No. 17-1880

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHRISTOPHER M. ROBERTS and THOMAS P. FISCHER,

Plaintiffs-Appellants,

v.

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

BRIEF OF DEFENDANTS-APPELLEES THE FEDERAL HOUSING FINANCE AGENCY AND FHFA DIRECTOR MELVIN L. WATT

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August 7, 2017

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1880

Short Caption: Christopher Roberts, et al., v. Federal Housing Finance Agency, et al.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Federal Housing Finance Agency ("FHFA")
Melvin L. Watt, in his official capacity as Director of the Federal Housing Finance Agency

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Chuhak & Tecson, P.C. (Kara. A. Allen; Kristen E. Hudson);
U.S. Attorney's Office (NDIL - Chicago) (Alex Harms Hartzler)

(3) If the party or amicus is a corporation:

(i) Identify all its parent corporations, if any; and

Not applicable

(ii) List any publicly held company that own 10% or more of the party's or amicus' stock:

Not applicable

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INTRODUCTION

This appeal concerns one of many suits brought by shareholders of Fannie Mae and Freddie Mac (the "Enterprises" or "GSEs") challenging an agreement between the Federal Housing Finance Agency ("FHFA"), as Conservator for the Enterprises, and the U.S. Department of Treasury. At issue is the agreement between FHFA and Treasury to amend, for a third time ("the Third Amendment"), the financing agreements by which Treasury provided the Enterprises a critical lifeline of hundreds of billions of taxpayer dollars during the financial crisis. Plaintiffs bring suit under the Administrative Procedure Act, seeking to vacate the Third Amendment and undo dividend payments made to Treasury thereunder. Plaintiffs' claims are barred; in agreeing to the Third Amendment, FHFA exercised its expansive statutory authority under HERA.

Indeed, every court that has considered such claims over the last three years—including the D.C. Circuit—has dismissed them as barred by federal law. *See Perry Capital LLC v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. Feb. 21, 2017), *reissued as modified*, --- F.3d ----, 2017 WL 3078345 (D.C. Cir. July 17, 2017);[1] *Collins v. FHFA*, --- F. Supp. 3d ----, 2017 WL 2255564, at *6 (S.D. Tex. May 22,

[1] The D.C. Circuit reissued its opinion on July 17, 2017. *See Perry Capital LLC v. Mnuchin*, --- F.3d ----, 2017 WL 3078345 (D.C. Cir. July 17, 2017). The new version contains changes made in response to petitions for panel rehearing filed by the plaintiffs in that case. None of the changes are relevant to the issues presented in this appeal. Cites in this brief are to the revised opinion.

2017); *Saxton v. FHFA*, No. 15-cv-47-LRR, 2017 WL 1148279, at *13 (N.D. Iowa Mar. 27, 2017); *Robinson v. FHFA*, 223 F. Supp. 3d 659, 670 (E.D. Ky. 2016); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015); *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 222 (D.D.C. 2014), *aff'd in part, remanded in part*, 2017 WL 3078345 ("*Perry Capital (D.D.C)*").

Here, the district court correctly held that 12 U.S.C. § 4617(f)—which provides that "no court may take any action to restrain or affect the exercise of [FHFA's] powers or functions" as Conservator—bars Plaintiffs' claims seeking to second-guess a business decision of the Conservator regarding how the Enterprises pay dividends for Treasury's commitment to fund them. But under HERA, courts are not permitted to enjoin the Conservator's exercise of its conservatorship functions; this necessarily includes decisions to enter into and amend funding agreements made on behalf of the Enterprises. Plaintiffs' allegations that the Conservator's decision was unwise, unnecessary, improperly motivated, and too favorable to Treasury cannot alter this result. And they ignore that Treasury was the only entity willing to invest the billions of dollars the Enterprises needed, and remains obligated to continue to do so.

In this appeal, Plaintiffs rehash the same arguments already rejected by numerous courts across the country. The relief they seek—an injunction vacating the Third Amendment—would indisputably restrain and effect the Conservator,

whether granted through claims against FHFA or claims against Treasury. Accordingly, Plaintiffs' claims are squarely foreclosed.

STATEMENT OF JURISDICTION

The jurisdictional summary in Plaintiffs' brief is not complete and correct. This case arises under 28 U.S.C. § 1331 because Plaintiffs purport to assert claims under the Administrative Procedure Act, 5 U.S.C. § 706. However, the district court lacked jurisdiction over Plaintiffs' claims because Congress withdrew jurisdiction to review claims seeking equitable relief against FHFA as Conservator pursuant to 12 U.S.C. § 4617(f). In addition, Plaintiffs lack standing to pursue their claims because FHFA, as Conservator, has succeeded to "all rights, titles, powers, and privileges" of the Enterprises and their stockholders, 12 U.S.C. § 4617(b)(2)(A)(i), including the right to bring suit on behalf of the Enterprises, as Plaintiffs seek to do here.

The district court entered judgment in favor of Defendants on March 20, 2017. SA24. Plaintiffs timely noticed their appeal on April 27, 2017. This Court accordingly has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether 12 U.S.C. § 4617(f)—which provides that "no court may take any action to restrain or affect the exercise of [FHFA's] powers or functions" as Conservator of Fannie Mae and Freddie Mac—bars Plaintiffs from seeking to

enjoin the Conservator's decision to amend the funding agreements between the Enterprises and Treasury through the Third Amendment.

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

STATEMENT OF THE CASE

A. The Enterprises and Their Importance to the National Economy

The GSEs are government-sponsored enterprises chartered by Congress to provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thus freeing up capital for those lenders to make additional loans. A3, A18.[2] The GSEs, which own or guarantee trillions of dollars of mortgages and mortgage-backed securities, play a vital role in housing finance and the U.S. economy. *Id.*

Throughout the first half of 2008, the GSEs suffered multi-billion dollar losses on their mortgage portfolios and guarantees, as the housing market collapsed and homeowners defaulted on mortgages at accelerating rates. A19. On July 30, 2008, responding to the "systemic danger that a Fannie Mae or Freddie Mac

[2] Citations to "A___" refer to the Appendix filed by Plaintiffs. Citations to "SA___" refer to the Plaintiffs' "Short Appendix," which contains the district court's decision.

collapse posed to the already fragile national economy," *Perry Capital*, 70 F. Supp. 3d at 215, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, § 1101, 122 Stat. 2654, 2661 (codified at 12 U.S.C. § 4511 *et seq*.).

HERA created FHFA, an independent federal agency, to supervise and regulate the Enterprises and Federal Home Loan Banks. 12 U.S.C. §§ 4501 *et seq*. HERA also granted FHFA's Director the discretionary authority to place the Enterprises in conservatorship and to act as their conservator "for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs." 12 U.S.C. § 4617(a)(2).

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

On September 6, 2008, having concluded that the Enterprises could not operate safely and soundly and fulfill their critical statutory mission, FHFA's Director placed the Enterprises into conservatorships. A5, A24. At that time, the GSEs' financial exposure on their combined guaranteed mortgage-backed securities and outstanding debt totaled more than $5.4 trillion, and their net worth and public stock prices had fallen sharply. *FHFA Fact Sheet: Questions & Answers on Conservatorship*, http://goo.gl/DV4nAt (cited at A24).

HERA provides that, upon its appointment as Conservator, FHFA "immediately succeed[ed] to . . . *all rights*, titles, powers, and privileges of the

regulated entity, and of *any stockholder*, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A) (emphasis added).

In addition to vesting the Conservator with all rights of the Enterprises and their owners, officers, and directors, HERA accords FHFA as Conservator broad powers to "operate" and "conduct all business" of the GSEs. *Id.* § 4617(b)(2)(B)(i). Specifically, HERA empowers the Conservator to:

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

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

action to restrain or affect the exercise of powers or functions of the Agency as a conservator."

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

HERA amended the Enterprises' statutory charters to grant Treasury authority to purchase securities issued by the Enterprises, so long as they reached "mutual agreement" on the terms. *See* 12 U.S.C. § 1719(g)(1)(A) (Fannie Mae); 12 U.S.C. § 1455*(l)*(1)(A) (Freddie Mac). Treasury exercised this authority in September 2008, purchasing senior preferred stock in the Enterprises. Treasury and the Conservator entered into two Senior Preferred Stock Purchase Agreements (the "PSPAs"), through which Treasury agreed to infuse hundreds of billions of taxpayer dollars into the Enterprises, as needed, to allow them to continue operating and avoid mandatory receivership and liquidation. *See* PSPAs at A89-116.

The PSPAs remain in effect and work as follows: if in any quarter an Enterprise's net worth is negative—defined as liabilities exceeding assets in accordance with Generally Accepted Accounting Principles ("GAAP")—then Treasury must invest additional funds in the Enterprise sufficient to cure its negative net worth. *See* A92 (PSPAs § 2.2). The PSPAs thus provide the GSEs with "unprecedented access to guaranteed capital." *Perry Capital*, 2017 WL 3078345, at *11.

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

First, the PSPAs provided Treasury with a senior liquidation preference starting at $1 billion per Enterprise, which increased dollar-for-dollar whenever the Enterprises drew Treasury funds. A94 (PSPAs § 3.3). Thus, if the Enterprises are liquidated through receivership, Treasury must be paid its preference from the proceeds of the liquidation before any other shareholders.

Second, the PSPAs required the Enterprises to pay Treasury a 10% annual dividend, assessed quarterly, based on the total amount of the liquidation preference. A119 (GSE Senior Preferred Stock Certificates § 2(b)-(c)). If the Enterprises failed to pay the dividend in cash, then the dividend would accrue at a rate of 12% and add to Treasury's outstanding liquidation preference. *Id.*

Third, the PSPAs allow Treasury to recover, over and above the dividends, an annual fee "intended to fully compensate [Treasury] for the support provided by the ongoing Commitment." A94 (PSPAs § 3.2(b)). The amount of the commitment fee was to reflect "the market value of the Commitment as then in effect." *Id.* The PSPAs allowed Treasury to waive the fee "based on adverse conditions in the United States mortgage market." *Id.* The Second Amendment to

the PSPAs deferred the fee until 2011 (Dist. Ct. Doc. # 39-4 at § 8), and Treasury waived it in 2011 and 2012. A31, A58.

