No.

IN THE

Supreme Court of the United States

PERRY CAPITAL LLC, for and on behalf of investment funds for which it acts as investment manager, ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, and FINANCIAL STRUCTURES LIMITED,

Petitioners,

v.

STEVEN T. MNUCHIN, 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, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Perry Capital LLC, Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, and Financial Structures Ltd. were plaintiffs in the district court and appellants in the D.C. Circuit.

Respondents Melvin L. Watt, U.S. Department of the Treasury, Federal Housing Finance Agency, the Federal Home Loan Mortgage Corporation, and the Federal National Mortgage Association were defendants in the district court and appellees in the D.C. Circuit. Respondent Steven Mnuchin was added an appellee in the D.C. Circuit after assuming office as Secretary of the Treasury, replacing Jacob J. Lew who, in his official capacity as Secretary of the Treasury, had been a defendant in the district court and an appellee in the D.C. Circuit. Fed. R. App. P. 43(c)(2). Respondents Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Fairholme Fund, Fairholme Funds, Inc., Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, Preferred Employers Insurance Company, American European Insurance Company, Melvin Bareiss, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin, and Mary Meiya Liao were plaintiffs in the district court and appellants in the D.C. Circuit.

Pursuant to this Court's Rule 29.6, undersigned counsel for Perry Capital LLC states that Perry Capital LLC is an affiliate of Perry Corp., which is an investment advisor registered with the United States Securities and Exchange Commission under the Investment Advisor Act of 1940. Perry Capital LLC primarily manages pooled investment vehicles, the Perry Funds, for the benefit of pension funds, university endowments, foundations, and other institutional and private investors.

Pursuant to this Court's Rule 29.6, undersigned counsel for Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, and Financial Structures Ltd. states that: Arrowood Indemnity Company is an insurance company, now in run-off under the jurisdiction of the Commissioner of Insurance of the State of Delaware. The parent corporation of Arrowood Indemnity Company is Arrowpoint Group, Inc.; the parent corporation of Arrowpoint Group, Inc. is Arrowpoint Capital Corp. No publicly-held company owns 10% or more of Arrowood Indemnity Company's stock. Arrowood Surplus Lines Insurance Company is an insurance company, now in run-off under the jurisdiction of the Commissioner of Insurance of the State of Delaware. The parent corporation of Arrowood Surplus Lines Insurance Company is Arrowood Indemnity Company. No publicly-held company owns 10% or more of Surplus Lines Insurance Company's stock. Financial Structures Limited is an insurance company. The parent corporation of Financial Structures Limited is Arrowpoint Group, Inc.; the parent corporation of Arrowpoint Group, Inc. is Arrowpoint Capital Corp. No publicly-held company owns 10% or more of Financial Structures Limited's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Perry Capital LLC, Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, and Financial Structures Ltd., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet.App. A) is reported at 864 F.3d 591. The opinion of the district court is reported at 70 F. Supp. 3d 208. Pet.App. B.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2017. The court of appeals resolved a timely filed petition for rehearing on July 17, 2017, and issued an amended opinion that same day. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are located in the appendix at Pet.App. D.

STATEMENT

In August 2012—nearly four years after the Federal Housing Finance Agency ("FHFA") placed Fannie Mae and Freddie Mac[1] in conservatorship during the 2008 financial crisis—FHFA, acting as conservator to the Companies, agreed to surrender each Company's net worth to the Treasury Department every quarter. This arrangement, referred to as the "Net Worth Sweep," replaced a fixed-rate dividend to Treasury that was tied to Treasury's purchase of senior preferred stock in the Companies during the financial crisis. FHFA and Treasury have provided justifications for the Net Worth Sweep that, as the Petition filed by Fairholme Funds, Inc. demonstrates, were pretextual. The Net Worth Sweep has enabled a massive confiscation by the government, allowing Treasury thus far to seize $130 billion more than it was entitled to receive under the pre-2012 financial arrangement—a fact that neither Treasury nor FHFA denies. As was intended, these massive capital outflows have brought the Companies to the edge of insolvency, and all but guaranteed that they will never exit FHFA's conservatorship.

Petitioners here, investors that own preferred stock in the Companies, challenged the Net Worth Sweep as exceeding both FHFA's and Treasury's respective statutory powers. But the court of appeals held that the Net Worth Sweep was within FHFA's statutory authority, and that keeping Treasury within the boundaries of its statutory mandate would impermissibly intrude on FHFA's authority as conservator.

[1] The Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") are collectively referred to as "the Companies."

The decision of the court of appeals adopts an erroneous view of conservatorship unknown to our legal system. Conservators operate as fiduciaries to care for the interests of the entities or individuals under their supervision. Yet in the decision below, the D.C. Circuit held that FHFA acts within its conservatorship authority so long as it is not actually liquidating the Companies. In dissent, Judge Brown aptly described that holding as "dangerously far-reaching," Pet.App. 88a, empowering a conservator even "to loot the Companies," Pet.App. 104a.

The D.C. Circuit's test for policing the bounds of FHFA's statutory authority as conservator—if one can call it a test at all—breaks sharply from those of the Eleventh and Ninth Circuits, which have held that FHFA cannot evade judicial review merely by disguising its actions in the cloak of a conservator. And it likewise patently violates centuries of common-law understandings of the meaning of a conservatorship, including views held by the Federal Deposit Insurance Corporation ("FDIC"), whose conservatorship authority under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), served as the template for FHFA's own conservatorship authority. Judge Brown correctly noted that the decision below thus "establish[es] a dangerous precedent" for FDIC-regulated financial institutions with trillions of dollars in assets. Pet.App. 109a. If the decision below is correct, then the FDIC as conservator could seize depositor funds from one bank and give them away—to another institution as equity, or to Treasury, or even to itself—as long as it is not actually liquidating the bank. The notion that the law permits a regulator appointed as conservator to act in a way so manifestly contrary to the interests of its conservatee is deeply destabilizing to our financial regulatory system.

Apart from its dire consequences, the D.C. Circuit's decision is wrong on its own terms. The Housing and Economic Recovery Act of 2008 ("HERA") empowered FHFA as conservator to "preserve and conserve" the Companies' assets and to put the Companies "in a sound and solvent condition." 12 U.S.C. § 4617(b)(2)(D). FHFA's own notice-and-comment regulations confirm that these are the conservator's ***obligations***. These, of course, have been the most basic duties of conservators for centuries, and were copied verbatim from the FDIC's own conservatorship authority. Yet, the D.C. Circuit concluded that for FHFA—quite unlike the FDIC—these were mere suggestions the conservator was free to disregard.

Still worse, under the decision below, FHFA's effective immunity from judicial review spreads; other agencies acting *ultra vires* also may avoid judicial review so long as the government can claim that reviewing the other agency's action would "affect" FHFA's actions as conservator. There is no basis for this conclusion, much less the clear and convincing evidence necessary to overcome the presumption of judicial review.

The bedrock principle—that courts can police the bounds of governmental authority—is essential to the rule of law. As Judge Brown stated in dissent, "even in a time of exigency, a nation governed by the rule of law cannot transfer broad and unreviewable power to a government entity to do whatsoever it wishes." Pet.App. 84a. The decision below, in conflict with the Eleventh and Ninth Circuits, transforms FHFA from an agency of limited authority into a plenary actor that "may take any action [it] wish[es], apart from formal liquidation [of the Companies] without judicial oversight." Pet.App. 88a. This Court should grant the petition to decide whether Congress intended to empower conservators to act in this unprecedented and dangerous way.

A. FHFA, Purporting To Act As The Companies' Conservator, Agrees To Transfer All Of The Companies' Net Assets To Treasury In Perpetuity

1. Although the Companies are federally chartered financial institutions, both have been privately owned for decades—Fannie Mae since 1968, and Freddie Mac since 1989. The government strongly encouraged private investment in the Companies' preferred stock by, among other things, providing regulatory benefits to banks that owned those securities. *See* 12 C.F.R. pt. 3, app. A, § 3(a)(2)(ix).

In July 2008, Congress created FHFA as the Companies' new regulator and authorized it, under certain circumstances, to act as either a "conservator" or a "receiver" for the Companies. 12 U.S.C. § 4617(a). The statutory language setting forth the distinct powers and obligations of conservators and receivers is adopted wholesale from FIRREA, which authorizes the FDIC to act as the conservator or receiver of failing banks. Thus, as a conservator, FHFA "succeed[s] to … all rights, titles, powers, and privileges" of the Companies and accordingly has authority to "operate" those entities, but may *only* "take such action as may be—(i) necessary to put the [Companies] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [Companies] and preserve and conserve the assets and property of the [Companies]." 12 U.S.C. § 4617(b)(2)(D); *compare id.* § 1821(d)(2) (FDIC conservatorship powers). By contrast, as receiver FHFA has power to "liquidat[e]," *id.* § 4617(b)(2)(E), but must follow a statutory priority scheme when distributing the liquidated company's assets, *id.* § 4617(b)(3)-(4); *compare id.* § 1821(d)(2)(E), (d)(3)-(4) (FDIC receivership powers).

To complement these limited powers, HERA also imported verbatim from FIRREA another provision that prohibits courts from taking any action to "restrain or affect the exercise of powers or functions of [FHFA] as a conservator or receiver." 12 U.S.C. § 4617(f); *compare id.* § 1821(j) (FDIC provision). In the context of FIRREA, this language has been interpreted as barring review of actions within FDIC's statutory authority, but not challenges that the agency exceeded its statutory authority. *See, e.g.*, *Nat'l Trust for Historic Pres.* v. *FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring). HERA's identical text demonstrates that Congress intended this provision to operate in the same way as to FHFA.

2. On September 6, 2008, FHFA placed the Companies into conservatorship. The next day, Treasury exercised its temporary authority under HERA—which Congress set to expire on December 31, 2009—to recapitalize the Companies by purchasing their "obligations or other securities," 12 U.S.C. §§ 1455(l)(1)(A) (Fannie Mae), 1719(g)(1)(A) (Freddie Mac), and entered into Preferred Stock Purchase Agreements ("Purchase Agreements") with FHFA as conservator for the Companies.

Under these agreements, each Company obtained the right to draw up to $100 billion from Treasury to ensure that its assets equaled its liabilities (Treasury's "Commitment"). In return, Treasury received from each Company, among other things, (1) shares of a new class of senior preferred stock valued at $1 billion that would increase dollar-for-dollar when that

Company drew funds from Treasury, repayable to Treasury on redemption of the stock or liquidation of the Company, (2) the right to receive a fixed-rate quarterly dividend on the senior preferred stock, and (3) warrants granting Treasury the right to purchase 79.9% of each Company's common stock at nominal prices. The dividend on the senior preferred stock was payable, at each Company's discretion, either in cash at a rate of 10% of the amount of the senior preferred stock, or "in kind" by increasing that amount by 12%. The payment-in-kind option allowed the Companies a cash-free alternative to compensate Treasury for its investment while also allowing the Companies to rebuild their capital base.

By design, this transaction left the Companies' equity structures intact. Then-Treasury Secretary Paulson explained that "conservatorship does not eliminate the outstanding preferred stock," C.A. App. at 2439, No. 14-5243 (D.C. Cir. Feb. 16, 2016) (Doc. 1599039), and FHFA confirmed that the Companies' public shareholders would "continue to retain all rights in the stock's financial worth," *id*. at 2443.

3. Beginning in 2008, FHFA as conservator required the Companies to make significant markdowns of assets, and thereby to incur substantial non-cash losses. For example, the Companies wrote down their deferred tax assets—unused tax deductions that the Companies can use in future years to offset future income—because FHFA concluded that it was "more likely than not" that the Companies would not generate sufficient income to use these deductions in subsequent years. *Id.* at 2784, 2961. Additional tens of billions of dollars in write-downs resulted from FHFA's pessimistic assumption that the Companies would in-

cur future losses. Although these accounting decisions did not actually cause cash to leave the Companies, the massive non-cash losses left the Companies with negative net worth, forcing the Companies to draw funds from Treasury.

Treasury and FHFA as conservator adopted the "First Amendment" to the Purchase Agreements in May 2009, increasing Treasury's Commitment from $100 billion to $200 billion for each Company. *Id.* at 588-92. Later that year, Treasury and FHFA amended the Purchase Agreements a second time to allow the Companies to draw unlimited sums from Treasury until the end of 2012, and thereafter to cap the commitment at the amount already drawn plus $200 billion per Company. *Id.* at 596.

By 2012, the Companies collectively had drawn $187 billion from Treasury—$161 billion of which was due to FHFA's decision to have the Companies write-down the value of their assets—and thus owed Treasury $189 billion upon liquidation, entitling Treasury to dividends totaling nearly $19 billion per year.

4. The Companies soon returned to profitability. By 2010, FHFA observed that the Companies' "actual results" "were substantially better than projected." *Id.* at 660; *id.* at 2900. By late 2011, FHFA and Treasury projected that the Companies would not need all of Treasury's Commitment, and that the Companies might have "positive net income after dividends." *Id.* at 674. And by the spring of 2012, both Companies were exceeding FHFA's most optimistic projections by producing billions in net income. *Id.* at 3596, 3845-46. With this restored profitability, as early as May 2012, Treasury officials discussed the possibility that the Companies would generate sufficient income to enable restoration of their deferred tax assets. *See* Mot. for

Judicial Notice at 4, No. 14-5243 (D.C. Cir. May 25, 2016) (Doc. 1615013); *id.*, Ex. 6, at A029. Indeed, Treasury officials were told on August 9, 2012—one week prior to the Net Worth Sweep—that Fannie Mae alone anticipated approximately $50 billion in profits in 2013 as a result of a non-cash mark-up of the sizeable deferred tax assets, reversing accounting decisions FHFA had made soon after placing the Companies in conservatorship. *See* Notice of Filing of Unsealed Non-Public Documents, Ex. B. at A046, A050, A056 (D.C. Cir. Apr. 13, 2016) (Doc. 1608481).

Despite (or perhaps because of) this sudden surge in profitability, FHFA did not permit the Companies to resume independent operations. FHFA instead agreed with Treasury on August 17, 2012, to a third amendment to the Purchase Agreement, replacing the existing fixed-rate dividend with a sweep of each Company's net worth every quarter above an initial capital reserve of $3 billion that declines to zero by 2018. This "Net Worth Sweep" was part of the Administration's new plan to ultimately "wind down" the Companies and not allow them "to retain profits, rebuild capital, and return to the market in their prior form." Press Release, Dep't of Treasury, Treasury Dep't Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012), https://tinyurl.com/jony4co ("2012 Press Release"). A White House official confirmed at the time that the Net Worth Sweep "ensur[es] that [the Companies] can't recapitalize" by "clos[ing] off [the] possibility that they ever[] go … private again." *See* Mot. for Judicial Notice at 2; *id.* Ex. 1, A0002-03.

As a result of the government's decision to enter into the Net Worth Sweep, the Companies' massive profits redounded to Treasury's, and not the Companies', benefit. Fannie Mae and Freddie Mac were spectacularly profitable in 2013, posting net income of $84 billion and $51.6 billion, respectively—in large part due to recognition of deferred tax assets. Rather than retain these assets to rebuild the Companies' capital base and return them to soundness and solvency, this capital was transferred directly to Treasury, which received a $130 billion "dividend" in 2013—$110 billion more than it would have collected absent the Net Worth Sweep—*i.e.*, had the fixed-rate dividend still been in effect. Notably, not a single cent reduced the $189 billion the Companies would owe to Treasury on liquidation. With no ability to build any capital, the Companies, despite their sustained profitability are, in FHFA's words, "effectively balance-sheet insolvent, a textbook illustration of financial instability," Def's Mot. to Dismiss 19, *Samuels* v. *FHFA*, No. 1:13-22399-Civ (S.D. Fla. Dec. 6, 2013) (Dkt. 38).

B. Petitioners Bring Suit To Hold FHFA And Treasury To Their Statutory Bounds

In July 2013, Perry Capital, along with other investors, brought APA claims in the United States District Court for the District of Columbia challenging the Net Worth Sweep's legality, and seeking declaratory and injunctive relief. Perry Capital argued that FHFA had exceeded its authority as conservator by intentionally depriving the Companies of all capital through the Net Worth Sweep, despite its obligations to "preserve and conserve" the Companies' assets and to place them in a "sound and solvent" condition. Perry Capital also argued that Treasury exceeded its authority under HERA because, after 2009, it had no authority to purchase or to amend securities in the Companies, but instead had authority only "to hold, exercise any rights received in connection with, or sell, any obligations or securities [it had] purchased," 12 U.S.C. § 1719(g)(2)(D), (g)(4), authority which could not encompass the transaction that created the Net Worth Sweep.

The district court granted FHFA's and Treasury's motions to dismiss, holding that HERA's provision prohibiting courts from "restrain[ing] or affect[ing] the exercise of powers or functions of [FHFA] as a conservator or receiver," 12 U.S.C. § 4617(f), barred all claims seeking equitable relief against FHFA. According to the court, FHFA would exceed its statutory authority as conservator only if it placed the Companies in "*de facto* liquidation." Pet.App. 160a. The district court also rejected Perry Capital's claims against Treasury, holding that Section 4617 "may be logically extended" to FHFA's contractual "counterparty" in "litigation concerning a contract signed by FHFA pursuant to its powers as conservator." Pet.App. 135a.

C. The D.C. Circuit Holds That FHFA Has Virtually Unlimited And Unreviewable Authority As Conservator, And That Treasury's Actions Also Are Effectively Immune From Judicial Review

A divided panel of the court of appeals affirmed.

The panel majority held that the Net Worth Sweep "falls within FHFA's statutory conservatorship powers." Pet.App. 22a. The court concluded that the Net Worth Sweep falls within FHFA's "general power[]" as conservator to "operate" the Companies. *Id.* The court found that FHFA as conservator was not required to "preserve and conserve" the Companies' assets or to attempt to make the Companies "sound and solvent" because HERA provides that FHFA "may" take these actions. Pet.App. at 22a-26a.

It reasoned that these provisions did not prohibit FHFA from reducing the Companies' capital base to zero because HERA "openly recognizes that sometimes conservatorships will involve managing the regulated entity in the lead up to the appointment of a liquidating receiver," but pointed to no plan to place the Companies in receivership. *Id.* at 29a. (In fact, the Companies are in their ninth year of conservatorship.) And without acknowledging nearly identical language governing FDIC conservatorships, the court further held that HERA's language permitting FHFA as conservator to act "in the best interests of the [Companies] *or the Agency*," rendered irrelevant centuries of common law and decades of FDIC practice establishing that a conservator must serve as a fiduciary to its ward. *Id.* at 36a (quoting 12 U.S.C. § 4617(b)(2)(J)(ii); emphasis added by court). FHFA would exceed its conservatorship powers only if it ceased to "operate" the Companies and initiated their terminal liquidation.

The majority then held that petitioners' claims against Treasury also were barred by Section 4617(f). The court did not address whether Treasury's actions exceeded its statutory authority, instead holding that review was barred in any event because "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." *Id.* at 41a-42a.

Judge Brown dissented based "entirely" on her "interpretation of HERA's text." Pet.App. 86a. She explained that "the text of Subsections 4617(b)(2)(D) and (b)(2)(E) mark the bounds of FHFA's conservator or receiver powers, respectively, if and when the

Agency chooses to exercise them in a manner consistent with its general authority to 'operate the regulated entity' appearing in Subsection 4617(b)(2)(B)." Pet.App. 90a. And HERA's provision that FHFA as conservator "may" conserve assets or restore the Companies to sound and solvent condition does not render optional these definitional obligations of any conservatorship; "may" "is best understood as a simple concession to the practical reality that a conservator may not always succeed in rehabilitating its ward." Pet.App. 90a n.1. "HERA," Judge Brown recognized, "does not exist in an interpretive vacuum;" both FIRREA and the common law clearly establish the distinctive roles and limits of conservators and receivers. Pet.App. 93a-102a. It is therefore, "the proper role of courts to determine whether FHFA's challenged actions fell within its statutorily-defined conservator role." Pet.App. 93a. And the Net Worth Sweep exceeds FHFA's authority as conservator because it places the Companies in "*de facto* liquidation." Pet.App. 106a-109a.

The majority's contrary decision, Judge Brown observed, is "dangerously far-reaching" as it permits FHFA and Treasury to "take any action they wish, apart from formal liquidation, without judicial oversight." Pet.App. 88a.[2]

REASONS FOR GRANTING THE PETITION

The decision of the D.C. Circuit gives conservators virtually unlimited powers—allowing them to do anything they like, short of actually liquidating their

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[2] On July 17, 2017, the court of appeals issued an amended opinion resolving petitions for rehearing directed at other claims; that opinion left intact the court's resolution of the APA claims.

wards. That legal rule conflicts with the Eleventh Circuit's decision in *Leon County, Fla.* v. *FHFA*, which held that FHFA cannot immunize itself from judicial review by labeling its actions with the "conservator stamp," 700 F.3d 1273, 1278 (11th Cir. 2012), and a decision from the Ninth Circuit, *County of Sonoma* v. *FHFA*, which similarly concluded that FHFA cannot evade suits for injunctive relief "simply by invoking its authority as conservator," 710 F.3d 987, 994 (9th Cir. 2013). The D.C. Circuit's decision has enormous consequences for the Companies; Treasury already has taken in more than $100 billion in excess dividends. And, because the statutory language governing FHFA's conservatorships is parallel to the statute governing the FDIC, the decision threatens equally grave consequences to banks subject to the FDIC's supervision. The D.C. Circuit's holding that conservators need not preserve and conserve the assets of their wards is contrary to decades of FDIC practice and centuries of common-law conservatorships. And the holding that the limitation on judicial review of the conservator's actions immunizes other agencies is unprecedented and contrary to the well-established presumption of judicial review of agency action.

I. The D.C. Circuit's Decision Conflicts With Eleventh And Ninth Circuit Law And Gives Federal Regulators License To Loot Private Companies Under The Guise Of "Conservatorship."

A. The Decision Below Creates A Circuit Split.

The D.C. Circuit's broad and limitless view of FHFA's powers as conservator—and Section 4617(f)'s corresponding limitations on judicial review of conservatorship actions—conflicts with decisions from the Eleventh and Ninth Circuits. In *Leon County*, the Eleventh Circuit held that Section 4617(f) does not bar claims where FHFA exceeds its authority. 700 F.3d at 1278. In determining whether FHFA's actions were within its conservatorship powers, it held that "FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp," but concluded that barring the Companies from insuring certain subordinated mortgages was "fully within the responsibilities of a protective conservator, acting as a prudent business manager." *Id.* at 1279.

Addressing challenges to the same program at issue in *Leon County*, the Ninth Circuit similarly held that "FHFA cannot evade judicial review … simply by invoking its authority as conservator." *Cty. of Sonoma*, 710 F.3d at 994.

The D.C. Circuit did not address these holdings and instead took, as the dissent noted, an extremely "formalis[tic]" approach, Pet.App. 109a, and embraced exactly the type of "conservator stamp" analysis that the Eleventh Circuit explained would be insufficient to foreclose judicial review. Notwithstanding the fact—recognized by other circuits—that only a receiver, and not a conservator, may liquidate an entity by "wind[ing] up the affairs of an institution," the decision below permits a conservator to wind up an institution's affairs so long as it does so without initiating a "formal liquidation." Pet.App. 95a-96a (citing *Del E. Webb McQueen Dev. Corp.* v. *RTC*, 69 F.3d 355, 361 (9th Cir. 1995), and *RTC* v. *United Trust Fund, Inc.*, 57 F.3d 1025, 1033 (11th Cir. 1995)). The D.C. Circuit's analysis does not permit a reviewing court to look behind FHFA's assertion of conservatorship authority, leaving FHFA free to "take any action [it] wish[es], apart from formal liquidation, without judicial oversight." Pet.App. 88a.

This cannot be reconciled with the approaches of the Eleventh and Ninth Circuits. As Judge Brown correctly explained, the D.C. Circuit's decision "abdicates [the Court's] crucial responsibility" "to determine whether FHFA's challenged actions fell within its statutorily defined conservator role." Pet.App. 93a (citing *Leon Cty.*, 700 F.3d at 1278). This case does not concern day-to-day business management—what mortgages to purchase and whether to require a particular FICO score—but rather whether a conservator may steal from its ward everything the ward has and ever will have. In the D.C. Circuit (but not in the Eleventh or Ninth Circuits) FHFA's "conservator stamp" is enough to defeat judicial review. This Court should grant review to resolve this division among the circuits over the appropriate scope of judicial review of the actions of FHFA as conservator.

B. The Decision Below Has Enormous Consequences For The Companies.

The Net Worth Sweep has been a disaster for the Companies and massively profitable for Treasury. Since the Net Worth Sweep took effect in 2013, FHFA has sent over $220 billion to Treasury—$130 billion more than the Companies would have paid under the fixed-rate dividend in effect prior to the Net Worth Sweep. Indeed, as of the Third Quarter of 2017, Treasury has recovered its entire investment in the Companies ***plus*** $88 billion. And not one penny of those billions has reduced Treasury's $189 billion liquidation claim on the Companies' assets.

These massive financial outlays have rendered the Companies functionally insolvent by depleting them of any capital buffer to absorb losses caused by a financial downturn. The Net Worth Sweep does this by requiring the Companies to distribute nearly all of their retained capital—and starting next year, *all* of their retained capital—to Treasury. And, contrary to well-established principles of conservatorship, it does so with the explicit purpose of ensuring that the Companies ***cannot*** operate independently. 2012 Press Release ("[T]he [Companies] will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form."). Indeed, the Companies' conservator himself recently acknowledged before Congress that leaving the Companies without "some kind of [capital] buffer to shield against short-term losses," is "irresponsible." Statement of Melvin L. Watt, Dir. FHFA, Before the U.S. House of Rep. Committee on Fin. Servs. (Oct. 3, 2017), https://tinyurl.com/y726u4eg. And FHFA has elsewhere acknowledged in litigation that the Net Worth Sweep makes the Companies "effectively balance-sheet insolvent, a textbook illustration of financial instability." Def's. Mot. to Dismiss 19, *Samuels* v. *FHFA*, No. 1:13-22399-Civ (S.D. Fla. Dec. 6, 2013). Despite the Companies' sustained profitability, the Net Worth Sweep's remission of all the Companies' capital to Treasury means that even a modest short-term loss would leave the Companies once again in need of a taxpayer bailout.

C. The Decision Below Poses An Existential Threat To Any Financial Institution Possibly Subject To Government Conservatorships.

Of course, the decision below will reverberate far beyond the Companies and FHFA's activities. FHFA is only one among several federal agencies empowered to serve as or to appoint conservators to supervise financial institutions, the most prominent of which is the FDIC. The D.C. Circuit's holding with respect to FHFA's conservatorship authority to "loot" its wards, Pet.App. 104a, is directly applicable to the FDIC, whose conservatorship provisions are identical to those governing FHFA. *Compare* 12 U.S.C. § 1821(d)(2)(D) *with id*. § 4617(b)(2)(D). Indeed, Congress copied FHFA's conservatorship provisions *verbatim* from the corresponding FDIC provisions. *See* Mark A. Calabria, *The Resolution of Systemically Important Financial Institutions: Lessons from Fannie and Freddie* (Cato Inst., Working Paper No. 25/CMFA Jan. 13, 2015); *see also* Michael Krimminger & Mark Calabria, *The Conservatorships of Fannie Mae and Freddie Mac* 20 (Cato Working Paper 2016), https://tinyurl.com/ybxp7dxn (HERA borrowed from the FDIC's statute to "provide both courts and market participants with greater predictability").

Under the logic of the D.C. Circuit's rule, the FDIC may do whatever it likes with respect to an institution's assets, if it purports to act as a conservator. Yet, detaching the FDIC from any restraints against expropriation would be disastrous to private enterprise. The FDIC supervises entities with $16 trillion in assets. According to the FDIC's former General Counsel—appearing below as counsel to *amici*—the

Net Worth Sweep represents a "manipulation" of accepted principles of financial supervision that "could dramatically affect public confidence in the fairness and predictability of the government's participation in insolvency proceedings." Investors Unite Amicus Brief 30, No. 14-5243 (D.C. Cir. July 6, 2015) (Doc. 1561142) ("Investors Unite Br.").[3]

With no restraints, the trillions of dollars under the FDIC's supervision is an attractive honeypot for whenever the government feels a fiscal pinch. As Judge Brown explained in dissent, the majority's unexpected break from the rule of law "could dramatically affect investor and public confidence in the fairness and predictability of the government's participation in conservatorship and insolvency proceedings." Pet.App. 112a. And that would much intensify the next financial crisis, as "capital will become more expensive, and potentially prohibitively expensive during times of financial distress, for all regulated financial institutions" potentially subject to the arbitrary and unreviewable actions of a conservator. Pet.App. 111a.

* * *

The decision below cries out for this Court's review. There is a division of circuit authority that poses both an existential threat to the Companies, which undeniably are systemically important to the nation's housing market, and a grave danger to the nation's broader financial regulatory system. The

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[3] Counsel to Investors Unite, *et al.*, Michael Krimminger, served as the FDIC's general counsel.

D.C. Circuit should not have the final word on such a consequential decision.

II. The D.C. Circuit's Decision Is Wrong.

A. The Decision Contravenes FHFA's Statutory Authority.

HERA's statutory grant of authority to FHFA is straightforward. Congress granted FHFA authority as "conservator or receiver" to "operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity." 12 U.S.C. § 4617(b)(2)(B). It then defines the scope of operations FHFA may take depending on which role it inhabits. As *receiver*, FHFA must "place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity," and then distribute the proceeds to stakeholders according to HERA's defined distribution schedule. *Id*. § 4617(b)(2)(E), (b)(3)-(5), (c). By contrast, as *conservator* FHFA may "take such action as may be—(i) necessary to put the [Companies] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [Companies] and preserve and conserve the assets of the property of the [Companies]." *Id*. § 4617(b)(2)(D).

The Net Worth Sweep transparently exceeds HERA's conservatorship authority. Indeed, it is absolutely antithetical to that authority. The Net Worth Sweep's giveaway of all of the Companies' net assets self-evidently does not "preserve" or "conserve" those assets. And far from moving the Companies toward a "sound and solvent condition," FHFA has admitted that the Net Worth Sweep rendered the Companies "effectively balance-sheet insolvent, a textbook illustration of financial instability," Def's Mot. to Dismiss 19, *Samuels*, *supra*, and the conservator himself, FHFA's Director, has told Congress that, by 2018, "neither [Company] will have the ability to weather any loss it experiences in any quarter without drawing further on taxpayer support," Statement of Melvin L. Watt Before the U.S. House of Representatives Committee on Fin. Servs., *supra*.

The court of appeals nevertheless held that, short of "formal liquidation," "any action … [FHFA] takes towards its wards" is within its statutory powers as conservator and is "unreviewable." Pet.App. 93a. According to the majority, all HERA requires of FHFA as conservator is that it "operate"—not actually liquidate—the Companies. The majority concluded that HERA otherwise imposes no requirement that, as conservator, FHFA "preserve and conserve" the Companies' assets or attempt to make the Companies "sound and solvent." Pet.App. 23a-24a.

The lynchpin of the majority's statutory analysis was HERA's use of the word "may." *See* 12 U.S.C. § 4617(b)(2)(D) ("The Agency *may*, as conservator, take such actions as may be—(i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to … preserve and conserve [the Company's] assets." (emphasis added)). But "may" does not suggest that what follows is optional where the mandatory nature of the duties is an "obvious inference[] from the structure and purpose of the statute." *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983). Here, reading "may" to suggest that the conservator, rather than having an obligation to conserve assets, has unlimited discretion to do the opposite—indeed, to give away all the Companies' assets in order to keep the Companies on the precipice of insolvency—does violence to the text and obvious purpose of HERA.

Indeed, the D.C. Circuit's construction of "may" renders the statutory language that follows—setting forth the defining characteristics of a conservator—wholly superfluous. Since HERA provides FHFA as conservator with the power to "operate" the Companies, 12 U.S.C. § 4617(b)(2)(B)(i), a provision purporting to give the conservator the *option* to conserve and preserve assets and to restore them to a sound and solvent condition would not in any way affect the conservator's authority; an option to operate the Companies prudently is obviously inherent in the power to "operate" the Companies. And interpreting HERA to permit a conservator (or receiver) to "loot," Pet.App. 104a, the Companies is self-evidently contrary to the purpose of the statute, which was to prevent the collapse of the Companies—a purpose not even remotely advanced by "affirmatively sabotag[ing] the Companies' recovery by confiscating their assets quarterly." Pet.App. 90a n.1.

As Judge Brown recognized, the only way to give meaning to all of HERA's text is to recognize that the power HERA grants to FHFA "as conservator or receiver" to "operate" the Companies, is a "general authority," and that "the text of Subsections 4617(b)(2)(D) and (b)(2)(E) mark the bounds of FHFA's conservator or receiver powers, respectively." Pet.App. 90a. Thus while conservators and receivers each have the power to "operate" the Companies, Subsection 4617(b)(2)(D) specifies the particular manner in which a conservator shall operate the Companies, while Subsection 4617(b)(2)(E) specifies how a receiver shall operate the Companies. Pet.App. 91a. "[R]ead in the context of the larger statute—especially the specifically defined powers of a conservator and receiver set forth in Subsections 4617(b)(2)(D) and (b)(2)(E)—Congress's decision to use permissive language with respect to a conservator's duties is best understood as a simple concession to the practical reality that a conservator may not always succeed in rehabilitating its ward." Pet.App. 90a n.1

Judge Brown's reading of the statutory text is strongly supported by FHFA's own statements outside of this litigation. FHFA's regulations on conservatorship state that FHFA "has a *statutory charge* to work to restore a regulated entity in conservatorship to a sound and solvent condition." 76 Fed. Reg. 35,724, 35,725-27 (June 20, 2011) (emphasis added). Indeed, outside of litigation, FHFA's official publications have never deviated from its view that preserving and conserving the Companies' assets is "FHFA's conservator obligation," 78 Fed. Reg. 77,450, 77,451 (Dec. 23, 2013), and among its "duties as conservator," 77 Fed. Reg. 67,535, 67,549 (Nov. 13, 2012). FHFA's pre-litigation view of its own powers accurately reflects HERA's language and purpose. And, as explained *infra*, it also echoes the common law and FDIC precedents requiring conservators to act in their wards' best interests from which HERA itself was drawn.

B. The Decision Below Is Irreconcilable With The Background Law Of Conservatorship.

That Subsections 4617(b)(2)(D) and (b)(2)(E) circumscribe FHFA's authority to operate the Companies is confirmed by the fact that the terms "conservator" and "receiver" are "obvious transplant[s]" from the common-law tradition, where both are distinct positions of limited authority. Pet.App. 98a.

1. A conservator is a fiduciary at common law who (as its name suggests) must conserve the assets of its ward. As far back as the fifteenth century, conservators were "appointed to protect the legal interests and rights of a particular organization or group," OED Online (conservator, *n.*) (last accessed Oct. 11, 2017). American law has adopted this understanding; it is well established that conservators must act as trustees. *See*, *e.g.*, *In re Kosmadakes*, 444 F.2d 999, 1004 (D.C. Cir. 1971) (applying fiduciary standards to a conservator); Unif. Prob. Code § 5-418(a) (conservator "shall observe the standards of care applicable to a trustee"); Va. Code § 64.2-2021 (conservator "shall act in the [ward's] best interest" and "preserve the estate"). Like any other fiduciary at common law, a conservator's "'most fundamental duty … is the duty of loyalty … to administer the trust solely in the interest of the beneficiaries.'" *Pegram* v. *Herdrich*, 530 U.S. 211, 224 (2000) (quoting 2A A. Scott & W. Fratcher, The Law of Trusts § 170 (4th ed. 1987)). And this duty obviously prohibits conservators from making "gifts" of the conservatee's estate to the conservator or the conservator's associates. *See Matter of Conservatorship of Marcotte*, 756 P.2d 1091, 1097 (Kan. 1988) ("gifts" to conservator's spouse and children "were not made for the benefit of the conservatee"); *Bryan* v. *Holzer*, 589 So. 2d 648, 660 (Miss. 1991) ("[T]he conservator and his wife violated the fiduciary duty to the ward and converted the ward's funds to their own use.").

As this Court has explained, "[a]t common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries," with the goal of "conserv[ing] and nurtur[ing] [those] assets." *Pegram*, 530 U.S. at 231; *see also Conservatorship of Lefkowitz*, 50 Cal. App. 4th 1310, 1315 (1996) (conservator must act with good faith belief that its actions will benefit conservatee); *Dowdy* v. *Jordan*, 196 S.E.2d 160, 165 (Ga. Ct. App. 1973) (conservator must manage conservatee's estate for the sole benefit of the conservatee).

Both federal and state bank-supervision laws also make clear that a bank conservator must act as a fiduciary for its ward. Cases interpreting early federal banking statutes describe conservators as operating for the benefit of the institution, explaining that conservatorship should be used when there is "a prospect that the [entity] … might … later reopen and resume its corporate functions." *Davis Trust Co.* v. *Hardee*, 85 F.2d 571, 572 (D.C. Cir. 1936); *see also RTC* v. *CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1453-54 (8th Cir. 1992) ("At least as early as the 1930s, it was recognized that the purpose of a conservator was to maintain the institution as an ongoing concern."). And cases from the same period interpreting state banking statutes similarly understood that conservators were installed to rehabilitate the entity in conservatorship. *See Bicknell* v. *Cent. Hanover Bank & Trust Co.*, 6 N.Y.S.2d 704, 705 (Sup. Ct. 1938) ("bank conservator's duties are to conserve the assets of the bank for the purpose of rehabilitation") (applying Michigan law), *aff'd*, 8 N.Y.S.2d 668 (App. Div. 1938); *see also Carpenter* v. *Pac. Mut. Life Ins. Co. of Cal.*, 74 P.2d 761, 775 (Cal. 1937) (regulator "must attempt to rehabilitate the business of the company as conservator"), *aff'd sub. nom.*, *Neblett* v. *Carpenter*, 305 U.S. 297 (1938).

2. Congress looked to this historical understanding of conservatorships when it empowered the FDIC to act as a conservator for federally insured banks. The statute implementing the FDIC's conservatorship authority made clear that a conservator's mission was to benefit the regulated entity: the FDIC as conservator would "preserve and conserve [an institution's] assets" and operate the entity in a "sound and solvent" manner. 12 U.S.C. § 1821(d)(2)(D). The FDIC has interpreted this mandate as requiring it to return the institution under conservatorship to "full compliance with all regulatory capital, liquidity, and other prudential standards to permit normal or 'sound' operations." Investors Unite Br. 19. And even though the statute authorizing the FDIC to act as a conservator, like HERA, provides that the FDIC "*may*, as conservator" preserve and conserve assets, the FDIC has never regarded that as a mere suggestion. 12 U.S.C. § 1821(d)(2)(D) (emphasis added); *compare id.* § 4617(b)(2)(D).

Indeed, the FDIC's own statements of policy explain that, in its view, its conservatorship role requires it to achieve for its ward "***sufficient tangible capitalization***" that reasonably assures "the future viability of the institution," Statement of Policy on Assistance to Operating Insured Depository Institutions, 57 Fed. Reg. 60,203 (Dec. 18, 1992) (Criteria 4 and 5) (emphasis added), because conservatorship is inherently temporary as the FDIC works to "preserve" and revive the "value of the institution," *see* FDIC, Resolutions Handbook 70-71 (2003).

And courts have held that the FDIC, like the common-law conservator, must act as a fiduciary when it takes into conservatorship a financial institution, *see,* *e.g.*, *Golden Pac. Bancorp.* v. *FDIC*, 273 F.3d 509, 519 (2d Cir. 2001), with the goal of rehabilitating that institution to financial health, *see, e.g.*, *Del E. Webb McQueen Dev. Corp.*, 69 F.3d at 361. In this way, the FDIC has "efficiently balance[ed] the preservation of critical functions and the protection of stakeholder rights through specific conservator duties." Investors Unite Br. 18.

3. Receivers are entirely different. The term refers to a "disinterested person appointed … for the protection or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt [entity] or is otherwise being litigated)." Black's Law Dictionary 370, 1460 (10th ed. 2014). The FDIC also is authorized to place companies in receivership, and courts interpreting its authority have made clear that, whereas FDIC as conservator "may operate and dispose of a bank as a going concern," as receiver FDIC has the different power "to liquidate and wind up the affairs of an institution." *James Madison Ltd. ex rel. Hecht* v. *Ludwig*, 82 F.3d 1085, 1090 (D.C. Cir. 1996). Far from preserving and conserving assets, a receiver "liquidates an institution and distributes its proceeds to creditors according to the priority rules set out in the regulations." *Del E. Webb McQueen Dev. Corp.*, 69 F.3d at 361; *see also United Trust Fund*, 57 F.3d at 1033 ("The receiver's mission is to shut a business down and sell off its assets."). As Judge Brown correctly observed, the roles of a conservator and a receiver "simply do not overlap." Pet.App. 96a.

4. Against this backdrop, Congress's decision to use the term "conservator" in HERA imported this historical understanding of a conservator's authority

and role, and as an entity distinct from that of a receiver. *Evans* v. *United States*, 504 U.S. 255, 259 (1992) ("[A] statutory term is generally presumed to have its common-law meaning."); *see also Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012) (looking to meaning of statutory terms at time of enactment). The common law of conservatorship is at least "a starting point" for a court to determine "whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law [ ] requirements." *Variety Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). The common law and the FDIC view a conservator as an entity whose core mission is that of a fiduciary charged with rehabilitating its ward, not stripping its ward of all capital. And the fact that Congress copied HERA's conservatorship provisions verbatim from the FDIC's conservatorship statute leads inexorably to the conclusion that Congress intended for FHFA to have identical powers and constraints. Congress legislated in light of this tradition, used the same words, and gave FHFA identical powers and limitations. FHFA then chose to act as a conservator for the Companies, rather than their receiver.

The panel majority nevertheless asserted that the traditional definition of a conservator's authority cannot be squared with Subsection 4617(b)(2)(J)(ii), which provides FHFA as conservator the "incidental power" "to take any action authorized by this section, which the Agency determines *is in the best interests of* the regulated entity or *the Agency*." Pet.App. 37a (quoting 12 U.S.C. § 4617(b)(2)(J)(ii) (emphasis added)). But this provision plainly is not a freestanding grant of authority for the conservator to do anything that it deems is in FHFA's interests; the action "as conservator" must be "*authorized by this section*." 12 U.S.C. § 4617(b)(2)(J)(ii) (emphasis added); *see also* 12 U.S.C. § 1821(d)(2)(J)(ii) (similar FDIC provision). Thus the conservator is permitted to act in its own interests only to the extent the action is otherwise within its statutory powers as conservator, which are, as discussed *supra*, the power to operate the Companies in a manner that conserves their assets and aims to restore them to a sound a solvent condition. *See id.* § 4617(b)(2)(D).

