No. 17-1880

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHRISTOPHER M. ROBERTS and THOMAS P. FISCHER

Plaintiffs-Appellants,

v.

FEDERAL HOUSING FINANCE AGENCY; MELVIN L. WATT, in his official capacity as Director of the Federal Housing Finance Agency; UNITED STATES DEPARTMENT OF THE TREASURY; and STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS (No. 1:16-cv-02107)
HONORABLE EDMOND E. CHANG

BRIEF FOR THE TREASURY DEPARTMENT

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INTRODUCTION

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

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

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

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

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

2. Plaintiffs do not dispute that Treasury's ongoing commitment is vital to the enterprises or that the Third Amendment ended the practice of drawing on the commitment to pay dividends. They nevertheless assert that that the Third Amendment was unlawful and seek injunctive and declaratory relief.

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

Second, under HERA, FHFA as conservator succeeded to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder[.]" 12 U.S.C.

§ 4617(b)(2)(A)(i). This provision "plainly transfers to the FHFA the shareholders' ability to bring derivative suits on behalf of [the enterprises]." *Perry Capital,* 848 F.3d at 1104. Plaintiffs' APA claims assert injury to the enterprises; they suffer their alleged injury derivatively as shareholders; and their actions fall squarely within the transfer-of-shareholder-rights provision.

STATEMENT OF JURISDICTION

The jurisdictional summary in the opening brief is not complete and correct. *See* 7th Cir. R. 28(b). Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. A16-17. The district court granted the defendants' motion to dismiss the suit, and entered final judgment on March 20, 2017. SA24. A timely notice of appeal was filed on April 27, 2017. Dkt. No. 65. This Court has jurisdiction over this appeal of the district court's final judgment. 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

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

2. Whether plaintiffs' claims against Treasury would fail as a matter of law even if they were not barred by HERA.

STATEMENT OF THE CASE

A. Fannie Mae and Freddie Mac

Congress created Fannie Mae and Freddie Mac to, among other things, "promote access to mortgage credit throughout the Nation . . . by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." 12 U.S.C. § 1716(4); *see* SA3. These government-sponsored enterprises provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. The enterprises finance these purchases by borrowing money in the credit markets and by packaging many of the loans they buy into mortgage-backed securities, which they sell to investors. *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1080 (D.C. Cir. 2017).

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

B. The 2008 Housing Crisis and HERA

With the 2008 collapse of the housing market, Fannie Mae and Freddie Mac experienced overwhelming losses due to a dramatic increase in default rates on residential mortgages. *Perry Capital*, 848 F.3d at 1080; *see also DeKalb Cty. v. FHFA*, 741 F.3d 795, 798 (7th Cir. 2013) (From 1995 through the early 2000s, the enterprises "bought risky mortgages and got caught up in the housing bubble; and when the bubble burst found [themselves] owning an immense inventory of defaulted and overvalued subprime mortgages."). At the time, the enterprises owned or guaranteed over $5 trillion of residential mortgage assets, representing nearly half the United States mortgage market. *Perry Capital*, 848 F.3d at 1080. Their failure would have had a catastrophic impact on the national housing market and economy.

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

In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654. *See* SA4. The legislation created

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

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

FHFA as an independent agency to supervise and regulate the enterprises, and granted FHFA the authority to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a). FHFA's authority to appoint itself conservator or receiver is generally discretionary, *id.* § 4617(a)(2), but it must place the enterprises into receivership if it determines that the enterprises' assets have been worth less than their obligations for 60 calendar days, *id.* § 4617(a)(4).

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

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

C. Conservatorship and the Preferred Stock Purchase Agreements

FHFA placed the enterprises in conservatorship on September 6, 2008. SA6. One day later, Treasury purchased senior preferred stock in each entity. *Id.* Under the Preferred Stock Purchase Agreements (Purchase Agreements), Treasury committed to provide up to $100 billion in taxpayer funds to each enterprise to maintain their solvency by ensuring that their assets were at least equal to their liabilities. SA6.

The Purchase Agreements entitled Treasury to four principal contractual rights. SA7. First, Treasury received preferred stock with a senior liquidation preference of

$1 billion for each enterprise plus a dollar-for-dollar increase each time the enterprises drew upon Treasury's funding commitment. *Id.*[3] Second, Treasury was entitled to quarterly dividends equal to 10% of Treasury's total liquidation preference. *Id.* Third, Treasury received warrants to acquire up to 79.9% of the enterprises' common stock at a nominal price. *Id.* Fourth, beginning in 2010, Treasury would be entitled to a periodic commitment fee. *Id.* Treasury could waive the commitment fee for one year at a time based on adverse conditions in the United States mortgage market. *See id.* n.6 (explaining that Treasury "repeatedly exercised its option under the stock purchase agreements to waive the commitment fee").

Treasury's initial funding commitment soon appeared to be inadequate. In May 2009, FHFA and Treasury agreed to double Treasury's funding commitment from $100 billion to $200 billion for each enterprise. SA7; *Perry Capital*, 848 F.3d at 1082.

In December 2009, in the face of ongoing losses, it appeared that even the $200 billion per enterprise funding commitment might be insufficient. Treasury and FHFA therefore amended the Purchase Agreements for a second time to allow the enterprises to draw unlimited amounts from Treasury to cure net-worth deficits until the end of 2012, at which point Treasury's funding commitment would be fixed. SA7.

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

As of June 30, 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment, *see* SA8, making Treasury's liquidation preference $189.5 billion, including the initial $1 billion senior liquidation preference for each enterprise. *Perry Capital*, 848 F.3d at 1082. Under the terms of the original Purchase Agreements, the enterprises' dividend obligations to Treasury were thus nearly $19 billion per year.

Between 2009 and 2011, the enterprises could not pay these substantial dividend obligations out of their earnings. *Perry Capital*, 848 F.3d at 1079, 1083. The enterprises thus drew on Treasury's funding commitment to meet those obligations. *Id.* at 1079. Through the first quarter of 2012, Fannie Mae had drawn $19.4 billion and Freddie Mac had drawn $7 billion, just to pay the dividends they owed Treasury. *Perry Capital*, 70 F. Supp. 3d at 218; *see* SA8. Those draws increased Treasury's liquidation preference, thus increasing the amount of dividends the enterprises owed. As their SEC filings reflect, the enterprises anticipated that they would not be able to pay their 10% dividends to Treasury without drawing on Treasury's funding commitment in the future. *See* Fannie Mae, 2012 Q2 Quarterly Report (Fannie Mae 10-Q) (Aug. 8, 2012) at 12; Freddie Mac, 2012 Q2 Quarterly Report (Freddie Mac 10-Q) (Aug. 7, 2012) at 10; *Perry Capital*, 848 F.3d at 1093. Indeed, the $11.7 billion Fannie Mae owed annually was more than the enterprise had made in any year of its existence. *See* Fannie Mae 10-Q at 4. The $7.2 billion that Freddie Mac owed annually was more than it had made in all but one year. Freddie Mac 10-Q at 8.

D. The Third Amendment

On August 17, 2012, Treasury and FHFA agreed to modify the Purchase Agreements for a third time. This "Third Amendment" ended the draws-to-pay dividends cycle by replacing the previous fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth for the quarter exceeds a capital buffer. (The capital buffer, initially set at $3 billion, gradually declines over time, reaching zero in 2018). SA8-9. Under the Third Amendment, the amount of the enterprises' dividend obligations thus depends on whether the enterprises have a positive net worth during a particular quarter, rather than being fixed at 10% of Treasury's existing liquidation preference. If the enterprises have a negative net worth, they pay no dividend.[4]

By exchanging a fixed dividend for a variable one, Treasury accepted more risk under the Third Amendment. In fact, Treasury received less in dividends in 2015 ($15.8 billion) and 2016 ($14.6 billion) than it would have under the original 10% dividend ($18.9 billion). FHFA, *Table 2: Dividends on Enterprise Draws from Treasury*;[5] *see also Perry Capital*, 848 F.3d at 1083. In 2013 and 2014, however, the enterprises' net worth was substantially higher than expected. The increase in net worth was due in

[4] Treasury also agreed to suspend the periodic commitment fee it was owed under the original Purchase Agreements for as long as the variable dividend was in place. *See* A58.

