Nos. 17-578, 17-580, 17-591

In the Supreme Court of the United States

PERRY CAPITAL LLC, ET AL.,
Petitioners,

v.

THE FEDERAL HOUSING FINANCE AGENCY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Colombia

BRIEF OF INVESTORS UNITE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 12 U.S.C. § 4617(f), which prohibits courts from issuing injunctions that "restrain or affect the exercise of powers or functions of" the Federal Housing Finance Agency ("FHFA") "as a conservator," bars judicial review of an action by FHFA and the Department of Treasury to seize for Treasury the net worth of Fannie Mae and Freddie Mac in perpetuity.

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BRIEF OF INVESTORS UNITE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Investors Unite respectfully submits this brief as *Amicus Curiae* in support of Petitioners.

INTERESTS OF *AMICUS CURIAE* [1]

Amicus curiae Investors Unite is a broad coalition of more than 1,800 private investors—big and small—in the government-sponsored enterprises Fannie Mae and Freddie Mac (the "Companies") who have a common interest in the restoration of their shareholder rights in the Companies by ensuring that FHFA complies with the statutory requirements of the Housing and Economic Recovery Act of 2008 ("HERA").

Mr. Krimminger, counsel of record to Investors Unite, was intimately involved in the legislative

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* hereby states that this brief was not authored in whole or in part by counsel for any party, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amicus*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Pursuant to Supreme Court Rule 37.3(a), on November 2, 2017, *Amicus* notified counsel of record for Petitioners and Respondents of its intent to file this brief. All parties consented in writing to the filing of this brief.

development of HERA through his role in advising Senate staff while serving with the Federal Deposit Insurance Corporation ("FDIC"). Mr. Krimminger served in senior positions at the FDIC, including Deputy to the Chairman for Policy and General Counsel. During his 21-year tenure at the FDIC, the agency conducted more than 1,053 bank and thrift resolutions, and Mr. Krimminger played a leading role as a participant in many of the most significant FDIC resolutions and in the development of legal policy, resolution strategies, and operational issues for resolutions.

In this brief, *Amicus* provides the Court with important background concerning the development and text of HERA's conservatorship and receivership provisions, which were deliberately modeled on virtually identical provisions in the Federal Deposit Insurance Act ("FDIA").[2] In addition, *Amicus* outlines certain fundamental principles that have guided the long-standing practices of the FDIC in applying the parallel FDIA provisions in resolving or rehabilitating banks and thrifts. As explained below, Congress intended to incorporate these well-established principles into HERA, and Investors Unite's members reasonably relied on them in investing in the Companies.

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[2] The FDIA was initially enacted in 1950, and expanded by the Financial Institution Reform, Recovery, and Enforcement Act (FIRREA) in 1989. References in the Petitions to "FIRREA" are thus to the same statute referred to in this brief as the "FDIA."

Contrary to the decision below, FHFA's actions in this case do not comply with HERA. As explained in the Petitions, FHFA has acted as conservator of the Companies under HERA since 2008. In August 2012, however, FHFA abruptly changed the nature of its purported conservatorship by an agreement with the Department of Treasury ("Treasury") known as the "Third Amendment." The Third Amendment implemented a "net worth sweep" that empties the Companies of their entire net worth each quarter and prevents them from accumulating any capital. It thus ensures that the Companies will never be able to rebuild any buffer against inevitable future losses, and financially forecloses recapitalization or any other action to put the Companies into a "sound and solvent" condition so that they could be rehabilitated. 12 U.S.C. § 4617(b)(2)(D).

By the Third Amendment, FHFA deviated from its role as conservator to "preserve and conserve" the Companies' assets, *id.*, and thereby stripped Investor Unite's members' investments of their value. The question presented—whether 12 U.S.C. § 4617(f) bars judicial review of this action by FHFA—is therefore of extraordinary importance to Investors Unite.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, the FDIC has acted as conservator and receiver to successfully resolve more than a thousand failing banks and thrifts. The key to this success is the predictability, fairness, and adherence to the FDIA's statutory framework in the FDIC's approach to its conservatorship and receivership roles. These attributes are important not just to the institutions the FDIC resolves, but to the overall health of our economy, as stakeholders are encouraged to invest and make deposits in financial institutions by the assurance that, in a crisis, losses will be allocated in a principled manner that they can anticipate *ex ante*.

