ORAL ARGUMENT NOT YET SCHEDULED

Nos. 14-5243 (L), 14-5254 (con.), 14-5260 (con.), 14-5262 (con.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PERRY CAPITAL LLC, for and on behalf of investment funds for which it acts as investment advisor,

Plaintiff-Appellant,

v.

JACOB J. LEW, in his official capacity as the Secretary of the Department of the Treasury, MELVIN L. WATT, in his official capacity as Director of the Federal Housing Finance Agency, UNITED STATES DEPARTMENT OF THE TREASURY, and FEDERAL HOUSING FINANCE AGENCY,

Defendants-Appellees.

On Appeal From The United States District Court
For The District Of Columbia

AMICUS CURIAE BRIEF OF INVESTORS UNITE IN SUPPORT OF APPELLANTS FOR REVERSAL

MICHAEL H. KRIMMINGER
CLEARY, GOTTLIEB, STEEN & HAMILTON LLP
2000 Pennsylvania Avenue
Washington, D.C. 20006
(202) 974-1500

Counsel for Investors Unite

July 6, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Except for the *amici curiae* listed below, all parties, intervenors, and *amici* who have appeared before the District Court and in this Court are listed in the Initial Opening Brief For Institutional Plaintiffs:

Investors Unite

The Independent Community Bankers of America ("ICBA")

Timothy Howard

B and C. The Rulings Under Review and Related Cases are set forth in the Initial Opening Brief For Institutional Plaintiffs.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel certify that Investors Unite has no parent company and that no publicly-held company owns more than 10% of Investors Unite.

RULE 29 CERTIFICATE

Amicus curiae, Investors Unite, is filing a separate brief from ICBA.

Investors Unite is a coalition of private investors in the government-sponsored enterprises Fannie Mae and Freddie Mac. Investors Unite's brief puts before the Court concerns raised by Investors Unite's members concerning actions taken by the Department of Treasury and the Federal Housing Finance Agency that adversely affect their shareholder rights under the Housing Economic Recovery Act of 2008. Investors Unite's and ICBA's briefs offer the Court two different perspectives, with ICBA focusing on the broader implications of the District Court's decision below for stakeholders in financial and other institutions governed by different, albeit similar, statutes, and Investors Unite focusing in particular on the statutory protections afforded to Fannie Mae and Freddie Mac shareholders, and on the government's public statements regarding such protections on which Investors Unite's members relied. Moreover, after conferring, counsel for Investors Unite and ICBA determined that in light of the different concerns raised by their respective clients, it would be impracticable to submit a single joint brief.

Pursuant to Circuit Rule 29(d), therefore, counsel for Investors Unite certifies that this separate brief is required to permit Investors Unite to raise certain policy concerns of importance to Investors Unite's members.

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure the undersigned counsel certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money to fund the preparation of this brief, and no person other than the *amicus curiae*, its members, and its counsel contributed money to fund the preparation of this brief.

Counsel for all Appellants and Counsel for all Appellees consent to the filing of this brief. *See* Fed. R. App. P. 29(a); D.C. Cir. R. 29(b).

Michael H. Krimminger
Michael H. Krimminger

2000 Pennsylvania Avenue
Washington, D.C. 20006
T: 202-974-1500
F: 202-974-1999
mkrimminger@cgsh.com

Counsel for Investors Unite

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Statutes and Regulatory Materials

Cases

Other Authorities

GLOSSARY

BRRD	EU Bank Recovery and Resolution Directive
The Companies	Federal National Mortgage Association (a.k.a. Fannie Mae) and Federal Home Loan Mortgage Corporation (a.k.a. Freddie Mac)
HERA	The Housing and Economic Recovery Act of 2008
FDIA	Federal Deposit Insurance Act
FDIC	Federal Deposit Insurance Corporation
FHFA	Federal Housing Finance Agency
Key Attributes	Financial Stability Board's Key Attributes of Effective Resolution Regimes for Financial Institutions
The PSPAs	Senior Preferred Stock Purchase Agreements between Treasury and FHFA acting as conservator of the Companies, dated September 7, 2008
The Third Amendment	The Third Amendment to the Senior Preferred Stock Purchase Agreements between Treasury and FHFA as conservator of the Companies, dated August 17, 2012
Treasury	United States Department of the Treasury

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Investors Unite is a broad coalition of more than 1,100 private investors—big and small—in the government-sponsored enterprises Fannie Mae and Freddie Mac (the "Companies") who have a common interest in the preservation of their shareholder rights in the Companies and recovery of the value attributable to those rights by ensuring that the government complies with the statutory requirements of the Housing and Economic Recovery Act of 2008 ("HERA").