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

part to a rebound in housing prices and, more importantly, to non-recurring events, including the enterprises' one-time recognition of deferred tax assets that they had previously written off. OIG, FHFA, *The Continued Profitability of Fannie Mae and Freddie Mac Is Not Assured* 7-8 (Mar. 18, 2015).[6] Through the end of 2016, Treasury has received $255 billion in cumulative dividends from the enterprises, in return for its $187.5 billion investment and ongoing commitment. FHFA, *Table 2: Dividends on Enterprise Draws from Treasury*.

E. District Court Proceedings

Plaintiffs are GSE stockholders who brought suit under the Administrative Procedure Act (APA), arguing that, in agreeing to the Third Amendment, (1) FHFA exceeded its authority as conservator under HERA, A76-78, (2) Treasury exceeded its authority under HERA, and (3) Treasury acted arbitrarily and capriciously, A78-84.

Treasury and FHFA moved to dismiss the suit, arguing that HERA's anti-injunction provision, 12 U.S.C. § 4617(f), and its transfer-of-shareholder-rights provision, *id.* § 4617(b)(2)(A)(i), independently bar plaintiffs' APA claims.

The district court granted the motions to dismiss, relying on HERA's anti-injunction provision, 12 U.S.C. § 4617(f). SA11. The court recognized that § 4617(f) effects "a sweeping ouster" of a court's authority to grant equitable relief that would affect actions taken by FHFA in its role as conservator. SA12 (quoting *Veluchamy v.*

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

FDIC, 706 F.3d 810, 817 (7th Cir. 2013)). Because such equitable relief was the only relief plaintiffs sought, the court reasoned, their claims were barred. SA14, 23.

The court noted that a narrow exception to § 4617(f)'s bar may exist where a plaintiff can show that FHFA acted beyond statutory or constitutional bounds, SA12, but explained that plaintiff had failed to make that showing. SA17-22. The court rejected plaintiffs' claim that FHFA violated 12 U.S.C. § 4617(a)(7), which provides that FHFA, when acting as conservator, "shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the agency." SA18. The court stressed that plaintiffs had "alleged no *facts* from which it can be reasonably inferred" that FHFA has "subjected itself to Treasury's will." SA18.

The court similarly rejected plaintiffs' claim that FHFA had violated its alleged "core statutory mandates" to "preserve and conserve" the GSEs' assets and to place them in a "sound and solvent condition." SA20. Plaintiffs' claim failed, the court concluded, because no such statutory mandates exist. *Id.* Moreover, even assuming HERA "required FHFA to take action to put Fannie and Freddie in a 'sound and solvent condition' and to 'preserve and conserve' their assets and property," FHFA's actions satisfied those conditions. SA21-22. Under FHFA's conservatorship, "the companies have returned to profitability," and "Treasury's funding commitment guarantees Fannie and Freddie will remain solvent." SA21. The court also emphasized that "nothing in the Act says that FHFA must preserve and conserve assets in order to guarantee that the companies can pay dividends to non-Treasury shareholders or can return to private control." SA21-22.

The court next ruled that plaintiffs could not circumvent § 4617(f)'s anti-injunction bar by suing Treasury as FHFA's contractual counterparty. SA15. The court observed that "[i]t takes two to tango," and that "undoing one side of the Third Amendment against Treasury necessarily affects FHFA." *Id.* The court also rejected plaintiffs' argument that Treasury violated HERA by purchasing new securities in the enterprises after Treasury's authority to make such purchases expired. SA22-23. The Third Amendment did not involve a "purchase" of new securities, but merely "substituted one dividend obligation for another." SA22.

SUMMARY OF ARGUMENT

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

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

Treasury or FHFA would "restrain or affect" the exercise of the conservator's powers.

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

2. Plaintiffs' claims against Treasury would fail even were they not barred by HERA. Treasury did not purchase new securities from the enterprises when it agreed to the Third Amendment: It obtained no new shares and obligated no additional funds. Rather, Treasury agreed to amend the compensation structure of the securities it already owned, an action well within its statutory authority.

STANDARD OF REVIEW

This Court reviews a district court's grant of a motion to dismiss de novo. *See Small v. Chao*, 398 F.3d 894, 897 (7th Cir. 2005).

ARGUMENT

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

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

Plaintiffs' claims are barred by 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator" of the GSEs. As the D.C. Circuit explained, HERA's anti-injunction provision "effect[s] a sweeping ouster of courts' power to grant equitable remedies" to parties challenging actions taken by FHFA as conservator. *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1087 (D.C. Cir. 2017) (quoting *Freeman v. FDIC,* 56 F.3d 1394, 1399 (D.C. Cir. 1995)). That holding accords with this Court's conclusion in *Courtney v. Halleran*, 485 F.3d 942, 948 (7th Cir. 2007), that the substantially identical anti-injunction provision under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821(j), "effects a sweeping ouster of courts' power to grant equitable remedies." *See also Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1016 (8th Cir. 2013) (Section 1821(j) "has been construed broadly to constrain the court's equitable powers."); *National Tr. for Historic Pres. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring) (Section 1821(j) "bar[s] a court from acting in virtually all circumstances.").

Judicial review is available under 12 U.S.C. § 4617(f), if at all, only in the rare case where FHFA unquestionably acts beyond statutory or constitutional bounds. *See*

Perry Capital, 848 F.3d at 1087. If FHFA is exercising a statutorily authorized power or function and the injunctive relief a plaintiff seeks would "restrain or affect" that exercise, § 4617(f) applies and the plaintiff's suit is barred. *Id.* at 1086-87; *see also Dittmer Props.*, 708 F.3d at 1017; *Bank of America Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010).

For the reasons explained in Part B, plaintiffs fall far short of making the showing necessary to circumvent § 4617(f)'s broad bar. Plaintiffs' challenge boils down to a disagreement over the manner in which FHFA executed its duties as conservator of the GSEs. They contend that FHFA restructured the enterprises' dividend obligations to Treasury when it did not need to do so, entered into a financially unsound agreement, failed to prioritize the build-up of capital, and placed too much weight on the risk of depleting Treasury's funding commitment. As several courts have held, § 4617(f) prohibits precisely such "second-guess[ing]" of "FHFA's business judgment that the Third Amendment better balances the interests of all parties involved." *Perry Capital*, 848 F.3d at 1095; *see also id.* at 1088-89 (Although the stockholders "no doubt disagree about the necessity and fiscal wisdom of the Third Amendment[,]. . . Congress could not have been clearer about leaving those hard operational calls to FHFA's managerial judgment."); *County of Sonoma v. FHFA*, 710 F.3d 987, 993 (9th Cir. 2013) ("[I]t is not our place to substitute our judgment for FHFA's."); *see also Bank of America*, 604 F.3d at 1244 (FIRREA's anti-injunction provision barred plaintiffs' claim, because claim was merely an allegation of "FDIC's improper performance of its legitimate receivership functions").

The applicability of the HERA bar does not depend, as plaintiffs suggest (Br.11, 46), on the rationale for actions taken by FHFA as conservator of the enterprises: "[F]or purposes of applying Section 4617(f)'s strict limitation on judicial relief, allegations of motive are neither here nor there"; nothing in HERA "hinges FHFA's exercise of its conservatorship discretion on particular motivations." *Perry Capital*, 848 F.3d at 1093; *see also* SA16; FHFA Br. Pt. I.C.

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

1. FHFA acted well within the scope of its statutory powers when it entered into the Third Amendment. HERA "endows FHFA with extraordinarily broad flexibility to carry out its role as conservator." *Perry Capital*, 848 F.3d at 1087. The statute grants FHFA an array of powers when acting as conservator, including the power to "take over the assets of and operate [the GSEs]," to "conduct all business of the regulated entit[ies]," to "preserve and conserve the assets and property of the [enterprises]," and to "transfer or sell any asset or liability of the regulated entity." 12 U.S.C. § 4617(b)(2)(B),(G). More generally, FHFA has the authority, as a conservator, to "take such action as may be . . . necessary to put the regulated entity in a sound and solvent condition" and to undertake any action "appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property

of the regulated entity." *Id.* § 4617(b)(2)(D). It may take these actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the GSEs. *Id.* § 4617(a)(2). And when exercising these powers, FHFA is empowered to take actions that it determines are "in the best interests of the regulated entit[ies] *or the Agency*." *Id.* § 4617(b)(2)(J)(ii) (emphasis added).

