No. 17-20364

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PATRICK J. COLLINS; MARCUS J. LIOTTA; WILLIAM M. HITCHCOCK,

Plaintiffs-Appellants,

v.

STEVEN T. MNUCHIN, SECRETARY, U.S. DEPARTMENT OF THE TREASURY; DEPARTMENT OF THE TREASURY; FEDERAL HOUSING FINANCE AGENCY; MELVIN L. WATT,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS (No. 4:16-cv-03113)

BRIEF FOR THE TREASURY DEPARTMENT

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CERTIFICATE OF INTERESTED PERSONS

Collins v. Mnuchin, No. 17-20364

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-appellants:

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Marcus J. Liotta
William M. Hitchcock

Defendants-appellees:

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Other interested parties:
Federal National Mortgage Association
Federal Home Loan Mortgage Corporation

STATEMENT REGARDING ORAL ARGUMENT

The Treasury Department respectfully requests oral argument in this case. This case concerns the application of two statutory bars to judicial review of plaintiffs' challenge to the government's multi-billion dollar rescue of Fannie Mae and Freddie Mac. The government believes oral argument could provide substantial assistance to this Court in understanding the issues in the case.

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INTRODUCTION

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

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

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

FHFA and Treasury amended the purchase agreements three times. The first amendment doubled Treasury's $100-billion-per-enterprise funding commitment. By December 2009, however, it appeared that even the $400-billion commitment might be insufficient. The second amendment thus permitted the enterprises to draw unlimited amounts from Treasury to cure any quarterly net-worth deficits through 2012. At the end of 2012, however, Treasury's commitment would be fixed and future draws would reduce the remaining funding available. As of August 2012, the enterprises had drawn $187.5 billion from Treasury's $444.5-billion commitment.

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

2. Plaintiffs do not dispute that Treasury's $250-plus-billion commitment is vital to the enterprises or that the Third Amendment ended the practice of drawing

on the commitment to pay dividends. They nevertheless assert that the Third Amendment was unlawful and seek injunctive and declaratory relief.

Two separate HERA provisions independently bar plaintiffs' challenges to the Third Amendment. First, HERA's sweeping anti-injunction provision, 12 U.S.C. § 4617(f), precludes a court from taking "any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." Every court to consider the question has held that § 4617(f) bars the statutory claims plaintiffs raise here. As the D.C. Circuit explained, "[s]ection 4617(f) prohibits [a court] from wielding [its] equitable relief to second-guess either the dividend-allocating terms that FHFA negotiated on behalf of the Companies, or FHFA's business judgment that the Third Amendment better balances the interests of all parties involved, including the taxpaying public, than earlier approaches had." *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1095 (D.C. Cir.), amended on reh'g, 864 F.3d 591 (D.C. Cir. 2017). As the D.C. Circuit and other courts have also recognized, litigants cannot evade the anti-injunction bar by naming Treasury as a defendant. An injunction against either FHFA or Treasury would "restrain or affect" the exercise of the conservator's powers.

Second, under HERA, FHFA as conservator succeeded to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder[.]" 12 U.S.C. § 4617(b)(2)(A)(1). This provision "plainly transfers to the FHFA the shareholders' ability to bring derivative suits on behalf of [the enterprises]." *Perry Capital,* 848 F.3d at 1104. Plaintiffs' Administrative Procedure Act (APA) and constitutional claims assert injury to the enterprises; plaintiffs suffer their alleged injury derivatively as shareholders; and their actions fall squarely within the transfer-of-shareholder-rights provision.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. On May 22, 2017, the district court granted the defendants' motion to dismiss the suit. ROA.962. Plaintiffs timely filed a notice of appeal on May 25, 2017. ROA.964-65. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

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

STATEMENT OF THE CASE

A. Fannie Mae and Freddie Mac

Congress created Fannie Mae and Freddie Mac to, among other things, provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. *See* 12 U.S.C. § 1716(4). The enterprises finance these purchases by borrowing money in the credit markets and by packaging many of the loans they buy into mortgage-backed securities, which they sell to investors. *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1080 (D.C. Cir.), amended on reh'g, 864 F.3d 591 (D.C. Cir. 2017).

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

B. The 2008 Housing Crisis and HERA

With the 2008 collapse of the housing market, the enterprises experienced overwhelming losses due to a dramatic increase in default rates on residential mortgages. ROA.947-48; *Perry Capital*, 848 F.3d at 1080; *see also DeKalb Cty. v. FHFA*, 741 F.3d 795, 798 (7th Cir. 2013) (From 1995 through the early 2000s, the enterprises "bought risky mortgages and got caught up in the housing bubble; and when the bubble burst found [themselves] owning an immense inventory of defaulted and overvalued subprime mortgages."). At the time, the enterprises owned or guaranteed over $5 trillion of residential mortgage assets, representing nearly half of the United States mortgage market. ROA.947. Their failure would have had catastrophic effects on the national housing market and economy.

The enterprises lost more in 2008 ($108 billion) than they had earned in the past 37 years combined ($95 billion). Office of Inspector General (OIG), FHFA, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 5 (Mar. 20, 2013).[1] As a result, the enterprises faced capital shortfalls. *Perry Capital*, 848 F.3d at 1080, 1082; *see also* OIG, FHFA, *White Paper: FHFA–OIG's Current Assessment of FHFA's Conservatorships of Fannie Mae and Freddie Mac* 11 (Mar. 28, 2012) (*OIG Report*).[2] Private investors were unwilling to provide the enterprises with the capital they needed to weather their losses and avoid receivership and liquidation. *Perry Capital*, 848 F.3d at 1082.

In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654. *See* ROA.948. The legislation created FHFA as an independent agency to supervise and regulate the enterprises, and granted FHFA the authority to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a). FHFA's authority to appoint itself conservator or receiver is generally discretionary, *id.* § 4617(a)(2), but it must place the enterprises into receivership if it determines that the enterprises' assets have been worth less than their obligations for 60 calendar days, *id.* § 4617(a)(4).

HERA provides that FHFA, as conservator or receiver, "immediately succeed[s] to—(i) all rights, titles, powers, and privileges of the [enterprises] and of any stockholder, officer, or director of such [enterprises] with respect to the [enterprises.]" 12 U.S.C. § 4617(b)(2)(A)(i). The legislation authorizes FHFA, as conservator, to "take such action as may be—(i) necessary to put the [enterprises] in a

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

sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]." *Id.* § 4617(b)(2)(D). HERA also permits a conservator to take actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the GSEs. *Id.* § 4617(a)(2). HERA further states that FHFA, when acting as conservator, may exercise its statutory authority in a manner "which the Agency determines is in the best interests of the regulated entity or the Agency." *Id.* § 4617(b)(2)(J)(ii). Finally, HERA contains an anti-injunction provision, which provides that "[e]xcept as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." *Id.* § 4617(f).

Recognizing that an enormous commitment of taxpayer funds could be required, Congress also amended the enterprises' charters to authorize Treasury (1) to "purchase any obligations and other securities issued by" the enterprises upon "Treasury's specific determination that the terms of the purchase would 'protect the taxpayer,'" *Perry Capital*, 848 F.3d at 1081, and (2) to "exercise any rights received in connection with such purchases." 12 U.S.C. §§ 1455(*l*)(1)(A), (2)(A), 1719(g)(1)(A), (B). Treasury's authority to purchase securities issued by the enterprises expired on December 31, 2009; its authority to exercise any rights received in connection with past purchases has no expiration date. *Id.* §§ 1455(*l*)(4), 1719(g)(4).

C. Conservatorship and the Preferred Stock Purchase Agreements

FHFA placed the enterprises in conservatorship on September 6, 2008. ROA.950. One day later, Treasury purchased senior preferred stock in each entity. *Id.* Under the Preferred Stock Purchase Agreements (Purchase Agreements), Treasury committed to provide up to $100 billion in taxpayer funds to each enterprise to maintain their solvency by ensuring that their assets were at least equal to their liabilities. ROA.951.

