No. 17-3794

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DAVID JACOBS, *et al.*,
Plaintiffs-Appellants,

v.

FEDERAL HOUSING FINANCE AGENCY, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR DELAWARE

BRIEF FOR THE TREASURY DEPARTMENT

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INTRODUCTION

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

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

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

FHFA and Treasury amended the purchase agreements three times. The first amendment doubled Treasury's $100-billion per-enterprise funding commitment. By December 2009, however, it appeared that even the $400 billion commitment might be insufficient. The second amendment thus permitted the enterprises to draw unlimited amounts from Treasury to cure any quarterly net-worth deficits through 2012. At the end of 2012, however, Treasury's commitment would be fixed, and future draws would reduce the remaining funding available. As of August 2012, the enterprises had drawn $187.4 billion from Treasury to prevent their insolvency.

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

2. Plaintiffs assert that that the Third Amendment was unlawful and seek injunctive and declaratory relief.

Two separate HERA provisions independently bar plaintiffs' challenges to FHFA's and Treasury's decision to enter into the Third Amendment. First, HERA's sweeping anti-injunction provision, 12 U.S.C. § 4617(f), precludes a court from taking "any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." Every court to consider the question has held that § 4617(f) bars courts from setting the Third Amendment aside. As the D.C. Circuit explained in reaching that conclusion, "[s]ection 4617(f) prohibits [a court] from wielding [its] equitable relief to second-guess either the dividend-allocating terms that FHFA negotiated on behalf of the Companies, or FHFA's business judgment that the Third Amendment better balances the interests of all parties involved, including the taxpaying public, than earlier approaches had." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 614-15 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 978 (2018); *see also id.* at 606 ("The plain statutory text draws a sharp line in the sand against litigative interference—through judicial injunctions, declaratory judgments, or other equitable relief—with FHFA's statutorily permitted actions as conservator or receiver."). As the D.C. Circuit and other courts have also recognized, a litigant cannot evade the anti-injunction bar by naming Treasury as well as FHFA as a defendant. An injunction against either party would "restrain or affect" the exercise of the conservator's powers.

Second, under the statute, FHFA as conservator succeeded to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder[.]" *Perry Capital,* 864 F.3d at 622. This provision "plainly transfers [to the FHFA] the shareholders' ability to bring derivative suits on behalf of" the enterprises. *Id.* at 623. Plaintiffs' claims assert injury to the enterprises; plaintiffs suffer their alleged injury derivatively as shareholders; and their actions fall squarely within the transfer-of-shareholder-rights provision.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under, among other statutes, 28 U.S.C. § 1331. JA55. On November 27, 2017, the district court granted the defendants' motion to dismiss. JA3. Plaintiffs timely filed a notice of appeal on December 21, 2017. JA1-2. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

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

STATEMENT OF RELATED CASES

This case has not previously been before this Court, and there are no pending related cases in this Court. Plaintiffs' brief lists additional cases raising similar challenges in other courts.

STATEMENT OF THE CASE

A. Fannie Mae and Freddie Mac

Congress created Fannie Mae and Freddie Mac to, among other things, "promote access to mortgage credit throughout the Nation . . . by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." 12 U.S.C. § 1716(4). These government-sponsored enterprises provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. The enterprises finance these purchases by borrowing money in the credit markets and by packaging many of the loans they buy into mortgage-backed securities, which they sell to investors. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 978 (2018).

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

B. The 2008 Housing Crisis and HERA

With the 2008 collapse of the housing market, Fannie Mae and Freddie Mac experienced overwhelming losses due to a dramatic increase in default rates on residential mortgages. *Perry Capital*, 864 F.3d at 599; *see also DeKalb County v. FHFA*, 741 F.3d 795, 798 (7th Cir. 2013) (From 1995 through the early 2000s, the enterprises "bought risky mortgages and got caught up in the housing bubble; and when the bubble burst found [themselves] owning an immense inventory of defaulted and overvalued subprime mortgages."); JA6. At the time, the enterprises owned or guaranteed over $5 trillion of residential mortgage assets, representing nearly half the United States mortgage market. *Perry Capital*, 864 F.3d at 599. Their failure would have had a catastrophic impact on the national housing market and economy.

The enterprises lost more in 2008 ($108 billion) than they had earned in the past 37 years combined ($95 billion). Office of Inspector General (OIG), FHFA, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 5 (Mar. 20, 2013).[1] As a result, the enterprises faced capital shortfalls. *Perry Capital*, 864 F.3d at 599-601; *see also* OIG, FHFA, *White Paper: FHFA-OIG's Current Assessment of FHFA's Conservatorships of Fannie Mae and Freddie Mac* 11 (Mar. 28, 2012) (*OIG Report*).[2] Private investors were unwilling to provide Fannie Mae and Freddie Mac with the capital they needed to weather their losses and avoid receivership and liquidation. *Perry Capital*, 864 F.3d at 601.

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

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

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

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

Recognizing that an enormous commitment of taxpayer funds could be required, Congress also amended the enterprises' statutory charters to authorize Treasury to "purchase any obligations and other securities issued by" the enterprises upon "Treasury's specific determination that the terms of the purchase would 'protect the taxpayer,'" *Perry Capital*, 864 F.3d at 600, and to "exercise any rights received in connection with such purchases." 12 U.S.C. §§ 1455(*l*)(1)(A), (2)(A), 1719(g)(1)(A), (B).

C. Conservatorship and the Preferred Stock Purchase Agreements

FHFA placed the enterprises in conservatorship on September 6, 2008. JA6. One day later, Treasury purchased senior preferred stock in each entity. *Id.* Under the Preferred Stock Purchase Agreements (Purchase Agreements), Treasury committed to provide up to $100 billion in taxpayer funds to each enterprise to maintain their solvency by ensuring that their assets were at least equal to their liabilities. JA6.

The Purchase Agreements entitled Treasury to four principal contractual rights. JA7. First, Treasury received preferred stock with a senior liquidation preference of $1 billion for each enterprise, plus a dollar-for-dollar increase each time the enterprises drew upon Treasury's funding commitment. *Id.*[3] Second, Treasury was entitled to quarterly dividends equal to 10% of Treasury's total liquidation preference. *Id.* Third, Treasury received warrants to acquire up to 79.9% of the enterprises' common stock at a nominal price. JA85, 99. Fourth, beginning in 2010, Treasury would be entitled to a periodic commitment fee that was intended "to fully compensate [Treasury] for the support provided by the ongoing [c]ommitment." *Id.* Treasury could waive the commitment fee for one year at a time based on adverse conditions in the United States mortgage market. *Id.*; *Perry Capital*, 864 F.3d at 601 n.1 (explaining that Treasury has never required the GSEs to pay the fee).

Treasury's initial funding commitment soon appeared to be inadequate. In May 2009, FHFA and Treasury agreed to double Treasury's funding commitment from $100 billion to $200 billion for each enterprise. JA7.

In December 2009, in the face of ongoing losses, it appeared that even the $200-billion per-enterprise funding commitment might be insufficient. Treasury and FHFA therefore amended the Purchase Agreements for a second time to allow the enterprises to draw unlimited amounts from Treasury to cure net-worth deficits until the end of 2012, at which point Treasury's funding commitment would be fixed. JA7.

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

As of June 30, 2012, the enterprises had drawn $187.4 billion from Treasury's funding commitment, making Treasury's liquidation preference $189.4 billion, including the initial $1 billion senior liquidation preference for each enterprise. JA64 ¶ 48; *Perry Capital*, 864 F.3d at 601. Under the terms of the original Purchase Agreements, the enterprises' dividend obligations to Treasury were thus nearly $19 billion per year.

