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Via ECF

Deborah S. Hunt, Esq.
Clerk of the Court
United States Court of Appeals for the Sixth Circuit
Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, OH 45202

Re: *Robinson v. Federal Housing Finance Agency*, No. 16-6680

Dear Ms. Hunt:

I write to alert the Court to an important concession Treasury recently made before the Eighth Circuit. In a brief to that court, Treasury states that HERA "*instruct[s]* the conservator to act in 'the best interests of the regulated entity or the Agency.'" Treasury Brief 27, *Saxton v. FHFA*, No. 17-1727 (8th Cir. June 27, 2017) (emphasis added) (quoting 12 U.S.C. § 4617(b)(2)(J)). The provision that Treasury admits imposes a mandatory duty says the following: "*The Agency may, as conservator* . . . 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). Importantly, Section 4617(b)(2)(D) begins with the exact same words, yet Defendants insist that it permits but does not require FHFA to preserve and conserve the Companies' assets and restore them to soundness and solvency. Treasury Brief 23 (Apr. 12, 2017); FHFA Brief 33-35 (Apr. 12, 2017).

"A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). But if the word "may" is interpreted throughout HERA in the manner Defendants propose for

Section 4617(b)(2)(D), FHFA will be left with no guidance from Congress as to the ends it should pursue when acting as conservator. *See* Reply Brief of Plaintiff-Appellant 7-8 (Apr. 26, 2017). To avoid that constitutional problem, Treasury is advancing in the Eighth Circuit an interpretation that would make the word "may" mandatory in some instances but optional in others.

No provision of HERA says that FHFA "*may* affirmatively sabotage the Companies' recovery by . . . authorizing a conservator to undermine the interests and destroy the assets of its ward without meaningful limit." *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1118 n.1 (D.C. Cir. 2017) (Brown, J., dissenting) (emphasis added). Rather, Section 4617(b)(2)(D) charges FHFA with a traditional conservator's mission to "preserve and conserve [an institution's] assets" and operate that institution in a "sound and solvent" manner. 12 U.S.C. § 1821(d)(2)(D).

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper

Counsel for Appellant

cc: Counsel of Record (by ECF)

EXHIBIT A

No. 17-1727

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS SAXTON, et al.,

Plaintiffs-Appellants,

v.

FEDERAL HOUSING FINANCE AGENCY, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA (Hon. Linda R. Reade)

BRIEF FOR THE TREASURY DEPARTMENT

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CASE SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

This appeal is one of several suits challenging actions taken by the Federal Housing Finance Agency (FHFA) as conservator of mortgage giants Fannie Mae and Freddie Mac. To avert the catastrophic impact on the housing market that would have resulted from the enterprises' collapse, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), which authorized the Treasury Department to purchase securities issued by the enterprises. After FHFA placed Fannie Mae and Freddie Mac into conservatorship in 2008, Treasury immediately purchased preferred stock in each entity and committed to provide billions of dollars in taxpayer funds to support the enterprises. In exchange, Treasury received, among other things, the right to a dividend at a fixed rate.

Plaintiffs in this Administrative Procedure Act suit challenge a 2012 amendment to the preferred stock purchase agreements that replaced the fixed dividend obligation with a variable dividend. Every court to consider the question to date has correctly concluded that such suits are barred by HERA, which precludes a court from taking "any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver," 12 U.S.C. § 4617(f), and provides that FHFA, as conservator, "immediately succeed[s]" to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder[]," *id.* § 4617(b)(2)(A)(i).

In view of the importance of the questions presented in this suit, Treasury agrees with plaintiffs that twenty minutes of oral argument is appropriate.

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INTRODUCTION

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

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

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

liquidation preference, due quarterly, and an entitlement to a periodic commitment fee intended to compensate taxpayers for their ongoing commitment.

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

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

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

commitment to pay dividends. They nevertheless assert that that the Third Amendment was unlawful and seek injunctive and declaratory relief.

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

Second, under the statute, FHFA as conservator succeeded to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder[.]" *Perry Capital,* 848 F.3d at 1104. This provision "plainly transfers [to the FHFA] the shareholders' ability to bring derivative suits on behalf of" the enterprises. *Id.* at 1104 (alteration in original). Plaintiffs' Administrative Procedure Act (APA) claims assert injury to the enterprises; they suffer their alleged injury derivatively as shareholders. Accordingly, their claims are derivative and fall squarely within the transfer-of-shareholder-rights provision.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. JA29. On March 27, 2017, the district court entered judgment granting the defendants' motions to dismiss. JA113. Plaintiff timely filed a notice of appeal on March 31, 2017. JA114. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

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

Authorities: 12 U.S.C. § 4617(b)(2)(A)(i), (f); *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. 2017); *Hanson v. FDIC*, 113 F.3d 866, 871 (8th Cir. 1997); *Craig Outdoor Advert., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1024-25 (8th Cir. 2008).

STATEMENT OF THE CASE

A. Fannie Mae and Freddie Mac

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

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

B. The 2008 Housing Crisis and HERA

With the 2008 collapse of the housing market, Fannie Mae and Freddie Mac experienced overwhelming losses due to a dramatic increase in default rates on

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

The enterprises lost more in 2008 ($108 billion) than they had earned in the past 37 years combined ($95 billion). Office of Inspector General (OIG), FHFA, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 5 (Mar. 20, 2013).[1] As a result, the enterprises faced capital shortfalls. *Perry Capital*, 848 F.3d at 1080, 1082; *see also* OIG, FHFA, *White Paper: FHFA-OIG's Current Assessment of FHFA's Conservatorships of Fannie Mae and Freddie Mac* 11 (Mar. 28, 2012) (*OIG Report*).[2] Private investors were unwilling to provide Fannie Mae and Freddie Mac with the capital they needed to weather their losses and avoid receivership and liquidation. *Perry Capital*, 848 F.3d at 1082.

In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654. The legislation created FHFA as

[1] https://www.fhfaoig.gov/Content/Files/WPR-2013-002_2.pdf
[2] https://www.fhfaoig.gov/Content/Files/WPR-2012-001.pdf

an independent agency to supervise and regulate the enterprises, and granted FHFA the authority to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a). FHFA's authority to appoint itself conservator or receiver is generally discretionary, *id.* § 4617(a)(2), but it must place the enterprises into receivership if it determines that the enterprises' assets have been worth less than their obligations for sixty calendar days, *id.* § 4617(a)(4).

HERA provides that FHFA, as conservator or receiver, "immediately succeed[s] to—(i) all rights, titles, powers, and privileges of the [enterprises] and of any stockholder, officer, or director of such [enterprises], with respect to the [enterprises.]" 12 U.S.C. § 4617(b)(2)(A)(i). The legislation authorizes FHFA, as conservator, to "take such action as may be—(i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]." *Id.* § 4617(b)(2)(D). HERA also permits a conservator to take actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the GSEs. *Id.* § 4617(a)(2). HERA further states that FHFA, when acting as conservator, may exercise its statutory authority in a manner "which the Agency determines is in the best interests of the regulated entity or the Agency." *Id.* § 4617(b)(2)(J)(ii). Finally, HERA contains an anti-injunction provision, which provides that "[e]xcept as provided in this section or at the request of the Director, no court may take any action

to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." *Id.* § 4617(f).

