No. 17-20364

In the United States Court of Appeals for the Fifth Circuit

PATRICK J. COLLINS; MARCUS J. LIOTTA;
WILLIAM M. HITCHCOCK,

Plaintiffs-Appellants

v.

STEVEN T. MNUCHIN, SECRETARY, U.S. DEPARTMENT OF TREASURY;
DEPARTMENT OF THE TREASURY; FEDERAL HOUSING FINANCE AGENCY;
MELVIN L. WATT,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, No. 4:16-cv-03113

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CERTIFICATE OF INTERESTED PERSONS

Patrick J. Collins, et al. v. Steven T. Mnuchin, et al., No. 17-20364

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Attorneys whose names are denoted with an asterisk entered appearances in the district court but have not entered appearances in the Fifth Circuit. Plaintiffs originally named Jacob J. Lew in his official capacity as Secretary of the Treasury as a defendant in this case. Secretary Mnuchin was substituted for Secretary Lew pursuant to Federal Rule of Civil Procedure 25(d). In addition to the named parties listed above, all Fannie Mae and Freddie Mac shareholders have a financial interest in the outcome of this case.

Dated: July 19, 2017

s/ Charles J. Cooper
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants ("Plaintiffs") respectfully request oral argument. This appeal presents an important separation of powers question regarding the structure of independent agencies and important statutory interpretation questions about the authority of a federal conservator to operate its ward for the exclusive benefit of the federal government. The outcome of this appeal will also have major implications for the future of Fannie Mae and Freddie Mac.

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INTRODUCTION

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

The Net Worth Sweep is a symptom of a fundamental constitutional flaw in FHFA's structure. Unlike virtually every other independent agency before it, FHFA is headed by a single Director rather than a multi-member commission. Both a panel of the D.C. Circuit and the Department of Justice have concluded that the identical structure of the Consumer Financial Protection Bureau ("CFPB") violates the separation of powers. The separation of powers is meant to protect individual rights

and guard against government decisions like the Net Worth Sweep, and the Constitution requires that this decision be vacated.

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

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. Plaintiffs have standing because the Net Worth Sweep "aggrieved" them by usurping the economic bundle rights associated with their securities and eliminating the value of their stock. The district court entered final judgment as to all claims in favor of the Defendants on May 22, 2017, and Plaintiffs filed a timely notice of appeal on May 25, 2017. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether FHFA's status as an independent agency headed by a single Director violates the separation of powers, thus requiring vacatur of its decision to impose the Net Worth Sweep.

2. Whether FHFA exceeded its statutory authority as conservator by imposing the Net Worth Sweep, which prevents the Companies from preserving capital or being restored to soundness and solvency.

3. Whether 12 U.S.C. § 4617(f) bars Plaintiffs' claim that Treasury violated its own obligations under HERA and the APA by imposing the Net Worth Sweep.

STATEMENT OF THE CASE

A. Fannie Mae and Freddie Mac.

This Nation's multi-trillion-dollar housing finance market is built on the foundation of two for-profit, privately owned entities—Fannie Mae and Freddie Mac. The Companies do not themselves originate mortgages but instead insure and securitize them, thus providing liquidity to the residential mortgage market that has made homeownership possible for millions of American families.

From 1992 until 2008, the Companies were regulated by the Office of Federal Housing Enterprise Oversight ("OFHEO")—an office within the Department of Housing and Urban Development. During the summer of 2008, Congress passed and President Bush signed HERA, which established FHFA as the successor to OFHEO. Unlike its predecessor, FHFA is an "independent" agency, 12 U.S.C. § 4511(a); 44 U.S.C. § 3502(5), and it is headed by a Director who is only removable "for cause by the President," 12 U.S.C. § 4512(b)(2). Also unlike OFHEO, FHFA is funded through assessments that are "not . . . construed to be Government or public funds

or appropriated money." *Id.* § 4516(f)(2). In contrast to almost all other independent agencies in our Nation's history, FHFA is headed by a single individual rather than a multi-member board or commission.

The Companies took a relatively conservative approach to investing in risky mortgages issued during the national run-up in home prices from 2004 to 2007. ROA.9, 26-27. As a result, they remained in a comparatively strong financial condition in 2008 that made it possible for them to rescue America's home mortgage system by providing mortgage funding even as distressed banks exited the marketplace. *See* ROA.9-10. Throughout the financial crisis and the years that followed, the Companies were capable of meeting their obligations to insureds and creditors and of absorbing any losses they might reasonably incur as a result of the financial downturn. *Id.*

B. FHFA Forces the Companies into Conservatorship and Subjects Them to the Purchase Agreements.

Invoking its statutory authority under HERA, FHFA forced the Companies into conservatorship on September 6, 2008. ROA.31-32; *see* 12 U.S.C. § 4617(a). At the time, FHFA stated that the purpose of the conservatorship was to restore confidence in and stabilize the Companies with the objective of returning them to normal business operations. ROA.32. FHFA publicly confirmed that conservatorship is necessarily temporary and that it may act as conservator for the Companies only until they are stabilized. *Id.*

Treasury then exercised its temporary authority under HERA to enter agreements with FHFA to purchase equity in the Companies ("Preferred Stock Purchase Agreements" or "PSPAs"). ROA.33-34; *see* 12 U.S.C. §§ 1455(*l*)(4), 1719(g)(4). The PSPAs allowed the Companies to draw up to $100 billion each from Treasury as needed to avoid a negative net worth—an amount that was subsequently increased to allow the Companies to draw unlimited sums from Treasury until the end of 2012, and thereafter capped at the amount drawn from 2010 through 2012, plus $200 billion per Company. ROA.40.

In return for Treasury's funding commitment, FHFA agreed that the Companies would provide several forms of consideration. First, the PSPAs created a new class of securities with very favorable terms to the Government, known as Senior Preferred Stock ("Government Stock"). For each Company, the Government Stock had an initial liquidation preference of $1 billion, an amount that would increase by one dollar for every dollar drawn on Treasury's funding commitment. ROA.35.[1] The original PSPAs also provided for the Companies to pay quarterly dividends on the outstanding Government Stock liquidation preference. These dividends could be paid in cash, at an annual rate of 10%, or in kind, at an annual rate of 12%, by adding to the liquidation preference the amount of dividends due—

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

an option Treasury and the Companies repeatedly acknowledged. *See* ROA.36-38. Opting to pay the dividends in kind would not have reduced the amount available under Treasury's funding commitment. ROA.38-39.

Second, FHFA agreed that the Companies would issue warrants entitling Treasury to buy 79.9% of their common stock at a nominal price. The common stock warrants gave Treasury "upside" via participation in the Companies' profitability, but this upside would be *shared* with the Companies' other preferred and common shareholders. *See* ROA.35.

Third, the PSPAs provided for the Companies to pay Treasury a quarterly periodic commitment fee beginning in 2010. ROA.39. Prior to the Net Worth Sweep, Treasury consistently waived this fee, and it could only be set with the agreement of the Companies at a market rate. ROA.62-63. Freddie forecasted its "sensitivity" to imposition of the periodic commitment fee beginning in 2013 at $0.4 billion per year. ROA.63.

The original PSPAs diluted, but did not eliminate, the economic interests of the Companies' private shareholders. As FHFA's Director assured Congress shortly after the agreements were signed, the Companies' "shareholders are still in place," and "both the preferred and common shareholders have an economic interest in the companies," which "going forward . . . may [have] some value." ROA.32.

C. Unwarranted Accounting Decisions Artificially Increase the Companies' Draws from Treasury, and the Companies Return to Sustained Profitability.

Under FHFA's supervision, the Companies were forced to dramatically write down the value of their assets and to incur substantial non-cash accounting losses in the form of loan loss reserves and write-offs of deferred tax assets.[2] Tens of billions of dollars of these accounting adjustments were based on FHFA's wildly pessimistic assumptions about potential future losses and were wholly unwarranted. ROA.41-44. By June 2012, Fannie and Freddie had drawn $161 billion from Treasury to make up for the paper losses caused by these accounting decisions, even though there was no indication that the Companies' actual cash expenses could not be met by their cash receipts. The Companies drew $26 billion more to pay dividends to Treasury.

As a result of these transactions, Treasury's liquidation preference swelled to $189 billion. But based on the Companies' performance in the second quarter of 2012, it was apparent that the Companies' private shares still had value. The Companies were thriving, paying cash dividends on the Government Stock without drawing additional capital from Treasury. *See* ROA.14. And based on the improving housing market and the high quality of the newer loans backed by the Companies,

[2] Loan loss reserves reduce reported net worth to reflect anticipated future losses. ROA.42. Deferred tax assets are used to reduce taxable income on future earnings. The book value of a tax asset depends on the likelihood that the corporation will earn sufficient income to use the tax asset. ROA.41-42.