Between 2009 and 2011, the enterprises could not pay these substantial dividend obligations out of their earnings, and the enterprises drew on Treasury's funding commitment to meet those obligations. *Perry Capital*, 864 F.3d at 601. Through the first quarter of 2012, Fannie Mae had drawn $19.4 billion and Freddie Mac had drawn $7 billion, just to pay the dividends they owed Treasury. *Perry Capital*, 70 F. Supp. 3d at 218. Those draws increased Treasury's liquidation preference, thus increasing the amount of dividends the enterprises owed. As their SEC filings reflect, the enterprises anticipated that they would not be able to pay their 10% dividends to Treasury without drawing on Treasury's funding commitment in the future. *See* Fannie Mae, 2012 Q2 Quarterly Report 12 (Aug. 8, 2012) (Fannie Mae 10-Q); Freddie Mac, 2012 Q2 Quarterly Report 10 (Aug. 7, 2012) (Freddie Mac 10-Q); *Perry Capital*, 864 F.3d at 612. Indeed, the $11.7 billion Fannie Mae owed annually in dividends to Treasury was more than the enterprise had made in any year of its existence. *See* Fannie Mae 10-Q, at 4. The $7.2 billion that Freddie Mac owed annually was more than it had made in all but one year. Freddie Mac 10-Q, at 8.

D. The Third Amendment

By June 2012, Treasury had committed $444.5 billion to support the GSEs. As noted, the GSEs had, at that point, drawn $187.4 billion from that commitment. Under the Second Amendment to the Purchase Agreements, each draw increased Treasury's commitment on a dollar-for-dollar basis; a draw did not reduce the size of the remaining commitment. But that state of affairs was about to change. At the end of 2012, the commitment would become fixed, and any future draws would reduce the size of the remaining commitment. To protect the remaining commitment, Treasury and FHFA thus needed to end the cycle of the enterprises paying dividends by drawing on Treasury's commitment.

In August 2012, Treasury and FHFA agreed to modify the Purchase Agreements for a third time. JA7. This "Third Amendment" ended the draws-to-pay-dividends cycle by replacing the previous fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth for the quarter exceeds a capital buffer. *Id.*; *Perry Capital*, 864 F.3d at 602. Under the Third Amendment, the amount of the enterprises' dividend obligations thus depends on whether the enterprises have a positive net worth during a particular quarter, rather than being fixed at 10% of Treasury's existing liquidation preference. If the enterprises have a negative net worth, they pay no dividend.[4]

By exchanging a fixed dividend for a variable one, Treasury thus accepted more risk under the Third Amendment. In fact, Treasury received less in dividends in 2015 ($15.8 billion) and 2016 ($14.6 billion) than it would have under the original 10% dividend ($18.9 billion). FHFA, *Table 2: Dividends on Enterprise Draws from Treasury*;[5] *see also Perry Capital*, 864 F.3d at 602. In 2013 and 2014, however, the enterprises' net worth was substantially higher than in other years. The increase in net worth was due in part to a rebound in housing prices and, more importantly, to non-recurring events, including the enterprises' one-time recognition of deferred tax assets that they had previously written off. OIG, FHFA, *The Continued Profitability of Fannie Mae and Freddie Mac Is Not Assured* 7-8 (Mar. 18, 2015).[6] Through the end of 2016, Treasury had received $255 billion in cumulative dividends from the enterprises, in return for its $187.4 billion investment and ongoing commitment, upon which both GSEs drew during the last quarter of 2017. FHFA, *Table 2: Dividends on Enterprise Draws from Treasury*; FHFA, *Table 1: Quarterly Draws on Treasury Commitment*.[7]

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[4] Treasury also agreed to suspend the periodic commitment fee it was owed under the original Purchase Agreements for as long as the variable dividend was in place. JA132, 140.

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

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

[7] https://www.fhfa.gov/DataTools/Downloads/Documents/Market-Data/Table_1.pdf

E. Procedural History

Plaintiffs are stockholders in Fannie Mae and Freddie Mac. JA7. Plaintiffs brought suit against Treasury and FHFA, alleging that the Third Amendment violates Delaware and Virginia law, and seeking injunctive and other equitable relief. JA9. Specifically, plaintiffs seek: (i) a declaratory judgment that the Third Amendment is void and unenforceable under state law; (ii) a declaration that Treasury was unjustly enriched; (iii) rescission of the Third Amendment; and (iv) restitution of dividends unjustly received by Treasury. *Id.*

Treasury and FHFA filed motions to dismiss, which the district granted on the ground that plaintiffs' claims were barred by HERA's anti-injunction provision, 12 U.S.C. § 4617(f). JA8-19. In accord with this Court's decision in *Gross v. Bell Savings Bank PA SA*, 974 F.2d 403, 407 (3d Cir. 1992), and the D.C. Circuit's decision in *Perry Capital*, the district court emphasized that § 4617(f) bars courts from granting equitable relief that would "restrain or affect" FHFA's exercise of its statutory powers, as those powers are defined by FHFA's governing statute, HERA. JA9-10. The court then concluded, in keeping with all other courts to consider the question, that "the Third Amendment falls squarely within the powers granted to [FHFA] under HERA, because renegotiating dividend agreements, managing debt obligations, and ensuring ongoing access to capital are some of the quintessential tasks of reorganizing, operating, and preserving a business." JA11-12 (citing cases).

The district court rejected plaintiffs' arguments that FHFA exceeded its statutory authority in adopting the Third Amendment. JA12-17. First, it rejected plaintiffs' arguments that FHFA's statutory powers were cabined by Delaware and Virginia corporation law and that a conservator therefore could be enjoined for violating those laws. JA12. As the court observed, plaintiffs' interpretation of HERA and its anti-injunction provision "would make equitable relief against the Agency available in every situation where it would be available against the" enterprises, "render[ing] Section 4617(f) superfluous." JA13. The court also stressed that plaintiffs' view of § 4617(f) as permitting suits based on alleged violations of state law was "contrary to well-established case law that equitable relief will be denied [under § 4617(f),] 'even where the [conservator] acts in violation of other statutory schemes.'" *Id.* (quoting *Gross*, 974 F.2d at 407). The court also concluded that plaintiffs' interpretation of § 4617(f) was "inconsistent with the purpose of HERA" and § 4617(f), which was to "broadly empower the Agency to act in times of extraordinary financial crisis," free of second-guessing from shareholders and federal courts. JA13.

The district court next rejected plaintiffs' argument that, in agreeing to the Third Amendment, FHFA ran afoul of HERA's provision regarding the repudiation of contracts, 12 U.S.C. § 4617(d), which states that FHFA may "repudiate any contract" to which an enterprise is a party "within a reasonable period" after its appointment as conservator. JA15. Plaintiffs urged that, because the Third

Amendment purportedly violated state law, it amounted to a repudiation of the contracts between plaintiffs and the enterprises. *Id.* In rejecting this "cryptic" argument, the court noted that plaintiffs cited no authority for the proposition that a violation of state law could equate to the repudiation of a contract. *Id.* The court further explained that, in any event, § 4617(f) did not allow the court to grant equitable relief to plaintiffs even if FHFA repudiated their contract outside the timeframe provided for by HERA given FHFA's broad powers to operate the enterprises free of judicial intervention. JA15-16.

The district court also rejected the plaintiffs' "hodgepodge of weaker arguments." JA16. The court explained that the enterprises were not in liquidation, and that plaintiffs' arguments regarding the limitations on FHFA's powers during a liquidation were thus irrelevant. *Id.* The court next rejected plaintiffs' argument that, in agreeing to the Third Amendment, FHFA violated a purported mandatory duty to place the enterprises in a "sound and solvent condition," to "preserve and conserve" the enterprises' assets, and to "maximize the net present value" from an asset sale. JA17. The court explained that HERA did not impose plaintiffs' asserted mandatory duties on FHFA, and that FHFA's alleged failure to carry out those duties would not remove plaintiffs' claims from the ambit of § 4617(f). *Id.*

Finally, the district court concluded that § 4617(f) barred plaintiffs from asserting claims for equitable and injunctive relief against FHFA's contractual counterparty, Treasury. JA18. As the court explained, "[s]ection 4617(f) bars claims that 'restrain or affect' the Agency's exercise of its powers, and a claim against the Agency's counterparty 'affect[s]' the Agency's exercise of its powers." *Id.*

After concluding that § 4617(f) barred plaintiffs' claims against FHFA and Treasury, the district court denied as moot plaintiffs' motion asking the court to take judicial notice of documents relating to the Third Amendment that were obtained by shareholders in other litigation. JA19. The court explained that the documents were irrelevant to its threshold determination that § 4617(f) prevented it from granting plaintiffs the relief they sought.