"FHFA's execution of the Third Amendment falls squarely within its statutory authority to '[o]perate the [Companies],' 12 U.S.C. § 4617(b)(2)(B); to 'reorganiz[e]' their affairs, *id.* § 4617(a)(2); and to 'take such action as may be * * * appropriate to carry on the[ir] business,' *id.* § 4617(b)(2)(D)(ii)." *Perry Capital*, 848 F.3d at 1088. By entering into the Third Amendment, FHFA took an action it deemed appropriate to "preserve and conserve" a crucial "asset[]" (or "property") of the GSEs: the unused portion of Treasury's funding commitment. At the time of the Third Amendment in 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment. Through the first quarter of 2012, the enterprises drew over $26 billion from the commitment to pay the 10% dividends they owed Treasury. *See supra* p. 10. These draws increased Treasury's liquidation preference, which in turn increased the amount of dividends the enterprises owed; they also threatened to diminish Treasury's remaining commitment, which became fixed at the end of 2012.

By replacing a fixed dividend obligation with a variable one, the Third Amendment ended this cycle and reduced the risk that the enterprises would exhaust Treasury's commitment prematurely. By reducing the risk that Treasury's capital commitment would be dissipated by dividend obligations, the Third Amendment ensured that the enterprises would remain solvent for the foreseeable future and provided certainty to the financial markets from which the enterprises raise funds. *See Perry Capital*, 848 F.3d at 1088 (noting that the Third Amendment ensured the enterprises "ongoing access to vital yet hard-to-come-by capital"). As the D.C. Circuit explained, "[s]uch management of Fannie's and Freddie's assets, debt load, and contractual dividend obligations during their ongoing business operation sits at the core of FHFA's conservatorship function." *Id.* at 1086; *see also Town of Babylon v. FHFA*, 699 F.3d 221, 227 (2d Cir. 2012) (taking "protective measures against perceived risks is squarely within FHFA's powers as a conservator"); *Leon Cty. v. FHFA*, 700 F.3d 1273, 1279 (11th Cir. 2012) (same).

Subsequent legislation confirms that FHFA was acting within its statutory authority when it entered into the Third Amendment. In section 702 of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015), Congress legislated with respect to the Purchase Agreements between Treasury and the enterprises, which it defined as "the Amended and Restated Senior Preferred Stock Purchase Agreement, dated September 26, 2008, as such Agreement has been amended on May 6, 2009, December 24, 2009, and August 17, 2012, respectively." *Id.* § 702(a)(2)(A). The legislation provides that "until at least January 1, 2018, the Secretary may not sell, transfer, relinquish, liquidate, divest, or otherwise dispose of any outstanding shares of senior preferred stock acquired pursuant" to the agreement "unless Congress has passed and the President has signed into law legislation that includes a specific instruction to the Secretary regarding" those actions. *Id.* § 702(b). Congress enacted the law fully aware of the Third Amendment and the agency's interpretation of its statutory authority. Because Congress took no steps to halt the agency action, "presumably the legislative intent has been correctly discerned." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982).

2. Plaintiffs mistakenly argue that "HERA requires[s] FHFA to seek to 'preserve and conserve' the Companies' assets and 'rehabilitat[e]'" them to a 'sound and solvent' condition," Br.16 (quoting 12 U.S.C. § 4617(b)(2)(D), (a)(2)), and that courts have the authority to review whether the Third Amendment was "necessary" and "appropriate" to achieve these purported statutory requirements, Br.30 .

The invitation to determine retrospectively what actions were necessary and appropriate to deal with the precarious condition of the GSEs is simply an impermissible request to examine FHFA's performance as conservator and is therefore barred by the statute's preclusion of judicial review.

Even taken on its own terms, moreover, plaintiffs' argument rests in large part on the mistaken premise that FHFA is under an obligation to return the enterprises to the same state that existed prior to the conservatorship. *See, e.g.*, Br.47 (arguing that the Third Amendment violates HERA because it precludes the enterprises from "building capital as a potential step to regaining their former corporate status"); Br.12 (asserting that FHFA is under a "statutory obligation[]" to manage the enterprises so that they may "emerge from conservatorship" as private companies under their pre-crisis charters).

But HERA does not require that FHFA return the enterprises to their pre-crisis form, much less that it make this goal a priority. *See Perry Capital*, 848 F.3d at 1093-94 ("[N]othing in [HERA] mandated that FHFA take steps to return Fannie Mae and Freddie Mac at the first sign of financial improvement to the old economic model that got them into so much trouble in the first place."). To the contrary, HERA authorizes FHFA, as conservator, to make significant changes to the enterprises' operations. *See, e.g.*, 12 U.S.C. § 4617(a)(2) (stating that FHFA may "be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a [GSE]"); *see also Perry Capital*, 848 F.3d at 1090-91 ("FHFA's textual authority to reorganize and rehabilitate the Companies, in other words, forecloses any argument that [HERA] made the *status quo ante* a statutorily compelled end game.").

The enterprises were on the precipice of failure in 2008, and Congress did not require that the conservator return the GSEs to the hands of private shareholders in their pre-crisis form—a point underscored by 2016 legislation preventing Treasury from selling its preferred stock in the GSEs for two years. Consolidated Appropriations Act, 2016, § 702(b). The legislation was accompanied by a "Sense of Congress" provision declaring that "Congress should pass and the President should sign into law legislation determining the future of Fannie Mae and Freddie Mac, and .

. . the Secretary should not . . . dispose of any outstanding shares of senior preferred stock acquired pursuant to the Senior Preferred Stock Purchase Agreement until such legislation is enacted." *Id.* § 702(c).

Neither 12 U.S.C. § 4617(a)(2) nor § 4617(b)(2)(D), the two provisions on which plaintiffs principally rely in arguing that FHFA's actions were not authorized, suggest that FHFA must act with the aim of returning the entities to private companies or must prioritize the build-up of internal capital. A conservator can stabilize or rehabilitate a troubled financial institution with an eye towards returning it to its former status. But it can also rehabilitate an entity to ready it for reorganization or liquidation. *See, e.g.*, *Ameristar Fin. Servicing Co. v. United States*, 75 Fed. Cl. 807, 808 n.3 (2007) (describing a conservator as "operat[ing] a troubled financial institution in an effort to conserve, manage, and protect the troubled institution's assets until the institution has stabilized or has been closed by the chartering authority"); *FDIC Resolutions Handbook* 33 (glossary) (same); *see also* 12 U.S.C. § 4617(a)(2) (stating that FHFA may be appointed conservator to reorganize, rehabilitate, or wind up a GSE's affairs); *Perry Capital*, 848 F.3d at 1093 ("Undertaking permissible conservatorship measures even with a receivership [in] mind would not be out of statutory bounds."). Nothing in HERA compels FHFA to preserve and conserve the enterprises' assets above all other considerations or to return the GSEs to a privately funded model. *See Perry Capital*, 848 F.3d at 1088 ("Entirely absent from [HERA's] text is any mandate, command, or directive to build up capital for the financial benefit of the Companies' stockholders.").

Apart from their fundamental misunderstanding of the grant of statutory authority, plaintiffs also fail to grapple with the governing provisions' broadly discretionary terms. In describing FHFA's powers and authorities as conservator, HERA uses the permissive "may," providing that FHFA "*may*, as conservator, take such action as may be . . . necessary to put the regulated entity in a sound and solvent condition; and . . . appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D) (emphasis added); *see also id.* § 4617(b)(2)(B)(iv) (FHFA "*may*, as conservator or receiver . . . preserve and conserve the assets and property of the regulated entity.") (emphasis added). "The statute is thus framed in terms of expansive grants of permissive, discretionary authority for FHFA to exercise as the 'Agency determines is in the best interests of the regulated entity or the Agency.'" *Perry Capital*, 848 F.3d at 1088 (quoting 12 U.S.C. § 4617(b)(2)(J)); SA21.