Defendants knew the Companies would enjoy stable profitability for the foreseeable future and thus would begin to rebuild significant amounts of capital. ROA.45-46. For example, minutes of a July 2012 Fannie management meeting indicating that the Company was entering a period of "golden years" of earnings were circulated broadly within FHFA, and projections attached to those minutes showed that Fannie expected its cumulative dividend payments to Treasury to exceed its total draws by 2020 and that over $115 billion of Treasury's commitment would remain available after 2022. ROA.48-49. Similar projections were shared with Treasury less than two weeks before the Net Worth Sweep was announced. ROA.50-53.

Defendants also knew that the Companies would soon reverse many of their previous unjustified non-cash accounting losses. Indeed, at an August 9, 2012 meeting, just eight days before the Net Worth Sweep was imposed, Fannie's Chief Financial Officer told senior Treasury officials that release of the valuation allowance on Fannie's deferred tax assets would likely occur in mid-2013 and would generate profits in the range of $50 billion—a prediction that proved to be remarkably accurate. ROA.52-53. This $50 billion reversal was not included in the projections that were circulated within FHFA and Treasury around the same time. Treasury was keenly interested in the deferred tax assets, which would have catalyzed the Companies' capital rebuilding process; indeed, it had discussions of the deferred tax assets with its financial consultant as early as May 2012, and a key

item on Treasury's agenda for the August 9 meeting was how quickly Fannie forecasted releasing its reserves. *See* ROA.47, 50.

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

On August 17, 2012, just days after the Companies announced robust second quarter earnings indicating that they had earned more than enough to pay Treasury's dividends without making a draw from the funding commitment, Defendants imposed the Net Worth Sweep to ensure, as Treasury put it, that "every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers." ROA.58. The Net Worth Sweep accomplishes this objective by replacing the prior dividend structure with one that requires Fannie and Freddie to pay Treasury their entire net worth on a quarterly basis, minus a small capital buffer that started at $3 billion and steadily decreases until it reaches $0 in 2018. ROA.59. Since the Net Worth Sweep guarantees that Treasury will receive all of the Companies' comprehensive income anyway, Defendants also agreed to suspend the periodic commitment fee. ROA.62-63. Defendants thus nationalized the Companies and expropriated not just their future earnings but also their retained capital, thereby depriving the Companies' private shareholders of all of their economic rights.

Defendants have claimed, both publicly and before the courts, that the Net Worth Sweep was necessary to prevent the Companies from falling into a purported "death spiral" in which the Companies' increasing dividend obligations to Treasury

would consume Treasury's remaining funding commitment. *See* ROA.16. But, as explained above, at all times prior to the Net Worth Sweep, the PSPAs permitted the Companies to pay dividends in kind—they were never required to pay cash dividends, let alone to do so by drawing on Treasury's funding commitment.

More important, Defendants' "death spiral" narrative cannot be squared with internal government documents and testimony obtained through discovery in other litigation. As summarized above, this evidence reveals that the Net Worth Sweep was imposed *after* the Companies had returned to stable profitability, and *just days after* Treasury learned that they were on the verge of reporting tens of billions of dollars in profits that would far exceed their existing dividend obligations.

The available evidence thus makes clear that the Net Worth Sweep was adopted not out of concern that the Companies would earn too little, but rather out of concern that the Companies would earn *too much* and complicate Defendants' plans to shackle them in perpetual conservatorship and to prevent their private shareholders from recouping their investment principal, let alone any return on that investment. Edward DeMarco, FHFA's then-Acting Director, testified that he had no intention of allowing the Companies to emerge from conservatorship under what he viewed as flawed charters, disavowing his statutory obligations specified in HERA. ROA.59. Similarly, an internal Treasury document finalized the day before the sweep was announced specifically identified the Companies' "improving

operating performance" and the "potential for near-term earnings to *exceed* the 10% dividend" as reasons for the Net Worth Sweep. ROA.55 (emphasis added).

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

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

Plaintiffs own shares of Fannie and Freddie stock. ROA.23-24, 541-46. On October 20, 2016, Plaintiffs filed suit challenging the Net Worth Sweep on both constitutional and statutory grounds. Defendants moved to dismiss Plaintiffs' claims, and Plaintiffs and FHFA filed cross motions for summary judgment on

Plaintiffs' constitutional claim. The district court granted Defendants' dispositive motions and denied Plaintiffs' motion for summary judgment on May 22, 2017. ROA.946, 962.

In rejecting Plaintiffs' constitutional claim, the district court expressly disagreed with a D.C. Circuit panel decision that held that the separation of powers does not permit the CFPB to operate as an independent agency headed by a single Director. ROA.959. With respect to Plaintiffs' APA claims, the district court acknowledged that FHFA could be enjoined if it exceeded its statutory conservatorship authority notwithstanding HERA's provision prohibiting courts from "restrain[ing] or affect[ing] the exercise of powers or functions of [FHFA] as a conservator or a receiver." 12 U.S.C. § 4617(f); *see* ROA.954-55. The district court, however, concluded that HERA does not require FHFA to preserve and conserve the Companies' assets when it acts as conservator or prevent FHFA as conservator from winding down the Companies. ROA.954-55. The district court also ruled that Section 4617(f) bars Plaintiffs' claims that Treasury's actions were arbitrary and capricious and violated HERA. ROA.955-56. Plaintiffs filed a timely notice of appeal on May 26, 2017. ROA.968.

SUMMARY OF ARGUMENT

In a thorough and scholarly opinion, a panel of the D.C. Circuit ruled that it violates the separation of powers for the CFPB to operate as an independent agency

headed by a single individual. *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *vacated and rehearing en banc granted* (D.C. Cir. Feb. 16, 2017). Although *PHH* is being reheard by the D.C. Circuit en banc, the panel's decision was correct, has been endorsed by the Department of Justice, and applies with equal force to FHFA. FHFA's status as an independent agency headed by a single Director "represents a gross departure from settled historical practice" and "poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency." *Id.* at 8. As the United States has recently explained, vesting control of an independent agency in a single individual also impermissibly diminishes the President's ability to influence agency decisions. ROA.766-68. Indeed, FHFA is wholly unaccountable to *any* of the three branches of government, for it is not only shielded from Presidential oversight but also is not subject to the Congressional appropriations process and claims to enjoy almost total immunity from judicial review. FHFA's structure therefore violates the separation of powers, and its decision to impose the Net Worth Sweep must be vacated.

Quite apart from the Net Worth Sweep's constitutional infirmity, it must be enjoined because it exceeded FHFA's statutory powers as conservator. *See* 12 U.S.C. § 4617(f). The Net Worth Sweep "affirmatively sabotage[s]" FHFA's statutory charge to preserve and conserve the Companies' assets, place them in a

safe and sound condition, and return them to normal business operations. *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1118 n.1 (D.C. Cir. 2017) (Brown, J., dissenting). Consistent with the fiduciary obligations of conservators at common law and with the FDIC statute upon which HERA was modeled, Congress required FHFA to seek to "preserve and conserve" the Companies' assets and "rehabilitat[e]" them to a "sound and solvent" condition. 12 U.S.C. § 4617(b)(2)(D), (a)(2). The Net Worth Sweep, however, does the opposite: It depletes the Companies' assets and pushes them to the brink of insolvency every quarter. As Treasury explained when it announced the Net Worth Sweep, it does this precisely so that the Companies ***cannot*** "rebuild capital, [or] return to the market in their prior form." ROA.72. The Net Worth Sweep thus is irreconcilable with—indeed, it is antithetical to—the duties Congress imposed on FHFA as conservator.

But even if judicial review of Plaintiffs' APA claims against *FHFA* were unavailable, it would still be necessary to enjoin the Net Worth Sweep because *Treasury* violated *its own* obligations under HERA and the APA by agreeing to this change to its investments in the Companies. Courts apply a strong presumption in favor of the reviewability of administrative actions, and Section 4617(f) does not speak with the clarity required to bar judicial review of actions by federal agencies other than FHFA.

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

ARGUMENT

I. The Net Worth Sweep Must Be Vacated Because FHFA's Structure Violates the Separation of Powers.

A. The Constitutional Separation of Powers Does Not Permit FHFA To Operate as an Independent Agency Headed by a Single Director.