Recognizing that an enormous commitment of taxpayer funds could be required, Congress also amended the enterprises' statutory charters to authorize Treasury (1) to "purchase any obligations and other securities issued by" the enterprises upon "Treasury's specific determination that the terms of the purchase would 'protect the taxpayer,'" *Perry Capital*, 848 F.3d at 1081, and (2) to "exercise any rights received in connection with such purchases." 12 U.S.C. §§ 1455(*l*)(1)(A), (2)(A), 1719(g)(1)(A), (B). Treasury's authority to purchase securities issued by the enterprises expired on December 31, 2009; its authority to exercise any rights received in connection with past purchases has no expiration date. *Id.* §§ 1455(*l*)(4), 1719(g)(4).

C. Conservatorship and the Preferred Stock Purchase Agreements

FHFA placed the enterprises in conservatorship on September 6, 2008. *Perry Capital*, 848 F.3d at 1082; JA91. One day later, Treasury purchased senior preferred stock in each entity. JA91; *Perry Capital*, 848 F.3d at 1082. Under the Preferred Stock Purchase Agreements (Purchase Agreements), Treasury committed to provide up to $100 billion in taxpayer funds to each enterprise to maintain their solvency by ensuring that their assets were at least equal to their liabilities. *Perry Capital*, 848 F.3d at 1082.

The Purchase Agreements entitled Treasury to four principal contractual rights. JA91-92. First, Treasury received preferred stock with a senior liquidation preference of $1 billion for each enterprise, plus a dollar-for-dollar increase each time the enterprises drew upon Treasury's funding commitment. JA92.[3] Second, Treasury was entitled to quarterly dividends equal to 10% of Treasury's total liquidation preference. *Id.* Third, Treasury received warrants to acquire up to 79.9% of the enterprises' common stock at a nominal price. JA91-92. Fourth, beginning in 2010, Treasury would be entitled to a periodic commitment fee that was intended "to fully compensate [Treasury] for the support provided by the ongoing [c]ommitment." JA40. Treasury could waive the commitment fee for one year at a time based on adverse conditions in the United States mortgage market. JA92 n.1 (explaining that Treasury waived the fee and thus its amount was never set).

Treasury's initial funding commitment soon appeared to be inadequate. In May 2009, FHFA and Treasury agreed to double Treasury's funding commitment from $100 billion to $200 billion for each enterprise. JA92; *Perry Capital*, 848 F.3d at 1082.

In December 2009, in the face of ongoing losses, it appeared that even the $200 billion per enterprise funding commitment might be insufficient. Treasury and FHFA therefore amended the Purchase Agreements for a second time to allow the

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

enterprises to draw unlimited amounts from Treasury to cure net-worth deficits until the end of 2012, at which point Treasury's funding commitment would be fixed. JA92-93.

As of June 30, 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment, making Treasury's liquidation preference $189.5 billion, including the initial $1 billion senior liquidation preference for each enterprise. JA93; *Perry Capital*, 848 F.3d at 1082. Under the terms of the original Purchase Agreements, the enterprises' dividend obligations to Treasury were thus nearly $19 billion per year.

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

10-Q, at 4. The $7.2 billion that Freddie Mac owed annually was more than it had made in all but one year. Freddie Mac 10-Q, at 8.

D. The Third Amendment

On August 17, 2012, Treasury and FHFA agreed to modify the Purchase Agreements for a third time. This "Third Amendment" ended the draws-to-pay-dividends cycle by replacing the previous fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth for the quarter exceeds a capital buffer. (The capital buffer, initially set at $3 billion, gradually declines over time, reaching zero in 2018). JA94; *Perry Capital*, 848 F.3d at 1083. Under the Third Amendment, the amount of the enterprises' dividend obligations thus depends on whether the enterprises have a positive net worth during a particular quarter, rather than being fixed at 10% of Treasury's existing liquidation preference. If the enterprises have a negative net worth, they pay no dividend.[4]

By exchanging a fixed dividend for a variable one, Treasury accepted more risk when it agreed to the Third Amendment. In fact, Treasury received less in dividends in 2015 ($15.8 billion) and 2016 ($14.6 billion) than it would have under the original 10% dividend ($18.9 billion). FHFA, *Table 2: Dividends on Enterprise Draws from*

[4] Treasury also agreed to suspend the periodic commitment fee it was owed under the original Purchase Agreements for as long as the variable dividend was in place. JA94.

Treasury;[5] *see also Perry Capital*, 848 F.3d at 1083. In 2013 and 2014, however, the enterprises' net worth was substantially higher than expected. The increase in net worth was due in part to a rebound in housing prices and, more importantly, to non-recurring events, including the enterprises' one-time recognition of deferred tax assets that they had previously written off. OIG, FHFA, *The Continued Profitability of Fannie Mae and Freddie Mac Is Not Assured* 7-8 (Mar. 18, 2015).[6] Through the end of 2016, Treasury has received $255 billion in cumulative dividends from the enterprises, in return for its $187.5 billion investment and ongoing commitment. JA93; FHFA, *Table 2: Dividends on Enterprise Draws from Treasury*.

E. District Court Proceedings

Plaintiffs are stockholders in Fannie Mae and Freddie Mac. JA90. Plaintiffs filed suit in the United States District Court for the Northern District of Iowa, seeking injunctive and declaratory relief under the Administrative Procedure Act (APA). JA75-87. Plaintiffs claim that in entering into the Third Amendment, FHFA exceeded its statutory authority. JA75-77. Plaintiffs also contend that Treasury exceeded its statutory authority in agreeing to the Third Amendment and that its actions were arbitrary and capricious. JA76-81.[7]

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

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

[7] Plaintiffs also brought claims for common-law breach of contract and breach of the implied covenant of good faith and fair dealing against FHFA. JA81-85.

Both FHFA and Treasury moved to dismiss the suit, and the district court granted both motions. JA88-112. In holding that plaintiffs' claims were derivative, the court rejected plaintiffs' contention that they had suffered a "direct" injury simply because the APA provides a cause of action to "any person" adversely affected by agency action. JA97-98. As the court explained, "mere access to judicial review under the APA has [no] bearing on whether Plaintiffs' claims are brought directly (as individuals) or derivatively (as the GSEs)." JA98. Applying Delaware law, the court concluded that plaintiffs' APA claims were derivative because both the harm they alleged (the expropriation of the GSEs' net worth) and the relief they sought (the unwinding of the Third Amendment and the return of dividend payments made to Treasury) "implicate[d] the GSEs and not Plaintiffs individually." JA100.

After identifying plaintiffs' claims as derivative, the court held that plaintiffs' APA claims were barred on two independent grounds. First, the court concluded that the claims were barred by HERA's anti-injunction provision, 12 U.S.C. § 4617(f). JA103-106. In reaching that conclusion, the court agreed with the analysis in *Perry Capital*, 848 F.3d 1072, and adopted that court's reasoning "in full." JA105. The court recognized that HERA provides FHFA with "expansive . . . discretionary authority for FHFA to exercise in a manner that it determines is in the best interests

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Plaintiffs sought damages for their claims against FHFA. JA85-87. Plaintiffs consented to dismissal of these claims. *See* JA96 n.2.

of the GSEs or FHFA." *Id.* The court further concluded that the discretionary authority HERA granted to FHFA "plainly allow[s] for the actions contemplated by the Third Amendment." JA106. Indeed, FHFA's agreement to the Third Amendment was a "quintessential conservatorship task[] designed to keep the [GSEs] operational." *Id.* The court rejected plaintiffs' "outcome-oriented" attack on the "wisdom of the Third Amendment," reasoning that "FHFA's adherence to its statutory role as conservator does not turn on the wisdom of its decision-making." *Id.* Accordingly, "[a]ny suggestion that FHFA could have or should have taken different actions to pursue the goals of conservatorship [was] . . . irrelevant." *Id.*

The court next concluded that § 4617(f)'s bar applied equally to claims made against Treasury. JA108. As the court explained, plaintiffs' claims against Treasury—which seek to enjoin Treasury's participation in the Third Amendment—"are integrally and inextricably interwoven with FHFA's conduct as conservator." JA109 (quoting *Perry Capital*, 848 F.3d at 1097). Barring Treasury from participating in the Third Amendment would thus "restrain or affect" FHFA's authority as conservator. JA109.