SUMMARY OF THE ARGUMENT

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

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

Second, HERA provides that FHFA, as conservator, "immediately succeed[s]" to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder[]" with respect to the enterprises and their assets. 12 U.S.C. § 4617(b)(2)(A)(i). This provision plainly transfers shareholders' ability to bring derivative suits on behalf of the enterprise to FHFA. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 624 (D.C. Cir. 2017), *cert. denied* 138 S. Ct. 978 (2018). Plaintiffs concede that their claims are brought "derivatively on behalf of" Fannie Mae and Freddie Mac to redress injuries suffered by the enterprises. JA69 ¶ 68. The relief they seek—the return of dividends paid to Treasury under the Third Amendment—would likewise flow to the enterprises, not to shareholders. Accordingly, plaintiffs' claims are derivative claims that fall squarely within the transfer-of-shareholder-rights provision.

Plaintiffs attempt to circumvent these two provisions by arguing that FHFA exceeded its authority in agreeing to the Third Amendment, because the Amendment purportedly violates Delaware and Virginia laws governing the issuance of preferred stock. Plaintiffs' argument reflects a fundamental misunderstanding of HERA's anti-injunction provision. "[T]he powers of [FHFA] as conservator . . . are defined by [HERA]," *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 398 (3d Cir. 1991), and § 4617(f) bars courts from enjoining actions taken by FHFA as conservator "where [FHFA] is colorably acting within its enumerated powers" under HERA, *Gross*, 974 F.2d at 408. FHFA acted well within its conservator authority under HERA in taking the actions challenged here. Whether those actions violated state law is irrelevant. In any event, plaintiffs' claim that the Third Amendment violates state-law rules governing the issuance of preferred stock fails because the terms of FHFA's transactions with Treasury are governed by HERA, which pre-empts any conflicting state-law requirements.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss for lack of subject matter jurisdiction. *Makky v. Chertoff*, 541 F.3d 205, 211 (3d Cir. 2008). This Court reviews a district court's denial of a motion to strike or for judicial notice for an abuse of discretion. *Meditz v. City of Newark*, 658 F.3d 364, 367 (3d Cir. 2011); *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1323 (3d Cir. 2002).

ARGUMENT

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

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

Plaintiffs' claims are barred by 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator" of the GSEs. As the D.C. and Sixth Circuits explained in rejecting similar challenges brought by GSE shareholders, HERA's anti-injunction provision, like its analogue under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), "effect[s] a sweeping ouster of courts' power to grant equitable remedies" to parties challenging actions taken by FHFA as conservator. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 605 (D.C. Cir. 2017); *Robinson v. FHFA*, 876 F.3d 220, 227 (6th Cir. 2017)). Those holdings accord with this Court's holding in *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 397 (3d Cir. 1991), that FIRREA's substantially identical anti-injunction provision, 12 U.S.C. § 1821(j), "permit[s] RTC as conservator or receiver to function without judicial interference that would restrain or affect the exercise of its powers." *See also Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1016 (8th Cir. 2013) (Section 1821(j) "has been construed broadly to constrain the court's equitable powers."); *National Tr. for Historic Pres. in U.S. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring) (Section 1821(j) "bar[s] a court from acting in virtually all circumstances."); *Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012).

Judicial review is available under 12 U.S.C. § 4617(f), if at all, only in the rare case where FHFA acts "clearly outside its statutory powers." *Gross v. Bell Savings Bank PA SA*, 974 F.2d 403, 407 (3d Cir. 1992); *see also id.* at 408 (Section 1821(j) bars a court from enjoining an action by the RTC where the RTC is "colorably acting within its enumerated powers."); *Perry Capital*, 864 F.3d at 606; *Robinson*, 876 F.3d at 227. If FHFA is exercising a statutorily authorized power or function and the injunctive relief a plaintiff seeks would "restrain or affect" that exercise, § 4617(f) applies and the plaintiff's suit is barred. *Perry Capital*, 864 F.3d at 606; *see also Robinson*, 876 F.3d at 228-29; *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010).

Moreover, as courts have recognized, the applicability of the HERA bar does not depend, as plaintiffs suggest (Br.10-11, 49, 54-55), on the rationale for actions taken by FHFA as conservator of the enterprises. "[F]or purposes of applying Section 4617(f)'s strict limitation on judicial relief, allegations of motives are neither here nor there"; nothing in HERA "hinges FHFA's exercise of its conservatorship discretion on particular motivations." *Perry Capital*, 864 F.3d at 612; *Robinson*, 876 F.3d at 229 n.7 ("[T]he § 4617(f) inquiry is limited to the contents of the Third Amendment, not why FHFA executed the Third Amendment or what FHFA has publicly stated about its role as the Companies' conservator or the Third Amendment."); *see also* FHFA.Br.53-55.[8]

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

1. As both the D.C. and Sixth Circuits have concluded, FHFA acted well within the scope of its statutory powers when it entered into the Third Amendment. *See Perry Capital*, 864 F.3d at 606-14; *Robinson*, 876 F.3d at 231. HERA "endows FHFA with extraordinarily broad flexibility to carry out its role as conservator." *Perry Capital*, 864 F.3d at 606. In keeping with that broad and flexible endowment, the statute grants FHFA an array of powers when acting as conservator. These include

[8] Because allegations of motive are irrelevant to the inquiry under § 4617(f), the district court properly denied as moot plaintiffs' request that the court take judicial notice of documents that purportedly shed light on FHFA's and Treasury's motive in entering into the Third Amendment. JA19; *see* Plaintiffs' Br. 53-56.

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

"FHFA's execution of the Third Amendment falls squarely within its statutory authority to '[o]perate the [Companies],' 12 U.S.C. § 4617(b)(2)(B); to 'reorganiz[e]' their affairs, *id.* § 4617(a)(2); and to 'take such action as may be . . . appropriate to carry on the[ir] business,' *id.* § 4617(b)(2)(D)(ii)." *Perry Capital*, 864 F.3d at 607 (alterations in original); *Robinson*, 876 F.3d at 231 ("FHFA's execution of the Third Amendment . . . falls squarely within its statutory conservator authority to operate the Companies, carry on business, transfer or sell assets, and to do so in the best interests of the Companies or itself."); *see also* JA12. In entering into the Third Amendment, FHFA renegotiated the financial obligations the GSEs owed to their critical investor, Treasury, whose remaining commitment of taxpayer funds is vital to the GSEs' continued operation. "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." *Robinson*, 876 F.3d at 231 (quoting *Perry Capital*, 864 F.3d at 607); *see also* JA12.

Moreover, by entering into the Third Amendment, FHFA also took an action it deemed appropriate to "preserve and conserve" a crucial "asset[]" (or "property") of the GSEs: the unused portion of Treasury's funding commitment. At the time of the Third Amendment in 2012, the enterprises had drawn $187.4 billion from Treasury's funding commitment. JA64. Through the first quarter of 2012, the enterprises drew over $26 billion from the commitment to pay the 10% dividends they owed Treasury. *See supra* p. 10. These draws increased Treasury's liquidation preference, which in turn increased the amount of dividends the enterprises owed; they also threatened to diminish Treasury's remaining commitment, which became fixed at the end of 2012.

