HERA also granted the Director of FHFA the

discretionary authority to place Fannie Mae and Freddie Mac in conservatorship "for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2).

B. FHFA Is Appointed Conservator of the Enterprises and Succeeds by Operation of Law to All Rights of the GSEs and Their Stockholders

On September 6, 2008, having concluded that the Enterprises could not operate safely and soundly and fulfill their critical statutory mission, FHFA's Director placed the Enterprises into conservatorship. JA35. At that time, the GSEs' financial exposure on their combined guaranteed mortgage-backed securities and outstanding debt totaled more than $5.4 trillion, and their net worth and public stock prices had fallen sharply. *FHFA Fact Sheet: Questions & Answers on Conservatorship*, https://goo.gl/DV4nAt (cited at JA35).

HERA provides that, upon its appointment as Conservator, FHFA "immediately succeed[ed] to . . . *all rights*, titles, powers, and privileges of the regulated entity, and of *any stockholder*, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added).

In addition to vesting the Conservator with all rights of the Enterprises and their owners, officers, and directors, HERA accords FHFA as Conservator broad

powers to "operate" and "conduct all business" of the GSEs. *Id.* § 4617(b)(2)(B)(i). Specifically, HERA empowers the Conservator to:

- "conduct all business of the [Enterprises]," *id.*;
- "perform all functions of the [Enterprises] in the name of the [Enterprises] which are consistent with the appointment as conservator," *id.* § 4617(b)(2)(B)(iii);
- "preserve and conserve the assets and property of the [Enterprises]," *id.* § 4617(b)(2)(B)(iv);
- "take over the assets of and operate the [Enterprises] with all the powers of the shareholders, the directors, and the officers," *id.* § 4617(b)(2)(B)(i); and
- "transfer or sell any asset or liability of the [Enterprises] without any approval, assignment, or consent with respect to such transfer or sale," *id*. § 4617(b)(2)(G).

Further, HERA authorizes the Conservator to "take any [authorized action], which the Agency determines is in the best interests of the [Enterprises] or the Agency." *Id.* § 4617(b)(2)(J)(ii). Reinforcing and facilitating the exercise of the Conservator's plenary operational authority, Congress shielded the Conservator's actions from judicial review. Under 12 U.S.C. § 4617(f), "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator."

C. Treasury Provides Unprecedented and Continuing Financial Support to the Enterprises In Exchange for Compensation Including Dividends and Liquidation Preferences

HERA specifically amended the statutory charters of the Enterprises to grant Treasury the authority to purchase securities issued by the Enterprises, so long as Treasury and the Enterprises reached a "mutual agreement" for the terms of such purchases. *See* 12 U.S.C. § 1719(g)(1)(A) (Fannie Mae); 12 U.S.C. § 1455*(l)*(1)(A) (Freddie Mac). Treasury exercised this authority in September 2008, shortly after FHFA was appointed conservator, and purchased senior preferred stock in the Enterprises. In particular, Treasury and the Conservator entered into two Senior Preferred Stock Purchase Agreements (the "PSPAs"), through which Treasury agreed to infuse hundreds of billions of taxpayer dollars into the Enterprises, as needed, to allow the Enterprises to remain in operation and avoid mandatory receivership and liquidation. *See* PSPAs, Dist. Ct. Doc. # 76-2 (cited in JA38). The PSPAs remain in full force and effect.

The PSPAs work as follows: if in any calendar quarter an Enterprise's net worth is negative—defined as liabilities exceeding assets in accordance with Generally Accepted Accounting Principles ("GAAP")—then the PSPAs required Treasury to invest additional funds in the Enterprise in the amount necessary to cure its negative net worth and bring it back up to zero. *See* PSPAs § 2.2 (Dist. Ct.

Doc. # 76-2). The PSPAs thus provide the GSEs with "unprecedented access to guaranteed capital." *Perry Capital*, 848 F.3d at 1090.

As consideration for Treasury's massive financial commitment, the PSPAs gave Treasury a comprehensive bundle of rights consistent with Congress's explicit statutory requirement that the Treasury's new Enterprise financial commitment authority be exercised so as to "protect the taxpayer." 12 U.S.C. §§ 1455(*l*)(1)(C), 1719(g)(1)(C).

First, the PSPAs provided Treasury with a senior liquidation preference starting at $1 billion for each Enterprise, which would increase dollar-for-dollar each time the Enterprises drew on the Treasury funding commitment. PSPAs § 3.3 (Dist. Ct. Doc. # 76-2). Thus, if the Enterprises are liquidated through receivership, Treasury must be paid its preference from the proceeds of the liquidation before any other shareholders.

Second, the PSPAs provided for the Enterprises to pay Treasury a 10% annual dividend, assessed quarterly, based on the total amount of the liquidation preference. Fannie Mae & Freddie Mac Senior Preferred Stock Certificates § 2(b)-(c) (Dist. Ct. Doc. # 76-3). If the Enterprises failed to pay the dividend in cash, then the dividend would accrue at a rate of 12% and add to Treasury's outstanding liquidation preference. *Id*.

Third, the PSPAs provided for Treasury to recover, over and above the dividends, an annual fee "intended to fully compensate [Treasury] for the support provided by the ongoing Commitment." PSPAs § 3.2(b) (Dist. Ct. Doc. # 76-2). The amount of the fee was to reflect "the market value of the Commitment as then in effect." *Id.* The PSPAs gave Treasury the right to waive the fee "based on adverse conditions in the United States mortgage market." *Id.* The fee was deferred until 2011 by the Second Amendment, § 3.2(a) (Dist. Ct. Doc. # 76-2 at PDF p.43), and Treasury waived the fee in 2011 and 2012. JA40.

Fourth, the PSPAs provided Treasury with warrants to acquire 79.9% of the Enterprises' common stock. PSPAs § 3.1 (Dist. Ct. Doc. # 76-2). The PSPAs also imposed covenants that preclude the Enterprises from paying dividends on non-Treasury stock, redeeming stock, or exiting from conservatorship (other than through receivership) without Treasury consent, and make clear that shareholders are not third-party beneficiaries to the PSPAs. PSPAs §§ 5.1, 5.3, 5.6, 6.1 (Dist. Ct. Doc. # 76-2).

In sum, consistent with Treasury's statutory obligation to "protect the taxpayer," 12 U.S.C. §§ 1455(*l*)(1)(C), 1719(g)(1)(C), the PSPAs are intended to assure that federal taxpayers, who contributed billions to save the Enterprises, are fully compensated for their ongoing commitments to sustain the Enterprises' operations following the federal rescue.

D. The Enterprises Draw Billions From Treasury, and the Parties Increase the Amount of the Treasury Commitment

By late 2008, soon after the Conservator and Treasury executed the PSPAs, the Enterprises' liabilities exceeded their assets as measured by GAAP, and Treasury thus began infusing billions of dollars into the Enterprises. JA45. Had Treasury not cured each and every one of the post-conservatorship net-worth deficiencies reported by the Enterprises, one or both of the Enterprises would have been immediately forced into mandatory receivership and liquidation. *See* 12 U.S.C. § 4617(a)(4).

While the PSPAs initially capped Treasury's commitment at $100 billion per Enterprise, this amount proved to be inadequate, and the parties amended the PSPAs (via the "First Amendment") to double the cap to $200 billion per Enterprise. JA41. When it appeared that even that extraordinary amount may have been insufficient, the parties thereafter amended the PSPAs again via a "Second Amendment," which permitted the Enterprises to draw *unlimited* amounts from Treasury to cure any quarterly net-worth deficits through 2012. Pursuant to the Second Amendment, at the end of 2012, Treasury's commitment became fixed, and future draws would reduce the remaining funding available.

To date, the Enterprises have drawn a total of $187.5 billion from the Treasury commitment, pursuant to the PSPAs. JA45. Pursuant to the formula established by the Second Amendment, the remaining amount of the commitment

available for Fannie Mae is $117.6 billion (over and above the $116.1 billion already infused), and an additional $140.5 billion for Freddie Mac (over and above the $71.3 billion already infused). JA41-42. Accordingly, Treasury has committed an additional $258 billion, for a total of $445 billion, to the Enterprises.

E. The Third Amendment to the PSPAs

Due to the substantial amounts drawn from the Treasury commitment, the Enterprises' dividend obligations to Treasury—calculated as 10% of the Treasury liquidation preference—were also substantial. By June 30, 2012, the Enterprises were obligated to pay Treasury approximately $19 billion per year—an amount that exceeded the Enterprises' average historical earnings per year.[3]

Between 2009 and 2011, the Enterprises did not earn enough to pay the Treasury dividend. To pay the dividends, the Enterprises drew billions from Treasury's funding commitment. Those draws, in turn, increased Treasury's liquidation preference and the Enterprises' dividend obligations going forward. Further, after the amount of the Treasury commitment became fixed in 2012, any such draws would reduce the finite amount remaining in the Treasury commitment.

[3] *See* Fannie Mae, Quarterly Report (Form 10-Q), at 4 (Aug. 8, 2012) ("The amount of this [$11.7 billion] dividend payment exceeds our reported annual net income for every year since our inception."), http://goo.gl/bGLVXz; Freddie Mac, Quarterly Report (Form 10-Q), at 8 (Aug. 7, 2012) ("As of June 30, 2012, our annual cash dividend obligation . . . of $7.2 billion exceeded our annual historical earnings in all but one period."), http://goo.gl/2dbgey.