Fourth, the PSPAs provided Treasury with warrants to acquire 79.9% of the Enterprises' common stock. A94 (PSPAs § 3.1). The PSPAs also imposed covenants precluding the Enterprises from paying dividends on non-Treasury stock, redeeming stock, or exiting conservatorship (other than through receivership) without Treasury's consent, and make clear that shareholders are not third-party beneficiaries to the PSPAs. A96-97, A99 (PSPAs §§ 5.1, 5.3, 5.6, 6.1).

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

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

By late 2008, the Enterprises' liabilities exceeded their assets under GAAP; Treasury thus began infusing billions of dollars into the Enterprises. A39. Had Treasury not cured these net-worth deficiencies, one or both of the Enterprises would have been forced into mandatory receivership and liquidation. *See* 12 U.S.C. § 4617(a)(4).

While the PSPAs initially capped Treasury's commitment at $100 billion per Enterprise, this amount proved inadequate, and the parties amended the PSPAs via

the "First Amendment" to double the cap to $200 billion per Enterprise. A34. When it appeared that even that amount may be insufficient, the parties amended the PSPAs again via a "Second Amendment," which permitted the Enterprises to draw *unlimited* amounts from Treasury to cure net-worth deficits through 2012. A35; *see also* Dist. Ct. Doc. # 39-4 at §§ 3, 6. Pursuant to the Second Amendment, Treasury's commitment became fixed at the end of 2012, and future draws would reduce the remaining funds available. *Id.*

To date, the Enterprises have drawn a total of $187.5 billion from Treasury. A39. Pursuant to the formula established by the Second Amendment, the remaining amount of the commitment available for Fannie Mae is $117.6 billion (over and above the $116.1 billion already infused), and $140.5 billion for Freddie Mac (over and above the $71.3 billion already infused). A39. Accordingly, Treasury has committed an additional $258 billion, for a total of $445 billion, to the Enterprises.

E. The Third Amendment to the PSPAs

Due to the substantial amounts drawn from Treasury, the Enterprises' dividend obligations—calculated as 10% of the Treasury liquidation preference—were also substantial. By June 30, 2012, the Enterprises were obligated to pay

Treasury approximately $19 billion per year—an amount that exceeded the Enterprises' average historical earnings per year.[3]

Between 2009 and 2011, the Enterprises did not earn enough to pay the Treasury dividend. So the Enterprises drew billions more from Treasury to make their dividend payments. Those draws, in turn, increased Treasury's liquidation preference and the Enterprises' future dividend obligations. After the amount of the Treasury commitment became fixed in 2012, any such draws would reduce the finite amount remaining in the Treasury commitment.

On August 17, 2012, FHFA and Treasury executed the Third Amendment to the PSPAs, which ended the practice of the Enterprises taking draws from Treasury to pay dividends to Treasury. In particular, the Third Amendment (1) eliminated the fixed-rate 10% annual dividend, (2) added a quarterly variable dividend in the amount (if any) of each Enterprise's positive net worth, subject to a declining reserve, and (3) suspended the periodic commitment fee while the quarterly variable dividend is in effect. *See* A136-52.

The Third Amendment thus relieved the Enterprises from obligations to pay fixed dividends of approximately $19 billion annually *plus* commitment fees equal

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

to the market value of Treasury's massive and historic commitment. Just before the Third Amendment, the Enterprises stated in SEC filings that they "d[id] not expect to generate net income or comprehensive income in excess of our annual dividend obligation to Treasury over the long term." Fannie Mae, Quarterly Report (Form 10-Q), at 12 (Aug. 8, 2012) (http://goo.gl/bGLVXz); *see also* Freddie Mac, Quarterly Report (Form 10-Q), at 10 (Aug. 7, 2012) (same) (http://goo.gl/2dbgey). After the Third Amendment, the Enterprises owed only variable net-worth dividends, and no periodic commitment fees. Accordingly, if the Enterprises' net worth is negative, they pay no dividend. If the Enterprises' net worth is positive, they pay that amount as a dividend, even if that amount is less (or greater) than the prior 10% dividend obligation. Thus, under the Third Amendment, Treasury accepted the risk that the Enterprises would earn less than 10% of the liquidation preference plus the amount of the periodic commitment fee.

F. Procedural History

Plaintiffs' complaint asserted APA claims against FHFA and Treasury (Counts I and II) for allegedly exceeding their statutory authority in agreeing to the Third Amendment, and against Treasury for allegedly engaging in arbitrary and capricious conduct in agreeing to the Third Amendment (Count III). Plaintiffs amended their complaint, adding various allegations but asserting the same claims.

A1. Defendants filed motions to dismiss the amended complaint, which the district court granted. SA1. This appeal followed.

SUMMARY OF THE ARGUMENT

Plaintiffs' claims are barred by two separate provisions of HERA.

First, the district court correctly recognized that the plain text of HERA resolves the central issue in this case: while the Enterprises are in conservatorship, "no court may take any action to restrain or affect the exercise of powers or functions" of FHFA as their Conservator. 12 U.S.C. § 4617(f). The powers and functions of the Conservator are far-reaching; they include, *inter alia*, the power to conduct all business of the Enterprises, reorganize their affairs, transfer or sell any Enterprise assets, and take all such actions in a manner the Conservator determines is in the best interests of the Enterprises or FHFA. *Id.* §§ 4617(a)(2), 4617(b)(2)(B), 4617(b)(2)(G), 4617(b)(2)(J). The district court correctly held that FHFA acted within its statutory powers and functions in agreeing to the Third Amendment. Section 4617(f) accordingly bars Plaintiffs' claims, each of which seeks to vacate the Third Amendment.

Second, though the district court did not reach this issue, Plaintiffs' claims also are barred by a separate, independently dispositive HERA provision that transfers "all rights" of the shareholders to the Conservator, foreclosing Plaintiffs' claims during conservatorship. Upon appointment, FHFA as Conservator

"immediately succeed[ed]" by operation of law to "all rights, titles, powers, and privileges of the [Enterprises] and of any stockholder." *Id.* § 4617(b)(2)(A). FHFA thus succeeded to, among other things, Plaintiffs' rights to pursue APA claims on behalf of the Enterprises during conservatorship. Accordingly, Plaintiffs' claims are barred by HERA's succession provision.

This Court accordingly should affirm.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of a motion to dismiss. *Ameritech Corp. v. McCann*, 297 F.3d 582, 585 (7th Cir. 2002).

ARGUMENT

I. SECTION 4617(f) BARS PLAINTIFFS' CLAIMS

Plaintiffs' claims seek solely declaratory and equitable relief. A84-86. Because the Conservator's decision to execute the Third Amendment falls squarely within its broad statutory powers and functions, the district court correctly held that Section 4617(f) bars Plaintiffs' claims, including those directed at Treasury. SA17-22.

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

To enable the Conservator to carry out its functions, Congress insulated the Conservator's actions from judicial second-guessing, mandating that "no court may take any action to restrain or affect the exercise of powers or functions of the

Agency as a conservator." 12 U.S.C. § 4617(f). As the D.C. Circuit recently explained in affirming the dismissal of APA claims identical to those Plaintiffs assert here, the "plain statutory text [of Section 4167(f)] draws a sharp line in the sand against litigative interference—through judicial injunctions, declaratory judgments, or other equitable relief—with FHFA's statutorily permitted actions as conservator." *Perry Capital*, 2017 WL 3078345, at *8. Courts routinely apply Section 4617(f) to bar all manner of claims, including APA claims, seeking relief that would "restrain or affect" the exercise of powers of FHFA as Conservator. *See, e.g.*, *Cty. of Sonoma v. FHFA*, 710 F.3d 987, 994 (9th Cir. 2013) ("Because . . . FHFA acted within its powers as conservator, neither we nor the district court have jurisdiction over Plaintiffs'-Appellees' [APA and other] claims."); *Leon Cty. v. FHFA*, 700 F.3d 1273, 1278-79 (11th Cir. 2012) (affirming dismissal of APA claims based on Section 4617(f)).

These decisions are consistent with the substantial body of case law—including from this Court—interpreting 12 U.S.C. § 1821(j), the materially identical provision governing Federal Deposit Insurance Corporation ("FDIC") conservatorships and receiverships.[4] Like Section 4617(f), Section 1821(j) "effect[s] a sweeping ouster of courts' power to grant equitable remedies."

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

Courtney v. Halleran, 485 F.3d 942, 948 (7th Cir.2007) (alteration in original) (quoting *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995)). Also like Section 4617(f), Section 1821(j) applies "regardless of the claimant's likelihood of success on the merits of his underlying claims." *Freeman*, 56 F.3d at 1399. Indeed, given "the breadth of the statutory language . . . the statute would appear to bar a court from acting in virtually all circumstances." *Nat'l Tr. for Historic Pres. in U.S. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring); *see also Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1016 (8th Cir. 2013) (Section 1821(j) is "construed broadly to constrain the court's equitable powers."); *Courtney*, 485 F.3d at 948 (recognizing "the breadth of § 1821(j)'s prohibition").[5]

The analysis to determine whether Section 4617(f) precludes judicial review is straightforward and "quite narrow." *Bank of Am. Nat'l Ass'n v. Colonial Bank*,

[5] Numerous courts have treated the Section 4617(f) and Section 1821(j) inquiry as jurisdictional. *See, e.g.*, *Cty. of Sonoma*, 710 F.3d at 990 (observing that, where Section 4617(f) applies, "the courts have no jurisdiction over Plaintiffs'–Appellees' claims"); *Leon Cty.*, 700 F.3d at 1276) (addressing the "jurisdictional bar in § 4617(f)"); *Hanson v. FDIC*, 113 F.3d 866, 870 (8th Cir. 1997) ("Section 1821(j) limits the subject matter jurisdiction of federal and state courts . . ."); *Volges v. RTC*, 32 F.3d 50, 51 (2d Cir. 1994) (Section 1821(j) "deprives the district court of jurisdiction to enjoin the RTC."); *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 704 (1st Cir. 1992) ("[U]nder 12 U.S.C. § 1821(j), a federal court lacks jurisdiction to enjoin the [FDIC] acting in its role as receiver . . . ."). While this Court has never directly addressed the issue, it too has observed that "some circuits frame Section 1821(j) as a jurisdictional inquiry (as does the FDIC)." *Veluchamy v. FDIC*, 706 F.3d 810, 817 (7th Cir. 2013). In this case, the district court stated "it is not clear that this provision is a *jurisdiction*-stripping statute, rather than a *merits*-based limit on the usual claims that a party might assert against a government agency." SA10. While the court considered the inquiry "a merits question," the court emphasized "it makes no practical difference in this case." SA11. Though the FHFA Defendants contend that Section 4617(f) is jurisdictional, the FHFA Defendants agree the issue makes no difference in this case and thus the Court need not resolve this issue here.