Since September 2008, the Federal Housing Finance Agency ("FHFA") has acted as conservator of the Companies under HERA. In August 2012, without advance warning, FHFA dramatically changed the nature of its purported conservancy by an agreement with the Department of Treasury ("Treasury") known as the "Third Amendment." The Third Amendment implemented a "net worth sweep" that strips the Companies of their entire net worth each quarter and prevents the accumulation of any funds by the Companies. It thus ensures that the Companies will never be able to rebuild any buffer against inevitable future losses, and forecloses recapitalization or any other action to put the Companies into a "sound and solvent" condition so that they could be rehabilitated.[1] By imposing the Third Amendment and thereby precluding the return of the Companies to a "sound and solvent" condition, FHFA has abandoned the statutory goals of a conservatorship. To return to compliance with HERA, either the Third Amendment should be vacated to permit rehabilitation or FHFA should place the Companies into receivership as required by HERA and ultimately make distributions to stakeholders, including the members of Investors Unite.

Investors Unite's members include farmers, teachers, retirees, technicians, and others who invested their hard-earned savings in the Companies before the announcement of the Third Amendment in reliance on HERA's statutory protections for private stakeholders during a conservatorship. In addition, these investors relied on the repeated statements by senior officials of Treasury and FHFA that the rights of all stakeholders, specifically including stockholders, would be preserved, as well as on quarterly filings by the Companies with the Securities and Exchange Commission. However, through the Third Amendment and other actions, Treasury and FHFA have acted to eliminate any value in the investments of Investors Unite's members and proven that these representations were false. As

---

[1] 12 U.S.C. § 4617(b)(2)(D) authorizes FHFA, as conservator, to "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." As demonstrated below, this phrase as used by the Federal Deposit Insurance Corporation has required rehabilitation of a bank and a return to compliance with regulatory capital and other prudential requirements.

a direct result, Investors Unite's members have suffered significant losses contrary to established law.

While Investors Unite agrees with the points raised in the Appellants' briefs on this appeal, it writes separately to address concerns unique to its members, in particular the protections HERA gives private stakeholders during a Company conservatorship in the form of specific conservatorship duties imposed on FHFA. In addition, Investors Unite seeks to provide the Court with important background concerning the development and text of HERA, the Federal Deposit Insurance Act ("FDIA") conservatorship and open bank assistance provisions and precedents on which the relevant provisions of HERA were modeled, and long-standing practices of the Federal Deposit Insurance Corporation ("FDIC") in applying the similar FDIA provisions. These precedents informed the investment decisions of Investors Unite's members, who reasonably relied on the government's public statements as well.

Counsel to Investors Unite was intimately involved in the legislative development of HERA through his role in advising Senate staff while serving with the FDIC.[2] Mr. Krimminger served in senior positions at the FDIC, including

[2] For further background on these issues, please see Michael Krimminger & Mark Calabria, *The Conservatorships of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles*, *available at* http://investorsunite.org/wp-content/uploads/2015/01/Krimminger-Calabria-HERA-White-Paper-Jan-29.pdf.

Deputy to the Chairman for Policy and General Counsel, for 21 years. His service encompassed more than 1053 bank and thrift resolutions and some of the most extensive resolution activity in the FDIC's history.[3] The cumulative experience of Mr. Krimminger and the former officials filing the brief on behalf of *amicus curiae* ICBA encompassed the great majority of the federal bank and thrift resolutions since the 1930s.

SUMMARY OF THE ARGUMENT

The District Court's erroneous conclusion that the Third Amendment is consistent with FHFA's statutory obligations as conservator, *see* Memorandum Opinion dated Sept. 30, 2014 (Dkt. No. 51) ("Op.") at 24-26,[4] cannot be reconciled with HERA and the legislative background and principles on which Congress consciously and expressly based HERA.

HERA directs FHFA, when acting as conservator of the Companies, to take any action that is necessary or appropriate to "preserve and conserve" the Companies' assets and place them in a "sound and solvent condition." 12 U.S.C. § 4617(b)(2)(D). By contrast, should the Companies become insolvent or be unable

[3] *See* FDIC, *Federal Deposit Insurance Corporation Failures and Assistance Transactions*, https://www2.fdic.gov/hsob/HSOBSummaryRpt.asp?BegYear=2012&EndYear=1991&State=1&Header=0.

[4] Docket citations refer to No. 13-cv-1025. "F___" refers to FHFA's Document Compilation (Dkt. No. 27). "T___" refers to Treasury's Administrative Record (Dkt. 26).

to pay their debts when due, HERA mandates that they be placed into receivership, in which FHFA "shall" liquidate the Companies for the benefit of stakeholders, who are paid according to defined priorities subject to judicial review. *See generally id.* §§ 4617(a)(4), (b), (c). Nothing in HERA authorizes the *de facto* nationalization of the Companies, 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 District Court erroneously concluded—provide FHFA with *carte blanche* to take actions inimical to those duties.