The Purchase Agreements entitled Treasury to four principal contractual compensation rights. First, Treasury received preferred stock with a senior liquidation preference of $1 billion for each enterprise plus a dollar-for-dollar increase each time the enterprises drew upon Treasury's funding commitment. ROA.950-51.[3] Second, Treasury was entitled to quarterly dividends equal to 10% of Treasury's total liquidation preference. *Id.* Third, Treasury received warrants to acquire up to 79.9% of the enterprises' common stock at a nominal price. *Id.* Fourth, beginning in 2010, Treasury would be entitled to a periodic commitment fee. *Id.* Treasury could waive the commitment fee for one year at a time based on adverse conditions in the mortgage market.

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

Treasury's initial funding commitment soon appeared inadequate. ROA.951. In May 2009, FHFA and Treasury agreed to double Treasury's funding commitment from $100 billion to $200 billion for each enterprise. *Id.*; *Perry Capital*, 848 F.3d at 1082.

In December 2009, in the face of ongoing losses, it appeared that even the $200-billion-per-enterprise funding commitment might be insufficient. Treasury and FHFA therefore amended the Purchase Agreements a second time to allow the enterprises to draw unlimited amounts from Treasury to cure net-worth deficits until the end of 2012, at which point Treasury's funding commitment would be fixed. ROA.951.

As of June 30, 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment, *see* ROA.951-52, making Treasury's liquidation preference $189.5 billion, including the initial $1-billion-per-enterprise senior liquidation preference. *Perry Capital*, 848 F.3d at 1082. Under the terms of the original Purchase Agreements, the enterprises' dividend obligations to Treasury were thus nearly $19 billion per year.

Between 2009 and 2011, the enterprises could not pay these substantial dividend obligations out of their earnings. ROA.952; *Perry Capital*, 848 F.3d at 1079, 1083. The enterprises thus drew on Treasury's funding commitment to meet those obligations. *Perry Capital*, 848 F.3d at 1079. Through the first quarter of 2012, Fannie Mae had drawn $19.4 billion and Freddie Mac had drawn $7 billion, just to pay the dividends they owed Treasury. *Perry Capital*, 70 F. Supp. 3d at 218. Those draws increased Treasury's liquidation preference, thus increasing the amount of dividends the enterprises owed. As their SEC filings reflect, the enterprises anticipated that they would not be able to pay their 10% dividends to Treasury without drawing on Treasury's funding commitment in the future. *See* Fannie Mae, 2012 Q2 Quarterly Report (Fannie Mae 10-Q) (Aug. 8, 2012) at 12; Freddie Mac, 2012 Q2 Quarterly Report (Freddie Mac 10-Q) (Aug. 7, 2012) at 10; *Perry Capital*, 848 F.3d at 1093. Indeed, the $11.7 billion Fannie Mae owed annually was more than it had made in any year of its existence. *See* Fannie Mae 10-Q at 4. The $7.2 billion that Freddie Mac owed annually was more than it had made in all but one year. Freddie Mac 10-Q at 8.

D. The Third Amendment

By June 2012, Treasury had committed $444.5 billion to support the GSEs. As noted, the GSEs had, at that point, drawn $187.5 billion from that commitment. Under the Second Amendment to the Purchase Agreements, each draw increased Treasury's commitment on a dollar-for-dollar basis; a draw did not reduce the size of the remaining commitment. But that state of affairs was about to change. At the end of 2012 (when Treasury's authority to invest additional funds in the GSEs expired) the commitment would become fixed, and any future draws would reduce the size of the remaining commitment. To protect the remaining commitment, Treasury and FHFA thus needed to end the cycle of the enterprises paying dividends by drawing on Treasury's commitment.

In August 2012, Treasury and FHFA agreed to modify the Purchase Agreements a third time. This "Third Amendment" ended the draws-to-pay-dividends cycle by replacing the previous fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth for the quarter exceeds a capital buffer. (The buffer, initially set at $3 billion, gradually declines over time, reaching zero in 2018). ROA.952-53. Under the Third Amendment, the amount of the enterprises' dividend obligations thus depends on whether the enterprises have a positive net worth during a particular quarter, rather than being fixed at 10% of Treasury's existing liquidation preference. If the enterprises have a negative net worth, they pay no dividend.[4]

By exchanging a fixed dividend for a variable one, Treasury accepted more risk under the Third Amendment. In fact, Treasury received less in dividends in 2015 ($15.8 billion) and 2016 ($14.6 billion) than it would have under the original 10% dividend ($18.9 billion). FHFA, *Table 2: Dividends on Enterprise Draws from Treasury*;[5] *see also* ROA.952-53; *Perry Capital*, 848 F.3d at 1083. In 2013 and 2014, however, the enterprises' net worth was substantially higher than expected. The increase in net worth was due partly to a rebound in housing prices and, more importantly, to non-

[4] Treasury also agreed to suspend the periodic commitment fee it was owed under the original Purchase Agreements for as long as the variable dividend was in place. *See* ROA.274.

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

recurring events, including the enterprises' one-time recognition of deferred tax assets they had previously written off. OIG, FHFA, *The Continued Profitability of Fannie Mae and Freddie Mac Is Not Assured* 7-8 (Mar. 18, 2015).[6] Through the end of 2016, Treasury had received $255 billion in cumulative dividends from the enterprises, in return for $187.5 billion in funding and its ongoing commitment. FHFA, *Table 2: Dividends on Enterprise Draws from Treasury*.

E. District Court Proceedings

Plaintiffs are GSE shareholders who brought suit under the APA, arguing that, in agreeing to the Third Amendment, (1) FHFA exceeded its authority as conservator under HERA; (2) Treasury exceeded its authority under HERA; and (3) Treasury acted arbitrarily and capriciously. ROA.81-88. Plaintiffs also urged that FHFA's structure is unconstitutional because FHFA's Director is not removable at the President's will. ROA.88-89. Plaintiffs sought an order declaring the Third Amendment invalid and setting it aside.

Treasury and FHFA moved to dismiss, arguing that HERA's anti-injunction provision, 12 U.S.C. § 4617(f), and its transfer-of-shareholder-rights provision, *id.* § 4617(b)(2)(A)(i), independently bar plaintiffs' claims. FHFA moved for summary judgment on plaintiffs' constitutional claim.

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

The district court granted the motions to dismiss and FHFA's motion for summary judgment. ROA.946-61. The court held that plaintiffs' APA claims were barred by HERA's anti-injunction provision, 12 U.S.C. § 4617(f). ROA.954-55. Adopting the D.C. Circuit's reasoning in *Perry Capital*, the district court emphasized that § 4617(f), by its plain text, bars judicial interference with FHFA's "statutorily permitted actions as conservator." ROA.954. Because FHFA acted within "the scope of its broad statutory authority as conservator" when it agreed to the Third Amendment, § 4617(f) applied and barred the court from granting plaintiffs the equitable relief they sought. ROA.955.

The court next ruled that plaintiffs could not circumvent § 4617(f)'s anti-injunction bar by suing Treasury as FHFA's contractual counterparty. ROA.955-56. The court observed that "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." ROA.955.

Finally, the district court rejected plaintiffs' separation-of-powers challenge to FHFA's structure. ROA.956-60. The court concluded that FHFA's agreement to the Third Amendment did not raise constitutional concerns because the amendment "was adopted by the FHFA in its capacity as conservator of Fannie Mae and Freddie Mac, not as an executive enforcing the laws of the United States." ROA.959.

SUMMARY OF ARGUMENT

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

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

Second, HERA provided that FHFA, as conservator or receiver, would "immediately succeed" to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder[]" with respect to the enterprises and their assets. 12 U.S.C. § 4617(b)(2)(A)(i). This provision "plainly transfers [to FHFA the] shareholders' ability to bring derivative suits on behalf of the Companies." *Perry Capital*, 848 F.3d at 1104. Plaintiffs assert that the Third Amendment deprived the enterprises of capital, and they seek an order that would require transfer of funds to the enterprises and would allegedly result in future increases in the enterprises' capital. Plaintiffs' APA and constitutional claims are thus quintessentially derivative and fall squarely within the transfer-of-shareholder-rights provision.

Plaintiffs' constitutional claim would not succeed, in any event. The Third Amendment was entered into by the Secretary of the Treasury and FHFA's Acting Director, whose designation as acting Director was revocable at will and who was exercising his authority as conservator.