By replacing a fixed dividend with a variable one, the Third Amendment ended this cycle, reducing the risk that the enterprises would exhaust Treasury's commitment prematurely, ensuring that the enterprises would remain solvent for the foreseeable future, and providing certainty to the financial markets from which the enterprises raise funds. *See Perry Capital*, 864 F.3d at 607 (noting that the Third Amendment ensured the enterprises "ongoing access to vital yet hard-to-come-by capital"); JA11

("The Stock Purchase Agreement and the Third Amendment thereto provided a funding commitment intended to ensure that the Companies remained in a sound and solvent condition."). As the D.C. Circuit explained, "[s]uch management of Fannie's and Freddie's assets, debt load, and contractual dividend obligations during their ongoing business operation sits at the core of FHFA's conservatorship function." *Perry Capital*, 864 F.3d at 605; *see also Town of Babylon*, 699 F.3d at 227 (taking "protective measures against perceived risks is squarely within FHFA's powers as a conservator"); *Leon County v. FHFA*, 700 F.3d 1273, 1279 (11th Cir. 2012) (same); *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 103 (5th Cir. 1993) ("When the RTC determines the method, terms and conditions of the disposition of assets, it is indisputably exercising its discretion and judgment in administering the affairs of a failed or troubled financial institution.").

Subsequent legislation confirms that FHFA was acting within its statutory authority when it entered into the Third Amendment. In section 702(a)(2)(A) of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 3024-25 (2015), Congress legislated with respect to the Senior Preferred Stock Purchase Agreement between Treasury and the enterprises, which it defined as "the Amended and Restated Senior Preferred Stock Purchase Agreement, dated September 26, 2008, as such Agreement has been amended on May 6, 2009, December 24, 2009, and August 17, 2012, respectively, and as such Agreement may be further amended." The legislation provides that "until at least January 1, 2018, the Secretary may not sell, transfer, relinquish, liquidate, divest, or otherwise dispose of any outstanding shares of senior preferred stock acquired pursuant" to the agreement "unless Congress has passed and the President has signed into law legislation that includes a specific instruction to the Secretary regarding" those actions. *Id.* § 702(b). Congress amended the law fully aware of the Third Amendment and the agency's interpretation of its statutory authority. Because Congress took no steps to halt the agency action, "presumably the legislative intent has been correctly discerned." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982).

2. Plaintiffs argue that FHFA exceeded its authority in agreeing to the Third Amendment, because the Amendment purportedly violates Delaware and Virginia laws governing the issuance of preferred stock. *See* Br.23-41; Br.30 (citing 8 Del. C. §§ 102(a)(4), 151(c); Va. Code § 13.1-6.38). According to plaintiffs, because the GSEs' officers were bound to comply with Delaware and Virginia law, and because HERA transferred "all rights, titles, powers, and privileges" of the GSEs' "officer[s]" to FHFA as conservator, then FHFA as conservator was likewise bound to comply with Delaware and Virginia and can be enjoined for failing to do so. Br.27-38.

Plaintiffs' argument reflects a fundamental misunderstanding of HERA's anti-injunction provision. "[T]he powers of [FHFA] as conservator . . . are defined by [HERA]," *Rosa*, 938 F.2d at 398, and § 4617(f) bars courts from enjoining actions taken by FHFA as conservator "where [FHFA] is colorably acting within its enumerated powers" under HERA, *Gross*, 974 F.2d at 408. For purposes of

§ 4617(f)'s bar, as this Court has held with respect to FIRREA's analogous anti-injunction provision, it is irrelevant whether an action taken by FHFA as conservator would "violat[e] . . . other statutory schemes" or would otherwise be improper if undertaken by the enterprises' officers outside of the conservatorship. *Gross*, 974 F.2d at 407; *see also id.* (rejecting argument that RTC, when acting as a failed bank's conservator, is "only authorized to run [the failed bank] in a legal manner" and concluding that "the availability of injunctive relief does not hinge on our view of the proper exercise of otherwise-legitimate powers"); *see also Bank of Am.*, 604 F.3d at 1243 (Section 4617(f)'s FIRREA analogue bars "judicial intervention whenever the FDIC is acting in its capacity as a receiver or conservator, even if it violates its own procedures or behaves unlawfully in doing so."); *Volges v. Resolution Trust Corp.*, 32 F.3d 50, 52 (2d Cir. 1994) ("As several courts have held, the fact that the RTC's actions might violate some other provision of law[, such as state contract law,] does not render the anti-injunction provision inapplicable.") (collecting cases); *Ward*, 996 F.2d at 103 (Where a conservator or receiver exercises an authorized power, such as the sale of a failed thrift's assets, injunctive relief is unavailable even if the conservator or receiver "improperly or unlawfully exercised" that power).

For the reasons explained *supra* pp. 20-24, the Third Amendment falls squarely within the powers granted to FHFA under HERA. Indeed, plaintiffs do not challenge FHFA's authority under HERA to issue preferred stock on behalf of the GSEs, to pay dividends on that stock, and to amend the terms of the GSEs' financial obligations. Plaintiffs instead allege that FHFA exercised that authority in a manner that violated state corporate law. Such allegations cannot circumvent § 4617(f)'s sweeping bar on injunctive relief. *See Gross*, 974 F.2d at 407-08 (allegation that the RTC violated ERISA when exercising its receivership authority was insufficient to overcome FIRREA's anti-injunction provision); *Rosa*, 938 F.2d at 397 (same); *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995) (FIRREA anti-injunction provision barred court from granting equitable relief based on plaintiffs' allegation that the FDIC's foreclosure of their home violated state tort and contract law); *Volges*, 32 F.3d at 52 (allegation that the RTC's sale of plaintiffs' mortgages would violate the plaintiffs' state-contract-law rights could not overcome FIRREA's anti-injunction provision); *National Tr. for Historic Pres.*, 21 F.3d at 472-73 (Wald, J., concurring) (section 1821(j) barred suit seeking to enjoin FDIC for allegedly violating the National Historic Preservation Act in connection with the sale of a failed bank's asset).

As the district court noted, plaintiffs' interpretation of § 4617(f) would allow parties to obtain injunctive relief against FHFA to the same extent that a party could obtain injunctive relief against the GSEs' directors before the conservatorship and would therefore render § 4617(f) a nullity. JA13. Because an alleged violation by FHFA of any state or federal law would suffice to defeat § 4617(f), every action taken by FHFA would be subject to judicial review and a possible injunction. Such an interpretation runs counter to § 4617(f)'s "plain statutory text"—which "draws a sharp line in the sand against litigative interference" with FHFA's actions as conservator—and with the statute's purpose to "protect FHFA as it addressed a critical aspect of one of the greatest financial crises in the Nation's modern history." *Perry Capital*, 864 F.3d at 606; *see also Rosa*, 938 F.2d at 397 (rejecting interpretation of FIRREA's anti-injunction provision that would "undermine the purpose of the statute, namely, to permit RTC as conservator or receiver to function without judicial interference").

Contrary to plaintiffs' contention (Br.35-37), the Supreme Court's decision in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), is wholly consistent with the district court's interpretation of § 4617(f) and this Court's interpretation of its FIRREA analogue, 12 U.S.C. § 1821(j). The Court in *O'Melveny & Myers* addressed whether federal common law, rather than state tort law, governed tort claims brought by FDIC in its capacity as receiver of a failed thrift. 512 U.S. at 85-87. The case did not implicate FIRREA's anti-injunction provision, and the Court did not consider the provision. Moreover, in concluding that state law applied to FDIC's tort claims in the same manner that the law would have applied if those claims had been brought by the failed thrift, the Court made clear that FIRREA "places the FDIC in the shoes of the insolvent S&L, . . . *except* where some provision in the extensive framework of FIRREA provides otherwise." *Id.* at 87 (emphasis added). FIRREA's and HERA's anti-injunction bars are such provisions. They provide FDIC and FHFA as a conservator with protection from injunctive and other equitable relief, a protection not available to a financial institution's management outside of a conservatorship. In other words, as the district court concluded, with respect to the availability of injunctive relief, FHFA as conservator is not identically situated to the enterprises' pre-conservatorship management. JA13.