Because of its success, the FDIC's approach has become the principal international model for rehabilitating or resolving significant financial institutions, an area of intense international focus in the last decade. It is no surprise, then, that in 2008, when Congress drafted the provisions in HERA to govern FHFA's powers to resolve or rehabilitate the Companies, it chose to use nearly identical language to that of the FDIA. Congress made a deliberate and rational decision to incorporate the successful and widely copied FDIC model to guide any FHFA conservatorship or receivership of the Companies.

In language lifted *verbatim* from the FDIA, HERA defines the function of FHFA, when acting as conservator of the Companies, as taking "such action as may be (i) necessary to put the regulated entity in

a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D). While this provision is framed as permissive authority ("may"), it very clearly defines the function of the conservator. In contrast, HERA defines the functions of FHFA as receiver very differently. Like the conservatorship provisions, HERA's receivership provisions provide the receiver with flexibility—by similarly using permissive language—in how to undertake its functions. However, HERA draws a stark distinction between the functions of conservator and receiver. If the Companies become insolvent or be unable to pay their debts when due, HERA mandates that they be placed into receivership and FHFA liquidate the Companies for the benefit of stakeholders. *See generally id.* §§ 4617(a)(4), (b), (c). The distinction between the statutory roles of conservator and receiver is clear, and stripping value from the Companies cannot be squared with the statutory role of conservator.

Nothing in HERA authorizes the *de facto* nationalization of the Companies for the benefit of a single creditor, such as occurred here, under the guise of a conservatorship. Similarly, while HERA provides broad discretion to FHFA when acting as conservator to take actions in fulfillment of its conservatorship duties, it does not—as the court below erroneously concluded—provide FHFA with

carte blanche to take actions inimical to those duties.

As relevant here, the precedent established by the FDIC's experience under the FDIA, which Congress intended to incorporate into HERA, makes two things clear. *First*, conservatorship is a temporary process in which the conservator must take steps to rehabilitate the institution for the purpose of restoring it to private control or, if that is not possible, preserve the going-concern value of the institution until receivership. In particular, the statutory function of a conservator to place the institution in a "sound and solvent condition" means that the conservator's goal must be to allow the institution to build "sufficient tangible capitalization" in order that there be a "reasonable assurance of the future viability of the [institution]" as a standalone enterprise.[3] The conservatorship cannot be subverted into a permanent nationalization of a troubled institution precisely because the explicit statutory function of the conservator is to rehabilitate the bank or, if that is not feasible, to place it into receivership. It is manifestly not to liquidate its net worth. *Second*, although the government is entitled to be repaid amounts that it provides the institution during conservatorship, once it has been repaid with interest it is entitled to no more. As defined by FDIC guidance and practice under identical statutory

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[3] *See infra* at 11-12.

language, and by the established principles essential for government intervention in insolvency proceedings, the government cannot nationalize the value in an institution far in excess of the assistance it provided under the guise of a conservatorship.

The decision below failed to recognize that these fundamental conservatorship principles are integral to FHFA's duties as conservator under HERA. Consequently, the court below did not recognize that FHFA acted outside its authority as a conservator because it affirmatively acted to strip, rather than "preserve and conserve," the assets of the Companies and to bar any prospect that the Companies could return to a "sound and solvent" condition by diverting off all future net worth to a single government creditor. In short, the Executive Branch ignored the substantive provisions of HERA.

Accordingly, the Executive Branch cannot rely on HERA's provision, also lifted *verbatim* from the FDIA, prohibiting courts from "tak[ing] any action to restrain or affect the exercise of powers or functions of the Agency *as a conservator or a receiver*" when it ignores the statutory framework defining its authority. 12 U.S.C. § 4617(f) (emphasis added); *see also id.* § 1821(j). If allowed to stand, the decision below would permit the Executive Branch to essentially nationalize the Companies in excess of congressionally-created powers and without any judicial review. To do so under HERA, despite the precedent under the parallel FDIA provisions discussed in this brief, could call into question the settled limits to the Government's authority under

the FDIA for thousands of FDIC-insured banks. A matter of such significance deserves review by this Court.