On August 17, 2012, FHFA and Treasury executed the Third Amendment to the PSPAs, which ended the practice of the Enterprises taking draws from Treasury in order to pay dividends to Treasury. In particular, the Third Amendment (1) eliminated the fixed-rate 10% annual dividend, (2) added a quarterly variable dividend in the amount (if any) of each Enterprise's positive net worth, subject to a declining reserve, and (3) suspended the periodic commitment fee for as long as the quarterly variable dividend is in effect. *See* Third Amendment, Dist. Ct. Doc. # 76-2 at PDF p.52-59.

The Third Amendment thus relieved the Enterprises from obligations to pay fixed dividends of approximately $19 billion annually *plus* commitment fees equal to the market value of Treasury's massive and historic commitment. Just before the Third Amendment, the Enterprises had stated in their SEC filings that they "d[id] not expect to generate net income or comprehensive income in excess of our annual dividend obligation to Treasury over the long term." Fannie Mae, Quarterly Report (Form 10-Q), at 12 (Aug. 8, 2012) (http://goo.gl/bGLVXz); *see also* Freddie Mac, Quarterly Report (Form 10-Q), at 10 (Aug. 7, 2012) (same) (http://goo.gl/2dbgey). After the Third Amendment, the Enterprises would owe only variable dividends equal to net worth, and no periodic commitment fees. Accordingly, if the Enterprises' net worth is negative, they pay no dividend. If the Enterprises' net worth is positive, they pay that amount as a dividend, even if that

amount is less than (or greater than) the prior 10% dividend obligation. Thus, under the Third Amendment, Treasury accepted the risk that the Enterprises would earn less than 10% of the liquidation preference plus the amount of the periodic commitment fee.

F. Procedural History

On February 9, 2016, Plaintiffs—stockholders of Fannie Mae and Freddie Mac—filed their amended complaint asserting APA claims against FHFA and Treasury and alleging both Defendants exceeded their statutory authority, and that Treasury acted arbitrarily and capriciously, in agreeing to the Third Amendment. JA75-81. While Plaintiffs' amended complaint also asserted common law claims for breach of contract and the implied covenant of good faith and fair dealing, JA81-85, Plaintiffs consented to the dismissal of those claims. Dist. Ct. Doc. # 86 at p.8 n.1. Following oral argument, the district court dismissed Plaintiffs' complaint. Add. 1-25. This appeal followed.

SUMMARY OF THE ARGUMENT

This Court should affirm because the district court correctly held Plaintiffs' claims to be barred by two separate provisions of HERA.

First, the district court correctly recognized that Congress, through the plain language of HERA, spoke to the central issue in this case: for as long as the Enterprises are in conservatorship, "no court may take any action to restrain or

affect the exercise of powers or functions" of FHFA as their Conservator. 12 U.S.C. § 4617(f). The powers and functions of the Conservator are far-reaching and include, *inter alia*, the power to conduct all business of the Enterprises, reorganize their affairs, transfer or sell any Enterprise assets, and take all such actions in a manner the Conservator determines is in the best interests of the Enterprises or FHFA. *Id*. §§ 4617(a)(2), 4617(b)(2)(B), 4617(b)(2)(G), 4617(b)(2)(J). The district court correctly held that "FHFA's adoption of the Third Amendment fully comported with its statutory conservatorship powers and that, accordingly, the plaintiff-shareholder's APA claims would 'restrain or affect' FHFA's exercise of such powers and [are] barred by § 4617(f)." Add. 18.

Second, the district court also correctly held Plaintiffs' claims are barred by a separate, independently dispositive provision of HERA that transfers "all rights" of the shareholders to the Conservator, stripping Plaintiffs of the right to assert claims during conservatorship. Upon appointment, FHFA as Conservator "immediately succeed[ed]" by operation of law to "all rights, titles, powers, and privileges of the [Enterprises] and of any stockholder." *Id*. § 4617(b)(2)(A)(i). FHFA thus succeeded to, among other things, Plaintiffs' rights to pursue APA claims on behalf of the GSEs during the conservatorship. Accordingly, the district court correctly held Plaintiffs' claims are barred by HERA's succession provision, and rightly rejected Plaintiffs' invitation to create a conflict of interest exception to

HERA's plain language. Such an exception lacks any basis in HERA's text and has been rejected by every other court that has considered it to date. This Court should affirm.

STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss *de novo*. *Vadnais v. Fed. Nat. Mortg.*, 754 F.3d 524, 526 (8th Cir. 2014).

ARGUMENT

I. SECTION 4617(f) BARS PLAINTIFFS' CLAIMS

Plaintiffs' claims seek solely declaratory and equitable relief. Specifically, Plaintiffs seek to, *inter alia*, vacate the Third Amendment and enjoin FHFA and Treasury from "taking any action whatsoever" to carry it out. JA86. But the Conservator's decision to execute that Amendment fits squarely within its broad statutory powers and functions. Accordingly, the district court correctly held that Section 4617(f) bars Plaintiffs' claims. Add. 16-23.

A. Section 4617(f) Bars Courts from Ordering Declaratory or Equitable Relief That Would Restrain or Affect FHFA's Exercise of Conservatorship Powers

To enable the Conservator to carry out its functions, Congress expressly insulated the Conservator's actions from judicial second-guessing, mandating that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f). As the D.C. Circuit recently explained in affirming the dismissal of APA claims identical to

those Plaintiffs assert here, the "plain statutory text [of Section 4167(f)] draws a sharp line in the sand against litigative interference—through judicial injunctions, declaratory judgments, or other equitable relief—with FHFA's statutorily permitted actions as conservator." *Perry Capital*, 848 F.3d at 1077. Courts routinely apply Section 4617(f) to bar all manner of claims, including APA claims, seeking relief that would "restrain or affect" the exercise of powers of FHFA as Conservator. *See, e.g.*, *Cty. of Sonoma v. FHFA*, 710 F.3d 987, 994 (9th Cir. 2013) ("Because . . . FHFA acted within its powers as conservator, neither we nor the district court have jurisdiction over Plaintiffs'-Appellees' [APA and other] claims"); *Leon Cty. v. FHFA*, 700 F.3d 1273, 1278-79 (11th Cir. 2012) (affirming dismissal of APA claims based on operation of Section 4617(f)).

These decisions under HERA are consistent with the substantial body of case law—including from this Court—interpreting the materially identical provision governing Federal Deposit Insurance Corporation ("FDIC") conservatorships and receiverships, 12 U.S.C. § 1821(j). Like Section 4617(f), Section 1821(j) "effect[s] a sweeping ouster of courts' power to grant equitable remedies," and applies "regardless of the claimant's likelihood of success on the merits of his underlying claims." *Hanson v. FDIC*, 113 F.3d 866, 871 (8th Cir.

1997) (quoting *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995)).[4] Indeed, given "the breadth of the statutory language . . . the statute would appear to bar a court from acting in virtually all circumstances." *Nat'l Trust for Historic Pres. in U.S. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring); *see also Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1016 (8th Cir. 2013) (Section 1821(j) is "construed broadly to constrain the court's equitable powers.").

The analysis to determine whether Section 4617(f) precludes judicial review is straightforward and "quite narrow." *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010) (discussing 12 U.S.C. § 1821(j)). The court "must first determine whether the challenged action is within the [Conservator's] power or function" under HERA. *Dittmer Props.*, 708 F.3d at 1017 (citing *Bank of Am.*, 604 F.3d at 1243). If so, the Conservator "is protected from all court action that would 'restrain or affect' the exercise of those powers or functions." *Bank of Am.*, 604 F.3d at 1243.[5] "A conclusion that the challenged acts were directed at an institution in conservatorship and within the powers given to the conservator [thus]

[4] Section 1821(j) provides that "no court may take any action . . . to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j).

[5] There is no dispute that Plaintiffs' claims would "restrain or affect" the Conservator's execution of the Third Amendment. Indeed, they expressly seek to vacate the Amendment. JA86.

ends the [Section 4617(f)] inquiry." *Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012).[6]

B. The Third Amendment Is Within FHFA's Statutory Conservatorship Powers

Applying the appropriately narrow Section 4617(f) inquiry here, the district court correctly held that "FHFA's adoption of the Third Amendment was within its powers as conservator." Add. 19.

