Nos. 17-578, 17-580, and 17-591

In the Supreme Court of the United States

JOSEPH CACCIAPALLE, ET AL., PETITIONERS

v.

THE FEDERAL HOUSING FINANCE AGENCY, ET AL.

PERRY CAPITAL LLC, ET AL., PETITIONERS

v.

STEVEN T. MNUCHIN, ET AL.

FAIRHOLME FUNDS, INC., ET AL., PETITIONERS

v.

THE FEDERAL HOUSING FINANCE AGENCY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 12 U.S.C. 4617(f), which bars courts from taking any action that would "restrain or affect the exercise of powers or functions of the" Federal Housing Finance Agency (FHFA) as conservator of Fannie Mae and Freddie Mac (the enterprises), precludes a federal court from setting aside FHFA's decision to renegotiate the financial obligations the enterprises owe to their largest and most critical investor.

2. Whether Section 4617(f)'s bar on judicial actions that would "restrain or affect" FHFA's exercise of its powers as conservator precludes a court from enjoining FHFA's contractual counterparty, the Department of the Treasury.

3. Whether 12 U.S.C. 4617(b)(2)(A)(i), which transfers all shareholder rights to FHFA during a conservatorship, includes an implicit conflict-of-interest exception that allows shareholders to bring derivative suits on behalf of the enterprises when FHFA takes an action as conservator that shareholders believe is improper.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-120a)[1] is reported at 864 F.3d 591. The opinion of the district court (Pet. App. 121a-196a) is reported at 70 F. Supp. 3d 208.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2017 (Pet. App. 203a-204a). The court of appeals issued an amended opinion on July 17, 2017, in response to petitions for panel rehearing (Pet. App. 1a-120a). The petitions for writs of certiorari were filed on October 16, 2017 (Monday). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Fannie Mae And Freddie Mac

Congress created the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) to, *inter alia*, "promote access to mortgage credit throughout the Nation * * * by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." 12 U.S.C. 1716(4). These government-sponsored enterprises (GSEs or enterprises) provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. The enterprises finance these purchases by borrowing money in the credit markets and by packaging many of the loans they buy into mortgage-backed securities, which they sell to investors. Pet App. 6a.

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[1] "Pet. App." refers to the petition appendix in No. 17-591.

Although Fannie Mae and Freddie Mac are private, publicly traded companies, they have long benefited from the public perception that the federal government would honor their obligations if they experienced financial difficulties. Pet. App. 125a. This perception has allowed the enterprises to obtain credit, to purchase mortgages, and to make guarantees at lower prices than would otherwise be possible. *Ibid.*

B. The 2008 Housing Crisis And HERA

In 2008, the national housing market collapsed, and the enterprises experienced overwhelming losses due to a dramatic increase in default rates on residential mortgages. Pet. App. 7a. At the time, the enterprises owned or guaranteed more than $5 trillion of residential mortgage assets, representing nearly half the United States mortgage market. *Ibid.* Their failure would have had a catastrophic impact on the national housing market and economy.

The GSEs lost more in 2008 ($108 billion) than they had earned in the prior 37 years combined ($95 billion). Office of Inspector Gen. (OIG), Federal Housing Finance Agency (FHFA), *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 5 (Mar. 20, 2013).[2] As a result, the enterprises faced capital shortfalls. Pet. App. 10a-11a; see OIG, FHFA, *White Paper: FHFA-OIG's Current Assessment of FHFA's Conservatorships of Fannie Mae and Freddie Mac* 11 (Mar. 28, 2012).[3] Private investors were unwilling to provide the capital the GSEs needed to weather their losses and avoid receivership and liquidation. Pet. App. 10a-11a.

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

[3] https://www.fhfaoig.gov/Content/Files/WPR-2012-001.pdf.

In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654. HERA created FHFA as an independent agency to supervise and regulate the enterprises, and it authorized FHFA 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, 12 U.S.C. 4617(a)(2), but FHFA must place the enterprises into receivership if it determines that their assets have been worth less than their obligations for 60 calendar days, 12 U.S.C. 4617(a)(4).