REASONS FOR GRANTING THE PETITION

I. FHFA's PURPORTED CONSERVATORSHIP ACTIONS ARE BEYOND THE POWERS GRANTED TO IT BY CONGRESS

The obligation of FHFA as conservator is to "preserve and conserve the assets" of the regulated entity in an effort to restore it to "a sound and solvent condition." 12 U.S.C. §§ 4617(b)(2)(D), 1821(d)(2)(D); *see also* Conservatorship and Receivership, 76 Fed. Reg. 35,724, 35,724-27 (June 20, 2011) ("FHFA's mission is to . . . ensur[e] the safety and soundness of the [Companies.]"). If FHFA is unable to do so, it must instead act as receiver and liquidate the entity according to a detailed statutory scheme. *Id.* §§ 4617(c), 1821(d). FHFA has done neither. Rather than "preserve and conserve" the Companies' assets to render them "sound and solvent," the Third Amendment sucks out every dollar of capital cushion and leaves the Companies recklessly vulnerable. But FHFA also is not winding up the Companies according to HERA's receivership provisions, which determine the relative priorities of various creditors, including Treasury. Such action by FHFA is contrary to the long-standing precedent set by the FDIC which was incorporated by Congress into HERA, and should be reviewed by this Court.

A. Congress Directed FHFA, When Acting as Conservator, to Take Steps to Allow the Companies to Rebuild Sufficient Capital, as the FDIC Had Done for Decades

1. Congress Intended FHFA to Follow the FDIC Model

The conservator obligations imposed on FHFA by HERA are substantially identical to those imposed on the FDIC by the FDIA. *Compare* 12 U.S.C. § 4617(b) *with* 12 U.S.C. § 1821(d). That was deliberate. "In crafting the conservator and receivership provisions that eventually comprised Section 1145 of HERA, the Committee staff, under the direction of Chairman Shelby, quite literally 'marked-up' Sections 11 and 13 of the Federal Deposit Insurance Act (FDIA)." Mark Calabria, *The Resolution of Systemically Important Financial Institutions: Lessons from Fannie and Freddie*, (Cato, Working Paper No. 25, 2015), [4] https://object.cato.org/sites/cato.org/files/pubs/pdf/working-paper-25_1.pdf; *see also* David H. Carpenter & M. Maureen Murphy, *Financial Institution Insolvency: Federal Authority Over Fannie Mae, Freddie Mac, and Depository Institutions*, Cong. Research Serv., RL34657 5 (Sept. 10, 2008), http://research.policyarchive.org/18831.pdf ("Among

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[4] Mr. Calabria "served as one of the primary drafters and negotiators of" HERA in his capacity as senior professional staff on the United States Senate Committee on Banking, Housing, and Urban Affairs. *Id.* at n.1.

the reforms included in [HERA] were extensive provisions providing [] FHFA with powers that substantially parallel those accorded the [FDIC.]"). "It was also intended that the existing body of law, including court decisions, surrounding the FDIC's exercise of its conservator and receivership powers be incorporated into that governing the [Companies]." *See*, Calabria, *supra*.

As this Court has concluded, "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998). Consequently, the FDIC's practices provide the meaning and content for the HERA provisions that replicate provisions in the FDIA. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it[.]").

2. The Goal of Conservatorship Must be to Preserve and Conserve Assets in an Effort to Return the Companies to a Sound and Solvent State

Congress based HERA's conservatorship and receivership provisions on the FDIA because the FDIA had a proven track record of effectively

balancing the preservation of critical functions and the protection of stakeholder rights. *See* Calabria, *supra*. Among these provisions, the "powers as conservator" given to FHFA in HERA are lifted verbatim from the FDIA. *Compare* 12 U.S.C. § 1821(d)(2)(D) (The FDIC may "take such action as may be (i) necessary to put the insured depository institution in a sound and solvent condition; and (ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution.") *with* 12 U.S.C. § 4617(b)(2)(D) (FHFA may "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."). These identical statutory texts clearly define the duties of a conservator, both for FHFA and the FDIC, to require that any action taken by the conservator must be designed to restore the institution to a "sound and solvent" position and "preserve and conserve" the institution's assets and property. Any action taken with neither purpose is simply *ultra vires*.