STANDARD OF REVIEW

This Court reviews a district court's grant of a motion to dismiss and a motion for summary judgment de novo. *See Copeland v. Wasserstein, Perella & Co.*, 278 F.3d 472, 477 (5th Cir. 2002).

ARGUMENT

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

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

Plaintiffs' claims are barred by 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator." As the D.C. Circuit explained, HERA's anti-injunction provision "effect[s] a sweeping ouster of courts' power to grant equitable remedies" to parties challenging actions taken by FHFA as conservator. *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1087 (D.C. Cir. 2017), amended on reh'g, 864 F.3d 591 (D.C. Cir. 2017) (quoting *Freeman v. FDIC,* 56 F.3d 1394, 1399 (D.C. Cir. 1995)). That holding accords with this Court's conclusion in *Ward v. Resolution Trust Corporation*, 996 F.2d 99, 102 (5th Cir. 1993), that the substantially identical anti-injunction provision under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821(j), "makes clear that the [conservator] is 'free to perform its functions . . . without being encumbered by the possibility of injunctive actions.'" *See also Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1016 (8th Cir. 2013) (Section 1821(j) "has been construed broadly to constrain the court's equitable powers."); *National Tr. for Historic Pres. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring) (Section 1821(j) "bar[s] a court from acting in virtually all circumstances.").

Judicial review is available under 12 U.S.C. § 4617(f), if at all, only in the rare case where FHFA "clearly" acts beyond statutory or constitutional bounds. *See Ward*, 996 F.2d at 102; *Perry Capital*, 848 F.3d at 1087. If FHFA is exercising a statutorily authorized power or function and the injunctive relief a plaintiff seeks would "restrain or affect" that exercise, § 4617(f) applies and the plaintiff's suit is barred. *Perry Capital*, 848 F.3d at 1086-87; *see also Bank of America N.A. v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010).

As explained in Part I.B, plaintiffs fall far short of making the showing necessary to circumvent § 4617(f)'s broad bar. Plaintiffs' challenge boils down to a disagreement over the manner in which FHFA executed its duties as conservator of the GSEs. Plaintiffs contend that FHFA restructured the enterprises' dividend obligations to Treasury when it did not need to do so, entered into a financially unsound agreement, failed to prioritize the build-up of capital, and placed too much weight on the risk of depleting Treasury's funding commitment. But § 4617(f) prohibits precisely such "second-guess[ing]" of "FHFA's business judgment that the Third Amendment better balances the interests of all parties involved." *Perry Capital*, 848 F.3d at 1095; *see also id.* at 1088-89 (Although the stockholders "no doubt disagree about the necessity and fiscal wisdom of the Third Amendment[,]. . . Congress could not have been clearer about leaving those hard operational calls to FHFA's managerial judgment."). As this Court explained in applying FIRREA's identical preclusion-of-review provision, "as long as the [Resolution Trust Corporation] RTC is 'exercise[ing] judgment under one of its enumerated powers,' such as running the affairs of a troubled financial institution . . ., the courts may not enjoin the activities of the RTC merely because someone alleges that it is not 'running [the troubled institution']s affairs in a legal manner.'" *Ward*, 996 F.2d at 102-03; *see also 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."); *Bank of America*, 604 F.3d at 1244 (FIRREA barred plaintiffs' claim, because claim was merely an allegation of "[Federal Deposit Insurance Corporation] FDIC's improper performance of its legitimate receivership functions").

The applicability of the HERA bar does not depend, as plaintiffs suggest (Br.10-11, 40), on the rationale for actions taken by FHFA as conservator of the enterprises: "[F]or purposes of applying Section 4617(f)'s strict limitation on judicial relief, allegations of motive are neither here nor there"; nothing in HERA "hinges FHFA's exercise of its conservatorship discretion on particular motivations." *Perry Capital*, 848 F.3d at 1093; FHFA Br. Pt. _.

B. FHFA acted within the scope of its statutory authority in agreeing to the Third Amendment.

1. As this Court has made clear in the FIRREA context, litigants may not circumvent the bar on judicial review by alleging that the conservator "is not running the troubled institution's affairs in a legal manner." *Ward*, 996 F.2d at 103. In any event, FHFA acted well within the scope of its statutory powers when it entered into the Third Amendment.

HERA "endows FHFA with extraordinarily broad flexibility to carry out its role as conservator." *Perry Capital*, 848 F.3d at 1087. The statute grants FHFA an array of powers as conservator, including the power to "take over the assets of and operate [the GSEs]," to "conduct all business of the regulated entit[ies]," to "preserve and conserve the assets and property of the [enterprises]," and to "transfer or sell any asset or liability of the regulated entity." 12 U.S.C. § 4617(b)(2)(B),(G). More generally, FHFA has the authority, as conservator, to "take such action as may be . . . necessary to put the regulated entity in a sound and solvent condition" and to undertake any action "appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." *Id.* § 4617(b)(2)(D). FHFA may take these actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the GSEs. *Id.* § 4617(a)(2). And when exercising these powers, FHFA is empowered to take actions that it determines are "in the best interests of the regulated entit[ies] *or the Agency*." *Id.* § 4617(b)(2)(J)(ii) (emphasis added).

"FHFA's execution of the Third Amendment falls squarely within its statutory authority to '[o]perate the [Companies],' 12 U.S.C. § 4617(b)(2)(B); to 'reorganiz[e]' their affairs, *id.* § 4617(a)(2); and to 'take such action as may be * * * appropriate to carry on the[ir] business,' *id.* § 4617(b)(2)(D)(ii)." *Perry Capital*, 848 F.3d at 1088 (alterations in original). By entering into the Third Amendment, FHFA took an action it deemed appropriate to "preserve and conserve" a crucial "asset[]" (or "property") of the GSEs: the unused portion of Treasury's funding commitment. At the time of the Third Amendment in 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment. ROA.952. Through the first quarter of 2012, the enterprises drew over $26 billion from the commitment to pay the 10% dividends they owed Treasury. These draws increased Treasury's liquidation preference, which in turn increased the amount of dividends the enterprises owed.

By replacing a fixed dividend obligation with a variable one, the Third Amendment ended this cycle, reducing the risk that the enterprises would exhaust Treasury's commitment prematurely, ensuring that the enterprises would remain solvent for the foreseeable future, and providing certainty to the financial markets from which the enterprises raise funds. *See Perry Capital*, 848 F.3d at 1088 (noting that the Third Amendment ensured the enterprises "ongoing access to vital yet hard-to-come-by capital"). As the D.C. Circuit explained, "[s]uch management of Fannie's and Freddie's assets, debt load, and contractual dividend obligations during their ongoing business operation sits at the core of FHFA's conservatorship function." *Id.* at 1086; *see also Ward*, 996 F.2d at 103 ("When the RTC determines the method, terms and conditions of the disposition of assets, it is indisputably exercising its discretion and judgment in administering the affairs of a failed or troubled financial institution."); *Town of Babylon v. FHFA*, 699 F.3d 221, 227 (2d Cir. 2012) (Taking "protective measures against perceived risks is squarely within FHFA's powers as a conservator."); *Leon Cty. v. FHFA*, 700 F.3d 1273, 1279 (11th Cir. 2012) (same).

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

2. Plaintiffs mistakenly argue that HERA "requires[s] FHFA to seek to 'preserve and conserve' the Companies' assets and 'rehabilitat[e]' them to a 'sound and solvent' condition," Br.14 (second alteration in original) (quoting 12 U.S.C. § 4617(a)(2), (b)(2)(D)), and that courts may review whether the Third Amendment was "necessary" and "appropriate" to achieve these purported statutory requirements, Br.26, 38-40.

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

Even on its own terms, moreover, plaintiffs' argument rests in large part on the mistaken premise that FHFA is under an obligation to return the enterprises to the same state that existed prior to the conservatorship. *See, e.g.*, Br.41 (arguing that the Third Amendment violates HERA because it precludes the enterprises from "building capital as a potential step to regaining their former corporate status"); Br.10 (asserting that FHFA has a "statutory obligation[]" to manage the enterprises so that they may "emerge from conservatorship" as private companies under their pre-crisis charters).