604 F.3d 1239, 1243 (11th Cir. 2010) (discussing 12 U.S.C. § 1821(j)). The court "must first determine whether the challenged action is within the [Conservator's] power or function" under HERA. *Dittmer Props.*, 708 F.3d at 1017. If so, the Conservator "is protected from all court action that would 'restrain or affect' the exercise of those powers or functions." *Bank of Am.*, 604 F.3d at 1243. "A conclusion that the challenged acts were directed at an institution in conservatorship and within the powers given to the conservator [thus] ends the inquiry." *Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012).

In an attempt to limit the breadth of Section 4617(f), Plaintiffs cite two Ninth Circuit decisions—*Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997) and *Bank of Manhattan v. FDIC*, 778 F.3d 1133 (9th Cir. 2015) (Roberts Br. 29-30)—but those decisions are inapt and unpersuasive. Both addressed breach-of-contract claims, which are not asserted here. *See Meritage Homes of Nev., Inc. v. FDIC*, 753 F.3d 819, 825 (9th Cir. 2014) ("*Sharpe* is not controlling outside of its limited context."). Further, *Bank of Manhattan* held only that FIRREA does not "immunize the FDIC [as receiver] from *damage claims* if it elects to breach pre-receivership contractual arrangements." 778 F.3d at 1134 (emphasis added). There are no claims for damages asserted here. And while *Sharpe* declined to apply Section 1821(j) to a claim for alleged breach of contract, that ruling conflicts

with the law of numerous other circuits that alleged breaches of contract cannot overcome Section 1821(j).[6]

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

The district court correctly held that the Conservator acted within its statutory powers and functions in executing the Third Amendment, and thus Section 4617(f) applies. SA17-23.

Courts consistently recognize that HERA "endows FHFA with extraordinarily broad flexibility to carry out its role as conservator." *Perry Capital*, 2017 WL 3078345, at *8. FHFA's statutory powers are at least as extensive and broad as those given to conservators and receivers under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), which courts have also described as "extraordinary," *MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 236 (D.C. Cir. 2013), and "exceptionally broad," *In re Landmark Land Co. of Okla., Inc.*, 973 F.2d 283, 288 (4th Cir. 1992).

[6] *See, e.g.*, *In re Landmark Land Co. of Carolina*, No. 96-1404, 1997 WL 159479, at *4 (4th Cir. Apr. 7, 1997) ("The mere fact that an action of the FDIC [as conservator or receiver] may violate state contract law . . . does not entitle a federal court to enjoin the FDIC . . . ."); *RPM Invs., Inc. v. RTC*, 75 F.3d 618, 621 (11th Cir. 1996) (similar); *Volges*, 32 F.3d at 52 ("The fact that the [conservator's or receiver's conduct] might violate [plaintiff]'s state law contract rights does not alter the calculus [under Section 1821(j)]."); *Ward v. RTC*, 996 F.2d 99, 103 (5th Cir. 1993) (similar); *Nat'l Tr. for Historic Pres. v. FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993) (observing "the strong language of § 1821(j)" does not "include the limitation that [a conservator's] powers be subject to—and hence enjoinable for non-compliance with—any and all other federal laws").

The Conservator's execution of the PSPAs and Third Amendment fell squarely within these broad statutory powers and functions: the Conservator exercised its power to "operate the [GSEs]," "carry on [their] business," "contract" on their behalf, and "conduct all business of the [GSEs]" in the manner the Conservator "determines is in the best interests of the [GSEs] or the Agency [FHFA]." 12 U.S.C. §§ 4617(b)(2)(B)(i), (v), (D)(ii), (J)(ii). Indeed, HERA specifically authorized the PSPAs, which were later amended via the Third Amendment, by authorizing the GSEs (and thus the Conservator) to issue stock to Treasury based on their "mutual agreement." *Id.* §§ 1455(*l*)(1)(A); 1719(g)(1)(A). At bottom, the PSPAs are funding agreements that provide the Enterprises with a capital backstop of hundreds of billions of dollars. Just as securing funding is a quintessential act for the conservator of a financial institution—a proposition Plaintiffs do not dispute—so too is agreeing to amend the PSPAs in a manner the Conservator believes, in its judgment, is in the best interests of the Enterprises or FHFA. *See* 12 U.S.C. § 4617(b)(2)(J)(ii).

As the D.C. Circuit held in addressing this issue, "FHFA's execution of the Third Amendment [thus] falls squarely within its statutory authority to '[o]perate the [Companies,]' 12 U.S.C. § 4617(b)(2)(B); to 'reorganiz[e]' their affairs, *id.* § 4617(a)(2); and to 'take such action as may be . . . appropriate to carry on the[ir] business,' *id.* § 4617(b)(2)(D)(ii)." *Perry Capital*, 2017 WL 3078345, at *9

(alterations in original). "Renegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital are quintessential conservatorship tasks designed to keep the Companies operational." *Id.* And because the Conservator's "management of Fannie's and Freddie's assets, debt load, and contractual dividend obligations during their ongoing business operation sits at the core of FHFA's conservatorship function," actions "to enjoin FHFA from implementing [the Third Amendment]," "to declare the Third Amendment invalid," or "to vacate the Third Amendment" seek relief "squarely within Section 4617(f)'s plain textual compass" and are barred. *Id.* at *7.

This case is no different: Plaintiffs challenge the same transaction, pursue the same theory, and seek the same relief as the *Perry Capital* plaintiffs. Accordingly, the district court correctly followed *Perry Capital* to hold that "Plaintiffs have not sufficiently alleged that FHFA acted outside the bounds of its statutory authority" in executing the Third Amendment. SA22. Every court that has addressed this issue is in accord. *See Collins*, 2017 WL 2255564, at *4 (Plaintiffs "fail to demonstrate that the FHFA's conduct was outside the scope of its broad statutory authority as conservator."); *Saxton*, 2017 WL 1148279, at *10 ("[T]he court concludes that FHFA's adoption of the Third Amendment was within its powers as conservator."); *Cont'l W.*, 83 F. Supp. 3d at 840 n.6 ("FHFA and

Treasury did not act outside the power granted to them by HERA."); *Robinson*, 223 F. Supp. 3d at 670-71 (similar).

Further, Plaintiffs characterize the Third Amendment as a "transfer[]" of GSE assets, *see* A49, A53, A84, and thus concede any issue of Conservator authority because HERA specifically authorizes the Conservator to "transfer or sell any asset" of the Enterprises "without any approval, assignment, or consent." 12 U.S.C. § 4617(b)(2)(G). Like FIRREA's materially identical provision, 12 U.S.C. § 1821(d)(2)(G)(i), HERA's transfer provision "does not provide any limitation"; indeed, "[i]t is hard to imagine more sweeping language." *Gosnell v. FDIC*, No. 90-1266L, 1991 WL 533637, at *6 (W.D.N.Y. Feb. 4, 1991), *aff'd*, 938 F.2d 372 (2d Cir. 1991). Thus, courts consistently have held that suits challenging an FDIC conservator's or receiver's transfer of assets are barred. *See, e.g.*, *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1323-24 (6th Cir. 1993) (FIRREA transfer provision and Section 1821(j) barred court from rescinding a receiver transaction "transferr[ing] substantially all" assets of the institution).[7]

Finally, Congress's enactment of the Consolidated Appropriations Act, 2016 (the "Act") on December 18, 2015, also confirms the Conservator's statutory

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

authority to execute the Third Amendment. *See* Pub. L. No. 114-113, § 702, Tit. VII, Div. O,129 Stat. 2242 (2015). The Act bars Treasury from selling or disposing of its preferred shares in the GSEs before January 1, 2018, but otherwise leaves in place Treasury's rights under the PSPAs—including the Third Amendment, which is expressly referenced in the "Definitions" section. *Id.* § 702(a). Congress's decision to circumscribe Treasury's authority in one area but leave intact other provisions of the PSPAs demonstrates that the Conservator and Treasury had the statutory authority to execute the Third Amendment. *See, e.g.*, *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) ("Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." (internal quotation marks and citation omitted)).

C. Plaintiffs' Attempts to Circumvent Section 4617(f) Are Meritless

Plaintiffs assert a variety of arguments in seeking to avoid, or create exceptions to, Section 4617(f). The district court correctly rejected these arguments, just as other courts have done in dismissing identical claims.

At the outset, Plaintiffs attempt to cabin the Conservator's powers and functions by arguing that one portion of HERA, 12 U.S.C. § 4617(b)(2)(D), "mark[s] the bounds" of FHFA's conservator powers. Roberts Br. 33 (quoting

Perry Capital, 2017 WL 3078345, at *34 (Brown, J., dissenting)). Not so. Section 4617(b)(2)(D) broadly empowers the Conservator to take action "to put the [Enterprises] in a sound and solvent condition," "carry on the business of" the GSEs, and "preserve and conserve" their assets. But "Section 4617(b)(2)(D) obviously does not set out the exclusive powers of FHFA as conservator." *Robinson*, 223 F. Supp. 3d at 670. "As a plain textual matter, [HERA] provides FHFA many '[g]eneral powers' 'as conservator or receiver,' 12 U.S.C. § 4617(b)(2), that are not delineated in Section 4617(b)(2)(D)." *Perry Capital*, 2017 WL 3078345, at *10. These powers include, *inter alia*, the power to "take over the assets of and operate" the Enterprises, to "perform all functions" and contract on their behalf, "transfer or sell" their assets, and take actions FHFA determines are in their "best interests." 12 U.S.C. § 4617(b)(2)(B), (b)(2)(G), (b)(2)(J)(ii). The Conservator acted squarely within these powers and functions in agreeing to the Third Amendment.