With that statutory directive in mind, the fundamental goal of the FDIC when acting as conservator was always to ensure rehabilitation of the bank. Rehabilitation was measured by "sufficient tangible capitalization." Statement of Policy and Criteria on Assistance to Operating

Insured Banks Which Are in Danger of Failing, 48 Fed. Reg. 38,669 (Aug. 25, 1983). Tangible capitalization, in turn, required that the bank "meet the regulatory capital standards of the appropriate federal banking agency." Statement of Policy on Assistance to Operating Insured Depository Institutions, 57 Fed. Reg. 60,203, 60,205 (Dec. 18, 1992) (notice) (Criteria 4 and 5). Only in this way, and through compliance with the other requirements for assistance, could there be "a reasonable assurance of the future viability of the institution." *Id.*

FHFA and Treasury have chosen to do the exact opposite. Rather than rehabilitate the Companies by ensuring that they are adequately capitalized, FHFA and Treasury have set out to ensure that the Companies will have no capital cushion whatsoever. Even the Director of FHFA has recognized that the effect of the Third Amendment is that the Companies will never be able to build capital, and can never be rehabilitated. Melvin L. Watt, Dir., FHFA, Statement before H. Comm. on Fin. Serv. (Jan. 27, 2015), https://www.fhfa.gov/mobile/Pages/public-affairs-detail.aspx?PageName=Statement-of-Melvin-L-Watt-Director-FHFA-Before-the-US-House-of-Representatives-Committee-on-Financial-Services-1272015.aspx ("[U]nder the terms of the PSPAs, the [Companies] do not have the ability to build capital internally while they remain in conservatorship.").

By implementing the Third Amendment, FHFA and Treasury have purposefully refused to return the Companies to a "sound and solvent condition." Instead, FHFA and Treasury have agreed to ensure a windfall for Treasury by funneling the net worth of the Companies into the Government. That *de facto* nationalization of the Companies is directly contrary to the statutory goal of rendering the Companies "sound and solvent." Indeed, FHFA recognized early on that "[t]he purpose of appointing the Conservator is to preserve and conserve the Company's assets and property and to put the Company in a sound and solvent condition." FHFA, *Questions and Answers on Conservatorship*, (Sept. 7, 2008), https://www.fhfa.gov/Media/PublicAffairs/Pages/Fact-Sheet-Questions-and-Answers-on-Conservatorship.aspx. More recently, however, FHFA has admitted that prohibiting the Companies from accumulating any net worth is "especially irresponsible" because they "need some kind of buffer to shield against short-term operating losses." Melvin L. Watt, Dir., FHFA, Statement before H. Comm. on Fin. Serv. (Oct. 3, 2017), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-Melvin-L--Watt,-Director,-FHFA,-Before-the-U-S--House-of-Representatives-Committee-on-Financial-Services.aspx.[5]

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[5] As explained in the Petitions, the panel majority below erred in interpreting the word "may" in the provision describing FHFA's powers and duties as conservator, 12 U.S.C. § 4617(b)(2)(d), to mean that FHFA could disregard those powers and duties and, instead, take actions that do the

3. Conservatorship Is Intended to be a Temporary *Process that Restores the Entity to a Sound State*

The FDIC has for decades exercised its conservatorship authority under the FDIA as a temporary measure designed to "preserve any existing franchise value of the failing institution, reduce the ultimate cost to the [deposit] insurance funds, and lessen any disruption to the local community." *See* FDIC, *Managing the Crisis: The FDIC and RTC Experience* 27 (1998), https://www.fdic.gov/bank/historical/managing/contents.pdf. The FDIC thus recognized that this process must be completed relatively quickly to rehabilitate the company and preserve its private character. In fact, the longest FDIC conservatorship was that for CrossLand Savings, FSB, which lasted only for eighteen months. *See id.* at 685.