Importantly, HERA's provisions are substantially identical to the provisions in the FDIA governing conservatorships, open bank assistance, and receiverships of FDIC-insured financial institutions. This was no accident. Congress expressly chose to replicate the FDIA provisions—and to incorporate administrative and judicial interpretations of such provisions—because they provided a proven framework that has been used for decades to resolve failing institutions while protecting the rights of stakeholders through clearly defined duties of conservators and receivers. The District Court ignored this background in interpreting HERA.

This FDIA precedent that Congress incorporated by reference 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 mandate 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.[5] The conservatorship cannot be subverted into a permanent nationalization of a troubled institution precisely because the explicit statutory mandate is to rehabilitate the bank or, if that is not feasible, to place it into receivership. *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.[6] This principle is internationally recognized, including in the Financial Stability Board's *Key*

[5] *See infra* note 15.

[6] As conservator and in open bank assistance transactions, FDIC practice, as described below, has limited its recovery to the funds that were contributed plus interest due to its fiduciary responsibilities as well as to the limitations on the use of insurance funds contained in 12 U.S.C. § 1823. The FDIC has also been clear regarding this limitation in Policy Statements applicable to open bank assistance transactions. *See infra* note 19 and accompanying text. As receiver, 12 U.S.C. § 1821(d)(11) provides that the FDIC may recover the "administrative expenses of the receiver" and, by virtue of its subrogation for depositors, amounts payable for "[a]ny deposit liability."

Attributes of Effective Resolution Regimes for Financial Institutions, as essential to effective resolution regimes regarding systemically important institutions.[7]

The Third Amendment subverts HERA's conservatorship duties. The District Court's conclusion that FHFA "acted within its broad statutory authority as a conservator" in agreeing to the Third Amendment, Op. at 24, cannot be reconciled with HERA or with relevant precedent under the FDIA. 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 siphoning off all future net worth to a single government creditor above and beyond its investment. This continues today, even though Treasury has already been repaid billions more than it lent the Companies.

[7] *See* Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions* (Oct. 2011), http://www.financialstabilityboard.org/wp-content/uploads/r_111104cc.pdf?page_moved=1.

ARGUMENT

POINT I

THE THIRD AMENDMENT IS INCONSISTENT WITH HERA'S REQUIREMENT THAT A CONSERVATORSHIP BE CONDUCTED WITH THE GOAL OF RESTORING THE COMPANIES TO A "SOUND AND SOLVENT CONDITION," AND WITH THE FDIA CONSERVATORSHIP PRECEDENTS ON WHICH HERA WAS MODELED

A. Background of the Third Amendment.

On September 6, 2008, FHFA placed the Companies into conservatorships and appointed itself as conservator pursuant to the newly enacted HERA. At the time, FHFA Director James Lockhart explained that the conservatorships were "a statutory process designed to stabilize a troubled institution *with the objective of returning the entities to normal business operations*. FHFA will act as the conservator to operate the [Companies] until they are stabilized." F0015-16, F0026-27 (emphasis added).

The next day, Treasury exercised its temporary authority under HERA to purchase senior preferred stock in the Companies pursuant to Preferred Stock Purchase Agreements between Treasury and FHFA acting as conservator of the Companies (the "PSPAs"). T0017-40 (Fannie Mae), T0051-74 (Freddie Mac). In the PSPAs, Treasury committed to provide up to $100 billion to each Company in return for principally four rights. First, Treasury received one million senior preferred shares in each Company with an initial senior liquidation preference of

$1,000 per share equivalent to $1 billion. The PSPAs provided that Treasury's liquidation preference would increase dollar-for-dollar with each draw by the Companies from Treasury's funding commitment. Second, Treasury was entitled to a quarterly cash dividend equal to 10% of its outstanding liquidation preference[8] that could have been paid in kind without any borrowing from Treasury. Third, Treasury received a warrant to purchase 79.9% of each Companies' common stock at a nominal price. Fourth, Treasury gained the right to collect a Periodic Commitment Fee beginning in 2010, which was to be set by mutual agreement with FHFA at the market price (although Treasury could waive it a year at a time).

Importantly, under the PSPAs, Treasury's senior preferred stock could be redeemed if its liquidation preference was paid down with interest. While the PSPAs were certainly dilutive of the existing shareholders' interests in the Companies, they did not purport to eliminate such interests. Privately held shares were allowed to continue to exist (and were actively traded) in companies generating substantial cash flows and therefore offering the real prospect of returning to private control. F0028 ("During the conservatorship, the Company's stock will continue to trade.").

---

[8] This amount was already unusually high in comparison with FDIC practice, which has always been to provide funding at basis points higher than the FDIC's cost of funds. *See infra* Part I.B.2.b.