1. Allegations of Failure to Comply with a Purported "Duty" to Preserve and Conserve Assets Cannot Overcome Section 4617(f)

Plaintiffs seek to convert the Conservator's broad powers and functions—*e.g.*, to preserve and conserve assets—into mandatory duties and obligations the Conservator is supposedly "required" to undertake, and which Plaintiffs purport to police through litigation. Roberts Br. 33-43. Plaintiffs contend these alleged

duties and obligations circumscribe how the Conservator may exercise all other statutory powers, and that private shareholders (and any other third party) can sue the Conservator—notwithstanding Section 4617(f)—to enforce these purported obligations. Plaintiffs are wrong.

The district court correctly held that HERA "makes the actions listed [therein] discretionary rather than obligatory." SA21. "Contrary to the Plaintiffs' arguments, FHFA did not violate any 'core statutory mandates' as conservator—largely because these mandates do not exist, at least not as the Plaintiffs have alleged." SA20. As the D.C. Circuit likewise held, "time and again, [HERA] outlines what FHFA as conservator 'may' do and what actions it 'may' take. . . . And 'may' is, of course, 'permissive rather than obligatory.'" *Perry Capital*, 2017 WL 3078345, at *9 (citations omitted); *see also, e.g.*, 12 U.S.C. § 4617(b)(2)(B) (describing various powers FHFA "may" exercise). Because HERA provides that FHFA "may" preserve and conserve assets, HERA "does not compel [FHFA] in any judicially enforceable sense, to preserve and conserve Fannie's and Freddie's assets and to return the Companies to private operation." *Perry Capital*, 2017 WL 3078345, at *9. In other words, "that FHFA '*may*, as conservator, take such action as may be (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to . . . preserve and conserve the assets and property of the regulated entity'. . . does not create a mandatory duty" requiring the Conservator to

do so. *Robinson*, 223 F. Supp. 3d at 669-70. Accordingly, "FHFA's alleged failure to exercise its permissive power . . . does not remove Plaintiffs' claims from the ambit of Section 4617(f)'s bar on equitable relief." *Id.*at 670; *see also Collins*, 2017 WL 2255564, at *3 (applying Section 4617(f) despite alleged "duty to preserve and conserve" assets); *Saxton*, 2017 WL 1148279, at *10 (similar).

Plaintiffs acknowledge that "the word 'may' 'implies some degree of discretion,'" but nevertheless argue that the "obvious inferences from the structure and purpose of the [HERA]" defeats that interpretation. Roberts Br. 34 (quoting *United States v. Rodgers*, 461 U.S. 677, 706 (1983)). Not so. HERA's clear structure and purpose is to give the Conservator maximum flexibility to do what it determines is in the Enterprises' and FHFA's best interests, and to protect those decisions from judicial review. Neither of those statutory purposes is consistent with transposing broad authority into mandatory, judicially-enforceable obligations on the Conservator.

Lacking a statutory hook for their "mandatory duty" argument, Plaintiffs revert to arguing the Conservator has an "overarching statutory mission" or "goal" to preserve Enterprise assets, and that the Third Amendment is "antithetical" to that mission. Roberts Br. 34, 43-46. In support, Plaintiffs cite statements by FHFA and Director Watt discussing the Conservator's efforts to carry on the Enterprises' business and to preserve and conserve their assets. *Id.* at 35-36, 40-

41. But these statements do not advance Plaintiffs' argument. At most, they are an acknowledgment that the Conservator must balance various, potentially competing, high-level goals and priorities set forth by Congress. That does not mean Congress required FHFA to take specific measures that are judicially enforceable by private plaintiffs in litigation. *See Perry Capital*, 2017 WL 3078345, at *9 (HERA "does not compel [FHFA] *in any judicially enforceable* sense to preserve and conserve Fannie's and Freddie's assets.") (emphasis added).

Adopting Plaintiffs' approach would allow litigants to sue the Conservator for purportedly failing to comply with its "mission" based merely on an allegation that some *other* course of action would have *better* preserved and conserved the Enterprises' assets. That would expose the Conservator to a flood of litigation aimed at second-guessing the Conservator's operational decisions, and could expose the Conservator to conflicting judicial orders directing its operations. This is precisely what Congress prohibited through enactment of Section 4617(f).

Plaintiffs' repeated citation to *Resolution Trust Corporation v. CedarMinn Building Limited Partnership*, 956 F.2d 1446 (8th Cir. 1992), is inapt. Roberts Br. 31-32, 47-48. The *CedarMinn* court simply contrasted the "mission" of a conservator with that of a receiver, observing the "conservator's mission is to conduct an institution as an ongoing business," while a receiver liquidates the institution. *Id*. at 1454. Of course, operating the institution as a going concern is

precisely what FHFA as Conservator has done, both before and after the Third Amendment. *CedarMinn* also gives no indication that private litigants can enforce a conservator's compliance with any such mission. Indeed, *CedarMinn* did not cite or address Section 1821(j), as it involved a suit for damages—not injunctive relief—related to a contract repudiation. *Id*. at 1449.

Plaintiffs also point to a provision of HERA that states the Conservator "*shall* conduct its operations in a manner which . . . maximizes the net present value return from the sale or disposition of [Enterprise] assets." Roberts Br. 37 (emphasis added by Plaintiffs) (quoting 12 U.S.C. § 4617(b)(11)(E)). According to Plaintiffs, "judicial review is available," notwithstanding Section 4617(f), to "determine whether FHFA complied" with this statutory provision when it executed the Third Amendment. *Id*. at 38. Again, Plaintiffs are wrong.

Just as Section 4617(f) bars declaratory and equitable claims against the Conservator for allegedly failing to "preserve and conserve" assets, Section 4617(f) also bars such claims for allegedly failing to "maximize" the value of those assets. Indeed, in *Ward v. Resolution Trust Corporation*, 996 F.2d 99, 103 (5th Cir. 1993), the Fifth Circuit rejected the *exact* argument Plaintiffs assert here. In *Ward*, the plaintiff likewise attempted to avoid the dispositive effect of Section 1821(j) by alleging a receiver had "violat[ed]" the same purported "restrictions" of FIRREA by "fail[ing] to maximize the net present value return from the sale" of

the entity's assets. 996 F.2d at 101, 103 (citing 12 U.S.C. § 1441a(b)(3)(C)). The Fifth Circuit "disagree[d] entirely," finding Plaintiffs' theory "was conceived in flawed logic and therefore dies aborning." *Id*. The court explained that, because transferring assets was a "quintessential statutory power" of conservators and receivers, Section 1821(j) applied:

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

Id. at 103. So too here. Because executing the Third Amendment was a "quintessential conservatorship task[]," *Perry Capital*, 2017 WL 3078345, at *9, Section 4617(f) applies, irrespective of Plaintiffs' argument that the Amendment fails to maximize the value of Enterprise assets. "Whatever Plaintiffs' views of the wisdom of the Third Amendment, FHFA's adherence to its statutory role as conservator does not turn on the wisdom of its decision-making. Any suggestion that FHFA could have or should have taken different actions to pursue the goals of

conservatorship are therefore irrelevant." *Saxton*, 2017 WL 1148279, at *10 (citing *Ward*, 996 F.3d at 103).[8]

Plaintiffs also refer throughout their brief to the notion of a "traditional conservator" and an alleged "traditional understanding" of conservatorship principles purportedly applicable to "conservators at common law." *See* Roberts Br. 15, 32-33, 39, 41, 57-58. However, in HERA, Congress gave the Conservator powers greater than those allegedly exercised by common-law conservators. As the district court correctly held, "Congress did not set up a typical conservatorship" in HERA. SA20. Indeed, HERA's conservatorship powers "bear[] no resemblance to the type of conservatorship measures that a private common-law conservator would be able to undertake. . . . Congress made clear in [HERA] that FHFA is not your grandparents' conservator. For good reason." *Perry Capital*, 2017 WL 3078345, at *14; *see also Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012) (rejecting shareholder arguments "delving deep into pre-HERA common law and expounding HERA's legislative history," in favor of simply "read[ing] the statute." (citation omitted)).

Moreover, HERA's rejection of common-law conservatorship principles is "best evidenced by the fact that FHFA is empowered, in its role as conservator, to

[8] The decisions in *Arkansas State Bank Commissioner v. RTC*, 911 F.2d 161 (8th Cir. 1990) and *RTC v. Diamond*, 45 F.3d 665 (2d Cir. 1995) (cited at Roberts Br. 38) are inapposite, as those decisions merely recite FIRREA's analogous provision in the background, without addressing or applying it.

act in *its own best interests*." SA20 (citing 12 U.S.C. § 4617(b)(2)(J)(ii)); *see Morissette v. United States*, 342 U.S. 246, 263 (1952) (common law meanings presumed only in the "absence of contrary direction"). Indeed, this provision of HERA confirms that the Conservator need not "act with a motive that exclusively favors the interests of Fannie or Freddie." SA16. Thus, the Court should reject Plaintiffs' (and the *Perry Capital* dissent's) unsupported notion that "Congress intended FHFA to be nothing more than a common-law conservator." *Perry Capital*, 2017 WL 3078345, at *14.[9]

2. Allegations that Treasury Acted Unlawfully Cannot Overcome Section 4617(f)

Plaintiffs next attempt to sidestep the Section 4617(f) inquiry by focusing on the merits of their claims against Treasury, FHFA's contractual counterparty in the Third Amendment. *See* Roberts Br. 16-22. Under Plaintiffs' theory, courts may vacate and declare unlawful any contract entered into by the Conservator—notwithstanding Section 4617(f)—if the counterparty acted unlawfully in executing the contract. According to Plaintiffs, "Congress chose to circumscribe judicial review *only as to FHFA*." Roberts Br. 25.

[9] For the same reasons, Plaintiffs incorrectly cite *Fahey v. Mallonee*, 332 U.S. 245, 250–53 (1947) (at Roberts Br. 42), to argue the Court should read purported historical principles into HERA in order to constrain the Conservator's express powers and functions. Congress gave the Conservator broad statutory powers well beyond those of traditional conservators; common law principles cannot override the plain text of the statute. *See Morissette*, 342 U.S. at 263.