The conservatorship of the Companies, however, began nearly a decade ago. And, in the meantime, rather than stabilize the Companies, FHFA instead

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opposite. Maj. Op. at 20-25. That is contrary to FHFA's interpretation of that provision, as well as the FDIC's longstanding interpretation of the similar provision in the FDIA. As a note from counsel, in my 21 years of experience with the FDIC, I never thought that "may" served as a mere suggestion and that in reality the FDIC could exercise its conservatorship powers in a way that would not "preserve and conserve" the entity in conservatorship.

agreed to sweep the Companies' entire net worth into Treasury's coffers thereby leaving the Companies vulnerable to call on Treasury even based on "small changes in home prices and interest rates [that] may have a significant impact on financial performance." FHFA, *Fiscal Year 2016 Performance and Accountability Report* 11 (Nov. 15, 2016), https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA-2016-PAR.pdf. Not only has FHFA's conservatorship over the Companies not proven to be temporary, it has also interfered with their ability to stabilize, in direct contravention of FHFA's mandate under HERA.

4. *If the Entity Cannot be Made Sound, Then It Must Enter Receivership*

If the entity could not be returned to viability, the FDIC placed it into receivership. In receivership, the FDIC resolved the entity fairly in accordance with the statutory priorities. 12 U.S.C. § 1821(d)(11). There has never been a statutorily authorized role for the FDIC to act as conservator *and* receiver *at the same time*. The statute permits the FDIC to act as "conservator *or* receiver" and the limitations on judicial review use that same language. *Id.* § 1821(c)(7) (emphasis added); *see also id.* § 4617(f) ("[N]o court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator *or* a receiver." (emphasis added)).

In accord with the statute, either the agency acts as a conservator and works to "preserve and

conserve" assets, *id.* § 1821(d)(2)(D)(ii), or it acts as a receiver and liquidates the entity, *id.* § 1821(d)(2)(E). Never did the FDIC continue to operate the entity, purportedly as conservator, to sweep assets to itself or to another preferred creditor until there are no assets left over for any other stakeholders. Nor would the courts have permitted it. *See Resolution Tr. Corp.* v. *CedarMinn Ltd. Bldg. P'shp*, 956 F.2d 1446, 1452 (8th Cir. 1992) (recognizing the "care Congress took to delineate those duties, rights, and powers the [FDIC] could pursue only in its capacity as receiver, or only in its capacity as conservator, but not both"). To do so, would have violated the fundamental principles of conservatorship of preserving the ongoing governance and operational structure, and rehabilitating the troubled bank. *See generally*, Donald Resseguie, Banks and Thrifts Government Enforcement and Receivership, Chapter 11, Rehabilitation and Open Institution Assistance, Resolution Methods (Barry Stuart Zisman ed., 2017) ("When acting as conservator, the FDIC's goal is that of restoring the viability of the depository institution as a going concern."). *See also* David A. Skeel, Jr., *The Law and Finance of Bank and Insurance Insolvency Regulation*, 76 Tex. L. Rev. 723, 729 (1998) ("Regulators generally use the conservatorship approach to preserve the bank's assets and re-establish it as a viable going concern[.]").

The same must be true for FHFA. Ultimately, FHFA is required to either "preserve and conserve"

the Companies' assets and return the Companies to "sound and solvent" condition, or place them into receivership. Sweeping the Companies' entire net worth to Treasury is certain to accomplish neither, even if the Companies continue to operate. *See* Melvin L. Watt, Dir., FHFA, Prepared Remarks at the Bipartisan Policy Ctr. (Feb. 18, 2016), https://www.fhfa.gov/Media/PublicAffairs/Pages/Prepared-Remarks-Melvin-Watt-at-BPC.aspx (pointing to the Companies' inability to build capital under the Third Amendment as "[t]he most serious risk" they face).