Contrary to Plaintiffs' attempt to recast the Conservator's powers as narrow and "limited" (Saxton Br. 20), courts consistently recognize that HERA "endows FHFA with *extraordinarily broad* flexibility to carry out its role as conservator." *Perry Capital*, 848 F.3d at 1087 (emphasis added); *see also Roberts*, 2017 WL 1049841, at *2 (describing conservator powers as "expansive"). FHFA's powers under HERA are at least as extensive and broad as those given to conservators and receivers under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), which courts have also described as "extraordinary," *MBIA Ins.*

[6] In attempting to limit the application of Section 4617(f), Plaintiffs cite *Sharpe v. FDIC* (*see* Saxton Br. 15), but that decision is both inapt and unpersuasive. While *Sharpe* declined to apply FIRREA's statutory bar (Section 1821(j) because "FIRREA does not authorize the breach of contracts," 126 F.3d 1147, 1155 (9th Cir. 1997), Plaintiffs here assert no breach of contract claim arising out of pre-conservatorship actions, which is the only scenario in which *Sharpe* applies. *See Meritage Homes v. FDIC*, 753 F.3d 819, 825 (9th Cir. 2014) ("*Sharpe* is not controlling outside of its limited context."). Moreover, *Sharpe* conflicts with other courts' precedents holding that alleged breaches of contract cannot overcome Section 1821(j). *See, e.g.*, *Ryan*, 985 F.2d at 1323-24, 1329; *In re Landmark Land Co. of Carolina*, No. 96-1404, 1997 WL 159479, at *4 (4th Cir. Apr. 7, 1997); *RPM Invs., Inc. v. RTC*, 75 F.3d 618, 621 (11th Cir. 1996); *Volges v. RTC*, 32 F.3d 50, 52 (2d Cir. 1994).

Corp. v. FDIC, 708 F.3d 234, 236 (D.C. Cir. 2013), and "exceptionally broad." *In re Landmark Land Co. of Okla., Inc.*, 973 F.2d 283, 288 (4th Cir. 1992).

Through HERA, Congress empowered the Conservator to (among other things) "operate" the GSEs, "carry on [their] business," "contract" on their behalf, and "transfer or sell any [GSE] asset or liability . . . without any approval, assignment, or consent." 12 U.S.C. § 4617(b)(2). Moreover, the statute permits FHFA to carry out its role as FHFA sees fit, authorizing the Conservator to exercise all of its powers in the manner the Conservator "determines is in the best interests of the [Enterprises] or the Agency." 12 U.S.C. § 4617(b)(2)(J)(ii).

By executing the PSPAs and the Third Amendment, the Conservator did precisely that; it exercised its power to "operate the [GSEs]" and to "conduct all business of the [GSEs]" in the manner the Conservator "determines is in the [GSEs' or FHFA's] best interests." 12 U.S.C. §§ 4617(b)(2)(B)(i), (J)(ii). The PSPAs are funding agreements that provide the Enterprises with a capital backstop of hundreds of billions of dollars. Just as securing essential funding is a quintessential act for the conservator of a financial institution—which authority Plaintiffs do not dispute or challenge—so too is agreeing to amend the PSPAs in a manner the Conservator believes, in its judgment, is in the best interests of the Enterprises or FHFA. *See* 12 U.S.C. § 4617(b)(2)(J)(ii).

As the D.C. Circuit held in addressing this exact issue, "FHFA's execution of the Third Amendment [thus] falls squarely within its statutory authority to '[o]perate the [Companies,]' 12 U.S.C. § 4617(b)(2)(B), to 'reorganiz[e]' their affairs, *id.* § 4617(a)(2), and to 'take such action as may be . . . appropriate to carry on the[ir] business,' *id.* § 4617(b)(2)(D)(ii)." *Perry Capital*, 848 F.3d at 1088. "Renegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital are quintessential conservatorship tasks designed to keep the Companies operational." *Id.* And because the Conservator's "management of Fannie's and Freddie's assets, debt load, and contractual dividend obligations during their ongoing business operation sits at the core of FHFA's conservatorship function," actions "to enjoin FHFA from implementing [the Third Amendment]," "to declare the Third Amendment invalid," or "to vacate the Third Amendment" seek relief "squarely within Section 4617(f)'s plain textual compass" and are barred. *Id.* at 1086.

This case is no different: Plaintiffs challenge the same transaction, pursue the same theory, and seek the same relief as did the *Perry Capital* plaintiffs. Accordingly, the district court correctly adopted the *Perry Capital* analysis "in full" to hold that FHFA's conservator powers under HERA "plainly allow for the actions contemplated by the Third Amendment." Add. 19. Every other court is in accord. *See Collins*, 2017 WL 2255564, at *4 (Plaintiffs "fail to demonstrate that

the FHFA's conduct was outside the scope of its broad statutory authority as conservator"); *Roberts*, 2017 WL 1049841, at *8 ("the Plaintiffs have not sufficiently alleged that FHFA acted outside the bounds of its statutory authority [in executing the Third Amendment]."); *Robinson*, 2016 WL 4726555, at *8; *Cont'l W.*, 83 F. Supp. 3d at 840 n.6 ("FHFA and Treasury did not act outside the power granted to them by HERA"; "HERA bars [plaintiff]'s claims under the APA").

Further, to the extent Plaintiffs characterize the Third Amendment as a "transfer[]" of GSE assets, *see, e.g.*, JA57, JA81, Plaintiffs concede any issue of Conservator authority because HERA expressly authorizes the Conservator to "transfer or sell any asset" of the Enterprises "without any approval, assignment, or consent," 12 U.S.C. § 4617(b)(2)(G), and permits FHFA to do so in the manner it "determines is in the best interests of the [Enterprises] or [FHFA]." *Id.* § 4617(b)(2)(J)(ii). HERA's transfer provision is one of the many "expansive grants of permissive, discretionary authority" that enables FHFA's "extraordinarily broad flexibility" as Conservator. *Perry Capital*, 848 F.3d at 1087-88. Like FIRREA's materially identical provision, 12 U.S.C. § 1821(d)(2)(G)(i), HERA's transfer provision "does not provide any limitation"; indeed, "[i]t is hard to imagine more sweeping language." *Gosnell v. FDIC*, No. 90-1266L, 1991 WL 533637, at *6 (W.D.N.Y. Feb. 4, 1991), *aff'd*, 938 F.2d 372 (2d Cir. 1991). Thus,

courts consistently have held that suits challenging a conservator's or receiver's transfer of assets are barred. *See, e.g.*, *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1323-24 (6th Cir. 1993) (holding FIRREA transfer provision and Section 1821(j) barred court from rescinding a receiver transaction "transferr[ing] substantially all" assets of the institution notwithstanding allegations that the transfer violated the plaintiffs' contract and due process rights).[7]

Finally, Congress's enactment of the Consolidated Appropriations Act, 2016 (the "Act") on December 18, 2015, also confirms that the Conservator had the statutory authority to execute the Third Amendment. *See* Pub. L. No. 114-113, § 702, Tit. VII, Div. O,129 Stat. 2242 (2015). The Act bars Treasury from selling or disposing of its preferred shares in the GSEs before January 1, 2018, but it otherwise leaves in place Treasury's rights under the PSPAs—including the Third Amendment, which is expressly referenced in the "Definitions" section. *Id.* § 702(a). Congress's decision to circumscribe Treasury's authority in one area but to leave intact other provisions of the PSPAs demonstrates that the Conservator and Treasury had the statutory authority to enter the Third Amendment. *See, e.g.*, *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) ("[w]here an agency's

[7] *See also Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696, 700-02 (D.C. Cir. 1997) (Section 1821(j) barred declaratory and injunctive relief against a receiver for breach of contract because the conduct fell within the receiver's transfer power under § 1821(d)(2)(G)(i)); *Volges v. RTC*, 32 F.3d 50, 53 (2d Cir. 1994) (Sections 1821(d)(2)(G)(i) and 1821(j) authorized receiver's asset transfer, allegedly in breach of a contract, "regardless of [Plaintiffs'] ultimate chance of success on his contract claim").

statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." (internal quotation marks and citation omitted)).

In sum, because the Third Amendment falls within the scope of the Conservator's statutory powers and functions, and Plaintiffs' claims would restrain or affect the Third Amendment, the district court correctly held that Section 4617(f) bars this action.

C. Plaintiffs' Attempts to Avoid and Create Exceptions to Section 4617(f) Are Meritless

Plaintiffs assert a variety of arguments in an attempt to avoid, or create exceptions to, the bar of Section 4617(f). The district court correctly rejected these arguments, just as other courts have done in dismissing materially identical claims, including claims brought by Plaintiffs' counsel in this case.

As an initial matter, Plaintiffs attempt to cabin the Conservator's powers and functions by arguing that one portion of HERA, 12 U.S.C. § 4617(b)(2)(D), "mark[s] the bounds" of FHFA's conservator powers. Saxton Br. 19 (quoting *Perry Capital*, 848 F.3d at 1118 (Brown, J., dissenting)). That is simply wrong. Section 4617(b)(2)(D) broadly empowers the Conservator to take action "to put the [Enterprises] in a sound and solvent condition," "carry on the business of" the GSEs, and "preserve and conserve" their assets. But **"**Section 4617(b)(2)(D)

obviously does not set out the exclusive powers and functions of FHFA as conservator." *Robinson*, 2016 WL 4726555, at *8. "As a plain textual matter, [HERA] 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)." *Perry Capital*, 848 F.3d at 1089. These powers include, *inter alia*, the power to "take over the assets of and operate" the Enterprises, to "perform all functions" and contract on their behalf, "transfer or sell" their assets, and take actions FHFA determines is in their best interests. 12 U.S.C. § 4617(b)(2)(B), (b)(2)(G), (b)(2)(J). The Conservator acted squarely within these powers and functions in agreeing to the Third Amendment.