As Judge Brown explained, this "incidental powers" provision relieves FHFA as conservator from the common-law requirement that a conservator exercise "single-minded devotion" to its ward in order to permit the conservator to engage in transactions in the mutual interest of both the conservator and its ward. Pet.App. 101a. It does not suggest that Congress had abandoned the common-law definition of conservator. To "depart[] from a common law definition" of a statutory term, "Supreme Court precedent requires an affirmative act by Congress—an explicit 'instruct[ion]' that review should proceed in a 'contrary' manner." Pet.App. 101a (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)). The incidental power to take "conservatorship" actions "authorized by [HERA]" that happen to be in the best interests of the Agency does not come close to providing the type of explicit instruction necessary to suggest that Congress abandoned the common law's historical attributes of conservatorship. In the absence of such an explicit instruction, the "widely accepted definition[]"

applies. *Morissette*, 342 U.S. at 263. And that explains why, even though the FDIC as conservator similarly is empowered to act in its own best interests, the FDIC has never claimed authority to loot a ward's coffers of all of its net assets in perpetuity.

* * *

HERA's text, structure, and ancestry all demonstrate that Congress delegated limited powers to FHFA as conservator and required it to act as the Companies' fiduciary, to preserve and conserve their assets, and to bring them to a sound and solvent condition. The Net Worth Sweep is antithetical to those obligations. As FHFA itself concedes, the Net Worth Sweep renders the Companies functionally insolvent by depleting them of any capital buffer through which they could absorb losses to withstand even a brief financial downturn. The Net Worth Sweep's terms are such that no responsible fiduciary ever could accept them. Yet the D.C. Circuit has held that HERA permits FHFA as conservator to do exactly that. And because the FDIC has identical conservatorship authority, the decision of the court of appeals necessarily suggests that the FDIC also has the authority to "loot" the institutions it supervises—and that the FDIC is free to do so in the next financial crisis, or before. HERA should not be construed to "authoriz[e] a conservator to undermine the interests and destroy the assets of [the Companies] without meaningful limit." Pet.App. 90a n.1. "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). The D.C. Circuit's decision cannot stand.

C. HERA Did Not Immunize Governmental Agencies Or Departments From Judicial Review Whenever They Act In Conjunction With FHFA.

The D.C. Circuit amplified FHFA's unreviewable power by also immunizing from judicial review any federal agency or department purportedly working with FHFA as conservator. The Net Worth Sweep plainly exceeded Treasury's authority because, after 2009, Treasury had only the authority "to hold, exercise any rights received in connection with, or sell" securities it had already purchased, and the amendment that created the Net Worth Sweep plainly does none of those. *See* 12 U.S.C. §§ 1455(l)(2)(D), 1719(g)(2)(D); *see also* Final Opening Br. for Institutional Pls. 49-61, *Perry Capital* v. *Lew*, No. 14-5243, Doc. No. 1602874 (D.C. Cir. Mar. 8, 2016). Although Section 4617(f) does not mention Treasury, the court of appeals concluded that the courts could not enforce the separate limitations on Treasury's authority because doing so would "affect" FHFA's powers as conservator. This holding is wrong as a matter of law, and dangerous as a matter of policy.

There is a "'strong presumption' favoring judicial review of administrative action," *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015), and courts require "'clear and convincing evidence' to dislodge the presumption," *Kucana* v. *Holder*, 558 U.S. 233, 251-52 (2010) (citation omitted). Even "[w]hen a statute is reasonably susceptible to divergent interpretation," courts "adopt[] the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Id.* at 251 (citation omitted).

Subsection 4617(f) does not even remotely suggest that Congress intended to shield Treasury's actions from judicial review. The statute does not ever mention Treasury and contains nothing, much less a clear statement, to "dislodge the presumption" that courts may review the legality of Treasury's actions. Congress chose to circumscribe judicial review of actions only as to FHFA. And Congress's "silence" cannot be construed "as a denial of authority to an aggrieved person to seek appropriate relief in the federal courts." *See Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993).

The D.C. Circuit nevertheless held that governmental departments and agencies may disregard their own statutory limitations when their actions are sufficiently intertwined with FHFA's actions as conservator. Pet.App. 41a-44a. This holding has staggering implications, particularly considering the court's unbounded view of FHFA's conservatorship powers. Most directly, it would prohibit any challenge to Treasury's entry into the Net Worth Sweep even in the absence of any claim against FHFA. But it closes the courthouse door to other claims as well. If, for instance, the conservator sold additional stock to Treasury in spite of the expiration of Treasury's purchasing authority in 2009, *see* 12 U.S.C. § 1719(g)(4), under the D.C. Circuit's reasoning, any suit targeting Treasury's purchase would be barred as "affect[ing]" the conservator's sale of stock. Indeed, courts could not enjoin even the Department of Education from purchasing securities in the Companies in connection with a FHFA-supervised capital infusion, even though the Department of Education *never* had authority to invest in the Companies' securities. Nothing in the statutory text suggests that Congress intended to foreclose judicial review of such plainly unlawful actions just because they were undertaken in conjunction with FHFA as conservator.

CONCLUSION

The D.C. Circuit's decision dangerously misconstrues FHFA's conservatorship powers. FHFA's conservatorship provisions are neither new nor alien—Congress took them verbatim from FIRREA, importing the FDIC's decades of sound experience in resolving troubled financial institutions, and the centuries of common-law conservatorships on which the FDIC relied. Nothing in the text or purpose of HERA, decades of FDIC practice, or centuries of common law even remotely condones the Net Worth Sweep's massive expropriation—a confiscation that leaves the Companies functionally insolvent, saddled with Treasury's $189 billion liquidation claim, and with no ability to escape a vampiric relationship with the government. Yet the decision below permits any governmental conservator—including the FDIC—to confiscate funds under its supervision without judicial review simply because the conservator did so in the course of operating the ward. That's not a conservatorship; that's embezzlement.

This Court should grant the petition.

Respectfully submitted.

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October 16, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 15, 2016 — Decided February 21, 2017
Reissued July 17, 2017

No. 14-5243

PERRY CAPITAL LLC, FOR AND ON BEHALF OF
INVESTMENT FUNDS FOR WHICH IT ACTS AS
INVESTMENT MANAGER,
APPELLANT

v.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS THE
SECRETARY OF THE DEPARTMENT OF THE TREASURY,
ET AL.,
APPELLEES

Consolidated with 14-5254, 14-5260, 14-5262

Appeals from the United States District Court
for the District of Columbia
(No. 1:13-cv-01025)
(No. 1:13-cv-01053)
(No. 1:13-cv-01439)
(No. 1:13-cv-01288)

Theodore B. Olson argued the cause for Perry Capital LLC, *et al*. With him on the briefs were *Douglas R. Cox*, *Matthew D. McGill*, *Charles J. Cooper*, *David H. Thompson*, *Peter A. Patterson*, *Brian W. Barnes*, *Drew W. Marrocco*,

Michael H. Barr, *Richard M. Zuckerman*, *Sandra Hauser*, and *Janet M. Weiss*.

Hamish P.M. Hume argued the cause for American European Insurance Company, et al. With him on the briefs were *Matthew A. Goldstein*, *David R. Kaplan*, and *Geoffrey C. Jarvis*.

Thomas P. Vartanian, *Steven G. Bradbury*, *Robert L. Ledig*, and *Robert J. Rhatigan* were on the brief for *amici curiae* the Independent Community Bankers of America, the Association of Mortgage Investors, Mr. William M. Isaac, and Mr. Robert H. Hartheimer in support of appellants.

Thomas F. Cullen, *Jr., Michael A. Carvin*, *James E. Gauch, Lawrence D. Rosenberg*, and *Paul V. Lettow* were on the brief for *amici* curiae Louise Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, L.P. in support of appellants and reversal.

Jerrold J. Ganzfried and *Bruce S. Ross* were on the brief for *amici curiae* 60 Plus Association, Inc. in support of reversal.

Eric Grant was on the brief for *amicus curiae* Jonathan R. Macey in support of appellants and reversal.

Thomas R. McCarthy was on the brief for *amici curiae* Timothy Howard and The Coalition for Mortgage Security in support of appellants.

Myron T. Steele was on the brief for *amicus curiae* Center for Individual Freedom in support of appellants.

Michael H. Krimminger was on the brief for *amicus curiae* Investors Unite in support of appellants for reversal.

Howard N. Cayne argued the cause for appellees Federal Housing Finance Agency, *et al*. With him on the brief were *Paul D. Clement*, *D. Zachary Hudson*, *Michael J. Ciatti, Graciela Maria Rodriguez, David B. Bergman, Michael A.F. Johnson, Dirk C. Phillips*, and *Ian S. Hoffman*.

Mark B. Stern, Attorney, U.S. Department of Justice, argued the cause for appellee Steven T. Mnuchin. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Beth S. Brinkmann*, Deputy Assistant Attorney General, *Alisa B. Klein*, *Abby C. Wright*, and *Gerard Sinzdak*, Attorneys.

Dennis M. Kelleher was on the brief for *amicus* curiae Better Markets, Inc. in support of appellees and affirmance.

Pierre H. Bergeron was on the brief for *amicus curiae* Black Chamber of Commerce in support of neither party.

Colleen J. Boles, Assistant General Counsel, *Kathryn R. Norcross*, Senior Counsel, and *Jerome A. Madden*, Counsel, were on the brief for *amicus curiae* The Federal Deposit Insurance Corporation in support of FHFA and affirmance.

Before: BROWN and MILLETT, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* MILLETT and *Senior Circuit Judge* GINSBURG.

Dissenting opinion filed by *Circuit Judge* BROWN.

MILLETT, *Circuit Judge*, and GINSBURG, *Senior Circuit Judge*: In 2007–2008, the national economy went into a severe recession due in significant part to a dramatic decline in the housing market. That downturn pushed two central players in the United States' housing mortgage market—the Federal National Mortgage Association ("Fannie Mae" or "Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie Mac" or "Freddie")—to the brink of collapse. Congress concluded that resuscitating Fannie Mae and Freddie Mac was vital for the Nation's economic health, and to that end passed the Housing and Economic Recovery Act of 2008 ("Recovery Act"), Pub. L. No. 110-289, 122 Stat. 2654 (codified, as relevant here, in various sections of 12 U.S.C.). Under the Recovery Act, the Federal Housing Finance Agency ("FHFA") became the conservator of Fannie Mae and Freddie Mac.

In an effort to keep Fannie Mae and Freddie Mac afloat, FHFA promptly concluded on their behalf a stock purchase agreement with the Treasury Department, under which Treasury made billions of dollars in emergency capital available to Fannie Mae and Freddie Mac (collectively, "the Companies") in exchange for preferred shares of their stock. In return, Fannie and Freddie agreed to pay Treasury a quarterly dividend in the amount of 10% of the total amount of funds drawn from Treasury. Fannie's and Freddie's frequent inability to make those dividend payments, however, meant that they often borrowed more cash from Treasury just to pay the dividends, which in turn increased the dividends that Fannie and Freddie were obligated to pay in future quarters. In 2012, FHFA and Treasury adopted the Third Amendment to their stock purchase agreement, which replaced the fixed 10% dividend with a formula by which Fannie and Freddie just paid to Treasury an amount (roughly) equal to their quarterly net worth, however much or little that may be.

A number of Fannie Mae and Freddie Mac stockholders filed suit alleging that FHFA's and Treasury's alteration of the dividend formula through the Third Amendment exceeded their statutory authority under the Recovery Act, and constituted arbitrary and capricious agency action in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). They also claimed that FHFA, Treasury, and the Companies committed various common-law torts and breaches of contract by restructuring the dividend formula.

We hold that the stockholders' statutory claims are barred by the Recovery Act's strict limitation on judicial review. *See* 12 U.S.C. § 4617(f). We also reject most of the stockholders' common-law claims. Insofar as we have subject matter jurisdiction over the stockholders' common-law claims against Treasury, and Congress has waived the agency's immunity from suit, those claims, too, are barred by the Recovery Act's limitation on judicial review. *Id.* As for the claims against FHFA and the Companies, some are barred because FHFA succeeded to all rights, powers, and privileges of the stockholders under the Recovery

Act, *id.* § 4617(b)(2)(A); others fail to state a claim upon which relief can be granted. The remaining claims, which are contract-based claims regarding liquidation preferences and dividend rights, are remanded to the district court for further proceedings.

I. Background

A. Statutory Framework

1. The Origins of Fannie Mae and Freddie Mac

Created by federal statute in 1938, Fannie Mae originated as a government-owned entity designed to "provide stability in the secondary market for residential mortgages," to "increas[e] the liquidity of mortgage investments," and to "promote access to mortgage credit throughout the Nation." 12 U.S.C. § 1716; *see id.* § 1717. To accomplish those goals, Fannie Mae (i) purchases mortgage loans from commercial banks, which frees up those lenders to make additional loans, (ii) finances those purchases by packaging the mortgage loans into mortgage-backed securities, and (iii) then sells those securities to investors. In 1968, Congress made Fannie Mae a publicly traded, stockholder-owned corporation. *See* Housing and Urban Development Act, Pub. L. No. 90-448, § 801, 82 Stat. 476, 536 (1968) (codified at 12 U.S.C. § 1716b).

Congress created Freddie Mac in 1970 to "increase the availability of mortgage credit for the financing of urgently needed housing." Federal Home Loan Mortgage Corporation Act, Pub. L. No. 91-351, preamble, 84 Stat. 450 (1970). Much like Fannie Mae, Freddie Mac buys mortgage loans from a broad variety of lenders, bundles them together into mortgage-backed securities, and then sells those mortgage-backed securities to investors. In 1989, Freddie Mac became a publicly traded, stockholder-owned corporation. *See* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 731, 103 Stat. 183, 429–436.

Fannie Mae and Freddie Mac became major players in the United States' housing market. Indeed, in the lead up to 2008, Fannie Mae's and Freddie Mac's mortgage portfolios had a combined value of $5 trillion and accounted for nearly half of the United States mortgage market. But in 2008, the United States economy fell into a severe recession, in large part due to a sharp decline in the national housing market. Fannie Mae and Freddie Mac suffered a precipitous drop in the value of their mortgage portfolios, pushing the Companies to the brink of default.

2. The 2008 Housing and Economic Recovery Act

Concerned that a default by Fannie and Freddie would imperil the already fragile national economy, Congress enacted the Recovery Act, which established FHFA and authorized it to undertake extraordinary economic measures to resuscitate the Companies. To begin with, the Recovery Act denominated Fannie and Freddie "regulated entit[ies]" subject to the direct "supervision" of FHFA, 12 U.S.C. § 4511(b)(1), and the "general regulatory authority" of FHFA's Director, *id.* § 4511(b)(1), (2). The Recovery Act charged FHFA's Director with "oversee[ing] the prudential operations" of Fannie Mae and Freddie Mac and "ensur[ing] that" they "operate[] in a safe and sound manner," "consistent with the public interest." *Id.* § 4513(a)(1)(A), (B)(i), (B)(v).

The Recovery Act further authorized the Director of FHFA to appoint FHFA as either conservator or receiver for Fannie Mae and Freddie Mac "for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs." 12 U.S.C. § 4617(a)(2). The Recovery Act invests FHFA as conservator with broad authority and discretion over the operation of Fannie Mae and Freddie Mac. For example, upon appointment as conservator, FHFA "shall * * * 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." *Id.* § 4617(b)(2)(A). In addition, FHFA "may * * * take over the assets of and operate the regulated entity," and "may * * * preserve and conserve the assets and property of the regulated entity." *Id.* § 4617(b)(2)(B)(i), (iv).

The Recovery Act further invests FHFA with expansive "[g]eneral powers," explaining that FHFA "may," among other things, "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 [its] assets and property[.]" 12 U.S.C. § 4617(b)(2), (2)(D). FHFA's powers also include the discretion to "transfer or sell any asset or liability of the regulated entity in default * * * without any approval, assignment, or consent," *id.* §4617(b)(2)(G), and to "disaffirm or repudiate [certain] contract[s] or lease[s]," *id.* § 4617(d)(1). *See also id.* § 4617(b)(2)(H) (power to pay the regulated entity's obligations); *id.* § 4617(b)(2)(I) (investing the conservator with subpoena power).

Consistent with Congress's mandate that FHFA's Director protect the "public interest," 12 U.S.C. § 4513(a)(1)(B)(v), the Recovery Act invested FHFA as conservator with the authority to exercise its statutory authority and any "necessary" "incidental powers" in the manner that "the Agency [FHFA] determines is in the best interests of the regulated entity *or the Agency*." *Id.* § 4617(b)(2)(J) (emphasis added).

The Recovery Act separately granted the Treasury Department "temporary" authority to "purchase any obligations and other securities issued by" Fannie and Freddie. 12 U.S.C. §§ 1455(l)(1)(A), 1719. That provision made it possible for Treasury to buy large amounts of Fannie and Freddie stock, and thereby infuse them with massive amounts of capital to ensure their continued liquidity and stability.

Continuing Congress's concern for protecting the public interest, however, the Recovery Act conditioned such purchases on Treasury's specific determination that the terms of the purchase would "protect the taxpayer," 12 U.S.C. § 1719(g)(1)(B)(iii), and to that end specifically authorized "limitations on the payment of dividends," *id.* § 1719(g)(1)(C)(vi). A sunset provision terminated Treasury's authority to purchase such securities after December 31, 2009. *Id.* § 1719(g)(4). After that, Treasury was authorized only "to hold, exercise any rights received in connection with, or sell, any obligations or securities purchased." *Id.* § 1719(g)(2)(D).

Lastly, the Recovery Act sharply limits judicial review of FHFA's conservatorship activities, directing that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f).

B. Factual Background

On September 6, 2008, FHFA's Director placed both Fannie Mae and Freddie Mac into conservatorship. The next day, Treasury entered into Senior Preferred Stock Purchase Agreements ("Stock Agreements") with Fannie and Freddie, under which Treasury committed to promptly invest billions of dollars in Fannie and Freddie to keep them from defaulting. Fannie and Freddie had been "unable to access [private] capital markets" to shore up their financial condition, "and the only way they could [raise capital] was with Treasury support." *Oversight Hearing to Examine Recent Treasury and FHFA Actions Regarding the Housing GSEs Before the H. Comm. on Fin. Servs.*, 110th Cong. 12 (2008) (Statement of James B. Lockhart III, Director, FHFA).

In exchange for that extraordinary capital infusion, Treasury received one million senior preferred shares in each company. Those shares entitled Treasury to: (i) a $1 billion senior liquidation preference—a priority right above all other stockholders, whether preferred or otherwise, to receive distributions from assets if the entities were dissolved; (ii) a dollar-for-dollar increase in that liquidation preference each time Fannie and Freddie drew upon Treasury's funding commitment; (iii) quarterly dividends that the Companies could either pay at a rate of 10% of Treasury's liquidation preference or a commitment to increase the liquidation preference by 12%; (iv) warrants allowing Treasury to purchase up to 79.9% of

Fannie's and Freddie's common stock; and (v) the possibility of periodic commitment fees over and above any dividends.[1]

The Stock Agreements also included a variety of covenants. Of most relevance here, the Stock Agreements included a flat prohibition on Fannie and Freddie "declar[ing] or pay[ing] any dividend (preferred or otherwise) or mak[ing] any other distribution (by reduction of capital or otherwise), whether in cash, property, securities or a combination thereof" without Treasury's advance consent (unless the dividend or distribution was for Treasury's Senior Preferred Stock or warrants). J.A. 2451.

The Stock Agreements initially capped Treasury's commitment to invest capital at $100 billion per company. It quickly became clear, however, that Fannie and Freddie were in a deeper financial quagmire than first anticipated. So their survival would require even greater capital infusions by Treasury, as sufficient private investors were still nowhere to be found. Consequently, FHFA and Treasury adopted the First Amendment to the Stock Agreements in May 2009, under which Treasury agreed to double the funding commitment to $200 billion for each company.

Seven months later, in a Second Amendment to the Stock Agreements, FHFA and Treasury again agreed to raise the cap, this time to an adjustable figure determined in part by the amount of Fannie's and Freddie's quarterly cumulative losses between 2010 and 2012. As of June 30, 2012, Fannie and Freddie

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[1] Thus far, Treasury has not asked Fannie and Freddie to pay any commitment fees.

together had drawn $187.5 billion from Treasury's funding commitment.

Through the first quarter of 2012, Fannie and Freddie repeatedly struggled to generate enough capital to pay the 10% dividend they owed to Treasury under the amended Stock Agreements.[2] FHFA and Treasury stated publicly that they worried about perpetuating the "circular practice of the Treasury advancing funds to [Fannie and Freddie] simply to pay dividends back to Treasury," and thereby increasing their debt loads in the process.[3]

Accordingly, FHFA and Treasury adopted the Third Amendment to the Stock Agreements on August 17, 2012. The Third Amendment to the Stock Agreements replaced the previous quarterly 10% dividend formula with a requirement that Fannie and Freddie pay as dividends only the amount, if any, by which their net worth for the quarter exceeded a capital buffer of $3 billion, with that buffer decreasing annually down to zero by 2018. In simple terms, the Third Amendment requires Fannie and Freddie to pay quarterly to Treasury a dividend equal to their net worth—however much or little that might be. Through that new dividend formula, Fannie and Freddie would never again incur more debt just to make their quar-

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[2] Neither company drew upon Treasury's commitment in the second quarter of 2012 though.

[3] Press Release, United States Dep't of the Treasury, *Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac* (August 17, 2012), https://www.treasury.gov/press-center/press-releases/Pages/tg 1684. aspx ("Treasury Press Release").

terly dividend payments, thereby precluding any dividend-driven downward debt spiral. But neither would Fannie or Freddie be able to accrue capital in good quarters.

Under the Third Amendment, Fannie Mae and Freddie Mac together paid Treasury $130 billion in dividends in 2013, and another $40 billion in 2014. The next year, however, Fannie's and Freddie's quarterly net worth was far lower: Fannie paid Treasury $10.3 billion and Freddie paid Treasury $5.5 billion. *See* FANNIE MAE, FORM 10-K FOR THE FISCAL YEAR ENDED DECEMBER 31, 2015 (Feb. 19, 2016); FREDDIE MAC, FORM 10-K FOR THE FISCAL YEAR ENDED DECEMBER 31, 2015 (Feb. 18, 2016). By comparison, without the Third Amendment, Fannie and Freddie together would have had to pay Treasury $19 billion in 2015 or else draw once again on Treasury's commitment of funds and thereby increase Treasury's liquidation preference. In the first quarter of 2016, Fannie paid Treasury $2.9 billion and Freddie paid Treasury no dividend at all. *See* FANNIE MAE, FORM 10-Q FOR THE QUARTERLY PERIOD ENDED MARCH 31, 2016 (May 5, 2016); FREDDIE MAC, FORM 10-Q FOR THE QUARTERLY PERIOD ENDED MARCH 31, 2016 (May 3, 2016).

Under the Third Amendment, and FHFA's conservatorship, Fannie and Freddie have continued their operations for more than four years. 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.[4]

C. Procedural History

In 2013, a number of Fannie Mae and Freddie Mac stockholders filed suit challenging the Third Amendment. Different groups of plaintiffs have pressed different claims. First, various hedge funds, mutual funds, and insurance companies (collectively, "institutional stockholders") argued that (i) FHFA's and Treasury's adoption of the Third Amendment exceeded their authority under the Recovery Act, and (ii) FHFA and Treasury each engaged in arbitrary and capricious conduct, in violation of the Administrative Procedure Act ("APA"). The institutional stockholders requested declaratory and injunctive relief, but no damages.[5]

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[4] *See* FANNIE MAE, FORM 10-K FOR THE FISCAL YEAR ENDED DECEMBER 31, 2015 (Feb. 19, 2016); FREDDIE MAC, ANNUAL HOUSING ACTIVITIES REPORT FOR 2015, at 1 (March 15, 2016); FANNIE MAE, 2015 ANNUAL HOUSING ACTIVITIES REPORT AND ANNUAL MORTGAGE REPORT, tbl. 1A (March 14, 2016); FANNIE MAE, 2014 ANNUAL HOUSING ACTIVITIES REPORT AND ANNUAL MORTGAGE REPORT, tbl. 1A (March 13, 2015); FREDDIE MAC, ANNUAL HOUSING ACTIVITIES REPORT FOR 2014, at 1 (March 11, 2015); FANNIE MAE, 2013 ANNUAL HOUSING ACTIVITIES REPORT AND ANNUAL MORTGAGE REPORT, tbl. 1A (March 13, 2014); FREDDIE MAC, ANNUAL HOUSING ACTIVITIES REPORT FOR 2013, at 1 (March 12, 2014).

[5] One of the institutional stockholders—Arrowood—does not identify the claims for which it seeks damages in its prayer for relief. However, looking at the description of each claim, Arrowood alleges that it sustained damages only in its breach of

Second, a class of stockholders ("class plaintiffs") and a few of the institutional stockholders alleged that, in adopting the Third Amendment, FHFA and the Companies breached the terms governing dividends, liquidation preferences, and voting rights in the stock certificates for Freddie's Common Stock and for both Fannie's and Freddie's Preferred Stock. They further alleged that those defendants breached the implied covenants of good faith and fair dealing in those certificates. The class plaintiffs also alleged that FHFA and Treasury breached state-law fiduciary duties owed by a corporation's management and controlling shareholder, respectively. Some of the institutional stockholders asserted similar claims against FHFA. The class plaintiffs asked the court to declare their lawsuit a "proper derivative action," J.A. 277, and to award damages as well as injunctive and declaratory relief.

The district court granted FHFA's and Treasury's motions to dismiss both complaints for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 246 (D.D.C. 2014). Specifically, the court dismissed the Recovery Act and APA claims as barred by the Recovery Act's express limitation on judicial review, 12 U.S.C. § 4617(f). The court dismissed the APA claims against Treasury on the same statutory ground, reasoning that Treasury's "interdependent, contractual conduct is directly connected to FHFA's activities as a conservator." *Id.* at 222. The district

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contract and breach of implied covenant claims. For the Recovery Act and APA claims, Arrowood alleges only that it is entitled to relief "under 5 U.S.C. §§ 702, 706(2)(C)," J.A. 208, provisions of the APA that do not authorize money damages.

court explained that "enjoining Treasury from partaking in the Third Amendment would restrain FHFA's uncontested authority to determine how to conserve the viability of [Fannie and Freddie]." *Id.* at 222–223.

Turning to the class plaintiffs' claims for breach of fiduciary duty, the court dismissed those as barred by FHFA's statutory succession to all rights and interests held by Fannie's and Freddie's stockholders, 12 U.S.C. § 4617(b)(2)(A). The court then dismissed the breach of contract and breach of the implied covenant of good faith and fair dealing claims based on liquidation preferences as not ripe because Fannie and Freddie had not been liquidated. Finally, the district court dismissed the dividend-rights claims, reasoning that no such rights exist.[6]

II. Jurisdiction

Before delving into the merits, we pause to assure ourselves of our jurisdiction, as is our duty. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction[.]") (citation omitted). A provision of the Recovery Act deprives courts of jurisdiction "to affect, by injunction or otherwise, the issuance or effectiveness of any classification or action of the Director under this subchapter * * * or to review, modify, suspend, terminate, or set

[6] The class plaintiffs had also alleged that the failure of FHFA and Treasury to provide just compensation for taking private property violated the Takings Clause of the Fifth Amendment. The district court dismissed that challenge for failure to state a legally cognizable claim, Fed. R. Civ. P. 12(b)(6), and the class plaintiffs have not challenged that ruling on appeal.

aside such classification or action." 12 U.S.C. § 4623(d).

That language does not strip this court of jurisdiction to hear this case. By its terms, Section 4623(d) applies only to "any classification or action of the Director." 12 U.S.C. § 4623(d). Thus, Section 4623(d) prohibits review of the Director's establishment of "risk-based capital requirements * * * to ensure that the enterprises operate in a safe and sound manner, maintaining sufficient capital and reserves to support the risks that arise in the operations and management of the enterprises." *Id.* § 4611(a)(1). In particular, Section 4614 requires "the Director" to "classify" Fannie and Freddie as "adequately capitalized," "undercapitalized," "significantly undercapitalized," or "critically undercapitalized." *Id.* § 4614(a). Classification as undercapitalized or significantly undercapitalized in turn subjects Fannie and Freddie to a host of supervisory actions by "the Director." *See id.* §§ 4615–4616. It is those capital-classification decisions that Section 4623(d) insulates from judicial review.

The Third Amendment was not a "classification or action of the Director" of FHFA. Rather, it was an action taken by FHFA acting as Fannie's and Freddie's conservator. Judicial review of the actions of the agency as *conservator* is addressed by Section 4617(f), not by Section 4623(d)'s particular focus on the Director's own actions. *Compare* 12 U.S.C. § 4617(f) (referencing "powers or functions of *the Agency*") (emphasis added), *with id.* § 4623(d) (referencing "any classification or action of *the Director*") (emphasis added).

FHFA argues that the Director's decision in 2008 to suspend capital classifications of Fannie Mae and

Freddie Mac during the conservatorship could be a "classification or action of the Director." FHFA Suppl. Br. at 6–8 (quoting 12 U.S.C. § 4623(d)). Perhaps. But those are not the actions that the institutional stockholders and the class plaintiffs challenge. Instead, they challenge FHFA's decision as conservator to agree to changes in the Stock Agreement and to how Fannie and Freddie will compensate Treasury for its extensive past and promised future infusions of needed capital. Those actions do not fall within Section 4623(d)'s jurisdictional bar for Director-specific actions.

III. Statutory Challenges to the Third Amendment

Turning to the merits, we address first the institutional stockholders' claims that FHFA's and Treasury's adoption of the Third Amendment violated both the Recovery Act and the APA. Both of those statutory claims founder on the Recovery Act's far-reaching limitation on judicial review. Congress was explicit in Section 4617(f) that "no court" can take "any action" that would "restrain or affect" FHFA's exercise of its "powers or functions * * * as a conservator or a receiver." 12 U.S.C. § 4617(f). We take that law at its word, and affirm dismissal of the institutional stockholders' claims for injunctive and declaratory relief designed to unravel FHFA's adoption of the Third Amendment.

A. Section 4617(f) Bars the Challenges to FHFA Based on the Recovery Act

1. Section 4617(f)'s Textual Barrier to Plaintiffs' Claims for Relief

The institutional stockholders' complaints ask the district court to declare the Third Amendment invalid, to vacate the Third Amendment, and to enjoin FHFA from implementing it. Those prayers for relief fall squarely within Section 4617(f)'s plain textual compass. The institutional stockholders seek to "restrain [and] affect" FHFA's "exercise of powers" "as a conservator" in amending the terms of Fannie's and Freddie's contractual funding agreement with Treasury to guarantee the Companies' continued access to taxpayer-financed capital without risk of incurring new debt just to pay dividends to Treasury. Such 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.

This court has interpreted a nearly identical statutory limitation on judicial review to prohibit claims for declaratory, injunctive, and other forms of equitable relief as long as the agency is acting within its statutory conservatorship authority. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, governs the Federal Deposit Insurance Corporation ("FDIC") when it serves as a conservator or receiver for troubled financial institutions. Section 1821(j) of that Act prohibits courts from "tak[ing] any action * * * to restrain or affect the exercise of powers or functions of [the FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j).

In multiple decisions, we have held that Section 1821(j) shields from a court's declaratory and other equitable powers a broad swath of the FDIC's conduct as conservator or receiver when exercising its statutory authority. To start with, in *National Trust for Historic Preservation in the United States v. FDIC* (*National Trust I*), 995 F.2d 238 (D.C. Cir. 1993) (per curiam), *aff'd in relevant part*, 21 F.3d 469 (D.C. Cir. 1994), we held that Section 1821(j) "bars the [plaintiff's] suit for injunctive relief" seeking to halt the sale of a building as violating the National Historic Preservation Act, 16 U.S.C. § 470 et seq. (repealed December 19, 2014). *See* 995 F.2d at 239. We explained that, because "the powers and functions the FDIC is exercising are, by statute, deemed to be those of a receiver," an injunction against the sale "would surely 'restrain or affect' the FDIC's exercise of those powers or functions." *Id.* Given Section 1821(j)'s "strong language," we continued, it would be "[im]possible * * * to interpret the FDIC's 'powers' and 'authorities' to include the limitation that those powers be subject to—and hence enjoinable for noncompliance with—any and all other federal laws." *Id.* at 240. Indeed, "given the breadth of the statutory language," Section 1821(j) "would appear to bar a court from acting" notwithstanding a "parade of possible violations of existing laws." *National Trust for Historic Preservation in the United States v. FDIC (National Trust II*), 21 F.3d 469, 472 (D.C. Cir. 1994) (per curiam) (Wald, J., joined by Silberman, J., concurring).

Again in *Freeman v. FDIC*, 56 F.3d 1394 (D.C. Cir. 1995), this court rejected the plaintiffs' attempt to enjoin the FDIC, as receiver of a bank, from foreclosing on their home, *id.* at 1396. We acknowledged that Section 1821(j)'s stringent limitation on judicial review "may appear drastic," but that "it fully accords with the intent of Congress at the time it enacted FIRREA in the midst of the savings and loan insolvency crisis to enable the FDIC" to act "expeditiously" in its role as conservator or receiver. *Id.* at 1398. Given those exigent financial circumstances, "Section 1821(j) does indeed effect a sweeping ouster of courts' power to grant equitable remedies[.]" *Id.* at 1399; *see also MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 247 (D.C. Cir. 2013) (In Section 1821(j), "Congress placed 'drastic' restrictions on a court's ability to institute equitable remedies[.]") (quoting *Freeman*, 56 F.3d at 1398).

The rationale of those decisions applies with equal force to Section 4617(f)'s indistinguishable operative language. 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. And, as with FIRREA, Congress adopted Section 4617(f) to protect FHFA as it addressed a critical aspect of one of the greatest financial crises in the Nation's modern history.

2. FHFA's Actions Fall Within its Statutory Authority

The institutional stockholders cite language in *National Trust I*, which states that FIRREA's—and by analogy the Recovery Act's—prohibition on injunctive and declaratory relief would not apply if the agency "has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions," *National Trust I*, 995 F.2d at 240. They then argue that FHFA's adoption of the Third Amendment was out of bounds because, in their view, the Recovery Act "*requires* FHFA as conservator to act independently to conserve and preserve the Companies' assets, to put the Companies in a sound and solvent condition, and to rehabilitate them." Institutional Pls. Br. at 26 (emphasis added). As the institutional stockholders see it, by committing Fannie's and Freddie's quarterly net worth—if any—to Treasury in exchange for continued access to Treasury's taxpayer-funded financial lifelines, FHFA acted like a *de facto* receiver functionally liquidating Fannie's and Freddie's businesses. And FHFA did so, they add, without following the procedural preconditions that the Recovery Act imposes on a receivership, such as publishing notice and providing an alternative dispute resolution process to resolve liquidation claims, *see* 12 U.S.C. § 4617(b)(3)(B)(i), (b)(7)(A)(i).[7]

That exception to the bar on judicial review has no application here because adoption of the Third Amendment falls within FHFA's statutory conservatorship powers, for four reasons.

(i) The Recovery Act endows FHFA with extraordinarily broad flexibility to carry out its role as conservator. Upon appointment as conservator, FHFA "immediately succeed[ed] to * * * all rights, titles, powers, and privileges" not only of Fannie Mae and Freddie Mac, but also "of any stockholder, officer, or

[7] The institutional stockholders do not argue that FHFA or Treasury transgressed constitutional bounds in any respect.

director of such regulated entit[ies] with respect to the regulated entit[ies] and the assets of the regulated entit[ies.]" 12 U.S.C. § 4617(b)(2)(A)(i). In addition, among FHFA's many "[g]eneral powers" is its authority to "[o]perate the regulated entity," pursuant to which FHFA "*may*, as conservator or receiver * * * take over the assets of and operate * * * and conduct all business of the regulated entity; * * * collect all obligations and money due the regulated entity; * * * perform all functions of the regulated entity * * * ; preserve and conserve the assets and property of the regulated entity; and * * * provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver." *Id.* § 4617(b)(2), (2)(B) (emphasis added). The Recovery Act further provides 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." *Id.* § 4617(b)(2)(D) (emphasis added). FHFA also "*may* disaffirm or repudiate [certain] contract[s] or lease[s]." *Id.* § 4617(d)(1) (emphasis added); *see also id.* § 4617(b)(2)(G) (providing that FHFA "*may*, as conservator or receiver, transfer or sell any asset or liability of the regulated entity in default" without consent) (emphasis added).

Accordingly, time and again, the Act outlines what FHFA as conservator "may" do and what actions it "may" take. 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." 12 U.S.C. § 4617(b)(2)(J). "It should go without saying that 'may means may.'" *United States Sugar Corp. v. EPA*, 830 F.3d 579, 608 (D.C. Cir. 2016) (quoting *McCreary v. Offner*, 172 F.3d 76, 83 (D.C. Cir. 1999)). And "may" is, of course, "permissive rather than obligatory." *Baptist Memorial Hosp. v. Sebelius*, 603 F.3d 57, 63 (D.C. Cir. 2010).

Entirely absent from the Recovery Act's text is any mandate, command, or directive to build up capital for the financial benefit of the Companies' stockholders. That is noteworthy because, when Congress wanted to compel FHFA to take specific measures as conservator or receiver, it switched to language of command, employing "shall" rather than "may." *Compare* 12 U.S.C. § 4617(b)(2)(B) (listing actions that FHFA "may" take "as conservator or receiver" to "[o]perate the regulated entity"), *and id.* § 4617(b)(2)(D) (specifying actions that FHFA "may, as conservator" take), *with id.* § 4617(b)(2)(E) (specifying actions that FHFA "shall" take when "acting as receiver"), *and id.* § 4617(b)(14)(A) (specifying that FHFA as conservator or receiver "shall * * * maintain a full accounting"). "[W]hen a statute uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory." *Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C. Cir. 2011) (internal quotation marks and citation omitted).

In short, the most natural reading of the Recovery Act is that it permits FHFA, but does not compel it in any judicially enforceable sense, to preserve and conserve Fannie's and Freddie's assets and to return the Companies to private operation. And, more to the point, the Act imposes no precise order in which FHFA must exercise its multi-faceted conservatorship powers.

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). 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. The institutional stockholders no doubt disagree about the necessity and fiscal wisdom of the Third Amendment. But Congress could not have been clearer about leaving those hard operational calls to FHFA's managerial judgment.

That, indeed, is why Congress provided that, in exercising its statutory authority, FHFA "may" "take any action * * * which *the Agency determines* is in the best interests of the regulated entity or the Agency." 12 U.S.C. § 4617(b)(2)(J) (emphasis added). Notably, while FIRREA explicitly permits FDIC to factor the best interests of depositors into its conservatorship judgments, *id.* § 1821(d)(2)(J)(ii), the Recovery Act refers only to the best interests of FHFA and the Companies—and *not* those of the Companies' shareholders or creditors. Congress, consistent with its concern to protect the public interest, thus made a deliberate choice in the Recovery Act to permit FHFA to act in its own best governmental interests, which may include the taxpaying public's interest.

The dissenting opinion (at 8) views Sections 4617(b)(2)(D) and (E) as "mark[ing] the bounds of FHFA's conservator or receiver powers." Not so. As a plain textual matter, the Recovery Act expressly provides FHFA many "[g]eneral powers" "as conservator or receiver," 12 U.S.C. § 4617(b)(2), that are not delineated in Section 4617(b)(2)(D) or (E). *See id.* § 4617(b)(2)(A) (assuming "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"); *id.* § 4617(b)(2)(B) (power to "[o]perate the regulated entity"); *id.* § 4617(b)(2)(C) (power to "provide for the exercise of any function by any stockholder, director, or officer of any regulated entity"); *id.* § 4617(b)(2)(G) (power to "transfer or sell any asset or liability of the regulated entity in default"); *id.* § 4617(b)(2)(H) (power to "pay [certain] valid obligations of the regulated entity"); *id.* § 4617(b)(2)(I) (power to issue subpoenas and take testimony under oath). *See also id.* § 4617(d)(1) (granting FHFA as the conservator or receiver the power to "repudiate [certain] contract[s] or lease[s]").

The institutional stockholders also argue that, because Section 4617(b)(2)(D) describes FHFA's "[p]owers as conservator" by providing that FHFA "may * * * take such action as may be" "necessary to put the [Companies] in a sound and solvent condition" and "appropriate to * * * preserve and conserve [their] assets," FHFA may act only when those two conditions are satisfied. Institutional Pls. Reply Br. at 13. In their view, FHFA "does not have other powers as conservator." *Id.*

The short answer is that the Recovery Act says nothing like that. It contains no such language of precondition or mandate. Indeed, if that is what Congress meant, it would have said FHFA "may only" act as necessary or appropriate to those tasks. Not only is that language missing from the Recovery Act, but Congress did not even say that FHFA "should"—let alone, "should first"—preserve and conserve assets or "should" first put the Companies in a sound and solvent condition. Nor did it articulate FHFA's power directly in terms of asset preservation or sound and solvent company operations. What the statute says is that FHFA "*may* * * * take such action as *may* be" "necessary to put the [Companies] in a sound and solvent condition" and "*may* be" "appropriate to * * * preserve or conserve [the Companies'] assets."12 U.S.C. § 4617(b)(2)(D) (emphases added). So at most, the Recovery Act empowers FHFA to "take such action" as may be necessary or appropriate to fulfill several goals. That is how Congress wrote the law, and that is the law we must apply. S*ee Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 461–462 (2002) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–254 (1992)); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014) ("[I]t is this court's obligation to enforce statutes as Congress wrote them.").[8]

[8] The dissenting opinion suggests that Congress's use of permissive "may" terminology is "a simple concession to the practical reality that a conservator may not always succeed in rehabilitating its ward." Dissenting Op. at 9 n.1. Not so. Even with the

(ii) Even if the Recovery Act did impose a primary duty to preserve and conserve assets, nothing in the Recovery Act says that FHFA must do that in a manner that returns them to their prior private, capital-accumulating, and dividend-paying condition for all stockholders. *See* Institutional Pls. Br. at 44. Tellingly, the institutional stockholders and dissenting opinion accept that the original Stock Agreements and the First and Second Amendments fit comfortably within FHFA's statutory authority as conservator. *See* Dissenting Op. at 21 (acknowledging that FHFA "manage[d] the Companies within the conservator role" until "the tide turned * * * with the Third Amendment"). But the Stock Agreements and First and Second Amendments themselves both obligated the Companies to pay large dividends to Treasury and prohibited them, without Treasury's approval, from "declar[ing] or pay[ing] any dividend (preferred or otherwise) or mak[ing] any other distribution (by reduction of capital or otherwise), whether in cash, property, securities or a combination thereof." *E.g.*, J.A. 2451; *cf.* 12 U.S.C. § 1719(g)(1)(C)(vi) ("To protect the taxpayers, the Secretary of the Treasury shall take into consideration," *inter alia*, "[r]estrictions on the use of corporation resources, including limitations on the payment of dividends[.]").

