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May 14, 2018

Via ECF

Michael E. Gans
Clerk of Court
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
St. Louis, MO 63102

Re: *Saxton v. Federal Housing Finance Agency*, No. 17-1727

Dear Mr. Gans:

The Court should not follow the Seventh Circuit's opinion in *Roberts v. FHFA*, which fails to engage with Judge Brown's dissenting opinion in *Perry Capital* and the most powerful arguments in favor of Plaintiffs' position.

When Congress says that an agency "may" do one thing, it does not simultaneously give the agency license to do the opposite. *See* Brief of Plaintiffs-Appellants at 20 (May 24, 2017). Like the *Perry Capital* majority, the Seventh Circuit was unable to identify a provision of HERA that affirmatively grants FHFA a conservatorship power to siphon essentially *all* of the Companies' capital into the federal government's coffers. Nor can the Seventh Circuit's interpretation of HERA as granting unlimited discretionary authority to FHFA as conservator be reconciled with common sense, let alone the avalanche of statements by FHFA itself over the last decade acknowledging that Section 4617(b)(2)(D) prescribes the agency's mandatory conservatorship mission. *See id.* at 21–22.

The Seventh Circuit also went seriously astray in concluding that FHFA's adoption of the Net Worth Sweep must be upheld so long as it "could have

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believed" that it was serving the purpose of conserving the Companies' assets. *Roberts* Op. at 12 (May 3, 2018). The court in *Roberts* was obliged, as is this Court, to accept as true the well-pled (and amply supported) factual allegations of the complaint, not to conjure purposes that contradict those detailed in the complaint, Compl. ¶¶ 15–16, 19, 90, 119 (JA24–26, 55, 68–69), and, indeed, admitted publicly by the Government itself when it adopted the Sweep, *see* Compl. ¶ 117 (JA67).

The Seventh Circuit was also wrong to treat shareholder challenges to the Net Worth Sweep as derivative and barred by 12 U.S.C. § 4617(b)(2)(A). *See* Brief of Plaintiffs-Appellants at 43–53. FHFA did not succeed to Plaintiffs' right to bring this direct APA claim, and in any event the Court should not read HERA to make vindication of Plaintiffs' rights contingent on FHFA's willingness to sue itself.

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper

Counsel for Appellants

cc: Counsel of Record (by ECF)

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