Both Treasury and FHFA explicitly emphasized that there was no nationalization and that the rights of stakeholders would be protected. For example, then-Treasury Secretary Paulson explained that "conservatorship does not eliminate the outstanding preferred stock." F0022; *see also* T0005 (Treasury memorandum stating that "[c]onservatorship preserves the status and claims of the preferred and common shareholders"). FHFA also confirmed that the "[s]tockholders will continue to retain all rights in the stock's financial worth; as such worth is determined by the market." F0028; *see also* F0018 (Director Lockhart's statement that "the common and all preferred stocks will continue to remain outstanding"); F0061-62 (Director Lockhart's testimony that "[t]he shareholders are still in place; both the preferred and common shareholders have an economic interest in the companies"). The Companies also continued to remain subject to registration and regulation by the Securities and Exchange Commission, which requires certification of financial statements.

In reliance on these statements and the fact that the Companies had not been nationalized and consequently offered the prospect of being returned to private control, Investors Unite's members invested in the Companies. Through 2011 and into 2012, the Companies' financial condition continued to improve and increased the positive prospects for these investments.[9] However, internal Treasury documents only released in connection with these lawsuits demonstrate that as early as December 2010, Treasury officials had adopted an undisclosed policy of "ensur[ing] [that] existing common equity holders will not have access to any positive earnings from the [Companies] in the future." T0202.

The first public disclosure of this change in policy occurred on August 17, 2012, when Treasury and FHFA announced a fundamental change to their arrangement. The "Third Amendment" replaced the fixed-rate dividend with a "net-worth sweep" of each Company's net worth above a capital reserve of $3 billion. The sweep progressively reduces the capital reserve to zero by 2018. *See* T4337, T4345; F4034, F4042 § 3. Importantly, the sweep payments never reduce Treasury's liquidation preference; all payments are characterized as dividends.

The effect of the Third Amendment is clear. The Companies will not be returned to a "sound and solvent" condition despite FHFA's statutory duty under HERA, and no capital buffer will be maintained to protect taxpayers from future losses. Treasury made this explicit by stating that it would prevent the

---

[9] By May 2012, both of the Companies announced net profits for the first quarter, despite the high dividend payments to Treasury. *See* Federal Nat'l Mortgage Ass'n, Quarterly Report (Form 10-Q) 1-2 (May 9, 2012) ("[W]e generated positive net worth for the quarter and were not required to draw funds from Treasury for the quarter under the senior preferred stock purchase agreement. We expect our financial results for 2012 to be significantly better than our 2011 results.").

Companies from "retain[ing] profits" or "rebuild[ing] capital." Press Release, U.S. Dep't of Treasury, *Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac* (Aug. 17, 2012) http://www.treasury.gov/press-center/press-releases/Pages/tg1684.aspx. FHFA's then-Acting Director DeMarco explained that the Third Amendment "reinforce[d] that the [Companies] will not be building capital as a potential step to regaining their former corporate status." Speech, Edward J. DeMarco, Acting Director, FHFA, *FHFA's Conservatorship Priorities for 2013* (Mar. 4, 2013), http://www.fhfa.gov/Media/PublicAffairs/Pages/Remarks-as-Prepared-for-Delivery-Edward-J-DeMarco-Acting-Director-FHFA-National-association-for-Business-Economics-.aspx.[10] Effectively, except in a nominal sense, the "conservancy" ended but no receivership was commenced.

The plaintiffs commenced these lawsuits beginning in 2013, challenging the Third Amendment under the Administrative Procedure Act and other grounds.

In the interim, as confirmed by the FHFA Director, the Companies have now paid dividends to Treasury that exceed by $40 billion the amounts the Companies borrowed from Treasury, without reducing Treasury's claims on the

[10] As noted above, in internal documents in 2010 Treasury officials expressly stated that Treasury will not allow any return of value to the stakeholders. *See* T0202.

Companies by a single cent. *See* Statement, Melvin L. Watt, Director, FHFA, *Statement Before the House Committee on Financial Services*, 3 (Jan. 27, 2015), www.financialservices.house.gov/uploadedfiles/hhrg-114-ba00-wstate-mwatt-20150127.pdf (Fannie Mae paid Treasury $130.5 billion through September 30, 2014, after having borrowed $116.1 billion; Freddie Mac paid Treasury $88.2 billion through September 30, 2014, after having borrowed $71.3 billion).

B. The District Court Erred In Concluding That The Third Amendment Is Consistent With HERA

The District Court erroneously concluded that FHFA acted within its statutory conservatorship powers when it entered into the Third Amendment because "the [Companies] maintain an operational mortgage finance business and are, once again, profitable—two facts indicative of a successful conservatorship." Op. at 25-26. This conclusion cannot be reconciled with the express definition of a successful conservatorship contained in HERA. In HERA, the proper goal of a conservatorship is to restore the enterprise to a "sound and solvent condition" and to "preserve and conserve" the Company's assets. This goal cannot be achieved by stripping the Companies of all future net worth and eliminating their capital buffer.