That means that FHFA's ability as conservator to give Treasury (and, by extension, the taxpayers) a

hypothesized addition of mandatory terms to the statute, the Act would at most command FHFA to take actions "necessary to put the [Companies] in a sound and solvent condition" and "appropriate to * * * preserve and conserve [their] assets." 12 U.S.C. § 4617(b)(2)(D). FHFA's compliance thus would turn on its actions, not on their outcome.

preferential right to dividends, to the effective exclusion of other stockholders, was already put in place by the unchallenged and thus presumptively proper Stock Agreements and Amendments that predated the Third Amendment. The Third Amendment just locked in an exclusive allocation of dividends to Treasury that was already made possible by—and had been in practice under—the previous agreements, in exchange for continuing the Companies' unprecedented access to guaranteed capital.

The institutional stockholders point to Section 4617(a)(2) as a purported source of FHFA's mandatory duty to return the Companies to their old financial ways. But that Section provides only that FHFA's Director has the power to appoint FHFA as "conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2). It is then the multi-paged remaining portion of Section 4617 that details at substantial length FHFA's many "[g]eneral powers" as conservator or receiver. *Id.* § 4617(b)(2).

Furthermore, that explicit power to "reorganiz[e]" supports FHFA's action because the Third Amendment reorganized the Companies' financial operations in a manner that ensures that quarterly dividend obligations are met without drawing upon Treasury's commitment and thereby increasing Treasury's liquidation preference. FHFA's textual authority to reorganize and rehabilitate the Companies, in other words, forecloses any argument that the Recovery Act made the *status quo ante* a statutorily compelled end game.

In addition, the Recovery Act openly recognizes that sometimes conservatorship will involve managing the regulated entity in the lead up to the appointment of a liquidating receiver. *See* 12 U.S.C. § 4617(a)(4)(D) (providing that appointment of FHFA as a receiver automatically terminates a conservatorship under the Act). The authority accorded FHFA as a conservator to reorganize or rehabilitate the affairs of a regulated entity thus must include taking measures to prepare a company for a variety of financial scenarios, including possible liquidation. Contrary to the dissenting opinion (at 11), that does not make FHFA a "hybrid" conservator-receiver. It makes FHFA a fully armed conservator empowered to address all potential aspects of the Companies' financial condition and operations at all stages when confronting a threatened business collapse of truly unprecedented magnitude and with national economic repercussions.

The institutional stockholders nonetheless argue that, rather than adopt the Third Amendment's dividend allocation, FHFA could instead have adopted a payment-in-kind dividend option that would have increased Treasury's liquidation preference by 12% in return for avoiding a 10% dividend payment. Perhaps. But the Recovery Act does not compel that choice over the variable dividend to Treasury put in place by the Third Amendment. Either way, Section 4617(f) flatly forbids declaratory and injunctive relief aimed at superintending to that degree FHFA's conservatorship or receivership judgments.[9]

The dissenting opinion claims that the Third Amendment's prevention of capital accumulation went too far because it constitutes a "*de facto* receiver[ship]" or "*de facto* liquidation," and thus could not possibly constitute a permissible "conservator" measure. *See* Dissenting Op. at 10, 17, 25. That position presumes the existence of a rigid boundary between the conservator and receiver roles that even the dissenting opinion seems to admit may not exist. *See* Dissenting Op. at 7 (acknowledging that "the line between a conservator and a receiver may not be completely impermeable"). Wherever that line may be, it is not crossed just because an agreement that ensures continued access to vital capital diverts all dividends to the lender, who had singlehandedly saved the Companies from collapse, even if the dividend payments under that agreement may at times be greater than

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[9] The institutional stockholders also contend that FHFA's adoption of the Third Amendment violated Section 4617(a)(7), which provides that FHFA "shall not be subject to the direction or supervision of any other agency." 12 U.S.C. § 4617(a)(7). The institutional stockholders pleaded, however, only that "on information and belief, FHFA agreed to the [Third Amendment] * * * at the insistence and under the direction and supervision of Treasury." J.A. 122, ¶ 70. On a motion to dismiss for failure to state a claim, we are not required to credit a bald legal conclusion that is devoid of factual allegations and that simply parrots the terms of the statute. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.") (citations, internal quotation marks, and alterations omitted).

the dividend payments under previous agreements. The proof that no *de facto* liquidation occurred is in the pudding: non-capital-accumulating entities that continue to operate long-term, purchasing more than 11 million mortgages and issuing more than $1.5 trillion in single-family mortgage-backed securities over four years, are not the same thing as liquidating entities.

The argument also overlooks that the Third Amendment's redirection of dividends to Treasury came in exchange for a promise of continued access to necessary capital free of the preexisting risk of accumulating more debt simply to pay dividends to Treasury. Now, after more than eight years of conservatorship—four of which have been under the Third Amendment—Fannie and Freddie have gone from a state of near-collapse to fluctuating levels of profitability. FHFA thus has "carr[ied] on the business of" Fannie and Freddie, 12 U.S.C. § 4617(b)(2)(D)(ii), in that they remain fully operational entities with combined operating assets of $5 trillion, *see* Treasury Resp. Br. at 35. While the dissenting opinion worries that the Companies have "no hope of survival past 2018," Dissenting Op. at 27, the Third Amendment allows the Companies after 2018 to draw upon Treasury's remaining funding commitment if needed to remedy any negative net worth.[10]

[10] The dissenting opinion comments that the dividend payments under the Third Amendment did not go towards paying off what the Companies borrowed from Treasury. *See* Dissenting Op. at 21, 23. Yet the Stock Agreements and the First and Second Amendments, which the dissenting opinion acknowledges were

(iii) The institutional stockholders argue that the Third Amendment violated FHFA's "fiduciary and statutory obligations to * * * rehabilitate [the Companies] to normal business operations," Institutional Pls. Br. at 34**,** because the Amendment was as a factual matter not needed to prevent further indebtedness, and was instead intended to secure a windfall for Treasury (and indirectly taxpayers) at the expense of the stockholders. They likewise contend that FHFA's motivation for adopting the Third Amendment all along has been to liquidate the Companies. They rest those arguments on factual allegations that FHFA and Treasury knew Fannie and Freddie had just turned an economic corner, and had experienced substantial increases in their net worth. In that regard, the institutional stockholders cite evidence that FHFA and Treasury were aware before they adopted the Third Amendment that Fannie and Freddie might each experience a substantial one-time increase in net worth in 2013 and 2014 due to the realization of certain deferred tax assets. They also point to presentations Fannie Mae made to FHFA and Treasury in July and August before the Third Amendment was executed, predicting that Fannie Mae and Freddie Mac would need only small draws from Treasury's commitment (totaling less than $9 billion) to pay Treasury its dividend through the year 2022. In the institutional stockholders' view, FHFA's alleged knowledge that rosier days were dawning shows that FHFA had no legitimate conservatorship reason to adopt the Third Amendment rather than to pursue measures that

lawful, *id*. at 21, similarly did not provide for the Companies' dividends to pay down Treasury's liquidation preference.

would allow the Companies to accumulate capital and return to the dividend-paying *status quo ante*.

To be clear, though, the institutional stockholders argue that the Third Amendment would be just as flawed in their view even if Fannie and Freddie had made no profits, were badly hemorrhaging money in 2013 and 2014, and thus were in dire need of the Third Amendment's promise of continued access to capital, free from dividend obligations that would have increased still further Treasury's liquidation preference. *See* Oral Arg. Tr. 22–24 (Q: "[D]oes the argument that they were not acting as a proper conservator depend on the fact that they were in fact profitable? A: "[N]o, it doesn't.").[11]

Treasury argues, by contrast, that FHFA was taking a broader and longer-term view of the Companies' financial condition. In almost every quarter before the Third Amendment was adopted, Fannie and Freddie had been unable to make their dividend payments to Treasury without taking on more debt to Treasury. In SEC filings, Fannie and Freddie themselves predicted that they would be unable to pay the 10% dividend over the long term. *See*, *e.g.*, J.A. 1983 (Fannie Mae statement that it "do[es] not expect to generate net income or comprehensive income in excess of [its] annual dividend obligation to Treasury over the long

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[11] After the large dividends in 2013 and 2014, Fannie and Freddie made a far smaller dividend payment—a combined $15.8 billion—in 2015. In the first quarter of 2016, Freddie Mac had a comprehensive loss of $200 million and paid no dividend at all. *See* FREDDIE MAC, FORM 10-Q FOR THE QUARTERLY PERIOD ENDED MARCH 31, 2016 (May 3, 2016). That loss was due to market forces such as interest-rate volatility and widening spreads between interest rates and benchmark rates. *Id*. at 1–2.

term[,]" so its "dividend obligation to Treasury will increasingly drive [its] future draws under the senior [Stock Agreement]"); *id.* at 2160 (similar for Freddie Mac). Other market participants shared that view. *See*, *e.g.*, *id.* at 655 (Moody's report).

According to Treasury, the Third Amendment put a structural end to "the circular practice of the Treasury advancing funds to [Fannie and Freddie] simply to pay dividends back to Treasury." Treasury Press Release, *supra*. Said another way, the Third Amendment changed the dividend formula to require Fannie and Freddie to pay whatever dividend they could afford—however little, however much—to prevent them from ever again having to fruitlessly borrow from Treasury to pay Treasury. If Fannie and Freddie made profits, Treasury would reap the rewards; if they suffered losses, Treasury would have to forgo payment entirely.

The problem with the institutional stockholders' argument is that the factual question of whether FHFA adopted the Third Amendment to arrest a "debt spiral" or whether it was intended to be a step in furthering the Companies' return to "normal business operations" is not dispositive of FHFA's authority to adopt the Third Amendment. Nothing in the Recovery Act confines FHFA's conservatorship judgments to those measures that are driven by financial necessity. And for purposes of applying Section 4617(f)'s strict limitation on judicial relief, allegations of motive are neither here nor there, as the dissenting opinion agrees (at 20). The stockholders cite nothing—nor can we find anything—in the Recovery Act that hinges FHFA's exercise of its conservatorship discretion on particular motivations. *See Leon County, Fla. v.*

FHFA, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011) ("Congress barred judicial review of the conservator's actions without making an exception for actions said to be taken from an improper motive.").

Likewise, the duty that the Recovery Act imposes on FHFA to comply with receivership procedural protections textually turns on FHFA actually liquidating the Companies. *See, e.g.*, 12 U.S.C. § 4617(b)(3)(B) ("The receiver, in any case involving the liquidation or winding up of the affairs of [Fannie or Freddie], shall * * * promptly publish a notice to the creditors of the regulated entity to present their claims, together with proof, to the receiver[.]"). Undertaking permissible conservatorship measures even with a receivership mind would not be out of statutory bounds.

The institutional stockholders' burden instead is to show that FHFA's actions were frolicking outside of statutory limits as a matter of law. What matters then is the substantive measures that FHFA took, and nothing in the Recovery Act 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. Nor did anything in the Recovery Act forbid FHFA from adopting measures that took a more comprehensive, wait-and-see view of the Companies' long-term financial condition, or simply kept the Companies' heads above water while FHFA observed their economic performance over time and through ever-changing market conditions. *See, e.g., supra* note 11.[12]

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[12] We grant the plaintiffs' various motions to supplement the record with evidence of what FHFA and Treasury officials knew

(iv) The institutional stockholders cite state-law and historical sources to suggest that FHFA was not acting as a common-law conservator normally would when it adopted the Third Amendment. *See* Institutional Pls. Br. at 29–33. The problem for the plaintiffs is that arguments about the contours of common-law conservatorship do nothing to show that FHFA exceeded *statutory* bounds, which is what *National Trust I* referenced. Under the Recovery Act, FHFA as conservator may "take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity *or the Agency*." 12 U.S.C. § 4617(b)(2)(J)(ii) (emphasis added). That explicit statutory authority to take conservatorship actions in the conservator's own interest, which here includes the public and governmental interests, directly undermines the dissenting opinion's supposition that Congress intended FHFA to be nothing more than a common-law conservator. *See* Dissenting Op. at 16 (asserting that, in the common-law probate context, a conservator is generally "forbid[den] * * * from acting for the benefit of the conservator himself or a third party").

On top of that, Congress in the Recovery Act gave FHFA the ability to obtain from Treasury capital infusions of unprecedented proportions, as long as the deal FHFA struck with Treasury "protect[ed] the tax-

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about the Companies' predicted financial performance and when. That evidence does not affect our analysis, and we see no need to remand the claims for the district court to consider a fuller administrative record because the Recovery Act simply does not impose upon FHFA the precise duties that the institutional plaintiffs' factual arguments suppose.

payer" and "provide[d] stability to the financial markets." 12 U.S.C. §§ 1455, 1719(g)(1)(B)(i), (iii). That $200 billion-plus lifeline is what saved the Companies—none of the institutional stockholders were willing to infuse that kind of capital during desperate economic times—and bears no resemblance to the type of conservatorship measures that a private common-law conservator would be able to undertake. Indeed, the dissenting opinion acknowledges that FHFA "operating as a conservator may act in its own interests to protect both the Companies and the taxpayers from whom [FHFA] was ultimately forced to borrow[.]" Dissenting Op. at 19. To paraphrase the dissenting opinion (at 27), Congress made clear in the Recovery Act that FHFA is not your grandparents' conservator. For good reason.

The dissenting opinion asserts that our reading of Section 4617(b)(2)(J)(ii) effectively "forecloses *any* opportunity for meaningful judicial review of FHFA's actions," Dissenting Op. at 18, and decries the abandonment of the "*rule of law*," *see id.* at 2. That is quite surprising to hear. As the balance of our opinion makes clear—much of which the dissenting opinion joins—the Recovery Act only limits judicial *remedies* (banning injunctive, declaratory, and other equitable relief) after a court determines that the actions taken fall within the scope of statutory authority. The Act does not prevent either constitutional claims (none are raised here) or judicial review through cognizable actions for damages like breach of contract.

The dissenting opinion also argues that the court's holding is inconsistent with Congress's provision of judicial review for FHFA's actions in Section 4617(a)(5). Dissenting Op. at 18. But Section 4617(a)(5) permits judicial review *only* at the behest of a regulated entity itself and even then *only* of the Director's decision to appoint FHFA as a conservator or receiver.[13] That narrow focus of the provision is underscored by the requirement that the lawsuit must be promptly filed within thirty days of the appointment decision (a deadline that none of the plaintiffs here met). We thus beg to differ with the dissenting opinion's claim (at 18, 22) that Section 4617(a)(5) provides more intrusive judicial review for actions FHFA takes when acting as a receiver, many of which would presumably occur outside of that thirty-day filing window. *Cf. James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1092–1094 (D.C. Cir. 1996) (distinguishing between provisions in FIRREA for judicial review of the appointment of FDIC as conservator or receiver and those governing judicial review of the FDIC's exercise of its powers as conservator or receiver). Nothing in

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[13] Section 4617(a)(5) provides in full:

> (A) In general
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> > If the Agency is appointed conservator or receiver under this section, the regulated entity may, within 30 days of such appointment, bring an action in the United States district court for the judicial district in which the home office of such regulated entity is located, or in the United States District Court for the District of Columbia, for an order requiring the Agency to remove itself as conservator or receiver.
>
> (B) Review
>
> > Upon the filing of an action under subparagraph (A), the court shall, upon the merits, dismiss such action or direct the Agency to remove itself as such conservator or receiver.

12 U.S.C. § 4617(a)(5).

our reading of Section 4617(b)(2)(J)(ii), which governs what decisions a properly appointed conservator or receiver makes, undermines the sharply cabined opportunity for early-stage judicial review of the appointment decision itself.

* * * * *

In short, for all of their arguments that FHFA has exceeded the bounds of conservatorship, the institutional stockholders have no textual hook on which to hang their hats. Indeed, they do not dispute that FHFA had the authority as conservator to enter the Companies into the Stock Agreements with Treasury to raise vitally needed capital, to agree to pay dividends to Treasury on the stocks sold as part of that capital-raising bargain, to foreclose dividend payments to private stockholders in that process, *cf*. 12 U.S.C. § 1719(g)(1)(C)(vi), or to amend the terms of the Stock Agreements. The dissenting opinion even admits that FHFA's actions prior to the Third Amendment—which include the debt-inducing dividends paid under the First and Second Amendments as well as the original Stock Agreements—were "within the conservator role." *See* Dissenting Op. at 21.

What the institutional stockholders and dissenting opinion take issue with, then, is the allocated amount of dividends that FHFA negotiated to pay its financial-lifeline stockholder—Treasury—to the exclusion of other stockholders, and that decision's feared impact on business operations in the future. But Section 4617(f) prohibits us from wielding our equitable relief to second-guess either the dividend-allocating terms that FHFA negotiated on behalf of the Companies, or FHFA's business judgment that the

Third Amendment better balances the interests of all parties involved, including the taxpaying public, than earlier approaches had. *See County of Sonoma v. FHFA*, 710 F.3d 987, 993 (9th Cir. 2013) ("[I]t is not our place to substitute our judgment for FHFA's[.]"). Because the Third Amendment falls within FHFA's broad conservatorship authority under the Recovery Act, we must enforce Section 4617(f)'s explicit prohibition on the equitable relief that the institutional stockholders seek.

B. Section 4617(f) Bars the Challenges to FHFA's Compliance with the APA

The institutional stockholders also claim that FHFA's adoption of the Third Amendment amounted to arbitrary and capricious agency action in violation of the APA. That argument cannot surmount Section 4617(f)'s barrier to equitable relief—the only form of relief statutorily authorized for an APA violation. S*ee* 5 U.S.C. § 702 (allowing "action in a court * * * seeking relief other than money damages"); *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) (en banc). Indeed, Section 4617(f)'s strict limitation on judicial review would be an empty promise if it evaporated upon the assertion that FHFA's actions ran afoul of some other statute.

We accordingly "do not think it possible, in light of the strong language of" Section 4617(f) to read the Recovery Act's grant of "'powers' and 'authorities' to include the limitation that those powers be subject to—and hence enjoinable for noncompliance with—any and all other federal laws." *See National Trust I*, 995 F.2d at 240. Just as we cannot second-guess FHFA's conservatorship decisions under the Recovery

Act, we cannot quarterback those actions under the APA either.

C. Section 4617(f) Bars the Challenges to Treasury's Compliance with the Recovery Act and the APA

Lastly, the institutional stockholders argue that declaratory and injunctive relief should be available against Treasury because its own actions in signing on to the Third Amendment both violated the Recovery Act and were arbitrary and capricious in violation of the APA. Those claims fall within Section 4617(f)'s sweep as well.

To be sure, Section 4617(f) most explicitly bars judicial relief against FHFA, and not Treasury. But Section 4617(f) also forecloses judicial relief that would "affect" the exercise of FHFA's "powers or functions" as conservator or receiver. 12 U.S.C. § 4617(f). An action "can 'affect' the exercise of powers by an agency without being aimed directly at [that agency]." *Hindes v. FDIC*, 137 F.3d 148, 160 (3d Cir. 1998); *see also Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992) (Enjoining a third party "would have the same effect, from the FDIC's perspective, as directly enjoining the FDIC[.]").

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

Accordingly, Section 4617(f)'s prohibition on relief that "affect[s]" FHFA applies here because the requested injunction's operation would have exactly the same force and effect as enjoining FHFA directly. *See Dittmer Properties*, *L.P. v. FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013) ("Dittmer's request for injunctive relief is barred by § 1821(j), even though the FDIC is no longer the holder of the note, because the relief requested—a declaration that the note is void as to Dittmer—affects the FDIC's ability to function as receiver in th[is] case.").[14]

The institutional stockholders argue that this case is different because they claim Treasury "violated a provision of federal law unrelated to the conduct of a receivership." Institutional Pls. Reply Br. at 25. But Section 4617(f)'s plain language focuses on the "[e]ffect" of "any action" on FHFA's exercise of its powers; the cause of that effect is textually irrelevant. What matters here is that the institutional stockholders' claims against Treasury are integrally and inextricably interwoven with FHFA's conduct as conservator. Specifically, the complaint alleges that Treasury violated a provision of the Recovery Act—the very same law that governs FHFA's conservatorship activities—and that the Recovery Act prevented Treasury from entering into the Third Amendment with the

[14] *See also Kuriakose v. Federal Home Loan Mortgage Corp.*, 674 F. Supp. 2d 483, 494 (S.D.N.Y. 2009) ("By moving to declare unenforceable the non-participation clause in Freddie Mac severance agreements, in essence Plaintiffs are seeking an order which restrains the FHFA from enforcing this contractual provision in the future. * * * [The Recovery Act] clearly provides that this Court does not have the jurisdiction to interfere with such authority.").

Companies, operating at the direction of FHFA as conservator. Such a holding would just be another way of declaring that the Recovery Act barred FHFA from entering the Companies into the Third Amendment with Treasury. Treasury's action thus cannot be enjoined without simultaneously unraveling FHFA's own exercise of its powers and functions.

In so holding, we have no occasion to decide whether or how Section 4617(f) might apply to "an order against a third party [that] would be of little consequence to [FHFA's] overall functioning as receiver" or conservator, *Hindes*, 137 F.3d at 161, or to third-party activities that are by their nature less interwoven with FHFA's judgments as conservator or receiver. It is enough that, in this case, the direct and unavoidable effect of invalidating Treasury's contract with the Companies would be to void the contract with Treasury that FHFA concluded on the Companies' behalf. That would be a "dramatic and fundamental" incursion on FHFA's exercise of its conservatorship authority. *Id.*[15]

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[15] None of the cases that plaintiffs cite has anything to do with third-party claims that would directly restrain or affect the actions of a conservator. *See, e.g., Ecco Plains, LLC v. United States*, 728 F.3d 1190, 1202 n.17 (10th Cir. 2013) (stating that Section 1821(j) does not apply to a claim for money damages); *National Trust II*, 995 F.2d at 241 (characterizing Section 1821(j) as "[t]he prohibition against restraining the FDIC" in a case that only sought to restrain the FDIC itself).

IV. The Class Plaintiffs' Claims

The class plaintiffs appeal the dismissal of their claims against Treasury, the FHFA, and the Companies (as nominal defendants) for breach of fiduciary duty,[16] and against the FHFA and the Companies for breach of contract and for breach of the implied covenant of good faith and fair dealing.[17] Two groups of institutional shareholders – namely, the Arrowood plaintiffs and the Fairholme plaintiffs – likewise asserted common-law claims (in addition to their APA claims) in district court. Because they neither made their arguments for breach of contract and breach of the implied covenant of good faith and fair dealing in their opening brief nor incorporated those arguments by reference to the class plaintiffs' brief, they did not properly preserve their appeal against the dismissal of those claims. In view, however, of the unusual circumstances presented by the separate briefing for the consolidated cases that we required in this case, we shall exercise our discretion under Federal Rule of Appellate Procedure 2 to permit appeal of the order dismissing those claims as if their arguments had been properly preserved. Therefore, subsequent references

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[16] The class plaintiffs named the Companies as nominal defendants to their derivative claims on behalf of the Companies for breach of fiduciary duty because "the corporation in a shareholder derivative suit should be aligned as a defendant when the corporation is under the control of officers who are the target of the derivative suit." *Knop v. Mackall*, 645 F.3d 381, 382 (D.C. Cir. 2011).

[17] The FHFA and the Companies submitted a joint brief. When describing their arguments on appeal, therefore, we will refer to them collectively as the FHFA.

to the class plaintiffs are also applicable to the Arrowood and Fairholme plaintiffs insofar as they concern claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

The Fairholme plaintiffs also forfeited their claim for breach of fiduciary duty against the FHFA by failing to raise in their opening brief the district court's alternative holding that the "claim is derivative . . . and, therefore, barred under § 4617(b)(2)(A)(i)," *Perry Capital LLC*, 70 F. Supp. 3d at 229 n.24. *See Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1086 (D.C. Cir. 2007). We see no reason to relieve them of the consequences of this forfeiture.

A. The Claims Against Treasury

The class plaintiffs alleged that by executing the Third Amendment Treasury violated fiduciary duties to the Companies and their shareholders that are imposed by state corporate law because it is a controlling shareholder in the Companies. We have subject matter jurisdiction over the class plaintiffs' claims for breach of fiduciary duty against Treasury because "all civil actions to which [Freddie Mac] is a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such actions." 12 U.S.C. § 1452(f); *see also Lackey v. Wells Fargo Bank*, N.A., 747 F.3d 1033, 1035 n.2 (8th Cir. 2014) ("Because Freddie Mac is a party to this case, the district court had original jurisdiction pursuant to 12 U.S.C. § 1452(f)").[18]

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[18] We previously have interpreted a so-called "Deemer Clause" to provide jurisdiction under 28 U.S.C. § 1331, *Auction Co. of Am. v. FDIC*, 132 F.3d 746, 751 (D.C. Cir. 1997), *clarified on denial of reh'g*, 141 F.3d 1198 (1998), but have also held a Deemer Clause instead grants jurisdiction "directly" under Article III, § 2 of the Constitution, *A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1460 (D.C. Cir. 1995). Although we need not decide which is the correct approach, we must assure ourselves the Congress has "not expand[ed] the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983). For federally chartered organizations such as Freddie Mac, the Congress may grant federal jurisdiction "so long as the legislature does more than merely confer a new jurisdiction," but also "ensure[s] the proper administration of some federal law (although the disputed issues in any specific case may be confined to matters of state law)." *A.I. Trade*, 62 F.3d at 1461-62 (internal quotation marks and brackets omitted).

Whether the Deemer Clause is constitutional depends upon the substantive law anchoring that grant of federal jurisdiction today, not just the legislation extant when the clause was enacted, viz., the Emergency Home Finance Act of 1970, Pub. L. No. 91-351, § 303(e)(2), 84 Stat. 450, 453. Federal law today governs the composition and election of Freddie Mac's board of directors, 12 U.S.C. § 1452(a)(2), limits its capital distributions, § 1452(b), sets forth in detail both the powers of and limitations upon Freddie Mac with respect to its purchase and disposition of mortgages, §§ 1452(c), 1454(a), exempts the company from certain taxes, § 1452(e), and provides for conservatorship or receivership by the FHFA, § 4617. *Cf. A.I. Trade*, 62 F.3d at 1463. An issue of federal law may well arise in a suit involving Freddie Mac and "the potential application of that law provides a sufficient predicate for the exercise of the federal judicial power." *Id.* at 1462. The Congress may, "by bringing all such disputes within the unifying jurisdiction of the federal courts," avoid or amelio-

Whether sovereign immunity shields Treasury from suit is a trickier question because the class plaintiffs forfeited any argument under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), by failing to respond to Treasury's contention that the FTCA is inapplicable. *Cf. NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008) ("[A]rguments in favor of subject matter jurisdiction can be waived by inattention or deliberate choice"). The class plaintiffs argue the APA provides an alternate waiver of sovereign immunity for their claims for breach of fiduciary duty against Treasury. Under 5 U.S.C. § 702,

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . .

We agree with the class plaintiffs with respect to their pleas for declaratory relief against Treasury for several reasons.

First, the class plaintiffs sought "relief other than money damages," to which the waiver of § 702 is limited, by requesting a declaration that Treasury breached its fiduciary duties. *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) (holding declaratory relief is

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rate the potential for "diverse interpretations of those substantive provisions" that may prove "vexing to the very commerce" the provisions were undoubtedly "enacted to promote." *Id*. at 1463.

not "money damages").[19] Therefore, § 702 waives immunity for the class plaintiffs' claims for breach of fiduciary duty insofar as they seek declaratory relief.

Second, § 702 waives Treasury's immunity for the claims for breach of fiduciary duty because they are not founded upon a contract. The waiver in § 702 does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *See also Albrecht v. Comm. on Emp. Benefits*, 357 F.3d 62, 67-68 (D.C. Cir. 2004). We have interpreted the Tucker Act, 28 U.S.C. § 1491(a)(1), which waives sovereign immunity for some claims "founded . . . upon" a contract and brought in the U.S. Court of Federal Claims, to "impliedly forbid[]" contract claims against the Government from being brought in district court under the waiver in the APA. *Albrecht*, 357 F.3d at 67-68. Treasury on appeal does not dispute the class plaintiffs' characterization of their claims as not contractual, though the agency argued in district court that the claims were in essence a contract action because it "assumed [any fiduciary duties] in entering

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[19] Contrary to the class plaintiffs' assertions, however, their request for "[s]uch other and further relief as the Court may deem just and proper" does not qualify as non-monetary relief. J.A. 279 ¶ 12. Such boilerplate requests – which refer to the proviso of Federal Rule of Civil Procedure 54(c) that a "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings" – "come[] into play only after the court determines it has jurisdiction." *See Hedgepeth ex rel. Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1152 n.2 (D.C. Cir. 2004) (Roberts, J.). The class plaintiffs do not argue that their request for "disgorgement," J.A. 278 ¶ 5, is not "money damages." Nor do they invoke the request for rescission of the Third Amendment that appears outside of the prayer for relief in their complaint.

into the [Stock Agreements]" with Fannie Mae and Freddie Mac. Treasury Defs. Mem. in Support of Mot. To Dismiss or for Summ. J., Doc. No. 19-1, at 44 *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigs.*, 1:13-mc-01288 (Jan. 17, 2014). That Treasury has not briefed the issue on appeal does not, however, relieve us of our obligation to assure ourselves we have jurisdiction, *see Steel Co.*, 523 U.S. at 94; this obligation extends to sovereign immunity because it is "jurisdictional in nature," *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), and may not be waived by an agency's conduct of a lawsuit, *Dep't of the Army v. FLRA*, 56 F.3d 273, 275 (D.C. Cir. 1995).

In order to determine whether an action is in "its essence" contractual, we examine "the source of the rights upon which the plaintiff bases its claims" and "the type of relief sought (or appropriate)." *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982); *see also Albrecht*, 357 F.3d at 68-69. The class plaintiffs claim that, because it is the controlling shareholder, Treasury owes the Companies and their shareholders "fiduciary duties of due care, good faith, loyalty, and candor." J.A. 275 ¶ 177; *see also* Derivative Compl., Doc. No. 39, at 27 ¶ 74 *In re Fannie Mae/Freddie Mac*, 1:13-mc-01288 (July 30, 2014). These claims against Treasury are not "a disguised contract action," *Megapulse*, *Inc.*, 672 F.2d at 968, because they do not seek to enforce any duty imposed upon Treasury by the Stock Agreements – the only relevant contracts to which Treasury is a party. Although any fiduciary duty allegedly owed by Treasury as a controlling shareholder in the Companies arose from its purchase of shares pursuant to the Stock Agreements, we do not think that "*any* case requiring some reference to . . . a contract is necessarily on the contract and therefore directly within the Tucker Act." *Id.* at 967-68. The class plaintiffs do not contend Treasury breached the terms of the Stock Agreements nor otherwise invoke them except to establish that Treasury is a controlling shareholder.

The relief the class plaintiffs seek does not further illuminate whether their claims are essentially contractual. In *Megapulse*, we held the action was not founded upon a contract in part because the plaintiffs sought no specific performance of the contract and no damages, 672 F.2d at 969, presumably because specific performance is an explicitly contractual remedy and because "damages are a prototypical contract remedy," *A & S Council Oil Co. v. Lader*, 56 F.3d 234, 240 (D.C. Cir. 1995). Here, the class plaintiffs seek a declaration that Treasury breached its fiduciary duties and an award of "compensatory damages" in favor of the Companies. These forms of relief are not specific to actions that sound in contract, *cf. Spectrum Leasing Corp. v. United States*, 764 F.2d 891, 894-95 (D.C. Cir. 1985) (concluding a claim was essentially contractual in part because the relief sought amounted to "the classic contractual remedy of specific performance"), and any relief would not be determined by reference to the terms of the contract, *cf. Albrecht*, 357 F.3d at 69 (concluding a claim was essentially contractual in part because a contract would "determine whether the relief sought . . . is available").[20] The plaintiffs also seek rescission with respect to their claim regarding Fannie Mae. This plea does not render the claim essentially contractual even though rescission is typically a remedy for breach of contract because there is no question that any breach of contract claim would concern the Purchase Agreement and the class plaintiffs seek rescission of only the Third Amendment. In sum, the Tucker Act does not "impliedly forbid[]" us from awarding relief against Treasury based on the waiver of immunity in § 702 because the class plaintiffs' claims are not founded upon a contract.

Third, Treasury's argument that § 702 does not waive its immunity from suit for state law claims is foreclosed by our precedent. We have "repeatedly" and "expressly" held in the broadest terms that "the APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) (internal quotation marks omitted). Furthermore, we concluded in *United States Information Agency v. Krc*, 989 F.2d

[20] The class plaintiffs also request "disgorgement" in favor of the Companies, but they do not explain further what measure of relief they seek and on appeal they appear to characterize the plea as one for damages. We do not take the class plaintiffs to seek more than restitution of the dividends paid to Treasury pursuant to the Third Amendment and in excess of the 10% dividend, because they have not alleged that Treasury has otherwise profited from its execution of the Third Amendment. Restitution of the benefits conferred by a plaintiff is not specific to claims for breach of contract, 1 Dan B. Dobbs, LAW OF REMEDIES § 4.1(1), pp. 552-53 (2d ed. 1993), so the plea for disgorgement does not alter our analysis.

1211 (D.C. Cir. 1993), that § 702 waived sovereign immunity for a (presumably) state tort claim against the Government because the FTCA did not "impliedly forbid" the non-monetary relief the plaintiff sought. *Id.* at 1216 (citing § 702).

Fourth, the class plaintiffs forthrightly point out that we have held "the waiver of sovereign immunity under § 702 is limited by the 'adequate remedy' bar of § 704," *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 947 (D.C. Cir. 2004) (quoting 5 U.S.C. § 704); *see also Transohio Sav. Bank v. Dir., OTS*, 967 F.2d 598, 607 (D.C. Cir. 1992), and go on to argue we should look to more recent authority that contradicts those holdings, *see Trudeau*, 456 F.3d at 187-89. Again, that Treasury has no response to this point does not relieve us of our duty to ascertain whether Treasury's immunity has been waived. We agree with the class plaintiffs that the holdings in *National Wrestling* and *Transohio Savings* are no longer good law.

Section 704 provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. In *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc), after first concluding that immunity from suit was waived by § 702 with nary a mention of the adequate remedy bar of § 704, *id.* at 722-31, we held that whether there is an "other adequate remedy" for the purpose of § 704 determines whether a litigant states "a valid cause of action" under the APA. *Id.* at 731. We did not expressly speak to whether the adequate remedy bar limits immunity, but it strains credulity to think the choice to address the adequate remedy bar not as a condition of immunity, but instead as a requirement for a cause of action, was not deliberate in that case.

A further reason for this reading of Cohen is that we there cited approvingly, *id.* at 723, our prior holding in *Trudeau*, 456 F.3d 178, that the requirement of final agency action in § 704 is not a condition of the waiver of immunity in § 702, but instead limits the cause of action created by the APA, *id.* at 187-89. The holding of Trudeau and its endorsement in Cohen clearly override *National Wrestling* and *Transohio Savings*: We see no textual or logical basis for construing § 704 – which limits judicial review to "final agency action for which there is no other adequate remedy" – to condition a waiver of sovereign immunity on the absence of an adequate remedy but not on the presence of final agency action. In *Trudeau* we concluded the finality requirement does not bear upon the waiver of immunity in § 702 because the waiver "is not limited to APA cases – and hence . . . it applies regardless of whether the elements of an APA cause of action [under § 704] are satisfied." *Id.* at 187. This reasoning applies equally to the adequate remedy bar. *See Viet. Veterans of Am. v. Shinseki*, 599 F.3d 654, 661 (D.C. Cir. 2010) (relying in part upon our holding that the finality requirement no longer limits a court's subject matter jurisdiction to reach the same conclusion for the adequate remedy bar and referring to them collectively as the "the APA's reviewability provisions").

Furthermore, in a departure from prior cases, we have several times recognized that the finality requirement and adequate remedy bar of § 704 determine whether there is a cause of action under the APA, not whether there is federal subject matter jurisdiction. *Cent. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 805-06 (D.C. Cir. 2006); *Trudeau*, 456 F.3d at 183-85; *Shinseki*, 599 F.3d at 661; *Cohen*, 650 F.3d at 731 & n.10. Reading § 704 to limit only the cause of action that may be brought under the APA and not the grant of immunity in § 702 is in line with our new understanding of § 704 as narrowly focused upon the requirements for the APA cause of action. We therefore hold that § 702 waives Treasury's immunity regardless whether there is another adequate remedy under § 704 because the absence of such a remedy is instead an element of the cause of action created by the APA.

In sum, pursuant to 12 U.S.C. § 1452(f) and 28 U.S.C. § 1291, we have subject matter jurisdiction over the class plaintiffs' claims against Treasury for breach of fiduciary duty, and the Congress waived the agency's immunity from suit for these claims, insofar as they are for declaratory relief, in the APA, 5 U.S.C. § 702. We nonetheless affirm the district court's dismissal of the claims for a declaratory judgment. As discussed in greater detail above, *supra* at 37-40, 12 U.S.C. § 4617(f) bars us from awarding equitable relief against Treasury with respect to the Third Amendment because doing so would impermissibly "restrain or affect the exercise of powers or functions of the [FHFA] as a conservator."

B. The Claims Against the FHFA and the Companies

The class plaintiffs sued the FHFA (and the Companies, as nominal defendants) for breach of fiduciary duties imposed on a corporation's management under state law. They also alleged claims against the FHFA and the Companies for breach of contract and breach of the implied covenant of good faith and fair dealing. We have subject matter jurisdiction over the class plaintiffs' claims under 12 U.S.C. § 1452(f). As mentioned above, our obligation to assure ourselves we have jurisdiction, *see Steel* Co., 523 U.S. at 94, extends to sovereign immunity because it is jurisdictional, *Meyer*, 510 U.S. at 475. "A waiver . . . must be unequivocally expressed in statutory text," *Lane v. Pena*, 518 U.S. 187, 192 (1996), so the Government may not waive immunity merely by its conduct in a lawsuit, *Dep't of the Army*, 56 F.3d at 275. We therefore disregard FHFA's point that the agency, "in its capacity as Conservator, has not asserted sovereign immunity with respect to [its] execution of the Third Amendment." FHFA July 2016 Supp. Br. at 4.

Assuming the FHFA has sovereign immunity when it acts on behalf of the Companies as conservator, *cf. Auction Co. of Am. v. FDIC*, 141 F.3d 1198, 1201-02 (D.C. Cir. 1998) (holding a suit against the FDIC was a suit against the United States for purposes of jurisdiction and sovereign immunity where the FDIC "did not act as receiver for any particular depository"), the Congress has waived the agency's immunity by consenting to suit. The Congress has granted Freddie Mac "power . . . to sue and be sued . . . in any State, Federal, or other court," 12 U.S.C. § 1452(c)(7), and has granted Fannie Mae the same "power . . . to sue and to be sued . . . in any court of competent jurisdiction, State or Federal," *id.* § 1723a(a). The FHFA "by operation of law[] immediately succeed[ed] to . . . all . . . powers" of the Companies upon its appointment as conservator – including the Companies' power to sue and be sued – under the so-called Succession Clause of the Recovery Act. *Id.* § 4617(b)(2)(A)(i). Such a statutory grant of power to "sue and be sued" constitutes an "unequivocally expressed" waiver of sovereign immunity. *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33-34 (1992); *see also Meyer*, 510 U.S. at 475.[21]

By providing for the FHFA to succeed to the Companies' power to sue and be sued, the Congress has given its express consent that the FHFA is subject to suit in the same way the Companies would otherwise be when the agency acts on their behalf as conservator. This understanding is borne out by the FHFA's other functions under the Succession Clause, which further provides that the FHFA succeeds to "all rights, titles, powers, and privileges of the regulated entity." § 4617(b)(2)(A)(i). The Supreme Court interpreted the nearly identical provision in FIRREA to "place[] the FDIC in the shoes of the [entity in receivership], to work out its claims under state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994) (interpreting 12 U.S.C. § 1821(d)(2)(A)(i)). The Recovery Act further empowers the FHFA, as conservator, to "take over the assets of and operate the [Companies] with all the powers of [their] shareholders, . . . directors, and . . . officers" and to "perform all functions of the [Companies] in the name of the [Companies]." 12 U.S.C. § 4617(b)(2)(B)(i), (iii).

What if the class plaintiffs' claims for breach of fiduciary duty are cognizable under the FTCA, 28

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[21] We need not reach the question whether the FHFA's conservatorship of Fannie Mae and Freddie Mac endows the Companies with sovereign immunity because their "sue and be sued" clauses would waive any immunity.

U.S.C. § 1346(b)? The FTCA does not withdraw the Congress's waiver of immunity in this case, for the FTCA provides:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under [the FTCA], and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. § 2679(a). The Congress has not, however, authorized the FHFA to be sued "in its own name" by enacting a "sue and be sued" clause specifically for the agency. Instead, the Congress has granted the FHFA the power to be sued just as the Companies would be absent a conservatorship insofar as the agency steps into the shoes of the Companies and acts on their behalf to defend alleged breaches of their obligations. Because the Companies, pre-conservatorship, were not affected by the FTCA proviso cited above, neither is the FHFA when it is sued for an action taken on their behalf – in this case, the Third Amendment.[22]

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[22] It follows that the FTCA does not apply to Fannie Mae or Freddie Mac either, even though the FHFA, as conservator, exercises complete control over the Companies. The statute provides that the remedies set forth in the FTCA "shall be exclusive" despite any "sue and be sued" clause of a "federal agency," 28 U.S.C. § 2679(a), which includes "corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States," *id*. § 2671. Generally, we determine whether a defendant is such a corporation that is subject to the FTCA by examining whether the Federal Government has the power "'to control the detailed physical performance of the [corporation].'" *Macharia v. United States*,

Nor would the Tucker Act, 28 U.S.C. § 1491(a)(1), require the class plaintiffs to file their claims for breach of contract in the Court of Federal Claims. "If a separate waiver of sovereign immunity and grant of jurisdiction exist, district courts may hear cases over which, under the Tucker Act alone, the Court of Federal Claims would have exclusive jurisdiction." *Auction Co. of Am. v. FDIC*, 132 F.3d 746, 752 n.4 (D.C. Cir. 1997) (suit for breach of contract), *clarified on denial of reh'g*, 141 F.3d 1198 (1998).

1. The Succession Clause

The FHFA and the class plaintiffs dispute whether the common-law claims against the agency are barred by the so-called Succession Clause, which provides that the FHFA, as conservator, "succeed[s] to" the stockholders' rights "with respect to" the Companies and their assets, 12 U.S.C. § 4617(b)(2)(A)(i). In *Kellmer v. Raines*, 674 F.3d 848 (D.C. Cir. 2012), we held the Succession Clause "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits" on behalf of the Companies, but left open whether it transfers claims as to which the FHFA would face a manifest conflict of interest. *Id.* at 850.

The class plaintiffs argue the Succession Clause should not be read to bar their derivative claims for

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334 F.3d 61, 68 (D.C. Cir. 2003) (quoting *United States v. Orleans*, 425 U.S. 807, 814 (1976)). As we have just concluded, however, the Recovery Act evinces the Congress's intention to "place[]" the FHFA "in the shoes" of the Companies, *O'Melveny & Myers*, 512 U.S. at 86-87, which become wards of the Government. The Companies therefore remain subject to suit as private corporations for violations of state law just as they were before the FHFA was appointed conservator.

breach of fiduciary duty because the FHFA would face a conflict of interest in pursuing, on behalf of the Companies, claims against itself. They also argue the Succession Clause does not apply to their direct claims for breach of contract and for breach of fiduciary duty. The FHFA responds that the Succession Clause transfers to it the right to bring derivative suits without exception, that all the claims of the class plaintiffs are derivative, and that the Succession Clause also transfers any direct claims to the agency.