1. Allegations that the Conservator Failed to Comply with an Alleged "Duty" to Preserve and Conserve Assets Cannot Overcome Section 4617(f)

Plaintiffs first attempt to avoid Section 4617(f) by seeking to convert the Conservator's broad powers and functions—*e.g.*, to preserve and conserve assets—into mandatory duties and obligations that the Conservator is supposedly "required" to undertake, and which Plaintiffs can supposedly police through litigation. Saxton Br. 19. Plaintiffs argue that these supposed duties and obligations limit and define how the Conservator may exercise all other powers HERA grants it. *See id.* 19-24. Plaintiffs are wrong.

The district court correctly held that HERA provides the Conservator with "broad and *permissive* statutory powers," rather than mandatory, judicially-enforceable duties. Add. 19 (emphasis added). "[T]ime and time again [HERA] outlines what FHFA as conservator 'may' do and what actions it 'may' take. . . . And 'may' is, of course, 'permissive rather than obligatory.'" *Perry Capital*, 848 F.3d at 1088 (citations omitted), *see also, e.g.*, 12 U.S.C. § 4617(b)(2)(B) (describing various powers FHFA "may" exercise). Because HERA provides that FHFA "may" preserve and conserve assets, HERA "does not compel [FHFA] in any judicially enforceable sense to preserve and conserve Fannie's and Freddie's assets and to return the Companies to private operation." *Perry Capital*, 848 F.3d at 1088. In other words, "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 . . . preserve and conserve the assets and property of the regulated entity'. . . *does not create a mandatory duty*" requiring the Conservator to do so. *Robinson*, 2016 WL 4726555, at *8 (emphasis added).

Accordingly, "FHFA's alleged failure to exercise its permissive power . . . does not remove Plaintiffs' claims from the ambit of Section 4617(f)'s bar on equitable relief." *Id.*; *see also Collins*, 2017 WL 2255564, at *3 (applying Section 4617(f) despite alleged "duty to preserve and conserve" assets); *Roberts*, 2017 WL 1049841, at *8 (same, holding HERA "makes the actions listed discretionary rather

than obligatory . . . . Ultimately, FHFA cannot be said to have violated a duty that did not exist.").

Plaintiffs acknowledge that "the word 'may' implies some degree of discretion,'" but nevertheless argue that the "obvious inferences from the structure and purpose of the [HERA]" defeats that interpretation. Saxton Br. 20 (quoting *United States v. Rodgers*, 461 U.S. 677, 706 (1983)). Not so. HERA's clear structure and purpose is to give the Conservator maximum flexibility to do what it determines is in the Enterprises' and FHFA's best interests, and to protect those decisions from judicial review. Neither of those purposes is consistent with imposing mandatory, judicially-enforceable obligations on the Conservator.

Lacking a hook in the statutory text for their "mandatory duty" argument, Plaintiffs revert to arguing the Conservator has an "overarching statutory mission" or "goal" to operate the Enterprises and preserve their assets, and that the Third Amendment is "antithetical" to that mission. Saxton Br. 19-20; *see also id*. at 16-31. In support, Plaintiffs cite various statements made by FHFA and Director Watt discussing the Conservator's efforts to carry on the Enterprises' business and preserve and conserve their assets. *Id.* at 17, 21-22. But these statements do nothing to advance Plaintiffs' argument. At most, they reflect an acknowledgment that the Conservator must balance various, potentially competing, high-level goals and priorities set forth by Congress. That does not mean Congress required FHFA

to take specific measures that are judicially enforceable at the behest of private plaintiffs in litigation. *See Perry Capital*, 848 F.3d at 1088 (HERA "does not compel [FHFA] *in any judicially enforceable* sense to preserve and conserve Fannie's and Freddie's assets") (emphasis added). Indeed, adopting Plaintiffs' approach would allow litigants to sue the Conservator for purportedly failing to comply with its "mission" based merely on an allegation that some other course of action would have better preserved and conserved the Enterprises' assets. That approach would expose the Conservator to a flood of litigation aimed at "second-guessing" the Conservator's operational decisions, which is precisely what Congress prohibited through enactment of Section 4617(f). Indeed, were courts permitted to control FHFA's conservatorship function, it could expose FHFA to conflicting decisions about the way in which Conservator discharges its duties.

Plaintiffs' citation to this Court's decision in *RTC v. CedarMinn Building Limited Partnership*, 956 F.2d 1446 (8th Cir. 1992) is inapt. Saxton Br. 16. In *CedarMinn*, the Court simply contrasted the "mission" of a conservator with that of a receiver, observing the "conservator's mission is to conduct an institution as an ongoing business," while a receiver liquidates the institution. *Id*. at 1454. Of course, operating the institution as a going concern is precisely what FHFA as Conservator has done, both before and after the Third Amendment. Moreover, *CedarMinn* says nothing to indicate that private litigants can sue to enforce a

conservator's compliance with any such mission in light of Section 1821(j). Indeed, *CedarMinn* did not cite or address Section 1821(j), as it involved a suit for damages—not injunctive relief—related to a contract repudiation. *Id.* at 1449.

Plaintiffs also point to a provision of HERA that states the Conservator "shall conduct its operations in a manner which . . . maximizes the net present value return from the sale or disposition of [Enterprise] assets." Saxton Br. 23 (quoting 12 U.S.C. § 4617(b)(11)(E)). According to Plaintiffs, "judicial review is available," notwithstanding Section 4617(f), to "determine whether FHFA complied" with this statutory provision when it executed the Third Amendment. Again, Plaintiffs are wrong.

Just as Section 4617(f) bars declaratory and equitable claims against the Conservator for allegedly failing to "preserve and conserve" assets, Section 4617(f) also bars such claims for allegedly failing to "maximize" the value of those assets. Indeed, in *Ward v. Resolution Trust Corporation*, 996 F.2d 99, 103 (5th Cir. 1993)—a decision relied upon by the district court below (Add. 19)—the Fifth Circuit rejected the *exact* argument Plaintiffs assert here. In *Ward*, the plaintiff likewise attempted to avoid the dispositive effect of Section 1821(j) by alleging a receiver had "violat[ed]" the same purported "restrictions" of FIRREA by "fail[ing] to maximize the net present value return from the sale" of the entity's assets. 996 F.2d at 101, 104 (citing 12 U.S.C. § 1441a(b)(3)(C)). The Fifth Circuit

"disagree[d] entirely," finding Plaintiffs' theory "was conceived in flawed logic and therefore dies aborning." *Id*. The court explained that, because transferring assets was a "quintessential statutory power" of conservators and receivers, Section 1821(j) applied:

> Therefore, even assuming arguendo, that (as alleged by [plaintiff]) the [conservator or receiver] exercised the power or function of selling the [asset] in a way that failed to maximize the net present value return . . . [plaintiff] could not prevail. For, even if the [conservator or receiver] improperly or unlawfully exercised an authorized power or function, it clearly did not engage in an activity outside its statutory powers.

Id. at 103. So too here. Because executing the Third Amendment was a "quintessential conservatorship task[]," *Perry Capital*, 848 F.3d at 1088, Section 4617(f) applies, irrespective of Plaintiffs' argument that the Amendment fails to maximize the value of Enterprise assets. As the district court recognized: "Whatever Plaintiffs' views of the wisdom of the Third Amendment, FHFA's adherence to its statutory role as conservator does not turn on the wisdom of its decision-making. Any suggestion that FHFA could have or should have taken different actions to pursue the goals of conservatorship are therefore irrelevant" Add. 19 (citing *Ward*, 996 F.3d at 103).[8]

[8] The decisions in *Arkansas State Bank Commissioner v. RTC*, 911 F.2d 161 (8th Cir. 1990) and *RTC v. Diamond*, 45 F.3d 665 (2d Cir. 1995) (cited at Saxton Br. 23) are inapposite, as those decisions merely recite FIRREA's analogous provision in the background, without addressing or applying it.

Finally, contrary to Plaintiffs' suggestion, Congress did not impose on the Conservator the types of alleged common-law duties imagined by Plaintiffs. *See* Saxton Br. 12, 18-19, 24. Courts consistently reject such attempts to overlay pre-HERA common law principles as a limit on the Conservator's authority. *See Kellmer*, 674 F. 3d at 850 (rejecting arguments "delving deep into pre-HERA common law and expounding HERA's legislative history," in favor of simply "read[ing] the statute"). Moreover, in HERA, Congress gave the Conservator powers greater than those powers allegedly held by common-law conservators. Both Plaintiffs and the *Perry Capital* dissent are thus wrong in their efforts to import common-law conservatorship principles that may be applicable in the probate or real property context but are far too limiting here. *See Perry Capital*, 848 F.2d at 1121-22 (Brown, J., dissenting) (Saxton Br. 18-19).

By delegating to the Conservator power to act in any manner the Conservator "determines is in the best interests of [the Enterprises] or the Agency," 12 U.S.C. § 4617(b)(2)(J)(ii), HERA rejects Plaintiffs' notion that common-law conservatorship principles can restrain the Conservator's exercise of its statutory powers. *See Morissette v. United States*, 342 U.S. 246, 263 (1952) (common law meanings presumed only in the "absence of contrary direction"). Indeed, this provision of HERA confirms the Conservator need not "act with a motive that exclusively favors the interests of Fannie or Freddie." *Roberts*, 2017 WL

1049841, at *6. Thus, the Court should reject the unsupported notion that "Congress intended FHFA to be nothing more than a common-law conservator." *Perry Capital*, 848 F.3d at 1094; *see also id*. (observing "FHFA is not your grandparents' conservator").