Plaintiffs' claim that the Third Amendment violates state-law rules governing the issuance of preferred stock fails, in any event, because the terms of FHFA's transactions with Treasury are governed by HERA, which pre-empts any conflicting state-law requirements. When it passed HERA, Congress amended the enterprises' statutory charters to allow the Secretary of the Treasury to purchase any securities issued by the enterprises "on such terms and conditions as the Secretary may determine." 12 U.S.C. § 1455(*l*)(1)(A); *id.* § 1719(g)(1)(A). HERA required the Secretary to consider various factors when determining the terms of such a purchase, including the need to "protect the taxpayer," to "provide stability to the financial markets," and to "prevent disruptions in the availability of mortgage finance." *Id.* § 1455(*l*)(1)(B); *id.* § 1719(g)(1)(B). But nothing in HERA limited the Secretary to only those terms authorized by state corporate law. Nor does the statute prohibit the enterprises (and FHFA as conservator of the enterprises) from agreeing to terms that would not be permitted under state corporate law. Thus, to the extent a conflict exists between state law and the terms of the Third Amendment which the Secretary and FHFA negotiated for the benefit of the enterprises and taxpayers, the state law requirements are preempted. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (stating that "state law is nullified to the extent that it actually conflicts with federal law," such as "when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and holding that a state law created such an obstacle where it "limit[ed] the availability of an option the [Federal Home Loan Bank] Board considers essential to the economic soundness of the thrift industry").[9]

Moreover, even if plaintiffs' claims were not barred by § 4617(f) or pre-empted by HERA, they would fail on the merits. For the reasons stated in FHFA's brief, the Third Amendment does not violate Delaware or Virginia laws governing the issuance of preferred stock. *See* FHFA.Br.47-52.

3. In an additional attempt to circumvent § 4617(f), plaintiffs argue that "the text of HERA requires FHFA as conservator to 'preserve and conserve' the Companies' assets, and to 'rehabilitate' the Companies by returning them to a 'sound and solvent condition,'" Br.52 (citing 12 U.S.C. § 4617(a)(2)(D), (b)(2)(D)-(E)), and that this Court has authority to review FHFA's actions for compliance with those purported mandates. Plaintiffs are mistaken.

[9] In adopting Delaware and Virginia law to govern their corporate practices and procedures, the enterprises themselves made clear that they would follow state law only to the extent state law was "not inconsistent with . . . Federal law, rules, and regulations." JA241 (Fannie Mae Bylaws § 1.05); JA291 (Freddie Mac Bylaws § 11.3(a)). The federal regulation that required the enterprises to designate a body of law to govern their corporate affairs likewise provided that the designated body of law would apply only to the extent it was not "inconsistent with" "Federal law, rules, and regulations." 12 C.F.R. § 1710.10 (2014). Plaintiffs' emphasis on the fact that the enterprises "select[ed] Delaware and Virginia corporation laws to govern their internal affairs" is thus misguided. Br.28-29.

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

Even taken on its own terms, moreover, plaintiffs' argument rests on the mistaken premise that FHFA is under an obligation to return the enterprises to the same state that existed prior to the conservatorship. *See, e.g.*, Br.52 (arguing that the Third Amendment violates HERA because it "ensur[es] that the Companies will never have enough capital to return to private control"). But HERA does not require that FHFA return the enterprises to their pre-crisis form, much less that it make this goal a priority. *See Perry Capital*, 864 F.3d at 613 ("[N]othing in [HERA] mandated that FHFA take steps to return Fannie Mae and Freddie Mac at the first sign of financial improvement to the old economic model that got them into so much trouble in the first place."). To the contrary, HERA authorizes FHFA, as conservator, to make significant changes to the enterprises' operations. *See, e.g.*, 12 U.S.C. § 4617(a)(2) (stating that FHFA may "be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a [GSE]"); *see also Perry Capital*, 864 F.3d at 609 ("FHFA's textual authority to reorganize and rehabilitate the Companies, in other words, forecloses any argument that [HERA] made the *status quo ante* a statutorily compelled end game.").

The enterprises were on the precipice of failure in 2008, and Congress did not require that the conservator return the GSEs to their pre-crisis state—a point underscored by congressional legislation in 2016 preventing Treasury from selling its preferred stock in the GSEs for two years. Consolidated Appropriations Act, 2016, § 702(b). The legislation was accompanied by a "Sense of Congress" provision declaring that "Congress should pass and the President should sign into law legislation determining the future of Fannie Mae and Freddie Mac, and that notwithstanding the expiration of subsection (b), the Secretary should not . . . dispose of any outstanding shares of senior preferred stock acquired pursuant to the Senior Preferred Stock Purchase Agreement until such legislation is enacted." *Id.* § 702(c).

Neither 12 U.S.C. § 4617(a)(2) nor § 4617(b)(2)(D), the two provisions plaintiffs cite in arguing that HERA imposes their proposed mandatory duties, suggest that FHFA must act with the aim of returning the entities to their pre-crisis form. A conservator can stabilize or rehabilitate a troubled financial institution with an eye toward returning it to its former status. But it can also rehabilitate an entity to ready it for reorganization or liquidation. *See, e.g.*, *Ameristar Fin. Servicing Co. v. United States*, 75 Fed. Cl. 807, 808 n.3 (2007) (describing a conservator as "operat[ing] a troubled financial institution in an effort to conserve, manage, and protect the troubled institution's assets until the institution has stabilized or has been closed by the chartering authority"); FDIC, *Resolutions Handbook* 33 (glossary) (2017) (same); *see also* 12 U.S.C. § 4617(a)(2) (stating that FHFA may be appointed conservator to reorganize, rehabilitate, or wind up a GSE's affairs); *Perry Capital*, 864 F.3d at 612 ("Undertaking permissible conservatorship measures even with a receivership [in] mind would not be out of statutory bounds."). Nothing in the Act compels FHFA to preserve and conserve the enterprises' assets above all other considerations or to return the GSEs to an entirely privately funded model. *See id.* at 607 ("Entirely absent from [HERA's] text is any mandate, command, or directive to build up capital for the financial benefit of the Companies' stockholders.").

Apart from their fundamental misunderstanding of the grant of statutory authority, plaintiffs also fail to grapple with the governing provisions' broadly discretionary terms. In describing FHFA's powers and authorities as conservator, HERA uses the permissive "may," providing that FHFA "*may*, as conservator, take such action as may be . . . necessary to put the regulated entity in a sound and solvent condition; and . . . appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D) (emphasis added); *see also id.* § 4617(b)(2)(B)(iv) (FHFA "*may*, as conservator . . . preserve and conserve the assets and property of the regulated entity.") (emphasis added). "The statute is thus framed in terms of expansive grants of permissive, discretionary authority for FHFA to exercise as the 'Agency determines is in the best interests of the regulated entity or the Agency.'" *Perry Capital*, 864 F.3d at 607 (quoting 12 U.S.C. § 4617(b)(2)(J)); *Robinson*, 876 F.3d at 232.

Plaintiffs' attempts to bring their claim within an *ultra vires* exception to the bar on judicial review are without basis, and there is thus no occasion to address the mistaken premises of their narrative. It should be clear, however, that the Third Amendment has not left the enterprises in an "[un]safe and [un]sound financial condition." Br.52. As explained *supra* pp. 11-12, 22-23, the Third Amendment arrested the draws-to-pay-dividends cycle that threatened to erode Treasury's unused funding commitment. By preserving those funds, the Third Amendment ensured that the GSEs would have sufficient funds to cover any near-term losses, to weather another housing-market downturn, and to maintain market confidence. If, at the end of a quarter, the enterprises' liabilities exceed their assets, they have an approximately $254-billion backstop (the current size of Treasury's remaining commitment) from which they can draw to correct the deficiency. Indeed, the enterprises made such draws for the final quarter of 2017. *See supra* p. 12. The Treasury commitment "ensures continued access to vital capital," *Perry Capital*, 864 F.3d at 610, and has been crucial to preserving the GSEs' financial stability and solvency.