The district court held the statute bars all the class plaintiffs' claims and dismissed them "pursuant to [Federal Rule of Civil Procedure] 12(b)(1) for lack of standing," *Perry Capital LLC*, 70 F. Supp. 3d at 233, 235 n.39, 239 n.45, but whether the Succession Clause bars the claims has no bearing upon standing under Article III of the Constitution of the United States. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The district court's error, however, is of no moment; we simply examine the issue under Rule 12(b)(6). *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) ("Although the district court erroneously dismissed the action pursuant to Rule 12(b)(1), we could nonetheless affirm the dismissal if dismissal were otherwise proper based on failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)").

We conclude the Succession Clause transfers to the FHFA without exception the right to bring derivative suits but not direct suits. The class plaintiffs' claims for breach of fiduciary duty are derivative and therefore barred, but their contract-based claims are direct and may therefore proceed.

a. The Succession Clause bars derivative suits, but not direct suits

The Recovery Act transfers some of the shareholders' rights to the FHFA during conservatorship and receivership and provides that others are retained by the shareholders during conservatorship but terminated during receivership. Specifically, the Succession Clause provides that "as conservator or receiver" the FHFA "shall . . . by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder . . . with respect to the regulated entity and [its] assets." § 4617(b)(2)(A)(i). The Recovery Act further limits shareholders' rights during receivership by providing that the FHFA's appointment as receiver and consequent succession to the shareholders' rights "terminate[s] all rights and claims that the stockholders . . . of the regulated entity may have against the assets or charter of the regulated entity or the [FHFA] . . . except for their right to payment, resolution, or other satisfaction of their claims" in the administrative claims process. § 4617(b)(2)(K)(i).

The Recovery Act thereby transfers to the FHFA all claims a shareholder may bring derivatively on behalf of a Company whilst claims a shareholder may lodge directly against the Company are retained by the shareholder in conservatorship but terminated during receivership. The Act distinguishes between the transfer of rights "with respect to the regulated entity and [its] assets" in the Succession Clause and the termination of rights "against the assets or charter of the regulated entity" in § 4617(b)(2)(K)(i). Rights "with respect to" a Company and its assets are only those an investor asserts derivatively on the

Company's behalf. *Cf. Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014) (so interpreting the analogous provision of FIRREA, 12 U.S.C. § 1821(d)(2)(A)(i)). Rights and claims "against the assets or charter of the regulated entity" are an investor's direct claims against and rights to the assets of the Company once it is placed in receivership in order to be liquidated, *see* 12 U.S.C. § 4617(b)(2)(E); that the Recovery Act terminates such rights and claims in receivership indicates that shareholders' direct claims against and rights in the Companies survive during conservatorship.[23]

This reading is borne out by the statutory context. If the Succession Clause transferred all of the stockholders' rights to the FHFA in conservatorship and receivership, as the FHFA contends, then they would have no rights left to assert during the administrative claims process should a Company be liquidated. That result is plainly precluded by § 4617(b)(2)(K)(i), which excepts from termination upon the FHFA's appointment as receiver a shareholder's "right to payment, resolution, or other satisfaction of [his or her] claims." Furthermore, we see the logic in permitting the shareholders to retain their rights to bring suit against a

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[23] The FHFA argues that "[b]ecause the Conservator already can pursue derivative claims belonging to the Enterprises, the statutory phrase 'rights . . . of any stockholder' only has meaning if it encompasses direct claims." FHFA Br. at 48. This argument is foreclosed by *Kellmer*, where we determined the Succession Clause "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits," 674 F.3d at 850, and it overlooks that, when the Companies are in conservatorship, the Succession Clause functions not only to grant the FHFA powers, but also to take powers from the shareholders.

Company during conservatorship and terminating those rights when the Agency institutes an administrative claims process as required when it becomes a receiver. *See* 12 U.S.C. § 4617(b)(3)-(5). We note that the Federal Circuit recently held, albeit without considering the Succession Clause, that Fannie Mae's former Chief Financial Officer had no takings claim based on the company's failure – pursuant to FHFA's regulations – to pay severance benefits as mandated by his employment contract because the CFO "was left with the right to enforce his contract against Freddie Mac in a breach of contract action . . . under state contract law." *Piszel v. United States*, 833 F.3d 1366, 1377 (Fed. Cir. 2016).

The class plaintiffs argue that because, as shareholders, they retain rights in the Companies during a conservatorship, the Succession Clause should be read to permit them to sue derivatively to protect those rights when the FHFA has a conflict of interest. They point to the decisions of two other circuits interpreting 12 U.S.C. § 1821(d)(2)(A), a nearly identical provision in FIRREA, to permit such an exception. *See First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999); *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1022-23 (9th Cir. 2001). Contrary to the class plaintiffs' assertions, two circuit court decisions do not so clearly "settle[] the meaning of [the] existing statutory provision" in FIRREA that we must conclude the Congress intended sub silentio to incorporate those rulings into the Recovery Act. *Merrill Lynch v. Dabit*, 547 U.S. 71, 85 (2006).

Nor are we convinced by the reasoning of those two cases that the Succession Clause implicitly excepts derivative suits where the FHFA would have a conflict of interest. The courts in those cases thought it would be irrational to transfer to an agency the right to sue itself derivatively because "the very object of the derivative suit mechanism is to permit shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so." *First Hartford*, 194 F.3d at 1295; *see also Delta Sav.*, 265 F.3d at 1022-23 (extending the exception to suits against certain agencies with which the conservator or receiver has an "interdependent" relationship and "managerial and operational overlap"). As the district court in this case noted, however, 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,'" rather than the plain statutory text to the contrary. *See Perry Capital LLC*, 70 F. Supp. 3d at 230-31. We therefore conclude the Succession Clause does not permit shareholders to bring derivative suits on behalf of the Companies even where the FHFA will not bring a derivative suit due to a conflict of interest.

b. The class plaintiffs' claims for breach of fiduciary duty are derivative but their contract-based claims are direct and may proceed

Having concluded the Succession Clause extends to derivative, but not direct, claims, it follows that the class plaintiffs' claims for breach of fiduciary duty are barred but their contract-based claims may proceed. The class plaintiffs contend they asserted both direct and derivative claims for breach of fiduciary duty, alleging a direct claim against the FHFA "with respect to . . . Fannie Mae" under Delaware law.[24] Class Pls.

[24] The district court applied Delaware law to the class plaintiffs' common-law claims. *See Perry Capital LLC*, 70 F. Supp. 3d at 235 n.39, 236, 238, 239 n.45. On appeal, all parties agree we should apply Delaware law to claims regarding Fannie Mae and Virginia law to those regarding Freddie Mac. The parties have thereby waived any objection to the district court's application of Delaware law to claims regarding Fannie Mae. *See A-L Assocs., Inc. v. Jorden*, 963 F.2d 1529, 1530 (D.C. Cir. 1992) (applying law "[t]he court below held, and the parties agree," was applicable); *Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397, 403 (D.C. Cir. 2012); *Jannenga v. Nationwide Life Ins. Co.*, 288 F.2d 169, 172 (D.C. Cir. 1961); *cf. Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 766 (D.C. Cir. 1992) (applying U.S. contract principles to determine whether a contractual choice-of-law provision was valid where the district court had applied those principles because "both parties here have assumed that American contract law principles control"). *Accord, e.g., Williams v. BASF Catalysts LLC*, 765 F.3d 306, 316 (3d Cir. 2014) (holding that "parties may waive choice-of-law issues" in part because "choice-of-law questions do not go to the court's jurisdiction"). We have occasionally held a party forfeited any objection to the district court's choice of law in part because we could detect no "error," *Wash. Metro. Area Transit Auth. v. Georgetown Univ.*, 347 F.3d 941, 945 (D.C. Cir. 2003); *Nello L. Teer Co. v. Wash. Metro. Area Transit Auth.*, 921 F.2d 300, 302 n.2 (D.C. Cir. 1990), or "apparent error" in the district court's choice, *Burke v. Air Serv Int'l, Inc.*, 685 F.3d 1102, 1105 (D.C. Cir. 2012). We do not read these cases to have established a standard for forfeiture or waiver particular to choice of law, especially considering none indicated that the absence of an error or "apparent" error was necessary to the outcome. In this case, we see no reason to deviate from the district court's selection of Delaware law for the claims regarding Fannie Mae.

We need not address whether the district court should have applied Virginia law to the claims regarding Freddie Mac because, for purposes of this appeal, Delaware and Virginia law

Br. at 21-22. In order to determine whether these claims are direct or derivative, we must examine (1) "[w]ho suffered the alleged harm" and (2) "who would receive the benefit of the recovery." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004); *see also Gentile v. Rossette*, 906 A.2d 91, 99-101 (Del. 2006). A suit is direct if "[t]he stockholder . . . demonstrate[s] that the duty breached was owed to the stockholder" and that "[t]he stockholder's claimed direct injury [is] independent of any alleged injury to the corporation." Tooley, 845 A.2d at 1039.

The class plaintiffs did not plead a direct claim for breach of fiduciary duty because they did not seek relief that would accrue directly to them. They instead requested a declaration that, "through the Third Amendment, Defendant[] FHFA ... breached [its] ... fiduciary dut[y] to Fannie Mae," and sought an award of "compensatory damages and disgorgement in favor of Fannie Mae." J.A. 278 ¶¶ 4-5. Both forms of relief would benefit Fannie Mae directly and the shareholders only derivatively. *See Tooley*, 845 A.2d at 1035.

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dictate the same result, *see Aref v. Lynch*, 833 F.3d 242, 262 (D.C. Cir. 2016) ("We need not determine which state's law applies . . . because the result is the same under all three" potentially applicable laws); *Skirlick v. Fid. & Deposit Co. of Md.*, 852 F.2d 1376, 1377 (D.C. Cir. 1988) (same), and the parties have waived any contention that yet another law should displace the district court's choice. The district court also cited federal case law in evaluating whether the class plaintiffs had a contractual right to dividends, *Perry Capital LLC*, 70 F. Supp. 3d at 237 & n.41, but the cited federal decisions do not displace state contract law, *cf. O'Melveny & Myers*, 512 U.S. at 85-89 (rejecting the argument that federal common law should govern tort claims lodged by the FDIC).

The class plaintiffs also asked the district court to declare the Third Amendment was not "in the best interests of Fannie Mae or its shareholders, and constituted waste and a gross abuse of discretion," J.A. 278 ¶ 3, but a declaration that only partially resolves a cause of action does not remedy any injury. *Cf. Calderon v. Ashmus*, 523 U.S. 740, 746-47 (1998) (holding that the case or controversy requirement of Article III was not satisfied where a prisoner sought a declaratory judgment as to the validity of a defense a state was likely to raise in his habeas action). In the introductory portion of their complaint, the class plaintiffs also sought rescission of the Third Amendment to remedy the alleged breach of fiduciary duty, but the class plaintiffs requested this relief only for their derivative claim. J.A. 215 ¶ 3 ("This is also a derivative action brought by Plaintiffs on behalf of Fannie Mae, seeking . . . equitable relief, including rescission, for breach of fiduciary duty"), 226 ¶ 27 ("[T]his action also seeks, derivatively on behalf of Fannie Mae, an award of . . . equitable relief with respect to such breach, including rescission of the Third Amendment").

In any event, the class plaintiffs forfeited in district court any argument that their claim for breach of fiduciary duty is direct. In its motion to dismiss, the FHFA contended the class plaintiffs' claims for breach of fiduciary duty were derivative, but the class plaintiffs did not respond by arguing they asserted a direct claim. Although they occasionally referred to the FHFA's fiduciary duties to the shareholders, the class plaintiffs did not develop any argument that the claims are direct and instead discussed separately why the Succession Clause does not bar "Their Direct Contract-Based Claims," Mem. in Opp'n to Mot. to

Dismiss, Doc. No. 33 at 25 *In re Fannie Mae / Freddie Mac*, 1:13-mc-01288 (Mar. 21, 2014) (hereinafter Class Pls. Opp'n to Mot. to Dismiss), and "Their Derivative Claims" for breach of fiduciary duty, *id.* at 32. The class plaintiffs then characterize their only count of breach of fiduciary duty as asserting "derivative claims." *Id*.

The class plaintiffs ask for a "remand to allow [them] to pursue their direct fiduciary breach claims regarding the Fannie Mae Third Amendment." Class Pls. Br. at 23. At oral argument they cited *DKT Memorial Fund v. Agency for International Development*, 810 F.2d 1236 (D.C. Cir. 1987), in which this court, "in the interest of justice," granted counsel's motion at oral argument to amend the complaint in order to correct an inadvertent error and then ruled the claims, as amended, were not subject to dismissal upon the grounds asserted by the defendants. *Id.* at 1239. In this case the class plaintiffs ask us to grant them leave to amend the complaint to add a new claim they are not asking us to rule on but instead want to pursue in district court. We see no reason to oust the district judge from making that decision in the first instance when the case returns to district court for further proceedings on certain of the plaintiffs' contract-based claims.

The district court also held the class plaintiffs' contract-based claims were derivative. *Perry Capital LLC*, 70 F. Supp. 3d at 235 & n.39, 239 n.45. Contrary to the FHFA's assertions, the class plaintiffs sufficiently appealed this ruling. Their statement of issues on appeal comprises whether the Succession Clause "bars any of Appellants' claims in this action." Furthermore, that the class plaintiffs' contract-based claims are direct is apparent from their extensive discussion of the FHFA's alleged breach of their contractual rights and the harm the alleged breach caused them.

Indeed, the contract-based claims are obviously direct "because they belong to" the class plaintiffs "and are ones that only [the class plaintiffs] can assert." *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1138 (Del. 2016). These are "not claims that could plausibly belong to" the Companies because they assert that the Companies breached contractual duties owed to the class plaintiffs by virtue of their stock certificates. *Id.* We therefore do not subject them to the two-part test set forth in Tooley, which determines "when a cause of action for breach of fiduciary duty or to enforce rights belonging to the corporation itself must be asserted derivatively." *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 176 (Del. 2015). The two-part test is necessary "[b]ecause directors owe fiduciary duties to the corporation and its stockholders, [and] there must be some way of determining whether stockholders can bring a claim for breach of fiduciary duty directly, or whether a particular fiduciary duty claim must be brought derivatively." *Citigroup Inc.*, 140 A.3d at 1139 (footnote omitted). *Tooley* has no application "when a plaintiff asserts a claim based on the plaintiff's own right." *Id.* at 113940; *El Paso Pipeline GP Co. v. Brinckerhoff*, 2016 WL 7380418, at *9 (Del. Dec. 20, 2016) ("[W]hen a plaintiff asserts a claim based upon the plaintiff's own right . . . *Tooley* does not apply").[25]

2. The Class Plaintiffs' contract-based claims

As a preliminary matter, the class plaintiffs assert the bar to equitable relief of 12 U.S.C. § 4617(f), discussed above, does not apply "to equitable claims related to contractual breaches," Class Pls. Br. at 34-35, but this argument is forfeit because it was not raised in district court. *Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 22 (D.C. Cir. 2010). Accordingly, we evaluate the class plaintiffs' contract-based claims only insofar as they seek damages. As discussed in greater detail above, *supra* at 17-37, an award of equitable relief against the FHFA with respect to the Third Amendment would impermissibly "restrain or affect the exercise of powers or functions of the [FHFA] as a conservator," § 4617(f), and a similar award against the Companies would plainly achieve the same result. The class plaintiffs next challenge the district court's dismissal under Rules 12(b)(1) and (6) of their claims

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[25] The class plaintiffs (the only party to address on the merits whether the contract-based claims are direct or derivative) cite only Delaware law in addressing the claims for breach of contract as to both Fannie Mae and Freddie Mac despite their assumption that Virginia law governs claims against Freddie Mac. The issue need detain us no further because we have found no indication Virginia would classify the breach of contract claims as derivative. *Cf. Simmons v. Miller*, 261 Va. 561, 573, 544 S.E.2d 666, 674 (2001) ("A derivative action is an equitable proceeding in which a shareholder asserts, on behalf of the corporation, a claim that belongs to the corporation rather than the shareholder . . . . [A]n action for injuries to a corporation cannot be maintained by a shareholder on an individual basis and must be brought derivatively.").

against the FHFA and the Companies for breach of contract and breach of the implied covenant as to the provisions in the stock certificates dealing with voting and dividend rights and liquidation preferences. Upon *de novo review, Kim v. United States*, 632 F.3d 713, 715 (D.C. Cir. 2011), we affirm the dismissal of all claims except for those regarding the liquidation preferences and the claim for breach of implied covenant regarding dividend rights.

a. Voting rights

The class plaintiffs contend the Third Amendment violates their stock certificates that, with some variations not relevant here, provide that a vote of two thirds of the stockholders is required "to authoriz[e], effect[] or validat[e] the amendment, alteration, supplementation or repeal of any of the provisions of [the] Certificate if such [action] would materially and adversely affect the . . . terms or conditions of the [stock]." J.A. 251. The class plaintiffs claim they were entitled to vote on the Third Amendment because it "nullif[ied] their right ever to receive a dividend or liquidation distribution," and thereby "materially and adversely affect[ed]" them. Class Pls. Reply Br. at 11. The FHFA does not respond to this argument on appeal, and the district court nowhere addressed it in dismissing the contract-based claims. We nonetheless affirm the district court's dismissal. Although the Third Amendment makes it impossible for the class plaintiffs to receive dividends or a liquidation preference, it was not an "alteration, supplementation or repeal of . . . provisions" in the certificates. Those provisions guarantee only the right to vote on certain changes to the certificates, not on any corporate action that affects the rights guaranteed by the certificates.

b. Dividend rights

The class plaintiffs' various stock certificates provide (with irrelevant variations in wording) that stockholders will "be entitled to receive, ratably, when, as and if declared by the Board of Directors, in its sole discretion . . . [,] non-cumulative cash dividends," J.A. 248, or "shall be entitled to receive, ratably, dividends . . . when, as and if declared by the Board," J.A. 250. According to the class plaintiffs, the certificates thereby guarantee them a right to dividends, discretionary though they may be. We agree with the FHFA's response that the class plaintiffs have no enforceable right to dividends because the certificates accord the Companies complete discretion to declare or withhold dividends.

The class plaintiffs argue they nonetheless have a contractual right to discretionary dividends because Delaware and Virginia limit directors' discretion to withhold dividends. This limit upon a board's discretion stems from its fiduciary duties to shareholders, not from the terms of their stock certificates. *See Gabelli & Co. v. Liggett Grp. Inc.*, 479 A.2d 276, 280 (Del. 1984) (Dividends may not be withheld as a result of "fraud or gross abuse of discretion"); *Penn v. Pemberton & Penn, Inc.*, 189 Va. 649, 658, 53 S.E.2d 823, 828 (Va. 1949) (Failure to declare dividends is actionable if it "is so arbitrary, or so unreasonable, as to amount to a breach of trust"). Such fiduciary duties have no bearing upon whether the terms of the contracts imposed a duty to declare dividends, as the class plaintiffs alleged.

Lastly, the class plaintiffs advance a convoluted argument that the Third Amendment violated their rights to receive mandatory dividends (1) for their preferred stock before any distributions on common stock, and (2) for their common stock "ratably," along with other holders of such stock. Before the Third Amendment, the class plaintiffs assert, Treasury could have received a dividend exceeding the 10% coupon on its liquidation preference only by exercising its option to purchase up to 79.9% of the Companies' common stock, and the payment of any dividend on that common stock would have required distributions to the class plaintiffs as well. To the class plaintiffs, it follows that their right to mandatory dividends was breached by the provision of the Third Amendment for dividends to be paid to Treasury that could (and at times did) exceed the 10% coupon. This argument fails because the plaintiffs have not shown their certificates guarantee that more senior shareholders will not exhaust the funds available for distribution as dividends. The class plaintiffs contend the Third Amendment "was a fiduciary breach, and hence cannot be relied on as the basis for nullifying the *mandatory* priority and ratability rights," Class Pls. Br. at 39, but this argument goes to their claims for breach of fiduciary duty, addressed above.

The class plaintiffs next challenge the district court's dismissal of their claim that the implied covenant prohibited the FHFA from depriving them of the opportunity to receive dividends. The class plaintiffs argue the district court wrongly concluded the FHFA did not breach the implied covenant because it acted within its statutory authority. *See Perry Capital LLC*, 70 F. Supp. 3d at 238-39. The FHFA contends the plaintiffs "try to impose fiduciary and other duties on the Conservator to always act in the best interests of shareholders, when [the Recovery Act] instead authorizes the Conservator to '[act] in the best interests of the [Companies] or the Agency,'" FHFA Br. at 18 (citing § 4617(b)(2)(J)(ii)) (second alteration in original), and that "the Conservator's discretion to declare dividends, unlike that of a corporate board, is without limitation," *id.* at 56 n.21. Insofar as the FHFA argues (and the district court held) that the Recovery Act preempts state law imposing an implied covenant, this approach is foreclosed by the plain text of the Recovery Act and by our precedent.

Virginia and Delaware law imposing an implied covenant of good faith and fair dealing is not "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hillman v. Maretta*, 133 S. Ct. 1943, 1949-50 (2013), and is therefore not preempted by the Recovery Act. The Recovery Act provides that the FHFA, as conservator, "may disaffirm or repudiate any contract" the Companies executed before the conservatorship "the performance of which the conservator . . . determines to be burdensome," 12 U.S.C. § 4617(d)(1), "within a reasonable period following" the agency's appointment as conservator, *id.* § 4617(d)(2). That the Recovery Act permits the FHFA in some circumstances to repudiate contracts the Companies concluded before the conservatorship indicates that the Companies' contractual obligations otherwise remain in force. *Cf. Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696, 700-01 (D.C. Cir. 1997) (so interpreting a nearly identical provision in FIRREA, 12 U.S.C. § 1821(e)). Furthermore, by providing for the FHFA to succeed to "all rights, titles, powers, and privileges of the [Companies]," 12 U.S.C. § 4617(b)(2)(A)(i), the Recovery Act places the FHFA "'in the shoes'" of the Companies and "does not permit [the agency] to increase the value of the [contract] in its hands by simply 'preempting' out of existence pre-receivership contractual obligations." *Waterview Mgmt*. Co., 105 F.3d at 701 (quoting *O'Melveny & Myers*, 512 U.S. at 87, in reaching the same conclusion for the Succession Clause of FIRREA, 12 U.S.C. § 1821(d)(2)(A)(i)).

The class plaintiffs next challenge the district court's conclusion that they failed to state a claim for breach of the implied covenant, which they contend required the Companies – and, therefore, their conservator – to act reasonably and not to deprive them of the fruits of their bargain, namely the opportunity to receive dividends. The FHFA urges us to affirm the district court's determination that the class plaintiffs' lack of an enforceable contractual right to dividends foreclosed the claim that the implied covenant instead provided such a right. *See Perry Capital LLC*, 70 F. Supp. 3d at 238.

Under Delaware law, "[e]xpress contractual provisions always supersede the implied covenant," *Gerber v. Enter. Prod. Holdings, LLC*, 67 A.3d 400, 419 (Del. 2013), *overruled on other grounds by Winshall v. Viacom Int'l Inc*., 76 A.3d 808, 815 n.13 (Del. 2013), and "one generally cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement," *Dunlap v. State Farm Fire & Cas. Co*., 878 A.2d 434, 441 (Del. 2005). Here, however, the stock certificates upon which the class plaintiffs rely provide for dividends "if declared by the Board of Directors, in its sole discretion." J.A. 248. A party to a contract providing for such discretion violates the implied covenant if it "act[s] arbitrarily or unreasonably." *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010); *see also Gerber*, 67 A.3d at 419 ("When exercising a discretionary right, a party to the contract must exercise its discretion reasonably" (emphasis omitted)). Virginia law similarly provides "where discretion is lodged in one of two parties to a contract . . . such discretion must, of course, be exercised in good faith." *Historic Green Springs, Inc. v. Brandy Farm, Ltd.*, 32 Va. Cir. 98, at *3 (Va. Cir. 1993) (alteration in original); *see also Va. Vermiculite, Ltd. v. W.R. Grace & Co.- Conn.*, 156 F.3d 535, 542 (4th Cir. 1998).

We remand this claim, insofar as it seeks damages, for the district court to evaluate it under the correct legal standard, namely, whether the Third Amendment violated the reasonable expectations of the parties. We note that the class plaintiffs specifically allege that some class members purchased their shares before the Recovery Act was enacted in July 2008 and the FHFA was appointed conservator the following September, while others purchased their shares later, but the class plaintiffs define their class action to include more broadly "all persons and entities who held shares . . . and who were damaged thereby," J.A. 262-63. The district court may need to redefine or subdivide the class depending upon what that court determines were the various plaintiffs' reasonable expectations. If the district court determines the enactment of the Recovery Act and the FHFA's appointment as conservator affected these expectations, then it should consider, *inter alia*, (1) Section 4617(b)(2)(J)(ii) (authorizing the FHFA to act "in the best interests of the [Companies] or the Agency"), (2) Provision 5.1 of the Stock Agreements, J.A. 2451, 2465 (permitting the Companies to declare dividends and make other distributions only with Treasury's consent), and (3) pertinent statements by the FHFA, *e.g.*, J.A. 217 ¶ 8, referencing *Statement of FHFA Director James B. Lockhart at News Conference Announcing Conservatorship of Fannie Mae and Freddie Mac* (Sept. 7, 2008) (The "FHFA has placed Fannie Mae and Freddie Mac into conservatorship. [Conservatorship] is 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 Enterprises until they are stabilized.").

The district court also held the class plaintiffs "fail to plead claims of breach of the implied covenant against the [Companies]" because they allege only that the FHFA's actions were arbitrary and unreasonable. *Perry Capital LLC*, 70 F. Supp. 3d at 239. This is a distinction without a difference because the action they challenge – the FHFA's adoption of the Third Amendment – was taken on behalf of the Companies. The Companies and the FHFA are thus identically situated for purposes of this claim.

c. Liquidation preferences

The class plaintiffs also allege the FHFA, by adopting the Third Amendment, breached the guarantees in their stock certificates and in the implied covenant to a share of the Companies' assets upon liquidation because it ensured there would be no assets to distribute. The FHFA urges us to affirm the district court's dismissal of these claims as unripe. *See Perry Capital LLC*, 70 F. Supp. 3d at 234-35.

"The ripeness doctrine generally deals with when a federal court can or should decide a case," *Am. Petrol. Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012), and has both constitutional and prudential facets. Ripeness "shares the constitutional requirement of standing that an injury in fact be certainly impending." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996). We decide whether to defer resolving a case for prudential reasons by "evaluat[ing] (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003); *see Am. Petrol.*, 683 F.3d at 386.

These claims satisfy the constitutional requirement because the class plaintiffs allege not only that the Third Amendment poses a "certainly impending" injury, *Nat'l Treasury*, 101 F.3d at 1427, but that it immediately harmed them by diminishing the value of their shares. *Cf. State Nat'l Bank v. Lew*, 795 F.3d 48, 56 (D.C. Cir. 2015) (holding unripe a claim seeking recovery for a present loss in share-price in part because the plaintiffs failed to allege "their current investments are worth less now, or have been otherwise adversely affected now"). The class plaintiffs allege the Third Amendment, by depriving them of their right to share in the Companies' assets when and if they are liquidated, immediately diminished the value of their shares. The case or controversy requirement of Article III of the U.S. Constitution is therefore met.

The FHFA (like the district court) says the claims are not prudentially ripe because there can be no breach of any contractual obligation to distribute assets until the Companies are required to perform, namely, upon liquidation. Not so. Under the doctrine of anticipatory breach, "a voluntary affirmative act which renders the obligor unable . . . to perform" is a repudiation, RESTATEMENT (SECOND) OF CONTRACTS § 250(b), that "ripens into a breach prior to the time for performance . . . if the promisee elects to treat it as such" by, for instance, suing for damages, *Franconia Assocs. v. United States*, 536 U.S. 129, 143 (2002) (internal quotation marks omitted); RESTATEMENT (SECOND) OF CONTRACTS §§ 253(1), 256 cmt. c. *Accord Lenders Fin. Corp. v. Talton*, 249 Va. 182, 189, 455 S.E.2d 232, 236 (Va. 1995); *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, C.A. No. 2742-VCN, 2009 WL 458779, at *5 & n.37 (Del. Ch. Feb. 23, 2009). An anticipatory breach satisfies prudential ripeness and therefore enables the promisee to seek damages immediately upon repudiation, *Sys. Council EM-3 v. AT&T Corp.*, 159 F.3d 1376, 1383 (D.C. Cir. 1998) ("[I]f a performing party unequivocally signifies its intent to breach a contract, the other party may seek damages immediately under the doctrine of anticipatory repudiation"). In other words, anticipatory breach is "a doctrine of accelerated ripeness" because it "gives the plaintiff the option to have the law treat the promise to breach [or the act rendering performance impossible] as a breach itself." *Homeland Training Ctr., LLC v. Summit Point Auto. Research Ctr.*, 594 F.3d 285, 294 (4th Cir. 2010) (citing *Franconia Assocs.*, 536 U.S. at 143).

The class plaintiffs' claims for breach of contract with respect to liquidation preferences are better understood as claims for anticipatory breach, so there is no prudential reason to defer their resolution.[26] Nor do we see any prudential obstacle to adjudicating the class plaintiffs' claim that repudiating the guarantee of liquidation preferences constitutes a breach of the implied covenant. Our holding that the claims are ripe sheds no light on the merit of those claims and, contrary to the assertions in the dissenting opinion (at 17), has no bearing upon the scope of the FHFA's statutory authority as conservator under the Recovery Act. Whether the class plaintiffs stated claims for breach of contract and breach of the implied covenant is best addressed by the district court in the first instance.[27] That court's earlier conclusion in the negative was made for "largely the same reasons" that it

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[26] Although the class plaintiffs do not describe the Third Amendment as "an anticipatory repudiation" until their reply brief, Class Pls. Reply Br. at 13, they have emphasized throughout this litigation that it "nullified – and thereby breached – the contractual rights to a liquidation distribution" by rendering performance impossible. Class Pls. Br. at 40-41; *see also, e.g.,* J.A. 223 ¶ 22 (alleging the Third Amendment "effectively eliminated the property and contractual rights of Plaintiffs and the Classes to receive their liquidation preference upon the dissolution, liquidation or winding up of Fannie Mae and Freddie Mac"); Class Pls. Opp'n to Mot. to Dismiss at 37 ("[T]he Third Amendment has made it impossible for [the Companies] ever to have . . . assets available for distribution to stockholders other than Treasury" and thereby "eliminated Plaintiffs' present . . . liquidation rights in breach of the Certificates" (internal quotation marks omitted)). The class plaintiffs allege they "paid valuable consideration in exchange for these contractual rights," which rights "had substantial market value . . . that [was] swiftly dissipated in the wake of the Third Amendment," J.A. 224 ¶ 23, causing the class plaintiffs to "suffer[] damages," *e.g.*, J.A. 269 ¶ 144.

[27] We remand the contract-based claims only insofar as they seek damages because the pleas for equitable relief are barred by

had held the claims unripe, *Perry Capital LLC*, 70 F. Supp. 3d at 236, and so must be reconsidered in light of our reversal of the court's holding on ripeness.

V. Conclusion

We affirm the judgment of the district court denying the institutional plaintiffs' claims against the FHFA and Treasury alleging arbitrary and capricious conduct and conduct in excess of their statutory authority because those claims are barred by 12 U.S.C. § 4617(f). With respect to the class plaintiffs' claims and those of the Arrowood and Fairholme plaintiffs, we affirm the judgment of the district court except for the claims alleging breach of contract and breach of the implied covenant of good faith and fair dealing regarding liquidation preferences and the claim for breach of the implied covenant with respect to dividend rights, which claims we remand to the district court for further proceedings consistent with this opinion.

So ordered.

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12 U.S.C. § 4617(f). "Because ripeness is a justiciability doctrine that is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction, we consider it first." *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 397 (D.C. Cir. 2008) (internal quotation marks and brackets omitted); *see also In re Aiken Cty*., 645 F.3d 428, 434 (D.C. Cir. 2011) ("The ripeness doctrine, even in its prudential aspect, is a threshold inquiry that does not involve adjudication on the merits"). We therefore first determined the claims are ripe, *supra* at 70-73, and only then concluded the requests for equitable relief are barred by § 4617(f).

BROWN, *Circuit Judge*, dissenting in part:

One critic has called it "wrecking-ball benevolence," James Bovard, Editorial, *Nothing Down*: *The Bush Administration's Wrecking-Ball Benevolence*, BARRON'S, Aug. 23, 2004, http://tinyurl.com/Barrons-Bovard; while another, dismissing the compassionate rhetoric, dubs it "crony capitalism," Gerald P. O'Driscoll, Jr., Commentary, F*annie/Freddie Bailout Baloney*, Cato Inst., http://tinyurl.com/Cato-O-Driscoll (last visited Feb. 13, 2017). But whether the road was paved with good intentions or greased by greed and indifference, affordable housing turned out to be the path to perdition for the U.S. mortgage market. And, because of the dominance of two so-called Government Sponsored Entities ("GSE"s)—the Federal National Mortgage Association ("Fannie Mae" or "Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie Mac" or "Freddie," collectively with Fannie Mae, the "Companies")—the trouble that began in the subprime mortgage market metastasized until it began to affect most debt markets, both domestic and international.

By 2008, the melt-down had become a crisis. A decade earlier, government policies and regulations encouraging greater home ownership pushed banks to underwrite mortgages to allow low-income borrowers with poor credit history to purchase homes they could not afford. Banks then used these risky mortgages to underwrite highly-profitable mortgage-backed securities—bundled mortgages—which hedge funds and other investors later bought and sold, further stoking demand for ever-riskier mortgages at ever-higher interest rates. Despite repeated warnings from regulators and economists, the GSEs' eagerness to buy these loans meant lenders had a strong incentive to make risky loans and then pass the risk off to Fannie and Freddie. By 2007, Fannie and Freddie had acquired roughly a trillion dollars' worth of subprime and non-traditional mortgages—approximately 40 percent of the value of all mortgages purchased. And since more risk meant more profit and the GSEs knew they could count on the federal government to cover their losses, their appetite for riskier mortgages was entirely rational.

The housing boom generated tremendous profit for Fannie and Freddie. But then the bubble burst. Individuals began to default on their loans, wrecking neighborhoods, wiping out the equity of prudent homeowners, and threatening the stability of banks and those who held or guaranteed mortgage-backed assets. In March 2008, Bear Sterns collapsed, requiring government funds to finance a takeover by J.P. Morgan Chase. In July, the Federal Deposit Insurance Corporation (the "FDIC") seized IndyMac. But Bear Sterns and IndyMac—huge companies, to be sure—paled in comparison to Fannie and Freddie, which together backed $5 trillion in outstanding mortgages, or nearly half of the $12 trillion U.S. mortgage market. In late-July 2008, Congress passed and President Bush signed the Housing and Economic Recovery Act of 2008, authorizing a new government agency, the Federal Housing Finance Agency ("FHFA" or the "Agency"), to serve as conservator or receiver for Fannie and Freddie if certain conditions were met; Fannie and Freddie were placed into FHFA conservatorship the following month. Only weeks thereafter, Lehman Brothers failed, the government bailed out A.I.G., Washington Mutual declared bankruptcy, and

Wells Fargo obtained government assistance for its buy-out of Wachovia.

There is no question that FHFA was created to confront a serious problem for U.S. financial markets. The Court apparently concludes a crisis of this magnitude justifies extraordinary actions by Congress. Perhaps it might. But even in a time of exigency, a nation governed by the rule of law cannot transfer broad and unreviewable power to a government entity to do whatsoever it wishes with the assets of these Companies. Moreover, to remain within constitutional parameters, even a less-sweeping delegation of authority would require an explicit and comprehensive framework. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.") Here, Congress did not endow FHFA with unlimited authority to pursue its own ends; rather, it seized upon the statutory text that had governed the FDIC for decades and adapted it ever so slightly to confront the new challenge posed by Fannie and Freddie.

Perhaps this was a bad idea. The perils of massive GSEs had been indisputably demonstrated. Congress could have faced up to the mess forthrightly. Had both Companies been placed into immediate receivership, the machinations that led to this litigation might have been avoided. *See* Thomas H. Stanton, *The Failure of Fannie Mae and Freddie Mac and the Future of Government Support for the Housing Finance System*, 14–15 (Brooklyn L. Sch., Conference Draft, Mar. 27, 2009), http://tinyurl.com/Stanton-Conference (arguing Fannie and Freddie could have been converted into wholly owned government corporations with limited lifespans in order to stabilize the mortgage market). But the question before the Court is not whether the good guys have stumbled upon a solution. There are no good guys. The question is whether the government has violated the legal limits imposed on its own authority.

Regardless of whether Congress had many options or very few, it chose a well-understood and clearly-defined statutory framework—one that drew upon the common law to clearly delineate the outer boundaries of the Agency's conservator or, alternatively, receiver powers. FHFA pole vaulted over those boundaries, disregarding the plain text of its authorizing statute and engaging in *ultra vires* conduct. Even now, FHFA continues to insist its authority is *entirely without limit* and argues for a complete ouster of federal courts' power to grant injunctive relief to redress *any action* it takes while purporting to serve in the conservator role. *See* FHFA Br. 21. While I agree with much of the Court's reasoning, I cannot conclude the anti-injunction provision protects FHFA's actions here or, more generally, endorses FHFA's stunningly broad view of its own power. Plaintiffs—not all innocent and ill-informed investors, to be sure—are betting the rule of law will prevail. In this country, *everyone* is entitled to win that bet. Therefore, I respectfully dissent from the portion of the Court's opinion rejecting the Institutional and Class Plaintiffs' claims as barred by the anti-injunction provision and all resulting legal conclusions.

I.

The Housing and Economic Recovery Act of 2008 ("HERA" or the "Act"), Pub. L. No. 110-289, 122 Stat. 2654 (codified at 12 U.S.C. § 4511, *et seq*.), established a new financial regulator, FHFA, and endowed it with the authority to act as conservator or receiver for Fannie and Freddie. The Act also temporarily expanded the United States Treasury's ("Treasury") authority to extend credit to Fannie and Freddie as well as purchase stock or debt from the Companies. My disagreement with the Court turns entirely on its interpretation of HERA's text.

Pursuant to HERA, FHFA may supervise and, if needed, operate Fannie and Freddie in a "safe and sound manner," "consistent with the public interest," while "foster[ing] liquid, efficient, competitive, and resilient national housing finance markets." 12 U.S.C. § 4513(a)(1)(B). The statute further authorizes the FHFA Director to "appoint [FHFA] as conservator or receiver" for Fannie and Freddie "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." *Id.* § 4617(a)(1), (2) (emphasis added). In order to ensure FHFA would be able to act quickly to prevent the effects of the subprime mortgage crisis from cascading further through the United States and global economies, HERA also provided "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) (emphasis added).

By its plain terms, HERA's broad anti-injunction provision bars equitable relief against FHFA only when the Agency acts within its statutory authority—*i.e.* when it performs its "powers or functions." *See*

New York v. FERC, 535 U.S. 1, 18 (2002) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). Accordingly, having been appointed as "conservator" for the Companies, FHFA was obligated to behave in a manner consistent with the conservator role as it is defined in HERA or risk intervention by courts. Indeed, this conclusion is consistent with judicial interpretations of HERA's sister statute and, more broadly, with the common law.

A.

FHFA's general authorization to act appears in HERA's "[d]iscretionary appointment" provision, which states, "The Agency may, at the discretion of the Director, be appointed conservator or receiver" for Fannie and Freddie. 12 U.S.C. § 4617(a)(2) (emphasis added). The disjunctive "or" clearly indicates FHFA may choose to behave either as a conservator or as a receiver, but it may not do both simultaneously. *See also id.* § 4617(a)(4)(D) ("The appointment of the Agency as receiver of a regulated entity under this section shall immediately terminate any conservatorship established for the regulated entity under this chapter."). The Agency chose the first option, publicly announcing it had placed Fannie and Freddie into conservatorship on September 6, 2008 after a series of unsuccessful efforts to capitalize the Companies. They remain in FHFA conservatorship today. Accordingly, we must determine the statutory boundaries of power, if any, placed on FHFA when it functions as a conservator and determine whether FHFA stepped out of bounds.

The Court emphasizes Subsection 4617(b)(2)(B)'s general overview of the Agency's purview:

> The Agency may, as conservator or receiver—
>
> (i) take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity;
>
> (ii) collect all obligations and money due the regulated entity;
>
> (iii) perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator or receiver;
>
> (iv) preserve and conserve the assets and property of the regulated entity; and
>
> (v) provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver.

Id. § 4617(b)(2)(B). From this text, the Court intuits a general statutory mission to behave as a "conservator" in virtually all corporate actions, presumably transitioning to a "receiver" only at the moment of liquidation. Op. 27 ("[HERA] openly recognizes that sometimes conservatorship will involve managing the regulated entity in the lead up to the appointment of a liquidating receiver."); 32 ("[T]he duty that [HERA] imposes on FHFA to comply with receivership procedural protections textually turns on FHFA actually liquidating the Companies."). In essence, the Court's position holds that because there was a financial crisis and only Treasury offered to serve as White Knight, both FHFA and Treasury may take any action they wish, apart from formal liquidation, without judicial oversight. This analysis is dangerously far-reaching. *See generally* 2 James Wilson, *Of the Natural Rights of Individuals, in* THE WORKS OF JAMES WILSON 587

(1967) (warning it is not "part of natural liberty . . . to do mischief to anyone" and suggesting such a nonexistent right can hardly be given to the state to impose by fiat). While the line between a conservator and a receiver may not be completely impermeable, the roles' heartlands are discrete, well-anchored, and authorize essentially distinct and specific conduct.

For clarification of the general mission statement appearing in Subsection (B), the reader need only continue to read through Subsection 4617(b)(2). *See Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012) ("[T]o resolve this [statutory interpretation of HERA] issue, we need only heed Professor Frankfurter's timeless advice: '(1) Read the statute; (2) read the statute; (3) read the statute!'" (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in* BENCHMARKS 196, 202 (1967))).

A mere two subsections later, HERA helpfully lists the specific "powers" that FHFA possesses once appointed conservator:

> The Agency may, as *conservator*, take such action as may be—
>
> (i) necessary to put the regulated entity in a sound and solvent condition; and
>
> (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.

12 U.S.C. § 4617(b)(2)(D) (emphasis added). The next subsection defines FHFA's "[a]dditional powers as *receiver*:"

> In any case in which the Agency is acting as receiver, the Agency shall place the regulated

> entity in liquidation and proceed to realize upon the assets of the regulated entity in such manner as the Agency deems appropriate, including through the sale of assets, the transfer of assets to a limited-life regulated entity[,] . . . or the exercise of any other rights or privileges granted to the Agency under this paragraph.