The District Court also improperly failed to appreciate the differences between the conservatorship and a receivership when it further observed that "[t]here surely can be a fluid progression from conservatorship to receivership without violating HERA" because "FHFA can lawfully take steps to maintain operational soundness and solvency, conserving the assets of the Companies, until it decides the time is right for liquidation." Op. at 25 n.20.[11] The Third Amendment, however, effectively created a liquidating receivership designed to prevent rehabilitation of the Companies and without according Investors Unite's members the protections of HERA's receivership provisions.

As explained below, the text of HERA establishes the District Court's errors. A consideration of the FDIA precedents and the FDIC's long-standing practices on which HERA was modeled confirm the plain meaning of HERA's text.

1. HERA's Conservatorship And Receivership Provisions

Congress clearly intended conservatorship under HERA to be a temporary measure, and not a substitute for receivership. The Director of FHFA is given discretionary authority to place the Companies into conservatorship or receivership if one of a long list of statutory grounds is satisfied. 12 U.S.C. §

[11] To the extent the District Court meant that a conservator may disregard its statutory duties and instead act for different purposes (such as ensuring that shareholders receive nothing), this contention has consistently been rejected by the courts. *See, e.g.*, *Resolution Trust Corp. v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1450, 1453 (8th Cir. 1992) ("Had Congress intended RTC's status as a conservator or receiver to be mere artifice, it would have granted all duties, rights, and powers to the Corporation. . . . That Congress intended conservators and receivers to have different missions is clear.").

4617(a). But the Director is *required* to place the Companies into receivership if the Director finds them to be insolvent or unable to pay their debts as they come due. *Id.* § 4617(a)(4). To discipline this process, the Director is required to "make a determination, in writing," as to whether the Companies meet the requirements for mandatory receivership every thirty days after they become "critically undercapitalized." *Id.* § 4617(a)(4)(B). FHFA's appointment as a receiver "shall immediately terminate any conservatorship established for the regulated entity under this chapter." *Id.* § 4617(a)(4)(D).

FHFA's "powers as conservator" are to "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." *Id.* § 4617(b)(2)(D).

In contrast, when acting as receiver, HERA directs that FHFA "shall" liquidate the Companies, whether "through the sale of assets, the transfer of assets to a limited-life regulated entity" or otherwise, and distribute to stakeholders according to defined priorities. *Id.* §§ 4617(b)(2)(E), 4617(c). As receiver, FHFA is authorized to determine claims against the Companies, pursuant to specific notice and process requirements. *Id.* § 4617(b)(3). A dissatisfied claimant may file suit for a judicial determination. *Id.* § 4617(b)(6) (a claimant may file or continue suit in district court after receiving notice by the receiver of the initial disallowance). Claims are then paid by FHFA as receiver under a statutory priority scheme that provides protections for similarly situated creditors. *Id.* § 4617(c).

It is noteworthy that there is no limitation on judicial action seeking damages against a conservator.[12] While the Appellees rely on the so-called "anti-injunction" provision of Section 4617(f)—which replicates the FDIA's Section 1821(j)—the predicate for that provision is that FHFA must be acting within its authority as conservator or receiver. As a result, although FHFA acting as conservator or receiver has broad discretion in taking specific actions, it cannot act directly contrary to its conservatorship duties under HERA. By focusing on the discretion, while ignoring the duties and complementary, but distinct, roles assigned to conservators and receivers, the District Court failed to "read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 576 U.S.__, No. 14-114, 2015 WL 2473448, at *2 (June 25, 2015) (quoting, in part, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). If, as here, FHFA is failing to fulfill its duties as conservator, it cannot assert a protection against judicial oversight that applies only when it is acting within the statutory framework that imposes those conservatorship duties.

[12] 12 U.S.C. § 4617(b)(10)(D)—which is identical to the corresponding FDIA provision at 12 U.S.C. § 1821(d)(13)(D)—simply affects jurisdiction over claims against the receiver. There is no corresponding limitation on claims against a conservator.

2. Congress Based HERA's Provisions On FDIA Precedents That Plainly Preclude the Third Amendment's Net Worth Sweep

The HERA provisions governing a FHFA conservatorship or receivership of the Companies, including the grounds for appointment as well as the powers and duties of FHFA once appointed, were based on—and in many instances replicate word-for-word—the FDIA's provisions governing conservatorships, open bank assistance, and receiverships of federally insured depository institutions by the FDIC. *See* David H. Carpenter & M. Maureen Murphy, Cong. Research Serv., RL34657, *Financial Institution Insolvency: Federal Authority Over Fannie Mae, Freddie Mac, and Depository Institutions* 5 (2008), *available at* http://fpc.state.gov/documents/organization/110098.pdf.