Plaintiffs implicitly acknowledge the absence of mandatory restrictions when they urge, Br.41-42, that the Court should construe the statute to impose specific duties in order to avoid a "nondelegation" problem. That is, plaintiffs urge that HERA might be constitutionally invalid because it fails to provide an "intelligible principle," *United States v. Goodwin*, 717 F.3d 511, 516 (7th Cir. 2013), to guide the conservator. Paradoxically, plaintiffs maintain both that FHFA is so evidently defying a statutory mandate contained in HERA as to act in an *ultra vires* fashion and that the Court should read non-existent requirements into HERA to avoid a fatal non-delegation problem.

Even on its own terms, plaintiffs' non-delegation argument is insubstantial. "[W]ith the exception of two cases in 1935, . . . the Supreme Court has uniformly rejected every nondelegation challenge it has considered." *United States v. Fernandez*, 710 F.3d 847, 849 (8th Cir. 2013). So long as Congress "delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of th[e] delegated authority," a delegation is constitutional. *Goodwin*, 717 F.3d at 516 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). Broad policy statements are sufficient to provide the guiding "intelligible principle." *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 420 (1944) (upholding delegation to administrator to set prices that "will be generally fair and equitable"); *National Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding delegation to FCC to regulate broadcast licenses in the "public interest"); *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005) (concluding that "an intelligible principle exists in the statutory phrase 'for the purpose of providing land for Indians'").

HERA easily satisfies this standard, establishing that the purpose of appointing a conservator is to "reorganiz[e], rehabilitat[e], or wind[] up the affairs" of the enterprises, 12 U.S.C. § 4617(a)(2); authorizing the conservator to act "the best interests of the regulated entity or the Agency," *id.* § 4617(b)(2)(J)(ii); and supplying a list of powers that FHFA may use as conservator to achieve the conservatorship's goals, thereby providing additional guidance to and limitations on FHFA's exercise of its discretion. That Congress delegated this authority to FHFA only in the limited circumstance in which it is appointed conservator or receiver of one of three entities (Fannie Mae, Freddie Mac, or a Federal Home Loan Bank, *see* 12 U.S.C. § 4502(20)), reinforces the validity of that delegation. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.").

3. Plaintiffs' attempts to bring their claim within an *ultra vires* exception to the bar on judicial review are without basis, and there is thus no occasion to address the mistaken premises of their narrative. It should be clear, however, that the Third Amendment has not left the enterprises on "the brink of insolvency," nor did FHFA fail to "conserve" and "preserve" the assets of the enterprises. Br.16, 43. As explained above, the Third Amendment arrested the draws-to-pay-dividends cycle that threatened to erode Treasury's unused funding commitment. *See supra* pp. 19-20. By preserving those funds, the Third Amendment ensured that the GSEs would have sufficient funds to cover any near-term losses, to weather another housing-market downturn, and to maintain market confidence. The Treasury commitment "ensures continued access to vital capital," *Perry Capital*, 848 F.3d at 1091, and has been crucial to preserving the GSEs' financial stability and solvency, regardless of how the commitment is treated on the enterprises' balance sheets. *See* SA21.

Plaintiffs do not dispute that Treasury's ongoing commitment is vital to the enterprises' continuing operation. Rather, they argue that FHFA could have preserved Treasury's commitment in another way (by paying Treasury's dividends in kind), that the Third Amendment may ultimately make draws on the commitment more, not less, likely, and that the Third Amendment caused the enterprises to incur additional debts in 2013. Br.43-45. But it is just such difficult operational calls and predictive judgments that Congress entrusted FHFA to make, free of second-guessing by shareholders and courts. *See Perry Capital*, 848 F.3d at 1095.

For similar reasons, plaintiffs are mistaken in asserting that the Third Amendment did not "preserve and conserve" the enterprises' assets. Br.43. Not only did the Third Amendment help preserve and conserve Treasury's funding commitment; it also relieved the enterprises of their obligation to pay a fixed 10% cash dividend to Treasury, an obligation that would have cost the GSEs at least $19 billion per year, regardless of their profitability. *See supra* p. 10. By forgoing a fixed dividend, Treasury thus incurred a risk of non-payment, to the benefit of the GSEs. Treasury also agreed to waive the periodic commitment fee as long as the variable dividend is in place. In short, the Third Amendment was structured to, among other things, preserve the enterprises' assets and avoid increasing their debts in years (such as 2015 and 2016) when the GSEs earned less than the $19 billion they otherwise would have owed Treasury. *See Perry Capital*, 848 F.3d at 1092 (explaining that through the Third Amendment, the GSEs obtained "continued access to necessary capital free of the preexisting risk of accumulating more debt simply to pay dividends to Treasury").

Plaintiffs' allegation that FHFA has failed to operate the enterprises as "ongoing business[es]," Br.47 n.5, does not withstand the briefest scrutiny. Five years after the Third Amendment, the GSEs are going concerns with combined assets of more than $5 trillion. Fannie Mae 2016 10-K, at 55; Freddie Mac 2016 10-K, at 11. "During that time, Fannie and Freddie, among other things, collectively purchased at least 11 million mortgages on single-family owner-occupied properties, and Fannie issued over $1.5 trillion in single-family mortgage-backed securities." *Perry Capital*, 848 F.3d at 1083. The Third Amendment thus was not, as plaintiffs suggest (Br.46-51), a *de facto* liquidation or tantamount to "placing [the GSEs] into receivership."[7]

Plaintiffs mistakenly seek to analogize the conservatorship of the enterprises to a typical federal conservatorship of a failing bank, and suggest that judicial action here is necessary to avoid dystopian consequences in the garden variety conservatorship context. (Br.55-58) The government rescued Fannie Mae and Freddie Mac—owners or guarantors of half the residential mortgages in the United States—with a massive infusion of taxpayer money. HERA "gave FHFA the ability to

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

obtain from Treasury capital infusions of unprecedented proportions, as long as the deal FHFA struck with Treasury 'protected the taxpayer' and 'provide[d] stability to the financial markets.'" *Perry Capital*, 848 F.3d at 1094 (quoting 12 U.S.C. §§ 1455, 1719(g)(1)(B)(i), (iii)). Treasury's $400 billion-plus commitment was necessary only because private investors were unwilling to provide the capital the GSEs required. *Perry Capital*, 848 F.3d at 1082, 1094.

4. The district court correctly dismissed plaintiffs' claim that FHFA violated 12 U.S.C. § 4617(a)(7) when it entered into the Third Amendment. Section 4617(a)(7) provides that "[w]hen acting as conservator or receiver, [FHFA] shall not be subject to the direction or supervision of any other agency." SA18-20. Plaintiffs lack standing to press an APA claim based on § 4617(a)(7), because they do not fall within the zone of interests § 4617(a)(7) was designed to protect. *See American Fed'n of Gov't Emps., Local 2119 v. Cohen*, 171 F.3d 460, 465 (7th Cir. 1999) (To pursue an APA claim, a plaintiff must show that the interest they seek to vindicate "fall[s] within the 'zone-of-interests' protected by the relevant statute[.]); *see also* FHFA Br. Pt. I.C.5.a.

Section 4617(a)(7) was not designed to protect the interests of shareholders. Rather, "the clear purpose of the [provision] is to provide a preemption defense *for FHFA* in its role as conservator." *Robinson v. FHFA*, 2016 WL 4726555, *6 (E.D. Ky. Sept. 9, 2016). Nor did Congress "intend[] for [shareholders] to be relied upon to challenge agency disregard of the law." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984). Had Congress intended shareholders to vindicate § 4617(a)(7), it would have reserved for them the right to do so. Instead, Congress specified that, upon the commencement of the conservatorships, FHFA "immediately succeed[ed]" to "all rights, titles, powers, and privileges" of the GSEs' shareholders, without exception. 12 U.S.C. § 4617(b)(2)(A)(i).