Although the court concluded that "each of Plaintiffs' claims are jurisdictionally barred by HERA's anti-injunction provision, § 4617(f)," it went on to hold, in the alternative, that the claims were barred by HERA's transfer-of-shareholder-rights provision, 12 U.S.C. § 4617(b)(2)(A). JA109-10. The court concluded that § 4617(b)(2)(A) barred shareholders from bringing derivative claims, a point plaintiffs

did not dispute. JA110. Because the court had previously concluded that plaintiffs' APA claims were derivative, application of § 4617(b)(2)(A) was straightforward. *Id.* The court rejected plaintiffs' suggestion that § 4617(b)(2)(A) includes an implicit exception that permits shareholders to bring derivative claims in cases where FHFA has an alleged conflict of interest. JA110-11. The court found "no ambiguity in the provision's meaning and, therefore, [no basis] to judicially alter the provision to allow for an unstated conflict-of-interest exception." JA111.

Finally, the court rejected plaintiffs' argument that the Third Amendment was unlawful because FHFA allegedly "adopt[ed] the Third Amendment at Treasury's direction" in violation of section 4617(a)(7), which prohibits FHFA from being "subject to the direction or supervision of any other agency." JA106-08. As the district court explained, plaintiffs fall outside the zone of interests protected by that provision because "HERA as a whole refers only to the best interests of FHFA and the [GSEs]—and *not* those of the [GSEs] shareholders." JA107. Thus, section 4617(a)(7) "functions to remove obstacles to FHFA's exercise of conservator powers—*i.e.* to preserve FHFA's interests, not those of GSE shareholders." JA108.

SUMMARY OF ARGUMENT

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

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

Second, HERA provided that FHFA, as conservator or receiver, would "immediately succeed" to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder[]" with respect to the enterprises and their assets. 12 U.S.C. § 4617(b)(2)(A)(i). This provision "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits" on behalf of the enterprise. *Perry Capital, LLC v. Mnuchin*, 848 F.3d 1072, 1104 (D.C. Cir. 2017) (alteration in original). Plaintiffs assert that the Third Amendment deprived the enterprises of capital; the relief they seek would require transfer of funds to the enterprises and would allegedly result in future increases in the enterprises' capital. As the district court found, plaintiffs' claims are thus quintessentially derivative claims and fall squarely within the transfer-of-shareholder-rights provision.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss for lack of subject matter jurisdiction. *Degnan v. Burwell*, 765 F.3d 805, 809 (8th Cir. 2014).

ARGUMENT

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

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

Plaintiffs' claims are barred by 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator" of the GSEs. As the D.C. Circuit recently explained, HERA's anti-injunction provision, like its analogue under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), "effect[s] a sweeping ouster of courts' power to grant equitable remedies" to parties challenging actions taken by FHFA as conservator. *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1087 (D.C. Cir. 2017) (quoting *Freeman v. FDIC,* 56 F.3d 1394, 1399 (D.C. Cir. 1995)). That holding accords with this Court's holding in *Hanson v. FDIC*, 113 F.3d 866, 871 (8th Cir. 1997), that FIRREA's substantially identical anti-injunction provision, 12 U.S.C. § 1821(j), "effects a sweeping ouster of a courts' power to grant equitable relief." *See also Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1016 (8th Cir. 2013) (Section 1821(j) "has been construed broadly to constrain the court's equitable powers."); *National Tr. for Historic Pres. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring)

(Section 1821(j) "bar[s] a court from acting in virtually all circumstances."); *Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012) (Section 4617(f) "excludes judicial review of 'the exercise of powers or functions' given to the FHFA as a conservator.").

Judicial review is available under 12 U.S.C. § 4617(f), if at all, only in the rare case where FHFA unquestionably acts beyond statutory or constitutional bounds. *See Perry Capital*, 848 F.3d at 1087. Provided that FHFA is exercising a statutorily authorized power or function and the injunctive relief a plaintiff seeks would "restrain or affect" that exercise, § 4617(f) applies and the plaintiff's suit is barred. *Id.* at 1086-87; *see also Dittmer Properties*, 708 F.3d at 1017; *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010).

For the reasons explained below in Part B, plaintiffs fall far short of making the showing necessary to circumvent § 4617(f)'s broad bar. At root, plaintiffs' challenge boils down to a disagreement over the manner in which FHFA executed its duties as conservator of the GSEs. Plaintiffs contend that FHFA restructured the enterprises' dividend obligations to Treasury when it did not need to do so, entered into a financially unsound agreement, failed to prioritize the build-up of capital, and placed too much weight on the risk of depleting Treasury's funding commitment. As several courts have held, § 4617(f) prohibits precisely such "second-guess[ing]" of "FHFA's business judgment that the Third Amendment better balances the interests of all parties involved." *Perry Capital*, 848 F.3d at 1095; *see also id.* at 1088-89 (Although the stockholders "no doubt disagree about the necessity and fiscal wisdom of the Third

Amendment[,]. . . Congress could not have been clearer about leaving those hard operational calls to FHFA's managerial judgment."); *County of Sonoma v. FHFA*, 710 F.3d 987, 993 (9th Cir. 2013) ("[I]t is not our place to substitute our judgment for FHFA's."); *see also Bank of America*, 604 F.3d at 1244 (FIRREA's anti-injunction provision barred claim that FDIC unlawfully sold assets belonging to the plaintiff, because claim was merely an allegation of "FDIC's improper performance of its legitimate receivership functions").

Moreover, the applicability of the HERA bar does not depend, as plaintiffs suggest, on the rationale for actions taken by FHFA as conservator of the enterprises. As the D.C. Circuit explained, "for purposes of applying Section 4617(f)'s strict limitation on judicial relief, allegations of motives are neither here nor there"; nothing in HERA "hinges FHFA's exercise of its conservatorship discretion on particular motivations." *Perry Capital*, 848 F.3d at 1093; *see also* FHFA Br. Pt. I.C.2.

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

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

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

"FHFA's execution of the Third Amendment falls squarely within its statutory authority to '[o]perate the [Companies],' 12 U.S.C. § 4617(b)(2)(B); to 'reorganiz[e]' their affairs, *id.* § 4617(a)(2); and to 'take such action as may be * * * appropriate to carry on the[ir] business,' *id.* § 4617(b)(2)(D)(ii)." *Perry Capital*, 848 F.3d at 1088 (alterations in original). By entering into the Third Amendment, FHFA took an action it deemed appropriate to "preserve and conserve" a crucial "asset[]" (or "property") of the GSEs: the unused portion of Treasury's funding commitment. At the time of the Third Amendment in 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment. JA93. Through the first quarter of 2012, the

enterprises drew over $26 billion from the commitment to pay the 10% dividends they owed Treasury. *See supra* p. 10. These draws increased Treasury's liquidation preference, which in turn increased the amount of dividends the enterprises owed; they also threatened to diminish Treasury's remaining commitment, which became fixed at the end of 2012.