Congress consciously decided to follow the FDIA model in HERA, with some considered exceptions (which are not relevant here). *See* Mark Calabria, *The Resolution of Systemically Important Institutions: Lessons From Fannie and Freddie* (Cato Institute Working Paper No. 25, 2015) http://www.cato.org/publications/working-paper/resolution-systematically-important-financial-institutions-lessons-fannie (explaining that Congressional staff "quite literally" marked up the FDIA provisions in drafting HERA). 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 through specific conservator and receiver duties and responsibilities, statutory priorities, and rights to judicial adjudication. *See* Calabria, *supra*.

Among these provisions, the "powers as conservator" given to FHFA in HERA are lifted verbatim from the FDIA:

HERA, 12 U.S.C. § 4617(b)(2)(D):	FDIA, 12 U.S.C. § 1821(d)(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."	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."

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*.[13]

[13] HERA's receivership provisions were similarly based on the FDIA model. As noted above, HERA directs that when acting as receiver, FHFA "shall" liquidate the Companies and distribute to stakeholders according to defined priorities. *Id.* §§ 4617(b)(2)(E), 4617(c). Similarly, under the FDIA, the FDIC as receiver has the responsibility to "place the insured depository institution in liquidation and proceed to realize upon the assets of the institution." *Id.* § 1821(d)(2)(E). The ultimate purpose of the liquidation is to "distribute the proceeds . . . to the failed bank's creditors." Stanley V. Ragalevsky & Sarah J. Ricardi, *Anatomy of A Bank Failure*, 126 Banking L.J. 867, 885 (2009).

Long before HERA was enacted, the FDIC had well-established practices in implementing these identical duties. As the Supreme 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 FDIA provisions replicated in HERA.

The FDIC has consistently interpreted its statutory mandate as conservator to place institutions in a "sound and solvent condition" to mean that the FDIC must return the institution to full compliance with all regulatory capital, liquidity, and other prudential standards to permit normal or "sound" operations. The express policy of the FDIC is to require any insured institution receiving open bank assistance or in conservatorship to achieve rehabilitation with "sufficient tangible capitalization" that reasonably assures "the future viability of the bank." Statement of Policy on Assistance to Operating Insured Depository Institutions, 57 Fed. Reg. 60,203 (Dec. 18, 1992) (Criteria 5 and 6). And, consistent with the FDIC's goal of restoring banks to viability as privately-controlled institutions, the government is compensated for the amount it provides in assistance plus appropriate interest—but no more.

Because Congress repeated the statutory language of the FDIA in HERA, it follows that HERA should be interpreted to incorporate these two principles established by FDIA precedent.

(a) *The Third Amendment Is Inconsistent With The Requirement That The Conservator Act To Preserve The Going Concern Value Of The Institution And Rebuild Sufficient Capital So That It Can Be Safely Returned To Private Control*

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* 1 FDIC, *Managing the Crisis: The FDIC and RTC Experience* 27 (1998), *available at* https://www.fdic.gov/bank/historical/managing/history1-01.pdf.[14] The "guiding principle" of FDIC-run conservatorships has been to "operate the institution for a period of time to return the institution to a sound and solvent operation" and "to preserve the 'going concern' value of the institution." *See* FDIC, *Resolutions Handbook* 70-71 (2003). *See also* David A. Skeel, Jr., *The Law and Finance of Bank and Insurance Insolvency Regulation*, 76 Tex. L. Rev. 723, 729 (1998) ("[The FDIC generally] use[s] the conservatorship approach to preserve the bank's

[14] *See also id.* at 117 ("The [Resolution Trust Corporation] was expected to manage the thrifts assigned to its conservatorship program for a period no longer than necessary . . . .").

assets and re-establish it as a viable going concern . . . .").[15] The FDIC has 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.[16]

It follows that Congress intended FHFA's powers as a conservator under HERA to be similarly circumscribed. Indeed, more than a year before entering into the Third Amendment, FHFA adopted regulations interpreting HERA's conservatorship provisions consistent with the FDIC's interpretation of the FDIA. FHFA specifically stated that HERA "charges [FHFA] with rehabilitating the regulated entity." Conservatorship and Receivership, 76 Fed. Reg. 35,727, 35,734 (FHFA June 20, 2011); *see also id.* at 35,730 ("A

---

[15] The FDIC's goal was always to ensure rehabilitation of the bank, as measured by "sufficient tangible capitalization" sufficient to provide "reasonabl[e] assur[ance of] the future viability of the bank." *See* 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.*

[16] *See* 2 FDIC, *Managing the Crisis: The FDIC and RTC Experience* 685 (1998), *available at* https://www.fdic.gov/bank/historical/managing/history2-11.pdf.

conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition.").[17]

Unfortunately, FHFA and Treasury have purposefully refused to return the Companies to a "sound and solvent condition." The effect of the Third Amendment is that the Companies will never be able to build capital, as both Treasury and FHFA have stated publicly, and can never be rehabilitated. Watt, *supra* pp. 12-13, at 3 ("[U]nder the terms of the PSPAs, the [Companies] do not have the ability to build capital internally while they remain in conservatorship."). This necessarily means that the Companies are being prevented from returning to a "sound and solvent condition" by Treasury and the FHFA.