HERA provides that FHFA, as conservator or receiver, "immediately succeed[s]" to "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). It authorizes FHFA, as conservator, to "take such action as may be—(i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]." 12 U.S.C. 4617(b)(2)(D). HERA also permits FHFA, as conservator, to take actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the GSEs. 12 U.S.C. 4617(a)(2). FHFA may "take over the assets of and operate the [enterprises] with all the powers of the shareholders, the directors, and the officers," 12 U.S.C. 4617(b)(2)(B)(i), and may "transfer or sell any asset or liability" of the enterprises "without any approval, assignment, or consent with respect to such transfer or sale," 12 U.S.C. 4617(b)(2)(G). HERA further states that FHFA, when acting as con-

servator, may exercise its statutory authority in a manner "which the Agency determines is in the best interests of the [enterprises] or the Agency." 12 U.S.C. 4617(b)(2)(J)(ii). Finally, HERA provides 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).

Recognizing that an enormous commitment of taxpayer funds could be required, Congress also amended the enterprises' statutory charters to authorize the Department of the Treasury (Treasury) to "purchase any obligations and other securities issued by" the enterprises on terms designed "to protect the taxpayer," and to "exercise any rights received in connection with such purchases." 12 U.S.C. 1455(*l*)(1)(A) and (2)(A), 1719(g)(1)(A) and (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. 12 U.S.C. 1455(*l*)(4), 1719(g)(4).

C. Conservatorship And The Preferred Stock Purchase Agreements

On September 6, 2008, FHFA placed the enterprises in conservatorship. Pet. App. 10a. One day later, Treasury purchased senior preferred stock in each entity. *Ibid.* 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. *Id.* at 12a.

The Purchase Agreements entitled Treasury to four principal contractual rights. Pet. App. 11a. 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. *Ibid.*[4] Second, Treasury was entitled to quarterly dividends equal to 10% of Treasury's total liquidation preference. *Ibid.*[5] Third, Treasury received warrants to acquire up to 79.9% of the enterprises' common stock at a nominal price. *Ibid.* Fourth, beginning in 2010, Treasury would be entitled to a periodic commitment fee that was intended to compensate Treasury for its ongoing financial commitment. *Id.* at 130a. Treasury could waive the commitment fee annually based on adverse conditions in the United States mortgage market. *Ibid.*

Treasury's initial funding commitment soon appeared to be inadequate. In May 2009, FHFA and Treasury agreed to double Treasury's funding commitment from $100 billion to $200 billion for each enterprise, for a total of $400 billion. Pet. App. 12a.

In December 2009, in the face of ongoing losses, it appeared that even the $200-billion-per-enterprise funding commitment might be insufficient. See Pet. App. 12a. Treasury and FHFA therefore amended the Purchase Agreements for a second time to allow the enterprises to draw unlimited amounts from Treasury to

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[4] "A liquidation preference is a priority right to receive distributions from the [enterprises'] assets in the event they are dissolved." Pet. App. 128a n.6 (citation omitted).

[5] Petitioners assert (Perry Pet. 7) that the dividend "was payable, at [FHFA]'s discretion," either in cash at a 10% rate or to be added to the liquidation preference at a 12% rate. The contention that this "was merely a matter of choice directly contravenes the unambiguous language of the contract," which "makes clear that 10% cash dividends were 'required'" and "that 12% dividends deferred to the liquidation preference were only triggered upon a 'failure' to meet the 10% cash dividend requirement." Pet. App. 122a n.7 (internal citation omitted).

cure net-worth deficits until the end of 2012, at which point Treasury's funding commitment would be fixed. *Ibid.*

By the end of 2012, Treasury had committed $445 billion in taxpayer funds to the enterprises. See Office of Mgmt. and Budget, *Budget of the U.S. Government, Fiscal Year 2014, Appendix* 1337 (2014).[6] To date, the enterprises have drawn a total of $187.5 billion from that commitment. Pet. App. 12a. Accordingly, $258 billion in taxpayer funds remains available for the enterprises to draw on whenever their net worth falls below zero. That funding commitment ensures that the enterprises will remain operational for the foreseeable future. See *id.* at 33a-34a.

Because Treasury's $400-plus billion commitment of taxpayer funds is critical to the GSEs' viability, its preservation has always been of paramount importance to FHFA as the enterprises' conservator. By June 30, 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment, making Treasury's liquidation preference $189.5 billion, including the initial $1 billion senior liquidation preference for each enterprise. *Id.* at 12a. Under the terms of the original Purchase Agreements, the enterprises' dividend obligations to Treasury were thus nearly $19 billion per year. *Id.* at 13a-14a.