The Constitution vests the Executive power in the President, who must "take Care that the Laws be faithfully executed." U.S. CONST. art. II, §§ 1, 3. Restrictions on the President's removal power are presumptively unconstitutional, and the Supreme Court has recognized only two exceptions: Congress may limit the President's ability to remove (1) a multimember "body of experts," *see Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935), and (2) inferior officers with a narrow scope of powers, *see Morrison v. Olson*, 487 U.S. 654, 671-73, 695-97 (1988).

When a court is asked "to consider a new situation not yet encountered by the [Supreme] Court," there must be special "circumstances" to justify "restrict[ing the

President] in his ability to remove" an officer. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 483-84 (2010). FHFA is precisely such a "new situation." Unlike the Federal Trade Commission, which was at issue in *Humphrey's Executor*, FHFA is headed not by an expert and nonpartisan multimember commission that contains its own internal checks, but by a single unchecked Director. *Humphrey's Executor*, 295 U.S. at 624 (citation omitted). In all events, the continued viability of *Humphrey's Executor* after *Free Enterprise Fund* has been questioned. *See In re Aiken Cty.*, 645 F.3d 428, 444, 446 (D.C. Cir. 2011) (Kavanaugh, J., concurring). Accordingly, *Humphrey's Executor* should be read narrowly and not extended. Further, Plaintiffs preserve the argument that the Supreme Court should revisit *Humphrey's Executor*.

Neither do the powers of FHFA's Director bear resemblance to those of the independent counsel whose authority the Supreme Court upheld in *Morrison*. The independent counsel was an inferior officer who had only "limited jurisdiction" for defined investigations, 487 U.S. at 691; *see also id.* at 671-72, and "lack[ed] policymaking or significant administrative authority," *id.* at 691. FHFA's Director, in contrast, is a principal officer with broad regulatory power over the Nation's multi-trillion-dollar housing finance system. *See* 12 U.S.C. § 4526. Indeed, FHFA's acting Director at the time of the Net Worth Sweep has written that "the entire housing system . . . rel[ies] almost entirely on [its] decisions," ROA.550.

"A long line of Supreme Court precedent tells us that history and tradition are important guides in separation of powers cases," *PHH*, 839 F.3d at 21; *see id.* at 21-25, and FHFA's structure finds no support in historical precedent. Plaintiffs are aware of only two instances in which Congress authorized a single individual to head an independent agency prior to the creation of FHFA: the Office of Special Counsel and the Social Security Administration.[3] But the single-head structure of those independent agencies is of recent vintage and has been constitutionally contested by the Executive Branch. *See PHH*, 839 F.3d at 18-19.

FHFA's unusual structure also diminishes the President's ability to influence FHFA's decisions, as the Department of Justice has recently argued to the en banc D.C. Circuit. ROA.766-68. Because the terms of commission members are staggered, a President inevitably will have the ability to influence a multi-member commission's deliberations by appointing one or more members. *See PHH*, 839 F.3d at 33. Many statutes establishing independent agencies expressly require bipartisan membership, thus guaranteeing that at least some members will belong to the President's party. *See, e.g.*, 15 U.S.C. § 41 (mandating that no more than three of

[3] Before the district court, FHFA argued that the Comptroller of the Currency also enjoys for-cause removal protection. But the *PHH* panel correctly concluded that the Comptroller of the Currency "is removable at will by the President." *PHH*, 839 F.3d at 20 n.6; *see also* Post-Employment Restriction of 12 U.S.C. § 1812(e), 25 Op. O.L.C. 184-87 (2001) (assuming Comptroller serves at the President's pleasure).

FTC's five commissioners be members of the same political party). And the President has unilateral authority to select the chair of many independent multi-member commissions. *See* CONGRESSIONAL RESEARCH SERVICE, APPOINTMENT AND CONFIRMATION OF EXECUTIVE BRANCH LEADERSHIP: AN OVERVIEW 11 (June 22, 2015), https://goo.gl/wShSp4 ("For many independent boards and commissions, the chair is appointed from among the group's members by the President alone, without a separate nomination."). Those features of independent multi-member commissions provide at least some accountability to the President. Multi-member commissions also must deliberate and compromise in ways that reduce the risk that they will adopt extreme policies that are inconsistent with those of the President. Like the second layer of for-cause removal protection struck down in *Free Enterprise Fund*, this reduced degree of Presidential control and increased risk of departures from Presidential policy "makes a difference" for separation of powers purposes. *See Free Enterprise Fund*, 561 U.S. at 495.

Furthermore, an independent agency headed by a single Director poses a grave threat to the individual liberty that the separation of powers safeguards. *PHH*, 839 F.3d at 26-28. Multi-member independent agencies better protect individual liberty because they do not concentrate power in the hands of any one individual, must necessarily account for multiple viewpoints, tend to make decisions that are less extreme, and better resist capture by interest groups. The district court did not treat

such considerations as relevant to the separation of powers analysis, ROA.958-59, but the ultimate aim of the separation of powers is to protect individual liberty, *see, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

The character of the powers FHFA exercises within its domain makes its structure even more constitutionally problematic. FHFA is the regulator of two of the Nation's largest privately owned financial institutions, and in the district court it claimed that during conservatorship it enjoys "plenary power" over the Companies and the rights of their shareholders. ROA.176; *see also* 12 U.S.C. §§ 4511 *et seq.* (granting FHFA's Director extensive regulatory powers over the Companies). When FHFA exercises its powers, it benefits from a variety of statutory restrictions on judicial review. *See* 12 U.S.C. § 4617(f); *id.* § 4617(b)(2)(A)(i); *id.* § 4617(b)(5)(E); *id.* § 4617(b)(11)(D); *id.* § 4623(d).[4] And unlike every other independent agency headed by a single individual save the CFPB, FHFA is not subject to the congressional appropriations process. *See* 12 U.S.C. § 4516(f)(2). In the absence of meaningful judicial review or Congressional oversight, Presidential control is an even more important safeguard against the threat that arbitrary agency decisionmaking poses to individual liberty. *See PHH*, 839 F.3d at 35-36. If the

[4] As explained *infra* at 24-44, Plaintiffs do not believe that HERA's restrictions on judicial review foreclose challenges to the Net Worth Sweep. But if the Court disagrees, that will only further reinforce the fact that FHFA's Director acts without meaningful oversight by any branch of government and in violation of the separation of powers.

separation of powers means anything, it does not permit a single, unsupervised government official to exercise broadly defined powers with no guidance from Congress, no prospect of review by the courts, and no accountability to the elected President.

B. The Constitutional Violation Inherent in FHFA's Structure Requires Vacatur of the Net Worth Sweep.

1. Administrative Actions Taken in Violation of the Separation of Powers Must Be Vacated.

When a government official acts on behalf of an agency that is structured in violation of the separation of powers, the official's action is *ultra vires* and must be vacated. That is what the Supreme Court did in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which affirmed a ruling of the D.C. Circuit that an NLRB decision was "void *ab initio*" because the Board "lacked authority to act" due to a violation of the Recess Appointments Clause, *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013). This Court subsequently deployed the same remedy with respect to other past NLRB actions that suffered from the same structural constitutional infirmity, observing that "nearly every circuit has vacated and remanded the Board's decisions during the applicable time period in light of the Supreme Court's decision." *Dresser-Rand Co. v. NLRB*, 576 F. App'x 332, 333 (5th Cir. 2014). Numerous other authorities support the same approach in separation of powers cases. *See, e.g.*, *Nguyen v. United States*, 539 U.S. 69, 83 (2003); *Ryder v. United States*, 515 U.S.

177, 182-83 (1995); *Kuretski v. Commissioner*, 755 F.3d 929, 938 (D.C. Cir. 2014).

To be sure, in *Free Enterprise Fund* the Supreme Court severed a statutory provision that violated the President's constitutional removal authority and allowed the agency in that case to continue to operate subject to additional Presidential oversight. *Free Enterprise Fund*, 561 U.S. at 508-09. Thus, if Plaintiffs prevail on the merits of their constitutional claim, it may be appropriate to declare that FHFA's Director is henceforth subject to at-will removal by the President and to allow the restructured agency to continue to function. But that solution to FHFA's unconstitutional structure would still require vacatur of the Net Worth Sweep, which at a minimum must be reconsidered by a FHFA Director who is subject to oversight by the President. *See IBS, Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 124 (D.C. Cir. 2015).