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

Subsequent legislation confirms that FHFA was acting within its statutory authority when it entered into the Third Amendment. In section 702 of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015),

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

2. Plaintiffs argue that "HERA requires[s] FHFA to seek to 'preserve and conserve' the Companies' assets and 'rehabilitat[e]' them to a 'sound and solvent' condition," Br.12 (quoting 12 U.S.C. § 4617(b)(2)(D), (a)(2)), and that courts have the authority to review whether the Third Amendment was "necessary" and "appropriate" to achieve these purported statutory requirements, Br.16.

As an initial matter, the invitation to determine retrospectively what actions were necessary and appropriate to deal with the precarious condition of the GSEs is

simply an impermissible request to examine FHFA's performance as conservator and is therefore barred by the statute's preclusion of judicial review.

Even taken on its own terms, plaintiffs' argument rests on the mistaken premise that FHFA is under an obligation to return the enterprises to the same state that existed prior to the conservatorship. *See, e.g.*, Br.31-32 (arguing that the Third Amendment violates HERA because it precludes the enterprises from "building capital as a potential step to regaining their former corporate status"). But HERA does not require that FHFA return the enterprises to their pre-crisis form, much less that it make this goal a priority. *See Perry Capital*, 848 F.3d at 1093-94 ("[N]othing in [HERA] mandated that FHFA take steps to return Fannie Mae and Freddie Mac at the first sign of financial improvement to the old economic model that got them into so much trouble in the first place."). To the contrary, HERA authorizes FHFA, as conservator, to make significant changes to the enterprises' operations. *See, e.g.*, 12 U.S.C. § 4617(a)(2) (stating that FHFA may "be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a [GSE]"); *see also Perry Capital*, 848 F.3d at 1090-91 ("FHFA's textual authority to reorganize and rehabilitate the Companies, in other words, forecloses any argument that [HERA] made the *status quo ante* a statutorily compelled end game.").

The enterprises were on the precipice of failure in 2008, and Congress did not require that the conservator return the GSEs to the hands of private shareholders without significant changes to their structure and operations—a point underscored by

congressional legislation in 2016 preventing Treasury from selling its preferred stock in the GSEs for two years. Consolidated Appropriations Act, 2016, § 702(b). The legislation was accompanied by a "Sense of Congress" provision declaring that "Congress should pass and the President should sign into law legislation determining the future of Fannie Mae and Freddie Mac, and that notwithstanding the expiration of subsection (b), the Secretary should not . . . dispose of any outstanding shares of senior preferred stock acquired pursuant to the Senior Preferred Stock Purchase Agreement until such legislation is enacted." *Id.* § 702(c).[8]

Neither 12 U.S.C. § 4617(a)(2) nor § 4617(b)(2)(D), the two provisions on which plaintiffs principally rely in arguing that FHFA's actions were not authorized here, suggest that FHFA must act with the aim of returning the entities to private companies. A conservator can stabilize or rehabilitate a troubled financial institution with an eye towards returning it to its former status. But it can also rehabilitate an entity to ready it for reorganization or liquidation. *See, e.g.*, *Ameristar Fin. Servicing Co. v. United States*, 75 Fed. Cl. 807, 808 n.3 (2007) (describing a conservator as "operat[ing]

[8] Although the matter has no bearing on the disposition of this suit, plaintiffs' arguments create the mistaken impression that undoing the Third Amendment would responsibly permit the return of the GSEs to their pre-conservatorship form. That discussion disregards the size and nature of the GSEs' portfolio of mortgage assets and the amount of capital that would be required to end the conservatorship and Treasury's commitment without structural alterations. *See* Jim Parrott & Mark Zandi, *Privatizing Fannie and Freddie* (May 15, 2015), http://www.urban.org/sites/default/files/2000229-privatizing-fannie-and-freddie.pdf (estimating that even under highly optimistic scenarios, the GSEs need 18 years to adequately recapitalize).

a troubled financial institution in an effort to conserve, manage, and protect the troubled institution's assets until the institution has stabilized or has been closed by the chartering authority"); *FDIC Resolutions Handbook* 33 (glossary) (same); *see also* 12 U.S.C. § 4617(a)(2) (stating that FHFA may be appointed conservator to reorganize, rehabilitate, or wind up a GSE's affairs); *Perry Capital*, 848 F.3d at 1093 ("Undertaking permissible conservatorship measures even with a receivership [in] mind would not be out of statutory bounds."). Nothing in the Act compels FHFA to preserve and conserve the enterprises' assets above all other considerations or to return the GSEs to a privately funded model. *See Perry Capital*, 848 F.3d at 1088 ("Entirely absent from [HERA's] text is any mandate, command, or directive to build up capital for the financial benefit of the Companies' stockholders.").

Apart from plaintiffs' fundamental misunderstanding of the grant of statutory authority, plaintiffs also fail to grapple with the governing provisions' broadly discretionary terms. In describing FHFA's powers and authorities as conservator, HERA uses the permissive "may," providing that FHFA "*may*, as conservator, take such action as may be . . . necessary to put the regulated entity in a sound and solvent condition; and . . . appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D) (emphasis added); *see also id.* § 4617(b)(2)(B)(iv) (FHFA "*may*, as conservator or receiver . . . preserve and conserve the assets and property of the regulated entity.") (emphasis added). "The statute is thus framed in terms of

expansive grants of permissive, discretionary authority for FHFA to exercise as the 'Agency determines is in the best interests of the regulated entity or the Agency.' " *Perry Capital*, 848 F.3d at 1088 (quoting 12 U.S.C. § 4617(b)(2)(J)).

Plaintiffs implicitly acknowledge the absence of mandatory restrictions when they urge, Br.26-28, that the Court should construe the statute to impose specific duties in order to avoid a "non-delegation" problem. That is, plaintiffs urge that HERA might be constitutionally invalid because it fails to provide an "intelligible principle," *United States v. Fernandez*, 710 F.3d 847, 849 (8th Cir. 2013), to guide the conservator. Paradoxically, plaintiffs maintain both that FHFA is so clearly defying a statutory mandate contained in HERA as to act in an *ultra vires* fashion and that the Court should read non-existent requirements into HERA to avoid a fatal non-delegation problem.

Even on its own terms, plaintiffs' non-delegation argument is insubstantial. "[W]ith the exception of two cases in 1935, . . . the Supreme Court has uniformly rejected every nondelegation challenge it has considered." *Fernandez*, 710 F.3d at 849. "[B]road policy statements . . . [are] sufficient provide an intelligible principle." *United States v. Kuehl*, 706 F.3d 917, 920 (8th Cir. 2013); *see also, e.g.*, *Yakus v. United States*, 321 U.S. 414, 420 (1944) (upholding delegation to administrator to set prices that "will be generally fair and equitable"); *National Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding delegation to FCC to regulate broadcast licenses in the "public interest"); *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005)

(concluding that "an intelligible principle exists in the statutory phrase 'for the purpose of providing land for Indians'").

HERA easily satisfies this standard, establishing that the purpose of appointing a conservator is to "reorganiz[e], rehabilitat[e], or wind[] up the affairs" of the enterprises, 12 U.S.C. § 4617(a)(2); instructing the conservator to act in "the best interests of the regulated entity or the Agency," *id.* § 4617(b)(2)(J)(ii); and supplying a list of powers that FHFA may use as conservator to achieve the conservatorship's goals, thereby providing additional guidance to and limitations on FHFA's exercise of its discretion. That Congress delegated this authority to FHFA only in the limited circumstance in which it is appointed conservator or receiver of one of three entities (Fannie Mae, Freddie Mac, or a Federal Home Loan Bank, *see* 12 U.S.C. § 4502(20)), reinforces the validity of that delegation. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."); *South Dakota*, 423 F.3d at 797 (holding that even "broad" grant of discretion was unproblematic because, among other things, the authority conferred did "not involve granting to the executive authority to unilaterally enact a sweeping regulatory scheme that will affect the entire national economy").