In any event, plaintiffs' claim that FHFA's actions violated § 4617(a)(7) fails as a matter of law. Plaintiffs assert that FHFA violated § 4617(a)(7) in two ways: (1) by agreeing to terms of the original Purchase Agreements that prohibit FHFA from taking certain actions (such as paying dividends to shareholders) without Treasury's consent; and (2) by purportedly agreeing to the Third Amendment at Treasury's direction. Br.52. The district court correctly rejected both claims. SA18-20. Plaintiffs' first claim is barred by the six-year statute of limitations applicable to APA claims. *See* 28 U.S.C. § 2401(a); *Polanco v. DEA*, 158 F.3d 647, 652-53 (2d Cir. 1998). Plaintiffs filed this lawsuit on February 10, 2016, almost seven-and-a-half years after Treasury and FHFA signed the Purchase Agreements. Dkt. No. 1. Any claim that the original Purchase Agreements violated § 4617(a)(7) is thus time-barred.

Even if not time-barred, plaintiffs' claim would be unavailing. As the district court recognized, § 4617(a)(7) protects FHFA from being subject to another agency's direction or supervision "*against FHFA's will*." SA19. It does not preclude FHFA "from voluntarily entering into a purchase agreement that gives Treasury a say in decisions that [could] impact Treasury's [substantial] investment." SA19-20. Indeed, HERA authorizes Treasury to purchase securities from the enterprises "on such terms and conditions as the Secretary [of the Treasury] may determine," including terms designed to "protect the taxpayer." 12 U.S.C. §§ 1455(*l*)(1)(A), (B)(iii), 1719(g)(1)(A), (B)(iii). At the same time, HERA makes clear that Treasury may not purchase securities from the enterprises "without the [enterprises'] agreement." *Id.* Thus, Congress provided FHFA with the authority to voluntarily agree to contract terms proposed by Treasury, including terms designed to protect taxpayers.

Plaintiffs' second claim—that FHFA violated § 4617(a)(7) by agreeing to the Third Amendment at Treasury's direction—fares no better. Plaintiffs' argument seems to be that a court should determine to what extent particular terms of the agreements reflected proposals from Treasury and then declare an agreement invalid based on some undefined calculus. In short, plaintiffs mistakenly seize on § 4617(a)(7) as another iteration of their contention that the Court should undertake review of the wisdom of the Third Amendment. And, like plaintiffs' other assertions, this finds no basis in the history of the efforts to rescue and stabilize the enterprises. Moreover, plaintiffs' allegations that FHFA acted "at the insistence and direction of Treasury" are based solely "on information and belief." A8; *see also* A15, A36, A64, A75, A77, A80. As the D.C. Circuit emphasized when it rejected this claim, a federal court is "not required to credit a bald legal conclusion that is devoid of factual allegations and that simply parrots the terms of the statute." *Perry Capital*, 848 F.3d at 1091 n.9. As FHFA's vigorous, years-long defense of the Third Amendment suggests, FHFA entered into the Third Amendment of its own volition.

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

Section 4617(f) does not permit plaintiffs to seek to enjoin FHFA's actions by naming Treasury as a defendant. "[T]he effect of any injunction or declaratory judgment aimed at Treasury's adoption of the Third Amendment would have just as direct and immediate an effect as if the injunction operated directly on FHFA." *Perry Capital*, 848 F.3d at 1096; SA15. Such an injunction against FHFA's contractual counterparty would thus run afoul of § 4617(f)'s prohibition on judicial relief that would "restrain or affect" FHFA's exercise of its conservatorship powers.

Courts applying FIRREA's analogous anti-injunction provision have reached the same conclusion, holding that the provision "precludes a court order against a third party which would affect the FDIC as receiver, particularly where the relief would have the same practical result as an order directed against the FDIC in that capacity." *Hindes v. FDIC*, 137 F.3d 148, 160-61 (3d Cir. 1998); *see also Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013) ("Even though the FDIC has apparently already sold the note in question, if plaintiffs such as Dittmer are allowed to attack the validity of a failed institution's assets by suing the remote purchaser, such actions would certainly restrain or affect the FDIC's powers to deal with the property it is charged with disbursing."); *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992) ("Permitting Telematics to attach the certificate of deposit, if that attachment were effective against the FDIC, would have the same effect, from the FDIC's perspective, as directly enjoining the FDIC from attaching the asset. In either event, the district court would restrain or affect the FDIC in the exercise of its powers as receiver.").

Plaintiffs' invocation of the presumption favoring judicial review of agency action (Br.25) casts no light on whether they should be able to avoid an explicit bar on judicial review. The presumption "is rebuttable" and "fails when a statute's language or structure demonstrates that Congress" intended to preclude review. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). Here, § 4617(f) expressly precludes judicial review of agency actions where such review would "restrain or affect" FHFA's exercise of its conservatorship powers. Because an order invalidating Treasury's decision to enter into the Third Amendment would do just that, the presumption favoring reviewability is overcome.

Plaintiffs' reliance on the Fifth Circuit's decision in *281—300 Joint Venture v. Onion*, 938 F.2d 35, 38 (5th Cir. 1991), is similarly misplaced. *See* Br.28-29. The plaintiff in *Joint Venture* challenged two separate actions taken by two separate entities: (1) a determination by the Federal Home Loan Bank Board that the claims of unsecured creditors of a failed bank were worthless; and (2) a foreclosure sale executed by the Resolution Trust Corporation, acting as conservator for the failed bank. 938 F.2d at 38-39. The Fifth Circuit concluded that the first challenge was prudentially moot, and the second was barred by § 4617(f)'s FIRREA analogue. *Id.* The plaintiff in *Joint Venture* did not seek to enjoin the Resolution Trust Corporation's contractual counterparty. Nor is there any indication that the plaintiff's claims against the Bank Board, which the court dismissed on threshold grounds, would have in any way restrained or affected the Resolution Trust Corporation's actions as conservator. *Id.* at 38. In short, the Fifth Circuit in *Joint Venture* did not address the situation presented here, where plaintiffs' "claims against [an agency] are integrally and inextricably interwoven with FHFA's conduct as conservator." *Perry Capital*, 848 F.3d at 1097.[8]

Plaintiffs fare no better when they argue that § 4617(f) cannot bar claims against Treasury because such a bar would permit Treasury to violate federal law, including HERA. Br.27. The inquiry under § 4617(f), like its FIRREA analogue, is "quite narrow." *Bank of America Nat'l Ass'n*, 604 F.3d at 1243. Once a court determines that (1) a challenged action involved the exercise of a conservatorship power or function and (2) the judicial relief sought would "restrain or affect" that power or function, the inquiry is over. *See id.*; *see also Perry Capital*, 848 F.3d at 1097. The cause of the restraint or effect is "irrelevant." *Perry Capital*, 848 F.3d at 1097. Thus, a suit is barred if it would restrain or affect FHFA's exercise of its

[8] Plaintiffs contend (Br.26-27) that enjoining Treasury from participating in the Third Amendment would not restrain or affect FHFA's exercise of its conservatorship powers because FHFA could not have adopted the Third Amendment without Treasury's consent. Plaintiffs' contention is difficult to comprehend. Barring Treasury from participating in the Third Amendment would preclude FHFA from entering into an agreement that FHFA believed to be in the best interests of the enterprises. An injunction would therefore directly affect FHFA's exercise of its conservatorship powers.

conservatorship functions, even if the suit seeks to enjoin Treasury from committing a purported violation of federal law. *See id.*

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

Plaintiffs' claims against Treasury and FHFA are independently barred by HERA's transfer-of-shareholder-rights provision, 12 U.S.C. § 4617(b)(2)(A)(i). That provision provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). This provision "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits," *Perry Capital*, 848 F.3d at 1104 (quoting *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012)), as this Court has held with respect to § 4617(b)(2)(A)(i)'s FIRREA analogue, 12 U.S.C. § 1821(d)(2)(A). *See Levin v. Miller*, 763 F.3d 667, 669 (7th Cir. 2014); *Courtney*, 485 F.3d at 950. Because plaintiffs' APA claims are derivative claims, they are barred.

A. Plaintiffs' claims are derivative claims.

1. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Thus, legal harms committed against a corporation give rise to claims belonging to the corporation itself, and shareholder suits seeking to enforce those claims are derivative.

See, e.g., *First Annapolis Bancorp, Inc. v. United States*, 644 F.3d 1367, 1373 (Fed. Cir. 2011). In a derivative suit, any recovery flows to the corporate treasury; in a direct suit, it flows to the individual plaintiff-shareholder.