2. FHFA Cannot Evade the Separation of Powers by Labeling Its Actions as Those of a "Conservator."

In the proceedings below, FHFA argued that the Net Worth Sweep is not subject to constitutional challenge because FHFA is a non-governmental actor when it makes decisions in its capacity as "conservator." As an initial matter, this argument misses the mark because it assumes that the constitutional flaw in FHFA's structure as regulator does not infect its decisions as conservator. FHFA's Director acted in his *regulatory* capacity when he appointed FHFA to be conservator, and he exercises regulatory authority to oversee the conservatorship's operations. *See* 12 U.S.C.

§ 4617(a)(1) (stating that "the Director," i.e., FHFA as regulator, "may appoint the Agency as conservator or receiver for a regulated entity"); *id.* § 4617(f) (permitting "the Director" to sue "to restrain or affect the exercise of powers or functions of the Agency as a conservator"); 12 C.F.R. § 1237.12(b) (requiring "the Director" (or his designee) to approve any capital distributions during conservatorship). With the conservator's authority entirely dependent upon a regulator that is operating without legal authority and in violation of the separation of powers, whether the conservator is *itself* bound by the Constitution is beside the point. FHFA's actions as conservator—including the Net Worth Sweep—can be no more lawful than those of the regulator that permitted it to take control of the Companies in the first place.

In all events, whether a federal conservator "should be treated as the United States depends on the context," *Auction Co. of America v. FDIC*, 132 F.3d 746, 748 (D.C. Cir. 1997), and the context here is FHFA's decision to expropriate Plaintiffs' investments for the benefit of the federal government. Confronted with similar allegations that as receiver the FDIC had retained a failed bank's liquidation surplus for itself rather than distributing the surplus to shareholders, the Federal Circuit held that the FDIC could be sued in its receivership capacity under the Tucker Act for a Fifth Amendment taking. *Slattery v. United States*, 583 F.3d 800, 826-29 (Fed. Cir. 2009). The Federal Circuit observed that "whether the FDIC as receiver is 'the government' depends on the context of the claim" and allowed the constitutional

claim to go forward because the facts before it were "unlike the standard receivership situation in which the receiver is enforcing the rights or defending claims and paying the bills of the seized bank." *Id.* at 827-28.

This Court's decision in *United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994), is not to the contrary. That case held that a federal receiver's suit for civil penalties did not implicate the Double Jeopardy Clause because the penalties collected would "not go to the United States Treasury" but instead "benefit all stockholders and creditors of the bank." *Id*. The conservatorship action at issue here, in contrast, was specifically undertaken for the purpose of harming the Companies' private shareholders while benefitting the public fisc. *See Bank One, Texas, NA v. Taylor*, 970 F.2d 16, 34 (5th Cir. 1992) (FDIC as receiver was the government for sovereign immunity purposes where judgment "would operate against the United States"); *FDIC v. New Iberia*, 921 F.2d 610, 613 (5th Cir. 1991) (FDIC as receiver is government instrumentality for purposes of Tax Anti-Injunction Act).

In distinguishing between private and governmental actors under the Appointments Clause, the Office of Legal Counsel has opined that a governmental actor exercises "power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit." Officers of the United States Within the Meaning of the Appointments Clause, 2007 WL 1405459, at *11 (O.L.C. Apr. 16, 2007). The Net Worth Sweep can only be sustained under the APA if FHFA

enjoys such power when it acts as conservator, a fact well illustrated by the *Perry Capital* majority opinion. *See Perry Capital*, 848 F.3d at 1089 (HERA "permit[s] FHFA to act in its own best governmental interests, which may include the taxpaying public's interest"). While Plaintiffs do not believe that FHFA has any such power when it acts as conservator, if this Court disagrees it will necessarily follow that FHFA acted in a governmental capacity when it imposed the Net Worth Sweep.

II. Section 4617(f) Does Not Bar Judicial Review of Plaintiffs' APA Claims.

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

HERA bars equitable relief for non-constitutional claims when such relief would "restrain or affect the exercise of powers or functions of [FHFA] as conservator." 12 U.S.C. § 4617(f). This Court has interpreted 12 U.S.C. § 1821(j)—the provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") on which Section 4617(f) was modeled—as applying only when the federal conservator or receiver is "exercising an authorized power or function." *Carney v. RTC*, 19 F.3d 950, 956 (5th Cir. 1994). It was likewise common ground between the majority and dissenting opinions in *Perry Capital* that Section 4617(f) does not apply in cases in which FHFA exceeds its "statutory conservatorship powers." *Perry Capital*, 848 F.3d at 1087; *id.* at 1119-20 (Brown, J., dissenting).

Importantly, Section 4617(f) and its predecessors do not "bar all actions for

[equitable] relief against the receiver of a failed financial institution," *Carney*, 19 F.3d at 958 n.3, and a federal conservator or receiver "cannot evade judicial scrutiny . . . by merely labeling its actions with a conservator stamp," *Leon Cty. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012); *see also County of Sonoma v. FHFA*, 710 F.3d 987, 994 (9th Cir. 2013). Thus, in *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997), the Ninth Circuit allowed claims for equitable relief against a receiver and held Section 1821(j) inapplicable where "the FDIC as receiver" had "assert[ed] authority beyond that granted to it as a receiver" by breaching a contract without statutory authorization. *See Bank of Manhattan, NA v. FDIC*, 778 F.3d 1133, 1136-37 (9th Cir. 2015) (reaffirming *Sharpe*). Similarly, in *Coit Independence Joint Venture v. Federal Savings & Loan Insurance Corp.*, 489 U.S. 561, 572-79 (1989), the Supreme Court held that the analogous provision in FIRREA's predecessor permitted judicial review where a federal receiver purported to adjudicate a claim the statute did not authorize it to resolve.

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

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

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

HERA provides that FHFA "may, as conservator, take such action as may be—(i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D). Interpreting materially identical language in FIRREA, this Court has said that it "states explicitly that a conservator only has the power to take actions necessary to restore a financially troubled institution to solvency." *McAllister v. RTC*, 201 F.3d 570, 579 (5th Cir. 2000). Numerous other courts agree. *See, e.g.*, *Elmco Props., Inc. v. Second Nat'l Fed. Sav. Ass'n*, 94 F.3d 914, 922 (4th Cir. 1996) ("[A] conservator's function is to restore the bank's solvency and preserve its assets."); *RTC v. United Tr. Fund, Inc.*, 57 F.3d 1025, 1033 (11th Cir. 1995) ("The conservator's mission is to conserve assets."); *RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1453 (8th Cir. 1992) (conservator's "mission[ ]" is "to take action necessary to restore the failed [financial institution] to a solvent position and to carry on the business of the institution and preserve and conserve the assets and property of the institution" (quotation marks omitted)).

FHFA has repeatedly expressed the same understanding of its statutory

mission. For example, FHFA has stated that "[t]he purpose of conservatorship is to preserve and conserve each company's assets and property and to put the companies in a sound and solvent condition." ROA.29 (alteration in original). FHFA's regulations explain that "the essential function of a conservator is to preserve and conserve the institution's assets" and that "[a] conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition." Conservatorship and Receivership, 76 Fed. Reg. 35,724, 35,727, 35,730 (June 20, 2011). The FDIC—on whose statutory conservatorship powers the relevant provisions of HERA were modeled—likewise understands that "[a] conservatorship is designed to operate the institution for a period of time in order to return the institution to a sound and solvent operation." FDIC, MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE 216 (1998), https://goo.gl/qjIjTh.

This understanding of FHFA's statutory mission is reinforced by Congress's use of the word "conservator," for it is well established that when Congress enacts a statute using "a well-established term," courts presume that it "intended the term to be construed in accordance with pre-existing . . . interpretations." *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). "Conservator" is one such "well-established term." As the Congressional Research Service has explained, "[a] conservator is appointed to operate the institution, conserve its resources, and restore it to viability." DAVID H. CARPENTER & M. MAUREEN MURPHY, CONG. RESEARCH SERV., FINANCIAL

INSTITUTION INSOLVENCY: FEDERAL AUTHORITY OVER FANNIE MAE, FREDDIE MAC, AND DEPOSITORY INSTITUTIONS 5 (2008), https://goo.gl/mgFwQr.

HERA's use of the word "conservator" thus draws on "the long history of fiduciary conservatorships at common law." *Perry Capital*, 848 F.3d at 1121 (Brown, J., dissenting); *see also Matter of Still*, 963 F.2d 75, 77 (5th Cir. 1992) (construing nature of FDIC's receivership authority in light of principles that govern common law receiverships); *CedarMinn*, 956 F.2d at 1453-54 (FIRREA conservatorship powers "parallel" those granted conservators under prior statutes). As Judge Brown explained in her *Perry Capital* dissent, "[a]t common law, 'conservators' were appointed to protect the legal interests of those unable to protect themselves," and that mission forbids the conservator "from acting for the benefit of the conservator . . . or a third party." *Perry Capital*, 848 F.3d at 1122 (Brown, J., dissenting); 12 U.S.C. § 1717(c)(1) (statute creating Fannie Mae discussing "trusts, receiverships, conservatorships, liquidating or other agencies, *or other fiduciary and representative undertakings and activities*" (emphasis added)); *Crites, Inc. v. Prudential Ins. Co. of America*, 322 U.S. 408, 414 (1944) (receiver "was bound to perform his delegated duties with the high degree of care demanded of a trustee or other similar fiduciary").