3. Plaintiffs' attempts to bring their claim within an *ultra vires* exception to the bar on judicial review are without basis, and there is thus no occasion to address the mistaken premises of their narrative. It should be clear, however, that the Third

Amendment has not left the enterprises on "the brink of insolvency." Br.12, 28-29. As explained above, the Third Amendment arrested the draws-to-pay-dividends cycle that threatened to erode Treasury's unused funding commitment. *See supra* pp. 11, 20-21. By preserving those funds, the Third Amendment ensured that the GSEs would have sufficient funds to cover any near-term losses, to weather another housing-market downturn, and to maintain market confidence. The Treasury commitment "ensures continued access to vital capital," *Perry Capital*, 848 F.3d at 1091, and has been crucial to preserving the GSEs' financial stability and solvency.

Plaintiffs do not dispute that Treasury's ongoing commitment is vital to the enterprises' continuing operation. Rather, they argue that FHFA could have preserved Treasury's commitment in another way (by paying Treasury's dividends in kind), that the Third Amendment may ultimately make draws on the commitment more, not less, likely, and that the Third Amendment caused the enterprises to incur additional debts in 2013. Br.29-31. But it is just such difficult operational calls and predictive judgments that Congress entrusted FHFA to make, free of second-guessing by shareholders and courts. *See Perry Capital*, 848 F.3d at 1095.

For similar reasons, plaintiffs are mistaken in asserting that the Third Amendment did not "preserve and conserve" the enterprises' assets. Br.28-29. Not only did the Third Amendment help preserve and conserve Treasury's funding commitment, it also relieved the enterprises of their obligation to pay a fixed 10% cash dividend to Treasury, an obligation that would have cost the GSEs at least $19

billion per year, regardless of their profitability. *See supra* p. 10. Under the Third Amendment, Treasury receives a dividend only if the enterprises make money. By forgoing a fixed dividend, Treasury thus incurred a risk of non-payment, to the benefit of the GSEs. Treasury also agreed to waive the periodic commitment fee as long as the variable dividend is in place. In short, the Third Amendment was structured to, among other things, preserve the enterprises' assets and avoid increasing their debts in years (such as 2015 and 2016) when the GSEs earned less than the $19 billion they otherwise would have owed Treasury. *See Perry Capital*, 848 F.3d at 1092 (explaining that through the Third Amendment, the GSEs obtained "continued access to necessary capital free of the preexisting risk of accumulating more debt simply to pay dividends to Treasury").

Plaintiffs' allegations that FHFA has failed to operate the enterprises as "ongoing business[es]," Br.32, do not withstand the briefest scrutiny. More than four years after the Third Amendment, the GSEs are going concerns with combined assets of more than $5 trillion. Fannie Mae 2016 10-K, at 55; Freddie Mac 2016 10-K, at 11. "During that time, Fannie and Freddie, among other things, collectively purchased at least 11 million mortgages on single-family owner-occupied properties, and Fannie issued over $1.5 trillion in single-family mortgage-backed securities." *Perry Capital*,

848 F.3d at 1083. The Third Amendment thus was not, as plaintiffs suggest (Br.32-36), a *de facto* liquidation or tantamount to "placing [the GSEs] into receivership."[9]

4. The district court correctly dismissed plaintiffs' claim that FHFA violated 12 U.S.C. § 4617(a)(7) when it entered into the Third Amendment. Section 4617(a)(7) provides that "[w]hen acting as conservator or receiver, [FHFA] shall not be subject to the direction or supervision of any other agency." As the district court concluded, plaintiffs lack standing to press an APA claim based on § 4617(a)(7), because they do not fall within the zone of interests § 4617(a)(7) was designed to protect. JA106-08; *see Central S.D. Coop. Grazing Dist. v. USDA*, 266 F.3d 889, 896-97 (8th Cir. 2001) (To pursue an APA claim, a plaintiff must show that the interest they seek to vindicate "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."); *see also* FHFA Br. Pt. I.C.5.a.

Section 4617(a)(7) was not designed to protect the interests of shareholders. Rather, the purpose of the provision is "to remove obstacles to FHFA's exercise of conservator powers." JA108; *see also* JA107-08 (agreeing "with other courts addressing the issue that the purpose of § 4617(a)(7) is to provide a preemption defense *for FHFA* in its role as conservator"). It is thus FHFA's interests that § 4617(a)(7)

[9] Section 4617(f) bars courts from taking any action that would affect or restrain FHFA's exercise of its powers as "a conservator or a receiver." 12 U.S.C. § 4617(f). Thus, the district court would have lacked jurisdiction to grant the equitable relief that plaintiffs seek—an order declaring the Third Amendment invalid—even if FHFA had acted as a receiver when it agreed to the Third Amendment.

safeguards. Moreover, it is clear that Congress did not "intend[] for [shareholders] to be relied upon to challenge agency disregard of the law." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984). As discussed *infra* Part II, Congress specified that, upon the commencement of the conservatorships, FHFA "immediately succeed[ed]" to "all rights, titles, powers, and privileges" of the GSEs' shareholders, without exception. 12 U.S.C. § 4617(b)(2)(A)(i). Had Congress intended shareholders to vindicate § 4617(a)(7), it would have reserved them the right to do so. It did not.

In any event, plaintiffs' claim that FHFA violated § 4617(a)(7) when it entered into the Third Amendment fails as a matter of law. The rescue of the enterprises required agreements between FHFA and Treasury, and plaintiffs rightly do not suggest that FHFA violated the law by entering into such agreements. Their argument, instead, seems to be that a Court should determine to what extent particular terms of the agreements reflected proposals from Treasury and then declare the agreements invalid based on some undefined calculus. In short, plaintiffs mistakenly seize on § 4617(a)(7) as another iteration of their contention that the Court should undertake review of the wisdom of the Third Amendment. And, like plaintiffs' other assertions, this finds no basis in the history of the efforts to rescue and stabilize the enterprises. In any event, plaintiffs' allegations that FHFA acted "at the insistence and direction of Treasury" are based solely "on information and belief," JA21-22; *see also* JA28, JA42, JA65, JA74, JA76, JA78, and are the quintessential type of "conclusory allegations" that are insufficient to survive a motion

to dismiss. *Richter v. Federal Nat'l Mortg. Ass'n*, 553 F. App'x. 655, 657 (8th Cir. 2014) (unpublished); *see also Perry Capital*, 848 F.3d at 1091 n.9 (rejecting identical claim). As FHFA's vigorous, years-long defense of the Third Amendment suggests, FHFA entered into the Third Amendment of its own volition.

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

Section 4617(f) does not permit plaintiffs to seek to enjoin FHFA's actions by naming Treasury as a defendant. As the D.C. Circuit and the district court observed, "the effect of any injunction or declaratory judgment aimed at Treasury's adoption of the Third Amendment would have just as direct and immediate an effect as if the injunction operated directly on FHFA." *Perry Capital*, 848 F.3d at 1096; JA108-09. Such an injunction against FHFA's contractual counterparty would thus run afoul of § 4617(f)'s prohibition on judicial relief that would "restrain or affect" FHFA's exercise of its conservatorship powers.