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

The principles for distinguishing direct from derivative claims are well established and consistent across federal and state law. The analysis is governed by two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004); *see also Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1335 (7th Cir. 1989) (recognizing that "shareholders . . . cannot recover on account of injury done the corporation" and concluding that the plaintiff-shareholders claims were "obviously" derivative where an "award putting [] $1 back in [the corporation's] treasury would restore the [plaintiffs] to their former position."). A claim is "direct" when "the duty breached was owed to the stockholder" and the stockholder "can prevail without showing an injury to the corporation." *Tooley*, 845 A.2d at 1039; *Courtney*, 485 F.3d at 950 ("[A] direct injury for these purposes is an injury independent of the firm's fate."). A claim is "derivative" if the harm to the shareholder is the byproduct of some injury to the corporate body as a whole. *Tooley*, 845 A.2d at 1039; *Courtney*, 485 F.3d at 950.[9]

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

[9] Citing *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 (Del. 2015), plaintiffs argued below that the *Tooley* test is inapplicable because their "claims are direct as a matter of law." Pls. Dist. Ct. Br. 49-50, Dkt. No. 46. That argument is unavailing. *NAF Holdings* stands for the unremarkable proposition that a court has no need to apply the *Tooley* test where a plaintiff's claim is self-evidently direct, such as where, as in *NAF Holdings*, the plaintiff is a party to a commercial contract that the plaintiff alleges the defendant breached. *See* 118 A.3d at 176. Under such circumstances, a plaintiff may sue directly to enforce "its own rights as a signatory to a commercial contract." *Id.*; *see also Citigroup v. AHW Investment Partnership*, 140 A.3d 1125 (Del. 2016) (no need to apply the *Tooley* test where the plaintiffs' claims could "not plausibly belong to the issuer corporation"); *Massey v. Merrill Lynch & Co.*, 464 F.3d 642, 646 (7th Cir. 2006). Plaintiffs raise no such self-evidently direct claims here.

to that principle. *See, e.g., Courtney*, 485 F.3d at 950; *Rawoof v. Texor Petroluem Co.*, 521 F.3d 750, 757 (7th Cir. 2008).

Moreover, "claims that [defendants] caused the company to enter into a series of 'unfair' transactions that have 'involved self-dealing' and 'diverting assets' are fundamentally claims belonging to the corporation and to [shareholders] only derivatively." *Cowin v. Bresler*, 741 F.2d 410, 416 (D.C. Cir. 1984); *see also Flynn v. Merrick*, 881 F.2d 446, 449 (7th Cir. 1989); *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) ("Pareto's allegations—that the directors breached their duties of care and loyalty by failing to safeguard Barbary Coast's assets and equity, mismanaging its operations, [and] improperly placing it into voluntary receivership . . . describe a direct injury to the bank, not the individual stockholders.").

2. Plaintiffs ask that the Third Amendment be declared invalid and enjoined, so that future increases in net worth would be retained by the enterprises, and also request that the dividends Treasury has already received be returned to the GSEs. A84-85.

Such an order would not benefit plaintiffs directly. The relief sought would enrich the enterprises and therefore make plaintiffs' rights in the enterprises more valuable. Similarly, the harm that plaintiffs allege—the assertedly improper transfer of the GSEs' net worth to Treasury—was suffered by the corporation. *See, e.g.*, A2 (Am. Compl.) (The Third Amendment "forc[ed] . . . [the] *Companies* to turn over all of *their* profits to the federal government.") (emphases added); A15 ("[T]he Net Worth Sweep pushes the *Companies* to the edge of insolvency by stripping the capital out of the *Companies* on a quarterly basis.") (emphases added); A16 ("FHFA chose instead to slowly poison its patients [(the GSEs)]; first by ordering the *Companies* to make accounting decisions that gratuitously ran up their dividend obligations to Treasury and later by compelling the *Companies* to simply turn over all of their profits to Treasury.") (emphases added); A63 ("But for the Net Worth Sweep, *Fannie and Freddie* would have nearly $130 billion of additional capital to cushion them from any future downturn in the housing market.") (emphasis added).

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

That the Third Amendment will allegedly cause plaintiffs indirect harm as shareholders, such as a decline in the value of their shares or a reduced likelihood of future dividends or liquidation payouts, does not transform those claims into direct claims. *See, e.g.*, *Flynn*, 881 F.2d at 449 (shareholders' claim that "the board of directors mismanaged [the company], which decreased the value of the interest held by the shareholders" was a derivative claim); *Massey v. Merrill Lynch & Co.*, 464 F.3d 642, 645 (7th Cir. 2006) ("[S]hareholders of a corporation may not maintain actions at law in their own names to redress an injury to the corporation even if the value of their stock is impaired as a result of the injury."); *Gaff v. FDIC*, 814 F.2d 311, 318 (6th Cir. 1987) ("Gaff primarily claims that his shares in the failed bank became totally worthless as a result of the defendants' conduct. . . . [A] diminution in the value of stock is merely indirect harm to a shareholder and does not bestow upon a shareholder the standing to bring a direct cause of action.").

3. Plaintiffs argued below that their APA claims are direct, not derivative, because the APA "creates a cause of action for any person 'adversely affected or aggrieved by agency action . . . ,' 5 U.S.C. § 702." Pls. Dist. Ct. Br. 47-48, Dkt. No. 46. This argument fundamentally misunderstands the distinction between direct and derivative suits. As explained above, whether a plaintiff's claim is direct or derivative turns on the nature of the plaintiffs' harm and the relief sought. *See supra* pp. 36-38. Thus, if plaintiffs are adversely affected by agency action only indirectly (*i.e.*, as a result

of harm to the corporation) and seek relief that accrues to the corporation, as is the case here, their APA claim is derivative.

This Court's analysis of 18 U.S.C. § 1964(c), the cause-of-action provision in the Racketeer Influenced and Corrupt Organizations Act (RICO), is illustrative. *See Flynn*, 881 F.2d at 450. Section 1964(c) provides a cause of action to "[a]ny person injured in his business or property by reason of" a RICO violation. In *Flynn*, a group of shareholders argued that they could bring suit directly under § 1964(c) because they had been injured as a company's shareholders when the company was victimized by a RICO violation. 881 F.2d at 450. This Court rejected that argument, concluding instead that the shareholders' claims were "derivative" and that, "absent a showing of individual and direct injury, shareholders in a corporation injured by a third party in violation of RICO do not have standing to bring individual causes of action [under § 1964(c)]." *Id.*; *see also Bixler v. Foster*, 596 F.3d 751, 758-59 (10th Cir. 2010) (noting that the court of appeals have "uniform[ly]" held that shareholder claims under § 1964(c) are "derivative" and that "corporate shareholders do not have standing to sue under [§ 1964(c)] for alleged injuries to the corporation").

Plaintiffs' claim that the APA provides shareholders with a direct cause of action would have implications extending far beyond the conservatorship context. Under plaintiffs' analysis, for example, the owner of a single share of a company's stock could challenge a regulation or administrative action that adversely affected the company without consulting the corporation's board of directors and notwithstanding a determination by the board that the company's interests would not be advanced by bringing suit. *See Kamen*, 500 U.S. at 108 (If a claim "is direct rather than derivative," it can be "maintained [by a shareholder] without *any* precomplaint demand on the directors."); *Massey*, 464 F.3d at 647 ("Th[e] [pre-suit] demand requirement is not an empty formality: the interests of a shareholder seeking to vindicate corporate rights may well diverge from the best interests of a corporation (and, indeed, this is one of the principle justifications for distinguishing between direct and derivative actions)."). Neither law nor logic supports that result.

Moreover, to the extent the APA grants a cause of action to an aggrieved party, it does so only where no "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). As explained *supra* pp. 35-36, HERA's transfer-of-shareholder-rights provision bars shareholders from bringing suits that seek to remedy harms that shareholders experience only derivatively and would thus preclude an APA action.