B. A Conservator Is Not Entitled to Receive More Than the Amount of Its Assistance

In attempting to carry out its statutory goals as conservator, the FDIC never imagined turning the regulated entity into a profit-making enterprise for the Government such that it could recoup its investment with interest and then sweep even more money into Government hands. *See* Michael Krimminger & Mark Calabria, *The Conservatorships of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles*, Investors Unite 10, (Jan. 29, 2015), http://investorsunite.org/wpcontent/uploads/2015/01/Krimminger-Calabria-HERA-White-Paper-Jan-29.pdf. That is because there exists a fundamental principle of conservatorship, established through decades of experience under the FDIA, that the government is only entitled to recover its investment with interest. In contravention of that principle, Treasury has restructured its assistance package

after the creation of the conservatorships to make them "profit-making" enterprises for Treasury alone. Treasury has transformed the concept of conservatorships from "preserving and conserving" to one of diverting value to Treasury far in excess of the funds put into the Companies.

Again, the FDIA precedent that Congress explicitly had in mind for HERA is directly to the contrary. From 1980 through 1994, the FDIC resolved 133 insured institutions with total assets of more than $82 billion. *See Managing the Crisis*, *supra*, at 20. Many of these took the form of "open bank assistance" transactions, in which the FDIC explicitly diluted shareholder interests through a negotiated transaction, assisted the institution, and returned it to private control on average within a matter of months. *Id.* Importantly, the stake-holders did not suffer further dilution of their interests during the term of the initial transaction. In order to provide guidance about its approach to this strategy, beginning in 1983 the FDIC adopted a series of statements of policy to govern its assistance to operating insured banks in danger of failing. The criteria established in these official administrative policy documents illustrate the essential nature of bank conservatorships and other forms of FDIC assistance to open banks under the FDIA.

FDIC assistance transactions imposed the costs of assistance on shareholders and other stakeholders in failing banks, but the FDIC's recovery was limited to the amount of the assistance it actually provided.

See Statement of Policy on Assistance to Operating Insured Depository Institutions, 57 Fed. Reg. 60,203 (Dec. 18, 1992) (Criterion 10: "Preexisting shareholders and debtholders of the assisted insured institution shall make substantial concessions. In general, any remaining ownership interest of preexisting shareholders shall be subordinate to the FDIC's right to receive reimbursement for any assistance provided."). If the assisted bank returned to profitability, all future value would inure to the benefit of the shareholders after repayment of the FDIC's assistance. *See Plaintiffs in All Winstar-Related Cases at the Court* v*. United States*, 44 Fed. Cl. 3, 10 (1999) ("[T]he shareholders of each failed thrift will [upon liquidation] be solely entitled to any surplus remaining after the thrift's creditors and the expenses of administration have been paid.").

In addition, in all FDIC resolutions—whether open bank assistance, conservatorships, or receiverships—the FDIC's recovery of interest on its assistance was calibrated closely to the FDIC's cost of funds. Since the FDIC's cost of funds was the investment it made in Treasury bills, FDIC open bank transactions and receiverships typically charged only a rate slightly in excess (normally less than 100 basis points) of the Treasury bill rate for comparable maturities. *See Managing the Crisis*, *supra*, at 685 (noting that FDIC Notes used to provide assistance to First City subsidiary banks bore interest at U.S. Treasury Bill rate plus 50 bps).

As a result, the costs imposed by the FDIC on assisted insured banks and thrifts were designed solely to recoup the FDIC's costs of providing the assistance and to allow the recovery of the institutions to fully capitalized and viable banking businesses. FDIC conservatorships were never run as profit-making enterprises for the FDIC as that would have been inconsistent with the essential purpose of a conservatorship. FHFA's decision to do so here is in excess of its statutory authority.

II. THE OPINION BELOW UNDERMINES THE RULE OF LAW AND SHOULD NOT BE PERMITTED TO STAND

The stability of our market economy is dependent on predictable rules and fair adjudication of disputes. *See supra* Krimminger & Calabria. As such, it is the "the existence of a predictable rule of law [that] has made America's enviable economic progress possible." Dissent at 28 (citing Tom Bethel, The Noblest Triumph Property and Prosperity Through the Ages 3 (1998)). The decision below, however, undermines the rule of law by giving FHFA unreviewable power to wipe out private investment according to the government's whim, rather than rules set *ex ante*. The grave uncertainty that decision creates for the Companies is bad enough, as they are at the center of the Nation's housing market, a critical aspect of the economy. Perhaps even worse, it calls into question the settled interpretations of the limits of the FDIC's authority that govern the potential intervention into the 5,787 FDIC-insured banks across the United States.