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

As Judge Brown correctly explained in her *Perry Capital* dissent, Section

4617(b)(2)(D) "mark[s] the bounds of FHFA's conservator . . . powers," and actions by FHFA that go beyond or conflict with these powers may be enjoined. *Perry Capital*, 848 F.3d at 1118. The district court disagreed and followed the *Perry Capital* majority, which concluded that as conservator FHFA has "permissive, discretionary authority" to pursue a traditional conservator's mission but is not required to do so. *Id.* at 1088. This was error.

a. The *Perry Capital* majority heavily relied on Section 4617(b)(2)(D)'s use of the word "may." *See id.* at 1087-89. But as Judge Brown correctly reasoned, Congress's use of "may" in this provision "is best understood as a simple concession to the practical reality that a conservator may not always succeed in rehabilitating its ward," and it does not leave FHFA as conservator free to "affirmatively sabotage the Companies' recovery." *Id.* at 1118 n.1 (Brown, J., dissenting). In other words, while Congress recognized that FHFA might not *achieve* its conservatorship goals, Section 4617(b)(2)(D) requires that FHFA *pursue* the overarching statutory mission of preserving and conserving the Companies' assets and restoring them to soundness and solvency.

Moreover, the assumption that the word "may" "implies some degree of discretion," can be "defeated by . . . obvious inferences from the structure and purpose of the statute." *United States v. Rodgers*, 461 U.S. 677, 706 (1983). In addition to jettisoning the well-established meaning of the term "conservator,"

treating Section 4617(b)(2)(D) as optional would lead to the anomalous result that FHFA would be free to decide as conservator whether to place the Companies in a sound condition and rebuild capital even though one of FHFA's "principal duties" as regulator is "to ensure that . . . each regulated entity operates in a safe and sound manner, including maintenance of adequate capital." 12 U.S.C. § 4513(a)(1)(B).

The *Perry Capital* majority's interpretation is also inconsistent with the statutory design, which, like virtually all grants of agency power, constitutes a limited delegation of authority from Congress. That Congress, in describing FHFA's "[p]owers as conservator" in Section 4617(b)(2)(D), spelled out what the conservator "may" do means that FHFA may *not* do anything else. *See New York v. FERC*, 535 U.S. 1, 18 (2002) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (finding that "Congress has not delegated authority to the agency to act beyond these [enumerated] statutory parameters"); *Halverson v. Slater*, 129 F.3d 180, 184-87 (D.C. Cir. 1997) (language that "Secretary may delegate" authority to specific entity prohibits delegation to another entity). Consistent with this reading of HERA, this Court has explained that under the parallel provision of FIRREA "a conservator *only* has the power to take actions necessary to restore a financially troubled institution to solvency." *McAllister*, 201 F.3d at 579 (emphasis added).

Despite the arguments of FHFA's outside counsel in this case, it is clear that FHFA itself understands pursuit of its statutory mission to be mandatory. Even after the D.C. Circuit's *Perry Capital* decision, FHFA's Director has said that FHFA's "statutory mandates obligate" it to "[c]onserve and preserve the assets of the Enterprises while they are in conservatorship." Statement of Melvin L. Watt, Director, FHFA, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (May 11, 2017), https://goo.gl/dUC0oj ("Statement of Melvin L. Watt"). A few days later, Director Watt reiterated that his agency has "statutory obligations to operate the [Companies] in a safe and sound manner." Prepared Remarks of Melvin L. Watt, Director, FHFA, at American Mortgage Conference (May 18, 2017), https://goo.gl/tZKnFK. Director Watt's predecessor likewise told Congress that FHFA has a "conservatorship *mandate* to preserve and conserve the [Companies'] assets." Statement of Edward J. DeMarco Before the U.S. Senate Comm. on Banking, Housing and Urban Affairs 3 (Apr. 18, 2013), https://goo.gl/QI7V44 (emphasis added). Mr. DeMarco also said in 2011 that "[a]s conservator and regulator" one of FHFA's "principal mandates set forth in law" is to " '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.' " Edward J. DeMarco, FHFA Acting Director, The Conservatorships of Fannie Mae and

Freddie Mac: Current and Future Operations (Sept. 19, 2011), https://goo.gl/QxVDdv (quoting 12 U.S.C. § 4617(b)(2)(D)). Indeed, outside of the context of litigation, FHFA has repeatedly and consistently evinced an understanding that Section 4617(b)(2)(D) is mandatory. *See, e.g.*, ROA.30 ("The statutory role of FHFA as conservator *requires* FHFA to take actions to preserve and conserve the assets of the Enterprises and restore them to safety and soundness." (emphasis added) (quoting FHFA 2009 Annual Report to Congress)); *id.* (referring to the " 'preserve and conserve' mandate" (quoting 2012 FHFA Strategic Plan)); 76 Fed. Reg. at 35,727 ("[T]he Conservator is *charged* with rehabilitating the regulated entity." (emphasis added)); Conservatorship & Receivership, 75 Fed. Reg. 39,462, 39,469 (July 9, 2010) (acknowledging "the Conservator's *mandate* to put the regulated entity in a sound and solvent condition and to preserve and conserve the assets and property of the regulated entity" (emphasis added)); FHFA STRATEGIC PLAN: FISCAL YEARS 2015-2019 at 5, 14 (Nov. 21, 2014), https://goo.gl/MdZ6TB ("FHFA, acting as conservator and regulator, must follow the *mandates* assigned to it by statute . . . . FHFA's authority as both conservator and regulator of the Enterprises is based upon *statutory mandates* enacted by Congress to ensure a liquid, efficient, competitive, and resilient national housing finance market, ensure safe and sound Enterprise operations, as well as to preserve and conserve their assets.").

Notably, in a recent brief to the Eighth Circuit Treasury stated 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 conceded 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). Section 4617(b)(2)(D) begins with the exact same words, yet the *Perry Capital* majority interpreted these words to permit but not require FHFA to preserve and conserve the Companies' assets and restore them to soundness and solvency.

b. The *Perry Capital* majority also relied on FHFA's "[i]ncidental power[ ] . . . as conservator or receiver" to "take *any action authorized by this section*, which the Agency determines is in the best interests of the regulated entity or the Agency." 12 U.S.C. § 4617(b)(2)(J) (emphasis added); *see Perry Capital*, 848 F.3d at 1089, 1094. But as the italicized language makes clear, this incidental power is limited to actions otherwise authorized by HERA and thus may not be exercised in a manner that is at odds with FHFA's core conservatorship mission to preserve and conserve the Companies' assets.

This interpretation is reinforced by the fact that the incidental power is expressly granted to FHFA "*as conservator or receiver*"—terms that have a well-established common law meaning. Supreme Court precedent "requires *an affirmative act by Congress* . . . to authorize departure from a common law definition," *Perry Capital*, 848 F.3d at 1123 (Brown, J., dissenting) (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *see also, e.g.*, *Universal Health Servs. v. United States*, 136 S. Ct. 1989, 1999 (2016), and Congress's conferral of authority that is "incidental" to others specifically enumerated does not come close to satisfying that requirement, *cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819) ("[A] great substantive and independent power . . . cannot be implied as incidental to other powers, or used as a means of executing them."); *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").[5] Thus, while the incidental powers provision may allow FHFA to

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[5] For similar reasons, FHFA's pursuit of its conservatorship mission is not optional because it is empowered to "[o]perate" the Companies, "transfer" their assets, and "carry on" and "conduct" their business. 12 U.S.C. §§ 4617(b)(2)(B), (b)(2)(G), (b)(2)(J). These statutory powers are given to FHFA "as conservator," and therefore must be exercised in a manner consistent with the core conservatorship mission specified in Section 4617(b)(2)(D). *See FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1057-58 (N.D. Ill. 2013) ("As conservator, FHFA has broad powers to operate Fannie and Freddie and do what it sees fit to '*preserve and conserve*

take its own interests *as conservator* into account when deciding what actions to take, it does not allow FHFA to abandon its conservatorship mission in pursuit of other, unrelated interests it may have, such as its Director's desire to pursue his preferred vision for housing finance reform.