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

Delaware's *Gentile* "fiduciary" exception, which plaintiffs cited in the district court in arguing that their claims were direct, *see* Pls. Dist. Ct. Br. 51-52, Dkt. No. 46, is not applicable here. Claims that a majority shareholder breached a fiduciary duty to minority shareholders with respect to a corporate transaction are typically derivative claims. *See, e.g.*, *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1218 (Del. 2012) (claim that controlling shareholder and the corporation's directors breached a fiduciary duty to minority shareholders by causing the corporation to pay an "unfair price" for an asset was a derivative claim). Delaware law has recognized a narrow exception to that rule for cases in which "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile*, 906 A.2d at 100. To the extent that "the harm resulting from the overpayment is not confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares," those minority shareholders may bring a direct claim to recover for that additional quantum of harm. *Id.* The Delaware Supreme Court has emphasized "that the extraction of solely economic value from the minority by a controlling stockholder" does not alone constitute "direct injury" under *Gentile*; a dilution of voting rights is also required. *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016). A *Gentile* claim is actionable based on the controlling shareholder's "breach of fiduciary duty" to the plaintiff. 906 A.2d at 99-100, 102-03.

Plaintiffs argue that their claims are direct under the narrow *Gentile* exception, because Treasury is a controlling shareholder and the Third Amendment "extract[ed] . . . the economic value of their stock." Pls. Dist. Ct. Br. 52, Dkt. No. 46. This argument is wrong in several respects.

The premise of plaintiffs' argument is incorrect: Treasury was not a controlling shareholder and did not owe a fiduciary duty to the GSEs' shareholders. A controlling shareholder of a corporation either owns a majority of the corporation's voting shares, or it exercises "actual control" over the corporation's affairs. *Starr Int'l Co. v. Federal Reserve Bank*, 906 F. Supp. 2d 202, 221-25 (S.D.N.Y. 2012), *aff'd*, 742 F.3d 37 (2d Cir. 2014); *see also Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987). Treasury is not and has never been a majority shareholder, nor does it have voting rights in the GSEs. Its rights as a senior preferred shareholder are entirely contractual. Even "a significant shareholder, who exercises a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take, does not become, without more, a controlling shareholder for that particular purpose." *Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, No. 1668-N, 2006 WL 2521426, at *5 (Del. Ch. Aug. 25, 2006) (unpublished); *see also Starr Int'l*, 906 F. Supp. 2d at 221-25. Moreover, HERA's requirements that Treasury act to "protect the taxpayer," 12 U.S.C. § 1719(g)(1)(B)(iii), and consider the "need for preferences or priorities regarding payments to the Government," *id.* § 1719(g)(1)(C)(i), negates any suggestion that Treasury owed common-law fiduciary duties to the GSEs' shareholders.

Even if Treasury could be deemed a controlling shareholder, the exception would be inapplicable. Plaintiffs assert only that Treasury extracted the economic value of their shares. Plaintiffs do not contend that the Third Amendment diluted their voting rights, and for good reason. The Third Amendment altered the way Treasury's dividends are calculated; it did not alter Treasury's voting rights (Treasury has none) or its ownership stake in the GSEs. *Cf. Perry Capital*, 848 F.3d at 1109 (concluding that the Third Amendment did not alter the shareholders' voting rights). Because "the extraction of solely economic value from the minority by a controlling stockholder" without a corresponding dilution in voting rights is not sufficient to state a claim under *Gentile*, plaintiffs' reliance on the *Gentile* exception necessarily fails. *See El Paso Pipeline*, 152 A.3d at 1264.

The *Gentile* exception is also inapplicable because the Third Amendment did not result in the issuance of additional shares of GSE stock, let alone "excessive" shares. Nor did the Third Amendment alter the percentage of GSE shares outstanding that Treasury owns or decrease the percentage owned by private investors. In short, Treasury and FHFA's agreement to the Third Amendment is far removed from the circumstances present in *Gentile*. *See Edwards v. Deloitte & Touche, LLP*, 2017 WL 1291994, *6-7 (D. Del. June 22, 2017).

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

In a further attempt to evade HERA's bar on derivative suits, plaintiffs argued below that there exists an implicit "conflict-of-interest" exception to HERA's transfer-of-shareholder-rights provision that would allow shareholders to bring derivative claims when FHFA, acting as conservator, is allegedly unwilling to bring suit due to a purported conflict of interest. Pls. Dist. Ct. Br. 54-57, Dkt. No. 46. Plaintiffs are barred by issue preclusion from advancing their argument that HERA's succession provision includes a conflict-of-interest exception, and that argument is without merit in any event.

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

The question whether HERA's transfer-of-shareholder-rights provision includes a conflict-of-interest exception was litigated and resolved against all GSE shareholders in *Perry Capital v. Lew*, 70 F. Supp. 3d 208, 229-30 (D.D.C. 2014). Addressing an expressly derivative breach of fiduciary duty claim brought by GSE shareholders, the district court in *Perry Capital* concluded that (1) HERA's transfer-of-shareholder-rights provision bars derivative suits; and (2) no conflict-of-interest exception to that provision exists. *Id.* Those conclusions, both of which were necessary to the court's dismissal of the relevant derivative claims, were affirmed by the court of appeals. *See Perry Capital*, 848 F.3d at 1106 ("We therefore conclude the Succession Clause does not permit shareholders to bring derivative suits on behalf of the Companies even where the FHFA will not bring a derivative suit due to a conflict of interest."). It is irrelevant that the derivative claims that the court addressed in *Perry Capital* were not derivative APA claims. Issue preclusion applies "even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892. Because the issue whether § 4617(b)(2)(A)(i) includes a conflict-of-interest exception was fully litigated and decided on the merits against GSE shareholders in previous derivative litigation, plaintiffs cannot relitigate it in pursuit of their derivative claims here.

Moreover, with respect to the question whether HERA's transfer-of-shareholder-rights provision includes an implicit conflict-of-interest exception, plaintiffs' interests are fully aligned with those of the derivative plaintiff-shareholders in *Perry Capital*. Indeed, the derivative plaintiffs in *Perry Capital* made the same arguments plaintiffs make here, citing the identical precedent to support their assertion that a conflict-of-interest exception exists. *Compare* Pls. Dist. Ct. Br. 54-57, Dkt. No. 46 *with* Class.Pl.Br. at 32-35, *In re: Fannie Mae/Freddie Mac*, No. 13-1288 (D.D.C), *and* Class.Pl.Br. at 23-24, *Perry Capital v. Mnuchin*, No. 14-5243 (D.C. Cir.).

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

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

But it is precisely to address such concerns that courts in some circumstances have permitted derivative suits. *See Kamen*, 500 U.S. at 95 ("[T]he purpose of the derivative action was to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers."). Through HERA, Congress precluded such actions. "[I]t makes little sense to base an exception to the rule against derivative suits in the Succession Clause on the purpose of the derivative suit mechanism." *Perry Capital*, 848 F.3d at 1106.

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

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

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

3. Plaintiffs' purported "conflict of interest" is simply that FHFA would have to sue itself to challenge the Third Amendment. But under this logic, every

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

III. Plaintiffs' Claim That Treasury Exceeded Its Authority Under HERA, Which Is Barred, Also Fails On The Merits.

For the reasons explained above, § 4617(f) bars plaintiffs' APA claims against Treasury. Plaintiffs' claim that Treasury exceeded its authority under HERA would also fail on the merits.

A. The Third Amendment was not a "purchase" of securities.

HERA vested Treasury with the authority "to purchase any obligations and other securities" issued by Fannie Mae and Freddie Mac, "on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine." 12 U.S.C. §§ 1719(g)(1)(A), 1455(*l*)(1)(A). HERA further granted Treasury the authority to, "at any time, exercise any rights received in connection with such purchases." *Id.* § 1719(g)(2)(A); *id.* § 1455(*l*)(2)(A). Treasury may also "hold" or "sell" any securities it acquires. *Id.* § 1719(g)(2)(D); *id.* § 1455(*l*)(2)(D).

Treasury's authority to purchase new securities from the enterprises expired on December 31, 2009. 12 U.S.C. § 1719(g)(4); *id.* § 1455(*l*)(4). Its authority to "exercise any rights received in connection" with earlier purchases, as well as its authority to hold or sell securities, did not. *See id.* § 1719(g)(2)(D); *id.* § 1455(*l*)(2)(D).