FDIC, Quarterly Banking Profile, Second Quarter 2017 (June 30, 2017).

Recognition of the need for uniform and predictable rules to address insolvency goes back to the Framers' decision to specifically authorize Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States[.]" U.S. Const. Art. 1, § 8. Since that time, "two basic principles [have] long characterized American bankruptcy law: fair treatment for creditors and a fresh start for debtors[.]" National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years*, Nat'l Bankr. Review Comm'n ii (Oct. 20, 1997), https://hdl.handle.net/2027/umn.31951d01560216p.

It is no surprise then that Congress specified a priority order of creditor claims under the FDIA and HERA's receivership provisions. *See* 12 U.S.C. §§ 1821(d), 4617(c). "Specifying a chain of priorities can give market participants greater certainty as to their potential recovery in insolvency." Calabria, *supra*. And that type of "priority system . . . has long been considered fundamental" to the operation of bankruptcies and insolvencies. *Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017).

But, here, FHFA has pulled the rug out from under investors who reasonably relied on these priorities. The Third Amendment reduces to virtually nothing the funds that could be available to distribute should the Companies enter

receivership because, without liquidating the Companies, it sweeps their net worth to Treasury each quarter. At the same time, the amount Treasury would be entitled to in a receivership is reduced by not a single cent, no matter how much the Companies sweep to Treasury. *See* Moody's Inv'r Serv., Reform of Fannie Mae and Freddie Mac Has Potential to Reshape US Mortgage Markets 2 (2017) ("Fannie Mae has drawn $116.1 billion . . . while Freddie Mac has drawn $71.3 billion . . . . Fannie Mae has paid $159.9 billion in dividends and Freddie Mac has paid $105.9 billion.").

Without predictable rules for the fair treatment of creditors, investors will demand higher premiums on investments to protect against that uncertainty, thereby reducing the ability of our economy to raise capital, particularly in times of need. *See supra* Krimminger & Calabria at 8-9. As Judge Brown aptly recognized in dissent, "if allegations of regulatory overreach are entirely insulated from judicial review, private capital may even become sparse. Certainly, capital will become more expensive, and potentially *prohibitively* expensive during times of financial distress, for all regulated financial institutions." Dissent at 27. The opinion below will have just that effect, as it is in crisis when the government is most likely to act as conservator.

As noted above, the FDIC model of predictably and fairly resolving or rehabilitating banks has

become the international model.[6] To deprive the economy of the predictable operation of those agencies is to unwind centuries of economic progress. That should not be permitted to occur, especially not without thorough review by this Court.

If Treasury and FHFA can conduct the conservatorships of the Companies to strip out any value and prevent the restoration of regulatory and market capital despite their obligations under HERA, this manipulation of the process could dramatically affect public confidence in the fairness and predictability of government's participation in insolvency proceedings. Given the important role that government bodies play in the resolution of many financial institutions, such as banks under the FDIA or systemically important financial institutions under the Dodd-Frank Act's new Orderly Liquidation Authority, it is essential that the performance of this role assure all stakeholders of fairness and predictability.

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[6] The actions of FHFA likewise violate those international standards, which were developed based on the American model of the FDIC and endorsed by each of the G20 countries, including the United States. *See* Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions* 7 (Oct. 2014), http://www.fsb.org/wp-content/uploads/r_141015.pdf (requiring an agency acting as conservator to manage the entity "with the objective of restoring the [entity] . . . to ongoing and sustainable viability").

As James Madison justly recognized, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." The Federalist No. 51 (James Madison). The moment FHFA over-stepped its powers as conservator and began depleting the Companies' assets for the Government's own benefit, its actions became subject to judicial review. *See Cty. of Sonoma* v. *FHFA*, 710 F.3d 987, 992 (9th Cir. 2013) ("[T]he anti-judicial review provision is inapplicable when FHFA acts beyond the scope of its conservator power."); *Leon Cty.* v. *FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012) ("FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp."). The District of Columbia Circuit's contrary conclusion is against precedent, it is wrong, and it ought to be reviewed by this Court.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully supports Petitioners' request that a writ of certiorari be granted.

Respectfully submitted,

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