HERA does not require that FHFA return the enterprises to their pre-crisis form, much less that it make this goal a priority. *See Perry Capital*, 848 F.3d at 1093-94 ("[N]othing in [HERA] mandated that FHFA take steps to return Fannie Mae and Freddie Mac at the first sign of financial improvement to the old economic model that got them into so much trouble in the first place."). To the contrary, HERA authorizes FHFA, as conservator, to make significant changes to the enterprises' operations. *See, e.g.*, 12 U.S.C. § 4617(a)(2) (stating that FHFA may "be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a [GSE]"); *see also Perry Capital*, 848 F.3d at 1090-91 ("FHFA's textual authority to reorganize and rehabilitate the Companies, in other words, forecloses any argument that [HERA] made the *status quo ante* a statutorily compelled end game.").

The enterprises were on the precipice of failure in 2008, and Congress did not require that the conservator return them to the hands of private shareholders in their pre-crisis form—a point underscored by 2016 legislation preventing Treasury from selling its preferred stock in the GSEs for two years. 2016 Act, § 702(b). The legislation was accompanied by a "Sense of Congress" provision declaring that "Congress should pass and the President should sign into law legislation determining the future of Fannie Mae and Freddie Mac, and . . . the Secretary should not . . . dispose of any outstanding shares of senior preferred stock acquired pursuant to the

Senior Preferred Stock Purchase Agreement until such legislation is enacted." *Id.* § 702(c).

Neither 12 U.S.C. § 4617(a)(2) nor § 4617(b)(2)(D), the two provisions on which plaintiffs principally rely in arguing that FHFA's actions were not authorized, suggests that FHFA must act with the aim of returning the entities to private companies or must prioritize the build-up of internal capital. A conservator can stabilize or rehabilitate a troubled financial institution with an eye towards returning it to its former status. But it can also rehabilitate an entity to ready it for reorganization or liquidation. *See, e.g.*, *Ameristar Fin. Servicing Co. v. United States*, 75 Fed. Cl. 807, 808 n.3 (2007) (describing a conservator as "operat[ing] a troubled financial institution in an effort to conserve, manage, and protect the troubled institution's assets until the institution has stabilized or has been closed by the chartering authority"); *FDIC Resolutions Handbook* 33 (glossary) (same); *see also* 12 U.S.C. § 4617(a)(2) (stating that FHFA may be appointed conservator to reorganize, rehabilitate, or wind up a GSE's affairs); *Perry Capital*, 848 F.3d at 1093 ("Undertaking permissible conservatorship measures even with a receivership [in] mind would not be out of statutory bounds."). Nothing in HERA compels FHFA to preserve and conserve the enterprises' assets above all other considerations or to return the GSEs to a privately funded model. *See Perry Capital*, 848 F.3d at 1088 ("Entirely absent from [HERA's] text is any mandate, command, or directive to build up capital for the financial benefit of the Companies' stockholders.").

Apart from their fundamental misunderstanding of the grant of statutory authority, plaintiffs also fail to grapple with the governing provisions' broadly discretionary terms. In describing FHFA's powers and authorities as conservator, HERA uses the permissive "may," providing that FHFA "*may*, as conservator, take such action as may be . . . necessary to put the regulated entity in a sound and solvent condition; and . . . appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D) (emphasis added); *see also id.* § 4617(b)(2)(B)(iv) (FHFA "*may*, as conservator or receiver . . . preserve and conserve the assets and property of the regulated entity.") (emphasis added). "The statute is thus framed in terms of expansive grants of permissive, discretionary authority for FHFA to exercise as the 'Agency determines is in the best interests of the regulated entity or the Agency.'" *Perry Capital*, 848 F.3d at 1088 (quoting 12 U.S.C. § 4617(b)(2)(J)); ROA.954-55.

Plaintiffs implicitly acknowledge the absence of mandatory restrictions when they urge, Br.36-37, that the Court should construe the statute to impose specific duties to avoid a "non-delegation" problem. That is, plaintiffs urge that HERA might be constitutionally invalid because it fails to provide an "intelligible principle," *United States v. Whaley*, 577 F.3d 254, 263 (5th Cir. 2009), to guide the conservator. Paradoxically, plaintiffs maintain both that FHFA is so evidently defying a statutory mandate contained in HERA as to act in an *ultra vires* fashion and that the Court should read non-existent requirements into HERA to avoid a fatal non-delegation problem.

Even on its own terms, plaintiffs' non-delegation argument is insubstantial. "[T]he Supreme Court has not struck down a statute on nondelegation grounds since 1935." *Whaley*, 577 F.3d at 263. As long as Congress "has provided an 'intelligible principle' to guide the agency's [actions]," a delegation is constitutional. *Id.* (quoting *United States v. Mistretta*, 488 U.S. 361, 372 (1989)). "The intelligible principle can be broad." *Whaley,* 577 F.3d at 264; *see, e.g.*, *Yakus v. United States*, 321 U.S. 414, 420 (1944) (upholding delegation to administrator to set prices that "will be generally fair and equitable"); *National Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding delegation to FCC to regulate broadcast licenses in the "public interest").

HERA easily satisfies this standard, establishing that the purpose of appointing a conservator is to "reorganiz[e], rehabilitat[e], or wind[] up the affairs" of the enterprises, 12 U.S.C. § 4617(a)(2); authorizing the conservator to act in "the best interests of the regulated entity or the Agency," *id.* § 4617(b)(2)(J)(ii); and supplying a list of powers that FHFA may use as conservator to achieve the conservatorship's goals, thereby providing additional guidance to and limitations on FHFA's exercise of its discretion. That Congress delegated this authority to FHFA only in the limited circumstance where it is appointed conservator or receiver of one of three entities (Fannie Mae, Freddie Mac, or a Federal Home Loan Bank, *see* 12 U.S.C. § 4502(20)), reinforces the validity of that delegation. *See Whitman v. American Trucking Ass'ns*, 531

U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.").

3. Plaintiffs' attempts to bring their claim within an *ultra vires* exception to the bar on judicial review are without basis, and there is thus no occasion to address the mistaken premises of their narrative. It should be clear, however, that the Third Amendment has not left the enterprises on "the brink of insolvency," nor did FHFA fail to "conserve" and "preserve" the enterprises' assets. Br.14, 38. As explained above, the Third Amendment arrested the draws-to-pay-dividends cycle that threatened to erode Treasury's unused funding commitment. *See supra* pp. 11-12. By preserving those funds, the Third Amendment ensured that the GSEs would have sufficient funds to cover any near-term losses, to weather another housing-market downturn, and to maintain market confidence. If, at the end of a quarter, the enterprises' liabilities exceed their assets, they have a $245-billion backstop (the current size of Treasury's remaining commitment) from which they can draw to correct that deficiency. The Treasury commitment thus "ensures continued access to vital capital," *Perry Capital*, 848 F.3d at 1091, and has been crucial to preserving the GSEs' financial stability and solvency.

Plaintiffs do not dispute that Treasury's ongoing commitment is vital to the enterprises' continuing operation. Rather, they argue that FHFA could have preserved Treasury's commitment another way (by paying Treasury's dividends in kind); that the Third Amendment may ultimately make draws on the commitment more, not less, likely; and that the Third Amendment caused the enterprises to incur additional debts in 2013. Br.38-40. But it is just such difficult operational calls and predictive judgments that Congress entrusted FHFA to make, free of second-guessing by shareholders and courts.

Moreover, the Third Amendment not only helped preserve and conserve Treasury's funding commitment; it also relieved the enterprises of their obligation to pay a fixed 10% cash dividend to Treasury, an obligation that would have cost the GSEs at least $19 billion per year, regardless of their profitability. *See supra* p. 9. By forgoing the fixed dividend, Treasury thus incurred a risk of non-payment, to the benefit of the GSEs. Treasury also agreed to waive the periodic commitment fee as long as the variable dividend was in place. In short, the Third Amendment was structured to, among other things, preserve the enterprises' assets and avoid increasing their debts in years (such as 2015 and 2016) when the GSEs earned less than the $19 billion they otherwise would have owed Treasury. *See Perry Capital*, 848 F.3d at 1092 (explaining that through the Third Amendment, the GSEs obtained "continued access to necessary capital free of the preexisting risk of accumulating more debt simply to pay dividends to Treasury").