In all events, there is nothing in the Complaint to support the conclusion that FHFA ever "determine[d]" that the Net Worth Sweep was "in the best interests of the [Companies] or the Agency." 12 U.S.C. § 4617(b)(2)(J)(ii). To the contrary, the Net Worth Sweep was adopted to harm Fannie's and Freddie's shareholders and prevent the Companies from rehabilitating, not to promote the interests of the Companies or FHFA as conservator. *See* ROA.74-75. When FHFA agreed to the Net Worth Sweep, it fully understood that by its very design the Net Worth Sweep would forever place the Companies in an unsound condition and make it impossible for FHFA to achieve its conservatorship mission of rehabilitating them. ROA.45-49. Indeed, FHFA's Director has described the Companies' lack of capital due to the Net Worth Sweep as a "serious risk" because it leaves the Companies with "no ability to weather quarterly losses." ROA.60. More recently, Director Watt testified that "[l]ike any business, the Enterprises need some kind of buffer to shield against short-term operating losses" and highlighted that the lack of any capital buffer "is

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[their] assets.' ") (emphasis added) (quoting 12 U.S.C. § 4617(c)(2), (b)(2)(D)(ii)); *cf*. *Leon County*, 700 F.3d at 1278-79.

especially irresponsible" because it "could erode investor confidence . . . stifle liquidity in the mortgage-backed securities market and could increase the cost of mortgage credit for borrowers." Statement of Melvin L. Watt, https://goo.gl/dUC0oj. Contrary to the *Perry Capital* majority's assumption, FHFA's "interests" as conservator do not include giving away the Companies' assets or otherwise abandoning its statutory mission.

c. Troublingly, the *Perry Capital* majority's sweeping conclusion that FHFA need not pursue the ends of a traditional conservator—and, indeed, may effectively do with the Companies whatever it wants—raises grave doubts about Section 4617's constitutionality under the nondelegation doctrine. Virtually every provision in HERA that discusses the conservator's responsibilities begins with the word "may," and if that word makes everything that follows optional, there is nothing left in the statute instructing FHFA as to how it should exercise its discretion as conservator. A statute that provides "literally no guidance for the exercise of discretion" is unconstitutional, *Whitman*, 531 U.S. at 474, and the *Perry Capital* majority's interpretation causes HERA to run afoul of that important principle.

The Supreme Court has repeatedly adopted "narrow constructions to statutory delegations that might otherwise" violate the nondelegation doctrine. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989); *see Jackson v. Stinnett*, 102 F.3d 132, 135 n.3 (5th Cir. 1996). In *Fahey v. Mallonee*, 332 U.S. 245, 250-53 (1947), for

example, a statute did not specify the criteria a bank regulator should use when deciding whether to place banks into conservatorship. In rejecting a nondelegation challenge to this statutory scheme, the *Fahey* Court interpreted the statute as implicitly adopting the "many precedents [that] have crystallized into well-known and generally acceptable standards" for the appointment of conservators. *Id.* at 250. While *Fahey* read background principles of conservatorship *into* a statute to *avoid* a nondelegation problem, the *Perry Capital* majority did the opposite—reading the word "may" to nullify the mission actually specified in the statute and thus leaving the conservator with no guidance from Congress as to how it should exercise its powers. This constitutional flaw in the statute as interpreted by the *Perry Capital* majority is made even more problematic by Section 4617(f)'s restriction on judicial review. *See United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994) (observing that the availability of judicial review "is a factor weighing in favor of upholding a statute against a nondelegation challenge"). And, as discussed above, the absence of meaningful direction from Congress or oversight by the courts makes FHFA's lack of accountability to the President even more constitutionally problematic. The Court should avoid these constitutional problems by declining to follow the *Perry Capital* majority's decision to "erase[ ] any outer limit to FHFA's statutory powers." *Perry Capital*, 848 F.3d at 1123 (Brown, J., dissenting).

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

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

It is beyond cavil that the Net Worth Sweep depletes the Companies' capital, a consequence that FHFA's regulations rightly declare "inconsistent with [its] statutory goals." 76 Fed. Reg. at 35,727. Rather than allow the Companies to retain and build up their capital, the Net Worth Sweep siphons off every dollar belonging to the Companies into Treasury's coffers, precluding them from strengthening along with the improving housing market. Indeed, Treasury made clear in publicly announcing the Net Worth Sweep that its purpose was to prevent the Companies from "retain[ing] profits" or "rebuild[ing] capital." ROA.72. The Net Worth Sweep is thus antithetical to FHFA's mission to "preserve and conserve the assets and property" of the Companies. 12 U.S.C. § 4617(b)(2)(D)(ii).

This permanent dissipation of capital also violates FHFA's obligation to seek to "put the [Companies] in a sound and solvent condition." *Id.* § 4617(b)(2)(D)(i). As FHFA has acknowledged, capital reserves are a critical aspect of soundness and solvency. ROA.60, 69-70. Capital is the standard by which "soundness" is measured by federal regulators of all financial institutions. Such reserves serve as a buffer against the inevitable vicissitudes of the economic cycle that affect all financial institutions. Institutions with sufficient capital are deemed safe, and those without are deemed unsound.

Furthermore, although the district court characterized the Net Worth Sweep as ensuring that the Companies "would no longer incur additional debt in order to make their quarterly dividend payments," ROA.952, the opposite is true. Because many of the Companies' assets are valued based on assumptions about future financial performance or fluctuating market prices, increases in the Companies' net worth do not necessarily reflect increased cash on hand. Recognizing deferred tax assets, for example, is an accounting decision that does not generate any cash. A cash dividend based solely on net worth may thus require financing through new borrowing. Indeed, the Companies incurred substantial additional debt in 2013 in order to pay cash dividends to Treasury under the Net Worth Sweep. *See* ROA.77-78. Ordering the Companies to weaken their financial position by paying debt-financed dividends when they are in conservatorship is financially reckless and at

war with FHFA's conservatorship mission.

The *Perry Capital* majority discounted these points by characterizing the Net Worth Sweep as "ensuring ongoing access to vital yet hard-to-come-by capital" by ending the circular practice of borrowing money from Treasury to pay dividends. *Perry Capital*, 848 F.3d at 1088. This defense of the Net Worth Sweep contradicts the allegations in the Complaint. But for the Net Worth Sweep, the Companies would today have approximately $130 billion in capital that they have instead turned over to Treasury. *See* FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, https://goo.gl/vHl8V0. The Defendants were fully aware that the Net Worth Sweep would have this effect on the Companies' finances. ROA.45-54. Without the $130 billion in capital the Companies have transferred to Treasury due to the Net Worth Sweep, they are *more*, not less, likely to need to draw on Treasury's commitment in the future. Moreover, the original terms of Treasury's stock posed no threat to the funding commitment because the Companies always had the ability to pay Treasury's dividends in kind, and doing so would not have reduced the funding commitment. The Defendants have repeatedly acknowledged the viability of the payment in kind option outside of litigation. *See* ROA.36-38.

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

The avowed purpose and indisputable effect of the Net Worth Sweep is to "expedite the wind down of Fannie Mae and Freddie Mac" and to ensure that these

two companies "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." ROA.72 (quoting Treasury Net Worth Sweep Press Release). As Acting FHFA Director DeMarco explained shortly after the Net Worth Sweep went into effect, it "reinforce[s] the notion that the [Companies] will not be building capital as a potential step to regaining their former corporate status." ROA.74 (second alteration in original).

FHFA exceeded its conservatorship powers by taking this step toward wind down without first placing the Companies into receivership, for "only receivers have the power to liquidate a failed [financial institution]." *McAllister*, 201 F.3d at 578; *see CedarMinn*, 956 F.2d at 1454 (emphasizing the "distinction in the roles between conservator and receiver" under FIRREA and explaining that a conservator is required to "conduct an institution as an ongoing business"); *Perry Capital*, 848 F.3d at 1119, 1123 (Brown, J., dissenting).[6] FHFA thus impermissibly abandoned its conservatorship duty to "rehabilitate" the Companies. *See* 76 Fed. Reg. at 35,727, 35,730; *see also* ROA.72-73 (quoting Treasury document acknowledging that "the

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

path laid out under HERA" is for the Companies to "becom[e] adequately capitalized" and "exit conservatorship as private companies").