For similar reasons, plaintiffs are mistaken in asserting that the Third Amendment did not "preserve and conserve" the enterprises' assets. Br.28-29. Not only did the Third Amendment help preserve and conserve Treasury's funding commitment, it also relieved the enterprises of their obligation to pay a fixed 10% cash dividend to Treasury, an obligation that would have cost the enterprises at least $19 billion per year, regardless of their profitability. By forgoing a fixed dividend, Treasury thus incurred a risk of non-payment, to the benefit of the GSEs. Treasury also agreed to waive the periodic commitment fee as long as the variable dividend is in place. In short, the Third Amendment was structured to, among other things, preserve the enterprises' assets and avoid increasing their debts in years (such as 2015 and 2016) when the GSEs earned less than the $19 billion they otherwise would have owed Treasury. *See Perry Capital*, 864 F.3d at 611 (explaining that through the Third Amendment, the GSEs obtained "continued access to necessary capital free of the preexisting risk of accumulating more debt simply to pay dividends to Treasury").

Plaintiffs' suggestion that FHFA has placed the entities in "liquidation" and its related argument that the Third Amendment "violated HERA's provisions governing the order of priorities for distribution of assets upon liquidiation," Br.48, do not withstand the briefest scrutiny. Five years after the Third Amendment, the GSEs are going concerns with combined assets of more than $5 trillion. Fannie Mae 2016 10-K, at 55; Freddie Mac 2016 10-K, at 11. "During that time, Fannie and Freddie, among other things, collectively purchased at least 11 million mortgages on single-family owner-occupied properties, and Fannie issued over $1.5 trillion in single-family mortgage-backed securities." *Perry Capital*, 864 F.3d at 602. The Third Amendment thus was not a liquidation.[10]

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[10] Section 4617(f) bars courts from taking any action that would affect or restrain FHFA's exercise of its powers as "a conservator or a receiver." 12 U.S.C. § 4617(f). Thus, the district court would have lacked jurisdiction to grant the

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

Section 4617(f) does not permit plaintiffs to seek to enjoin FHFA's actions by naming Treasury as a defendant. As the D.C. Circuit and the district court here observed, "the effect of any injunction or declaratory judgment aimed at Treasury's adoption of the Third Amendment would have just as direct and immediate an effect as if the injunction operated directly on FHFA." *Perry Capital*, 864 F.3d at 615; JA18. Such an injunction against FHFA's contractual counterparty would thus run afoul of § 4617(f)'s prohibition on judicial relief that would "restrain or affect" FHFA's exercise of its conservatorship powers.

This Court, in applying FIRREA's analogous anti-injunction provision, has reached the same conclusion, holding that the provision "precludes a court order against a third party which would affect the FDIC as receiver, particularly where the relief would have the same practical result as an order directed against the FDIC in that capacity." *Hindes v. FDIC*, 137 F.3d 148, 160-61 (3d Cir. 1998); *see also Dittmer*, 708 F.3d at 1017 ("[I]f plaintiffs . . . are allowed to attack the validity of a failed institution's assets by suing the remote purchaser, such actions would certainly restrain or affect the FDIC's powers to deal with the property it is charged with disbursing."); *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir.

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equitable relief that plaintiffs seek—an order declaring the Third Amendment invalid—even if FHFA had acted as a receiver when it agreed to the Third Amendment.

1992) ("Permitting Telematics to attach the certificate of deposit, if that attachment were effective against the FDIC, would have the same effect, from the FDIC's perspective, as directly enjoining the FDIC from attaching the asset. In either event, the district court would restrain or affect the FDIC in the exercise of its powers as receiver.").

Although plaintiffs state, without further explanation, that "HERA contains no provision limiting judicial review of claims against Treasury," Br.53, they do not otherwise challenge the district court's conclusion that a plaintiff "cannot make an end-run around Section 4617(f) by asserting claims for equitable and injunctive relief against the Agency's contractual counterparty, when the contract in question was within the scope of the Agency's power," JA18. Plaintiffs have thus waived any argument that § 4617(f) permits a court to enjoin Treasury from entering into the Third Amendment even if the statute would preclude relief against FHFA. *See Garza v. Citigroup Inc.*, 881 F.3d 277, 284-85 (2018) ("[A]n appellant waives an argument in support of reversal if it is not raised in the opening brief.").

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

Although the district court did not reach the issue, plaintiffs' claims against Treasury and FHFA are independently barred by HERA's transfer-of-shareholder-rights provision (also known as HERA's succession provision), 12 U.S.C. § 4617(b)(2)(A)(i); JA110-11; *Fairview Township v. EPA,* 773 F.2d 517, 525 n.15 (3d Cir.

1985) (court may affirm on any basis in the record). That provision states that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). This provision "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits." *Perry Capital*, 864 F.3d at 623. Because plaintiffs' claims are derivative claims, as plaintiffs themselves concede, the claims are barred.

A. Plaintiffs' claims are derivative claims.

1. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Thus, legal harms committed against a corporation give rise to claims belonging to the corporation itself, and shareholder suits seeking to enforce those claims are derivative. *See, e.g.*, *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732-33 (3d Cir. 1970); *In re SemCrude LP*, 796 F.3d 310, 316 (3d Cir. 2015). In a derivative suit, any recovery flows to the corporate treasury; in a direct suit, it flows to the individual plaintiff-shareholder.

The determination whether a federal-law claim is direct or derivative is governed by federal law. *See* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1821 (2017); *cf. Rifkin v. Bear Stearns & Co.*, 248 F.3d 628, 631 (7th Cir. 2001) ("[S]tanding to bring a federal claim in federal court is exclusively a question of federal law."). Where standing turns on the "allocation of governing power within [a] corporation," however, federal law often looks to state-law principles. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991); *Starr International Co. v. United States*, 856 F.3d 953, 965-66 (Fed. Cir. 2017), *cert. denied* 138 S. Ct. 1324 (2018).

The principles for distinguishing direct from derivative claims are well established and consistent across federal and state law. The analysis is governed by two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004); *see also Kauffman*, 434 F.2d at 732. A claim is "direct" when "the duty breached was owed to the stockholder" and the stockholder "can prevail without showing an injury to the corporation." *Tooley*, 845 A.2d at 1039. A claim is "derivative" if the harm to the shareholder is the byproduct of some injury to the corporate body as a whole. *Id.*[11]

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[11] In *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 (Del. 2015), the Delaware Supreme Court found no need to apply the *Tooley* test where a plaintiff's claim is self-evidently direct, such as where, as in *NAF Holdings*, the plaintiff is a party to a commercial contract that the plaintiff alleges the defendant breached. *See* 118 A.3d at 176. Under such circumstances, a plaintiff may sue directly to enforce "its own rights as a signatory to a commercial contract." *Id.* One set of plaintiffs in *Perry Capital* brought such breach-of-contract claims, arguing that the Third Amendment breached the contracts between the plaintiffs and the GSEs. *See Perry Capital*, 864 F.3d at 628 (stating that the class plaintiffs' breach-of-contract claims were "obviously direct," because "they assert that the Companies breached contractual duties owed to the class plaintiffs by virtue of their stock certificates").

Moreover, "claims that [defendants] caused the company to enter into a series of 'unfair' transactions that have 'involved self-dealing' and 'diverting assets' are fundamentally claims belonging to the corporation and to [shareholders] only derivatively." *Cowin v. Bresler*, 741 F.2d 410, 416 (D.C. Cir. 1984); *see also Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) ("Pareto's allegations—that the directors breached their duties of care and loyalty by failing to safeguard Barbary Coast's assets and equity, mismanaging its operations, [and] improperly placing it into voluntary receivership . . . describe a direct injury to the bank, not the individual stockholders."); *Blasband v. Rales*, 971 F.2d 1034, 1045 (3d. Cir. 1992) ("[A]ctions charging waste or mismanagement which depress the value of stock may not be maintained directly, but must be brought derivatively on behalf of the corporation.").

2. Plaintiffs ask that the Third Amendment be declared invalid and enjoined, so that future increases in net worth would be retained by the enterprises, and also request that the dividends Treasury has already received be returned to the GSEs. JA76-78. Such an order would not benefit plaintiffs directly. The relief sought would enrich the enterprises and therefore make plaintiffs' rights in the enterprises more valuable.