Plaintiffs' suggestion that FHFA has failed to operate the enterprises as "ongoing business[es]," Br.41 n.6, does not withstand the briefest scrutiny. Five years after the Third Amendment, the GSEs are going concerns with combined assets of more than $5 trillion. Fannie Mae 2016 10-K, at 55; Freddie Mac 2016 10-K, at 11.

"During that time, Fannie and Freddie, among other things, collectively purchased at least 11 million mortgages on single-family owner-occupied properties, and Fannie issued over $1.5 trillion in single-family mortgage-backed securities." *Perry Capital*, 848 F.3d at 1083. The Third Amendment thus was not, as plaintiffs suggest (Br.40-44), a de facto liquidation or tantamount to "placing [the GSEs] into receivership."[7]

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

Section 4617(f) does not permit plaintiffs to seek to enjoin FHFA's actions by naming Treasury as a defendant. "[T]he effect of any injunction or declaratory judgment aimed at Treasury's adoption of the Third Amendment would have just as direct and immediate an effect as if the injunction operated directly on FHFA." *Perry Capital*, 848 F.3d at 1096; ROA.955-56. Such an injunction against FHFA's contractual counterparty would thus run afoul of § 4617(f)'s prohibition on judicial relief that would "restrain or affect" FHFA's exercise of its conservatorship powers.

Courts applying FIRREA's analogous anti-injunction provision have reached the same conclusion, holding that the provision "precludes a court order against a third party which would affect the FDIC as receiver, particularly where the relief

[7] Section 4617(f) bars courts from taking any action that would affect or restrain FHFA's exercise of its powers as "a conservator or a receiver." 12 U.S.C. § 4617(f). Thus, the district court would have lacked jurisdiction to grant the equitable relief that plaintiffs seek—an order declaring the Third Amendment invalid—even if FHFA had acted as a receiver when it agreed to the Third Amendment.

would have the same practical result as an order directed against the FDIC in that capacity." *Hindes v. FDIC*, 137 F.3d 148, 160-61 (3d Cir. 1998); *see also Dittmer*, 708 F.3d at 1017 ("[I]f plaintiffs . . . are allowed to attack the validity of a failed institution's assets by suing the remote purchaser, such actions would certainly restrain or affect the FDIC's powers to deal with the property it is charged with disbursing."); *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992) ("Permitting Telematics to attach the certificate of deposit . . . would have the same effect, from the FDIC's perspective, as directly enjoining the FDIC from attaching the asset. In either event, the district court would restrain or affect the FDIC in the exercise of its powers as receiver.").

Plaintiffs' invocation of the presumption favoring judicial review of agency action (Br.45) casts no light on whether they should be able to avoid an explicit bar on judicial review. The presumption "is rebuttable" and "fails when a statute's language or structure demonstrates that Congress" intended to preclude review. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). Here, § 4617(f) expressly precludes judicial review of agency actions where such review would "restrain or affect" FHFA's exercise of its conservatorship powers. Because an order invalidating Treasury's decision to enter into the Third Amendment would do just that, the presumption favoring reviewability is overcome.

Plaintiffs' reliance on this Court's decision in *281–300 Joint Venture v. Onion*, 938 F.2d 35, 38 (5th Cir. 1991), is similarly misplaced. *See* Br.48. The plaintiff in *Joint*

Venture challenged two separate actions taken by two separate entities: (1) a determination by the Federal Home Loan Bank Board that the claims of unsecured creditors of a failed bank were worthless; and (2) a foreclosure sale executed by the Resolution Trust Corporation (RTC), acting as conservator for the failed bank. 938 F.2d at 38-39. This Court concluded that the first challenge was prudentially moot, and the second was barred by FIRREA's anti-injunction provision. *Id.* The plaintiff in *Joint Venture* did not seek to enjoin RTC's contractual counterparty. Nor is there any indication that the plaintiff's claims against the Bank Board, which the court dismissed on threshold grounds, would have in any way restrained or affected RTC's actions as conservator. *Id.* at 38. In short, this Court in *Joint Venture* did not address the situation presented here, where plaintiffs' "claims against [an agency] are integrally and inextricably interwoven with FHFA's conduct as conservator." *Perry Capital*, 848 F.3d at 1097.[8]

Plaintiffs fare no better in arguing that § 4617(f) cannot bar claims against Treasury because such a bar would permit Treasury to violate federal law, including HERA. Br.46-47. The inquiry under § 4617(f), like its FIRREA analogue, is "quite

[8] Plaintiffs contend (Br.46) that enjoining Treasury from participating in the Third Amendment would not restrain or affect FHFA's exercise of its conservatorship powers because FHFA could not have adopted the Third Amendment without Treasury's consent. Plaintiffs' contention is difficult to comprehend. Barring Treasury from participating in the Third Amendment would preclude FHFA from entering into an agreement that FHFA believed to be in the best interests of the enterprises. An injunction would therefore directly affect FHFA's exercise of its conservatorship powers.

narrow." *Bank of America*, 604 F.3d at 1243. Once a court determines that a challenged action involved the exercise of a conservatorship power or function and that the judicial relief sought would "restrain or affect" that power or function, the inquiry is over. *See id.*; *see also Perry Capital*, 848 F.3d at 1097. The cause of the restraint is "irrelevant." *Perry Capital*, 848 F.3d at 1097. A suit is barred if it would restrain or affect FHFA's exercise of its conservatorship functions, even if the suit seeks to enjoin Treasury from committing a purported violation of federal law. *See id.*

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

Plaintiffs' claims against Treasury and FHFA are independently barred by HERA's transfer-of-shareholder-rights provision, 12 U.S.C. § 4617(b)(2)(A)(i). That provision provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). This provision "plainly transfers [to FHFA the] shareholders' ability to bring derivative suits," *Perry Capital*, 848 F.3d at 1104 (quoting *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012)). Because plaintiffs' claims are derivative claims, they are barred.

A. Plaintiffs' claims are derivative claims.

1. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003); *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236, 243 (5th Cir. 1993). Thus, legal harms committed against a corporation give rise to claims belonging to the corporation itself, and shareholder suits seeking to enforce those claims are derivative. *See, e.g.*, *Stevens v. Lowder*, 643 F.2d 1078, 1080 (5th Cir. Unit B Apr. 1981) (per curiam). In a derivative suit, any recovery flows to the corporate treasury; in a direct suit, it flows to the individual plaintiff-shareholder.

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

The principles for distinguishing direct from derivative claims are well established and consistent across federal and state law. The analysis is governed by two questions: "who suffered the alleged harm (the corporation or the suing stockholders, individually)"; and "who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004); *see also Stevens*, 643 F.2d at 1080. A claim is "direct" when "the duty breached was owed to the stockholder" and the stockholder "can prevail without showing an injury to the corporation." *Tooley*, 845 A.2d at 1039. A claim is "derivative" if the harm to the shareholder is the byproduct of some injury to the corporate body as a whole. *Id.*; *Stevens*, 643 F.2d at 1080.[9]

Moreover, "claims that [defendants] caused the company to enter into a series of 'unfair' transactions that have 'involved self-dealing' and 'diverting assets' are fundamentally claims belonging to the corporation and to [shareholders] only derivatively." *Cowin v. Bresler*, 741 F.2d 410, 416 (D.C. Cir. 1984); *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) ("Pareto's allegations—that the directors breached their duties of care and loyalty by failing to safeguard Barbary Coast's assets and equity, mismanaging its operations, [and] improperly placing it into voluntary receivership . . . describe a direct injury to the bank, not the individual stockholders.").

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[9] In *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 (Del. 2015), cited by plaintiffs (Br.52), the court found no need to apply the *Tooley* test where a plaintiff's claim is self-evidently direct, as was the case in in *NAF Holdings*, where the plaintiff was a party to a commercial contract allegedly breached by the defendant. *See* 118 A.3d at 176. Under such circumstances, a plaintiff may sue directly to enforce "its own rights as a signatory to a commercial contract." *Id.* One set of plaintiffs in *Perry Capital* brought such breach-of-contract claims, arguing that the Third Amendment breached the contracts between the plaintiffs and the GSEs. *See Perry Capital*, 848 F.3d at 1108. Plaintiffs raise no such direct claims here.