2. Allegations that the Third Amendment Was Improperly Motivated Cannot Overcome Section 4617(f)

Throughout their brief, Plaintiffs assert that Section 4617(f) does not apply because the Conservator supposedly had a host of improper motives for the Third Amendment—*e.g.*, to "nationalize" the Enterprises, "siphon" their assets in order "to reduce the federal deficit," "shackle them in perpetual conservatorship," to "affirmatively sabotage" their recovery, and "to promote the interests of Treasury." Saxton Br. 8, 10, 12, 15, 19, 25, 29. Plaintiffs are wrong: allegations of improper motives or intent cannot overcome Section 4617(f).

As the D.C. Circuit held, "nothing . . . in [HERA] hinges FHFA's exercise of its conservatorship discretion on particular motivations." *Perry Capital*, 848 F.3d at 1093. Allegations about the Conservator's alleged motives are thus irrelevant to the Section 4617(f) analysis: "for purposes of applying Section 4617(f)'s strict limitation on judicial relief, allegations of motive are neither here nor there." *Id.* at 1093. Indeed, courts evaluating challenges to the Third Amendment have done so by reviewing the Conservator's actions "on their face," without "wad[ing] into the merits or motives of FHFA and Treasury's actions."

Cont'l W., 83 F. Supp. 3d at 840 n.6; *see also Perry Capital*, 70 F. Supp. 3d at 225 (explaining the court's task in applying Section 4617(f) is to ask "*what* the Third Amendment entails, rather than *why* FHFA executed [it]").

Courts have applied Section 1821(j), FIRREA's analog to Section 4617(f), in the same way, holding the statutory bar applies notwithstanding allegations of improper motive. *See, e.g.*, *Hindes v. FDIC*, 137 F.3d 148, 159-61 (3d Cir. 1998) (barring challenge to alleged "conspiracy with state officials to close the bank"); *In re Landmark Land Co. of Okla.*, 973 F.2d at 288-90 (barring challenge to action allegedly taken for conservator's "own benefit" and to other interested parties' detriment). These decisions rest on sound policy: if motives *were* relevant, statutory bars on judicial review like Section 4617(f) would be meaningless; plaintiffs could plead around them simply by alleging an improper purpose. "Congress surely knew, when it enacted S 4617(f), that challenges to agency action sometimes assert an improper motive." *Leon Cty. v. FHFA*, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273. But in drafting HERA, "Congress barred judicial review of the Conservator's actions without making an exception for actions said to be taken from an allegedly improper motive." *Id.*

3. Allegations that the Third Amendment Was an Unfavorable Deal Cannot Overcome Section 4617(f)

Plaintiffs also attempt to overcome Section 4617(f) by asserting that the Third Amendment was bad for the Enterprises and their shareholders because it

failed to preserve and conserve assets or maximize their value, and was "financially reckless," "needless[]," and "perverse." Saxton Br. 26-31.

But these allegations are merely attacks on the *merits* of the Conservator's decision to execute the Third Amendment—not allegations that the Conservator lacked the authority to execute that amendment in the first place. Just as there is no "bad motive" exception to Section 4617(f), there also is no "bad job" exception. "Congress has removed from the purview [of] the court the power to second-guess the FHFA's business judgment." *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 101 n.7 (D. Mass. 2014). As the district court correctly held, "FHFA's adherence to its statutory role as conservator does not turn on the wisdom of its decision-making." Add. 19; *see also Cty. of Sonoma*, 710 F.3d at 993 ("[I]t is not our place to substitute our judgment for FHFA's."). To create such an exception would expose the Conservator to all manner of hindsight analysis and render "Section 4617(f)'s strict limitation on judicial review . . . an empty promise."[9] *Perry Capital*, 848 F.3d at 1096. As the D.C. Circuit explained:

> What the [plaintiffs] and dissenting opinion take issue with, then, is the allocated amount of dividends that FHFA negotiated to pay its financial-lifeline

[9] *See also, e.g.*, *Gross v. Bell Sav. Bank PaSA*, 974 F.2d 403, 408 (3d Cir. 1992) (holding with respect to Section 1821(j) that "the availability of injunctive relief does not hinge on [the court's] view of the proper exercise of otherwise-legitimate power"); *Ward*, 996 F.2d at 104; *MBIA Ins. Corp. v. FDIC*, 816 F. Supp. 2d 81, 103 (D.D.C. 2011) (applying Section 1821(j) despite allegation that receiver "came to the wrong conclusion" and another course "would have been preferable"), *aff'd*, 708 F.3d 234 (D.C. Cir. 2013).

> stockholder—Treasury—to the exclusion of other stockholders, and that decision's feared impact on business operations in the future. But *Section 4617(f) prohibits us from wielding our equitable relief to second-guess either the dividend-allocating terms that FHFA negotiated on behalf of the Companies, or FHFA's business judgment* that the Third Amendment better balances the interests of all parties involved, including the taxpaying public, than earlier approaches had.

Id. at 1095 (emphasis added). The exact same rationale applies here; allegations that the Conservator "improperly" exercised its powers by supposedly mismanaging Enterprise assets cannot overcome Section 4617(f).

Plaintiffs similarly assert the Third Amendment was unnecessary in light of the Enterprises' ability to accrue dividends at a 12% (so-called "in kind") rate, rather than paying them at a 10% rate. Saxton Br. 4, 9, 31. But "[n]othing in [HERA] confines FHFA's conservatorship judgments to those measures that are driven by financial necessity." *Perry Capital*, 848 F.3d at 1093. The district court thus rightly rejected Plaintiffs' preference for this "alternative dividend system" (Add. 5), holding that Section 4617(f) renders "[a]ny suggestion that FHFA could have or should have taken different actions to pursue the goals of conservatorship . . . irrelevant." Add. 19. The court in *Perry Capital* also rightly rejected this preference for an "in-kind dividend option," concluding that HERA "does not compel that choice over the variable dividend to Treasury put in place by the Third Amendment. Either way, Section 4617(f) flatly forbids declaratory and injunctive

relief aimed at superintending to that degree FHFA's conservatorship or receivership judgments." 848 F.3d at 1091.

Plaintiffs further allege the Third Amendment amounts to a "giveaway to Treasury." Saxton Br. 23; *see also id*. at 26; JA23, JA58 (alleging Enterprises did not receive "meaningful consideration" for the Third Amendment). But again, Section 4617(f) bars such a merits-based attack on the Conservator's business decisions. Additionally, Plaintiffs ignore the "elementary" contract-law principle that courts "will not inquire into the adequacy of consideration as long as the consideration is otherwise valid or sufficient to support a promise." *See* 3 WILLISTON ON CONTRACTS § 7:21 (4th ed.).

Moreover, the exchange of consideration under the Third Amendment is plain on its face. Before the Third Amendment, the PSPAs required the Enterprises to pay Treasury a fixed annual cash dividend equal to 10% of the liquidation preference. *Perry Capital*, 848 F.3d at 1082. By the time of the Third Amendment, the 10% cash dividend had grown to $18.9 billion per year, an amount that exceeded the Enterprises' historical annual earnings for nearly every year since their founding. In addition, Treasury was entitled to an annual periodic commitment fee, which was intended to compensate taxpayers fully for Treasury's massive and ongoing commitment of public funds to maintain the Enterprises' operations. *See id.* In the Third Amendment, the Conservator agreed to trade (a) a

stream of profits that historically averaged less than $19 billion in exchange for relief from (b) $19 billion per year in fixed dividends *and* payment of the periodic commitment fee. Thus, consideration for the Third Amendment flowed in both directions, with Treasury accepting the risk that the Enterprises would earn less than 10% of the liquidation preference plus the amount of the periodic commitment fee. Indeed, if the Enterprises earned no profits in a year, they would owe Treasury *no* dividend. *Id.* at 1083. Section 4617(f) bars Plaintiffs and the courts from second-guessing whether the consideration for the Third Amendment was favorable enough. Congress vested the Conservator alone with responsibility for making such fundamental decisions.

4. Allegations that the Third Amendment Is Improperly "Winding Up" the Enterprises Cannot Overcome Section 4617(f)

Plaintiffs assert that the Conservator has exceeded its statutory powers by acting in the "exclusive[] . . . province of a receiver" because the Third Amendment is "winding up" the Enterprises' affairs. Saxton Br. 35. But the Third Amendment is *not* a winding up of the Enterprises. Four years after execution of the Third Amendment, the Enterprises "continue to operate long-term, purchasing more than 11 million mortgages and issuing more than $1.5 trillion in single-family mortgage-backed securities," and "remain fully operational entities with combined operating assets of $5 trillion." *Perry Capital*, 848 F.3d at 1091.