The *Perry Capital* majority rejected this argument, reasoning that there is no "rigid boundary between the conservator and receiver roles." *Perry Capital*, 848 F.3d at 1091. But this Court has taken care to honor the distinct roles Congress created for conservators and receivers under materially identical provisions of FIRREA, recognizing that "a conservator, by definition, does not incur any expenses of liquidation." *McAllister*, 201 F.3d at 578; *see also CedarMinn*, 956 F.2d at 1452, 1454. In HERA, Congress authorized FHFA to act "as conservator *or* receiver," 12 U.S.C. § 4617(a) (emphasis added); whichever choice FHFA made had corresponding limits and obligations imposed by Congress.

By allowing FHFA to wind down the Companies and distribute their assets to a favored stakeholder during conservatorship, the *Perry Capital* majority's contrary reading of HERA provides a mechanism by which FHFA could effect an end run around the statute's procedures for resolving claims against the Companies during liquidation. *See* 12 U.S.C. § 4617(b)(3)-(9), (c). For example, by winding down the Companies during conservatorship, FHFA could transfer the Companies' assets to shareholders or subordinated debtholders before paying general creditors, in direct contravention of 12 U.S.C. § 4617(c)(1). The Supreme Court recently rejected a

similar attempt to evade the statutory order of priorities in the bankruptcy context. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017).

The procedures FHFA must follow when winding up the Companies during receivership ensure that the receiver "fairly adjudicat[es] claims against failed financial institutions," *Whatley v. RTC*, 32 F.3d 905, 909-10 (5th Cir. 1994), and may well be constitutionally required to afford due process, *see Greater Slidell Auto Auction, Inc. v. American Bank & Tr. Co. of Baton Rouge*, 32 F.3d 939, 942 (5th Cir. 1994). Congress's failure to specify wind up procedures or an order of priorities for the distribution of assets during conservatorship reflects its understanding that as conservator FHFA's mission is to preserve and conserve the Companies' assets rather than to wind them down.

To be sure, Section 4617(a)(2) states that FHFA may "be appointed conservator *or* receiver for the purpose of *reorganizing*, *rehabilitating*, or *winding up* the affairs of a regulated entity." But this provision cannot plausibly be read to suggest that all of the powers it articulates belong to both conservators and receivers. HERA, caselaw, commentators, and dictionaries all use "liquidation" and "wind up" synonymously.[7] Liquidation is exclusively the province of a receiver, as both

[7] For example, HERA imposes specific requirements on FHFA when it initiates "the *liquidation* or *winding up* of the [Companies'] affairs." 12 U.S.C. § 4617(b)(3)(B) (emphasis added). Caselaw holds that the purpose of a receivership is "to expeditiously 'wind up the affairs of failed banks.' " *Freeman v. FDIC*, 56

HERA's text and FHFA's regulations provide. *See* 12 U.S.C. § 4617(b)(2)(E); 12 C.F.R. § 1237.3(b). And given that liquidating the Companies is beyond FHFA's powers as conservator, "winding [them] up" must also exceed these powers.

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

F.3d 1394, 1401 (D.C. Cir. 1995) (quoting *Local 2 v. FDIC*, 962 F.2d 63, 64 (D.C. Cir. 1992)). Treatises explain that receivers "liquidate the institution and wind up its affairs." Donald Resseguie, *Banks & Thrifts: Government Enforcement & Receivership* § 11.01 (2013). Dictionaries define "liquidation" and "winding up" virtually synonymously. *Compare* BLACK'S LAW DICTIONARY 1738 (10th ed. 2014) (winding up: "The process of settling accounts and liquidating assets in anticipation of a partnership's or a corporation's dissolution."), *with* OXFORD ENGLISH DICTIONARY ONLINE (Dec. 2013) (liquidation, n.: "The action or process of winding up the affairs of a company").

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

Separate from their claims against FHFA, Plaintiffs claim that Treasury acted arbitrarily and capriciously by agreeing to the Net Worth Sweep and violated provisions of HERA that limit what Treasury may do with the Companies' securities after 2009. ROA.83-88; 12 U.S.C. §§ 1455(*l*), 1719(g). Following the *Perry Capital* majority, the district court concluded that Section 4617(f) bars such claims. But Section 4617(f) does not apply to federal agencies other than FHFA.

There is a " 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015); *see Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993). Applying that presumption, this Court has declined to extend Section 4617(f)'s FIRREA analogue to cases in which the FDIC acts in its corporate capacity because the limitation on judicial review does not "clearly and unambiguously" apply in that context. *Sierra Club v. FDIC*, 992 F.2d 545, 548-51 (5th Cir. 1993). Even though HERA specifically contemplates that both FHFA and Treasury would take action with respect to the Companies, Congress chose to circumscribe judicial review *only as to FHFA*; Section 4617(f) does not clearly and unambiguously apply to Treasury. *See Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 341 (2005).

Far from the clear and convincing evidence required to displace the presumption in favor of the reviewability of Treasury's actions, HERA's text

requires that the Secretary of the Treasury make specified findings and consider certain factors before purchasing the Companies' securities. 12 U.S.C. §§ 1455(*l*)(1)(B)-(C), 1719(g)(1)(B)-(C). HERA also strictly limits what Treasury may do with the Companies' securities after 2009. 12 U.S.C. §§ 1455(*l*)(4), 1719(g)(4). Congress plainly did not intend for these limits on Treasury's investment authority to be meaningless during conservatorship.

The *Perry Capital* majority ruled that Section 4617(f) applies because Treasury's decision to impose the Net Worth Sweep is "integrally and inextricably interwoven with FHFA's conduct as conservator." *Perry Capital*, 848 F.3d at 1097. But the question is whether enjoining Treasury from violating HERA would "restrain or affect the exercise" of FHFA's conservatorship "powers or functions," 12 U.S.C. § 4617(f), and unilaterally amending the PSPAs is not among FHFA's "powers or functions." Rather, the Net Worth Sweep could have only been imposed with Treasury's consent. Insisting that Treasury comply with *its own* legal obligations when deciding whether to consent to a change to the PSPAs no more restrains or affects *FHFA's* conservatorship powers than would Treasury refusing to agree to a modification in the first place.

The more sweeping interpretation of Section 4617(f) embraced by the *Perry Capital* majority is especially anomalous in light of its acknowledgement that FHFA may be enjoined from exceeding its conservatorship powers under HERA. Surely

Congress did not intend for Section 4617(f) to bar claims that Treasury exceeded its authority under HERA when similar claims against the conservator itself may go forward, as even the district court in *Perry Capital* understood. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 222 (D.D.C. 2014) (reasoning that Section 4617(f) bar would not apply when FHFA "signs a contract with another government entity that is acting beyond the scope of its HERA powers"). Notably, under Treasury's reading of the statute, no court could restrain it from openly purchasing new securities issued by the Companies in 2017 even though such purchases would blatantly violate HERA's sunset provision.

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

Rather than the claims at issue in *Dittmer*, Plaintiffs' claims against Treasury are most similar to the APA claims against the Federal Home Loan Bank Board that this Court said could go forward in *281-300 Joint Venture v. Onion*, 938 F.2d 35, 38 (5th Cir. 1991). In that case, the Bank Board determined that a failed financial institution did not have sufficient assets to pay unsecured creditors. Although this Court ruled that the plaintiff could not collaterally attack the Bank Board's determination by suing the federal conservator for its refusal to pay unsecured creditors, it nevertheless said that the Bank Board's determinations "are subject to review under the Administrative Procedure Act." *Id.* In the same way here, Section 4617(f) does not prevent Plaintiffs from directly suing Treasury for violating its own legal obligations.

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

Before the district court, Defendants argued that Plaintiffs' APA claims are derivative and that all derivative claims are transferred to FHFA during conservatorship by HERA's Succession Clause, which provides that as conservator FHFA "immediately succeed[s] to . . . all rights, titles, powers, and privileges . . . of any stockholder . . . with respect to" the Companies. 12 U.S.C. § 4617(b)(2)(A). Notably, the *Perry Capital* court did not embrace this argument even though it was pressed by Treasury and, had it been accepted, would have obviated the divided panel's need to prepare lengthy competing opinions on the meaning of Section

4617(f). For the reasons explained below, HERA's Succession Clause does not provide an alternative basis for affirming the district court's dismissal of Plaintiffs' APA claims.