Nor is FHFA's "preserve and conserve" duty satisfied because the Companies remain operating, even if solely for the benefit of Treasury. FHFA is required to "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.

[17] While FHFA's regulations permit the agency "to suspend capital classifications . . . during the duration of the conservatorship or receivership of that regulated entity," *see* 12 C.F.R. § 1237.3(c), this authority must be applied consistently with the explicit statutory and regulatory duty to place the troubled Companies back into a "sound and solvent" condition, or else appoint a receiver.

(b) *The Third Amendment Is Inconsistent With The Requirement That In A Conservatorship The Government Is Not Entitled To Receive More Than The Amount Of Its Assistance*

It is also a fundamental principle of a conservatorship established through decades of experience under the FDIA that the government is only entitled to recover its investment with interest. In effect, 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 which 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* 1 FDIC, *Managing the Crisis*, *supra* p.20, Chapter 5. 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.[18] Importantly, the

[18] Conservatorships conducted by the FDIC were either "open bank" or "closed bank." A "closed bank" conservatorship was when a bank or thrift was placed into formal insolvency proceedings in a receivership, and the valuable operations of the institution were "passed through" to a new bank or thrift, which was then put into conservatorship. Open bank conservatorships have been used infrequently by the FDIC. More often, the FDIC intervened into open insured banks through so-called

stakeholders 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.[19] 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

"open bank assistance." The goal of this process was to rehabilitate the troubled bank and return it to normal banking operations in full compliance with the requisite regulatory capital standards. Such open bank assistance was similar to the conservatorship process. *See* 1 FDIC, *Managing the Crisis*, *supra* p.20, Chapter 5 and Case Studies of Open Bank Assistance at 158-63. *See also* 2 FDIC, *Managing the Crisis*, *supra* note 16, Chapters 2, 4, and 5.

[19] *See* 12 U.S.C. § 1823 (limitations on use of deposit insurance funds); Statement of Policy on Assistance to Operating Insured Depository Institutions, 57 Fed. Reg. 60,203 (Dec. 18, 1992); Statement of Policy on Assistance to Operating Insured Banks and Savings Associations, 55 Fed. Reg. 12,559 (Apr. 4, 1990); Statement of Policy and Criteria on Assistance to Operating Insured Banks, 51 Fed. Reg. 44,122 (Dec. 8, 1986); Statement of Policy and Criteria on Assistance to Operating Insured Banks Which Are in Danger of Failing, 48 Fed. Reg. 38,669. The FDIC rescinded the last of these Statements of Policy in 1997 as a consequence of intervening statutory changes.

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 Pls. 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, e.g.*, 2 FDIC, *Managing the Crisis*, *supra* note 16, at 572 (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.

POINT II

THE THIRD AMENDMENT IS INCONSISTENT WITH INTERNATIONAL STANDARDS FOR AN EFFECTIVE RESOLUTION REGIME

These established principles applied in FDIC conservatorships and assistance transactions are consistent with international standards. The United States and other industrialized countries have long recognized that predictable and fair treatment of shareholders and other stakeholders is essential to a well-functioning financial system. In the wake of the recent global financial crisis, the international community has developed principles of effective resolution regimes governing state interventions in privately held institutions to prevent or remediate systemic crises.

The Financial Stability Board's *Key Attributes of Effective Resolution Regimes for Financial Institutions* were endorsed by the G20 leaders, including the United States, in 2011. The Key Attributes parallel the FDIC's powers and policies for resolution of failing banks.[20] Our government's endorsement of these principles is consistent with a belief that our own resolution regimes, including HERA, complied with them.

The Key Attributes make clear that "[r]esolution authorities should have at their disposal a broad range of resolution powers," which include (among others) the distinct powers to "(ii) [a]ppoint an administrator to take control of and manage the affected firm *with the objective of restoring the firm, or parts of its business, to ongoing and sustainable viability*" which is separate from the authority to "(xii) [e]ffect the closure and orderly wind-down (liquidation) of the whole or part of a failing firm." Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions*, *supra* note 7, § 3.2 (emphasis added).