Id. § 4617(b)(2)(E) (emphasis added). Apparently, when the Court asserts "for all of their arguments that FHFA has exceeded the bounds of conservatorship, the institutional stockholders have no textual hook on which to hang their hats," Op. 36, it refers solely to the limited confines of Subsection 4617(b)(2)(B).

Plainly the text of Subsections 4617(b)(2)(D) and (b)(2)(E) mark the bounds of FHFA's conservator or receiver powers, respectively, if and when the Agency chooses to exercise them in a manner consistent with its general authority to "operate the regulated entity" appearing in Subsection 4617(b)(2)(B).[1] Of course,

[1] The Court makes much of the statute's statement that a conservator "may" take action to operate the company in a sound and solvent condition and preserve and conserve its assets while a receiver "*shall*" liquidate the company. It concludes the statute permits, but does not compel in any judicially enforceable sense, FHFA to preserve and conserve Fannie's and Freddie's assets however it sees fit. *See* Op. 21–25. I disagree. Rather, read in the context of the larger statute—especially the specifically defined powers of a conservator and receiver set forth in Subsections 4617(b)(2)(D) and (b)(2)(E)—Congress's decision to use permissive language with respect to a conservator's duties is best understood as a simple concession to the practical reality that a conservator may not always succeed in rehabilitating its ward. The statute wisely acknowledges that it is "not in the power of

this is not to say FHFA may take action if and only if the preconditions listed in the statute are met. Indeed, in provisions following the specific articulation of powers contained in Subsections (D) and (E), and thus drafted in contemplation of the distinctions articulated in those earlier subsections, the statute lists certain powers that may be exercised by FHFA as either a "conservator or receiver." 12 U.S.C. § 4617(b)(2)(G) (power to "transfer or sell any asset or liability of the regulated entity in default" without prior approval by the regulated entity); *id.* § 4617(b)(2)(H) (power to "pay [certain] valid obligations of the regulated entity"). Indeed, each of these powers is entirely consistent with *either* the Subsection (D) conservator role or the Subsection (E) receiver role, and they do not override the distinctions between them. Congress cannot be expected to specifically address an entire universe of possible actions in its enacted text—assigning each to a "conservator," a "receiver," or both. *See, e.g.*, *id.* § 4617(b)(2)(C) (joint conservator/receiver power to "provide for the exercise of any function by any stockholder, director, or officer of any regulated entity"). But if a power is enumerated as that of a "receiver" (or fairly read to be a "receiver"

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any man to command success" and does not convert failure into a legal wrong. *See* Letter from George Washington to Benedict Arnold (Dec. 5, 1775), *in* 3 THE WRITINGS OF GEORGE WASHINGTON, 192 (Jared Sparks, ed., 1834). Of course, this does not mean the Agency may affirmatively sabotage the Companies' recovery by confiscating their assets quarterly to ensure they cannot pay off their crippling indebtedness. There is a vast difference between recognizing that flexibility is necessary to permit a conservator to address evolving circumstances and authorizing a conservator to undermine the interests and destroy the assets of its ward without meaningful limit.

power), FHFA cannot exercise that power while calling itself a "conservator." The statute confirms as much: the Agency "as conservator or receiver" may "exercise all powers and authorities *specifically granted to conservators or receivers, respectively*, under [Section 4617], and such *incidental powers* as shall be necessary to carry out such powers." *Id.* § 4617(J)(i) (emphasis added).

A conservator endeavors to "put the regulated entity in a sound and solvent condition" by "reorganizing [and] rehabilitating" it, and a receiver takes steps towards "liquidat[ing]" the regulated entity by "winding up [its] affairs." 12 U.S.C. § 4617(a)(2), (b)(2)(D)–(E).[22] In short, FHFA may choose whether it intends to serve as a conservator or receiver; once the choice is made, however, its "hard operational calls" consistent with its "managerial judgment" are statutorily confined to acts within its chosen role. *See* Op. 23. There is no such thing as a hybrid conservator-receiver capable of governing the Companies in any manner it chooses up to the very moment of liquidation. *See* Op. 55–56 (noting HERA "terminates [shareholders] rights and claims" in receivership and acknowledging

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[2] The Director's discretion to appoint FHFA as "'conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity'" does not suggest slippage between the roles. *See* FHFA Br. 41 (quoting 12 U.S.C. § 4617(a)(2)). Between the conservator and receiver roles, FHFA surely has the power to accomplish each of the enumerated functions; nonetheless, a conservator can no more "wind[] up" a company than a receiver can "rehabilitat[e]" it. *See* 12 U.S.C. § 4617(b)(3)(B) (using "liquidation" and "winding up" as synonyms).

shareholders' direct claims against and rights in the Companies survive during conservatorship).[3]

Moreover, it is the proper role of courts to determine whether FHFA's challenged actions fell within its statutorily-defined conservator role. In *County of Sonoma v. FHFA*, for example, when our sister circuit undertook this inquiry, it observed, "If the [relevant] directive falls within FHFA's conservator powers, it is insulated from review and this case must be dismissed," but "[c]onversely, the anti-judicial review provision is inapplicable when FHFA acts beyond the scope of its conservator power." 710 F.3d 987, 992 (9th Cir. 2013); *see also Leon Cty. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012) ("FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp."). Here, the Court abdicates this crucial responsibility, blessing FHFA with unreviewable discretion over any action—short of formal liquidation—it takes towards its wards.

B.

But HERA does not exist in an interpretive vacuum. Congress imported the powers and limitations FHFA enjoys in its "conservator" and "receiver" roles,

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[3] HERA's provision for judicial review over a claim promptly filed "within 30 days" of the Director's decision to appoint a conservator or receiver further indicates Congress contemplated continuity of the conservator or receiver role during the period the conservatorship or receivership endured. 12 U.S.C. § 4617(a)(5). Here, therefore, in transitioning sub silencio from the conservator to receiver role, FHFA has escaped the statute's contemplated, though admittedly brief, period for judicial review following the transition.

as well as the insulation from judicial review that accompanies them, directly from the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 10173, 103 Stat. 183, which governs the FDIC. *See* Mark A. Calabria, *The Resolution of Systemically Important Financial Institutions: Lessons from Fannie and Freddie* 10 (Cato Inst., Working Paper No. 25, 2015), http://tinyurl.com/Cato-Working-Paper ("In crafting the conservator and receivership provisions . . . the Committee staff . . . quite literally 'marked up' Sections 11 and 13 of the [Federal Deposit Insurance Act ("FDIA"), FIRREA's predecessor statute] . . . . The presumption was that FDIA powers would apply to a GSE resolution, unless there was a compelling reason otherwise."). Our interpretation of conservator powers and the judiciary's role in policing their boundaries under HERA is, therefore, guided by congressional intent expressed in FIRREA and the case law interpreting it. *See Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978) (noting when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law" and to have "adopte[d] that interpretation"); *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("*Statutory provisions in pari materia* normally are construed together to discern their meaning."); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) [hereinafter *Reading of Statutes*] ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.").

In language later copied word-for-word into HERA, FIRREA lists the FDIC's powers "as conservator or receiver," 12 U.S.C. § 1821(d)(2)(A)–(B), and it later lists the FDIC's "[p]owers as conservator" alone, *id.* § 1821(d)(2)(D). Save for references to a "regulated entity" in place of a "depository institution," the conservator powers delineated in the two statutes are *identical*. In fact, FIRREA's text demonstrates the Legislature's clear intent to create a textual distinction between conservator and receiver powers:

> The FDIC is authorized to act as conservator or receiver for insured banks and insured savings associations that are chartered under Federal or State law. The title also distinguishes between the powers of a conservator and receiver, *making clear that a conservator operates or disposes of an institution as a going concern while a receiver has the power to liquidate and wind up the affairs of an institution*.

H.R. REP. No. 101-209, at 398 (1989) (Conf. Rep.) (emphasis added). Courts have respected this delineation, noting "Congress did not use the phrase 'conservator or receiver' loosely." 1185 *Ave. of Americas Assocs. v. RTC*, 22 F.3d 494, 497 (2d Cir. 1994) ("Throughout FIRREA, Congress used 'conservator or receiver' where it granted rights to both conservators and receivers, and it used 'conservator' or 'receiver' individually where it granted rights to the [agency] in only one capacity.").

FIRREA had assigned to "conservators" responsibility for taking "such action as may be . . . necessary to put the insured depository institution in a sound and solvent condition; and . . . appropriate to carry on the business of the institution and preserve and conserve [its] assets," 12 U.S.C. § 1821(d)(2)(D), and it imposed upon them a "fiduciary duty to minimize the institution's losses," 12 U.S.C. § 1831f(d)(3). "Receivers," on the other hand, "place the insured depository institution in liquidation and proceed to realize upon the assets of the institution." *Id.* § 1821(d)(2)(E). The proper interpretation of the text is unmistakable: "a conservator may operate and dispose of a bank as a going concern, while a receiver has the power to liquidate and wind up the affairs of an institution." *James Madison Ltd. ex rel. Hecht v. Ludwig*, 82 F.3d 1085, 1090 (D.C. Cir. 1996); *see also*, *e.g.*, *Del E. Webb McQueen Dev. Corp. v. RTC*, 69 F.3d 355, 361 (9th Cir. 1995) ("The RTC [a government agency similar to the FDIC], as conservator, operates an institution with the hope that it might someday be rehabilitated. The RTC, as receiver, liquidates an institution and distributes its proceeds to creditors according to the priority rules set out in the regulations."); *RTC v. United Tr. Fund, Inc.*, 57 F.3d 1025, 1033 (11th Cir. 1995) ("The conservator's mission is to conserve assets[,] which often involves continuing an ongoing business. The receiver's mission is to shut a business down and sell off its assets. A receiver and conservator consider different interests when making . . . strategic decision[s]."). The two roles simply do not overlap, and any conservator who "winds up the affairs of an institution" rather than operate it "as a going concern"—within the context of a formal liquidation or not—does so outside its authority as conservator under the statute.

Of course, parameters for the "conservator" and "receiver" roles are not the only things HERA lifted directly from FIRREA. The anti-injunction clause at issue here came too. Section 1821(j) of FIRREA provided, "[N]o court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j). Another near-perfect fit.

Indeed, *National Trust for Historic Preservation in the United States v. FDIC* emphasized that, while FIRREA's anti-injunction clause prevented review of the FDIC's actions where it had "exercise[d the] powers or functions" granted to it as "conservator or receiver," the Court retained the ability to decide claims alleging the agency "ha[d] acted or propose[d] to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions." 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring); *see also Freeman v. FDIC*, 56 F.3d 1394, 1398 (D.C. Cir. 1995) ("'[Section] 1821(j) does indeed bar courts from restraining or affecting the exercise of powers or functions of the FDIC as a conservator or a receiver . . . unless it has acted or proposed to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions.'" (quoting *Nat'l Tr. for Historic Pres.*, 21 F.3d at 472 (Wald, J., concurring))). Insulating all actions within the conservator role is an entirely different proposition from exempting actions *outside* that role, and this Circuit's precedent leaves no doubt that a thorough analysis is required to determine where on the continuum an agency stands before applying FIRREA's—or HERA's—anti-injunction clause to bar a plaintiff's claims.

C.

When Congress lifted HERA's conservatorship standards verbatim from FIRREA, it also incorporated the long history of fiduciary conservatorships at common law baked into that statute. Indeed, "[i]t is a familiar maxim that a statutory term is generally presumed to have its common-law meaning." *Evans v. United States*, 504 U.S. 255, 259 (1992); *see Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."); *see generally* Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 Cath. U. L. Rev. 401 (1968) (discussing the interaction between statutes and judicial decisions across a number of fields, including commercial law). As Justice Frankfurter colorfully put it, "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Reading of Statutes, supra*, at 537.

We have an obvious transplant here. At common law, "conservators" were appointed to protect the legal interests of those unable to protect themselves. In the probate context, for example, a conservator was bound to act as the fiduciary of his ward. *See In re Kosmadakes*, 444 F.2d 999, 1004 (D.C. Cir. 1971).

This duty forbade the conservator—whether overseeing a human or corporate person—from acting for the benefit of the conservator himself or a third party. *See RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1453–54 (8th Cir. 1992) (observing "[a]t least as early as the 1930s, it was recognized that the purpose of a conservator was to maintain the institution as an ongoing concern," and holding "the distinction in duties between [RTC] conservators and receivers" is thus not "more theoretical than real").[4]

Consequently, today's Black's Law Dictionary defines a "conservator" as a "guardian, protector, or preserver," while a "receiver" is a "disinterested person appointed . . . for the protection or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt [entity] or is otherwise being litigated)." BLACK'S LAW DICTIONARY 370, 1460 (10th ed. 2014). These "[w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning." *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, J., concurring).[5]

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[4] While the execution of multiple contracts with Treasury "bears no resemblance to the type of conservatorship measures that a private common-law conservator would be able to undertake," Op. 34, that is a distinction in degree, not in kind.

[5] These legal definitions are reflected in the terms' ordinary meaning. For example, the *Oxford English Dictionary* defines a "conservator" as "[a]n officer appointed to conserve or manage something; a keeper, administrator, trustee of some organization, interest, right, or resource." 3 OXFORD ENGLISH DICTIONARY 766 (2d ed. 1989). In contrast, it defines a "receiver" as "[a]n official appointed by a government . . . to receive . . . monies due; a collector." 13 OXFORD ENGLISH DICTIONARY 317–18 (2d ed. 1989).

They comprise the common law vocabulary that Congress chose to employ in FIRREA and, later, in HERA to authorize the FDIC and FHFA to serve as "conservators" in order to "preserve and conserve [an institution's] assets" and operate that institution in a "sound and solvent" manner. 12 U.S.C. § 1821(d)(2)(D).

The word "conservator," therefore, is not an infinitely malleable term that may be stretched and contorted to encompass FHFA's conduct here and insulate Plaintiffs' APA claims from judicial review. Indeed, the Court implicitly acknowledges this fact in permitting the Class Plaintiffs to mount a claim for anticipatory breach of the promises in their shareholder agreements. *See* Op. 71–73. A proper reading of the statute prevents FHFA from exceeding the bounds of the conservator role and behaving as a *de facto* receiver.

The Court suggests FHFA's incidental power to, "as conservator or receiver[,] . . . take any action authorized by [Section 4617], which the *Agency* determines is in the bes interests of the regulated entity or the Agency" in 12 U.S.C. § 4617(b)(2)(J)(ii) erases any outer limit to FHFA's statutory powers despite the common law definition of "conservator" and, therefore, forecloses *any* opportunity for meaningful judicial review of FHFA's actions in conducting its so-called conservatorship at the time of the Third Amendment. *See* Op. 33–34. Of course, the Court's reading of Subsection 4617(b)(2)(J)(ii) directly contradicts the immediately-preceding subsection's authorization of FHFA

Regardless of the terms' audience, therefore, a "conservator" protects and preserves assets for an entity while a "receiver" operates as a collection agent for creditors.

"as conservator or receiver" to "exercise all powers and authorities specifically granted to *conservators or receivers, respectively*." 12 U.S.C. § 4617(b)(2)(J)(i) (emphasis added). It also upends Subsection 4617(a)(5)'s provision of judicial review for actions FHFA may take in certain facets of its receiver role. But even if that were not the case, Supreme Court precedent requires *an affirmative act by Congress*—an explicit "instruct[ion]" that review should proceed in a "contrary" manner—to authorize departure from a common law definition. *Morissette*, 342 U.S. at 263. And given the potential for disruption in the financial markets discussed in Part III *infra*, one would expect Congress to express itself explicitly in this matter. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). Congress offered no such statement here.

Rather, the more appropriate reading of the relevant text merely permits FHFA to engage in self-dealing transactions, an authorization otherwise inconsistent with the conservator role. *See Gov't of Rwanda v. Johnson*, 409 F.3d 368, 373 (D.C. Cir. 2005) (discussing "the age-old principle applicable to fiduciary relationships that, unless there is a full disclosure by the agent, trustee, or attorney of his activity and interest in the transaction to the party he represents and the obtaining of the consent of the party represented, the party serving in the fiduciary capacity cannot receive any profit or emolument from the transaction"); *see also* 7 COLLIER ON BANKRUPTCY ¶ 1108.09 (16th ed.) (noting a trustee's duty of loyalty in bankruptcy law requires a "single-minded devotion to the interests of those on whose behalf the trustee acts"). FHFA operating as a conservator may act in its own interests to protect both the Companies and the taxpayers from whom the Agency was ultimately forced to borrow, but FHFA is not empowered to jettison every duty a conservator owes its ward, and it is certainly not entitled to disregard the statute's own clearly defined limits on conservator power.

In fact, FIRREA contains a nearly identical self-dealing provision, which provides, "The [FDIC] may, as conservator or receiver . . . take any action authorized by this chapter, which the [FDIC] determines is in the best interests of the depository institution, its depositors, or the [FDIC]." 12 U.S.C. § 1821(d)(2)(J)(ii). This authorization has not given courts pause in interpreting FIRREA to require the FDIC to behave within its statutory role. *See Nat'l Tr. for Historic Pres*., 21 F.3d at 472 (Wald, J., concurring) ("[Section] 1821(j) does indeed bar courts from restraining or affecting the exercise of powers or functions of the FDIC as a conservator or a receiver, unless it has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions."); *see also Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997) (holding the statutory bar on judicial review of the FDIC's actions taken as a conservator or receiver "does not bar injunctive relief when the FDIC has acted beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions").[6]

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[6] The Court also suggests the authority to act "'in the best interests of the regulated entity or *the Agency*'" is consistent with the

II.

Having determined this Court may enjoin FHFA if it exceeded its powers as conservator of Fannie and Freddie, I now examine FHFA's conduct. It is important to note at the outset the *motives* behind any actions taken by FHFA are irrelevant to this inquiry, as no portion of HERA's text invites such an analysis. Rather, I examine whether or not FHFA acted beyond its authority, looking only to whether its actions are consistent either with (1) "put[ting] the regulated entity in a sound and solvent condition" by "reorganizing [and] rehabilitating" it as a conservator or (2) taking steps towards "liquidat[ing]" it by "winding up [its] affairs" as a receiver. 12 U.S.C. § 4617(a)(2), (b)(2)(D)–(E).

In September 2008, FHFA placed Fannie and Freddie into conservatorship; Director James Lockhart explained the conservatorship as "a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations" and promised FHFA would "act as the conservator to operate [Fannie and Freddie] until they are stabilized." Press Release, Fed. Hous.

Director's mandate to protect the "'public interest.'" Op. 8 (quoting 12 U.S.C. § 4513(a)(1)(B)(v)). Of course, the FHFA Director is also bound to "carr[y] out [FHFA's] statutory mission only through activities that are authorized under and consistent with this chapter and the authorizing statutes." *Id.* § 4513(a)(1)(B)(iv). Indeed, this text only confirms what should have been evident: the availability of meaningful judicial review cannot bend to exigency, especially since Congress clearly did not believe the 2008 financial crisis required a more far-reaching statutory authorization than prior occasions of financial distress had commanded.

Fin. Agency, Statement of FHFA Director James B. Lockhart at News Conference Announcing Conservatorship of Fannie Mae and Freddie Mac (Sept. 7, 2008), http://tinyurl.com/Lockhart-Statement. FHFA even promised it would "continue to retain all rights in the [Fannie and Freddie] stock's financial worth; as such worth is determined by the market." JA 2443 (FHFA Fact Sheet containing "Questions and Answers on Conservatorship"). And, for a period of time thereafter, FHFA did in fact manage the Companies within the conservator role. It even enlisted Treasury to provide cash infusions that, while costly, preserved at least a portion of the value of the market-held shares in the corporations.

But the tide turned in August 2012 with the Third Amendment and its "Net Worth Sweep," transferring nearly all of the Companies' profits into Treasury's coffers. Specifically, the Third Amendment replaced Treasury's right to a fixed-rate 10 percent dividend with the right to sweep Fannie and Freddie's entire quarterly net worth (except for an initial capital reserve, which initially totaled $3 billion and will decline to zero by 2018). Additionally, the agreement provided that, regardless of the amount of money paid to Treasury as part of this Net Worth Sweep dividend, Fannie and Freddie would continue to owe Treasury the $187.5 billion it had originally loaned the Companies. It was, to say the least, a highly unusual transaction. Treasury was no longer another, admittedly very important, investor entitled to a preferred share of the Companies' profits; it had received a contractual right from FHFA to loot the Companies to the guaranteed exclusion of all other investors.

In an August 2012 press release summarizing the Third Amendment's terms, Treasury took a very different tone from Lockhart's 2008 statement: "[W]e are taking the next step toward responsibly *winding down* Fannie Mae and Freddie Mac, while continuing to support the necessary process of repair and recovery in the housing market." Press Release, Dep't of Treasury, Treasury Department Announces Further Steps To Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012), http://tinyurl.com/Treasury-Press-Release (emphasis added). Treasury further noted the Third Amendment would achieve the "important objective[]" of "[a]cting upon the commitment made in the Administration's 2011 White Paper that the GSEs will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." *Id.* The Acting FHFA Director echoed Treasury's sentiment in April 2013, explaining to Congress the following year the Net Worth Sweep would "wind down" Fannie and Freddie and "reinforce the notion that [they] will not be building capital as a potential step to regaining their former corporate status." Statement of Edward J. DeMarco, Acting Director, FHFA, Before the S. Comm. on Banking, Hous. & Urban Affairs (Apr. 18, 2013), http://tinyurl.com/DeMarco-Statement.

The evolution of FHFA's position from 2008 to 2013 is remarkable; it had functionally removed itself from the role of a HERA conservator. FHFA and Treasury even described their actions using HERA's *exact phrase defining a receiver's conduct*, yet FHFA still purported to exercise only its power as a conservator and operated free from HERA's constraints on receivers. *See* 12 U.S.C. § 4617(a)(4)(D), (b)(2)(E), (b)(3), (c) (establishing liquidation procedures and priority requirements); *id.* § 4617(a)(5) (providing for judicial review).

The shift in policy was borne out in FHFA's and Treasury's actions. Indeed, all parties agree the Net Worth Sweep had the effect of replacing a fixed-rate dividend with a quarterly transfer of each company's net worth above an initial (and declining) capital reserve of $3 billion. There is similarly no dispute that Treasury collected a $130 billion dividend in 2013, $40 billion in 2014, and $15.8 billion in 2015. In fact, during the period from 2008 to 2015, Fannie and Freddie together paid Treasury $241.2 billion, an amount well in excess of the $187.5 billion Treasury loaned the Companies. FHFA's decision to strip these cash reserves from Fannie and Freddie, consistently divesting the Companies of their near-entire net worth, is plainly antithetical to a conservator's charge to "preserve and conserve" the Companies' assets.

Of course, and as the Court observes, Op. 29–31, Fannie and Freddie continue to operate at a profit. Indeed, as early as the second quarter of 2012, the Companies had outearned Treasury's 10 percent cash dividend. Nonetheless, the Net Worth Sweep imposed through the Third Amendment—which was executed shortly after the second quarter 2012 earnings were released—confiscated all but a small portion of Fannie's and Freddie's profits. The maximum reserve of $3 billion, given the Companies' enormous size, rendered them extremely vulnerable to market fluctuations and risked triggering a need to once again infuse Fannie and Freddie with taxpayer money. *See* JA 1983 (2012 SEC filing stating "there is significant uncertainty in the current market environment, and any changes in the trends in macroeconomic factors that [Fannie] currently anticipate[s], such as home prices and unemployment, may cause [its] future credit-related expenses or income and credit losses to vary significantly from [its then-]current expectations"). In fact, FHFA has since referred to the Companies, even with their several-billion-dollar cushion, as "effectively balance-sheet insolvent" and "a textbook illustration of instability." Defs. Mot. to Dismiss at 19, *Samuels v. FHFA*, No. 13-cv-22399 (S.D. Fla. Dec. 6, 2013), ECF No. 38; *see also generally*, Statement of Melvin L. Watt, Director, FHFA, Statement Before the H. Comm. on Fin. Servs., at 3 (Jan. 27, 2015), http://tinyurl.com/Watt-Statement ("[U]nder the terms of the [contracts with Treasury], the [Companies] do not have the ability to build capital internally while they remain in conservatorship."). As time went on, and the maximum reserve decreased, the situation only deteriorated. Given the task of replicating their successful rise each quarter amid volatile market conditions, it is surprising the Companies managed to maintain consistent profitability until 2016, when Freddie Mac posted a $200 million loss in the first quarter. *See* FREDDIE MAC, FORM 10-Q FOR THE QUARTERLY PERIOD ENDED MARCH 31, 2016, at 7 (May 3, 2016). Under the circumstances, it strains credulity to argue FHFA was acting as a conservator to "observe[Fannie's and Freddie's] economic performance over time" and consider other regulatory options when it executed the Third Amendment. Op. 33. FHFA and

Treasury are not "studying" the Companies, they are profiting off of them![7]

Nonetheless, the Court suggests the Third Amendment was simply a logical extension of the principles articulated in the prior two agreements. Op. 25–26. This is incorrect; the Net Worth Sweep fundamentally transformed the relationship between the Companies and Treasury: a 10 percent dividend became a sweep of the Companies' near-entire net worth; an in-kind dividend option disappeared in favor of cash payments; the ability to retain capital above and beyond the required dividend payment evaporated; and, most importantly, the Companies lost any hope of repaying Treasury's liquidation preference and freeing themselves from its debt. Indeed, the capital depletion accomplished in the Third Amendment, regardless of motive, is patently incompatible with any definition of the conservator role. Outside the litigation context, even FHFA agrees: "As one of the primary objectives of conservatorship of a regulated entity would be restoring that regulated entity to a sound and solvent condition, allowing capital distributions to deplete the entity's conservatorship

[7] Similarly, any argument that the Third Amendment was executed to avoid a downward spiral hardly saves FHFA at this juncture. *See, e.g.*, Op. 31–32. As an initial matter, the contention rests entirely upon an examination of motives. *But see id*. 32 (confirming motives are irrelevant to the legal inquiry). Second, even if one were to consider motives, the availability of an in-kind dividend and information recently obtained in this litigation creates, to put it mildly, a dispute of fact regarding the motivations behind FHFA and Treasury's decision to execute the Third Amendment.

assets would be inconsistent with the agency's statutory goals, as they would result in removing capital at a time when the Conservator is charged with rehabilitating the regulated entity." 76 Fed. Reg. 35,724, 35,727 (June 20, 2011). But rendering Fannie and Freddie mere pass-through entities for huge amounts of money destined for Treasury does exactly that which FHFA has deemed impermissible. Even Congress, in debating the Consolidated Appropriations Act of 2016, H.R. 2029, 114th Cong. § 702 (2015), acknowledged such action would require additional congressional authorization. *See* 161 Cong. Rec. S8760 (daily ed. Dec. 17, 2015) (statement of Sen. Corker) (noting the Senate Banking Committee passed a bipartisan bill to "protect taxpayers from future economic down-turns by replacing Fannie and Freddie with a privately capitalized system" that ultimately did not receive a vote by the full Senate).

Here, FHFA placed the Companies in *de facto* liquidation—inconsistent even with "managing the regulated entit[ies] in the lead up to the appointment of a liquidating receiver," as the Court incorrectly, and obliquely, defines the outer limits of the conservator role, Op. 27—when it entered into the Third Amendment and captured nearly all of the Companies' profits for Treasury. To paraphrase an aphorism usually attributed to Everett Dirksen, a hundred billion here, a hundred billion there, and pretty soon you're talking about real money. But instead of acknowledging the reality of the Companies' situation, the Court hides behind a false formalism, establishing a dangerous precedent for future acts of FHFA, the FDIC, and even common law conservators.

III.

Finally, the practical effect of the Court's ruling is pernicious. By holding, contrary to the Act's text, FHFA need not declare itself as either a conservator or receiver and then act in a manner consistent with the well-defined powers associated with its chosen role, the *Court* has disrupted settled expectations about financial markets in a manner likely to negatively affect the nation's overall financial health.

Congress originally established the FDIC to rebuild confidence in our nation's banking system following the Great Depression, *see* Banking Act of 1933, Pub. L. No. 7366, 48 Stat. 162, and in the years that followed it has empowered the institution to insure deposits and serve as a conservator or receiver for failed banks, *see* Federal Deposit Insurance Act of 1950, Pub. L. No. 81-979, 64 Stat. 873 (FIRREA's predecessor statute, which incorporated the conservator and receiver roles). Consistent with its mission, the FDIC has provided assistance, up to and including conservatorship and receivership, for thousands of financial institutions over numerous periods of economic stress. For decades, investors relied on the common law's conservator/receiver distinction, maintained by the FDIC and enforced by courts, to evaluate their investments and guide judicial review.

Congress chose to import this effective statutory scheme into HERA in an effort to combat our most recent financial crisis, evidencing its belief that FIRREA's terms were equal to the task confronting FHFA. But FHFA's actions in implementing the Net Worth Sweep "bear no resemblance to actions taken in conservatorships or receiverships overseen by the

FDIC." Amicus Br. for Indep. Comm. Bankers of Am. 6 (reflecting the views of former high-ranking officials of the FDIC). Yet today the Court holds that, in the context of HERA—and FIRREA by extension—any action taken by a regulator claiming to be a conservator (short of officially liquidating the company) is immunized from meaningful judicial scrutiny. All this in the context of the Third Amendment's Net Worth Sweep, which comes perilously close to liquidating Fannie and Freddie by ensuring they have no hope of survival past 2018. The Court's conservator is not your grandfather's, or even your father's, conservator. Rather, the Court adopts a dangerous and radical new regime that introduces great uncertainty into the already-volatile market for debt and equity in distressed financial institutions.

Now investors in regulated industries must invest cognizant of the risk that some conservators may abrogate their property rights entirely in a process that circumvents the clear procedures of bankruptcy law, FIRREA, and HERA. Consequently, equity in these corporations will decrease as investors discount their expected value to account for the increased uncertainty—indeed if allegations of regulatory overreach are entirely insulated from judicial review, private capital may even become sparse. Certainly, capital will become more expensive, and potentially *prohibitively* expensive during times of financial distress, for all regulated financial institutions.

More ominously, the existence of a predictable rule of law has made America's enviable economic progress possible. *See*, *e.g.*, Tom Bethell, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 3 (1998) ("When property is privatized, and the rule of law is established, in such a way that all including the rulers themselves are subject to the same law, economies will prosper and civilization will blossom."). Private individual and institutional investors in regulated industries rightly expect the law will protect their financial rights—either through an agency interpreting statutory text or a court reviewing agency action thereafter. They are also entitled to expect a conservator will act to conserve and preserve the value of the company in which they have invested, honoring the capital and investment conventions of governing law. A rational investor contemplating the terms of HERA would not conclude Congress had changed these prevailing norms. *See generally Yates v. United States*, 135 S. Ct. 1074, 1096 (2015) (Kagan, J., dissenting) (noting statutory text may be drafted "to satisfy audiences other than courts"). Today, however, the Court explains this rational investor was wrong. And its bold and incorrect statutory interpretation could dramatically affect investor and public confidence in the fairness and predictability of the government's participation in conservatorship and insolvency proceedings.

When assessing responsibility for the mortgage mess there is, as economist Tom Sowell notes, plenty of blame to be shared. Who was at fault? "The borrowers? The lenders? The government? The financial markets? The answer is yes. All were responsible and many were irresponsible." Thomas Sowell, THE HOUSING BOOM AND BUST 28 (2009). But that does not mean more irresponsibility is the solution. Conservation is not a synonym for nationalization. Confiscation may be. But HERA did not authorize either, and

FHFA may not do covertly what Congress did not authorize explicitly. What might serve in a banana republic will not do in a constitutional one.

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FHFA, like the FDIC before it, was given broad powers to enable it to respond in a perilous time in U.S. financial history. But with great power comes great responsibility. Here, those responsibilities and the authority FHFA received to address them were well-defined, and yet FHFA disregarded them. In so doing, FHFA abandoned the protection of the anti-injunction provision, and it should be required to defend against the Institutional and Class Plaintiffs' claims.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PERRY CAPITAL LLC,	)	
Plaintiff,	)	
v.	)	**Civil No. 13-1025 (RCL)**
JACOB J. LEW, *et al.*,	)	
Defendants.	)	

FAIRHOLME FUNDS, INC, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil No. 13-1053 (RCL)**
FEDERAL HOUSING FINANCE AGENCY, *et al.*,	)	
Defendants.	)	

ARROWOOD INDEMNITY COMPANY, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil No. 13-1439 (RCL)**
FEDERAL NATIONAL MORTGAGE ASSOCATION, *et al.*,	)	
Defendants.	)	

In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations	)	**Miscellaneous No. 13-1288 (RCL)**
This Memorandum Opinion relates to: ALL CASES	)	<u>CLASS ACTION</u>

MEMORANDUM OPINION

Before the Court are motions to dismiss or, in the alternative, for summary judgment, filed by the defendants United States Department of the Treasury ("Treasury") and Federal Housing Finance Agency ("FHFA"), as well as a cross-motion for summary judgment on Administrative Procedure Act ("APA") claims filed by the *Perry, Fairholme*, and *Arrowood* plaintiffs (collectively, "individual plaintiffs"). on consideration of the defendants' respective motions to dismiss, the individual plaintiffs' cross-motion for summary judgment, the various opposition and reply briefs thereto filed by the defendants, the individual plaintiffs, and the class action plaintiffs ("class plaintiffs"), the applicable law, and the entire record herein, the Court will GRANT the defendants' motions to dismiss and DENY the individual plaintiffs' cross-motion for summary judgment.

I. BACKGROUND

This matter is brought before the Court by both a class action lawsuit and a set of three individual lawsuits. hese four lawsuits contain numerous overlapping, though not identical, claims. he purported class plaintiffs consist of private individual and institutional investors who own either preferred or common stock in the Federal National Mortgage Association ("Fannie Mae") or the Federal Home Loan Mortgage Corporation ("Freddie Mac"). Am. Compl. at ¶¶ 30-44, *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigs.*, No. 13-1288 (D.D.C. Dec. 3, 2013), ECF No. 4 ("*In re Fannie Mae/Freddie Mac* Am. Compl."); Derivative Compl. at ¶¶ 19-21, *In re Fannie Mae/Freddie Mac*, No. 13-1288 (D.D.C. July 30, 2014), ECF No. 39 ("*In re Fannie Mae/Freddie Mac* Derivative Compl."). The individual plaintiffs comprise a collection of private investment funds and insurance companies. Compl. at ¶¶ 25-27, *Perry Capital LLC* v. *Lew*, No. 13-1025 (D.D.C. July 7, 2013), ECF No. 1 ("*Perry* Compl."); Compl. at ¶¶ 18-28, *Fairholme Funds, Inc., v. FHFA*, No. 13-1053 (D.D.C. July 10, 2013), ECF No. 1 ("*Fairholme* Compl."); Compl. at ¶¶ 15-19, *Arrowood Indem. Co. v. Fannie Mae*, No. 13-1439 (D.D.C. Sept. 20, 2013), ECF No. 1 ("*Arrowood* Compl.").

Fannie Mae and Freddie Mac are government-sponsored enterprises ("GSEs"),[1] born from statutory charters issued by Congress. *See* Federal National Mortgage Association Charter Act, 12 U.S.C. §§ 1716-1723; Federal Home Loan Mortgage Corporation Act, 12 U.S.C. §§ 1451-1459. Congress created the GSEs in order to, among other goals, "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(3). In other words, the GSEs' shared purpose was to make it easier (*i.e*., less risky) for local banks and other lenders to offer mortgages to prospective home buyers. The GSEs sought to accomplish this objective by purchasing mortgage loans from lenders, thus relieving lenders of default risk and "freeing up lenders' capital to

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[1] While Fannie Mae and Freddie Mac are not the only GSEs, *see*, *e.g.*, Federal Home Loan Banks, for convenience, this Memorandum Opinion will employ the term "GSE" to refer to Fannie Mae and Freddie Mac exclusively.

make additional loans." *See* Treasury Defs.'s Mot. to Dismiss, or, in the Alternative, for Summ. J. at 6 (D.D.C. Jan. 17, 2014) ("Treasury Mot.").[2] In order to finance this operation, the GSEs would, primarily, pool the many mortgage loans they purchased into various mortgage-backed securities and sell these securities to investors. *See*, *e.g*., Individual Pls.'s Opp'n and Cross-Mot. for Summ. J. at 4 (D.D.C. Mar. 21, 2014) ("Individual Pls.'s Opp'n").

Fannie Mae and Freddie Mac are considered government-*sponsored*, rather than government-*owned*, because both congressionally chartered entities were eventually converted, by statute, into publicly traded corporations. Housing and Urban Development Act, Pub. L. No. 90-448, § 802, 82 Stat. 536-538 (1968); Financial Institutions Reform, Recovery and Enforcement Act, Pub. L. No. 101-73, § 731, 103 Stat. 432-433 (1989). Yet despite this historically market-driven ownership structure, "the GSEs have benefitted from a public perception that the federal government had implicitly guaranteed the securities they issued; this perception allowed the GSEs to purchase more mortgages and [mortgage-backed securities], at cheaper rates, than would otherwise prevail in the private market." Treasury Mot. at 6-7.

By 2008, the United States economy faced dire straits, in large part due to a massive decline within the national housing market. *See* Individual Pls.'s

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[2] Rather than list each of the numerous dockets on which the briefs in this matter have been filed, this Memorandum Opinion will cite the name of the brief, the date on which it was filed on all relevant dockets, and the short form citation by which the brief will be referenced thereinafter.

Opp'n at 7. "As a result of the housing crisis, the value of the [GSEs'] assets . . . deteriorated and the [GSEs] suffered . . . credit losses in their portfolios." FHFA Mot. to Dismiss, or, in the Alternative, for Summ. J. at 7 (D.D.C. Jan. 17, 2014) ("FHFA Mot.").

Given the systemic danger that a Fannie Mae or Freddie Mac collapse posed to the already fragile national economy, among other housing market-related perils, Congress enacted the Housing and Economic Recovery Act ("HERA") on July 30, 2008. *See* Individual Pls.'s Opp'n at 6; Pub. L. No. 110-289, 122 Stat. 2654. HERA established FHFA as an independent agency to supervise and regulate the GSEs. 12 U.S.C. § 4511. HERA further granted FHFA's director the authority to appoint the agency as conservator or receiver for the GSEs. 12 U.S.C. § 4617(a). Of most relevance to the present litigation, HERA empowered FHFA, as conservator or receiver, to "immediately succeed to—(i) all rights, titles, powers, and privileges of the [GSE], and of any stockholder, officer, or director of such [GSE] with respect to the [GSE] and the assets of the [GSE]." 12 U.S.C. § 4617(b)(2)(A)(i). The statute also set forth a "[l]imitation on court action," noting 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." 12 U.S.C. § 4617(f). Moreover, apparently recognizing that Treasury (*i.e.*, taxpayer) funds may soon be necessary to capitalize the struggling GSEs,[3] Congress,

[3] The purpose of HERA's provision authorizing Treasury to invest in the GSEs was, in part, to "prevent disruptions in the availability of mortgage finance"—disruptions presumably due

under HERA, amended the GSEs' charters to temporarily authorize Treasury to "purchase any obligations and other securities issued by the [GSEs]." 12 U.S.C. § 1455(*l*)(1)(A) (Freddie Mac); 12 U.S.C. § 1719(g)(1)(A) (Fannie Mae).[4] This provision also provided that the "Secretary of the Treasury may, at any time, exercise any rights received in connection with such purchases." 12 U.S.C. § 1719(g)(2)(A). Treasury's authority to invest in the GSEs expired on December 31, 2009. 12 U.S.C. § 1719(g)(4).

Following the GSEs' unsuccessful effort to "raise capital in the private markets," FHFA Mot. at 7-8, FHFA placed the GSEs into conservatorship on September 6, 2008. *See, e.g*., Class Pls.'s Opp'n at 7 (D.D.C. Mar. 21, 2014) ("Class Pls.'s Opp'n"). One day later, Treasury, pursuant to 12 U.S.C. § 1719(g), entered into Senior Preferred Stock Purchase Agreements ("PSPAs") with each of the GSEs. Individual Pls.'s Opp'n at 8. Under the initial PSPAs, Treasury committed to provide up to $100 billion in funding to each GSE "to ensure that their assets were equal to their liabilities"—*i.e*., to "cure [the GSEs'] negative net worth"—at the end of any fiscal quarter. *Id*.; FHFA Mot. at 11. On May 6, 2009, Treasury and the

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to the challenges confronting the GSEs in 2008. *See* 12 U.S.C. § 1455(*l*)(1)(B); 12 U.S.C. § 1719(g)(1)(B) ("Emergency determination required[.] In connection with any use of this [purchasing] authority, the [Treasury] Secretary must determine that such actions are necessary to—(i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer.").

[4] Since 12 U.S.C. § 1455(*l*) and 12 U.S.C. § 1719(g) are identical provisions, this Memorandum Opinion, hereinafter, will refer only to the Fannie Mae provision, § 1719(g).

GSEs, through FHFA, entered into the First Amendment to the PSPAs, whereby Treasury doubled its funding cap to $200 billion for each GSE. Individual Pls.'s Opp'n at 11. On December 24, 2009, the parties executed the Second Amendment, which permitted the GSEs to continue to "draw unlimited sums from Treasury [as required to cure any quarterly negative net worth] until the end of 2012," and then, as of December 31, 2012, permanently fixed the funding cap for each GSE (at an amount that, in the end, totaled greater than $200 billion per GSE), in accordance with an agreed-upon formula. *Id*. at 11-12; FHFA Mot. at 12; *see also* Treasury AR at 190-91, 196-97.[5]

In exchange for its funding commitment, Treasury received senior preferred stock in each GSE, which entitled Treasury to four principal contractual rights under the PSPAs. *See, e.g*., Treasury AR at 14. First, Treasury received a senior liquidation preference[6] of $1 billion for each GSE *plus* a dollar-for-dollar increase each time the GSEs drew upon Treasury's funding commitment. Individual Pls.'s Opp'n at 8-9 (citing Treasury AR at 100, 133). Second, the PSPAs entitled Treasury to dividends equivalent to 10% of

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[5] Citations to the administrative record filed by the Treasury defendants, *e.g.*, Administrative R., *In re Fannie Mae/Freddie Mac*, No. 13-1288 (D.D.C. Dec. 17, 2013), ECF No. 6, are noted as " Treasury AR." Citations to the document compilation regarding the Third Amendment filed by the FHFA defendants, *e.g., In re Fannie Mae/Freddie Mac*, ECF No. 7, are noted as "FHFA Docs."

[6] "A liquidation preference is a priority right to receive distributions from the [GSEs'] assets in the event they are dissolved." Individual Pls.'s Opp'n at 5.