Plaintiffs are wrong; their theory would carve out an atextual exception to Section 4617(f) and create a conflict with the law of numerous other circuits holding that injunctive relief directed to third parties is barred if it restrains or affects the Conservator, even where the third party is alleged to have acted unlawfully. Section 4617(f) simply contains no exception for third-party misconduct. "[T]he statute, by its terms, can preclude relief even against a third party . . . where the result is such that the relief 'restrain[s] or *affect[s]* the exercise of powers or functions of the [FDIC] as a conservator or a receiver.' After all, an action can 'affect' the exercise of powers by an agency without being aimed directly at it." *Hindes v. FDIC*, 137 F.3d 148, 160 (3d Cir. 1998) (alterations in original) (interpreting Section 1821(j)).[10]

Plaintiffs cite the district court decision in *Perry Capital*, which suggested—without citation—that Section 4617(f) may not apply if Treasury exceeded its statutory authority in executing the Third Amendment. Roberts Br. 27 (citing *Perry Capital (D.D.C.)*, 70 F. Supp. 3d at 222). But the language Plaintiffs rely on is dicta; the district court in *Perry Capital* held that Treasury did *not* exceed its

[10] *See also Dittmer*, 708 F.3d at 1017 (If plaintiffs "are allowed to attack the validity of a failed institution's assets by suing the remote [third party] purchaser, such actions would certainly restrain or affect the [conservator or receiver's] powers to deal with the property" of the institution.); *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992) (enjoining third party "would have the same effect, from the FDIC's perspective, as directly enjoining the FDIC").

statutory purchasing authority, *see* 70 F. Supp. 3d at 223-24, so it was unnecessary to reach the issue.[11]

In any event, the D.C. Circuit *overruled* the very language Plaintiffs quote from the district court opinion. Like Plaintiffs here, the shareholders in *Perry Capital* argued they could assert claims against Treasury because they "allege[d] that Treasury violated a provision of [HERA]—the very same law that governs FHFA's conservatorship activities"—by allegedly purchasing new securities through the Third Amendment. *See Perry Capital*, 2017 WL 3078345, at *17. The D.C. Circuit rejected this argument:

> [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. After all, it takes (at least) two to contract, and the Companies, under FHFA's conservatorship, are just as much parties to the Third Amendment as Treasury. One side of the agreement cannot exist without the other.

Perry Capital, 2017 WL 3078345, at *16. Thus, the D.C. Circuit did not reach the question whether Treasury violated its purchasing authority in executing the Third Amendment—Section 4617(f) made such an inquiry unnecessary.

[11] The district court below repeated this dicta (SA14), as did the district court in *Robinson*, 223 F. Supp. 3d at 665 n.1. These references were likewise dicta because each court held that Treasury acted within its statutory purchasing authority under HERA. SA22-23; *Robinson*, 223 F. Supp. 3d at 665 n.1 & 666-67.

Since the D.C. Circuit's decision, other courts also have rejected shareholder attempts to plead around Section 4617(f) by directing their claims at Treasury. *See Collins*, 2017 WL 2255564, at *4 (Section 4617(f) bars claims alleging that "Treasury's conduct in connection with the Third Amendment exceeded its statutory authority under HERA."); *Saxton*, 2017 WL 1148279, at *11 (similar).

These decisions are correct. Application of Section 4617(f) does not hinge on whether Treasury complied with all purported obligations under HERA, or whether Treasury could be said to have violated some other law. The "only relevant question" is whether the Conservator acted within its own statutory powers and functions in executing the Third Amendment. *See Furgatch v. RTC*, No. CIV. 93-20304, 1993 WL 149084, at *2 (N.D. Cal. Apr. 30, 1993) ("[E]njoining these [third] parties indirectly enjoins the RTC, which a district court has no power to do" under Section 1821(j).). Because the Conservator acted within its powers and functions, Section 4617(f) bars the claims, irrespective of any alleged misconduct on the part of FHFA's contractual counterparty. A judicially-created exception for third-party misconduct would undermine Congressional intent to immunize the Conservator from burdensome litigation, enabling plaintiffs *carte blanche* to plead around the statutory bar. Here, because Plaintiffs' claims seeking injunctive relief against Treasury would indisputably "restrain or affect" the Conservator, Section 4617(f) bars them; "the cause of that

effect"—*i.e.*, judicial relief aimed at curbing allegedly unlawful Treasury conduct—"is textually irrelevant." *Perry Capital*, 2017 WL 3078345, at *17.

Plaintiffs also argue that enjoining Treasury due to its allegedly unlawful activity "no more restrains or affects *FHFA's* conservatorship powers than would Treasury refusing to agree to a modification [of the PSPAs] in the first place." Roberts Br. 27. But this misses the point: Section 4617(f) prohibits *judicial* interference, stating that "*no court* may take any action to restrain or affect the exercise of the powers or functions" of the Conservator. 12 U.S.C. § 4617(f) (emphasis added). Thus, whether Treasury's negotiations with FHFA could ever be construed as "restrain[ing]" the Conservator is irrelevant.

In sum, Plaintiffs cannot avoid Section 4617(f) by alleging that Treasury acted unlawfully. Plaintiffs also are wrong on the merits: Treasury did *not* exceed its statutory purchase authority when executing the Third Amendment. FHFA adopts and incorporates by reference Treasury's argument that Treasury acted within its statutory authority. *See* Treasury Br. § III.

3. Allegations of Improper Motive Cannot Overcome Section 4617(f)

Throughout their brief, Plaintiffs assert that Section 4617(f) does not apply because the Conservator supposedly had a host of improper motives for the Third Amendment—*e.g.*, to "nationalize" the Enterprises, "siphon" or "harness" their assets in order "to reduce the federal deficit," "shackle them in perpetual

conservatorship," "affirmatively sabotage" their recovery, and "promote the interests of Treasury." Roberts Br. 11-12, 15, 30, 34, 40, 43, 57-58.

This argument fails: as the district court correctly recognized, "[w]hen considering whether FHFA or Treasury has acted ultra vires, the agencies' motives are irrelevant." SA15-16. "Nothing in [HERA] limits FHFA to exercising its powers only when it has proper 'motives,' as the Plaintiffs seem to think." SA16; *see also Perry Capital*, 2017 WL 3078345, at *13 ("[N]othing . . . in [HERA] hinges FHFA's exercise of its conservatorship discretion on particular motivations."). Indeed, even the dissenting judge in *Perry Capital* agreed with this point. *Perry Capital*, 2017 WL 3078345, at *39 (Brown, J., dissenting).

Instead, courts evaluate challenges to the Third Amendment by reviewing the Conservator's actions "on their face," without "wad[ing] into the merits or motives of FHFA and Treasury's actions." *Cont'l W.*, 83 F. Supp. 3d at 840 n.6; *see also Perry Capital (D.D.C.)*, 70 F. Supp. 3d at 225 (explaining the court's task in applying Section 4617(f) is to ask "*what* the Third Amendment entails, rather than *why* FHFA executed [it]"); SA16 (collecting cases).

Courts have applied Section 1821(j) the same way, enforcing the statutory bar notwithstanding allegations of improper motive. *See, e.g.*, *Hindes*, 137 F.3d at 158-61 (3d Cir. 1998) (barring challenge to alleged "conspiracy with state officials to close the bank"); *In re Landmark Land Co. of Okla.*, 973 F.2d at 288-90 (barring

challenge to action allegedly taken for conservator's "own benefit" and to other interested parties' detriment). These decisions rest on sound policy: if motives *were* relevant, statutory bars on judicial review would be meaningless; plaintiffs could plead around them simply by alleging an improper purpose. "Congress surely knew, when it enacted§ 4617(f), that challenges to agency action sometimes assert an improper motive." *Leon Cty. v. FHFA*, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273 (11th Cir. 2012). But in drafting HERA, "Congress barred judicial review of the conservator's actions without making an exception for actions said to be taken from an allegedly improper motive." *Id.*[12]

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

Plaintiffs also attempt to overcome Section 4617(f) by asserting that the Third Amendment failed to preserve and conserve assets or maximize their value, and was "financially reckless," "needless[]," and "perverse." Roberts Br. 40-45.

These allegations are merely attacks on the *merits* of the Conservator's decision to execute the Third Amendment—not allegations that the Conservator lacked authority to execute that amendment. Just as there is no "bad motive" exception to Section 4617(f), there also is no "bad job" exception. "Congress has

[12] The district court also correctly rejected Plaintiffs' attempt to spin the Eleventh Circuit's *Leon County* decision in their favor. SA16 n.11. At most, that decision suggests that a court may consider the "purpose" of FHFA action "when determining whether FHFA took a particular action as a conservator or as a regulator, *not* when determining whether FHFA's actions as a conservator were within the scope of its statutory powers as a conservator." *Id.* (citation omitted).

removed from the purview [of] the court the power to second-guess the FHFA's business judgment." *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 101 n.7 (D. Mass. 2014). Accordingly, "FHFA's adherence to its statutory role as conservator does not turn on the wisdom of its decision-making." *Saxton*, 2017 WL 1148279, at *10; *see also Cty. of Sonoma*, 710 F.3d at 993 ("[I]t is not our place to substitute our judgment for FHFA's."). To create such an exception would expose the Conservator to all manner of hindsight analysis and render "Section 4617(f)'s strict limitation on judicial review . . . an empty promise."[13] *Perry Capital*, 2017 WL 3078345, at *16. As the D.C. Circuit explained:

> What the [plaintiffs] and dissenting opinion take issue with, then, is the allocated amount of dividends that FHFA negotiated to pay its financial-lifeline stockholder—Treasury—to the exclusion of other stockholders, and that decision's feared impact on business operations in the future. But *Section 4617(f) prohibits us from wielding our equitable relief to second-guess either the dividend-allocating terms that FHFA negotiated on behalf of the Companies, or FHFA's business judgment* that the Third Amendment better balances the interests of all parties involved, including the taxpaying public, than earlier approaches had.

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

Id. at *15 (emphasis added). The same rationale applies here; allegations that the Conservator "improperly" exercised its powers by allegedly mismanaging Enterprise assets cannot overcome Section 4617(f).

Plaintiffs assert the Third Amendment was unnecessary in light of the Enterprises' ability to accrue dividends at a 12% (so-called "in kind") rate, rather than paying them at a 10% rate. Roberts Br. 6, 11, 45. But "[n]othing in [HERA] confines FHFA's conservatorship judgments to those measures that are driven by financial necessity." *Perry Capital*, 2017 WL 3078345, at *13. Thus, multiple courts have rightly rejected shareholder challenges to the Third Amendment that express a preference for this "alternative dividend system." *Saxton*, 2017 WL 1148279, at *3, *10 (Section 4617(f) renders "[a]ny suggestion that FHFA could have or should have taken different actions to pursue the goals of conservatorship . . . irrelevant."); *Perry Capital*, 2017 WL 3078345, at *17 (HERA "does not compel that [in kind dividend] choice over the variable dividend to Treasury put in place by the Third Amendment. Either way, Section 4617(f) flatly forbids declaratory and injunctive relief aimed at superintending to that degree FHFA's conservatorship or receivership judgments.").