Regardless, contrary to Plaintiffs' contention, HERA's plain text authorizes FHFA as "conservator *or* receiver" to be appointed "for purposes of reorganizing, rehabilitating, *or winding up* the affairs" of the Enterprises. 12 U.S.C. § 4617(a)(2) (emphasis added); *cf. Henson v. Santander Consumer USA Inc.*, --- S. Ct. ----, 2017 WL 2507342, at *4 (U.S. June 12, 2017) (rejecting notion that, when "Congress set two words cheek by jowl in the same phrase," it "meant them to speak to entirely different periods of time"). Indeed, FHFA may undertake a mix of actions under its various statutory authorities.

Plaintiffs argue that HERA uses the terms "liquidation" and "winding up" synonymously, and because the Conservator is not permitted to do the former, it must not be permitted to do the latter. Saxton Br. 35. But winding up is different from liquidation; it includes prudential steps short of liquidation, such as transferring Enterprise assets without approvals and shrinking the Enterprises' operations to ensure soundness until an ultimate resolution is determined. *See* 12 U.S.C. § 4617(b)(2)(G). Accordingly, "[u]ndertaking permissible conservatorship measures even with a receivership mind" would not be outside of the Conservator's "statutory bounds," *Perry Capital*, 848 F.3d at 1093, a principle courts consistently recognize. *See Roberts*, 2017 WL 1049841, at *8 ("FHFA can operate the companies as a conservator in anticipation of moving onto receivership") (citing 12 U.S.C. § 4617(a)(4)(D)); *Robinson*, 2016 WL 4726555, at

*8 (HERA "clearly envisions the possibility" of FHFA "convert[ing] its current conservatorship into a receivership"); *Perry Capital LLC v. Lew*, 70 F. Supp. 3d at 246 ("There surely can be a fluid progression from conservatorship to receivership without violating HERA, and that progression could very well involve a conservator that acknowledges an ultimate goal of liquidation."), *aff'd in relevant part*, 848 F.3d at 1093.

For similar reasons, Plaintiffs' repeated reliance on *RTC v. CedarMinn Building Limited Partnership*, 956 F.2d 1446 (8th Cir. 1992) (at Saxton Br. 32-33) is misplaced. In *CedarMinn*, this Court expressly recognizes that where, as here, Congress authorizes an agency to "exercise a duty, right or power in its capacity as 'a conservator *or* receiver,'" that generally means that "the duty, right, or power [is] to be enjoyed or exercised by *both* the conservator and the receiver." 956 F.2d at 1451-52 (emphases added). This is particularly true if, as here, Congress has taken care, in *other* portions of the statute, to delineate the powers that can be pursued only by a receiver or only by a conservator, but not by both. *Id.* at 1452; *see also* 12 U.S.C. § 4617(b)(2)(D)-(E). Furthermore, while *CedarMinn* describes the "mission" of a conservator as "maintain[ing] the institution as an ongoing concern," that does not foreclose it from acting in ways that a receiver may also

act—*i.e.*, transferring assets and reducing the obligations of the institution—where the statute gives such powers to both types of entities. *See* 956 F.2d at 1454.[10]

Plaintiffs also argue that Section 4617(a)(2)'s plain command that either the "conservator *or* receiver" may "*wind[] up* the affairs" of an Enterprise cannot mean what it says. *See* Saxton Br. 35-36 (quoting 12 U.S.C. § 4617(a)(2); emphases added by Plaintiffs). Plaintiffs assert that giving effect to the plain text of Section 4617(a)(2) would permit FHFA, if appointed as receiver, to act with the purpose of rehabilitation, instead of liquidation. *Id.* at 36. But this provision of HERA makes perfect sense, and there is no reason to discard it. HERA directs the receiver not only to liquidate Enterprise assets, but also to "rehabilitat[e]" the business of the Enterprise by creating a limited-life regulated entity ("LLRE"). 12 U.S.C. § 4617(a)(2). An LLRE, once established, "succeed[s] to the charter" of the Enterprise and "thereafter operate[s] in accordance with, and subject to, such charter." *Id.* § 4617(i)(2)(A). Thus, HERA provides that a receiver will both liquidate and, through an LLRE, rehabilitate and reorganize the Enterprises upon a selective transfer of assets and liabilities.

[10] Plaintiffs also cite the passing remark in *McAllister v. RTC*, 201 F.3d 570 (5th Cir. 2000), that a "conservator only has the power to take actions necessary to restore a financially troubled institution to solvency." *Id.* at 579; Saxton Br. 21. But that statement addressed "[e]xpenses of liquidation," which "cannot be incurred by a conservator as a matter of law, *as liquidation is not a function of the conservator*." *McAllister*, 201 F.3d at 579 (emphasis added).

Finally, Plaintiffs argue the Third Amendment improperly allows an "end run" around the receivership distribution-priority scheme outlined in HERA. Saxton 33-34. But the Enterprises are not in receivership, and are not liquidating their assets, so the priority scheme is inapplicable here. *See Perry Capital*, 848 F.3d at 1093 ("the duty that [HERA] imposes on FHFA to comply with receivership procedural protections textually turns on FHFA actually liquidating the Companies"); *Cobell v. Norton*, 283 F. Supp. 2d 66, 91 n.12 (D.D.C. 2003) ("The notion of a '*de facto* receivership' is rather akin to the concept of 'semi-pregnancy': an entity is either in *de jure* receivership or it is not."), *vacated in part on other grounds*, 392 F.3d 461 (D.C. Cir. 2004).

In any case, allegations that a conservator's conduct violates the statutory order of priority for receiverships are insufficient to overcome Section 4617(f). In *Courtney*, the Seventh Circuit rejected the Plaintiffs' argument that an asset transfer was purportedly a "thinly disguised way of circumventing the statutory priority scheme and allowing the [investor] to get more than its proper share." 485 F.3d at 945. The "glaring problem" with this argument, the court held, was that under FIRREA (like HERA), a conservator or receiver is authorized to "transfer assets or liabilities without any further approvals," and thus "the anti-injunction language of § 1821(j)" barred the relief requested. *Id*. at 948. So too here: Section 4617(f) protects the Conservator's exercise of its statutory powers—

including to "transfer or sell any asset" of the Enterprises "without any approval, assignment, or consent" 12 U.S.C. § 4617(b)(2)(G)—irrespective of allegations that those transfers may violate HERA's receivership priority scheme.

5. Plaintiffs Cannot Avoid Section 4617(f) by Alleging that Treasury "Supervised" or "Directed" the Conservator

Plaintiffs also attempt to avoid Section 4617(f) by alleging the Conservator agreed to the Third Amendment only "at Treasury's direction," Saxton Br. 41, supposedly in violation of 12 U.S.C. § 4617(a)(7), which provides that the Conservator "shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of [the Conservator's] rights, powers, and privileges." The district court correctly rejected this argument, holding that Plaintiffs are not within the "zone of interests" of Section 4617(a)(7) and thus lack prudential standing to enforce this provision. Add. 20-21.

a. Plaintiffs Lack Prudential Standing to Enforce Section 4617(a)(7)

To assert an APA claim, the plaintiff must be "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. This means Plaintiffs' grievance must "arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). To determine whether a plaintiff is within the zone, courts "consider the purposes of the specific statutory provision that is at

issue," *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074-75 (D.C. Cir. 1998), and "who 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) (internal quotation marks and citation omitted).

Here, the district court correctly held that only the Conservator is within Section 4617(a)(7)'s zone of interests because that provision protects *the Conservator* from state and federal encroachment. Add. 20-21. This section "specifically functions to remove obstacles to FHFA's exercise of conservator powers—*i.e.* to preserve FHFA's interests, not those of GSE shareholders." Add. 21. Accordingly, the Conservator is the party who can be expected to police that interest by raising a Section 4617(a)(7) defense. *See also Robinson*, 2016 WL 4726555, at *5-6 (holding shareholders are not in zone of interests of Section 4617(a)(7), as "the clear purpose of the requirement is to provide a preemption defense *for FHFA* in its role as conservator") (emphasis in original); *City of Chicago*, 962 F. Supp. 2d at 1059 (describing Section 4617(a)(7) as "HERA's preemption provision").

On appeal, Plaintiffs argue the district court did not take a "lenient" enough approach or give Plaintiffs "the benefit of any doubt" regarding standing. Saxton Br. 41. Plaintiffs are wrong: the district court applied the correct standard, even citing the same precedent Plaintiffs contend the district court ignored. Add. 20

(citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014)). Moreover, while the zone of interests test is not "especially demanding," *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987), it is not a rubber stamp for Plaintiffs' chosen theory of standing. *See id*. (denying review if Plaintiffs' interests are "marginally related" to the statutory purposes). Further, contrary to Plaintiffs' suggestion (Saxton Br. 42), the district court did not require a specific congressional purpose to benefit shareholders in Section 4617(a)(7). Rather, the court correctly identified the provision's "purpose . . . to provide a preemption defense *for FHFA*" to conclude that Plaintiffs lack standing. Add. 20-21 (citation omitted, emphasis in original).

Plaintiffs argue they fit within the zone of interests because Section 4617(a)(7) "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." Saxton Br. 42. This argument—that Enterprise shareholders may lose money if the Conservator's independence is threatened—fails because a financial interest in the enforcement of a statute does not confer prudential standing. *See Gosnell*, 938 F.2d at 374 (disappointed bidder not within the zone of interests protected by FIRREA's asset transfer provision and thus could not challenge FDIC's failure to dispose of assets "on the open market for sale to the highest bidder"); *see also Dismas Charities*,

Inc. v. U.S. DOJ, 401 F.3d 666, 677 (6th Cir. 2005) (interest in receiving financial benefits of government program insufficient to confer prudential standing).