Treasury's existing liquidation preference, paid quarterly.[7] *Id*. at 9 (citing AR at 32-33, 67-68); Treasury

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[7] Given the Court's ruling to grant the defendants' motion to dismiss, there is no need to evaluate the merits of the defendants' decision to execute the Third Amendment instead of selecting other options in lieu of the cash dividend that, under the PSPAs, was equal to 10% of Treasury's liquidation preference. Nevertheless, the Court notes its disagreement with the plaintiffs' characterization of one purported alternative to the Third Amendment. The plaintiffs claim that the GSEs "had no obligation to pay the 10 percent dividend in cash," and instead could simply opt to pay a 12% dividend that would be added to the outstanding liquidation preference rather than be paid in cash each quarter. Individual Pls.'s Opp'n at 9, 66-67. However, the plaintiffs' contention that paying 10% in cash or adding 12% to the liquidation preference was merely a matter of choice, Class Pls.'s Opp'n at 11, directly contravenes the unambiguous language of the contract. The relevant provisions, which are identical, in Treasury's respective stock certificates with each of the GSEs, state:

> "'Dividend Rate' means 10.0%; provided, however, that if at any time the [GSE] shall have for any reason *failed to pay dividends in cash in a timely manner as required by this Certificate*, then immediately following such *failure* and for all Dividend Periods thereafter until the Dividend Period following the date on which the Company shall have paid in cash full cumulative dividends (including any unpaid dividends added to the Liquidation Preference pursuant to Section 8), the 'Dividend Rate' shall mean 12.0%."

Treasury AR at 33, 67-68 (Treasury Senior Preferred Stock Certificates § 2(c)) (emphasis added). The provision makes clear that 10% cash dividends were "required by" the stock certificates, and that 12% dividends deferred to the liquidation preference were only triggered upon a "failure" to meet the 10% cash dividend requirement. Thus, classifying the 12% dividend feature as a "penalty," as Treasury does, is surely more accurate than classifying it as a "right." *Compare* Treasury Defs.'s Reply at 49-50 (D.D.C. May 2, 2014) ("Treasury Reply"), *with* Individual Pls.'s Opp'n at 9. The plaintiffs cannot gloss over this distinction by

Mot. at 13. Third, Treasury received warrants to acquire up to 79.9% of the GSEs' common stock at a nominal price. Individual Pls.'s Opp'n at 9; *e.g.*, Treasury AR at 15, 43. Fourth, beginning on March 31, 2010, Treasury would be entitled to a periodic commitment fee "to fully compensate [Treasury] for the support provided by the ongoing [funding] [c]ommitment." Treasury AR at 22, 56. The amount of the periodic commitment fee was to be determined by mutual agreement, and Treasury reserved the right to waive the fee for one year at a time "based on adverse conditions in the United States mortgage market." *Id*. Treasury waived the commitment fee in 2010 and 2011, and later, under the Third Amendment, the fee was suspended. Treasury Mot. at 14, 18.

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repetitively using the phrase "in kind" to describe the 12% dividend feature. *See* Individual Pls.'s Opp'n at 9, 66-67, 80-81; Class Pls.'s Opp'n at 16. Inclusion of "in kind" within § 2(c) would have slightly improved the plaintiffs' argument that the contract expressly permitted the GSEs to simply choose between a 10% cash dividend or 12% dividend deferred to the liquidation preference. But, as plaintiffs are certainly aware, "in kind" appears nowhere within the stock certificates' dividends provision. *See* Treasury AR at 33, 67-68.

With regard to the two other hypothetical alternatives presented by the individual plaintiffs—Treasury accepting lower dividends or allowing the GSEs to use excess profits to pay down the liquidation preference and, thus, the basis for the 10% dividend—the Court has no occasion to determine whether the plaintiffs' arguments demonstrate arbitrary and capricious decisionmaking or only amount to second-guessing decisionmakers charged with exercising predictive judgments. *Compare* Individual Pls.'s Opp'n at 79-82, *with* FHFA Defs.'s Reply at 52-58 (D.D.C. May 2, 2014) ("FHFA Reply").

As of August 8, 2012, Treasury had provided \$187.5 billion in funding to the GSEs,[8] and, thus, held a total \$189.5 billion senior liquidation preference between both GSEs, including the initial \$1 billion liquidation preferences from each GSE. Therefore, "the GSEs' dividend obligations to Treasury were nearly \$19 billion per year." Treasury Mot. at 16.

On August 17, 2012, Treasury and the GSEs, through FHFA, agreed to the Third Amendment to the PSPA, which is the focus of this litigation. The Third Amendment "replaced the previous dividend formula with a requirement that the GSEs pay, as a dividend, the amount by which their net worth for the quarter exceeds a capital buffer of \$3 billion. The capital buffer gradually declines over time by \$600 million per year, and is entirely eliminated in 2018." Treasury Mot. at 18. In simpler terms, the amendment "requires Fannie Mae and Freddie Mac to pay a quarterly dividend to Treasury equal to the *entire net worth* of each Enterprise, minus a small reserve that shrinks to zero over time." Class Pls.'s Opp'n at 3. These dividend payments do not reduce Treasury's outstanding liquidation preferences. *See* Individual Pls.'s Opp'n at 16.

The plaintiffs cite multiple justifications offered publicly by the defendants for this "net worth sweep." *See* Individual Pls.'s Opp'n at 16-17. First, Treasury asserted that the amendment will end "the circular practice of the Treasury advancing funds to the [GSEs] simply to pay dividends back to Treasury." *Id*. at 16 (citing Press Release, Treasury Dep't Announces

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[8] A figure that is unchanged through 2013. *See* Treasury AR 4351.

Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012), *available at* http://www.treasury.gov/press-center/press-releases/Pages/tg1684.aspx); *see also* Treasury Mot. at 2, 5, 50; FHFA Mot. at 3, 15-16. However, the plaintiffs counter that in 2012, the GSEs were once again profitable and, pertinently, able to pay the 10% dividend without drawing additional funds from Treasury. *Id*. at 14-15; *but see Fairholme Compl*. at ¶ 26 (stating that "approximately $26 billion" of Treasury's current liquidation preference "were required simply to pay the 10% dividend payments owed to Treasury"). Second, quoting from the same Treasury press release, the plaintiffs note Treasury's statement that the net worth sweep is consistent with the Obama Administration's "commitment . . . that the GSEs will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." *Id*. at 16-17. Third, according to the press release, the net worth sweep would "make sure that every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers for their investment in those firms." *Id*. at 17.

Under the Third Amendment net worth sweep, the GSEs paid Treasury nearly $130 billion in 2013.[9] Treasury AR at 4352. As mentioned above, under the former dividend arrangement requiring payment equivalent to 10% of Treasury's existing liquidation

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[9] Though this figure includes the outlier $59.3 billion dividend paid by Fannie Mae in the second quarter and $30.4 billion dividend paid by Freddie Mac in the fourth quarter. Treasury AR 4352.

preference, the GSEs would have owed nearly $19 billion. Through 2013, the cumulative draws of Treasury funding taken by the GSEs remained $187.5 billion, *id*. at 4351, and the cumulative dividends paid to Treasury by the GSEs totaled $185.2 billion, *id*. at 4352.

Notwithstanding the plaintiffs' attempt to downplay the need for a GSE bailout in the first place, *see*, *e.g*., Individual Pls.'s Opp'n at 6, 10-11, the plaintiffs do not contest the initial PSPA or subsequent two amendments to the PSPA, *see, e.g*., Class Pls.'s Opp'n at 11, but rather only challenge the Third Amendment to the PSPA. The class plaintiffs have brought claims of breach of contract, regarding allegedly promised dividends and liquidation preferences, breach of the implied covenant of good faith and fair dealing, and an unconstitutional taking, as well as derivative claims of breach of fiduciary duty. The *Perry* plaintiff has brought claims under the Administrative Procedure Act ("APA"). The *Arrowood* plaintiffs have also brought APA claims, as well as claims of breach of contract, regarding allegedly promised dividends and liquidation preferences, and breach of the implied covenant of good faith and fair dealing. The *Fairholme* plaintiffs have brought the same claims as the *Perry* and *Arrowood* plaintiffs with an additional claim of breach of fiduciary duty against FHFA. The parties dispute whether the Fairholme plaintiffs' fiduciary duty claim is direct or derivative. *See infra* n.24.

On January 17, 2014, the defendants moved to dismiss the complaints against the Third Amendment for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). In the alternative, the defendants moved for summary judgment pursuant to Rule 56. In their opposition, filed March 21, 2014, the individual plaintiffs presented a cross-motion for summary judgment.

II. LEGAL STANDARD

"Federal courts are of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Under Rule 12(b)(1), the plaintiffs bear the burden of demonstrating that subject matter jurisdiction exists. *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). The Court must "assume the truth of all material factual allegations in the complaint and construe the complaint liberally, granting [the] plaintiff[s] the benefit of all inferences that can be derived from the facts alleged." *Am. Nat. Ins. Co. v. F.D.I.C.*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (internal quotation marks and citation omitted). But "[b]ecause subject-matter jurisdiction focuses on the [C]ourt's power to hear the claim . . . , the [C]ourt must give the plaintiff[s'] factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim." *Youming Jin v. Ministry of State Sec.*, 475 F. Supp. 2d 54, 60 (D.D.C. 2007). Furthermore, when evaluating a Rule 12(b)(1) motion to dismiss, "it has been long accepted that the [Court] may make appropriate inquiry beyond the pleadings to satisfy itself on authority to entertain the case." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987) (internal quotation marks and citation omitted).

A motion to dismiss is also appropriate when the complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The Court does not "require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Once again, "the complaint is construed liberally in the plaintiffs' favor, and [the Court] grant[s] plaintiffs the benefit of all inferences that can be derived from the facts alleged. However, the [C]ourt need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the [C]ourt accept legal conclusions cast in the form of factual allegations. *Kowal v. MCI Commc'ns Corp*., 16 F.3d 1271, 1276 (D.C. Cir. 1994) (internal quotation marks and citation omitted). "If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the [C]ourt, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12.

III. ANALYSIS

A. HERA Bars the Plaintiffs' Prayers for Declaratory, Injunctive, and Other Equitable Relief against FHFA and Treasury

By this Court's calculation, twenty-four of the thirty-one substantive prayers for relief[10] requested by the plaintiffs across their five complaints seek declaratory, injunctive, or other equitable relief against FHFA or Treasury. *See also* FHFA Mot. at 22 n.13.

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[10] This thirty-one prayers for relief figure does not include the two prayers for "reasonable costs, including attorneys' fees, incurred in bringing this action" and "such other and further relief as this Court deems just and proper" that appear in each of the five complaints at issue here. *See*, *e.g.*, *Fairholme* Compl. at ¶ 146(i) and (j).

Such relief runs up against HERA's anti-injunction provision, which declares that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." 12 U.S.C. § 4617(f).

While case law adjudicating HERA-related disputes is generally sparse, "[c]ourts interpreting the scope of [§] 4617(f) have relied on decisions addressing the nearly identical jurisdictional bar applicable to the Federal Deposit Insurance Corporation ('FDIC') conservatorships contained in 12 U.S.C. § 1821(j)."[11] *Natural Res. Def. Council, Inc. v. FHFA*, 815 F. Supp. 2d 630, 641 (S.D.N.Y. 2011), *aff'd sub nom. Town of Babylon v. FHFA*, 699 F.3d 221 (2d Cir. 2012). Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, during the savings and loan crisis to enable the FDIC (and, formerly, the Resolution Trust Corporation ("RTC")) to serve as a conservator or receiver for troubled financial institutions. It was with this backdrop that the Court of Appeals for the District of Columbia Circuit, in *Freeman v. FDIC*, explained that the language of § 1821(j) "does indeed effect a sweeping ouster of courts' power to grant equitable remedies." 56 F.3d 1394, 1399 (D.C. Cir. 1995).[12] The Circuit held that the FIRREA provision precludes courts from granting "non-monetary

[11] Section 1821(j) reads: ". . . no court may take any action . . . to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j).

[12] "Although this limitation on courts' power to grant equitable relief may appear drastic, it fully accords with the intent of Congress at the time it enacted FIRREA in the midst of the savings

remedies, including injunctive relief [] [and] declaratory relief" that would "effectively 'restrain' the [agency] from" exercising its statutorily authorized responsibilities. *Id*. (quoting 12 U.S.C. § 1821(j)). As the parties both agree, an equivalent bar on jurisdiction derives from HERA's substantially identical anti-injunction provision. *E.g*., Individual Pls.'s Opp'n at 31-32.

Like a number of its sister circuits, however, this Circuit has established that, if the agency "has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions," then 12 U.S.C. § 4617(f) shall not apply. *Nat'l Trust for Historic Pres. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring) (internal quotation marks and citation omitted) (referring to 12 U.S.C. § 1821(j)); *see also Leon Cnty., Fla. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012) ("'[I]f the FHFA were to act beyond statutory or constitutional bounds in a manner that adversely impacted the rights of others, § 4617(f) would not bar judicial oversight or review of its actions.'") (quoting *In re Freddie Mac Derivative Litig*., 643 F. Supp. 2d 790, 799 (E.D. Va. 2009)); *Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013) ("[T]he anti-judicial review provision is

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and loan insolvency crisis to enable the FDIC and the [RTC] to expeditiously wind up the affairs of literally hundreds of failed financial institutions throughout the country." *Id*. at 1398. Whether or not FHFA is "winding up the affairs of" the GSEs, the Circuit's interpretation of congressional intent to grant the FDIC enormous discretion to act as a conservator or receiver during the savings and loan crisis of 1989 applies with equal force to the mortgage finance crisis of 2008.

inapplicable when FHFA acts beyond the scope of its conservator power."). Thus, the question for this Court is whether the plaintiffs sufficiently plead that FHFA acted beyond the scope of its statutory "powers or functions . . . as a conservator" when the agency executed the Third Amendment to the PSPAs with Treasury. 12 U.S.C. § 4617(f). If not, the Court must dismiss all of the defendants' claims for declaratory, injunctive, or other equitable relief.[13]

1. Section 4617(f) Bars Claims of Arbitrary and Capricious Conduct, under APA § 706(2)(A), Which Seek Declaratory, Injunctive, or Other Equitable Relief

While there is a "strong presumption that Congress intends judicial review of administrative action," *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986), that presumption is "defeated if the substantive statute precludes review." *Heckler v. Chaney*, 470 U.S. 821, 843 (1985) (citing 5 U.S.C. § 701(a)(1)). The plaintiffs do not discuss the applicability of 5 U.S.C. § 701(a)(1) of the APA to the present case in any of their oppositions, except to cite *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 63-64 (1993), in the individual plaintiffs' opposition and reply briefs for the proposition that the Court can preclude APA review "only if presented with clear and convincing evidence" of congressional intent to preclude such review. *E.g.*, Individual Pls.'s Reply to Defs.'s Mot. for Summ. J. at 15-16 (D.D.C. June 2, 2014) ("Individual Pls.'s

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[13] As the Court will explain below, this is true regardless of whether the defendants have levied some of their non-monetary claims against Treasury instead of FHFA.

Reply"). The individual plaintiffs are correct in that the "presumption of judicial review [under the APA] is, after all, a presumption, and like all presumptions used in interpreting statutes, may be overcome by, *inter alia*, specific language . . . that is a reliable indicator of congressional intent . . . to preclude judicial review." *Bowen*, 476 U.S. at 673 (internal quotation marks and citation omitted). HERA's express anti-injunction provision, which, as explained below, necessarily covers litigation arising out of contracts executed by FHFA in accordance with its duties as a conservator, qualifies as a reliable indicator of congressional intent to preclude review of non-monetary APA claims brought against both FHFA and Treasury. Importantly, when applying FIRREA's anti-injunction provision, 12 U.S.C § 1821(j), this Circuit has only considered whether the FDIC acted beyond "its statutorily prescribed, constitutionally permitted, powers or functions" under FIRREA, specifically, and not whether it acted beyond any of its more general APA obligations under 5 U.S.C. § 702(2). *See Nat'l Trust*, 21 F.3d at 472 (Wald, J., concurring and further noting that, "given the breadth of the statutory language [of § 1821(j)], untempered by any persuasive legislative history pointing in a different direction, the statute would appear to bar a court from acting in virtually all circumstances"); *Freeman*, 56 F.3d at 1398-99; *MBIA Ins. Corp. v. FDIC*, 816 F. Supp. 2d 81, 103 (D.D.C. 2011), aff'd, 708 F.3d 234 (D.C. Cir. 2013); *see also Leon Cnty*., 700 F.3d at 1278¬79. In other words, this Circuit, like the APA itself, implicitly draws a distinction between acting beyond the scope of the constitution or a statute, *see* § 702(2)(B) and (C), and acting within the scope of a statute, but doing so arbitrarily and capriciously, *see* § 702(2)(A). This distinction arises directly from the text of § 4617(f), which prohibits the Court from restraining "the *exercise* of powers or functions of [FHFA]"—*i.e.*, restraining *how* FHFA employs its powers or functions—but does not prohibit review based upon the statutory or constitutional origin of the powers or functions themselves. 12 U.S.C. § 4617(f) (emphasis added). Consequently, it does appear that § 4617(f) bars all declaratory, injunctive, or other equitable relief stemming from claims of arbitrary and capricious decisionmaking, under APA § 706(2)(A). Thus, the two counts in each of the *Perry, Fairholme, and Arrowood* Complaints, and related prayers for relief, that claim APA violations for arbitrary and capricious conduct by both Treasury and FHFA are hereby dismissed pursuant to Rule 12(b)(1).[14]

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[14] The class, *Arrowood*, and *Fairholme* plaintiffs each present a claim of breach of the implied covenant of good faith and fair dealing that closely parallels the individual plaintiffs' APA claims for arbitrary and capricious conduct. *See*, *e.g.*, *In re Fannie Mae/Freddie Mac* Am. Compl. at ¶ 161 (". . . Fannie Mae, acting through FHFA, acted arbitrarily and unreasonably and not in good faith or with fair dealing toward the members of the Fannie Preferred Class."). Given the breadth of HERA and this Circuit's wariness toward evaluating *how* FHFA carries out its conservatorship responsibilities, *any* claim—APA- or contract-based—dependent upon allegations of arbitrary and capricious behavior coupled with a request for equitable relief probably should be summarily dismissed under § 4617(f). Yet regardless of whether the Circuit sees fit to establish a categorical rule, the plaintiffs' claims of breach of the implied covenant which seek equitable relief are still generally dismissed on § 4617(f) grounds because the Court finds that FHFA acted within its statutory authority under HERA. *See infra* Section III(A)(4). And because some

2. Section 4617(f) Applies to Treasury's Authority under HERA

As a threshold matter, the plaintiffs contend that § 4617(f) does not bar claims against Treasury because the provision only governs claims against FHFA. However, the defendants' argument that granting relief against the counterparty to a contract with FHFA would directly restrain FHFA's ability as a conservator vis-à-vis that contract is based on sound reasoning. *See, e.g.*, Treasury Reply at 12-13 (collecting cases outside of this Circuit). Conduct by a counterparty that is required under a contract with FHFA does not merely constitute "a peripheral connection to FHFA's activities as the [GSEs'] conservator." *See* Individual Pls.'s Opp'n at 29. To the contrary, such interdependent, contractual conduct is directly connected to FHFA's activities as a conservator. A plaintiff is not entitled to use the technical wording of her complaint—*i.e.*, bringing a claim against a counterparty when the contract in question is intertwined with FHFA's responsibilities as a conservator—as an end-run around HERA. Therefore, § 4617(f) applies generally to litigation concerning a contract signed by FHFA pursuant to its powers as a conservator.

Additionally, when the counterparty to FHFA's contract—Treasury—is also a government entity operating based on authority derived from HERA, *e.g.* 12 U.S.C. § 1719(g) (temporarily authorizing Treas-

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plaintiffs include within their breach of the implied covenant allegations a request for monetary relief, dismissal is also proper on ripeness and failure to state a claim grounds. *See infra* Section III(C).

ury to purchase GSE securities), HERA's anti-injunction provision may be logically extended to that government counterparty. Likewise, if FHFA, as a conservator or receiver, signs a contract with another government entity that is acting beyond the scope of its HERA powers, then FHFA is functionally complicit in its counterparty's misconduct, and such unlawful actions may be imputed to FHFA. Here, as noted above, there can be little doubt that enjoining Treasury from partaking in the Third Amendment would restrain FHFA's uncontested authority to determine how to conserve the viability of the GSEs. Accordingly, the Court must decide whether Treasury acted in contradiction of its temporary power, under HERA, to invest in the GSEs.

The individual plaintiffs argue that Treasury acted beyond the scope of HERA because the Third Amendment constitutes the purchase of new GSE securities after HERA's December 31, 2009 sunset provision and because Treasury violated the APA by acting arbitrarily and capriciously when entering into the net worth sweep. Here, given § 4617(f)'s bar on non-monetary claims of arbitrary and capricious decisionmaking under the APA, the Court must only consider whether Treasury purchased new securities through the Third Amendment.

3. Treasury's Execution of the Third Amendment Does Not Constitute the Purchase of New Securities in Contravention of HERA

The individual plaintiffs argue that Treasury violated the sunset provision associated with its authority to purchase GSE securities under 12 U.S.C. § 1719(g) because the Third Amendment was not an "exercise of rights" under the statute and because the Third Amendment was effectively a purchase of new securities after December 31, 2009. Individual Pls.'s Opp'n at 37. Both claims are unpersuasive.

Asserting that the Third Amendment was not the exercise of a right, as allegedly required for any "market participa[tion]" after 2009, the individual plaintiffs state that, "[a]s of 2010, Treasury's authority as a market participant was limited to 'hold[ing], exercis[ing] any rights received in connection with, or sell[ing] any obligations or securities purchased'" from the GSEs. Individual Pls.'s Opp'n at 36-37 (quoting 12 U.S.C. § 1719(g)(2)(D)). But this contention overreads the provision governing the application of the statutory expiration date to purchased securities. While § 1719(g)(2)(D) notes that holding securities, exercising any rights under the securities contract, or selling securities are specifically *exempt* from the sunset provision, the existence of that provision does not therefore preclude other non-security purchasing activities otherwise permitted under an already agreed-upon, pre-2010 investment contract with the GSEs.[15] To then say that the purchase authority sunset provision also categorically prohibits any provision within Treasury's contracts with the GSEs that requires "mutual assent" is to reach too far. *Cf*. Individual Pls.'s Opp'n at 38. Thus, whether or not amending the PSPA is a "right," as understood under § 1719(g), is

[15] While legislative history on this issue is unrevealing, the Court can easily imagine that Congress, with its exclusion from the sunset provision of Treasury's ability to "exercise any rights received in connection with . . . securities purchased," was contemplating an investment agreement whereby Treasury maintained future rights to purchase more GSE securities.

irrelevant, as long as the Third Amendment did not constitute a purchase of new securities.

Here, Treasury purchased one million senior preferred shares in each GSE in exchange for a number of contractual entitlements. *E.g.*, Treasury AR at 21-22 (Fannie Mae PSPA). This "purchase" of GSE securities required Treasury to provide the GSEs with a funding commitment. While in all three amendments that followed this purchase Treasury never received additional GSE shares, under the first two amendments, Treasury provided the GSEs with an expanded funding commitment. The individual plaintiffs cite the "Action Memorandum for [Treasury] Secretary Geithner," which invokes Treasury's statutory purchasing authority under § 1719(g) as a justification for the funding expansion, as evidence that the Third Amendment was also a purchase of securities. Individual Pls.'s Reply at 21 (Treasury AR at 181-88). The Court, however, does not accept that a reference to Treasury's general purchasing authority in a memorandum to Secretary Geithner regarding the Second Amendment means that the Second Amendment (and First Amendment, for that matter) was, in fact, a purchase of new obligations or securities according to § 1719(g)(1)(a). While Treasury's funding commitment is the currency by which Treasury purchased shares, which came with additional rights for Treasury, in the original PSPAs, no new shares or obligations were purchased during the first two amendments. Treasury's receipt of "valuable consideration"—*i.e.*, the potential for increased liquidation preferences as the GSEs drew more funding—for these amendments does not, on its own, constitute the purchase of new GSE securities under § 1719(g)(1)(a).[16] *Cf.* Individual Pls.'s Reply at 21.

Yet regardless of whether the first two amendments to the PSPAs should be considered a purchase of new securities, the Court finds that Treasury did not purchase new securities under the Third Amendment. Under the Third Amendment—unlike the first two amendments—Treasury *neither* granted the GSEs additional funding commitments *nor* received an increased liquidation preference. Instead, Treasury agreed to a net worth sweep in exchange for eliminating the cash dividend equivalent to 10% of the GSEs' liquidation preference. This net worth sweep represented a new formula of dividend compensation for a $200 billion-plus investment Treasury had already made. As FHFA further claims, the agency executed the Third Amendment to ameliorate the existential challenge of paying the dividends it *already* owed pursuant to the GSE securities Treasury purchased through the PSPA; it did not do so in order to sell more GSE securities. FHFA Mot. at 3 ("The [GSEs] were unable to meet their 10% dividend obligations without drawing more from Treasury, causing a downward spiral of repaying *preexisting obligations* to Treasury through additional draws from Treasury.") (emphasis added). Notwithstanding plaintiffs'

[16] Similarly, the fact that Treasury, prior to executing the First and Second Amendments, made § 1719(g)(1)(B) "emergency determinations" generally required before purchasing new securities does not, alone, signify the purchase of new securities. *See* Treasury Reply at 37-38 (determinations made "because [Treasury] was pledging additional taxpayer funds to the GSEs").

contentions regarding the "fundamental change doctrine," Treasury's own tax regulations, or otherwise, the present fact pattern strikes the Court as straightforward, at least in the context of the applicability of § 1719(g)'s sunset provision. Without providing an additional funding commitment or receiving new securities from the GSEs as consideration for its Third Amendment to the already existing PSPAs, Treasury cannot be said to have purchased new securities under § 1719(g)(1)(a). Treasury may have amended the compensation structure of its investment in a way that plaintiffs find troubling, but doing so did not violate the purchase authority sunset provision. § 1719(g)(4).

4. *FHFA Acted within Its Statutory Authority*

The individual plaintiffs put forth a number of claims that FHFA violated HERA by entering into the Third Amendment.[17] These arguments concern both FHFA's conduct and the purported reasons *for* FHFA's conduct—the *what* and the *why*, so to speak.[18]

At bottom, the Third Amendment sweeps nearly all GSE profit dollars to Treasury. The result for non-Treasury shareholders is virtually no likelihood of dividend payments (given the lack of profits along with Treasury's discretion to pay dividends, *see, e.g*. Treas-

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[17] The class plaintiffs appear to adopt the individual plaintiffs' briefing on this issue. *See* Class Pls.'s Opp'n at 25.

[18] The Court has already dismissed, *supra*, claims of arbitrary and capricious decisionmaking brought pursuant to 5 U.S.C. 706(2)(A). This subsection, then, will address all other claims for equitable relief against FHFA.

ury AR at 58 (Freddie Mac PSPA § 5.1)) and a decrease in the potential liquidation preference they would receive if the company liquidated during a period of profitability. Both parties essentially admit this same depiction in their briefs, biased adjectives aside. Looking past the financial engineering involved in the PSPAs and subsequent amendments, the question for this Court, simply, is whether the net worth sweep amendment represents conduct that exceeds FHFA's authority under HERA—a statute of exceptional scope that gave immense discretion to FHFA as a conservator. It is surely true that "FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp." *Leon Cnty. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012). Yet construing the allegations in a light most favorable to the plaintiffs, the Court finds that the plaintiffs fail to demonstrate by a preponderance of the evidence—if at all—that FHFA's execution of the Third Amendment violated HERA. *See, e.g., Pitney Bowes, Inc. v. U.S. Postal Serv*., 27 F. Supp. 2d 15, 19 (D.D.C. 1998) ("The plaintiff bears the burden of persuasion to establish subject matter jurisdiction by a preponderance of the evidence."). As such, the plaintiffs cannot overcome § 4617(f)'s jurisdictional bar on equitable relief.

a. FHFA's Justifications for Executing the Third Amendment and, Consequently, the Accompanying Administrative Record, Are Irrelevant for § 4617(f) Analysis

The extraordinary breadth of HERA's statutory grant to FHFA as a conservator or receiver for the GSEs, likely due to the bill's enactment during an unprecedented crisis in the housing market, *Cf. Freeman*, 56 F.3d at 1398, coupled with the anti-injunction provision, narrows the Court's jurisdictional analysis to *what* the Third Amendment entails, rather than *why* FHFA executed the Third Amendment. *See also id*. (the anti-injunction provision applies "unless [the conservator] has acted . . . beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions."). Nevertheless, the individual plaintiffs focus a sizable portion of their opposition and reply briefs on disputing FHFA's *justifications* for the Third Amendment. *See* Individual Pls.'s Opp'n at 58-73; Individual Pls.'s Reply at 31-39. Similarly, the individual plaintiffs argue that FHFA violated HERA by not producing the full administrative record. Individual Pls.'s Opp'n at 46-51; Individual Pls.'s Reply at 26-29. Both sets of claims ask the Court, directly or indirectly, to evaluate FHFA's rationale for entering into the Third Amendment—a request that contravenes § 4617(f).

Claims that FHFA's varying explanations for entering into the Third Amendment reveal that the agency's conduct went beyond its statutory authority under HERA—which are merely extensions of the individual plaintiffs' arbitrary and capricious arguments under a different subheading—share the same fate as the plaintiff's APA arbitrary and capricious claims. Once again, to determine whether it has jurisdiction to adjudicate claims for equitable relief against FHFA as a conservator, the Court must look at *what* has happened, not *why* it happened. For instance, the Court will examine whether the Third Amendment *actually* resulted in a *de facto* receivership, *infra*; not what FHFA has publicly stated regarding any power it may or may not have, as conservator, to prepare the GSEs for liquidation, *see* Individual Pls.'s Opp'n at 58-66. FHFA's underlying motives or opinions—*i.e.*, whether the net worth sweep would arrest a downward spiral of dividend payments (*see also supra* n.7), increase payments to Treasury, or keep the GSEs in a holding pattern, Individual Pls.'s Opp'n at 66-73—do not matter for the purposes of § 4617(f). *Cf. Leon Cnty., Fla. v. FHFA*, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011) *aff'd*, 700 F.3d 1273 (11th Cir. 2012) ("Congress surely knew, when it enacted § 4617(f), that challenges to agency action sometimes assert an improper motive. But Congress barred judicial review of the conservator's actions without making an exception for actions said to be taken from an improper motive."). Moreover, contrary to the individual plaintiffs' assertion, *id*. at 46-51, and consistent with the Court's ruling regarding the bar on arbitrary and capricious review under § 4617(f), *supra*, the Court need not view the full administrative record to determine whether the Third Amendment, *in practice*, exceeds the bounds of HERA.

Generally, "[i]t is not [the Court's] place to substitute [its] judgment for FHFA's," *Cnty. of Sonoma*, 710 F.3d at 993, let alone in the face of HERA's "sweeping ouster of courts' power to grant equitable remedies," *Freeman*, 56 F.3d at 1398. *See also MBIA Ins. Corp.*, 816 F. Supp. 2d at 103 ("In seeking injunctive or declaratory relief, it is not enough for [the plaintiffs] to allege that [conservator] came to the wrong conclusion . . . ."). Requiring the Court to evaluate the merits of FHFA's decisionmaking each time it considers HERA's jurisdictional bar would render the anti-injunction provision hollow, disregarding Congress' express intention to divest the Court of jurisdiction to restrain FHFA's "exercise of [its] powers or functions" under HERA—*i.e., how* FHFA employs its powers or functions. *See* 12 U.S.C. § 4617(f). Therefore, the Court will only consider FHFA's actual conduct.

b. FHFA Has Not Violated 12 U.S.C. § 4617(a)(7)

The individual plaintiffs briefly argue that FHFA violated HERA's prescription "not [to] be subject to the direction or supervision of any other agency of the United States . . . in the exercise of the rights, powers, and privileges of the Agency." 12 U.S.C. § 4617(a)(7); *see* Individual Pls.'s Opp'n at 51; *Fairholme and Arrowood* Plaintiffs' Supplemental Opp'n at 7-10 (D.D.C. Mar. 21, 2014) ("Sup. Opp'n"); Individual Pls.'s Reply at 13, 40. However, "records" showing that Treasury "invented the net-worth sweep concept with no input from FHFA" do not come close to a reasonable inference that "FHFA considered itself bound to do whatever Treasury ordered." *See* Individual Pls.'s Opp'n at 51. The plaintiffs cannot transform subjective, conclusory allegations into objective facts. *See* Sup. Opp'n at 9-10 (claiming that "[o]nly a conservator that has given up the will to exercise its independent judgment could agree to forfeit so much"). Notwithstanding the plaintiffs' perspective that the Third Amendment was a "one-sided deal" favoring Treasury, the amendment was executed by two sophisticated parties, and there is nothing in the pleadings or the administrative record provided by Treasury that hints at coercion actionable under § 4617(a)(7). *See* Individual Pls.'s Opp'n at 51 (citing Treasury AR at 3775-802, 3833-62, 3883-94, 3895-903). Undoubtedly, many negotiations arise from one party conjuring up an idea, and then bringing their proposal to the other party. This claim does not pass muster under either Rule 12(b)(1) or Rule 12(b)(6).

c. FHFA Has Not Placed the GSEs in De Facto Liquidation

The individual plaintiffs further contend that the Third Amendment amounts to a *de facto* liquidation, which exceeds FHFA's statutory authority as a conservator. By entering into an agreement that sweeps away nearly all GSE profits, they argue, FHFA has forsaken its statutory responsibility to "rehabilitate" the GSEs and, instead, has effectively placed the GSEs in receivership. Individual Pls.'s Opp'n at 55-58; *see* 12 U.S.C. § 4617(a)(2). But FHFA counters that full-scale rehabilitation is not the only possible statutory duty of a conservator—that the statute also permits a conservator to "reorganize" or "wind up" the affairs of a GSE. FHFA Mot. at 30 (citing 12 U.S.C. § 4617(a)(2)). The Court has no occasion to decide whether the conservator is empowered to wind down the GSEs. It is unnecessary to engage in a lengthy debate over statutory interpretation because the facts, as stated in the plaintiffs' pleadings, belie the individual plaintiffs' claims of *de facto* liquidation under receivership authority.

Here, the Court need not look further than the current state of the GSEs to find that FHFA has acted within its broad statutory authority as a conservator. Four years ago, on the brink of collapse, the GSEs went into conservatorship under the authority of FHFA. *E.g.*, *Fairholme* Compl. at ¶ 3. Today, both GSEs continue to operate, and have now regained profitability. *E.g.*, *Fairholme* Compl at ¶¶ 8, 60, 63 ("Fannie and Freddie are now immensely profitable."); *cf. id*. at ¶ 14 (noting that prior to the Third Amendment, "[t]he conservatorship of Fannie and Freddie achieved the purpose of restoring the Companies to financial health"). Unquestionably, the plaintiffs take great issue with FHFA's conduct between and since these two bookend facts. However, when the Court is asked to determine whether FHFA acted beyond, or contrary to, its responsibilities as conservator under a statute that grants the agency expansive discretion to act as it sees fit, it is the current state of affairs that must weigh heaviest on this analysis. If the Third Amendment were really part of a scheme to liquidate the GSEs, then the GSEs would, presumably, be in liquidation rather than still be "immensely profitable." *See Fairholme* Compl. at ¶ 60. There is no dispute that the Third Amendment substantially changed the flow of profits, directing billions of dollars into Treasury's coffers.[19] But that alteration, alone, is in no way sufficient to reclassify a conservatorship into a receivership.[20]

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[19] It is worth noting that Treasury's insistence on receiving cash dividends, as required under the PSPAs, rather than accepting a 12% dividend deferred to the liquidation preference, suggests that Treasury believed there was no intention to imminently liquidate the GSEs. *See* Treasury Reply at 49-50; *see also supra* n.7. A belief that there was no planned liquidation—and thus no forthcoming receipt of liquidation payments—would mean that adding owed dividends to Treasury's ever-growing liquidation preference would produce increased risk for the taxpayer.

[20] The individual plaintiffs specifically argue that the net worth sweep exceeds FHFA's authority as a conservator because it (1)

The individual plaintiffs cite no precedent stating that a net worth sweep, or some equivalent, is

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depletes available capital; (2) "eliminates the possibility of normal business operations"; and (3) carries an ultimate intent to wind down the GSEs. Individual Pls.'s Opp'n at 56-58. First, the original dividend distribution scheme under the PSPAs also depleted the GSEs' capital. Dividends distributed to security holders, by nature, constitute a depletion of available capital. Second, there is no HERA provision that requires a conservator to abide by every public statement it has made. To the contrary, HERA permits a conservator wide latitude to flexibly operate the GSEs over time. *See* 12 U.S.C. § 4617(b)(2) Third, even if FHFA has explicitly stated an intent to eventually wind down the GSEs, such an intent is not automatically inconsistent with acting as a conservator. There surely can be a fluid progression from conservatorship to receivership without violating HERA, and that progression could very well involve a conservator that acknowledges an ultimate goal of liquidation. FHFA can lawfully take steps to maintain operational soundness and solvency, conserving the assets of the GSEs, until it decides that the time is right for liquidation. *See* 12 U.S.C. § 4617(b)(2)(D) ("[p]owers as conservator").

Moreover, since the Third Amendment remains consistent with FHFA's wide-ranging authority as a conservator, there is no need for the Court to further resolve whether the amendment falls within FHFA's authority to "transfer or sell any asset" under § 4617(b)(2)(G). *Compare* FHFA Mot. at 27-29 *and* FHFA Reply at 5-7, *with* Individual Pls.'s Opp'n at 63-66 *and* Individual Pls.'s Reply at 31-33. The plaintiffs essentially argue that the Third Amendment runs counter to FHFA's power to transfer *assets because* FHFA is not seeking to "rehabilitate" the GSEs when making this transfer. Individual Pls.'s Opp'n at 64-66. Yet, as explained, the Court finds the plaintiffs' premise—that FHFA's conduct is inconsistent with a conservatorship—to be lacking. Therefore, whether or not FHFA classifies the Third Amendment as a transfer of assets is of no moment. The breadth of Congress' grant of authority to FHFA under HERA means that the Court's analysis must center much more on the ends than the means.

functionally akin to liquidation. The case law cited in their opposition actually supports the position that FHFA is acting as a conservator. Individual Pls.'s Opp'n at 52-54 (collecting cases). In sum, these cases stand for the proposition that a conservator should "carry on the business of the institution," *MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 236 (D.C. Cir. 2013), and "take actions necessary to restore a financially troubled institution to solvency," *McAllister v. RTC*, 201 F.3d 570, 579 (5th Cir. 2000). Here, the GSEs maintain an operational mortgage finance business and are, once again, profitable—two facts indicative of a successful conservatorship.[21] Thus, the plaintiffs plead no facts demonstrating that FHFA has exceeded its statutory authority as a conservator.

Given that § 4617(f) bars subject matter jurisdiction[22] over all declaratory, injunctive, and other equitable relief requested against the defendants that

[21] Indeed, the GSE's current profitability is the fundamental justification for the plaintiffs' prayers for equitable and monetary relief. In other words, this litigation only exists *because* the GSEs have, under FHFA's authority, progressed from insolvency to profitability.

[22] The Court acknowledges that there appears to be some confusion over whether Rule 12(b)(1) or Rule 12(b)(6) applies to § 4617(f). This Circuit has framed FIRREA's substantially identical anti-injunction provision, 12 U.S.C. § 1821(j), as a bar on relief. *See Freeman*, 56 F.3d at 1396, 1398, 1406; *see also MBIA Ins. Corp*., 816 F. Supp. 2d at 104, 106 (explicitly dismissing claims on § 1821(j) grounds pursuant to Rule 12(b)(6)). However, recent rulings by courts in the Second, Ninth, and Eleventh Circuits framing § 4617(f) as a *jurisdictional bar, see Town of Babylon*, 699 F.3d at 227-28; *Cnty. of Sonoma*, 710 F.3d at 990, 994-

would restrain the conservator's ability to "exercise [its statutory] powers or functions," all claims related to these prayers for relief must be dismissed pursuant to Rule 12(b)(1). Included are the individual plaintiffs' APA claims against both FHFA and Treasury,[23] the *Fairholme plaintiffs*' claim of breach of fiduciary duty against FHFA, and any part of the plaintiffs' claims of breach of the implied covenant of good faith and fair dealing which request declaratory relief.

B. HERA Bars the Plaintiffs' Derivative Claims against FHFA and Treasury

The class plaintiffs bring derivative claims against both FHFA and Treasury on behalf of Fannie Mae and Freddie Mac. *In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 72-79 (Fannie Mae); *In re Fannie Mae/Freddie Mac* Derivative Compl. at ¶¶ 175-82 (Freddie Mac).[24] Under HERA, FHFA "shall, as con-

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95; *Leon Cnty*., 700 F.3d at 1275 n.1, 1276, coupled with the parties in this case doing the same, *see, e.g.*, Individual Pls.'s Opp'n at 31-32 ("HERA's jurisdictional bar"); FHFA Mot. at 28 ("[t]he jurisdictional bar of Section 4617(f)"), leads the Court to believe that the breadth of § 4617(f) better represents a jurisdictional bar, with related claims subject to dismissal under Rule 12(b)(1), than a bar on relief. But regardless of the proper basis for dismissal, the Court would dismiss the plaintiffs' claims for equitable relief under 12(b)(1) *or* 12(b)(6).

[23] Accordingly, the *Perry* Complaint is dismissed in its entirety.

[24] The Court need not determine whether the individual plaintiffs' APA claims should be considered derivative, since all such claims are dismissed pursuant to § 4617(f). *Compare* Treasury Mot. at 30-33, *with* Individual Pls.'s Reply at 9-11.

Similarly, the *Fairholme* plaintiffs' fiduciary duty claim against FHFA, which seeks only equitable relief, is also dismissed pursuant to § 4617(f). *See* Sup. Opp'n at 13 ("The Fairholme Plaintiffs, moreover, have expressly limited their fiduciary duty claim to seek only 'equitable and declaratory relief' aimed at unwinding the Sweep Amendment and eliminating its harmful effect on Plaintiffs' interests in Fannie and Freddie.") (internal quotations and citation to Complaint omitted). As such, there is no requirement for the Court to decide whether such claims are derivative or direct. However, if such a determination were necessary, the Court notes that it would find that the *Fairholme* plaintiffs' fiduciary duty claim is derivative in nature and, therefore, barred under § 4617(b)(2)(A)(i) as well. Without resolving whether Delaware and/or Virginia law applies to the *Fairholme* plaintiffs' fiduciary duty claim, the Court—like both parties—will briefly utilize the analysis established by the Supreme Court of Delaware in *Tooley v. Donaldson, Lufkin & Jenrette, Inc*., 845 A.2d 1031 (Del. 2004). To determine whether a shareholder's claim is derivative or direct, the Court asks: "(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)?" *Id*. at 1033. Regardless of whether the *Fairholme* plaintiffs plead injuries to both the GSEs and the individual plaintiff shareholders, *see* FHFA Reply at 23; *but see* Sup. Opp'n at 12-13, the claim qualifies as derivative, not direct, under *Tooley's* second prong. Here, recovery or relief will not flow "directly to the stockholders." *Tooley*, 845 A.2d at 1036. Instead, the equitable relief *Fairholme* seeks—"namely, vacating the Third Amendment and returning its resulting dividends from Treasury to the Enterprises (*Fairholme* Compl. ¶ 146(d)-(e))—would flow first and foremost to the [GSEs]." *FHFA Reply* at 24. That relief will *not* flow directly to the *Fairholme* plaintiffs is especially true since, after signing the PSPAs, Treasury effectively maintained discretion over GSE dividend payments, *see, e.g*., Treasury AR at 24 (Fannie Mae PSPA § 5.1), and the GSEs, still in conservatorship, are not liquidating assets pursuant to any liquidation preferences.

servator or receiver, and by operation of law, immediately succeed to (i) all rights, titles, powers, and privileges of the [GSE], and of any stockholder . . . ." 12 U.S.C. § 4617(b)(2)(A)(i).[25] The Circuit has held that "[t]his language plainly transfers shareholders' ability to bring derivative suits—a 'right[ ], title[ ], power[ ], [or] privilege[ ]'—to FHFA." *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012).