The district court correctly rejected plaintiffs' assertion that the Third Amendment was a "purchase" of new "securities." SA22-23. Treasury obtained no new shares of the enterprises' stock as a result of the Third Amendment. *See Isquith ex rel. Isquith v. Caremark Int'l, Inc.*, 136 F.3d 531, 534 (7th Cir. 1998) (plaintiffs did not "purchase or sell securities" where they "did not buy or sell shares" in the relevant companies). Treasury did not commit any additional funds to the enterprises in the Third Amendment. As the district court explained, the Third Amendment merely "substituted one dividend obligation for another." SA22. In exchange for waiving the periodic commitment fee and its entitlement to a dividend equal to 10% of its liquidation preference, Treasury agreed to accept a dividend equal to the enterprises' variable net worth, if any.

Plaintiffs correctly note that the Third Amendment involved an exchange of value: FHFA "trad[ed] the Enterprises' annual fixed dividend and periodic commitment fee obligations for the payment of a variable dividend based on net worth." Br.17. Plaintiffs err, however, in inferring that the Third Amendment therefore must have effected a purchase of securities. Plaintiffs declare that "[t]he touchstone of a purchase is an *exchange of value*." Br.18. But an "exchange of value" is also the touchstone of a valid contract amendment. *See, e.g.*, *Robinson v. Ada S. McKinley Cmty. Servs.*, 19 F.3d 359, 364 (7th Cir. 1994) ("A valid modification requires an offer, acceptance, and consideration."); 1 *Farnsworth on Contracts* § 4.21, p. 524 (3d ed. 2004). And HERA's sunset provision only bars Treasury's purchase of obligations or securities issued by the GSEs. It does not bar Treasury from agreeing to contract amendments. Implying such a restriction would be particularly anomalous when the amendment plainly falls within Treasury's authority to "hold" or "sell" the securities it owns or to "exercise" previously secured rights.

In the absence of an actual purchase of securities, plaintiffs are left to argue that the Third Amendment should be treated as a purchase of new securities because it "fundamental[ly] change[d]" Treasury's senior preferred stock. Br.19. The "fundamental change" doctrine, adopted in some securities-fraud cases, is an "esoteric and dubious judge-made doctrine" whose ongoing validity has been questioned by this Court. *Isquith*, 136 F.3d at 535-36 ("[W]e very much doubt that the doctrine retains any validity in any class of case."). Some courts of appeals have expressly declined to adopt it, *see Katz v. Gerardi*, 655 F.3d 1212, 1221 (10th Cir. 2011), and even those which have accepted it have acknowledged that it "does not cut a wide swath," *Jacobson v. AEG Capital*, 50 F.3d 1493, 1499 (9th Cir. 1995). It is implausible that Congress intended to incorporate such an "esoteric and dubious" doctrine into HERA's definition of "purchase."

In any event, the doctrine is inapplicable on its own terms. It applies "where a defendant's fraud results in a fundamental change in the nature of the plaintiff's investment without the plaintiff's consent." *Katz*, 655 F.3d at 1221; *Jacobson*, 50 F.3d at 1499 (The fundamental change doctrine is a "narrow" doctrine that applies to "shareholders who, without any say, find themselves fraudulently forced-out of their securities."). Plaintiffs do not claim that the Third Amendment was the product of fraud. Treasury and FHFA bargained for the changes that were made to the original Purchase Agreements, and FHFA freely agreed to those changes.[10]

B. The Third Amendment did not otherwise exceed Treasury's authority.

Plaintiffs alternatively assert that the Third Amendment exceeded Treasury's authority even if it did not constitute a purchase of new securities, urging that it falls outside the powers granted by HERA. Br.22-24.

This argument is difficult to fathom. Congress provided Treasury with broad authority, which it restricted in one respect by ending Treasury's authority to purchase

[10] Plaintiffs also cite (Br.20-21) an IRS tax regulation, 26 C.F.R. § 1.1001-3, which address the circumstances in which "modification of the terms of a debt instrument" qualifies as an "exchange" of property, such that any financial gain resulting from the modification must be declared as income. Plaintiffs provide no reason to believe that Congress intended the word "purchase" to be read synonymously with the word "exchange," as used by the IRS in a tax regulation addressing debt instruments. Plaintiffs likewise provide no grounds for their suggestion (Br.20) that, in drafting HERA's sunset provision, Congress had a 1976 SEC no-action letter, a 1936 letter from the SEC's general counsel, or a 1938 district court decision in mind.

new securities on December 31, 2009. It did not freeze the parties' contract terms as of that date and preclude Treasury and FHFA from altering their compensation arrangements as appropriate. Like parties to any contract, Treasury and FHFA had the power to modify the terms of their contract. Indeed, Congress recognized Treasury's inherent authority to modify the terms of its purchase contracts in HERA and expressly funded such modifications, providing that "[a]ny funds expended for the purchase of, or modifications to, obligations and securities, or the exercise of any rights received in connection with such purchases under this subsection shall be deemed appropriated at the time of such purchase, modification, or exercise." *See* 12 U.S.C. § 1719(g)(3); *id.* § 1455(*l*)(3). And Congress has continued to recognize Treasury's ongoing authority to amend the Purchase Agreement. *See* Consolidated Appropriations Act, 2016 § 702(a)(2)(A), (B) (defining "Senior Preferred Stock Purchase Agreement" as "the Amended and Restated Senior Preferred Stock Purchase Agreement, . . . and as such Agreement may be further amended and restated, entered into between the Department of the Treasury and each enterprise").

Even assuming, moreover, that it were necessary that Treasury modify the Purchase Agreements through the "exercise" of a reserved contractual "right," that requirement was satisfied here. When it entered into the Third Amendment, Treasury "exercise[d] [the] right[]," 12 U.S.C. § 1719(g)(2)(A)—explicitly conferred by the original Preferred Stock Purchase Agreements in 2008—to amend those contracts. *See* A100 ("This Agreement may be waived or amended solely by a writing executed by both of the parties hereto."); A114 (same). That Treasury exercised its right to amend jointly with FHFA makes it no less the exercise of a right. A contract confers a "right" to be "exercised" even when the right is to be exercised jointly. *See, e.g.*, *Public Serv. Co. of N.H. v. Hudson Light & Power Dep't*, 938 F.2d 338, 345, 347 (1st Cir. 1991) (rejecting "attempt by appellants . . . to impede [one party's] exercise of its exclusive contractual right to enter into an agreement with [the counterparty] to modify the Sellback Agreement").[11] A right, as plaintiffs assert, is a "legal, equitable, or moral entitlement to do something," Br.23, and to "exercise" means to "make use of; to put into action" or "[t]o implement the terms of." *Black's Law Dictionary* 693 (10th ed. 2014). When Treasury and FHFA agreed to the Third Amendment, they "ma[d]e use of" their "legal . . . entitlement" to amend the original Purchase Agreements.

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[11] Plaintiffs cite two cases for the assertion that "an arrangement that depends on 'mutual consent' is not a right at all," Br.23, both of which are inapposite. *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), was a takings case that concerned the amount of just compensation the government owed to tenants of a property that the government had appropriated. The Supreme Court determined that the tenants were entitled to damages equal to the value of the remainder of their lease. *Id.* at 380. In a footnote, the Court noted that plaintiffs were not entitled to damages based on the expected renewal of their leases, even though the building's landlord had often extended their leases through "mutual consent." *Id.* at 380 n.9. It was the terms of the lease, not the parties' informal expectations, that delineated the tenants' "rights" to compensation. *Id.* *International Union, UAW v. NLRB*, 765 F.2d 175, 183 (D.C. Cir. 1985), applied the rule that an employer must obtain a union's consent before taking an action that is a mandatory subject of bargaining, unless the employer has reserved the right to act unilaterally in its contract with the union. *UAW* does not suggest that a contract right that is exercised mutually is not a right the parties possess.

In sum, insofar as plaintiffs seek to bring their claims against Treasury within an exception to HERA's anti-injunction provision on the basis of *ultra vires* action, they have signally failed to do so.

CONCLUSION

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

Respectfully submitted,

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AUGUST 2017

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,998 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Gerard Sinzdak
GERARD SINZDAK

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I further certify that I will cause 15 paper copies of this brief to be received by the Clerk within seven days of the Notice of Docket Activity generated upon acceptance of the brief, in compliance with 7th Circuit Rule 31(b) and ECF Procedure (h)(2).

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