Section 4617(a)(7) was plainly designed to give FHFA a defense it may utilize as Conservator (in its discretion) to fend off encroaching, inconsistent directives from states or federal agencies. It is not a sword for shareholders to use to advance their financial interests at the expense of the Conservator's judgment.

b. Plaintiffs Fail to State a Claim for an Alleged Violation of Section 4617(a)(7)

Further, in addition to Plaintiffs' lack of prudential standing, Plaintiffs' allegation that the Conservator agreed to the Third Amendment only at Treasury's "direction and supervision" (JA28, JA65) fails to satisfy the plausibility requirements of *Iqbal* and *Twombly*. As in other identical cases, "Plaintiffs have alleged no *facts* from which it can be reasonably inferred that something like that actually happened." *Roberts*, 2017 WL 1049841, at *7. In *Perry Capital*, the D.C. Circuit rejected the same claim based on the same conclusory allegations that, upon "information and belief," the Third Amendment resulted only from Treasury's "insistence." *Perry Capital*, 848 F.3d at 1091 n.9. The Court held "we are not required to credit a bald legal conclusion that is devoid of factual allegations and that simply parrots the terms of the statute." *Id*. (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The court in *Roberts* came to the same conclusion: "At most, on the facts alleged, Treasury came up with the idea for the

new dividend formula in the Third Amendment and proposed it to FHFA. Formulating a plan and proposing it to FHFA does not mean that Treasury was subjecting FHFA to its 'direction' or 'supervision.'" 2017 WL 1049841, at *7.

Additionally, "the very fact that FHFA itself has not brought suit to enjoin the Treasury from the alleged coercion it was subjected to suggests that FHFA was an independent, willing participant in its negotiations with the Treasury." *Robinson*, 2016 WL 4726555, at *6. Indeed, the Conservator—for years—has vigorously defended in courts across the country the very same amendment it was purportedly forced to execute against its will. This course of conduct alone demonstrates that Plaintiffs' "direction and supervision" argument fails for lack of plausibility. *See Suero v. Fed. Home Loan Mortg. Corp.*, 123 F. Supp. 3d 162, 172 (D. Mass. 2015) (applying Section 4617(f) by looking to Conservator's "efforts to defend Freddie Mac against the legal challenges that have been brought against it").

Thus, the Court should uphold the dismissal of Plaintiffs' "direction and supervision" claim for lack of prudential standing and failure to state a claim.[11]

[11] Plaintiffs also suggest they could have third-party standing due to their "close relationship" with the Enterprises and the purported "hindrance" on the Enterprises' ability to protect their own interests. Saxton Br. 45. But this argument is akin to seeking derivative standing on behalf of the Enterprises, *see Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (addressing "third party standing to assert the rights of another"), and thus fails due to HERA's Succession Provision. *See infra* Sec. II.

D. Plaintiffs' Nondelegation Argument Is Meritless

Though Plaintiffs raise no constitutional claims or challenges to HERA, Plaintiffs argue that *Perry Capital*'s approach, followed by the district court here, "raises grave doubts about Section 4617's constitutionality under the nondelegation doctrine." Saxton Br. 26-27. 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 limits on delegation are frequently stated, but rarely invoked." *United States v. Whaley*, 577 F.3d 254, 263 (5th Cir. 2009). "Indeed, with the exception of two cases in 1935, the Supreme Court has uniformly rejected every nondelegation challenge it has considered." *United States v. Fernandez*, 710 F.3d 847, 849 (8th Cir. 2013) (internal citations omitted). The modern test is simply whether Congress has provided an "intelligible principle," which may be "broad" (including to act in the "public interest") to guide the agency's exercise of its discretion. *Id.*; *see United States v. Kuehl*, 706 F.3d 917, 919 (8th Cir. 2013) (upholding delegation to "protect the public from sex offenders").[12]

[12] *See also, 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"); *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1475 (D.C. Cir. 1998) (upholding delegation to act based on "compelling public interest").

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). 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 easily 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).

II. HERA'S SUCCESSION PROVISION BARS PLAINTIFFS' CLAIMS

Because Section 4617(f) bars Plaintiffs' claims in their entirety, the Court need go no further in its analysis in order to affirm. Nevertheless, the district court also correctly held that Plaintiffs' claims should be dismissed for an additional, independently dispositive reason: HERA Succession Provision—by which FHFA holds "all rights" of the Enterprises and their stockholders during

conservatorship—bars prosecution of stockholder claims during conservatorship, irrespective of any alleged conflict of interest. Add. 23-24.

A. The Conservator Has Succeeded to All Stockholder Rights

Congress could not have been more clear: upon its appointment, the Conservator "immediately succeed[ed] to . . . *all rights, titles, powers, and privileges* of the [GSEs], and *of any stockholder*, officer, or director *of [the GSEs]* with respect to the [GSEs] and the assets of the [GSEs]." 12 U.S.C. § 4617(b)(2)(A) (emphases added). This broad, unequivocal language evidences Congress's intent to ensure "that nothing was missed" and to "transfer[] everything it could to the [Conservator]." *Kellmer v. Raines*, 674 F.3d 848, 851 (D.C. Cir. 2012) (quoting *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir. 1998)). Accordingly, "[t]he shareholders' rights are now the FHFA's." *Esther Sadowsky Testamentary Trust v. Syron*, 639 F. Supp. 2d 347, 351 (S.D.N.Y. 2009).

Courts uniformly hold that this Succession Provision of HERA bars Enterprise stockholders from asserting at least shareholder derivative claims during the conservatorships. Because "[t]his language plainly transfers shareholders' ability to bring derivative suits—a "right[ ], title[ ], power[ ], [or] privilege[ ]"—to FHFA, *Kellmer*, 674 F.3d at 850, it "bars shareholder derivative suits, without exception." *Perry Capital*, 70 F. Supp. 3d at 232; *see also Louisiana Mun. Police Employees Ret. Sys. v. FHFA*, 434 F. App'x 188, 191 (4th Cir. 2011) (upholding

substitution of the Conservator in place of shareholder plaintiffs asserting derivative claims on behalf of Freddie Mac); *Cont'l W.*, 83 F. Supp. 3d at 840 n.6 (HERA grants to FHFA "the right to bring a derivative suit").

HERA's Succession Provision, when coupled with the other statutory powers granted to FHFA, vest total control over the GSEs exclusively in the Conservator, not the shareholders. Indeed, numerous courts have held that Section 4617(f) *itself* displaces shareholder plaintiffs' attempts to pursue derivative claims. *See Gail C. Sweeney Estate Martial Trust v. U.S. Treasury Dep't*, 68 F. Supp. 3d 116, 126 (D.D.C. 2014) ("Plaintiffs' lawsuit would 'affect' and 'interfere' with the Conservator's exercise of its powers"); *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 799 (E.D. Va. 2009) ("allowing the [shareholder] plaintiffs to remain in this action would violate § 4617(f)"), *aff'd sub nom. Louisiana Mun. Police*, 434 F. App'x 188, 191; *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, ERISA Litig.*, 629 F. Supp. 2d 1, 4 n.4 (D.D.C. 2009) ("allowing [shareholder] plaintiffs to continue to pursue derivative claims independent of FHFA would require this Court to take action that would 'restrain or affect' FHFA's discretion, which HERA explicitly prohibits"), *aff'd sub nom. Kellmer*, 674 F.3d 848.

Here, the district court correctly held that, under the Succession Clause, "FHFA assumes shareholders' rights to pursue derivative claims." Add. 23.

B. The Conservator Has Succeeded to Plaintiffs' Claims Whether Those Claims Are Characterized as Derivative or Direct

Plaintiffs do not contest that the Conservator succeeds to all shareholder derivative claims. Instead, Plaintiffs argue that HERA's Succession Clause does not apply to Plaintiffs' APA claims because they are supposedly direct. Saxton Br. 43-51. This argument is wrong twice-over.

First, as the district court correctly held (and Treasury's brief explains), Plaintiffs' claims are derivative because they are premised on classically derivative injury (*e.g.*, depletion of corporate assets) and seek relief that would plainly flow to the GSEs directly (*e.g.*, return of dividends paid pursuant to the Third Amendment). Add. 11-13. The FHFA Defendants adopt and incorporate by reference Treasury's argument that Plaintiffs' APA claims are derivative, not direct. Treasury Br. §§ II.A-B.