Plaintiffs further allege the Third Amendment amounts to a "giveaway to Treasury." Roberts Br. 35, 38; A10, A58 (alleging lack of "meaningful consideration" for the Third Amendment). But this conflicts directly with the

Third Amendment itself, as the exchange of consideration is plain on its face. The PSPAs required the Enterprises to pay Treasury a fixed annual cash dividend equal to 10% of the liquidation preference. *Perry Capital*, 2017 WL 3078345, at *3. By the time of the Third Amendment, the 10% cash dividend had grown to $18.9 billion per year, an amount that exceeded the Enterprises' historical annual earnings for nearly every year since their founding. In addition, Treasury was entitled to an annual periodic commitment fee intended to compensate taxpayers for Treasury's massive, ongoing commitment of public funds. In the Third Amendment, the Conservator agreed to trade (a) a stream of profits that historically averaged less than $19 billion in exchange for relief from (b) $19 billion per year in fixed dividends *and* payment of the periodic commitment fee. Thus, consideration for the Third Amendment flowed in both directions, with Treasury accepting the risk that the Enterprises would earn less than 10% of the liquidation preference plus the amount of the periodic commitment fee. Indeed, if the Enterprises earned no profits in a year, they would owe Treasury *no* dividend. *Id.* at *4.

Thus, the Court can reject Plaintiffs' "giveaway" argument because (1) it is "elementary" that courts "will not inquire into the adequacy of consideration as long as the consideration is otherwise valid or sufficient to support a promise," 3 Williston on Contracts § 7:21 (4th ed.), and (2) Section 4617(f) bars courts from

second-guessing whether the consideration for the Third Amendment was favorable enough to the Enterprises; Congress vested the Conservator alone with responsibility for making such decisions.

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

Plaintiffs next assert that the Conservator exceeded its powers by acting in the "exclusive[] . . . province of a receiver" (Roberts Br. 50) because the Third Amendment is allegedly "winding up" the Enterprises' affairs and liquidating their assets. *Id*. at 46-51. The Third Amendment does no such thing; four years after its execution, the GSEs "continue to operate long-term, purchasing more than 11 million mortgages and issuing more than $1.5 trillion in single-family mortgage-backed securities," and "remain fully operational entities with combined operating assets of $5 trillion." *Perry Capital*, 2017 WL 3078345, at *12.

Regardless, contrary to Plaintiffs' contention, HERA's plain text authorizes FHFA as "conservator *or* receiver" to be appointed "for the purpose of reorganizing, rehabilitating, *or winding up* the affairs" of the Enterprises. 12 U.S.C. § 4617(a)(2) (emphasis added); *cf. Henson v. Santander Consumer USA Inc*., 137 S. Ct. 1718, 1722 (2017) (rejecting notion that, when "Congress set two words cheek by jowl in the same phrase," it "meant them to speak to entirely

different periods of time"). Indeed, FHFA may undertake a mix of actions under its various statutory authorities.

Plaintiffs argue that HERA uses the terms "liquidation" and "winding up" synonymously, and because the Conservator is not permitted to do the former, it must not be permitted to do the latter. Roberts Br. 50-51. But winding up is different from liquidation; it includes prudential steps short of liquidation, such as transferring Enterprise assets without approvals and shrinking the Enterprises' operations to ensure soundness until an ultimate resolution is determined. *See* 12 U.S.C. § 4617(b)(2)(G). Accordingly, "[u]ndertaking permissible conservatorship measures even with a receivership mind" would not be outside of the Conservator's "statutory bounds," *Perry Capital*, 2017 WL 3078345, at *14, as the district court below and multiple others have recognized. *See* SA22 ("FHFA can operate the companies as a conservator in anticipation of moving onto receivership." (citing 12 U.S.C. § 4617(a)(4)(D))); *Robinson*, 223 F. Supp. 3d at 670 ("HERA clearly envisions the possibility" of FHFA "convert[ing] its current conservatorship into a receivership."); *Perry Capital (D.D.C.)*, 70 F. Supp. 3d at 225 n.20 ("There surely can be a fluid progression from conservatorship to receivership without violating HERA, and that progression could very well involve a conservator that acknowledges an ultimate goal of liquidation.").

For similar reasons, Plaintiffs' reliance on *CedarMinn* (at Roberts Br. 47-48) is misplaced. The *CedarMinn* Court recognized that where, as here, Congress authorizes an agency to "exercise a duty, right or power in its capacity as 'a conservator *or* receiver,'" that generally means that "the duty, right, or power [is] to be enjoyed or exercised by *both* the conservator and the receiver." 956 F.2d at 1451-52 (emphases added). This is particularly true if, as here, Congress took care in *other* portions of the statute to delineate the powers that can be pursued only by a receiver or only by a conservator, but not by both. *Id.* at 1452; *see also* 12 U.S.C. § 4617(b)(2)(D)-(E). Furthermore, while *CedarMinn* describes the "mission" of a conservator as "maintain[ing] the institution as an ongoing concern," that does not foreclose it from acting in ways that a receiver may also act—*i.e.*, transferring assets and reducing the obligations of the institution—where the statute gives such powers to both types of entities. *See* 956 F.2d at 1454.[14]

Plaintiffs also argue that Section 4617(a)(2)'s statement that either the "conservator *or* receiver" may "*wind[] up* the affairs" of an Enterprise cannot mean what it says. *See* Roberts Br. 50-51 (quoting 12 U.S.C. § 4617(a)(2); emphases added by Plaintiffs). Plaintiffs assert that giving effect to this text would

[14] Plaintiffs also cite the passing remark in *McAllister v. RTC*, that a "conservator only has the power to take actions necessary to restore a financially troubled institution to solvency." 201 F.3d 570, 579 (5th Cir. 2000); Roberts Br. 35. But that statement addressed "[e]xpenses of liquidation," which "cannot be incurred by a conservator as a matter of law, *as liquidation is not a function of the conservator*." *McAllister*, 201 F.3d at 579 (emphasis added).

permit FHFA, if appointed as receiver, to act with the purpose of rehabilitation, instead of liquidation. *Id*. But this provision of HERA makes perfect sense: HERA directs the receiver not only to liquidate Enterprise assets, but also to "rehabilitat[e]" the business of the Enterprise by creating a limited-life regulated entity ("LLRE"). 12 U.S.C. § 4617(a)(2). An LLRE, once established, "succeed[s] to the charter" of the Enterprise and "thereafter operate[s] in accordance with, and subject to, such charter." *Id.* § 4617(i)(2)(A). Thus, HERA provides that a receiver will both liquidate and, through an LLRE, rehabilitate and reorganize the Enterprises upon a selective transfer of assets and liabilities.

Finally, Plaintiffs argue the Third Amendment improperly allows an "end run" around the receivership distribution-priority scheme outlined in HERA. Roberts Br. 48-49. But the Enterprises are neither in receivership nor liquidating assets, so the priority scheme is inapplicable here. *See Perry Capital*, 2017 WL 3078345, at *14 ("[T]he duty that [HERA] imposes on FHFA to comply with receivership procedural protections textually turns on FHFA actually liquidating the Companies."); *Cobell v. Norton*, 283 F. Supp. 2d 66, 91 n.12 (D.D.C. 2003) ("The notion of a '*de facto* receivership' is rather akin to the concept of 'semi-pregnancy': an entity is either in *de jure* receivership or it is not."), *vacated in part on other grounds*, 392 F.3d 461 (D.C. Cir. 2004).

In all events, under this Court's precedent, allegations that a conservator is violating the statutory order of priority for receiverships are insufficient to overcome Section 4617(f). In *Courtney*, this Court rejected the argument that an asset transfer was purportedly a "thinly disguised way of circumventing the statutory priority scheme and allowing the [investor] to get more than its proper share." 485 F.3d at 945. The "glaring problem" with this argument, the court held, was that under FIRREA (like HERA), a conservator or receiver is authorized to "transfer assets or liabilities without any further approvals," and thus "the anti-injunction language of § 1821(j)" barred the relief requested. *Id.* at 948. So too here: Section 4617(f) protects the Conservator's exercise of its statutory powers—including to "transfer or sell any asset" of the Enterprises "without any approval, assignment, or consent" 12 U.S.C. § 4617(b)(2)(G)—irrespective of allegations that those transfers may violate HERA's receivership-priority scheme.[15]

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

Plaintiffs also attempt to avoid Section 4617(f) by alleging the Conservator agreed to the Third Amendment "at Treasury's direction," Roberts Br. 52-55,

[15] In the past, other shareholders have attempted to distinguish *Courtney* as concerning only a receiver's power to settle legal claims under a different provision (12 U.S.C. § 1821(p)(3)(A)). But the Court addressed that provision only in connection with a different issue—whether the assets at issue were subject to liquidation. *See Courtney*, 485 F.3d at 949. The Court *also* applied Section 1821(j) despite an assertion (like Plaintiffs' assertion here) that the receiver violated FIRREA's receivership-priority scheme. *See id.* at 948.

supposedly in violation of 12 U.S.C. § 4617(a)(7), which provides that the Conservator "shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of [the Conservator's] rights, powers, and privileges." The district court correctly rejected this argument. SA18-20.

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

To assert an APA claim, the plaintiff must be "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. That is, Plaintiffs' grievance must "arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). To determine whether a plaintiff is within the zone, courts "consider the purposes of the specific statutory provision that is at issue," *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074-75 (D.C. Cir. 1998), and "who in practice can be expected to police the interests that the statute protects." *Air Line Pilots Ass'n Int'l v. Trans States Airlines, LLC*, 638 F.3d 572, 577 (8th Cir. 2011) (internal quotation marks and citation omitted).