2. Plaintiffs ask that the Third Amendment be declared invalid and enjoined, so that future increases in net worth would be retained by the enterprises, and also request that the dividends Treasury has already received be returned to the GSEs. ROA.89-90.

Such an order would not benefit plaintiffs directly. The relief sought would enrich the enterprises and therefore assertedly make plaintiffs' rights in the enterprises more valuable. Similarly, the harm that plaintiffs allege—the allegedly improper transfer of the GSEs' net worth to Treasury—was suffered by the corporation. *See, e.g.*, ROA.8 (Compl.) (The Third Amendment "forc[ed] . . . [the] *Companie*s to turn over their entire net worth."); ROA.22 ("[T]he Net Worth Sweep . . . pushes *the Companies* to the edge of insolvency by stripping the capital out of the Companies on a quarterly basis."); *Id.* ("FHFA chose instead to slowly poison its patients [] first by ordering *the Companies* to make accounting decisions that gratuitously ran up their dividend obligations to Treasury . . . and later by compelling *the Companies* to simply turn their entire net worth."); ROA.68 ("But for the Net Worth Sweep, *Fannie and Freddie* would have over $124 billion of additional capital to cushion them from any future downturn in the housing market and to reassure debtholders of the soundness of their investments.") (emphases added).

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

That the Third Amendment will allegedly cause plaintiffs indirect harm as shareholders, such as a decline in the value of their shares or a reduced likelihood of future dividends or liquidation payouts, does not transform those claims into direct claims. *See, e.g.*, *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981) (Stockholders cannot "maintain an action to redress an injury to the corporation even though the value of their stock is impaired as a result of the injury."); *Gaff v. FDIC*, 814 F.2d 311, 318 (6th Cir. 1987) ("[Plaintiff] claims that his shares in the failed bank became totally worthless as a result of the defendants' conduct. . . . [A] diminution in the value of stock is merely indirect harm to a shareholder and does not bestow upon a shareholder the standing to bring a direct cause of action.").

3. Plaintiffs argue that their APA claims are direct, not derivative, because the APA "confers a cause of action on any person 'adversely affected or aggrieved by agency action . . . ,' 5 U.S.C. § 702." Br.50. This argument fundamentally misunderstands the distinction between direct and derivative suits. As explained *supra* pp. 33-35, whether a plaintiff's claim is direct or derivative turns on the nature of the plaintiff's harm and the relief sought. Thus, if plaintiffs are adversely affected by agency action only indirectly (*i.e.*, as a result of harm to the corporation) and seek relief that accrues to the corporation, as is the case here, their APA claim is derivative.

This Court's analysis of 18 U.S.C. § 1964(c), the cause-of-action provision in the Racketeer Influenced and Corrupt Organizations Act (RICO), is illustrative. *See Whalen v. Carter*, 954 F.2d 1087, 1091 (5th Cir. 1992). Section 1964(c) provides a cause of action to "[a]ny person injured in his business or property by reason of" a RICO violation. In *Whalen*, a group of shareholders argued that they could bring suit directly under § 1964(c) because they had been injured as a company's shareholders when the company was victimized by a RICO violation. *Id.* This Court rejected that argument, concluding that "the RICO standing analysis does not end with a simple finding that there is a causal relation between predicate acts and the subsequent injury." *Id.* To bring suit, plaintiffs had to surmount the traditional rule that shareholders lack standing to bring suit where "the alleged injury to the shareholders merely derived from, and thus was not distinct from, the injury to the corporation." *Id.* at 1092. Because the shareholders' injuries were purely derivative, this Court held that they "lacked standing to assert a direct claim under RICO." *Id.* at 1092; *see also Bixler v. Foster*, 596 F.3d 751, 758-59 (10th Cir. 2010) (noting that the court of appeals have "uniform[ly]" held that shareholder claims under § 1964(c) are "derivative" and that "corporate shareholders do not have standing to sue under [§ 1964(c)] for alleged injuries to the corporation").

Plaintiffs' claim that the APA provides shareholders with a direct cause of action would have implications extending far beyond the conservatorship context. Under plaintiffs' analysis, for example, the owner of one share of a company's stock could challenge a regulation or administrative action that adversely affected the company without consulting the corporation's board of directors and notwithstanding a determination by the board that the company's interests would not be advanced by bringing suit. *See Kamen*, 500 U.S. at 108 (If a claim "is direct rather than derivative," it can be "maintained [by a shareholder] without *any* precomplaint demand on the directors."). Neither law nor logic supports that result.

Moreover, to the extent the APA grants a cause of action to an aggrieved party, it does so only where no "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). HERA's transfer-of-shareholder-rights provision bars shareholders from bringing suits that seek to remedy harms that shareholders experience only derivatively and would thus preclude an APA action.

B. The *Gentile* exception has no applicability here.

In arguing that their claims are direct, plaintiffs assert that the Third Amendment involves "the unlawful transfer of the entire value of their stock to a dominant shareholder." Br.52. But claims that a majority shareholder breached a fiduciary duty to minority shareholders with respect to a corporate transaction are typically derivative claims. *See, e.g.*, *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1218 (Del. 2012). Delaware law has recognized a narrow exception to that rule for cases in which "a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value"; and "the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006). To the extent that "the harm resulting from the overpayment is not confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares," those minority shareholders may bring a direct claim to recover for that additional quantum of harm. *Id.* The Delaware Supreme Court has emphasized "that the extraction of solely economic value from the minority by a controlling stockholder" does not alone constitute "direct injury" under *Gentile*; a dilution of voting rights is also required. *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016).

Plaintiffs argue that they fit within this exception because Treasury is a controlling shareholder and the Third Amendment transferred the entire value of their stock to Treasury. But the premise of plaintiffs' argument is incorrect: Treasury was not a controlling shareholder and did not owe a fiduciary duty to the GSEs' shareholders. A controlling shareholder of a corporation either owns a majority of the corporation's voting shares, or it exercises "actual control" over the corporation's affairs. *Starr Int'l Co. v. Federal Reserve Bank*, 906 F. Supp. 2d 202, 221-25 (S.D.N.Y. 2012), *aff'd*, 742 F.3d 37 (2d Cir. 2014); *see also Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987). Treasury is not and has never been a majority shareholder, nor does it have voting rights in the GSEs. Its rights as a senior preferred shareholder are entirely contractual. Even "a significant shareholder, who exercises a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take, does not become, without more, a controlling shareholder for that particular purpose." *Superior Vision Servs. v. ReliaStar Life Ins. Co.*, No. 1668-N, 2006 WL 2521426, at *5 (Del. Ch. Aug. 25, 2006) (unpublished); *see also Starr Int'l*, 906 F. Supp. 2d at 221-25. Moreover, HERA's requirements that Treasury act to "protect the taxpayer," 12 U.S.C. § 1719(g)(1)(B)(iii), and consider the "need for preferences or priorities regarding payments to the Government," *id.* § 1719(g)(1)(C)(i), negates any suggestion that Treasury owed common-law fiduciary duties to the GSEs' shareholders.

Moreover, plaintiffs assert only that Treasury extracted the economic value of their shares. Plaintiffs do not contend that the Third Amendment diluted their voting rights, and for good reason. The Third Amendment altered the way Treasury's dividends are calculated; it did not alter Treasury's voting rights (Treasury has none) or its ownership stake in the GSEs. *Cf. Perry Capital*, 848 F.3d at 1109 (concluding that the Third Amendment did not alter the shareholders' voting rights). Because "the extraction of solely economic value from the minority by a controlling stockholder" without a corresponding dilution in voting rights is not sufficient to state a claim under *Gentile*, the *Gentile* exception has no application here. *See El Paso Pipeline*, 152 A.3d at 1264.

The *Gentile* exception is also inapplicable because the Third Amendment did not result in the issuance of additional shares of GSE stock, let alone "excessive" shares. Nor did the Third Amendment alter the percentage of GSE shares outstanding that Treasury owns or decrease the percentage owned by private investors.