Between 2009 and 2011, the enterprises could not pay these substantial dividend obligations out of their earnings. Pet. App. 12a-13a. The enterprises thus drew on Treasury's funding commitment to meet those obligations. *Ibid.* Through the first quarter of 2012, Fannie Mae and Freddie Mac had together drawn $26 billion

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[6] https://www.gpo.gov/fdsys/pkg/BUDGET-2014-APP/pdf/BUDGET-2014-APP.pdf.

from Treasury just to pay the dividends they owed to Treasury. *Id.* at 132a. Those circular draws increased Treasury's liquidation preference, thus increasing the amount of dividends the enterprises owed.

As their securities 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, *Form 10-Q: Quarterly Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, at 12 (Aug. 8, 2012) (Fannie Mae 10-Q); Freddie Mac, *Form 10-Q: Quarterly Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, at 10 (Aug. 7, 2012) (Freddie Mac 10-Q). Indeed, the $11.7 billion Fannie Mae owed annually was more than the enterprise had made in any year of its existence. See Fannie Mae 10-Q, at 4. The $7.2 billion that Freddie Mac owed annually was more than it had made in all but one year. Freddie Mac 10-Q, at 8.

Under the Second Amendment to the Purchase Agreements, each draw increased Treasury's commitment on a dollar-for-dollar basis; a draw, including a draw to pay dividends to Treasury, thus did not reduce the size of the remaining commitment. But that state of affairs was about to change. At the end of 2012, the commitment would become fixed, and any future draws would reduce the size of the remaining commitment. To protect the remaining commitment, Treasury and FHFA thus needed to end the cycle of the enterprises paying dividends by drawing on Treasury's commitment. Pet. App. 12a-13a.

D. The Third Amendment

On August 17, 2012, Treasury and FHFA agreed to modify the Purchase Agreements for a third time. This

"Third Amendment" broke the draws-to-pay-dividends debt spiral 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 capital buffer, initially set at $3 billion, gradually declines over time, reaching zero in 2018). Pet. App. 13a.[7] 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. *Ibid.*[8]

By exchanging a fixed dividend for a variable one, Treasury thus accepted more risk in agreeing to the Third Amendment. Due to unusually high profitability, Treasury received more in dividends from Fannie Mae and Freddie Mac in 2013 ($130 billion) and 2014 ($40 billion), with the large dividends due in part to a rebound in housing prices and, more importantly, to non-recurring events, including the enterprises' one-time recognition of deferred tax assets that they had previously written off. Pet. App. 13a; OIG, FHFA, *The Continued Profitability of Fannie Mae and Freddie Mac Is Not*

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[7] On December 21, 2017, FHFA and Treasury agreed to amend the Purchase Agreements again, allowing Fannie Mae and Freddie Mac to maintain a $3 billion capital buffer going forward, without dropping to zero in 2018. See Dep't of Treasury, Press Release, *Treasury Department and FHFA Modify Terms of Preferred Stock Purchase Agreements for Fannie Mae and Freddie Mac* (Dec. 21, 2017), https://home.treasury.gov/news/press-releases/sm0242.

[8] 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. Pet. App. 130a-131a.

Assured 7-8 (Mar. 18, 2015).[9] But 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 each year). Pet. App. 13a-14a; FHFA, *Treasury and Federal Research Purchase Programs for GSE and Mortgage-Related Securities, Table 2: Dividends on Enterprise Draws from Treasury* 2 (Dec. 29, 2017) (Dividend Data).[10] Through the end of 2016, Treasury had received $255 billion in cumulative dividends from the enterprises, in return for its $187.5 billion investment and $258 billion ongoing commitment. Dividend Data 2.[11]

E. Proceedings In The Courts Below

1. GSE shareholders challenged the Third Amendment by filing multiple lawsuits in the United States District Court for the District of Columbia. They asserted claims under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, alleging that the Third Amendment exceeded FHFA's and Treasury's statutory authority and was arbitrary and capricious. See 5 U.S.C. 706. They also asserted claims for breach of contract regarding allegedly promised dividends and liquidation preferences; claims for breach of the implied covenant of good faith and fair dealing; claims for breach of fiduciary duty; and a claim for an unconstitutional taking. Pet. App. 133a-134a.