Here, the Conservator is the only party that fits within Section 4617(a)(7)'s zone of interests because that provision protects *the Conservator* from state and federal encroachment. As multiple courts have held, Section 4617(a)(7) "specifically functions to remove obstacles to FHFA's exercise of conservator

powers—*i.e.* to preserve FHFA's interests, not those of GSE shareholders." *Saxton*, 2017 WL 1148279, at *10. Accordingly, the Conservator is the party who can be expected to police that interest by raising a Section 4617(a)(7) defense. *See id.* (shareholders not in zone of interests of Section 4617(a)(7)); *Robinson*, 223 F. Supp. 3d at 667-68 (same, as "the clear purpose of the requirement is to provide a preemption defense *for FHFA* in its role as conservator").

Plaintiffs do not fit within the zone of interests of Section 4617(a)(7). At most, Plaintiffs have an indirect financial interest in the financial performance of the Enterprises. But this is insufficient to place them within the zone of interests of Section 4617(a)(7) or confer prudential standing. *See Gosnell*, 938 F.2d at 374 (disappointed bidder not within the zone of interests protected by FIRREA's asset-transfer provision and thus could not challenge FDIC's failure to dispose of assets "on the open market for sale to the highest bidder"); *see also Dismas Charities, Inc. v. U.S. DOJ*, 401 F.3d 666, 677 (6th Cir. 2005) (interest in receiving financial benefits of government program insufficient to confer prudential standing). Section 4617(a)(7) was designed to give FHFA a defense as Conservator to fend off directives from states or other federal agencies. It is not a sword for use by shareholders.

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

Plaintiffs' allegation that the Conservator agreed to the Third Amendment at Treasury's "direction and supervision" fails to satisfy the plausibility requirements of *Iqbal* and *Twombly*. As the district court held, "Plaintiffs have alleged no *facts* from which it can be reasonably inferred that something like that actually happened." SA18. "At most, on the facts alleged, Treasury came up with the idea for the new dividend formula in the Third Amendment and proposed it to FHFA. Formulating a plan and proposing it to FHFA does not mean that Treasury was subjecting FHFA to its 'direction' or 'supervision.'" SA18. In *Perry Capital*, the D.C. Circuit rejected the same claim based on the same conclusory allegations that, upon "information and belief," the Third Amendment resulted only from Treasury's "insistence." 2017 WL 3078345, at *11 n.9. Beyond complaining about the terms of the agreement, Plaintiffs merely reiterate their allegation that Treasury had "significant influence" over FHFA, and that the Third Amendment was a "Treasury-driven process." Roberts Br. 54. These allegations fail to state a claim.

Additionally, "the very fact that FHFA itself has not brought suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA was an independent, willing participant in its negotiations with the Treasury." *Robinson*, 223 F. Supp. 3d at 668. Indeed, the Conservator has vigorously

defended in courts across the country the amendment it was purportedly forced to execute against its will, further undermining Plaintiffs' argument. *See Suero v. Freddie Mac*, 123 F. Supp. 3d 162, 172 (D. Mass. 2015) (applying Section 4617(f) by looking to Conservator's litigation conduct).

c. Plaintiffs' Belated, Indirect Attempt to Challenge the Original PSPAs Through Section 4617(a)(7) Fails

Plaintiffs also assert that the Conservator's agreement to the original PSPAs in September 2008—at the height of the financial crisis—was somehow done at Treasury's "direction and supervision." Roberts Br. 52-53. Thus, Plaintiffs also ask the Court to rewrite the *original* PSPAs by striking various provisions Plaintiffs believe are "unusual" or too favorable to Treasury. *See id.* at 53; A85.

Plaintiffs' belated attack fails. As explained in Treasury's brief, Plaintiffs' attempt to challenge the original PSPAs is barred by the APA's six-year statute of limitations. *See* Treasury Br. at 30. FHFA adopts and incorporates this argument by reference.

In all events, Section 4617(f) bars Plaintiffs' attacks on the original PSPAs. When it enacted HERA, Congress amended the Enterprises' federal charters to authorize them (and thus the Conservator) to issue stock to Treasury on terms set through the Conservator and Treasury's "mutual agreement." SA19 (citing 12 U.S.C. §§ 1455(l)(1)(A), 1719(g)(1)(A)). FHFA and Treasury agreed to the original PSPAs pursuant to this statutory authorization, thereby securing necessary

capital for the Enterprises. Section 4617(f) thus bars Plaintiffs' demands to vacate portions of the original PSPAs.

Plaintiffs' conclusory allegations of "direction and supervision" change nothing. As the district court correctly held, Section 4617(a)(7) protects the Conservator "from being subject to Treasury's supervision and direction *against FHFA's will*, but [it does] not prevent FHFA from voluntarily entering into to a purchase agreement that gives Treasury a say in decisions that would impact Treasury's investment." SA19-20. Plaintiffs argue the PSPAs contain "highly unusual terms" that give Treasury "veto power[s]" over the Enterprises' operations, but this is simply a variation on Plaintiffs' "bad job" arguments addressed above—namely, that the Conservator exercised its statutory authority (*i.e.*, to enter into an agreement with Treasury on mutually agreeable terms) in a manner Plaintiffs believe was too favorable to Treasury. Section 4617(f) bars precisely this type of second guessing of the Conservator's judgment.

D. Plaintiffs' Nondelegation Argument Is Meritless

Finally, though Plaintiffs raise no constitutional claims, they argue that *Perry Capital*'s approach, followed by the district court here, "raises grave doubts about Section 4617's constitutionality under the nondelegation doctrine." Roberts Br. 41. But that doctrine addresses whether Congress improperly delegated

legislative power to a federal agency (*see United States v. Mistretta*, 488 U.S. 361, 372 (1989)), and Plaintiffs are not challenging any purported legislative acts here.

In all events, "the limits on delegation are frequently stated, but rarely invoked." *United States v. Whaley*, 577 F.3d 254, 263 (5th Cir. 2009). "Indeed, with the exception of two cases in 1935, the Supreme Court has uniformly rejected every nondelegation challenge it has considered." *United States v. Fernandez*, 710 F.3d 847, 849 (8th Cir. 2013) (internal citations omitted). Under the modern test, "a delegation is constitutional so long as Congress provides 'an intelligible principle'" to guide the agency's exercise of its discretion. *Krukowski v. C.I.R.*, 279 F.3d 547, 552 (7th Cir. 2002). Such principles may be "broad," including to act in the "public interest." *Fernandez*, 710 F.3d at 849; *see also United States v. Goodwin*, 717 F.3d 511, 516 (7th Cir. 2013) (upholding delegation to "protect the public from sex offenders").[16]

Here, Congress provided "intelligible principle[s]" to guide FHFA's discretion. HERA states the "purpose" of FHFA's appointment as conservator is to "reorganiz[e], rehabilitat[e], or wind[] up the affairs" of the Enterprises. 12 U.S.C. § 4617(a)(2). Congress thus "empower[ed] FHFA to 'take such action' as

[16] *See also, e.g.*, *Yakus v. United States*, 321 U.S. 414 (1944) (upholding delegation to fix prices that are "generally fair and equitable"); *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (upholding delegation to regulate in the "public interest"); *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1475 (D.C. Cir. 1998) (upholding delegation to act based on "compelling public interest").

may be necessary or appropriate to fulfill several goals," *Perry Capital*, 2017 WL 3078345, at *10, including to "take such action as may be . . . appropriate to carry on the business of the regulated entit[ies] and preserve and conserve the[ir] assets and property." 12 U.S.C. § 4617(b)(2)(D)(ii). These statutory purposes and goals easily provide a sufficient "intelligible principle" to avoid any unconstitutional delegation. Moreover, that Section 4617(f) bars courts from *policing* the Conservator's pursuit of these goals does not raise a nondelegation problem. *See United States v. Bozarov*, 974 F.2d 1037, 1038 (9th Cir. 1992) (rejecting nondelegation challenge of statute barring judicial review of agency action).[17]

II. HERA'S SUCCESSION PROVISION BARS PLAINTIFFS' CLAIMS

Because Section 4617(f) bars Plaintiffs' claims in their entirety, this Court—like the district court—need go no further in its analysis in order to affirm. Nevertheless, Plaintiffs' claims should be dismissed for an additional, independently dispositive reason, as set forth below.

[17] *Fahey* (cited at Roberts Br. 42) does not support Plaintiffs' argument. In that decision, the Court upheld a statute that provided the banking agency with broad discretion to appoint conservators and receivers despite no guidance or standards provided in the statute. 332 U.S. at 253. Here, Congress identified in HERA the Conservator's "purposes" and enumerated a broad list of powers and functions the Conservator may exercise in carrying out those purposes. As in *Fahey*, there is no unconstitutional delegation here.

A. The Conservator Succeeded to All Stockholder Rights

Upon its appointment, the Conservator "immediately succeed[ed] to . . . all rights, titles, powers, and privileges of the [GSEs], and of any stockholder, officer, or director of [the GSEs] with respect to the [GSEs] and the assets of the [GSEs]." 12 U.S.C. § 4617(b)(2)(A). This broad, unequivocal language evidences Congress's intent to ensure "that nothing was missed" and to "transfer[] everything it could to the [Conservator]." *Kellmer*, 674 F.3d at 851(citation omitted). Accordingly, "[t]he shareholders' rights are now the FHFA's." *Esther Sadowsky Testamentary Tr. v. Syron*, 639 F. Supp. 2d 347, 351 (S.D.N.Y. 2009). HERA's Succession Provision, coupled with FHFA's other statutory powers, vests control over the GSEs exclusively in the Conservator.

Courts uniformly hold that the Succession Provision bars shareholders from asserting derivative claims during the conservatorships. Because "[t]his language plainly transfers shareholders' ability to bring derivative suits—a "right[ ], title[ ], power[ ], [or] privilege[ ]"—to FHFA, *Kellmer*, 674 F.3d at 850 (alteration in original), it "bars shareholder derivative suits, without exception," *Perry Capital (D.D.C.)*, 70 F. Supp. 3d at 232; *see also La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188, 191 (4th Cir. 2011); *Cont'l W.*, 83 F. Supp. 3d at 840 n.6.

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

In the district court, Plaintiffs argued that HERA's Succession Provision does not apply to Plaintiffs' APA claims because they are supposedly direct, rather than derivative. This argument is wrong twice-over.