Similarly, the harm that plaintiffs allege—the assertedly improper transfer of the GSEs' net worth to Treasury—was suffered by the corporation. *See, e.g.*, Br.52

Plaintiffs raise no such self-evidently direct claims here, and, indeed, expressly declined to pursue claims for breach of contract.

(asserting that, under the Third Amendment, "FHFA continues to strip *the Companies*' assets and transfer them to Treasury, ensuring that *the Companies* will never have enough capital to return to private control") (emphasis added); Br.12 (stating that under the Third Amendment, "it will be impossible for either *Company* to ever have a position net worth") (emphasis added); JA53 (Am. Compl.) (Under the Third Amendment, "Treasury will receive—in perpetuity—any and all profits that *Fannie Mae and Freddie Mac* earn," making it "impossible for *either Company* to ever have a positive net worth"); JA54 (Am. Compl.) (The Third Amendment "has stripped *Fannie Mae and Freddie Mac* of their ability to rebuild their capital reserves."). Indeed, plaintiffs repeatedly describe the Third Amendment as constituting a "waste of corporate assets." Br.49; *see also* Br.21, 52. A claim that a corporation's management has wasted corporate assets through "self-dealing," Br.12, or otherwise is a quintessential derivative claim. *See Blasband*, 971 F.2d at 1045; *see also Kramer v. Western Pac. Indus.*, 546 A.2d 348, 353 (Del. 1988) ("A claim of mismanagement resulting in corporate waste, if proven, represents a direct wrong to the corporation" and is "entirely derivative in nature.").

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

That the Third Amendment will allegedly cause plaintiffs indirect harm as shareholders, such as a decline in the value of their shares or a reduced likelihood of future dividends or liquidation payouts, does not transform those claims into direct claims. *See, e.g.*, *Kauffman*, 434 F.2d at 732 ("[D]iminution in value of [a shareholder's] corporate shares resulting from the impairment of corporate assets" is a derivative injury); *Winer Family Tr. v. Queen*, 503 F.3d 319, 338 (3d Cir. 2007) ("The essence of Winer's claim is that Smithfield Foods engaged in self-dealing at the direct expense of Pennexx, which ultimately resulted in a diminution in value of Pennexx stock. That injury, if proved, belongs to Pennexx, and Pennexx alone has standing to sue as a corporation."); *Gaff v. FDIC*, 814 F.2d 311, 318 (6th Cir. 1987) ("Gaff primarily claims that his shares in the failed bank became totally worthless as a result of the defendants' conduct. . . . [A] diminution in the value of stock is merely indirect harm to a shareholder and does not bestow upon a shareholder the standing to bring a direct cause of action.").

3. Plaintiffs concede that their claims are derivative claims, labeling each as such in their amended complaint and expressly stating in their complaint that they are bringing "this action derivatively on behalf of and for the benefit of" the enterprises. *See* JA69, 71-75. While admitting that their claims are derivative, plaintiffs argued below that their claims are also direct claims, for two reasons. First, they asserted that the claims are direct because, in agreeing to the Third Amendment, FHFA breached their contractual rights under the contract that exists between the shareholders and the enterprises. *See* Dkt. 69, at 45-47. Second, they argued that the claims are direct because the Third Amendment allegedly involved the "extraction and redistribution of all of the earnings and net worth of the Companies to Treasury, the Companies' controlling shareholder." *Id.* at 47. Plaintiffs are wrong on both counts.

Plaintiffs cannot recast their claims as direct merely by alleging that the Third Amendment violated unspecified contractual rights that they purportedly possess. Plaintiffs did not assert any breach of contract claims in their amended complaint, and, in fact, moved for leave to amend for the purpose of dropping such claims from their original complaint. *See* FHFA.Br.12-14. Plaintiffs' suggestion that their claims are direct because they involve a breach of contract is thus unavailing.

In any event, as the Delaware Supreme Court held in *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1259 (Del. 2016), Delaware law "does not support the proposition that *any* claim sounding in contract is direct by default, irrespective of *Tooley*." For a contract claim to be direct, a plaintiff must demonstrate, among other things, "that he or she can prevail without showing an injury to the corporation" and that "the recovery . . . flows to" the shareholder, not the corporation. *Id.* at 1260-61. As explained, the harm plaintiffs allege was suffered by, and the remedy they seek would flow to, the corporation directly and to shareholders only indirectly. Plaintiffs' claims are therefore derivative claims, whether styled as contract claims or otherwise.

Plaintiffs' reliance on Delaware's majority-shareholder exception (known as the *Gentile* exception) likewise fails to advance their claim. Claims that a majority shareholder breached a fiduciary duty to minority shareholders with respect to a corporate transaction are typically derivative claims. *See, e.g.*, *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1218 (Del. 2012) (claim that controlling shareholder and the corporation's directors breached a fiduciary duty to minority shareholders by causing the corporation to pay an "unfair price" for an asset was a derivative claim). Delaware law has recognized a narrow exception to that rule for cases in which "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006). To the extent that "the harm resulting from the overpayment is not confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares," those minority shareholders may bring a direct claim to recover for that additional quantum of harm. *Id.* The Delaware Supreme Court has emphasized "that the extraction of solely economic value from the minority by a controlling stockholder" does not alone constitute "direct injury"; a dilution of voting rights is also required. *El Paso Pipeline*, 152 A.3d at 1264. A *Gentile* claim is actionable based on the controlling shareholder's "breach of fiduciary duty" to the plaintiff. 906 A.2d at 99-100, 103.

Plaintiffs argue that their claims are direct under the narrow *Gentile* exception, because Treasury was a controlling shareholder and the Third Amendment transferred the economic value of their stock to Treasury. *See* Dkt. 69, at 47-49. This argument is wrong in several respects.

The premise of plaintiffs' argument is incorrect: Treasury was not a controlling shareholder and did not owe a fiduciary duty to GSE shareholders. A controlling shareholder of a corporation owns a majority of the corporation's voting shares or exercises "actual control" over the corporation's affairs. *Starr Int'l Co. v. Federal Reserve Bank*, 906 F. Supp. 2d 202, 221-25 (S.D.N.Y. 2012), *aff'd*, 742 F.3d 37 (2d Cir. 2014); *see also Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987). Treasury is not and has never been a majority shareholder, nor does it have voting rights in the GSEs. Its rights as a senior preferred shareholder are entirely contractual. Even "a significant shareholder, who exercises a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take, does not become, without more, a controlling shareholder for that particular purpose." *Superior Vision Servs. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426, at *5 (Del. Ch. Aug. 25, 2006) (unpublished); *see also Starr Int'l*, 906 F. Supp. 2d at 221-25. Moreover, HERA's requirements that Treasury act to "protect the taxpayer," 12 U.S.C. § 1719(g)(1)(B)(iii), and consider the "need for preferences or priorities regarding payments to the Government," *id.* § 1719(g)(1)(C)(i), negates any suggestion that Treasury owed common-law fiduciary duties to the GSEs' shareholders.

Even if Treasury could be deemed a controlling shareholder, the exception would be inapplicable. Plaintiffs assert only that Treasury extracted the economic value of their shares. The Third Amendment did not alter Treasury's voting rights (Treasury has none) or its ownership stake in the GSEs. *Cf. Perry Capital*, 864 F.3d at 629 (concluding that the Third Amendment did not alter the shareholders' voting rights). Because "the extraction of solely economic value from the minority by a controlling stockholder" without a corresponding dilution in voting rights is not sufficient to state a claim under *Gentile*, plaintiffs' reliance on the *Gentile* exception necessarily fails. *See El Paso Pipeline*, 152 A.3d at 1264.