In response to the FSB's Key Attributes, and following the example provided by the long-standing FDIC model for resolution of banks, the European Union adopted the EU Bank Recovery and Resolution Directive ("BRRD"). *See* Memo, Eur. Comm'n, *EU Bank Recovery and Resolution Directive (BRRD): Frequently Asked Questions* (Apr. 15, 2014), http://europa.eu/rapid/press-release_MEMO-14-297_en.htm ("The BRRD is fully in line with the Financial

[20] Counsel to Investors Unite was a member of the Financial Stability Board's Resolution Steering Group that developed the Key Attributes.

Stability Board (FSB) recommendations."). The BRRD[21] also distinguishes between the goal and powers of a "temporary administrator" and the resolution authority when it is winding up the institution. The role of the temporary administrator is to "manag[e] the business or part of the business of the institution *with a view to preserving or restoring the financial position of the institution* and [to] tak[e] measures to restore the sound and prudent management of the business of the institution." *Id.* art. 29 (Temporary administrator) ¶ 3 (emphasis added). This administrator's powers are temporary[22] and must remain "proportionate" to these goals, *id.* art. 29 ¶ 2, and in the event that rehabilitation is not possible, the institution must be resolved in accordance with carefully designed "resolution tools".[23]

Both the Key Attributes and the BRRD provide safeguards to insure that shareholders and creditors are protected to the extent of the relative priority of their claims against the institution's assets in a liquidation. The Key Attributes

---

[21] Directive 2014/59, of the European Parliament and of the Council of 15 May 2014, 2014 O.J. (L 173/190) . The full text of the BRRD is available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0059.

[22] *See id.* art. 29 ¶ 7 ("The appointment of a temporary administrator shall not last more than one year. That period may be exceptionally renewed if the conditions for appointing the temporary administrator continue to be met.").

[23] A particular focus of the BRRD is the use of the "bail-in" tool. When the bail-in tool is used to intervene while the institution remains open and operating, the clear goal is to recapitalize the institution to meet regulatory capital standards and to attract market funding by virtue of its restored balance sheet strength. *Id.* art. 43(2)(a).

impose a "no creditor worse off than in liquidation" safeguard and mandate a defined creditor priority system. *See* Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions*, *supra* note 7, §§ 5.1, 5.2. Similarly, BRRD Article 34 directs that "resolution authorities take all appropriate measures to ensure that the resolution action is taken in accordance with" certain principles, including that shareholder and creditors bear losses "in accordance with the order of priority of their claims under normal insolvency proceedings." The overarching principle is that "no creditor shall incur greater losses than would have been incurred if the institution . . . had been wound up under normal insolvency proceedings." BRRD, *supra* note 21, art. 34 ¶ 1.

POINT III

THE DISTRICT COURT'S DECISION HAS POTENTIAL BROAD ADVERSE CONSEQUENCES FOR THE ECONOMY

This is not a dispute that only affects the Companies' stakeholders. First, because the Third Amendment deprives Fannie and Freddie of 100% of their net worth, it means that no capital is accumulated against future losses. That leaves the taxpayers on the hook once again in the event of a downturn. Second, it manipulates the conservatorship process to redirect billions of dollars to the government's general operating budget, with no accountability over how funds are spent.

Third, and most importantly, these unprecedented deviations from settled creditor protections undercut one of the critical foundations of a market economy, and could call into question the reliability of the government as a resolution authority. While shareholders and other stakeholders typically suffer losses in FDIC conservatorships, the amount of those losses is determined in a fair and predictable process with rights to contest any disputed decisions.

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.

It is imperative that HERA be enforced and that FHFA comply with its duties. Fair and predictably applied insolvency rules allow investors, creditors and even consumers to judge the risks of investing in, doing business with, or buying products or services from a company. Without public confidence in this process, a critical foundation of our market economy will be lost.

CONCLUSION

The District Court's decision that the Third Amendment complied with FHFA's conservatorship obligations under HERA should be reversed.

Dated: Washington, D.C.
July 6, 2015

Respectfully submitted,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: Michael H. Krimminger
Michael H. Krimminger

2000 Pennsylvania Avenue
Washington, D.C. 20006
T: 202-974-1500
F: 202-974-1999
mkrimminger@cgsh.com

Counsel for Investors Unite

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,851 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure and this Circuit because it has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Times New Roman Type.

Michael H. Krimminger

Michael H. Krimminger

2000 Pennsylvania Avenue
Washington, D.C. 20006
T: 202-974-1500
F: 202-974-1999
mkrimminger@cgsh.com

Counsel for Investors Unite

CERTIFICATE OF SERVICE

I, Olena Penn, Assistant Managing Clerk at Cleary Gottlieb Steen & Hamilton LLP, hereby certify that on July 6, 2015, I electronically filed the foregoing Amicus Curiae Brief of Investors Unite in Support of Appellants for Reversal with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished on all counsel of record by the appellate CM/ECF system.

Dated: July 6, 2015

By: Olena P

Olena Penn