This Court, in applying FIRREA's analogous anti-injunction provision, has reached the same conclusion, explaining that if plaintiffs "are allowed to attack the validity of a failed institution's assets by suing the remote purchaser, such actions would certainly restrain or affect the FDIC's powers to deal with the property it is charged with disbursing." *Dittmer Props.*, 708 F.3d at 1017; *see also Hindes v. FDIC*, 137 F.3d 148, 160-61 (3d Cir. 1998) (holding that the provision "precludes a court order against a third party which would affect the FDIC as receiver, particularly where the

relief would have the same practical result as an order directed against the FDIC in that capacity"); *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992) ("Permitting Telematics to attach the certificate of deposit, if that attachment were effective against the FDIC, would have the same effect, from the FDIC's perspective, as directly enjoining the FDIC from attaching the asset. In either event, the district court would restrain or affect the FDIC in the exercise of its powers as receiver.").

Plaintiffs' invocation of the presumption favoring judicial review of agency action casts no light on whether they should be able to avoid an explicit bar on judicial review. The presumption "is rebuttable" and "fails when a statute's language or structure demonstrates that Congress" intended to preclude review. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). Here, § 4617(f) expressly precludes judicial review of agency actions where such review would "restrain or affect" FHFA's exercise of its conservatorship powers. Because an order invalidating Treasury's decision to enter into the Third Amendment would do just that, the presumption favoring reviewability is overcome.

Plaintiffs' reliance on the Fifth Circuit's decision in *281—300 Joint Venture v. Onion*, 938 F.2d 35, 38 (5th Cir. 1991), is similarly misplaced. *See* Br.40. The plaintiff in *Joint Venture* challenged two separate actions: (1) a determination by the Federal Home Loan Bank Board that the claims of unsecured creditors of a failed bank were worthless; and (2) a foreclosure sale executed by the Resolution Trust Corporation,

acting as conservator for the failed bank. 938 F.2d at 38-39. The Fifth Circuit concluded that the first challenge was prudentially moot, and the second was barred by § 4617(f)'s FIRREA analogue. *Id.* The plaintiff in *Joint Venture* did not seek to enjoin the Resolution Trust Corporation's contractual counterparty. Nor is there any indication that the plaintiff's claims against the Bank Board, which the court dismissed on threshold grounds, would have in any way restrained or affected the Resolution Trust Corporation's actions as conservator. *Id.* at 38. In short, the Fifth Circuit in *Joint Venture* had no occasion to address the situation presented here, where plaintiffs' "claims against [an agency] are integrally and inextricably interwoven with FHFA's conduct as conservator." *Perry Capital*, 848 F.3d at 1097.[10]

Plaintiffs fare no better when they argue that § 4617(f) cannot bar claims against Treasury because such a bar would permit Treasury to violate federal law, including HERA. Br.39. The jurisdictional inquiry under § 4617(f), like its FIRREA analogue, is "quite narrow." *Bank of Am. Nat. Ass'n*, 604 F.3d at 1243. Once a court determines that (1) a challenged action involved the exercise of a conservatorship power or function and (2) the judicial relief sought would "restrain or affect" that

[10] Plaintiffs contend (Br.38-39) that enjoining Treasury from participating in the Third Amendment would not restrain or affect FHFA's exercise of its conservatorship powers because FHFA could not have adopted the Third Amendment without Treasury's consent. Plaintiffs' contention is difficult to comprehend. Barring Treasury from participating in the Third Amendment would preclude FHFA from entering into an agreement that FHFA believed to be in the best interests of the enterprises. An injunction would therefore directly affect FHFA's exercise of its conservatorship powers.

power or function, the inquiry is over. *See id.*; *see also Perry Capital*, 848 F.3d at 1097. As the D.C. Circuit explained when it rejected this same argument in *Perry Capital*, the cause of the restraint or effect is "irrelevant." 848 F.3d at 1097. Thus, a suit is barred if it would restrain or affect FHFA's exercise of its conservatorship functions, even if the suit seeks to enjoin Treasury from committing a purported violation of federal law. *See id.*

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

Plaintiffs' claims against Treasury and FHFA are independently barred by HERA's transfer-of-shareholder-rights provision, 12 U.S.C. § 4617(b)(2)(A)(i); JA110-111. That provision provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). This provision "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits." *Perry Capital*, 848 F.3d at 1104 (quoting *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012)) (alteration in original). Because plaintiffs' APA claims are derivative claims, they are barred.

A. Plaintiffs' claims are derivative claims.

1. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003).

Thus, legal harms committed against a corporation give rise to claims belonging to the corporation itself, and shareholder suits seeking to enforce those claims are derivative. *See, e.g.*, *First Annapolis Bancorp, Inc. v. United States*, 644 F.3d 1367, 1373 (Fed. Cir. 2011). In a derivative suit, any recovery flows to the corporate treasury; in a direct suit, it flows to the individual plaintiff-shareholder.

The determination whether a federal-law claim is direct or derivative is governed by federal law. *See* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1821 (2017); *cf. Rifkin v. Bear Stearns & Co.*, 248 F.3d 628, 631 (7th Cir. 2001) ("[S]tanding to bring a federal claim in federal court is exclusively a question of federal law."). Where standing turns on the "allocation of governing power within [a] corporation," however, federal law often looks to state-law principles. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991); *Starr Int'l Co. v. United States*, 856 F.3d 953, 965-66 (Fed. Cir. 2017).

The principles for distinguishing direct from derivative claims are well established and consistent across federal and state law. The analysis is governed by two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004); *see also Potthoff v. Morin*, 245 F.3d 710, 716-17 (8th Cir. 2001) ("[A]ctions to enforce corporate rights or redress injuries to the corporation cannot be maintained by a stockholder in his own name . . .

even though the injury to the corporation may incidentally result in the depreciation or destruction of the value of the stock. . . . . [A shareholder's] claim can survive only if he has alleged that he personally has suffered a direct, nonderivative injury."). A claim is "direct" when "the duty breached was owed to the stockholder" and the stockholder "can prevail without showing an injury to the corporation." *Tooley*, 845 A.2d at 1039. A claim is "derivative" if the harm to the shareholder is the byproduct of some injury to the corporate body as a whole. *Id.*[11]

"Where all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature." *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008); *see also, e.g.*, *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006) ("In the eyes of the law, such equal 'injury' to the shares . . . is not viewed as, or equated with,

[11] Citing *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 (Del. 2015), plaintiffs argue that the *Tooley* test is inapplicable because their "claim is direct without the need for any further inquiry." Br.46-47. Plaintiffs' argument is unavailing. *NAF Holdings* stands for the unremarkable proposition that a court has no need to apply the *Tooley* test where a plaintiff's claim is self-evidently direct, such as where, as in *NAF Holdings*, the plaintiff is a party to a commercial contract that the plaintiff alleges the defendant breached. *See* 118 A.3d at 176. Under such circumstances, a plaintiff may sue directly to enforce "its own rights as a signatory to a commercial contract." *Id.* One set of plaintiffs in *Perry Capital* brought such breach-of-contract claims, arguing that the Third Amendment breached the contracts between the plaintiffs and the GSEs. *See Perry Capital*, 848 F.3d at 1108 (stating that the class plaintiffs' breach-of-contract claims were "obviously direct," because "they assert that the Companies breached contractual duties owed to the class plaintiffs by virtue of their stock certificates"). Plaintiffs raise no such self-evidently direct claims here.

harm to specific shareholders individually."). Decisions in this Circuit have adhered to that principle. *See, e.g., Arent v. Distribution Scis., Inc.*, 975 F.2d 1370, 1372 (8th Cir. 1992); *Pothoff*, 245 F.3d at 716; *Craig Outdoor Advert., Inc. v. Viacom Outdoor Inc.*, 528 F.3d 1001, 1024 (8th Cir. 2008).