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

Whether Plaintiffs' APA claims are claims "with respect to" the Companies within the meaning of Section 4617(b)(2)(A) is a question of federal law. Courts tasked with applying this provision and its FIRREA analogue have focused on the distinction between direct and derivative claims. *See, e.g.*, *Perry Capital*, 848 F.3d at 1105; *Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014). The closely related shareholder standing rule—one of "the prudential requirements of the standing doctrine"—"generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." *Franchise Tax Bd. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990). "There is, however, an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated." *Id.* As with other applications of third-party standing doctrine, determining whether a litigant has a sufficiently direct, personal interest to obviate the need to sue derivatively is "closely related to the question whether a person in the litigant's position would have a right of action on the claim." *Department of Labor v. Triplett*,

494 U.S. 715, 721 n.** (1990).

The direct or derivative nature of Plaintiffs' APA claims thus ultimately turns on whether Plaintiffs are entitled to sue on behalf of themselves and not the Companies under the APA's "generous review provisions." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395 (1987). They clearly are. The APA confers a cause of action on any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, thus sweeping away more demanding prudential standing requirements and giving personal rights to anyone who is " 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)); *see FAIC Sec., Inc. v. United States*, 768 F.2d 352, 357 (D.C. Cir. 1985) (Scalia, J.) (explaining that through the APA "Congress itself has pared back traditional prudential limitations" on standing). Litigants who themselves fall within the zone of interests have direct, personal rights under the APA and thus need not demonstrate third-party standing or comply with the procedural requirements for suing derivatively. *Cf. Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 (D.C. Cir. 1987) (Bork, J.); *FAIC*, 768 F.2d at 357.

Plaintiffs' APA claims easily satisfy the zone of interests test. As

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

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

While Plaintiffs' APA claims are direct without regard to state law, Plaintiffs note that Delaware law would likewise treat these claims as direct. Delaware courts tasked with deciding whether a claim is direct or derivative begin by looking to "the laws governing" the claim in question. *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1126 (Del. 2016). Where, as here, the substantive law that gives rise to a claim provides that the claim "belong[s] to the stockholder," the claim is direct without the need for any further inquiry. *Id.*

Defendants contested this point before the district court, contending that the nature of Plaintiffs' claims should be analyzed under *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004). But *Tooley* is not "a general statement

requiring all claims, whether based on a tort, contract, or statutory cause of action (e.g., antitrust), to be brought derivatively whenever the corporation of which the plaintiff is a stockholder suffered the alleged harm." *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 (Del. 2015). "Before evaluating a claim under *Tooley*," under Delaware law "a more important initial question has to be answered: does the plaintiff seek to bring a claim belonging to her personally or one belonging to the corporation itself?" *Citigroup*, 140 A.3d at 1127 (quotation marks omitted), for "when a plaintiff asserts a claim based upon the plaintiff's own right . . . *Tooley* does not apply," *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1259 (Del. 2016); *accord Perry Capital*, 848 F.3d at 1108 (ruling that contract claims were direct because they "belong to" shareholders and therefore declining to "subject them to the two-part test set forth in *Tooley*").

Furthermore, even if the *Tooley* test did apply, Plaintiffs' claims would still be direct. The basic harm for which Plaintiffs seek redress—the unlawful transfer of the entire value of their stock to a dominant shareholder—was suffered by Plaintiffs directly. That injury "is not dependent on an injury to [either] corporation." *Tooley*, 845 A.2d at 1036.

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

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

whether to sue itself and Treasury.

Before Congress enacted HERA, both the Federal and Ninth Circuits had interpreted 12 U.S.C. § 1821(d)(2)(A)(i), the provision of FIRREA on which HERA's Succession Clause was modeled, as permitting shareholders to maintain a derivative suit when the conservator or receiver has a manifest conflict of interest. *See First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1283 (Fed. Cir. 1999); *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1024 (9th Cir. 2001); *see also Suess v. United States*, 33 Fed. Cl. 89, 94-96 (1995); *Branch v. FDIC*, 825 F. Supp. 384, 405 (D. Mass. 1993). When Congress reenacted substantially the same language in HERA, it must be presumed to have adopted these consistent judicial constructions. *See Bragdon*, 524 U.S. at 645.

In declining to follow *First Hartford* and *Delta Savings Bank* and dismissing derivative fiduciary duty claims, the *Perry Capital* majority concluded that "two circuit court decisions" are not enough to "settle the meaning of the existing statutory provision" such that Congress should be understood to have adopted the prior rulings when it reenacted the same language. *Perry Capital*, 848 F.3d at 1106 (alterations omitted). But other courts apply the canon under circumstances similar to those presented here. *See, e.g.*, *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1111 (8th Cir. 2016); *Elkimya v. Department of Homeland Sec.*, 484 F.3d 151, 154 (2d Cir. 2007); *PDV Midwest Ref., LLC v. Armada Oil & Gas Co.*, 305 F.3d 498, 512 (6th Cir.

2002); *cf. United States v. Barlow*, 41 F.3d 935, 943 (5th Cir. 1994) ("When Congress enacts laws, it is presumed to be aware of all pertinent judgments rendered by our branch."). Moreover, given the importance of financial markets' "settled expectations" in this sensitive area and Congress's manifest intent to reassure investors by including in HERA conservatorship provisions modeled on the familiar provisions of FIRREA, *see Perry Capital*, 848 F.3d at 1127 (Brown, J., dissenting), prior judicial constructions of FIRREA deserve particular weight when interpreting HERA.

In any event, *First Hartford* and *Delta Savings Bank* were correctly decided. Another provision of HERA explicitly contemplates that during conservatorship a "regulated entity" may sue "for an order requiring the Agency to remove itself as conservator," 12 U.S.C. § 4617(a)(5). Since FHFA controls the Companies during conservatorship and the Constitution would not permit FHFA to sue itself, this provision would be meaningless if shareholders could not sue the conservator derivatively on behalf of the Companies. *See United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 430 (1949) (recognizing the "general principle that no person may sue himself"); *SEC v. Federal Labor Relations Auth.*, 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring). HERA's Succession Clause, moreover, does not purport to *eliminate* any shareholder rights but only provides that FHFA temporarily "succeed[s]" to them. For this reason as well, HERA should not

be read as making FHFA the "successor" to rights it cannot exercise. *See Delta Savings*, 265 F.3d at 1024; *cf. Kowalski*, 543 U.S. at 129-30 (there are "circumstances where it is necessary to grant a third party standing to assert the rights of another" due to inability of third party to vindicate its own rights).

CONCLUSION

The district court's judgment should be reversed.

Date: July 19, 2017

Respectfully submitted,

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STATUTORY ADDENDUM

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§ 1821 Insurance Funds

. . . .

(j) Limitation on court action

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

12 U.S.C. § 4617

§ 4617 Authority over critically undercapitalized regulated entities

(a) Appointment of the Agency 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.

. . . .

(b) Powers and duties of the 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

. . . .

(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.

(E) Additional powers as receiver

In any case in which the Agency is acting as receiver, the Agency shall place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity in such manner as the Agency deems appropriate, including through the sale of assets, the transfer of assets to a limited-life regulated entity established under subsection (i), or the exercise of any other rights or privileges granted to the Agency under this paragraph.

. . . .

(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.

. . . .

(3) Authority of receiver to determine claims

. . . .

(B) Notice requirements

The receiver, in any case involving the liquidation or winding up of the affairs of a closed regulated entity, shall—

(i) promptly publish a notice to the creditors of the regulated entity to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the date of publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the date of publication under clause (i).

. . . .

(c) Priority of expenses and unsecured claims

(1) In general

Unsecured claims against a regulated entity, or the receiver therefor, that are proven to the satisfaction of the receiver shall have priority in the following order:

(A) Administrative expenses of the receiver.

(B) Any other general or senior liability of the regulated entity (which is not a liability described under subparagraph (C) or (D).

(C) Any obligation subordinated to general creditors (which is not an obligation described under subparagraph (D)).

(D) Any obligation to shareholders or members arising as a result of their status as shareholder or members

. . . .

(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.

. . . .

(i) Limited-life regulated entities

(1) Organization

(A) Purpose

The Agency, as receiver appointed pursuant to subsection (a)—

. . . .

(ii) shall, in the case of an enterprise, organize a limited-life regulated entity with respect to that enterprise in accordance with this subsection.

. . . .

(6) Winding up

(A) In general

Subject to subparagraphs (B) and (C), not later than 2 years after the date of its organization, the Agency shall wind up the affairs of a limited-life regulated entity.

(B) Extension

The Director may, in the discretion of the Director, extend the status of a limited-life regulated entity for 3 additional 1-year periods.

. . . .

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(g), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 12,999 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 using the 2016 version of Microsoft Word in 14-point Times New Roman font.

Dated: July 19, 2017

s/ Charles J. Cooper
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Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on July 19, 2017 by using the appellate CM/ECF system. I certify that service will be accomplished on July 19, 2017 by the appellate CM/ECF system on the following:

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