The *Gentile* exception is also inapplicable because the Third Amendment did not result in the issuance of additional shares of GSE stock, let alone "excessive" shares. Nor did the Third Amendment alter the percentage of GSE shares outstanding that Treasury owns, or decrease the percentage owned by private investors. For these reasons, courts have rejected application of the *Gentile* exception in lawsuits challenging the Third Amendment. *See Edwards v. Deloitte & Touche, LLP*, No. 16-21221-CIV, 2017 WL 1291994, at *7 (S.D. Fla. Jan. 18, 2017); *Saxton v. FHFA*, 245 F. Supp. 3d 1063, 1072-73 (N.D. Iowa 2017).

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

In a further attempt to evade HERA's bar on derivative suits, plaintiffs argued in the district court that there exists an implicit "conflict-of-interest" exception to HERA's transfer-of-shareholder-rights provision that would allow shareholders to bring derivative claims when FHFA, acting as conservator, is allegedly unwilling to bring suit due to a purported conflict of interest. Dkt. 69, at 52-55. Plaintiffs are barred by issue preclusion from advancing their argument that HERA's succession provision includes a conflict-of-interest exception, and that argument is without merit in any event.

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

The question whether HERA's transfer-of-shareholder-rights provision includes a conflict-of-interest exception was litigated and resolved against all GSE shareholders in *Perry Capital v. Lew*, 70 F. Supp. 3d 208, 229-30 (D.D.C. 2014), and *Saxton*, 245 F. Supp. 3d at 1079. Addressing various derivative claims brought by GSE shareholders, the district court in *Perry Capital* concluded that (1) HERA's transfer-of-shareholder-rights provision bars derivative suits, and (2) no conflict-of-interest exception to that provision exists. 70 F. Supp. 3d at 229. Those conclusions, both of which were necessary to the court's dismissal of the relevant derivative claims, were affirmed by the court of appeals. *See Perry Capital*, 864 F.3d at 625. The district court in *Saxton* reached the same conclusions. *Saxton*, 245 F. Supp. 3d at 1079. It is irrelevant that the derivative claims that the courts addressed in *Perry Capital* and *Saxton* were not identical to the claims plaintiffs raise here. Issue preclusion applies "even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892. Because the issue whether § 4617(b)(2)(A)(i) includes a conflict-of-interest exception was fully litigated and decided on the merits against GSE shareholders in previous derivative litigation, plaintiffs cannot relitigate it in pursuit of their derivative claims here.

Moreover, with respect to the question whether HERA's transfer-of-shareholder-rights provision includes an implicit conflict-of-interest exception, plaintiffs' interests are fully aligned with those of the derivative plaintiff-shareholders in *Perry Capital* and *Saxton*. Indeed, the derivative plaintiffs in *Perry Capital* and *Saxton* made the same arguments plaintiffs make here, citing the identical precedent to support their assertion that a conflict-of-interest exception exists. *Compare* Dkt. 69, at 52-53 *with* Class.Pl.Br. 32-35, *Perry Capital v. Lew*, No. 1:13-mc-1288 (D.D.C), Class.Pl.Br. 23-24, *Perry Capital v. Mnuchin*, No. 14-5243 (D.C. Cir.), *and* Pl.Br. 76-79, *Saxton v. FHFA*, No. 1:15-cv-00047 (N.D. Iowa).

2. Plaintiffs' contention that HERA's transfer-of-shareholder-rights provision contains a conflict-of-interest exception lacks merit in any event. HERA's transfer-of-shareholder-rights provision by its terms admits of no exceptions. *See also Kellmer v. Raines*, 674 F.3d 848, 851 (D.C. Cir. 2012) ("Congress has transferred everything it could to the [conservator]" through § 4617(b)(2)(A)(i).).

As the D.C. Circuit recognized in *Perry Capital*, creating a judicial conflict-of-interest exception would also be inconsistent with the purpose of HERA's transfer-of-rights provision. *Perry Capital*, 864 F.3d at 625. The two courts of appeals that have recognized a conflict-of-interest exception to FIRREA's analogous provision did so on the ground that a receiver facing a conflict of interest might be "unable or unwilling to [file suit on a corporation's behalf], despite it being in the best interests of the corporation." *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999); *see also Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021-22 (9th Cir. 2001).

But it is precisely to address such concerns that courts in some circumstances have permitted derivative suits. *See Kamen*, 500 U.S. at 95 ("[T]he purpose of the derivative action was to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers." (quotation marks omitted)). Through HERA, Congress precluded such actions. As the D.C. Circuit recognized, "it makes little sense to base an exception to the rule against derivative suits in the Succession Clause on the purpose of the derivative suit mechanism." *Perry Capital*, 864 F.3d at 625 (quotation marks omitted).

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

In contrast, HERA provided for shareholders' participation in the statutory claims process in the event of the enterprises' liquidation. 12 U.S.C. § 4617(b)(2)(K)(i). In § 4617(a)(5), Congress also provided the enterprises with a thirty-day window to file a lawsuit challenging FHFA's appointment as conservator or receiver. That Congress expressly granted shareholders and the enterprises these narrow post-conservatorship rights only underscores that the enterprises and their shareholders do not otherwise retain the right to bring suit.

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

3. Plaintiffs' purported "conflict of interest" is simply that FHFA would have to sue "a sister federal agency" to challenge the Third Amendment. Dkt. 69, at 55. Even the two courts that have adopted the conflict-of-interest exception have rejected such a sweeping rule. *See Delta Savings*, 265 F.3d at 1023 ("We do not suggest that the

FDIC-as-receiver is faced with a disqualifying conflict every time a bank-in-receivership is asked to sue another federal agency."); *First Hartford*, 194 F.3d at 1295 (emphasizing that the conflict-of-interest exception will apply "only . . . in a very narrow range of circumstances"). Moreover, unlike the agencies involved in *Delta Savings*, no manifest conflict-of-interest exists that would prevent FHFA from suing Treasury. FHFA and Treasury operate independently of one another and have no "managerial and operational overlap." *Delta Savings*, 265 F.3d at 1022. Nor do they have a common genesis: FHFA was created by HERA as an "independent agency," 12 U.S.C. § 4511(a), and Treasury by the 1789 "[A]ct to [E]stablish the Treasury Department," *see United States ex rel. Work v. Boutwell*, 3 MacArth. 172, 180 (D.C. 1879).

III. Sovereign Immunity Bars Money Damages Claims Against Treasury.

Plaintiffs assert (Br.41-43) that the district court's decision must be reversed for the additional reason that, in their view, the court failed to address their purported claims for "money damages." Because any such claims would be derivative claims, they are barred by HERA's transfer-of-shareholder-rights provision. *See supra* Part II. In any event, the district court did not err in failing to address money damages claims that plaintiffs had neither asserted in their amended complaint nor briefed in district court.

Insofar as plaintiffs are attempting to assert on appeal that they have money damages claims against Treasury, plaintiffs have failed to identify where they raised any such claims in their amended complaint or in their district court papers. Br.42-43. That is not surprising because plaintiffs advanced precisely the opposite argument below. In an attempt to fit their claims against Treasury within the Administrative Procedure Act's (APA) limited waiver of sovereign immunity, plaintiffs asserted that they were *not* seeking money damages. Dkt. 69, at 3, 29. "[A]rguments asserted for the first time on appeal are deemed to be waived and consequently are not susceptible to review in this Court absent exceptional circumstances." *Tri–M Grp., LLC v. Sharp,* 638 F.3d 406, 416 (3d Cir. 2011).

In any event, any money damages claim against Treasury would necessarily fail because plaintiffs have not identified a waiver of sovereign immunity that would permit them to pursue such claims in district court. The only waiver of sovereign immunity that plaintiffs identified below is the waiver contained in the APA. *See* JA75, 76 (citing 5 U.S.C. § 702). By its terms, however, the APA waives the government's sovereign immunity only for claims "other than money damages." 5 U.S.C. § 702. Thus, even if plaintiffs had adequately pleaded and developed a money damages claim against Treasury, the district court would have lacked jurisdiction to consider it.

CONCLUSION

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

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. Government counsel are not required to be members of the bar of this Court.

2. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,939 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

3. On April 26, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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