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

2. Plaintiffs ask that the Third Amendment be declared invalid and enjoined, so that future increases in net worth would be retained by the enterprises, and also request that the dividends Treasury has already received be returned to the GSEs. JA85-86.

As the district court recognized, such an order would not benefit plaintiffs directly. JA98-100. The relief sought would enrich the enterprises and therefore make plaintiffs' rights in the enterprises more valuable. Similarly, the harm that plaintiffs allege—the assertedly improper transfer of the GSEs' net worth to Treasury—was suffered by the corporation. *See, e.g.*, JA27 (Am. Compl.) (Under the

Third Amendment, "*Fannie and Freddie* … have been forced to pay $186 billion in 'dividends' to the federal government . . . nearly $130 billion more than" under the original preferred stock purchase agreements.) (emphasis added); JA28 ("[T]he Net Worth Sweep forces the *Companies* to operate on the edge of insolvency by stripping the capital out of the *Companies* on a quarterly basis.") (emphases added); JA58 ("The *Companies* did not receive any meaningful consideration for agreeing to the Net Worth Sweep.") (emphasis added); JA64 ("But for the Net Worth Sweep *Fannie and Freddie* would have nearly $130 billion of additional capital to cushion them from any future downturn in the housing market.") (emphasis added).

The shareholder claims here parallel in relevant respects those in *Starr International Co.*, in which the Federal Circuit held that a shareholder challenge to the terms of the government's bailout of the American International Group (AIG) asserted a derivative claim belonging to the corporation. 856 F.3d at 963-73. The AIG shareholders argued that the terms of the government's bailout, which required AIG to issue stock to the government in exchange for an $85 billion loan, were unlawful and constituted an illegal exaction of the corporation's and the shareholders' economic interests. *See id.* at 959, 961. The Federal Circuit held that the AIG shareholders' claims were "quintessentially" derivative because they were "dependent on an injury to the corporation [(the alleged loss in value from the unlawful loan)], and any remedy [(the unwinding of the loan)] would flow to AIG." *Id.* at 967. The

same is true here; plaintiffs' claims are "dependent on an injury" to the enterprises and "any remedy would flow" to the enterprises. *Id.*

That the Third Amendment will allegedly cause plaintiffs indirect harm as shareholders, such as a decline in the value of their shares or a reduced likelihood of future dividends or liquidation payouts, does not transform those claims into direct claims. *See, e.g.*, *Potthoff*, 245 F.3d at 716 ("[D]epreciation or destruction of the value of the [shareholder's] stock" is a derivative injury.); *Craig Outdoor Advert.*, 528 F.3d at 1024 ("A shareholder generally may not sue on his own behalf . . . to recover the wrongful diminution in value of his stock or to recoup his share of money taken from the corporation; such claims must generally be pursued in a shareholders derivative action."); *Gaff v. FDIC*, 814 F.2d 311, 318 (6th Cir. 1987) ("Gaff primarily claims that his shares in the failed bank became totally worthless as a result of the defendants' conduct. . . . [A] diminution in the value of stock is merely indirect harm to a shareholder and does not bestow upon a shareholder the standing to bring a direct cause of action."); *Tooley*, 845 A.2d at 1037 (A claim is derivative where "the *indirect* injury to the stockholders arising out of the harm to the corporation comes about solely by virtue of their stockholdings.").

3. Plaintiffs argue that their APA claims are direct, not derivative, because the APA "confers a cause of action on any person 'adversely affected or aggrieved by agency action . . . ,' 5 U.S.C. § 702." Br.44. This argument fundamentally misunderstands the distinction between direct and derivative suits. As explained

above, whether a plaintiff's claim is direct or derivative turns on the nature of the plaintiff's harm and the relief sought. *See supra* pp. 36-38. Thus, if plaintiffs are adversely affected by agency action only indirectly (*i.e.*, as a result of harm to the corporation) and seek relief that accrues to the corporation, as is the case here, their APA claim is derivative.

This Court's analysis of 18 U.S.C. § 1964(c), the cause-of-action provision in the Racketeer Influenced and Corrupt Organizations Act (RICO), is illustrative. Section 1964(c) provides a cause of action to "[a]ny person injured in his business or property by reason of" a RICO violation. Shareholders have argued that they may bring suit directly under § 1964(c) to recover damages when the company whose shares they own is the victim of a RICO violation, resulting in a decline in the value of the shareholders' stockholdings. This Court has rejected that contention, *see Craig Outdoor Advert.*, 528 F.3d at 1024-25, and, indeed, the courts of appeals have "uniform[ly]" rejected it, concluding instead that such claims are "derivative" and that "corporate shareholders do not have standing to sue under the civil RICO statute for alleged injuries to the corporation." *Bixler v. Foster*, 596 F.3d 751, 758-59 (10th Cir. 2010) (citing cases).

Plaintiffs' claim that the APA provides shareholders with a direct cause of action would have implications extending far beyond the conservatorship context. Under plaintiffs' analysis, for example, the owner of a single share of a company's stock could challenge a regulation or administrative action that adversely affected the

company without consulting the corporation's board of directors and notwithstanding a determination by the board that the company's interests would not be advanced by bringing suit. *See Kamen*, 500 U.S. at 108 (If a claim "is direct rather than derivative," it can be "maintained [by a shareholder] without *any* precomplaint demand on the directors."). Neither law nor logic supports that result.

Moreover, to the extent the APA grants a cause of action to an aggrieved party, it does so only where no "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). As explained *supra* pp. 35-40, HERA's transfer-of-shareholder-rights provision bars shareholders from bringing suits that seek to remedy harms that shareholders experience only derivatively and would, in any event, preclude an APA action.

B. The "fiduciary" exception has no applicability here.

Plaintiffs' reliance on Delaware's "fiduciary" exception fails to advance their claim. Br.49-50. Claims that a majority shareholder breached a fiduciary duty to minority shareholders with respect to a corporate transaction are typically derivative claims. *See, e.g.*, *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1218 (Del. 2012) (claim that controlling shareholder and the corporation's directors breached a fiduciary duty to minority shareholders by causing the corporation to pay an "unfair price" for an asset was a derivative claim). Delaware law has recognized a narrow exception to that rule for cases in which "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the

exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile*, 906 A.2d at 100. To the extent that "the harm resulting from the overpayment is not confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares," those minority shareholders may bring a direct claim to recover for that additional quantum of harm. *Id.* The Delaware Supreme Court has emphasized "that the extraction of solely economic value from the minority by a controlling stockholder" does not alone constitute "direct injury" under *Gentile*; a dilution of voting rights is also required. *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016). A *Gentile* claim is actionable based on the controlling shareholder's "breach of fiduciary duty" to the plaintiff. 906 A.2d at 99-100, 103.

Plaintiffs argue that their claims are direct under the narrow *Gentile* exception, because Treasury was a controlling shareholder and the Third Amendment "expropriate[d] 100% of the economic rights of all minority shareholders." Br.49-50. This argument is wrong in several respects.