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

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

1. Issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). And "a judgment rendered in a shareholder-derivative lawsuit will preclude subsequent litigation [of that issue] by the corporation and its shareholders." *Cottrell v. Duke*, 737 F.3d 1238, 1243 (8th Cir. 2013); *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) ("Furthermore, in shareholder derivative actions arising under Fed.R.Civ.P. 23.1, parties and their privies include the corporation and all nonparty shareholders."); *United States v. LTV Corp.*, 746 F.2d 51, 53 n.5 (D.C. Cir. 1984).

The question whether HERA's transfer-of-shareholder-rights provision includes a conflict-of-interest exception was litigated and resolved against all GSE shareholders in *Perry Capital v. Lew*, 70 F. Supp. 3d 208, 229-30 (D.D.C. 2014). Addressing an expressly derivative breach of fiduciary duty claim brought by GSE shareholders, the district court in *Perry Capital* concluded that (1) HERA's transfer-of-shareholder-rights provision bars derivative suits; and (2) no conflict-of-interest exception to that provision exists. *Id.* Those conclusions, both of which were necessary to the court's dismissal of the relevant derivative claims, were affirmed by the court of appeals. *See Perry Capital*, 848 F.3d at 1106 ("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."). It is irrelevant that the derivative claims that the court addressed in *Perry Capital* were not derivative APA claims. Issue preclusion applies "even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892. Because the issue whether § 4617(b)(2)(A)(i) includes a conflict-of-interest exception was fully litigated and decided on the merits against GSE shareholders in previous derivative litigation, plaintiffs cannot relitigate it in pursuit of their derivative claims here.

Moreover, with respect to the question whether HERA's transfer-of-shareholder-rights provision includes an implicit conflict-of-interest exception, plaintiffs' interests are fully aligned with those of the derivative plaintiff-shareholders in *Perry Capital*. Indeed, the derivative plaintiffs in *Perry Capital* made the same arguments plaintiffs make here, citing the identical precedent to support their assertion that a conflict-of-interest exception exists. *Compare* Br.52-55 with Class.Pl.Br.32-35, *In re: Fannie Mae/Freddie Mac*, No. 13-1288 (D.D.C), and Class.Pl.Br.23-24, *Perry Capital v. Mnuchin*, No. 14-5243 (D.C. Cir.).

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

As the D.C. Circuit recognized in *Perry Capital*, creating a judicial conflict-of-interest exception would also be inconsistent with the purpose of HERA's transfer-of-rights provision. *Perry Capital*, 848 F.3d at 1106. The two courts of appeals that have recognized a conflict-of-interest exception to FIRREA's analogous provision did so on the ground that a receiver facing a conflict of interest might be "unable or unwilling to [file suit on a corporation's behalf], despite it being in the best interests of the corporation." *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999); *see also Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021-22 (9th Cir. 2001).

But "the purpose of the derivative action [i]s 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." *Kamen*, 500 U.S. at 95. Through HERA, Congress precluded such actions. "[I]t makes little sense to base an exception to the rule against derivative suits in the Succession Clause on the purpose of the derivative suit mechanism." *Perry Capital*, 848 F.3d at 1106.

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

In contrast, HERA provided for shareholders' participation in the statutory claims process in the event of the enterprises' liquidation. 12 U.S.C. § 4617(b)(2)(K)(i). In § 4617(a)(5), Congress also provided the enterprises with a thirty-day window to file a lawsuit challenging FHFA's appointment as conservator or receiver. *See* Br.54. That Congress expressly granted shareholders and the enterprises these narrow post-conservatorship rights only underscores that the enterprises and their shareholders do not otherwise retain the right to bring suit on behalf of the GSEs during conservatorship.

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

Plaintiffs' purported "conflict of interest" is simply that FHFA would have to sue itself to challenge the Third Amendment. But under this logic, every transaction FHFA entered could be challenged by shareholders. Even the two courts that have adopted the conflict-of-interest exception have rejected such a far-reaching rule. *See First Hartford*, 194 F.3d at 1295 (emphasizing that the conflict-of-interest exception will apply "only . . . in a very narrow range of circumstances"); *Delta Savings*, 265 F.3d at 1023 ("We do not suggest that the FDIC-as-receiver is faced with a disqualifying conflict every time a bank-in-receivership is asked to sue another federal agency.").

III. Plaintiffs' Separation-Of-Powers Claim Is Barred By HERA And, In Any Event, Provides No Basis For Invalidating The Third Amendment.

Plaintiffs attempt to evade HERA's statutory bars by claiming that FHFA's structure violates Article II of the Constitution because FHFA's permanent director is not removable at the President's will. Br.15-24. According to plaintiffs, this alleged constitutional defect requires that the Third Amendment be set aside. But like plaintiffs' statutory challenges to the Third Amendment, plaintiffs' constitutional challenge is barred by HERA's transfer-of-shareholder-rights provision, 12 U.S.C. § 4617(b)(2)(A)(i).

Even apart from HERA's statutory bar, this Court should not weigh in on the constitutionality of FHFA's governance structure. Plaintiffs' separation-of-powers arguments provide no basis for setting the Third Amendment aside, and any ruling on the constitutionality of FHFA's governance structure would therefore be an impermissible advisory one. *See Bayou Liberty Ass'n v. U.S. Army Corps of Engineers*, 217 F.3d 393, 397-398 (5th Cir. 2000).

A. HERA's transfer-of-shareholder-rights provision bars plaintiffs' constitutional claim.

Like their APA claims, plaintiffs' constitutional claim is a derivative claim barred by HERA's transfer-of-shareholder rights provision, 12 U.S.C. § 4617(b)(2)(A)(i). As explained *supra* Pt. II, whether a claim is direct or derivative turns on the nature of the plaintiffs' injury and the relief sought; it does not depend on whether the source of the claimed injury was a statutory violation or a constitutional one. *See, e.g., Gregory*, 634 F.2d at 202 (Shareholders do not have standing to pursue constitutional claims on behalf of the corporation in which they own stock.); *Pagán v. Calderón*, 448 F.3d 16, 28-29 (1st Cir. 2006) (Shareholders lacked standing to pursue substantive due process and equal protection claims because they had failed to allege that they "sustained a particularized, nonderivative injury" separate from any injury to the corporation.); *Duran v. City of Corpus Christi*, 240 F. App'x 639, 642–43 (5th Cir. 2007) (per curiam) (concluding that "only the corporation [had] standing to seek redress" for an alleged First Amendment violation).

Here, the injury plaintiffs allege (the allegedly improper transfer of the GSEs' net worth to Treasury) and the relief they seek (the unwinding of the Third Amendment) are identical under both their statutory and constitutional causes of action. Accordingly, for the reasons stated *supra*, Pt. II, all of plaintiffs' claims are derivative claims barred by 12 U.S.C. § 4617(b)(2)(A)(i).

B. Plaintiffs' separation-of-powers arguments provide no basis to set aside the Third Amendment.

In any event, whatever constitutional issues may be raised by the for-cause limitation on the President's ability to remove FHFA's permanent Director, those issues are not properly presented here.

1.a. The actions FHFA takes as conservator do not implicate the separation of powers because a conservator does not exercise Executive power. This Court's explanation of the role of RTC acting as a receiver is equally applicable when the FHFA acts as a conservator for a GSE—as it did when it entered into the Third Amendment. In that circumstance, FHFA "stands in the shoes of the [GSE]" and any actions it takes are "private, [and] non-governmental" actions. *United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994). Relying on that well-settled understanding of federal conservatorships, the D.C. Circuit recently rejected a First Amendment challenge to a decision FHFA made as conservator for Fannie Mae. *See Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017). When "FHFA step[ped] into Fannie Mae's private shoes[, as conservator] . . . FHFA 'shed[] its government character and [became] a private party'" not subject to constitutional constraints. *Id.*

In agreeing to the Third Amendment, FHFA undertook the "quintessential conservatorship tasks" of "[r]enegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital." *Perry Capital*, 848 F.3d at 1088. Such tasks are the hallmarks of a private financial manager. They bear no resemblance to the regulatory activities and enforcement actions that characterize the exercise of Executive power. *See Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010).