1. An Exception to HERA's Bar on Shareholder Derivative Claims Would Contravene the Plain Language of the Statute

The plaintiffs argue that, despite the general bar against derivative suits, they have standing to sue derivatively because FHFA, due to a conflict of interest, would be unwilling to sue itself or Treasury.[26] Class Pls.'s Opp'n at 32-35; Sup. Opp'n at 14-16. In passing, *Kellmer* notes the existence, among other circuits, of

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Finally, Treasury's argument that the plaintiffs lack prudential standing, Treasury Mot. at 34-36, does not require consideration here. *Cf. Louisiana Envtl. Action Network v. Browner*, 87 F.3d 1379, 1384 (D.C. Cir. 1996) ("[The Court has] no difficulty dismissing a case based on one jurisdictional bar rather than another. . . . Because issues of standing, ripeness, and other such 'elements' of justiciability are each predicate to any review on the merits, a court need not identify all such elements that a complainant may have failed to show in a particular case.").

[25] The statute also provides that FHFA may, as conservator, ". . . operate the [GSE] with all the powers of the shareholders." 12 U.S.C. § 4617(b)(2)(B)(i).

[26] "The party invoking federal jurisdiction bears the burden of establishing [standing]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

an exception to the equivalent bar on shareholder derivative actions brought against the FDIC under the substantially similar FIRREA provision, 12 U.S.C. § 1821(d)(2)(A), for instances of "manifest conflict of interest." *Kellmer*, 674 F.3d at 850. The defendants are right, however, that this Circuit has not adopted such an exception. *E.g.*, Treasury Mot. at 31. While *Kellmer* concerned a suit against officers and directors rather than one against FHFA and Treasury, *see* Class Pls.'s Opp'n at 31, the Circuit's holding puts no limitations on HERA's rule against shareholder derivative suits. Based on the Circuit's discussion of the text of 12 U.S.C. § 4617(b)(2)(A)(i), it stands to reason that if the *Kellmer* Court had occasion to consider the purported conflict of interest exception, it would not have found that such an exception exists.

The idea of an exception to HERA's rule against derivative suits comes from two cases, both considering FIRREA § 1821(d)(2)(A). First, the Federal Circuit held that, notwithstanding the "general proposition" that the FDIC assumed "the right to control the prosecution of legal claims on behalf of the insured depository institution now in its receivership," a plaintiff has standing to bring a derivative suit when the FDIC has a "manifest conflict of interest"—*i.e.*, when the plaintiffs ask the receiver to bring a suit based on a breach allegedly caused by the receiver. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295-96 (Fed. Cir. 1999). Then, the Ninth Circuit "adopt[ed] the *First Hartford* exception" in *Delta Savings Bank v. United States*, 265 F.3d 1017

(9th Cir. 2001), for instances of conflict of interest between sufficiently "interdependent entities." *Id.* at 1021-23.[27]

It strikes this Court as odd that a statute like HERA, through which Congress grants immense discretionary power to the conservator, § 4617(b)(2)(A), and prohibits courts from interfering with the exercise of such power, § 4617(f), would still house an *implicit* end-run around FHFA's conservatorship authority by means of the shareholder derivative suits that the statute explicitly bars. "To resolve this [oddity, however,] we need only heed Professor Frankfurter's timeless advice: '(1) Read the statute; (2) read the statute; (3) read the statute!'" *Kellmer*, 674 F.3d at 850 (second internal quotation marks omitted) (citing Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 196, 202 (1967)). The Circuit tells the Court that HERA, by its unambiguous text, removes the power to bring derivative suits from shareholders and gives it to FHFA. *Id.* (citing § 4617(b)(2)(A)).[28] As the *basis* for its exception to the rule against shareholder derivative suits, the Federal Circuit explained that "the very object of the derivative suit mechanism is to permit shareholders to file suit on behalf of a corporation when the managers or

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[27] The Court can reasonably presume the Ninth Circuit's exception would also apply to instances where a plaintiff demands that the FDIC sue itself.

[28] *See also La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188, 191 (4th Cir. 2011) (affirming and quoting *In re Freddie Mac Derivative Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009) ("[T]he plain meaning of the statute is that *all* rights previously held by Freddie Mac's stockholders, including the right to sue derivatively, now belong exclusively to the [Agency].")).

directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation." *First Hartford*, 194 F.3d at 1295; *see also* Class Pls.'s Opp'n at 32 (quoting the same). Yet the existence of a rule against shareholder derivative suits, § 4617(b)(2)(A)(i), indicates that courts cannot use the rationale for why derivative suits are available to shareholders as a legal tool—including the conflict of interest rationale—to carve out an *exception* to that prohibition. Derivative suits largely exist so that shareholders can protect a corporation from those who run it—and HERA takes the right to such suits away from shareholders.[29] How, then, can a court base the exception to a rule barring shareholder derivative suits on the purpose of the "derivative suit mechanism" that rule seeks to bar? *See First Hartford*, 194 F.3d at 1295. Such an exception would swallow the rule.[30]

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[29] "Indeed, as the Supreme Court has explained, 'the 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.'" *First Hartford*, 194 F.3d at 1295 (quoting *Kamen v. Kemper Fin. Servs., Inc*., 500 U.S. 90, 95 (1991)).

[30] The Court further notes that the First *Hartford* and *Delta Savings* decisions both involved the FDIC in receivership. Applying an exception to the statutory rule against derivative suits makes still less sense in the conservatorship context, where FHFA enjoys even greater power free from judicial intervention. Consistent with congressional intent to decrease restrictions governing the emergency scenario during which FHFA would need to conserve the viability of the GSEs, under HERA, court involvement on issues brought by outside stakeholders, and not by the

By looking outside HERA's statutory language to find an exception to the rule against derivative suits that is based on the reason the judicial system permits derivative suits in the first place, a court would effectively be asserting its disagreement with the breadth of HERA's text. HERA provides no qualification for its bar on shareholder derivative suits, and neither will this Court. § 4617(b)(2)(A) (the conservator "shall . . . immediately succeed to . . . *all* rights, titles, powers, and privileges . . . of any stockholder) (emphasis added).[31]It is a slippery slope for the Court to poke holes in, or limit, the plain language of a statute, especially when, as here, the plaintiffs have not asked the Court to weigh in on the statute's constitutionality. Therefore, the Court finds that HERA's plain language bars shareholder derivative suits, without exception.

GSEs themselves, *cf.* § 4617(a)(5), is most available throughout the *receivership* claims process. *E.g.*, § 4617(b)(5), (6).

[31] The Court respectfully disagrees with the Ninth Circuit's argument that "strict adherence to an absolute rule would be at least impracticable, and arguably absurd." *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1023-24 (9th Cir. 2001). This Court believes that an unequivocal, "absolute rule" against shareholder derivative suits enacted by Congress during a time of economic crises requires "strict adherence." HERA's anti-injunction provision, § 4617(f), is illustrative of Congress' intention to transfer "all" shareholder rights to the conservator so that it could work, unimpeded, to save the GSEs from impending collapse, without a concern for preserving any such shareholder rights to derivative suits.

2. Even If the Exception Applies, There Is No Conflict of Interest between FHFA and Treasury

Even assuming *arguendo* that the *First Hartford* and *Delta Savings* exceptions to HERA's prohibition on shareholder derivative suits applied to HERA § 4617(b)(2)(A)(i), there is no conflict of interest between FHFA and Treasury, and the class plaintiffs' fiduciary duty claims against Treasury would be dismissed. The *First Hartford* decision would not apply to the Treasury fiduciary duty claims because the plaintiffs are not demanding that FHFA sue itself or sue another government entity on account of FHFA's own breach, 194 F.3d at 1295—the plaintiffs' claims against Treasury are due to Treasury's alleged breach. *E.g., In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 177-79. In *Delta Savings*, the Ninth Circuit's finding of a "manifest conflict of interest" was not just based on the presence of two government entities, but rather two sufficiently *interrelated* government agencies. 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; it is the nature of the [Office of Thrift Supervision ('OTS')]–FDIC relationship that raises the conflict here."). As the *Delta Savings* Court explained, the FDIC and the OTS were "interrelated agencies with overlapping personnel, structures, and responsibilities." *Id*. at 1021-22. The relationship between FHFA and Treasury fails the Ninth Circuit's interrelatedness test. The class plaintiffs point to no "operational or managerial overlap," and the agencies do not "share a common genesis." *Id*. at

1022-23. Unlike OTS, which supervised thrift institutions and retained the ability to "choose the FDIC to be the conservator," *id*. at 1023, Treasury plays no role in choosing FHFA to act as a conservator for the GSEs. While Treasury and FHFA, *inter alia*, have jointly proposed regulations, *e.g*., Credit Risk Retention, 78 Fed. Reg. 183 (proposed Sept. 20, 2013), the fact that both entities exist within the financial regulation space cannot, on its own, satisfy *Delta Savings*' narrowly applied interrelatedness test. *See* 265 F.3d at 1022-1023.

Furthermore, the Court understands that Treasury represented the only feasible entity—public or private—capable of injecting sufficient liquidity into and serving as a backstop for the GSEs within the short timeframe necessary to preserve their existence in September 2008. There was no other investment partner at FHFA's disposal. *See* FHFA Mot. at 7-8. In fact, Congress expressly foresaw the need for a Treasury-FHFA relationship, specifically authorizing Treasury to invest in the GSEs. 12 U.S.C. § 1719(g); *see also* 12 U.S.C. § 4617(b)(5)(D)(iii)(I) (Congress highlighted Treasury's potential role as creditor to the GSEs by explicitly creating an exception to FHFA's authority, as receiver, to disallow creditor claims made by Treasury).[32] A relationship-based conflict of interest analysis, *see Delta Sav*. Bank, 265 F.3d at 1023, does not require the Court to ignore the harsh economic realities facing the GSEs—and the national

[32] Notably, Congress omitted Treasury from its list of potential credit providers exempt from FDIC's authority to disallow claims under FIRREA. *See* 12 U.S.C. § 1821(d)(5)(D)(iii)(I).

financial system if the GSEs collapsed—when FHFA and Treasury executed the PSPAs in 2008. Courts, generally, should be wary of labeling a transaction with an investor of last resort as a conflict of interest.[33]

Thus, the class plaintiffs' derivative claims, on behalf of the GSEs, for breach of fiduciary duty by FHFA and Treasury, are dismissed pursuant to Rule 12(b)(1) for lack of standing.[34]

C. The Plaintiffs' Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing Claims for Monetary Damages Must Also Be Dismissed

The plaintiffs further request monetary damages for claims of breach of contract and breach of the implied covenant of good faith and fair dealing, specifically regarding the dividends and liquidation preference provisions within their respective GSE stock certificates. *See In re Fannie Mae/Freddie Mac* Am. Compl. at 64 (¶ 7); *Arrowood* Compl. at 52 (¶ E);[35]

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[33] A recent ruling by Judge Jackson provides additional persuasive reasoning that, even if the conflict of interest exception existed in this Circuit, the FHFA-Treasury relationship does not constitute such a conflict. *Gail C. Sweeney Estate Marital Trust v. U.S. Treasury Dep't*, No. 13-0206, 2014 WL 4661983 (D.D.C. Sept. 19, 2014).

[34] "[T]he defect of standing is a defect in subject matter jurisdiction." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987).

[35] It is unclear to the Court whether the *Arrowood* plaintiffs incorporate their claim of breach of the implied covenant into their request for monetary relief, *Arrowood* Compl. at 52 (¶ E). Yet,

Fairholme Compl. at ¶ 146(h). As the class plaintiffs correctly assert, HERA's anti-injunction provision, § 4617(f), does not bar requests for *monetary* relief. *See* Class Pls.'s Opp'n at 21-22 (citing, among other cases, *Hindes v. FDIC*., 137 F.3d 148, 161 (3d Cir. 1998); *Willow Grove, Ltd. v. Fed. Nat'l Mortg. Ass'n*, No. 13-0723, 2013 WL 6865127, at *2 (D. Colo. Dec. 31, 2013)); *see also Freeman*, 56 F.3d at 1399 (concluding that FIRREA § 1821(j) precluded nonmonetary remedies, but noting that "aggrieved parties will [still] have opportunities to seek money damages"). Nevertheless, the plaintiffs' contract-based claims seeking monetary damages must also be dismissed under the threshold analyses required by Rule 12(b)(1) and Rule 12(b)(6).

1. The Plaintiffs' Liquidation Preference Claims Are Not Ripe

FHFA's entrance into the Third Amendment, allegedly in contravention of the GSEs' existing contract—*i.e.*, stock certificates—with the plaintiffs, constitutes a decision by an administrative agency. *See* 12 U.S.C. § 4511(a) ("There is established the Federal Housing Finance Agency, which shall be an independent agency of the Federal Government."). While the class and *Arrowood* plaintiffs also include the GSEs

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regardless of the *Arrowood* plaintiff's intention, the claim is dismissed. If the claim of breach of the implied covenant is included within ¶ E, then the claim is dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(6). *See infra*. If the *Arrowood* plaintiffs only intended to seek declaratory relief for the alleged breach of the implied covenant, then Count VI of the *Arrowood* Complaint is dismissed, under HERA § 4617(f), pursuant to Rule 12(b)(1). *See supra* Section III(A).

as targets of their claims of breach of contract and breach of the implied covenant, the action in question was undeniably one taken by FHFA. As such, the ripeness doctrine, which is most often applied to pre-enforcement review of agency determinations, may also govern the Court's assessment of subject matter jurisdiction here.[36] "Ripeness entails a functional, not a formal, inquiry." *Pfizer Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999). "Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 580-81).

An analysis of the plaintiffs' contentions regarding the liquidation preference written into their preferred stock certificates is uncomplicated. The certificates grant the plaintiffs "a priority right to receive distributions from the Companies' assets in the event they are dissolved." Individual Pls.'s Opp'n at 5.[37]

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[36] "The question of ripeness goes to [the Court's] subject matter jurisdiction . . . ." *Duke City Lumber Co. v. Butz*, 539 F.2d 220, 221 n.2 (D.C. Cir. 1976).

[37] The common stockholders among the class plaintiffs similarly claim deprivation "of any possibility of receiving dividends or a

Therefore, by definition, the GSEs owe a liquidation preference payment to a preferred shareholder only during liquidation. It follows that there can be no loss of a liquidation preference prior to the time that such a preference can, contractually, be paid. Here, the GSEs remain in conservatorship, not receivership, and there is no evidence of *de facto* liquidation.[38] *See supra* Section III(A)(4)(c).

The question for the Court cannot be whether the Third Amendment diminishes an opportunity for liquidation preferences at some point in the future, but rather whether the plaintiffs have suffered an injury to their right to a liquidation preference in fact and at present. Yet the individual plaintiffs assert that the Third Amendment "has clearly injured Plaintiffs in a direct and personal way" because "[t]heir right to an opportunity to benefit from the liquidation preferences in their preferred stock—once valuable—is now worthless . . . ." Individual Pls.'s Opp'n at 36. But, just as there was a Third Amendment, the Court cannot definitively say there will be no Fourth or Fifth

liquidation preference." *E.g., In re Fannie Mae/Freddie Mac Am*. Compl. at ¶ 155.

[38] *The Arrowood and Fairholme* plaintiffs' citation to *Quadrangle Offshore (Cayman), LLC v. Kenetech Corp*., No. 16362, 1998 WL 778359 (Del. Ch. Oct. 21, 1998) is, thus, inapposite, since that case concerns what the plaintiffs would aptly classify as *de facto* liquidation. *See* Sup. Opp'n at 41-42, 45 ("In *Quadrangle*, the defendant company had pursued no business and sold most of its assets to pay creditors, but because the company did not formally declare that it was in liquidation, it did not pay the preferred shareholders their contractually-specified liquidation preference.").

Amendment that will transform the current "opportunity to benefit from the liquidation preferences in [the plaintiffs'] preferred stock." A ripeness requirement prevents the Court from deciding a case "contingent [on] future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. at 300. Indeed, the purpose of the ripeness doctrine is to ensure the Court hears only an "actual case or controversy." *Cf. Pfizer*, 182 F.3d at 980. Thus, the plaintiffs' liquidation preference claims are not fit for a judicial decision until liquidation occurs.[39]

Given that the plaintiffs maintain no current right to a liquidation preference while the GSEs are in conservatorship, the plaintiffs are no worse off today than they were before the Third Amendment. Therefore, there is no hardship imposed on the plaintiffs by withholding court consideration until this contingent right matures at the moment of liquidation.

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[39] Even if the plaintiffs could presently claim damages as a result of a prospective contractual breach regarding the plaintiff shareholders' liquidation preference, this claim would, at best, be one of damage to the price of their GSE shares, as valued by the market "based in part on the existence of their attendant . . . liquidation rights." Class Pls.'s Opp'n at 37-38. Such claims are considered derivative under Delaware law, and would be barred under HERA § 4617(b)(2)(A)(i), *supra* Section III(B). *E.g., Labovitz v. Wash. Times Corp.*, 172 F.3d 897, 904-05 (D.C. Cir. 1999) ("the loss [plaintiffs] suffered in share value is a derivative harm") (citing *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988), for the proposition that "Delaware courts have long recognized that actions charging mismanagement which depress[ ] the value of stock [allege] a wrong to the corporation; *i.e.*, the stockholders collectively, to be enforced by a derivative action") (internal quotation marks and citation omitted).

Once again, any present injury is, at most, a decrease in share value, which can only be claimed as part of a derivative action that would be barred by HERA. *See supra* n.39. "Moreover, no irremediable adverse consequences flow from requiring a later challenge to" the Third Amendment with regard to liquidation preferences since, as the defendants acknowledge, FHFA Mot. at 34-35, the right to a liquidation preference can be adjudicated during the statutorily prescribed receivership claims process. *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967); *see also* 12 U.S.C. § 4617(b)(2)(K)(i), (b)(3)-(10). Until then, the plaintiffs have no direct claims to liquidation preference-related damages that are ripe for judicial review, and their existing claims must be dismissed under Rule 12(b)(1).[40]

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[40] FHFA and Treasury further argue that, under 12 U.S.C. § 4617(e)(2), which limits the maximum liability of FHFA during receivership, the plaintiffs liquidation preference claims are limited "to the amount that shareholders would have received had the GSEs' assets and liabilities been liquidated at the time the conservator was appointed in September 2008." Treasury Mot. at 28, 34. The Court is unable to identify any case law discussing this HERA provision, though a number of courts, including a handful within this Circuit, have examined FIRREA's similar provision capping liability, 12 U.S.C. § 1821(i)(2). *E.g., Bank of Am., N.A. v. F.D.I.C.*, 962 F. Supp. 2d 165, 173 (D.D.C. 2013) ("12 U.S.C. § 1821(i)(2) unequivocally limits the maximum liability of the FDIC to the amount a claimant would have received in liquidation under the distribution scheme set forth in FIRREA."). The Tenth Circuit has noted that § 1821(i)(2) limits creditor claims against the agency to the "pro rata share of the assets which would have been available *on the day the institution was placed in receivership." Castleglen, Inc. v. RTC*, 984 F.2d 1571, 1583 (10th Cir. 1993) (emphasis added). Identifying the point at which

In addition, for largely the same reasons that lead the Court to conclude that the plaintiffs' liquidation preference claims lack ripeness, the plaintiffs' breach of contract and breach of implied covenant claims regarding liquidation preferences fail to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The right to this elevated preference for asset distribution, given to preferred shareholders under GSE stock certificates, is only triggered during liquidation. Consequently, the plaintiffs' direct breach of contract claims for injuries related to their liquidation preference rights can provide them no "plausible" relief against FHFA—or against the GSEs, for that matter—until the agency places the GSEs into receivership and commences the dissolution process. *See Twombly*, 550 U.S. at 570; *see also supra* n.39 (the plaintiffs' attempt to amorphously straddle the line between direct injury to their contingent right to a liquidation preference and derivative injury to the present "value" of their GSE holdings further demonstrates the uncertainty of their claims). The Court's reasoning requiring dismissal of such breach of contract claims also requires dismissal of the plaintiffs'

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to measure FHFA's maximum liability as "the day the institution was placed in receivership"—as opposed to the day the GSEs were placed in conservatorship, like the defendants suggest here—is consistent with the fact that this maximum liability is set only in reference to "a claim against the *receiver* or the regulated entity for which such *receiver* is appointed." 12 U.S.C. § 1821(i)(2) (emphasis added). As such, § 4617(e)(2) "has no relevance outside of receivership," and provides the court with no guidance regarding potential damages—or lack thereof—from claims made against FHFA as a conservator or against the GSEs while in conservatorship. *See* Individual Pls.'s Opp'n at 23; *see also* Class Pls.'s Opp'n at 39.

claims of breach of the implied covenant of good faith and fair dealing, insofar as such claims request monetary relief. "Although an implied covenant of good faith and honest conduct exists in every contract, . . . such subjective standards cannot override the literal terms of an agreement." *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1143 (Del. 1990). As mentioned, the stock certificates, on their face, only require liquidation preference payments when the GSEs enter liquidation. Since no liquidation has occurred, the plaintiffs' implied covenant claims relating to liquidation preference rights cannot stand at this time.

2. The Plaintiffs' Dividend Claims Fail to State a Claim upon Which Relief Can Be Granted

The stock certificates upon which the plaintiffs base their claims of breach of contract and breach of the implied covenant state that "holders of outstanding shares of . . . Preferred Stock . . . shall be entitled to receive, ratably, *when, as and if declared by the Board of Directors, in its sole discretion*, out of funds legally available therefor, non-cumulative cash dividends . . . ." *E.g.*, Individual Pls.'s Opp'n Ex. A at A-1 (Fannie Mae Preferred Stock Series S); Ex. B at A-1 (Freddie Mac Preferred Stock) (emphasis added). The "right" to dividends to which the plaintiffs refer throughout their briefs, then, is, in actuality, wholly dependent upon the discretion of the GSEs' board of directors. As the individual plaintiffs stress, "[a] contractual 'right' is an entitlement to certain performance from the counter-party, and it is 'exercised' through unilateral action that does not require negotiation or mutual assent." Individual Pls.'s Opp'n at

38. Here, the payment of a dividend expressly requires "mutual assent," since, under the contract, plaintiffs cannot receive such payment without board approval. This Court—like many courts over the past two centuries—agrees with the defendants that shareholders do not have a present or absolute right to dividends which are subject to the discretion of the board. FHFA Mot. at 41-42. As Justice Holmes fittingly explained eighty-four years ago, an investment in stock "presupposes that the business is to go on, and therefore even if there are net earnings, the holder of stock, preferred as well as common, is entitled to have a dividend declared only out of such part of them as can be applied to dividends consistently with a wise administration of a going concern." *Wabash Ry. Co. v. Barclay, 280 U.S.* 197, 203-04 (1930) (further noting that dividend payments are "in the first instance at least a matter for the directors to determine").[41]

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[41] *See also New York, L.E. & W.R. Co. v. Nickals*, 119 U.S. 296, 305-07 (1886) (By qualifying dividend payments with "as declared by the board" language, the preferred stock contract did "not intend[] to confer upon the former an absolute right to a dividend in any particular year. . . . We are of opinion that . . . preferred stockholders . . . are not entitled, of right, to dividends, payable out of the net profits accruing in any particular year, unless the directors of the company formally declare, or ought to declare, a dividend payable out of such profits."); *In re Terex Corp.*, No. 91-3864, 1993 WL 7519, at *1 (6th Cir. Jan. 12, 1993) ("The decision to pay (or not to pay) a dividend was within the sole discretion of Metropolitan's board of directors; accordingly, Terex had no contractual right to receive a dividend for any given year."); *Crawford Drug Stores v. United States*, 220 F.2d 292, 296 (10th Cir. 1955) ("[I]n ordinary circumstances the holder of preferred stock has no such absolute right to the payment of dividends."); *Comm'r of Internal Revenue v. Meridient & Thirteenth*

The history of case law finding no contractual right to discretionary dividends is only bolstered by the specific facts of this case. Under HERA, FHFA succeeded to all rights and powers of the board of directors. *See* 12 U.S.C. § 4617(b)(2)(A)(i) ("[FHFA] shall, as conservator or receiver, and by operation of law, immediately succeed to—(i) all rights, titles, powers, and privileges of the [GSEs], and of any . . . director of such regulated entity with respect to the regulated entity and *the assets of the [GSEs].*") FHFA's power over the assets of the GSEs surely includes the power to declare discretionary dividends from the surplus assets of the GSEs. Consistent with FHFA's assumption of the board's power, FHFA's director, James Lockhart, stated that "the common stock and preferred stock dividends will be eliminated." *In re Fannie Mae/Freddie Mac Am*. Compl. at ¶ 53 (quoting Statement of FHFA Director James B. Lockhart at News Conference Announcing Conservatorship of Fannie Mae and Freddie Mac (Sept. 7, 2008), available at http://www.fhfa.gov/Media/PublicAffairs/Pages /Statement-of-FHFA-Director-James-B--Lockhart-at-News-Conference-Annnouncing-Conservatorship-of

Fannie-Mae-and-Freddie-Mac.aspx). Once the agency executed the PSPAs, however, FHFA effectively transferred discretionary power over dividend issuance to Treasury. *See* Treasury AR at 24, 58 (Fannie Mae and Freddie Mac PSPAs § 5.1, requiring Treasury's written consent for declaration of any dividends, "preferred or otherwise"). Thus, not only do

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Realty Co., 132 F.2d 182, 187 (7th Cir. 1942) (unlike a creditor's absolute right to interest, "[s]tockholders have no absolute right to dividends until they are declared").

the plaintiffs lack a right to dividend payments under their original stock certificates, but FHFA—the primary target of the plaintiffs' breach of contract and breach of the implied covenant claims concerning dividends—no longer has exclusive discretion to issue such dividends.

Without a contractual right to dividends, the plaintiffs cannot state a claim for breach of contract specifically based on their alleged dividend entitlements. *See In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 155, 161, 167; *Fairholme* Compl. at ¶ 122.[42] And when the contract is unambiguous regarding a lack of contractual right, there cannot be a coinciding claim of breach of the implied covenant of good faith and fair dealing. *Dave Greytak Enters, Inc. v. Mazda Motors of Am.*, Inc., 622 A.2d 14, 23 (Del. Ch. 1992), aff'd sub nom. *David Greytak Enters., Inc. v. Mazda Motors of Am.*, Inc., No. 64, 1992 WL 135147 (Del. 1992) ("[W]here the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play."); *see also Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) ("Existing contract terms control, however, such that implied good faith cannot be used to circumvent the parties' bargain, or to create a free-floating duty . . . unattached to the underlying legal document.") (internal quotation marks and citation

[42] 42 While the *Arrowood* Complaint does not specify dividends and liquidation preferences as the "rights" affected by the Third Amendment, *see Arrowood* Compl. ¶¶ 135-38, other sections of the Complaint clarify that dividends and liquidation preferences are the rights for which the *Arrowood plaintiffs* seek monetary damages. *See, e.g.*, *id*. at ¶ 7.

omitted); *QVT Fund LP v. Eurohypo Capital Funding LLC I*, No. 5881, 2011 WL 2672092, at *14 (Del. Ch. July 8, 2011) ("If the contract clearly delineates the parties' rights, there is no room for the implied covenant because it cannot override the express terms of a contract.") (internal quotation marks and citation omitted).[43] As such, the plaintiffs' claims for breach of contract[44] and breach of the implied covenant regarding the dividend provisions of the plaintiffs' stock certificates must be dismissed pursuant to Rule 12(b)(6).

Even if the implied covenant was applicable to this case—and it is not—the plaintiffs would have failed to plead such a cause of action. The Court has ruled that the plaintiffs fail to demonstrate through

[43] The individual plaintiffs' citation to *QVT Fund*, Sup. Opp'n at 40-41, 44-45, is distinguishable from this case. In *QVT Fund*, the plaintiffs claim that the alleged breach of an "implied obligation"—which the Court of Chancery deemed sufficiently pleaded—is the reason why mandatory dividend payments were not triggered. *See* 2011 WL 2672092, at *14-15. Here, no contractual obligation—implicit or explicit—exists that could transform unmistakably discretionary dividends into mandatory dividends.

[44] The Court rejects the individual plaintiffs' additional contention that the Third Amendment "effectively converted [Treasury's stock] into common stock," which would "represent a distribution to the common shareholder ahead of and in violation of the contractual rights of Plaintiffs and other preferred shareholders." Sup. Opp'n at 30. Here, the characteristics of preferred stock "that distinguish that stock from common stock"—*e.g.*, senior-most dividend and liquidation rights—remain "expressly and clearly stated" under the Third Amendment. *See Elliot Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 852 (Del. 1998); *see also* FHFA Reply at 35-37.

their pleadings that FHFA violated its statutory authority under HERA by entering into the Third Amendment with Treasury. *See supra* Section III(A)(4). Yet the plaintiffs attempt to brand agency actions that fall within FHFA's statutorily established powers to succeed to all the rights of shareholders and stabilize the GSEs as performed in "bad faith." *E.g., In re Fannie Mae/Freddie Mac Am*. Compl. at ¶¶ 90-91, 161. But the plaintiffs cannot overcome FHFA's sweeping congressional mandate with conclusory statements regarding the Third Amendment's effect on the plaintiffs' *prospective*—and not present—rights to dividends and liquidation preferences. *E.g., Arrowood* Compl. at ¶¶ 96, 141.[45] Furthermore, the class and *Arrowood* plaintiffs fail to plead claims of breach of the implied covenant against the GSEs, since the plaintiffs attribute all alleged "arbitrar[y] and unreasonabl[e]" conduct only to FHFA, as a conservator that assumed all rights of the GSEs, and not to the GSEs themselves.[46] *E.g.*, *In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 161, 167, 173; *see also* FHFA Reply at 32-33.[47]

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[45] Since the plaintiffs have not demonstrated, through their pleadings, that FHFA acted in bad faith, Delaware case law under which discretionary dividends will only be compelled in the rare instance of a judicial finding of "fraud or gross abuse of discretion" by the board of directors is inapposite. *See, e.g., Gabelli & Co. v. Liggett Grp. Inc*., 479 A.2d 276, 280 (Del. 1984); *Moskowitz v. Bantrell*, 190 A.2d 749, 750 (Del. 1963).

[46] The Fairholme plaintiffs bring their claims only against FHFA. *See* Fairholme Compl. Count VI.

[47] 47 The reasoning of this section would also apply to dividend and liquidation preference claims for non-monetary relief even if

D. The Class Plaintiffs Fail to Plead That the Third Amendment Is an Unconstitutional Taking

Finally, the class plaintiffs claim that the Third Amendment effected an unconstitutional taking of their alleged dividend entitlements and liquidation rights without just compensation. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"); *see In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 110-16, 183-92. Takings claims are reviewed as either physical or regulatory takings. A "paradigmatic" physical taking "is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Since the class plaintiffs do not allege a physical taking, the Court must decide whether they adequately plead a taking as a result of government regulation. Class Pls.'s Opp'n at 67-70. Before determining which takings rubric to utilize for its analysis, a court must first evaluate whether a plaintiff has a cognizable property interest protected by the Fifth Amendment. *See, e.g., Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Additionally, even if the plaintiffs presented allegations of "gross abuse of discretion" resulting in present damage to the "value" of the plaintiffs' investment, such claims

§ 4617(f) did not bar such claims. "In assessing whether a declaratory judgment action is ripe, courts must determine 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *RDP Technologies, Inc. v. Cambi AS*, 800 F. Supp. 2d 127, 136 (D.D.C. 2011) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)).

would be considered derivative and barred under HERA § 4617(b)(2)(A)(i). *See supra* n.39; *cf. U.S. v. Byrum*, 408 U.S. 125, 141 (1972) ("Although vested with broad discretion in determining whether, when, and what amount of dividends shall be paid, that discretion is subject to legal restraints. If, in obedience to the will of the majority stockholder, corporate directors disregard the interests of shareholders by accumulating earnings to an unreasonable extent, they are vulnerable to a derivative suit.") Cir. 2002); *Nat'l Leased Hous. Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, No. 03-1509, 2007 WL 148829, at *11 (D.D.C. Jan. 16, 2007). Here, the class plaintiffs do not allege a cognizable property interest and, as such, fail to state a claim against FHFA and Treasury for a violation of the Fifth Amendment's Takings Clause.

1. The Jurisdictional Defect in the Class Plaintiffs' Pleadings Is Not Dispositive of Their Takings Claims

As an initial matter, the defendants argue that the class plaintiffs' takings claims belong in the Court of Federal Claims rather than in this Court. Pursuant to the so-called "Big" Tucker Act, 28 U.S.C. § 1491(a)(1), the Court of Claims maintains exclusive jurisdiction over claims against the United States that exceed $10,000. Under the "Little" Tucker Act, 28 U.S.C. § 1346(a)(2), the Court of Claims shares concurrent jurisdiction with federal district courts over claims against the United States not exceeding $10,000. In this Circuit, for complaints that include *potential* claims over $10,000, Little Tucker Act jurisdiction is only satisfied by a "clearly and adequately expressed" waiver of such claims. *See Waters v. Rumsfeld*, 320 F.3d 265, 271-272 (D.C. Cir. 2003)

("[F]or a district court to maintain jurisdiction over a claim that might otherwise exceed $10,000, a plaintiff's waiver of amounts over that threshold must be clearly and adequately expressed.") (internal quotation marks and citation omitted). Here, the class plaintiffs argue that "expressly limit[ing] the prospective takings class to individuals who suffered losses less than $10,000" is an adequate alternative to waiver, and that waiver is "premature" until the class certification phase. Class Pls.'s Opp'n at 53. Yet the plaintiffs' refusal to clearly and adequately waive claims exceeding $10,000 in either their pleadings or subsequent opposition brief contravenes Circuit precedent. *See Goble v. Marsh*, 684 F.2d 12, 15-16 (D.C. Cir. 1982); *Stone v. United States*, 683 F.2d 449, 454 n.8 (D.C. Cir. 1982) ("Generally a plaintiffs' waiver should be set forth in the initial pleadings."). Nevertheless, the Circuit has also made clear its preference that the District Court should not transfer a case that is defective on Little Tucker Act grounds to the Court of Claims "without first giving [the plaintiffs] an opportunity to amend their complaints to effect an adequate waiver." *Goble*, 684 F.2d at 17.

Thus, while the class plaintiffs' takings pleading is inadequate for jurisdiction in this Court under the "Little" Tucker Act, in keeping with the tenor of Circuit case law, the Court would generally provide the class plaintiffs "an opportunity to amend their complaints to effect an adequate waiver." *Id*. However, doing so here is unnecessary, since the Court finds that the class plaintiffs' takings claims are dismissed on alternative grounds.

2. The Class Plaintiffs Fail to Plead a Cognizable Property Interest

Any property rights that the class plaintiffs claim can only arise from their GSE stock certificates. Yet "existing rules," "understandings," or "background principles" derived from legislation enacted prior to the share purchase inhere in the plaintiffs' title to the stock certificates and "define the range of interests that qualify for protection as 'property' under the Fifth" Amendment. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1028-30 (1992); *see also Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1379 (Fed. Cir. 2004).[48] Since 1992, when Congress established FHFA's predecessor, the Office of Federal Housing Enterprise Oversight ("OFHEO"), the GSEs have been subject to regulatory oversight, including the specter of conservatorship or receivership under which the regulatory agency succeeds to "all rights" of the GSEs and shareholders. *See* Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, §§ 1301-1395, 106 Stat. 3672, 3941-4012 (establishing OFHEO); 12 U.S.C. § 4617(b)(2)(i). This enduring regulatory scheme governing the GSEs at the time the class plaintiffs purchased their shares represents the "background principle" that inheres in the stock certificates.

The defendants argue that the plaintiffs fail to plead a cognizable property interest, for takings purposes, because the GSEs—and, therefore, the plaintiff

[48] Given the extensive history of Takings Clause jurisprudence within the Court of Appeals for the Federal Circuit, the Court will look to such cases for guidance.

shareholders—lack the right to exclude the government from their property. Treasury Mot. at 59-60; FHFA Mot. at 60-62; but *see* Class Pls.'s Opp'n at 61-65. The Court agrees. "[T]he 'right to exclude' is doubtless . . . 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). The defendants analogize the "federal oversight and regulation" to which the GSEs have been subject to that of regulated financial institutions. *See* Treasury Mot. at 59. Utilizing this analogy, the defendants cite Federal Circuit case law for the proposition that the plaintiff shareholders have no present cognizable property interest in the dividends or liquidation preferences referenced in their stock certificates.

In two cases involving statutorily regulated financial institutions, placed under the authority of either the FDIC or RTC, the Federal Circuit found that the shareholders of these institutions lacked the requisite property interests to support a takings claim. *Golden Pac. Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994); *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992).[49] On account of the existing regulatory structure permitting the appointment of a conservator or receiver, the financial institutions "lacked the fundamental right to exclude the

[49] The fact that the *California Housing* Court only considered the "permanent physical occupation" rubric of regulatory takings analysis from *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which would not apply to the present facts, has no effect on its holding regarding the threshold determination of a cognizable property interest.

government from its property at those times when the government could legally impose a conservatorship or receivership on [the institutions].” *Golden Pac.*, 15 F.3d at 1073 (quoting *Cal. Hous.,* 959 F.2d at 958) (internal quotation marks omitted). And the result of this “regulated environment” is imputed to the shareholders of the financial institution, who thus hold “less than the full bundle of property rights.” *Id.* (internal quotation marks omitted).

The Court finds this reasoning to be persuasive. By statutory definition, the GSEs are subject to governmental control at the discretion of FHFA’s director. 12 U.S.C. § 4617(a)(2). Therefore, the GSE shareholders necessarily lack the right to exclude the government from their investment when FHFA places the GSEs under governmental control—*e.g.*, into conservatorship.[50] This conclusion is especially true since the statute explicitly grants FHFA the power to assume “all rights . . . of the regulated entity, and of any stockholder . . . .” *See* 12 U.S.C. § 4617(b)(2)(i).[51]

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[50] The Court notes that FHFA overreads the Federal Circuit holdings. Unlike FHFA’s contention that “shareholders had no cognizable property interest within the meaning of the Takings Clause *before* conservatorship,” FHFA Mot. at 61, the shareholders only lose their cognizable property interests “when [the GSEs are] in conservatorship,” Treasury Mot. at 58.

[51] The class plaintiffs’ alarmist assertion that a holding like the one at present “would mean that the defendants could expropriate all of the shares in the most profitable and stable financial institutions in the country without triggering the Takings Clause” is unwarranted. Class Pls.’s Opp’n at 63-64. There is no right to exclude, and therefore no cognizable property interest upon which to state a takings claim, only when the government

Without disputing the broader analogy that the defendants draw between regulated financial institutions and the GSEs,[52] the class plaintiffs seek to distinguish the Federal Circuit decisions based on why FHFA and Treasury entered into the Third Amendment. *Id.* at 63. But motives are irrelevant, for takings purposes, if the plaintiffs possess no cognizable property interests in the first place. *Golden Pacific* and *California Housing* stand for the general notion that investors have no right to exclude the government from their alleged property interests when the regulated institution in which they own shares is placed into conservatorship or receivership. *See Cal. Hous.*, 959 F.2d at 958 (no right to exclude when a conservatorship or receivership is legally imposed). Whether the defendants executed the Third Amendment to generate profits for taxpayers or to escape a "downward spiral" of the GSEs seeking funding in order to pay owed dividends back to Treasury, it does not change the fact that it was executed during a period of conservatorship and, thus, after the plaintiffs' property interests—whatever they may have been prior to the Third Amendment—were extinguished. Unless the plaintiffs can demonstrate that FHFA

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may "legally impose a conservatorship"—*i.e.*, when necessary to stabilize a stressed financial institution. *See Cal. Hous.*, 959 F.2d at 958; 12 U.S.C. § 4617(a)(2).