The premise of plaintiffs' argument is incorrect: Treasury was not a controlling shareholder and did not owe a fiduciary duty to the GSEs' shareholders. A controlling shareholder of a corporation either owns a majority of the corporation's voting shares, or it exercises "actual control" over the corporation's affairs. *Starr Int'l Co. v. Federal Reserve Bank*, 906 F. Supp. 2d 202, 221-25 (S.D.N.Y. 2012), *aff'd*, 742 F.3d

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

Even if Treasury could be deemed a controlling shareholder, the exception would be inapplicable. Plaintiffs assert only that Treasury extracted the economic value of their shares. Plaintiffs do not contend that the Third Amendment diluted their voting rights, and for good reason. The Third Amendment altered the way Treasury's dividends are calculated; it did not alter Treasury's voting rights (Treasury has none) or its ownership stake in the GSEs. *Cf. Perry Capital*, 848 F.3d at 1109 (concluding that the Third Amendment did not alter the shareholders' voting rights). Because "the extraction of solely economic value from the minority by a controlling

stockholder" without a corresponding dilution in voting rights is not sufficient to state a claim under *Gentile*, plaintiffs' reliance on the *Gentile* exception necessarily fails. *See El Paso Pipeline*, 152 A.3d at 1264; JA99.[12]

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

C. There is no conflict-of-interest exception to HERA's bar on derivative suits.

In a further attempt to evade HERA's bar on derivative suits, plaintiffs argue that there exists an implicit "conflict-of-interest" exception to HERA's transfer-of-shareholder-rights provision that would allow shareholders to bring derivative claims when FHFA, acting as conservator, is allegedly unwilling to bring suit due to a purported conflict of interest. Br.51-53. Plaintiffs are barred by issue preclusion from

[12] Plaintiffs argue that *El Paso Pipeline* is distinguishable because it did not "involve[] a controlling shareholder coercing the Companies . . . to amend its preferred shareholder agreement to expropriate 100% of the economic rights of all minority shareholders." Br.49-50. Contrary to plaintiffs' assertion, the "extraction" of "economic value from the minority [shareholders] by a controlling shareholder" was precisely the situation addressed in *El Paso Pipeline*. 152 A.3d at 1264.

advancing their argument that HERA's succession provision includes a conflict-of-interest exception, and that argument is without merit in any event.

1. Issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). And "a judgment rendered in a shareholder-derivative lawsuit will preclude subsequent litigation [of that issue] by the corporation and its shareholders." *Cottrell v. Duke*, 737 F.3d 1238, 1243 (8th Cir. 2013); *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) ("Furthermore, in shareholder derivative actions arising under Fed.R.Civ.P. 23.1, parties and their privies include the corporation and all nonparty shareholders."); *Cramer v. General Tel. & Elecs. Corp.*, 582 F.2d 259, 267 (3rd Cir. 1978) ("Although different shareholders brought the two actions, the actual plaintiff on whose behalf the claims were brought is the identical corporation."); *United States v. LTV Corp.*, 746 F.2d 51, 53 n.5 (D.C. Cir. 1984).

The question whether HERA's transfer-of-shareholder-rights provision includes a conflict-of-interest exception was litigated and resolved against all GSE shareholders in *Perry Capital v. Lew*, 70 F. Supp. 3d 208, 229-30 (D.D.C. 2014). Addressing various derivative claims brought by GSE shareholders, the district court in *Perry Capital* concluded that (1) HERA's transfer-of-shareholder-rights provision bars derivative suits; and (2) no conflict-of-interest exception to that provision exists. *Id.* Those conclusions, both of which were necessary to the court's dismissal of the

relevant derivative claims, were affirmed by the court of appeals. *See Perry Capital*, 848 F.3d at 1106 ("We therefore conclude the Succession Clause does not permit shareholders to bring derivative suits on behalf of the Companies even where the FHFA will not bring a derivative suit due to a conflict of interest."). It is irrelevant that the derivative claims that the court addressed in *Perry Capital* were not derivative APA claims. Issue preclusion applies "even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892. Because the issue whether § 4617(b)(2)(A)(i) includes a conflict-of-interest exception was fully litigated and decided on the merits against GSE shareholders in previous derivative litigation, plaintiffs cannot relitigate it in pursuit of their derivative claims here.

Moreover, with respect to the question whether HERA's transfer-of-shareholder-rights provision includes an implicit conflict-of-interest exception, plaintiffs' interests are fully aligned with those of the derivative plaintiff-shareholders in *Perry Capital*. Indeed, the derivative plaintiffs in *Perry Capital* made the same arguments plaintiffs make here, citing the identical precedent to support their assertion that a conflict-of-interest exception exists. *Compare* Br.51-53 with Class.Pl.Br. at 32-35, *In re: Fannie Mae/Freddie Mac*, No. 13-1288 (D.D.C), and Class.Pl.Br. at 23024, *Perry Capital v. Mnuchin*, No. 14-5243 (D.C. Cir.). The district court was thus mistaken in concluding that plaintiffs were not in privity with the *Perry Capital* derivative-shareholder plaintiffs.

2. Plaintiffs' arguments in favor of a conflict-of-interest exception lack merit in any event. HERA's transfer-of-shareholder-rights provision by its terms admits of no exceptions. *See also Kellmer*, 674 F.3d at 851 ("Congress has transferred everything it could to the [conservator]" through § 4617(b)(2)(A)(i).); JA111.

As the D.C. Circuit recognized in *Perry Capital*, creating a judicial conflict-of-interest exception would also be inconsistent with the purpose of HERA's transfer-of-rights provision. *Perry Capital*, 848 F.3d at 1106. The two courts of appeals that have recognized a conflict-of-interest exception to FIRREA's analogous provision did so on the ground that a receiver facing a conflict of interest might be "unable or unwilling to [file suit on a corporation's behalf], despite it being in the best interests of the corporation." *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999); *see also Delta Savings Bank v. United States*, 265 F.3d 1017, 1021-22 (9th Cir. 2001).

But it is precisely to address such concerns that courts in some circumstances have permitted derivative suits. *See Kamen*, 500 U.S. at 95 ("[T]he purpose of the derivative action was to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers." (quotation marks omitted)). Through HERA, Congress precluded such actions. As the D.C. Circuit recognized, "it makes little sense to base an exception to the rule against derivative suits in the Succession Clause

on the purpose of the derivative suit mechanism." *Perry Capital*, 848 F.3d at 1106 (quotation marks omitted).

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

In contrast, HERA provided for shareholders' participation in the statutory claims process in the event of the enterprises' liquidation. 12 U.S.C. § 4617(b)(2)(K)(i). That Congress expressly granted certain rights to shareholders during a receivership underscores that Congress did not intend shareholders to retain any other rights during a conservatorship.[13]

[13] Plaintiffs' contention that 12 U.S.C. § 4617(a)(5) supports a conflict-of-interest exception is without basis. Br.51-53. In § 4617(a)(5), Congress provided the enterprises with a thirty-day window to file a lawsuit challenging FHFA's appointment as conservator or receiver. That Congress expressly granted the enterprises this narrow post-conservatorship right only underscores that the enterprises and their shareholders do not otherwise retain the right to bring suit on behalf of the GSEs during conservatorship.

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

3. Plaintiffs' purported "conflict of interest" is simply that FHFA would have to sue itself to challenge the Third Amendment. But under this logic, every transaction FHFA entered could be challenged by shareholders. Even the two courts that have adopted the conflict-of-interest exception have rejected such a far-reaching rule. *See First Hartford*, 194 F.3d at 1295 (emphasizing that the conflict-of-interest exception will apply "only . . . in a very narrow range of circumstances"); *Delta Savings*, 265 F.3d at 1023 ("We do not suggest that the FDIC-as-receiver is faced with a disqualifying conflict every time a bank-in-receivership is asked to sue another federal agency.").

CONCLUSION

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

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