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

[10] https://www.fhfa.gov/DataTools/Downloads/Documents/MarketData/Table_2.pdf.

[11] In 2017, Fannie Mae and Freddie Mac paid $20.6 billion and $19.61 billion in dividends, respectively, for a cumulative total of $295 billion. See Dividend Data 2.

The district court granted the defendants' motions to dismiss all of plaintiffs' claims, relying largely on HERA's anti-injunction and transfer-of-shareholder-rights provisions, 12 U.S.C. 4617(f) and 4617(b)(2)(A)(i). Pet. App. 121a-196a. The court explained that it "need not look further than the current state of the [enterprises] to find that FHFA has acted within its broad statutory authority as conservator." *Id.* at 153a. The court observed that the enterprises had been "on the brink of collapse" when the conservatorship was formed, *ibid.*, but that "both [enterprises] continue[d] to operate [four years later] and have now regained profitability," *id.* at 154a. The court further ruled that plaintiffs could not circumvent the anti-injunction bar by suing Treasury as FHFA's contractual counterparty, *id.* at 142a, or by inviting the court to engage in review of FHFA's motives or justifications for entering into the Third Amendment, *id.* at 149a.

2. The court of appeals affirmed in relevant part. Pet. App. 1a-86a.

a. The court of appeals held that Section 4617(f) barred petitioners' claims for equitable relief, including their APA claims. Pet. App. 19a-47a. The court recognized that the "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 20a; see *id.* at 26a ("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 court concluded that an order setting the Third Amendment aside or otherwise declaring it invalid would "'restrain [and] affect'"

FHFA's exercise of its conservator powers and therefore "fall[s] squarely within Section 4617(f)'s plain textual compass." *Id.* at 19a-20a (first set of brackets in original). The court emphasized that HERA's anti-injunction provision, like its analogue in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 212(a), 103 Stat. 222 (12 U.S.C 1821(j)), "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." Pet. App. 22a.

The court of appeals acknowledged that Section 4617(f)'s bar on judicial intervention does not apply when FHFA "has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions." Pet. App. 22a-23a. The court found that exception inapplicable here, however, because "FHFA's execution of the Third Amendment falls squarely within its statutory authorit[ies]," including the agency's power "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)." Pet. App. 26a (some brackets in original).

In rejecting petitioners' claim that FHFA had exceeded its statutory authority, the court of appeals held that HERA did not require FHFA to prioritize the build-up of internal capital above all other considerations. Pet. App. 23a-29a. The court emphasized that HERA is "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

[enterprises] or the Agency.'" *Id.* at 25a (quoting 12 U.S.C. 4617(b)(2)(J)). The court concluded that, while the enterprises' "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." *Id.* at 26a. The court also emphasized that FHFA's statutory authority to "reorganiz[e]" and "rehabilitat[e]" the enterprises, 12 U.S.C. 4617(a)(2), negated petitioners' claim that FHFA must operate the enterprises "in a manner that returns [the GSEs] to their prior private, capital-accumulating, and dividend-paying condition." Pet. App. 29a.

The court of appeals next rejected petitioners' contention that the Third Amendment amounted to a "*de facto* liquidation," and was thus the act of a receiver rather than a conservator. Pet. App. 33a. The court noted that the line between conservator and receiver "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 [enterprises] from collapse, even if the dividend payments under that agreement may at times be greater than the dividend payments under previous agreements." *Ibid.* The court further explained that "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." *Ibid.*

The court of appeals next rejected petitioners' assertion that the Third Amendment could be enjoined because FHFA had executed it to benefit Treasury rather

than the enterprises. Pet. App. 34a. The court explained 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." *Id.* at 37a. The court further observed that nothing in HERA "confines FHFA's conservatorship judgments to those measures that are driven by financial necessity," and that, "for purposes of applying section 4617(f)'s strict limitation on judicial relief, allegations of motive are neither here nor there." *Ibid.*

The court of appeals also rejected petitioners' contention that FHFA had exceeded its statutory authority by "not acting as a common-law conservator normally would when it adopted the Third Amendment." Pet. App. 39a. The court emphasized that HERA had granted FHFA an array of powers and responsibilities—including the power to contract with Treasury on terms that protect taxpayers and provide stability to the financial markets—that belie the notion that "Congress intended FHFA to be nothing more than a common-law conservator." *Ibid.* The court also explained that Treasury's $400 billion-plus commitment had "saved the [enterprises]—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." *Id.* at 40a.