First, Plaintiffs' claims are derivative because they are premised on classically derivative injury (*i.e.*, depletion of corporate assets) and seek relief that would flow directly to the GSEs (*i.e.*, return of dividends). FHFA adopts and incorporates by reference Treasury's argument that Plaintiffs' APA claims are derivative, not direct. Treasury Br. § II(A).

Second, Plaintiffs' characterization of their claims as direct is irrelevant because HERA's Succession Provision applies equally to direct shareholder claims. Under HERA, the Conservator succeeded to "*all*" shareholder rights. 12 U.S.C. § 4617(b)(2)(A) (emphasis added). When interpreting HERA, "all means all." *Hennepin Cty. v. Fannie Mae*, 742 F.3d 818, 822 (8th Cir. 2014) (internal quotation marks and citation omitted); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). As the court held in *Pagliara v. Freddie Mac*, the Conservator succeeds to all shareholder rights, including those "enforceable through a direct lawsuit, not a derivative lawsuit."

203 F. Supp. 3d 678, 687, 692 (E.D. Va. 2016) (holding Conservator succeeded to the right to inspect books and records).

To be sure, in *Levin v. Miller*, a panel of this Court briefly discussed the analogous succession language in 12 U.S.C. § 1821(d)(2)(A)(i) and read that provision as transferring claims that the institution's stockholders "would pursue derivatively," rather than "every investor's claims of every description." 763 F.3d 667, 672 (7th Cir. 2014). However, the question whether a conservator's succession to "all rights" of a stockholder extends to direct claims was not contested or even briefed in that case. *See id.* At oral argument, the FDIC chose not to argue that the succession language applied to direct claims, and the Court adopted the FDIC's interpretation. *Id.*

Nevertheless, in his concurring opinion, Judge Hamilton observed: "[i]t is not obvious to me that the language must be interpreted so narrowly, nor did the cases cited at page 2 of the opinion confront this issue or require that result." *Id.* at 673 (Hamilton, J., concurring). Judge Hamilton found the statutory language "could be interpreted, for sound policy reasons, more broadly to include a stockholder's *direct* claims that are based on harms resulting from dealings with the assets of the failed institution." *Id.* Because the Conservator already can pursue derivative claims on behalf of the Enterprises, the statutory phrase "rights . . . of any stockholder" has meaning only if it encompasses direct claims arising

from shareholders' interests. Accordingly, "[t]he doctrine that statutes should not be construed to render language mere surplusage . . . weighs in favor of a broader reach that could include direct claims." *Id.* Judge Hamilton noted the FDIC "could choose to modify its interpretation of the ambiguous § 1821(d)(2)(A)," and expressed his "hope" that the FDIC would "consider this issue." *Id.* at 674.

FHFA respectfully urges this Court to follow Judge Hamilton's approach—as the *Pagliara* court recently did—which is consistent with the text and structure of the statute. *See Pagliara*, 203 F. Supp. 3d at 688 ("[A]s Judge Hamilton recognized in *Levin v. Miller*, '[i]f "rights . . . of any stockholder" was meant to refer only to derivative claims, it's a broad and roundabout way of expressing that narrower idea.'") (quoting 763 F.3d at 673).

FHFA also respectfully disagrees with the D.C. Circuit's conclusion in *Perry Capital* that HERA's succession language does not cover direct claims. *See* 2017 WL 3078345, at *24-25 (citing *Levin*, 763 F.3d at 672). The D.C. Circuit stated that shareholders' rights "with respect to the regulated entity and [its] assets" are "only those an investor asserts derivatively on the Company's behalf." *Id.* at *24 (alteration in original). But this reading "strain[s] any reasonable interpretation" of HERA, *Pagliara*, 203 F. Supp. 3d at 688, because Plaintiffs' claims are unquestionably related to the Enterprises and their assets. Furthermore, the D.C. Circuit reached its conclusion based on its reasoning that a separate

provision of HERA, 12 U.S.C. § 4617(b)(2)(K)(i), "terminates [shareholders'] rights and claims in receivership" against the assets or charter of the Enterprises and thus "indicates that shareholders' direct claims against and rights in the Companies survive during conservatorship." *Perry Capital*, 2017 WL 3078345, at *24. But the Succession Provision does not *terminate* any rights upon conservatorship; it transfers them to the Conservator during the conservatorship. Only if and when the Enterprises enter receivership would any shareholder rights be terminated, and in that context, Section 4617(b)(2)(K)(i) excludes certain rights from termination and permits shareholders to assert those rights through the administrative claims process. Accordingly, there is no reason to limit the succession clause's broad language—encompassing "all rights" of a shareholder—to only derivative claims.

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

In the district court, Plaintiffs argued their claims can survive HERA's Succession Provision based upon a so-called "conflict of interest" exception. As Treasury explains in its brief, issue preclusion bars Plaintiffs from advancing this argument. FHFA adopts and incorporates by reference Treasury's argument that issue preclusion bars Plaintiffs from advancing their conflict-of-interest argument. *See* Treasury Br. § II(C).

In all events, there is no "conflict of interest" exception to HERA's Succession Provision and the Court should reject any invitation to create one. Every court to have addressed this issue under HERA, including the D.C. Circuit, has rejected any such judicially created exception as "contrary" to "the plain statutory text." *Perry Capital*, 2017 WL 3078345, at *25; *see also Edwards v. Deloitte & Touche, LLP*, No. 16-21221-CIV, 2017 WL 1291994, at *7 (S.D. Fla. Jan. 18, 2017) ("Looking at the plain wording of HERA's succession clause, there is no exception to the bar on derivative suits."); *Saxton*, 2017 WL 1148279, at *12 ("refus[ing] to judicially alter the [succession] provision to allow for an unstated conflict-of-interest exception"); *Pagliara*, 203 F. Supp. 3d at 691 n.20 (rejecting conflict of interest exception).

Only two decisions have applied a conflict-of-interest exception to FIRREA's succession provision. *See First Hartford Corp. Pension Plan & Tr. v. United States*,194 F.3d 1279, 1295-96 (Fed. Cir. 1999); *Delta Savs. Bank v. United States*, 265 F.3d 1017, 1021-24 (9th Cir. 2001). They are outliers, and *Perry Capital* correctly rejected them as being poorly reasoned, "mak[ing] little sense," and contradicting FIRREA's plain language. 2017 WL 3078345, at *25. Moreover, the limited holdings of *First Hartford* and *Delta*, both receivership cases, "make[] still less sense in the conservatorship context, where FHFA enjoys

even greater power free from judicial intervention." *Perry Capital (D.D.C.)*, 70 F. Supp. 3d at 231 n.30.

In the past, shareholders have argued that Congress should be presumed to have adopted *First Hartford* and *Delta Savings* when it enacted HERA. Not so. "[W]here the law is plain"—as here—"subsequent reenactment does not constitute an adoption" of a judicial interpretation, *Brown v. Gardner*, 513 U.S. 115, 121 (1994), especially when there is "no direct evidence that Congress ever considered the issue . . . or voiced any views upon it," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971). Moreover, as the *Perry Capital* court recognized, "two circuit court decisions do not so clearly 'settle[ ] the meaning of [the] existing statutory provision' in FIRREA that we must conclude the Congress intended *sub silentio* to incorporate those rulings into [HERA]." 2017 WL 3078345, at *25 (alterations in original) (quoting *Merrill Lynch v. Dabit*, 547 U.S. 71, 85 (2006)). Supreme Court precedent is in accord. *See Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 351 (2005) (concluding that the "decisions of two Courts of Appeals" do not reflect a "settled judicial construction nor one which we would be justified in presuming Congress, by its silence, impliedly approved"); *see also SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 965 (2017) (When determining whether

Congress intended to codify a purported common law rule, two circuit court holdings "are too few to establish a settled, national consensus.").

III. PLAINTIFFS' SPECULATIVE POLICY ARGUMENTS CANNOT SALVAGE THEIR CLAIMS

Finally, Plaintiffs contend that the alleged actions taken by the Conservator are unlike those taken by the conservators of prior troubled financial institutions. Roberts Br. 56-58. Even assuming the truth of Plaintiffs' allegations, the Conservator faced a unique situation within the context of troubled financial institutions—*i.e.*, the potential failure of two entities holding more than $5 trillion in assets, the collapse of which would cause unprecedented harm to the national economy. The Conservator accordingly took actions that fall squarely within its statutory powers and functions to keep the Enterprises out of mandatory receivership and liquidation, and to facilitate their statutory mission and the critical role they play in the national economy.

Moreover, investors in any troubled financial institution run the risk that the institution will be placed in federal conservatorship or receivership and that the investors may lose their investment. Here, the institutions found themselves in the midst of a great recession and housing finance crisis. The Conservator did not create the situation. When no private capital was available, the Conservator arranged for a capital backstop of billions of taxpayer dollars. This backstop, which Plaintiffs do not challenge, was triggered only after existing capital was

exhausted. Accordingly, Plaintiffs' speculative concern—that future investors will be discouraged from assisting troubled financial institutions because they cannot predict the potential actions a federal conservator or receiver might take—is misplaced and cannot salvage their claims.

CONCLUSION

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

Dated: August 7, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Seventh Circuit Rule 32(b) because this brief contains 13,994 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2017, I filed the foregoing Brief of Defendants-Appellees the Federal Housing Finance Agency and FHFA Director Melvin L. Watt with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered users:

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STATUTORY ADDENDUM

12 U.S.C. § 4617

§ 4617. Authority over critically undercapitalized regulated entities

(a) Appointment of the Agency as conservator or receiver

(1) In general

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

(2) Discretionary appointment

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

. . .

(4) Mandatory receivership

(A) In general

The Director shall appoint the Agency as receiver for a regulated entity if the Director determines, in writing, that--

(i) the assets of the regulated entity are, and during the preceding 60 calendar days have been, less than the obligations of the regulated entity to its creditors and others; or

(ii) the regulated entity is not, and during the preceding 60 calendar days has not been, generally

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

. . .

(7) Agency not subject to any other Federal agency

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

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

. . .

(2) General Powers

(A) Successor to regulated entity

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

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

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

(B) Operate the regulated entity

The Agency may, as conservator or receiver--

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

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

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

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

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

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

. . .

(D) Powers as conservator

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

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

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

. . .

(G) Transfer or sale of assets and liabilities

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

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

. . .

(J) Incidental Powers

The Agency may, as conservator or receiver--

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

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

. . .

(f) Limitation on court action

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