The non-governmental nature of FHFA's actions as conservator accords with historical practice. Federal regulators appointed private entities to be conservators and receivers of troubled financial institutions until the advent of the FDIC, and may continue to appoint private entities as receivers for banks that are not federally insured. *See* 12 U.S.C. § 191; 12 C.F.R. § 51.2; *see also* FDIC, *Managing the Crisis*: *The FDIC and RTC Experience* 212-13 (1998). State law also generally authorizes the appointment of private entities to serve as receivers for failed banks. *Id.* at 213-15.

Because the actions FHFA takes as conservator are not governmental actions, the President's inability to remove the conservator's top manager except for cause does not sufficiently impinge on "the functioning of the Executive Branch," *Morrison v. Olson*, 487 U.S. 654, 691 (1988), to run afoul of Article II of the Constitution.[10]

b. Plaintiffs' attempts to circumvent the well-established rule that conservators are private, non-governmental actors are without merit. Plaintiffs first argue that the

[10] Plaintiffs' suggestion that the Third Amendment was an "extreme polic[y] that [was] inconsistent with th[e] [views] of the President," Br.18, is also particularly inapt because they challenge an agreement entered into with the authorization of the Secretary of the Treasury, who is removable at will by the President.

private nature of a conservator's actions is irrelevant because "FHFA's Director acted in his *regulatory* capacity when he appointed FHFA to be conservator, and he exercises regulatory authority to oversee the conservatorship's operations." Br.21. But plaintiffs here challenge only FHFA's agreement to the Third Amendment in its capacity as conservator. *Cf. Beszborn*, 21 F.3d at 68 ("It is well settled in the law that the RTC may function in a corporate or regulatory capacity or in a capacity as receiver. The separateness of these dual identities has been well recognized in this circuit and others."). Indeed, plaintiffs expressly sued FHFA "in its capacity as Conservator," ROA.8 (Compl.), and a fundamental premise of their lawsuit is that FHFA exceeded its statutory conservatorship authority when it agreed to the Third Amendment, s*ee, e.g.*, Br.25 ("[T]he central question for purposes of Plaintiffs' APA claims is whether HERA authorized FHFA as conservator" to agree the Third Amendment.).

Plaintiffs next argue that FHFA's agreement to the Third Amendment was not the act of a private party under *Beszborn* because the Third Amendment harms "private shareholders while benefitting the public fisc." Br.23. Plaintiffs' attempt to distinguish *Beszborn* is unavailing. This Court explained in *Beszborn* that the nature of RTC's actions—there, the collection of debts owed to the failed institution—was in keeping with the actions a private financial manager would take for the benefit of the institution and its stakeholders. *See Beszborn*, 21 F.3d at 68. As explained above, the

Third Amendment similarly involved an action that private fiscal managers typically undertake for the benefit of the financial institutions they oversee—the renegotiation of the institution's financial obligations to its most significant investor. That the GSEs' dividend payments "go to the United States Treasury," *id.*, merely reflects Treasury's status as a GSE stockholder—indeed, the only stockholder who was willing to provide the enterprises with the capital they needed to weather the financial crisis. *See Perry Capital*, 848 F.3d at 1082.[11]

Plaintiffs are equally wide of the mark when they suggest that the conservator is a governmental actor because it may take actions that it determines are "in the best interests of the regulated entity or the Agency." 12 U.S.C. § 4617(b)(2)(J)(ii). The GSEs' statutory charters similarly authorize the GSEs to act with certain public purposes in mind, *see* 12 U.S.C. §§ 1451, 1716, but that authority has never been deemed sufficient to render them government actors. *See Herron*, 861 F.3d at 167-68; *Mik v. Federal Home Loan Mortgage Corp.*, 743 F.3d 149, 168 (6th Cir. 2014). Similarly, FHFA's actions are not governmental in nature merely because Congress directed the

[11] For similar reasons, plaintiffs' reliance on *Slattery v. United States*, 583 F.3d 800 (Fed. Cir. 2009), vacated, 635 F.3d 1298 (Fed. Cir. 2011) (Opinion, 583 F.3d 800, reinstated as modified) is misplaced. In concluding that the FDIC could be considered the United States for purposes of the plaintiffs' particular takings claim, the Federal Circuit emphasized that FDIC's actions in the case—*i.e.*, its refusal to turn over the monetary surplus it obtained from the liquidation of the seized bank—were "unlike the standard receivership situation in which the receiver is enforcing the rights or defending claims and paying the bills of the seized bank." *Id.* at 827-28. By contrast, FHFA's negotiation of and agreement to the Third Amendment were "quintessential conservatorship tasks." *Perry Capital*, 848 F.3d at 1088.

conservator of an institution whose continuing viability has been made possible by an infusion of taxpayer money to take into account the interests of the GSEs (rather than stockholders) and the public interest represented by the agency.

2. Plaintiffs' separation-of-powers challenge to the Third Amendment fails for a second, independent reason: When FHFA as conservator agreed to the Third Amendment, it was headed by an acting Director whose designation as an acting officer was revocable at will by the President. *See* ROA.277 (Third Amendment signed by FHFA Acting Director Edward J. DeMarco); 12 U.S.C. § 4512(f). The for-cause removal restriction that plaintiffs challenge here, 12 U.S.C. § 4512(b)(2), applies by its plain terms only to FHFA's permanent Director, who is "appointed by the President, by and with the advice and consent of the Senate." No such for-cause limitation exists with respect to the Acting Director of the FHFA, whose designation to act in that capacity is revocable by the President for any reason.

In the district court, plaintiffs argued that section 4512(b)(2)'s for-cause removal restriction should be interpreted as applying to a person serving as acting Director. ROA.534-36. Plaintiffs' argument cannot be squared with the text of the statute or cardinal principles of statutory construction. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Congress established the position of Director of FHFA and provided for an acting

Director in the *same* statutory section. *See* 12 U.S.C. § 4512(a), (f). In doing so, Congress included a for-cause removal restriction for the former, but not the latter. That straightforward reading of the statute is sufficient to defeat plaintiffs' contention.

Principles of constitutional avoidance also counsel against construing the statute to limit the President's authority to revoke the designation of the Acting Director. As noted above, the provision creating the Acting Director position, section 4512(f), contains no such limitation. But even if that provision were regarded as ambiguous, "federal statutes are to be construed so as to avoid serious doubts as to their constitutionality" where "it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988). It is more than "fairly possible" to interpret § 4512(f) as allowing the President to revoke the designation of the FHFA's Acting Director at will, thus avoiding any doubt as to its constitutionality

3. Plaintiffs' constitutional claim suffers from an additional infirmity. As a remedy for the alleged separation-of-powers violation, plaintiffs seek an order vacating the Third Amendment and requiring Treasury to return the dividends it received under the Third Amendment. ROA.89-90. But under plaintiffs' theory, all actions taken by FHFA as conservator would be unlawful, including its agreement to the original Purchase Agreements and the First and Second Amendments. *See* Br.20 (arguing that "administrative actions taken in violation of the separation of powers must be vacated"). It is undisputed that the original Purchase Agreements and

subsequent amendments rescued the GSEs from insolvency and continue to provide capital that is essential to their ongoing operation. In asking that only the Third Amendment be set aside and unwound, leaving the Purchase Agreements and first two amendments in place, plaintiffs seek to benefit from agency action they now insist is unlawful. Principles of equity do not support such a remedy. *See Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) ("[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable.").

CONCLUSION

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

Respectfully submitted,

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SEPTEMBER 2017

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I also certify that I will file paper copies with the Court, via Federal Express overnight delivery, when the court requests them.

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Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief was prepared using Microsoft Word 2010 and complies with the type and volume limitations set forth in Rule 32 of the Federal Rules of Appellate Procedure. I further certify that the font used is 14 point Garamond, for text and footnotes, and that the computerized word count for the foregoing brief (excluding exempt material) is 12,955 words.

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No. 17-20364 Patrick Collins, et al v. Steven Mnuchin, Secretary, et al
USDC No. 4:16-CV-3113

Dear Ms. Wright,

We have reviewed your electronically filed appellee's brief for Department of the Treasury and Mr. Steven T. Mnuchin, Secretary, U.S. Department of Treasury and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

Sabrina B. Short

By: _________________________
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