[52] *See* Class Pls.'s Opp'n at 61-62 ("Those cases hold that shareholders in regulated financial institutions are on notice that government regulators may place the institution into conservatorship or receivership if they conclude that the institution is insolvent or being operated in an unsafe and unsound manner, and therefore those shareholders lack the 'right to exclude' the government in such circumstances.")

could not legally impose a conservatorship upon the GSEs at the time of the Third Amendment, allegations of mischievous intentions during a conservatorship do not revive already eliminated cognizable property interests. *See id*. And here, the class plaintiffs only plead that the Third Amendment was inconsistent with FHFA's responsibilities as conservator—not that FHFA lacked any legal right to be a conservator on August 17, 2012. *E.g., In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 92-101 (alleging that "the Third Amendment was inconsistent and in conflict with FHFA's statutory responsibilities as a conservator"); *see also* 12 U.S.C. § 4617(a)(2) ("[FHFA] may, *at the discretion of the Director*, be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity.") (emphasis added). Given that the class plaintiffs cannot repair the overarching threshold defect of having no cognizable property interest at stake, their takings claim must be dismissed under Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.").[53]

[53] In consideration of the class plaintiffs' takings claims concerning dividends, specifically, the Court further acknowledges the multitude of federal cases, in different contexts, finding a lack of a cognizable property interest when another party maintains *discretion* to grant a plaintiff's alleged property interest. *E.g., Toxco, Inc. v. Chu*, 801 F. Supp. 2d 1, 10 (D.D.C. 2011) ("[I]f the government is vested with complete discretion as to whether or not it must undertake any of its contractual obligations, the plaintiff does not have a constitutional property interest in that contract.") (citing *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1295-96 (5th Cir. 1994); *Christ Gatzonis Elec. Contractor, Inc. v. N.Y. City*

3. The Class Plaintiffs Further Fail to Plead a Regulatory Taking

Even if the class plaintiffs could claim a cognizable property interest—and they cannot—their claims would still fail on a motion to dismiss under existing Supreme Court regulatory takings precedent. "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Supreme Court has developed a series of analytical rubrics under which courts are to determine "whether a regulation 'reaches a certain magnitude' in depriving an owner of the use of property." *See Dist. Intown Props. Ltd. P'ship v. D.C.*, 198 F.3d 874, 878 (D.C. Cir. 1999) (quoting *Mahon*, 260 U.S. at 413). There are two principal "narrow categories" of *per se* takings. *See Lingle*

Sch. Constr. Auth., 23 F.3d 636, 640 (2d Cir. 1994)); *Barrington Cove Ltd. P'ship v. R.I. Hous. & Mortg. Fin.* Corp., 246 F.3d 1, 5-6 (1st Cir. 2001) (finding that a plaintiff has no cognizable property interest in "'promised' federal income tax credits" because a state agency maintained "absolute discretion to determine whether" such tax credits are awarded); *Nello L. Teer Co. v. Orange Cnty.*, No. 92-2240, 1993 WL 177872, at *2 (4th Cir. 1993) ("Under our precedents, if a local zoning authority possesses any significant discretion in granting a permit, there is no cognizable property interest in the issuance of that permit.") (internal quotation marks, alteration, and citation omitted). The logic of these decisions would appear to extend to dividends that are issued at the "sole discretion" of a GSE board—or, in this case, the regulatory entity that has succeeded to all the rights of the board. Much like how plaintiffs cannot claim that discretionary dividends amount to a contractual right, the class plaintiffs cannot contend that such dividend provisions constitute a cognizable property interest.

v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005). First, "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426. Here, the government has not physically occupied the plaintiffs' property.[54] Second, a government regulation that deprives an owner of "all economically beneficial uses" of his property is also a taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Regardless of whether *Lucas* only applies to real property, *compare* Treasury Mot. at 61, *with* Class Pls.'s Opp'n at 67-68, the plaintiffs cannot find relief under a "total wipeout" theory. *See* Class Pls.'s Opp'n at 67-68. The plaintiffs maintain "economically beneficial use" of their shares, since the stock very much remains a tradable equity. Indeed, GSE shares are traded daily on public over-the-counter (OTC) exchanges.[55] And given the Court's rejection of the plain-

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[54] The Supreme Court has also held that "when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, 'a per se [takings] approach' is the proper mode of analysis." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003)). Despite citing this language in their opposition brief, Class Pls.'s Opp'n at 67, the class plaintiffs have not alleged that the government has commanded them to *relinquish* any funds—or property, for that matter—already owned or possessed. *See* Treasury Reply at 56 ("The plaintiffs' claim, instead, is that the value of their expectation of dividends or a liquidation preference has been diminished . . . .").

[55] That the plaintiffs retained value in their market traded shares is consistent with the statement from Freddie Mac's Form 8-K filing on September 8, 2011, which the class plaintiffs quote

tiffs' alleged present rights to dividends and liquidation payments, it is clear that the government has not "seized [the plaintiffs'] private property and kept that property for itself." Class Pls.'s Opp'n at 67.

A regulatory taking, on the other hand, is evaluated under the "ad hoc" inquiry set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Id*. at 124. *Penn Central* identified three "factors that have particular significance" in evaluating regulatory takings claims: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Id*. A plaintiff is not required to demonstrate favorable results under all three *Penn Central* factors in order for the Court to find a taking—it is a balancing test. *See Dist. Intown Props*., 198 F.3d at 878-79 (*Penn Central* submits "three primary factors [to be] weigh[ed] in the balance"). While regulatory takings require a "more fact specific inquiry", *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002), no supplementation of the factual record could alter dismissal here.

At present, the Third Amendment has had no economic impact on the plaintiffs' alleged dividend or

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in the Amended Complaint. *See In re Fannie Mae/Freddie Mac* Am. Compl. at ¶ 53 ("The holders of Freddie Mac's existing common stock and preferred stock . . . will retain all their rights in the financial worth of those instruments, *as such worth is determined by the market*.") (emphasis added) (quoting Freddie Mac 2011 8-K (Sept. 11, 2008)).

liquidation preference rights. In view of the unambiguous language of the stock certificate's dividend provision coupled with Treasury's discretion to pay dividends under the PSPAs, the plaintiffs cannot show that the Third Amendment rendered their prospects of receiving dividends any less discretionary than they were prior to the amendment. Additionally, since liquidation preference rights only *ripen during liquidation*, any impact on such rights is, at best, theoretical while the GSEs remain in conservatorship.

"A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). "In determining whether a reasonable investment-backed expectation exists, one relevant consideration is the extent of government regulation within an industry." *Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*, 885 F. Supp. 2d 156, 195 (D.D.C. 2012) (collecting cases). For decades—and at the time each of the class plaintiffs purchased their GSE stock—the GSEs have been under the watchful eye of regulatory agencies and subject to conservatorship or receivership largely at the government's discretion. *See supra* Section III(D)(2).[56] As the Federal Circuit's holdings in *Cali-*

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[56] Furthermore, as FHFA cogently explains, "[b]ecause the [GSEs] benefited from preferential tax treatment, far lower capital requirements, and a widely perceived government guarantee, [the] [p]laintiffs should have anticipated that the [GSEs] would be subject to . . . regulation." FHFA Mot. at 61 n.37 (cita-

fornia Housing and *Golden Pacific* elucidate, by lacking the right to exclusive possession of their stock certificates—and therefore lacking a cognizable property interest—at the time of the Third Amendment, the plaintiff shareholders could not have "developed a historically rooted expectation of compensation" for any possible seizures that occurred during FHFA's conservatorship. *See Cal. Hous.*, 959 F.2d at 958. The plaintiffs "voluntarily entered into [investment contracts with] the highly regulated" GSEs. *See Golden Pac.*, 15 F.3d at 1073.[57] In fact, a number of the class plaintiffs purchased their shares mere months before or shortly after FHFA exercised its statutory authority to place the GSEs into conservatorship. *E.g., In re Fannie Mae / Freddie Mac* Am. Compl. at ¶¶ 30-35; *In re Fannie Mae / Freddie Mac* Derivative Compl. at ¶¶ 20-21. There can be no doubt that the plaintiff shareholders understood the risks intrinsic to investments in entities as closely regulated as the GSEs, and, as such, have not now been deprived of any *reasonable* investment-backed expectations.

Looking to the character of the governmental action in dispute, the *Penn Central* Court explained that "[a] 'taking' may more readily be found when the interference with property can be characterized as a

tion omitted). The tradeoff when investing in government-sponsored entities that receive meaningfully different benefits than private corporations is increased regulation and the prospect of a government takeover.

[57] Both Fannie Mae and Freddie Mac preferred stock certificates provide notice that "[t]he ability of the Board of Directors to declare dividends may be restricted by [FHFA's predecessor] OFHEO." *See* Individual Pls.'s Opp'n Ex. A at 20 (Fannie Mae Preferred Stock Series S); Ex. B at 27 (Freddie Mac Preferred Stock).

physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. Here, the plaintiffs do not plead a physical invasion of their property. Whether the regulatory action taken by FHFA and Treasury when executing the Third Amendment "promote[s] the common good" or advances a public purpose, however, is in dispute. The Supreme Court in *Kelo v. City of New London*, a public use case, reaffirmed that courts should take a deferential stance regarding what constitutes a legitimate public purpose. 545 U.S. 469, 487-88 (2005) ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts."); *see also Hilton Washington Corp. v. D.C.*, 777 F.2d 47, 49-50 (D.C. Cir. 1985) (looking only for a "valid public purpose" when examining *Penn Central's* "character of the governmental action" factor). The plaintiffs would be hard pressed to argue that actions taken to "benefit taxpayers" do not qualify as a legitimate public purpose. *E.g.*, Class Pls.'s Opp'n at 15. To reach this conclusion with certainty, however, the Court would likely need to permit additional fact-finding. Nevertheless, more discovery is unnecessary because *Penn Central's* first two factors weigh strongly enough against the plaintiffs' takings claims that dismissal would be proper in this case. *See Monsanto*, 467 U.S. at 1005 ("[T]he force of [the reasonable investment-backed expectations] factor [here] is so overwhelming . . . that it disposes of the taking question . . . .").

4. Claims of an Unconstitutional Taking of Liquidation Rights Are Not Ripe

Moreover, the Court would also dismiss the class plaintiffs' takings claims, at least in relation to liquidation preference rights, on ripeness grounds. As mentioned above, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. at 300 (internal quotation marks and citation omitted). Liquidation preferences only entitle a preferred stockholder to payment in the event of liquidation. Consistent with the Court's reasoning discussed *supra*, Section III(C)(1), the government cannot take a property right that has not yet matured. This Court's findings concerning cognizable property interests aside, a claim of an unconstitutional taking of liquidation preference rights may only be brought once a liquidation process has commenced.[58]

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[58] Regarding another possible basis for dismissal, the Court appreciates the logical appeal of FHFA's comparison of the *Omnia* Court's finding that consequential—rather than direct—injuries to a third party do not entitle that third party to a takings remedy and the alleged injury caused to the plaintiffs here by the Third Amendment agreement between FHFA and Treasury. FHFA Mot. at 62-63; FHFA Reply at 40-45 (citing *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923)); *but see* Class Pls.'s Opp'n at 70-72. However, the Court is wary of applying to the present facts a decision that came just five months after the concept of a regulatory taking was born, *see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and many decades before the Supreme Court began actively developing its regulatory takings

IV. CONCLUSION

It is understandable for the Third Amendment, which sweeps nearly all GSE profits to Treasury, to raise eyebrows, or even engender a feeling of discomfort. But any sense of unease over the defendants' conduct is not enough to overcome the plain meaning of HERA's text. Here, the plaintiffs' true gripe is with the language of a statute that enabled FHFA and, consequently, Treasury, to take unprecedented steps to salvage the largest players in the mortgage finance industry before their looming collapse triggered a systemic panic. Indeed, the plaintiffs' grievance is really with Congress itself. It was Congress, after all, that parted the legal seas so that FHFA and Treasury could effectively do whatever they thought was needed to stabilize and, if necessary, liquidate, the GSEs. Recognizing its role in the constitutional system, this Court does not seek to evaluate the merits of whether the Third Amendment is sound financial or even moral policy. The Court does, however, find that HERA's unambiguous statutory provisions, coupled with the unequivocal language of the plaintiffs' original GSE stock certificates, compels the dismissal of all of the plaintiffs' claims.

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jurisprudence. *See Lingle*, 544 U.S. at 536-40 (outlining the evolution of regulatory takings case law since the Supreme Court's *Penn Central* decision in 1978).

The Court need not address whether the class plaintiffs' takings claims are further barred because FHFA is not the United States for takings purposes, FHFA Mot. at 59-60, or because Treasury entered into the Third Amendment as a "market participant," Treasury Mot. at 64-65. Such additional arguments are unnecessary to consider in order to resolve the takings issue at the motion to dismiss stage.

Thus, for the foregoing reasons, the Court GRANTS the defendants' motions to dismiss and DENIES the individual plaintiffs' cross-motion for summary judgment.

A separate Order consistent with this Memorandum Opinion shall issue this date.

	/s/
Date	ROYCE C. LAMBERTH United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5243 **September Term, 2016**

1:13-cv-01025-RCL
1:13-cv-01053-RCL
1:13-cv-01439-RCL
1:13-mc-01288-RCL

Filed On:
July 17, 2017

PERRY CAPITAL LLC, FOR AND ON BEHALF OF INVESTMENT FUNDS FOR WHICH IT ACTS AS INVESTMENT MANAGER,
APPELLANT

v.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF THE TREASURY, ET AL.,
APPELLEES

Consolidated with 14-5254, 14-5260, 14-5262

BEFORE: Brown and Millett, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petitions of Fairholme and Arrowood Plaintiffs and the Class Plaintiffs for panel rehearing, the responses thereto, the motion of the Class Plaintiffs for leave to file a reply to FHFA's response to their petition for panel rehearing and the lodged reply, it is

ORDERED that the motion for leave to file a reply be denied. The Clerk is directed to note the docket accordingly. It is

FURTHER ORDERED that the petitions be granted and the opinion issued February 21, 2017 be amended, both as set forth in the opinion issued this date. The amendments in *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. 2017), are as follows:

(1) 848 F.3d at 1097-98: In the first paragraph following the section "IV. The Class Plaintiffs' Claims", delete:

> in district court (in addition to their APA claims), but they did not preserve their appeal against the dismissal of those claims: They did not raise in their opening brief their claims for breach of contract. The Fairholme plaintiffs also forfeited their claim for breach of fiduciary duty against the FHFA by failing to raise in their opening brief the district court's alternative holding that the "claim is derivative . . . and, therefore, barred under § 4617(b)(2)(A)(i)," *Perry Capital LLC*, 70 F. Supp. 3d at 229 n.24. *See Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1086 (D.C. Cir. 2007).

In lieu thereof, insert:

> (in addition to their APA claims) in district court. Because they neither made their arguments for breach of contract and breach of the implied covenant of good faith and fair dealing in their opening brief nor incorporated those arguments by reference to the class plaintiffs' brief, they did not properly preserve their appeal against the dismissal of those claims. In view, however, of the unusual circumstances presented by the separate briefing for the consolidated cases that we required in this case, we shall exercise our discretion under Federal Rule of Appellate Procedure 2 to permit appeal of the order dismissing those claims as if their arguments had been properly preserved. Therefore, subsequent references to the class plaintiffs are also applicable to the Arrowood and Fairholme plaintiffs insofar as they concern claims for breach of contract and breach of the implied covenant of good faith and fair dealing.
>
> The Fairholme plaintiffs also forfeited their claim for breach of fiduciary duty against the FHFA by failing to raise in their opening brief the district court's alternative holding that the "claim is derivative . . . and, therefore, barred under § 4617(b)(2)(A)(i)," *Perry Capital LLC*, 70 F. Supp. 3d at 229 n.24. *See Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1086 (D.C. Cir. 2007). We see no reason to relieve them of the consequences of this forfeiture.

(2) 848 F.3d at 1111: In the paragraph beginning "Under Delaware law" delete:

> What is arbitrary or unreasonable depends upon "the parties' reasonable expectations at the time of contracting." Nemec, 991 A.2d at 1126; *see also Gerber*, 67 A.3d at 419.

(3) 848 F.3d at 1111-12: Delete the paragraph beginning "We remand this claim", and in lieu thereof, insert:

> We remand this claim, insofar as it seeks damages, for the district court to evaluate it under the correct legal standard, namely, whether the Third Amendment violated the reasonable expectations of the parties. We note that the class plaintiffs specifically allege that some class members purchased their shares before the Recovery Act was enacted in July 2008 and the FHFA was appointed conservator the following September, while others purchased their shares later, but the class plaintiffs define their class action to include more broadly "all persons and entities who held shares . . . and who were damaged thereby," J.A. 262-63. The district court may need to redefine or subdivide the class depending upon what that court determines were the various plaintiffs' reasonable expectations. If the district court determines the enactment of the Recovery Act and the FHFA's appointment as conservator affected these expectations, then it should consider, *inter alia*, (1) Section 4617(b)(2)(J)(ii) (authorizing the

> FHFA to act "in the best interests of the [Companies] or the Agency"), (2) Provision 5.1 of the Stock Agreements, J.A. 2451, 2465 (permitting the Companies to declare dividends and make other distributions only with Treasury's consent), and (3) pertinent statements by the FHFA, *e.g.*, J.A. 217 ¶ 8, referencing *Statement of FHFA Director James B. Lockhart at News Conference Announcing Conservatorship of Fannie Mae and Freddie Mac* (Sept. 7, 2008) (The "FHFA has placed Fannie Mae and Freddie Mac into conservatorship. [Conservatorship] is 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 Enterprises until they are stabilized.").

(4) 848 F.3d at 1114: Delete the paragraph in section "V. Conclusion", and in lieu thereof, insert:

> We affirm the judgment of the district court denying the institutional plaintiffs' claims against the FHFA and Treasury alleging arbitrary and capricious conduct and conduct in excess of their statutory authority because those claims are barred by 12 U.S.C. § 4617(f). With respect to the class plaintiffs' claims and those of the Arrowood and Fairholme plaintiffs, we affirm the judgment of the district court except for the claims alleging breach of contract and breach of the implied covenant of good faith and fair dealing regarding liquidation preferences and the claim for breach of the implied covenant with respect to

> dividend rights, which claims we remand to the district court for further proceedings consistent with this opinion.

The Clerk is directed to issue the mandate seven days after the issuance of this order. *See* Fed. R. App. P. 41; D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

APPENDIX D

12 U.S.C. § 1455. Obligations and securities of the Corporation

* * *

(l) Temporary authority of Treasury to purchase obligations and securities; conditions

(1) Authority to purchase

(A) General authority

In addition to the authority under subsection (c) of this section, the Secretary of the Treasury is authorized to purchase any obligations and other securities issued by the Corporation under any section of this chapter, on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine. Nothing in this subsection requires the Corporation to issue obligations or securities to the Secretary without mutual agreement between the Secretary and the Corporation. Nothing in this subsection permits or authorizes the Secretary, without the agreement of the Corporation, to engage in open market purchases of the common securities of the Corporation.

(B) Emergency determination required

In connection with any use of this authority, the Secretary must determine that such actions are necessary to—

(i) provide stability to the financial markets;

(ii) prevent disruptions in the availability of mortgage finance; and

(iii) protect the taxpayer.

(C) Considerations

To protect the taxpayers, the Secretary of the Treasury shall take into consideration the following in connection with exercising the authority contained in this paragraph:

(i) The need for preferences or priorities regarding payments to the Government.

(ii) Limits on maturity or disposition of obligations or securities to be purchased.

(iii) The Corporation's plan for the orderly resumption of private market funding or capital market accessp.

(iv) The probability of the Corporation fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the Corporation's status as a private shareholder-owned company.

(vi) Restrictions on the use of Corporation resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

(D) Reports to Congress

Upon exercise of this authority, the Secretary shall report to the Committees on the Budget, Financial Services, and Ways and Means of the House of Representatives and the Committees on the Budget, Finance, and Banking, Housing, and Urban Affairs of the Senate as to the necessity for the purchase and the determinations made by the Secretary under subparagraph (B) and with respect to the considerations required under subparagraph (C), and the size, terms, and probability of repayment or fulfillment of other terms of such purchase.

(2) Rights; sale of obligations and securities

(A) Exercise of rights

The Secretary of the Treasury may, at any time, exercise any rights received in connection with such purchases.

(B) Sale of obligation and securities

The Secretary of the Treasury may, at any time, subject to the terms of the security or otherwise upon terms and conditions and at prices determined by the Secretary, sell any obligation or security acquired by the Secretary under this subsection.

(C) Deficit reduction

The Secretary of the Treasury shall deposit in the General Fund of the Treasury any amounts received by the Secretary from the sale of any obligation acquired by the Secretary under this subsection, where such amounts shall be—

(i) dedicated for the sole purpose of deficit reduction; and

(ii) prohibited from use as an offset for other spending increases or revenue reductions.

(D) Application of sunset to purchased obligations or securities

The authority of the Secretary of the Treasury to hold, exercise any rights received in connection with, or sell, any obligations or securities purchased is not subject to the provisions of paragraph (4).

(3) Funding

For the purpose of the authorities granted in this subsection, the Secretary of the Treasury may use the proceeds of the sale of any securities issued under chapter 31 of Title 31, and the purposes for which securities may be issued under chapter 31 of Title 31 are extended to include such purchases and the exercise of any rights in connection with such purchases. Any funds expended for the purchase of, or modifications to, obligations and securities, or the exercise of any rights received in connection with such purchases under this subsection shall be deemed appropriated at the time of such purchase, modification, or exercise.

(4) Termination of authority

The authority under this subsection (l), with the exception of paragraphs (2) and (3) of this subsection, shall expire December 31, 2009.

(5) Authority of the Director with respect to executive compensation

The Director shall have the power to approve, disapprove, or modify the executive compensation of the Corporation, as defined under Regulation S-K, 17 C.F.R. 229.

12 U.S.C. § 1719. Secondary market operations

* * *

(g) Temporary authority of Treasury to purchase obligations and securities; conditions

(1) Authority to purchase

(A) General authority

In addition to the authority under subsection (c) of this section, the Secretary of the Treasury is authorized to purchase any obligations and other securities issued by the corporation under any section of this chapter, on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine. Nothing in this subsection requires the corporation to issue obligations or securities to the Secretary without mutual agreement between the Secretary and the corporation. Nothing in this subsection permits or authorizes the Secretary, without the agreement of the corporation, to engage in open market purchases of the common securities of the corporation.

(B) Emergency determination required

In connection with any use of this authority, the Secretary must determine that such actions are necessary to—

(i) provide stability to the financial markets;

(ii) prevent disruptions in the availability of mortgage finance; and

(iii) protect the taxpayer.

(C) Considerations

To protect the taxpayers, the Secretary of the Treasury shall take into consideration the following in connection with exercising the authority contained in this paragraph:

(i) The need for preferences or priorities regarding payments to the Government.

(ii) Limits on maturity or disposition of obligations or securities to be purchased.

(iii) The corporation's plan for the orderly resumption of private market funding or capital market access.

(iv) The probability of the corporation fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the corporation's status as a private shareholder-owned company.

(vi) Restrictions on the use of corporation resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

(D) Reports to Congress

Upon exercise of this authority, the Secretary shall report to the Committees on the Budget, Financial Services, and Ways and Means of the House of Representatives and the Committees on the Budget, Finance, and Banking, Housing, and Urban Affairs of the Senate as to the necessity for the purchase and the determinations made by the

Secretary under subparagraph (B) and with respect to the considerations required under subparagraph (C), and the size, terms, and probability of repayment or fulfillment of other terms of such purchase.

(2) Rights; sale of obligations and securities

(A) Exercise of rights

The Secretary of the Treasury may, at any time, exercise any rights received in connection with such purchases.

(B) Sale of obligation and securities

The Secretary of the Treasury may, at any time, subject to the terms of the security or otherwise upon terms and conditions and at prices determined by the Secretary, sell any obligation or security acquired by the Secretary under this subsection.

(C) Deficit reduction

The Secretary of the Treasury shall deposit in the General Fund of the Treasury any amounts received by the Secretary from the sale of any obligation acquired by the Secretary under this subsection, where such amounts shall be—

(i) dedicated for the sole purpose of deficit reduction; and

(ii) prohibited from use as an offset for other spending increases or revenue reductions.

(D) Application of sunset to purchased obligations or securities

The authority of the Secretary of the Treasury to hold, exercise any rights received in connection with, or sell, any obligations or securities purchased is not subject to the provisions of paragraph (4).

(3) Funding

For the purpose of the authorities granted in this subsection, the Secretary of the Treasury may use the proceeds of the sale of any securities issued under chapter 31 of Title 31, and the purposes for which securities may be issued under chapter 31 of Title 31 are extended to include such purchases and the exercise of any rights in connection with such purchases. Any funds expended for the purchase of, or modifications to, obligations and securities, or the exercise of any rights received in connection with such purchases under this subsection shall be deemed appropriated at the time of such purchase, modification, or exercise.

(4) Termination of authority

The authority under this subsection (g), with the exception of paragraphs (2) and (3) of this subsection, shall expire December 31, 2009.

(5) Authority of the Director with respect to executive compensation

The Director shall have the power to approve, disapprove, or modify the executive compensation of the corporation, as defined under Regulation S-K, 17 C.F.R. 229.

*   *   *

12 U.S.C. § 1821. Actions; limitation; concurrent jurisdiction of courts

* * *

(c) Appointment of Corporation as conservator or receiver

(1) In general

Notwithstanding any other provision of Federal law, the law of any State, or the constitution of any State, the Corporation may accept appointment and act as conservator or receiver for any insured depository institution upon appointment in the manner provided in paragraph (2) or (3).

(2) Federal depository institutions

(A) Appointment

(i) Conservator

The Corporation may, at the discretion of the supervisory authority, be appointed conservator of any insured Federal depository institution and the Corporation may accept such appointment.

(ii) Receiver

The Corporation shall be appointed receiver, and shall accept such appointment, whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution by the appropriate Federal banking agency, notwithstanding any other provision of Federal law.

(B) Additional powers

In addition to and not in derogation of the powers conferred and the duties imposed by this section on the Corporation as conservator or receiver, the Corporation, to the extent not inconsistent with such powers and duties, shall have any other power conferred on or any duty (which is related to the exercise of such power) imposed on a conservator or receiver for any Federal depository institution under any other provision of law.

(C) Corporation not subject to any other agency

When acting as conservator or receiver pursuant to an appointment described in subparagraph (A), the Corporation shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the Corporation's rights, powers, and privileges.

(D) Depository institution in conservatorship subject to banking agency supervision

Notwithstanding subparagraph (C), any Federal depository institution for which the Corporation has been appointed conservator shall remain subject to the supervision of the appropriate Federal banking agency.

(3) Insured State depository institutions

(A) Appointment by appropriate State supervisor

Whenever the authority having supervision of any insured State depository institution appoints a conservator or receiver for such institution and tenders appointment to the Corporation, the Corporation may accept such appointment.

(B) Additional powers

In addition to the powers conferred and the duties related to the exercise of such powers imposed by State law on any conservator or receiver appointed under the law of such State for an insured State depository institution, the Corporation, as conservator or receiver pursuant to an appointment described in subparagraph (A), shall have the powers conferred and the duties imposed by this section on the Corporation as conservator or receiver.

(C) Corporation not subject to any other agency

When acting as conservator or receiver pursuant to an appointment described in subparagraph (A), the Corporation shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of its rights, powers, and privileges.

(D) Depository institution in conservatorship subject to banking agency supervision

Notwithstanding subparagraph (C), any insured State depository institution for which the Corporation has been appointed conservator shall remain subject to the supervision of the appropriate State bank or savings association supervisor.

(4) Appointment of Corporation by the Corporation

Notwithstanding any other provision of Federal law, the law of any State, or the constitution of any State, the Corporation may appoint itself as sole conservator or receiver of any insured State depository institution if—

(A) the Corporation determines—

(i) that—

(I) a conservator, receiver, or other legal custodian has been appointed for such institution;

(II) such institution has been subject to the appointment of any such conservator, receiver, or custodian for a period of at least 15 consecutive days; and

(III) 1 or more of the depositors in such institution is unable to withdraw any amount of any insured deposit; or

(ii) that such institution has been closed by or under the laws of any State; and

(B) the Corporation determines that 1 or more of the grounds specified in paragraph (5)—

(i) existed with respect to such institution at the time—

(I) the conservator, receiver, or other legal custodian was appointed; or

(II) such institution was closed; or

(ii) exist at any time—

(I) during the appointment of the conservator, receiver, or other legal custodian; or

(II) while such institution is closed.

(5) Grounds for appointing conservator or receiver

The grounds for appointing a conservator or receiver (which may be the Corporation) for any insured depository institution are as follows:

(A) Assets insufficient for obligations.—The institution's assets are less than the institution's obligations to its creditors and others, including members of the institution.

(B) Substantial dissipation.—Substantial dissipation of assets or earnings due to—

(i) any violation of any statute or regulation; or

(ii) any unsafe or unsound practice.

(C) Unsafe or unsound condition.—An unsafe or unsound condition to transact business.

(D) Cease and desist orders.—Any willful violation of a cease-and-desist order which has become final.

(E) Concealment.—Any concealment of the institution's books, papers, records, or assets, or any refusal to submit the institution's books, papers, records, or affairs for inspection to any examiner or to any lawful agent of the appropriate Federal banking agency or State bank or savings association supervisor.

(F) Inability to meet obligations.—The institution is likely to be unable to pay its obligations or meet its depositors' demands in the normal course of business.

(G) Losses.—The institution has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the institution to become adequately capitalized (as defined in section 1831o(b) of this title) without Federal assistance.

(H) Violations of law.—Any violation of any law or regulation, or any unsafe or unsound practice or condition that is likely to—

(i) cause insolvency or substantial dissipation of assets or earnings;

(ii) weaken the institution's condition; or

(iii) otherwise seriously prejudice the interests of the institution's depositors or the Deposit Insurance Fund.

(I) Consent.—The institution, by resolution of its board of directors or its shareholders or members, consents to the appointment.

(J) Cessation of insured status.—The institution ceases to be an insured institution.

(K) Undercapitalization.—The institution is undercapitalized (as defined in section 1831o(b) of this title), and—

(i) has no reasonable prospect of becoming adequately capitalized (as defined in that section);

(ii) fails to become adequately capitalized when required to do so under section 1831o(f)(2)(A) of this title;

(iii) fails to submit a capital restoration plan acceptable to that agency within the time prescribed under section 1831o(e)(2)(D) of this title; or

(iv) materially fails to implement a capital restoration plan submitted and accepted under section 1831o(e)(2) of this title.

(L) The institution—

(i) is critically undercapitalized, as defined in section 1831o(b) of this title; or

(ii) otherwise has substantially insufficient capital.

(M) Money laundering offense.—The Attorney General notifies the appropriate Federal banking agency or the Corporation in writing that the insured depository institution has been found guilty of a criminal offense under section 1956 or 1957 of title 18 or section 5322 or 5324 of title 31.

(6) Appointment by Comptroller of the Currency

(A) Conservator

The Corporation may, at the discretion of the Comptroller of the Currency, be appointed conservator and the Corporation may accept any such appointment.

(B) Receiver

The Corporation may, at the discretion of the Comptroller of the Currency, be appointed receiver and the Corporation may accept any such appointment.

(7) Judicial review

If the Corporation is appointed (including the appointment of the Corporation as receiver by the Board of Directors) as conservator or receiver of a depository institution under paragraph (4), (9), or (10), the depository institution may, not later than 30 days thereafter, bring an action in the United States district court for the judicial district in which the home office of such depository institution is located, or in the United States District Court for the District of Columbia, for an order requiring the Corporation to be removed as the conservator or receiver (regardless of how such appointment was made), and the court shall, upon the merits, dismiss such action or direct the Corporation to be removed as the conservator or receiver.

(8) Replacement of conservator of State depository institution

(A) In general

In the case of any insured State depository institution for which the Corporation appointed itself as conservator pursuant to paragraph (4), the Corporation may, without any requirement of notice, hearing, or other action, replace itself as conservator with itself as receiver of such institution.

(B) Replacement treated as removal of incumbent

The replacement of a conservator with a receiver under subparagraph (A) shall be treated as the removal of the Corporation as conservator.

(C) Right of review of original appointment not affected

The replacement of a conservator with a receiver under subparagraph (A) shall not affect any right of the insured State depository institution to obtain review, pursuant to paragraph (7), of the original appointment of the conservator.

(9) Appropriate Federal banking agency may appoint Corporation as conservator or receiver for insured State depository institution to carry out section 1831o

(A) In general

The appropriate Federal banking agency may appoint the Corporation as sole receiver (or, subject to paragraph (11), sole conservator) of any insured State depository institution, after consultation with the appropriate State supervisor, if the appropriate Federal banking agency determines that—

(i) 1 or more of the grounds specified in subparagraphs (K) and (L) of paragraph (5) exist with respect to that institution; and

(ii) the appointment is necessary to carry out the purpose of section 1831o of this title.

(B) Nondelegation

The appropriate Federal banking agency shall not delegate any action under subparagraph (A).

(10) Corporation may appoint itself as conservator or receiver for insured depository institution to prevent loss to Deposit Insurance Fund

The Board of Directors may appoint the Corporation as sole conservator or receiver of an insured depository institution, after consultation with the appropriate Federal banking agency and the appropriate State supervisor (if any), if the Board of Directors determines that—

(A) 1 or more of the grounds specified in any subparagraph of paragraph (5) exist with respect to the institution; and

(B) the appointment is necessary to reduce—

(i) the risk that the Deposit Insurance Fund would incur a loss with respect to the insured depository institution, or

(ii) any loss that the Deposit Insurance Fund is expected to incur with respect to that institution.

(11) Appropriate Federal banking agency shall not appoint conservator under certain provisions without giving Corporation opportunity to appoint receiver

The appropriate Federal banking agency shall not appoint a conservator for an insured depository institution under subparagraph (K) or (L) of paragraph (5) without the Corporation's consent unless the agency has given the Corporation 48 hours notice of the agency's intention to appoint the conservator and the grounds for the appointment.

(12) Directors not liable for acquiescing in appointment of conservator or receiver

The members of the board of directors of an insured depository institution shall not be liable to the institution's shareholders or creditors for acquiescing in or consenting in good faith to—

(A) the appointment of the Corporation as conservator or receiver for that institution; or

(B) an acquisition or combination under section 1831o(f)(2)(A)(iii) of this title.

(13) Additional powers

In any case in which the Corporation is appointed conservator or receiver under paragraph (4), (6), (9), or (10) for any insured State depository institution—

(A) this section shall apply to the Corporation as conservator or receiver in the same manner and to the same extent as if that institution were a Federal depository institution for which the Corporation had been appointed conservator or receiver; and

(B) the Corporation as receiver of the institution may—

(i) liquidate the institution in an orderly manner; and

(ii) make any other disposition of any matter concerning the institution, as the Corporation determines is in the best interests of the institution, the depositors of the institution, and the Corporation.

(d) Powers and duties of Corporation as conservator or receiver

(1) Rulemaking authority of Corporation

The Corporation may prescribe such regulations as the Corporation determines to be appropriate regarding the conduct of conservatorships or receiverships.

(2) General powers

(A) Successor to institution

The Corporation shall, as conservator or receiver, and by operation of law, succeed to—

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

(B) Operate the institution

The Corporation may (subject to the provisions of section 1831q of this title), as conservator or receiver—

(i) take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the officers of the institution and conduct all business of the institution;

(ii) collect all obligations and money due the institution;

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

(iv) preserve and conserve the assets and property of such institution.

(C) Functions of institution's officers, directors, and shareholders

The Corporation may, by regulation or order, provide for the exercise of any function by any member or stockholder, director, or officer of any insured depository institution for which the Corporation has been appointed conservator or receiver.

(D) Powers as conservator

The Corporation may, as conservator, 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.

(E) Additional powers as receiver

The Corporation may (subject to the provisions of section 1831q of this title), as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution, having due regard to the conditions of credit in the locality.

(F) Organization of new institutions

The Corporation may, as receiver, with respect to any insured depository institution, organize a new depository institution under subsection (m) or a bridge depository institution under subsection (n).

(G) Merger; transfer of assets and liabilities

(i) In general

The Corporation may, as conservator or receiver—

(I) merge the insured depository institution with another insured depository institution; or

(II) subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.

(ii) Approval by appropriate Federal banking agency

No transfer described in clause (i)(II) may be made to another depository institution (other than a new depository institution or a bridge depository institution established pursuant to subsection (m) or (n)) without the approval of the appropriate Federal banking agency for such institution.

(H) Payment of valid obligations

The Corporation, as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter.

(I) Subpoena authority

(i) In general

The Corporation may, as conservator, receiver, or exclusive manager and for purposes of carrying out any power, authority, or duty with respect to an insured depository institution (including determining any claim against the institution and determining and realizing upon any asset of any person in the course of collecting money due the institution), exercise any power established under section 1818(n) of this title, and the provisions of such section shall apply with respect to the exercise of any such power under this subparagraph in the same manner as such provisions apply under such section.

(ii) Authority of Board of Directors

A subpoena or subpoena duces tecum may be issued under clause (i) only by, or with the written approval of, the Board of Directors or their designees (or, in the case of a subpoena or subpoena duces tecum issued by the Resolution Trust Corporation under this subparagraph and section 1441a(b)(4) of this title, only by, or with the written approval of, the Board of Directors of such Corporation or their designees).

(iii) Rule of construction

This subsection shall not be construed as limiting any rights that the Corporation, in any capacity, might otherwise have under section 1820(c) of this title.

(J) Incidental powers

The Corporation may, as conservator or receiver—

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

(ii) take any action authorized by this chapter, which the Corporation determines is in the best interests of the depository institution, its depositors, or the Corporation.

(K) Utilization of private sector

In carrying out its responsibilities in the management and disposition of assets from insured depository institutions, as conservator, receiver, or in its corporate capacity, the Corporation shall utilize the services of private persons, including real estate and loan portfolio asset management, property management, auction marketing, legal, and brokerage services, only if such services are available in the private sector and the Corporation determines utilization of such services is the most practicable, efficient, and cost effective.

*   *   *

(j) Limitation on court action

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

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12 U.S.C. § 4617. Authority over critically undercapitalized regulated entities

(a) Appointment of the Agency as conservator or receiver

(1) In general

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

(2) Discretionary appointment

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

(3) Grounds for discretionary appointment of conservator or receiver

The grounds for appointing conservator or receiver for any regulated entity under paragraph (2) are as follows:

(A) Assets insufficient for obligations

The assets of the regulated entity are less than the obligations of the regulated entity to its creditors and others.

(B) Substantial dissipation

Substantial dissipation of assets or earnings due to—

(i) any violation of any provision of Federal or State law; or

(ii) any unsafe or unsound practice.

(C) Unsafe or unsound condition

An unsafe or unsound condition to transact business.

(D) Cease and desist orders

Any willful violation of a cease and desist order that has become final.

(E) Concealment

Any concealment of the books, papers, records, or assets of the regulated entity, or any refusal to submit the books, papers, records, or affairs of the regulated entity, for inspection to any examiner or to any lawful agent of the Director.

(F) Inability to meet obligations

The regulated entity is likely to be unable to pay its obligations or meet the demands of its creditors in the normal course of business.

(G) Losses

The regulated entity has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the regulated entity to become adequately capitalized (as defined in section 4614(a)(1) of this title).

(H) Violations of law

Any violation of any law or regulation, or any unsafe or unsound practice or condition that is likely to—

(i) cause insolvency or substantial dissipation of assets or earnings; or

(ii) weaken the condition of the regulated entity.

(I) Consent

The regulated entity, by resolution of its board of directors or its shareholders or members, consents to the appointment.

(J) Undercapitalization

The regulated entity is undercapitalized or significantly undercapitalized (as defined in section 4614(a)(3) of this title), and—

(i) has no reasonable prospect of becoming adequately capitalized;

(ii) fails to become adequately capitalized, as required by—

(I) section 4615(a)(1) of this title with respect to a regulated entity; or

(II) section 4616(a)(1) of this title with respect to a significantly undercapitalized regulated entity;

(iii) fails to submit a capital restoration plan acceptable to the Agency within the time prescribed under section 4622 of this title; or

(iv) materially fails to implement a capital restoration plan submitted and accepted under section 4622 of this title.

(K) Critical undercapitalization

The regulated entity is critically undercapitalized, as defined in section 4614(a)(4) of this title.

(L) Money laundering

The Attorney General notifies the Director in writing that the regulated entity has been found guilty of a criminal offense under section 1956 or 1957 of title 18 or section 5322 or 5324 of title 31.

(4) Mandatory receivership

(A) In general

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

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

(ii) the regulated entity is not, and during the preceding 60 calendar days has not been, generally paying the debts of the regulated entity (other than debts that are the subject of a bona fide dispute) as such debts become due.

(B) Periodic determination required for critically undercapitalized regulated entity

If a regulated entity is critically undercapitalized, the Director shall make a determination, in writing, as to whether the regulated entity meets the criteria specified in clause (i) or (ii) of subparagraph (A)—

(i) not later than 30 calendar days after the regulated entity initially becomes critically undercapitalized; and

(ii) at least once during each succeeding 30-calendar day period.

(C) Determination not required if receivership already in place

Subparagraph (B) does not apply with respect to a regulated entity in any period during which the Agency serves as receiver for the regulated entity.

(D) Receivership terminates conservatorship

The appointment of the Agency as receiver of a regulated entity under this section shall immediately terminate any conservatorship established for the regulated entity under this chapter.

(5) Judicial review

(A) In general

If the Agency is appointed conservator or receiver under this section, the regulated entity may, within 30 days of such appointment, bring an action in the United States district court for the judicial district in which the home office of such regulated entity is located, or in the United States District Court for the District of Columbia, for an order requiring the Agency to remove itself as conservator or receiver.

(B) Review

Upon the filing of an action under subparagraph (A), the court shall, upon the merits, dismiss such action or direct the Agency to remove itself as such conservator or receiver.

(6) Directors not liable for acquiescing in appointment of conservator or receiver

The members of the board of directors of a regulated entity shall not be liable to the shareholders or creditors of the regulated entity for acquiescing in or consenting in good faith to the appointment of the Agency as conservator or receiver for that regulated entity.

(7) Agency not subject to any other Federal agency

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

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

(1) Rulemaking authority of the agency

The Agency may prescribe such regulations as the Agency determines to be appropriate regarding the conduct of conservatorships or receiverships.

(2) General powers

(A) Successor to regulated entity

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

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

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

(B) Operate the regulated entity

The Agency may, as conservator or receiver—

(i) take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity;

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

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

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

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

(C) Functions of officers, directors, and shareholders of a regulated entity

The Agency may, by regulation or order, provide for the exercise of any function by any stockholder, director, or officer of any regulated entity for which the Agency has been named conservator or receiver.

(D) Powers as conservator

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

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

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

(E) Additional powers as receiver

In any case in which the Agency is acting as receiver, the Agency shall place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity in such manner as the Agency deems appropriate, including through the sale of assets, the transfer of assets to a limited-life regulated entity established under subsection (i), or the exercise of any other rights or privileges granted to the Agency under this paragraph.

(F) Organization of new enterprise

The Agency may, as receiver for an enterprise, organize a successor enterprise that will operate pursuant to subsection (i).

(G) Transfer or sale of assets and liabilities

The Agency may, as conservator or receiver, transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale.

(H) Payment of valid obligations

The Agency, as conservator or receiver, shall, to the extent of proceeds realized from the performance of contracts or sale of the assets of a regulated entity, pay all valid obligations of the regulated entity that are due and payable at the time of the appointment of the Agency as conservator or receiver, in accordance with the prescriptions and limitations of this section.

(I) Subpoena authority

(i) In general

(I) Agency authority

The Agency may, as conservator or receiver, and for purposes of carrying out any power, authority, or duty with respect to a regulated entity (including determining any claim against the regulated entity and determining and realizing upon any asset of any person in the course of collecting money due the regulated entity), exercise any power established under section 4588 of this title.

(II) Applicability of law

The provisions of section 4588 of this title shall apply with respect to the exercise of any power under this subparagraph, in the same manner as such provisions apply under that section.

(ii) Subpoena

A subpoena or subpoena duces tecum may be issued under clause (i) only by, or with the written approval of, the Director, or the designee of the Director.

(iii) Rule of construction

This subsection shall not be construed to limit any rights that the Agency, in any capacity, might otherwise have under section 4517 or 4639 of this title.

(J) Incidental powers

The Agency may, as conservator or receiver—

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

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

(K) Other provisions

(i) Shareholders and creditors of failed regulated entity

Notwithstanding any other provision of law, the appointment of the Agency as receiver for a regulated entity pursuant to paragraph (2) or (4) of subsection (a) and its succession, by operation of law, to the rights, titles, powers, and privileges described in subsection (b)(2)(A) shall terminate all rights and claims that the stockholders and creditors of the regulated entity may have against the assets or charter of the regulated entity or the Agency arising as a result of their status as stockholders or creditors, except for their right to payment, resolution, or other satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e).

(ii) Assets of regulated entity

Notwithstanding any other provision of law, for purposes of this section, the charter of a regulated entity shall not be considered an asset of the regulated entity.

* * *

(f) Limitation on court action

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

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