Second, Plaintiffs' characterization of their claims as direct is in all events irrelevant because HERA's Succession Provision applies equally to direct shareholder claims. Under HERA, the Conservator succeeded to "*all*" shareholder rights. 12 U.S.C. § 4617(b)(2)(A) (emphasis added). When interpreting HERA, "all means all." *Hennepin Cty. v. Fed. Nat'l Mortg. Ass'n*, 742 F.3d 818, 822 (8th Cir. 2014); *see also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

As the court held in *Pagliara v. Federal Home Loan Mortgage Corp.*, 203 F. Supp. 3d 678 (E.D. Va. 2016), the Conservator succeeds to all shareholder rights, including those that are "enforceable through a direct lawsuit, not a derivative lawsuit." *Id.* at 687 (holding Conservator succeeded to the right to inspect books and records and to vote to elect directors). *Pagliara* distinguished a case principally relied on by Plaintiffs, *Levin v. Miller*, 763 F.3d 667 (7th Cir. 2014) (at Saxton Br. 44), and sided with the concurring opinion in that case, holding that HERA's succession provision extends to direct shareholder claims. *See Pagliara*, 203 F. Supp. 3d at 688. This Court should follow the same approach and hold that Plaintiffs' APA claims are barred, irrespective of whether they are direct or derivative.

In this regard, the FHFA Defendants respectfully disagree with the D.C. Circuit's conclusion in *Perry Capital* that HERA's succession language does not apply to direct claims. *See* 848 F.3d at 1104-05. The D.C. Circuit stated that shareholders' rights "with respect to the regulated entity and [its] assets" are "only those an investor asserts derivatively on the Company's behalf." *Id*. But this reading "strain[s] any reasonable interpretation" of HERA, *Pagliara*, 203 F. Supp. 3d at 688, because Plaintiffs' claims are unquestionably related to the Enterprises and their assets. Furthermore, the D.C. Circuit reached its conclusion based on its reasoning that a separate provision of HERA, 12 U.S.C. § 4617(b)(2)(K)(i),

"terminates [shareholders'] rights and claims in receivership" against the assets or charter of the Enterprises and thus "indicates that shareholders' direct claims against and rights in the Companies survive during conservatorship." *Perry Capital*, 848 F.3d at1105. But the succession clause does not *terminate* any rights upon conservatorship; instead, it transfers them to the Conservator during the conservatorship. Only if and when the Enterprises enter receivership would any shareholder rights be terminated, and in that context, Section 4617(b)(2)(K)(i) excludes certain rights from termination and permits shareholders to assert those rights through the administrative process. Accordingly, there is no reason to limit the succession clause's broad language— encompassing "all rights" of a shareholder—to only derivative claims.

C. There Is No "Conflict of Interest" Exception to HERA's Succession Provision

Plaintiffs also argue their claims can survive HERA's Succession Provision based upon a so-called "conflict of interest" exception. Saxton Br. 51-53. As Treasury explains in its brief, issue preclusion bars Plaintiffs from advancing this argument. The FHFA Defendants adopt and incorporate by reference Treasury's argument that issue preclusion bars Plaintiffs from advancing its conflict of interest argument. Treasury Br. §§ II.C.1.

In all events, there is no "conflict of interest" exception in HERA' Succession Provision and the district court correctly rejected Plaintiffs' invitation

to create one. The court rightly found "no ambiguity in the provision's meaning and, therefore, refuse[d] to judicially alter the provision to allow for an unstated conflict-of-interest exception." Add. 24. In so doing, the district court followed every other court that has addressed this issue under HERA, including the D.C. Circuit, which found any such exception would be "contrary" to "the plain statutory text." *Perry Capital*, 848 F.3d at 1106; *see also Edwards v. Deloitte & Touche, LLP*, No. 16-21221-CIV, 2017 WL 1291994, at *7 (S.D. Fla. Jan. 18, 2017) ("Looking at the plain wording of HERA's succession clause, there is no exception to the bar on derivative suits."); *Pagliara*, 203 F. Supp. 3d 678 at 691 n.20 ("The Court is not persuaded by [Plaintiffs'] argument that he may have standing to pursue a derivative claim because FHFA and/or Treasury may have a conflict of interest.").

Only two decisions have applied a conflict-of-interest exception to FIRREA's succession provision, and those decisions are outliers that other courts have rejected. *See First Hartford Corp. Pension Plan & Tr. v. United States*,194 F.3d 1279, 1295-96 (Fed. Cir. 1999); *Delta Savs. Bank v. United States*, 265 F.3d 1017, 1021-24 (9th Cir. 2001). *Perry Capital* rejected these decisions as being poorly reasoned, "mak[ing] little sense," and contradicting FIRREA's plain language. 848 F.3d at 1105-06; *Perry Capital*, 70 F. Supp. 3d at 231 ("[conflict of interest] exception would swallow the rule [against derivative actions]").

Moreover, the limited holdings of *First Hartford* and *Delta*, both receivership cases, "make[] still less sense in the conservatorship context, where FHFA enjoys even greater power free from judicial intervention." *Id.* at 231 n.30. The district court below rightly rejected these two decisions as inconsistent with the plain language of HERA. Add. 24.

On appeal, Plaintiffs contend that Congress "should be presumed to have adopted" *First Hartford* and *Delta Savings* when Congress enacted HERA. Saxton Br. 51. Plaintiffs are wrong. As an initial matter, "where the law is plain"—as here—"subsequent reenactment does not constitute an adoption" of a judicial interpretation, *Brown v. Gardner*, 513 U.S. 115, 121 (1994), especially when there is "no direct evidence that Congress ever considered the issue . . . or voiced any views upon it." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971).

Moreover, as the court in *Perry Capital* recognized, "two circuit court decisions do not so clearly 'settle[ ] the meaning of [the] existing statutory provision' in FIRREA that we must conclude the Congress intended *sub silentio* to incorporate those rulings into [HERA]." 848 F.3d at 1106 (quoting *Merrill Lynch v. Dabit*, 547 U.S. 71, 85 (2006)). Supreme Court precedent is in accord. *See Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 351 (2005) (concluding that the "decisions of two Courts of Appeals" do not reflect a "settled judicial

construction nor one which we would be justified in presuming Congress, by its silence, impliedly approved"); *see also SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954, 965 (2017) (when determining whether Congress intended to codify a purported common law rule, two circuit court holdings "are too few to establish a settled, national consensus").[13]

Finally, Plaintiffs point to a purported "ambiguity" in HERA that "permit[s] FHFA to sue itself," which, according to Plaintiffs, supports creation of a conflict of interest exception. Saxton Br. 52-53. HERA does no such thing. Instead, in 12 U.S.C. § 4617(a)(5), Congress provided the "regulated entity" (*i.e.*, Fannie Mae or Freddie Mac) itself—not FHFA as Conservator—a 30-day window in which to challenge the FHFA's appointment of a conservator or receiver. That limited, statutorily-authorized challenge mechanism—which was never exercised by either of the Enterprises—in no way supports the creation of an conflict of interest exception that would permit shareholders to pursue derivative claims on behalf of the Enterprises in conservatorship.

[13] This Court's precedents are not "to the contrary." Saxton Br. 52. In *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1110-11 (8th Cir. 2016), and *Stringer v. St. James R-1 Sch. Dist.*, 446 F.3d 799, 804-05 (8th Cir. 2006), Congress chose to amend one part of a sentence in order to modify a judicial interpretation, while leaving untouched another part of the same sentence, which also had been subject to judicial interpretation. Here, by contrast, there is there is no evidence Congress scrutinized FIRREA's succession provision with an eye toward correcting or ratifying any judicial decisions.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Dated: June 23, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 12,974 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

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

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RELEVANT STATUTES, REGULATIONS, AND RULES

12 U.S.C. § 4617

§ 4617. Authority over critically undercapitalized regulated entities

(a) Appointment of the Agency as conservator or receiver

(1) In general

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

(2) Discretionary appointment

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

(4) Mandatory receivership

> (A) In general
>
> > The Director shall appoint the Agency as receiver for a regulated entity if the Director determines, in writing, that--
> >
> > > (i) the assets of the regulated entity are, and during the preceding 60 calendar days have been, less than the obligations of the regulated entity to its creditors and others; or
> > >
> > > (ii) the regulated entity is not, and during the preceding 60 calendar days has not been, generally

paying the debts of the regulated entity (other than debts that are the subject of a bona fide dispute) as such debts become due.

. . .

(7) Agency not subject to any other Federal agency

When acting as conservator or receiver, the Agency shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the Agency.

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

. . .

(2) General Powers

(A) Successor to regulated entity

The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to--

(i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity; and

(ii) title to the books, records, and assets of any other legal custodian of such regulated entity.

(B) Operate the regulated entity

The Agency may, as conservator or receiver--

(i) take over the assets of and operate the regulated entity with all the powers of the shareholders, the

directors, and the officers of the regulated entity and conduct all business of the regulated entity;

(ii) collect all obligations and money due the regulated entity;

(iii) perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator or receiver;

(iv) preserve and conserve the assets and property of the regulated entity; and

(v) provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver.

. . .

(D) Powers as conservator

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

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

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

. . .

(G) Transfer or sale of assets and liabilities

The Agency may, as conservator or receiver, transfer or sell any asset or liability of the regulated entity in default, and may do so without

any approval, assignment, or consent with respect to such transfer or sale.

. . .

(J) Incidental Powers

The Agency may, as conservator or receiver--

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this section, and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity or the Agency.

. . .

(f) Limitation on court action

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

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of June, 2017, I filed the foregoing Brief of Defendants-Appellees the Federal Housing Finance Agency, as Conservator for Fannie Mae and Freddie Mac, and FHFA Director Melvin L. Watt with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered users:

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