Summing up, the court of appeals emphasized that petitioners did "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 stock sold as part of that capital-raising bargain," "to foreclose dividend payments to private stockholders in that process," or "to amend the terms of the Stock Agreements." Pet. App. 42a. Accordingly, the court recognized that "[w]hat 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." *Id.* at 42a-43a. The court stressed that Section 4617(f) prohibits courts "from wielding * * * equitable relief to second-guess either the dividend-allocating terms that FHFA negotiated on behalf of the [enterprises], 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." *Id.* at 43a.

b. The court of appeals next held that Section 4617(f) barred petitioners' request for an injunction that would preclude Treasury from participating in the Third Amendment. Pet. App. 45a. Section 4617(f) prohibits a court from taking "any action to restrain or affect" FHFA's exercise of its powers or functions as a conservator or receiver. 12 U.S.C. 4617(f). The court held that this prohibition encompassed petitioners' claims against Treasury because "any injunction or declaratory judgment aimed at Treasury's adoption of the Third Amendment would have just as direct and immediate an effect" on FHFA's exercise of its conservator powers "as if the injunction operated directly on FHFA." Pet. App. 45a.

c. The court of appeals then turned to petitioners' monetary claims, which included a derivative claim brought on behalf of the enterprises. As relevant here, the court held that HERA's Succession Clause, 12 U.S.C. 4617(b)(2)(A)(i), under which FHFA as conservator "succeed[s] to * * * all rights, titles, powers, and privileges" of the GSEs' shareholders, barred petitioners from bringing the derivative claim on behalf of the GSEs during a conservatorship. Pet. App. 64a, 67a. The court rejected petitioners' assertion that the Succession Clause included a "manifest conflict of interest" exception that permitted shareholders to sue on behalf of the enterprises to challenge FHFA's decision to enter into the Third Amendment. *Id.* at 63a, 67a-68a. While noting that the Ninth and Federal Circuits had recognized a limited conflict-of-interest exception in interpreting an analogous FIRREA provision, the court declined to extend that rationale to HERA. The court explained that "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." *Id.* at 68a (citation omitted).

The court of appeals further held, however, that shareholders retained the right to bring direct claims against FHFA during a conservatorship. Pet. App. 64a-67a. The court then determined that petitioners' breach-of-contract claims were direct and that the bases upon which the district court had dismissed them were insufficient. *Id.* at 74a-86a. It therefore reversed the district court's dismissal of those claims and remanded for further proceedings.

d. Judge Brown dissented in part, concluding that Section 4617(f) did not bar review of FHFA's decision

to enter into the Third Amendment. Pet. App. 86a-120a. She believed that FHFA had not "behave[d] in a manner consistent with the conservator role as it is defined in HERA," *id.* at 92a, because the Third Amendment constituted a "*de facto* liquidation," *id.* at 116a.

ARGUMENT

Petitioners seek review of the court of appeals' dismissal of their claims for equitable and monetary relief. Those claims challenged FHFA's decision as conservator of Fannie Mae and Freddie Mac to renegotiate the enterprises' financial obligations to their critical investor, Treasury, whose $258 billion commitment of taxpayer funds is responsible for the GSEs' continued operation.

The court below correctly held that petitioners' equitable claims against both FHFA and Treasury were barred by 12 U.S.C. 4617(f), which prohibits courts from taking "any action to restrain or affect the exercise of powers or functions of" FHFA as conservator. The court also correctly held that HERA's Succession Clause, 12 U.S.C. 4617(b)(2)(A)(i), which transfers all shareholder rights to FHFA during a conservatorship, bars petitioners from bringing derivative claims for money damages on behalf of the GSEs. Those holdings do not conflict with any decision of this Court or another court of appeals. Indeed, the Sixth Circuit recently rejected a substantially similar effort to vacate the Third Amendment. See *Robinson* v. *FHFA*, 876 F.3d 220 (2017). Further review is not warranted.

A. The Court Of Appeals' Decision Is Correct

1. The court of appeals correctly held that HERA's anti-injunction provision, 12 U.S.C. 4617(f), bars federal

courts from enjoining the Third Amendment or otherwise setting it aside. Section 4617(f) precludes courts from taking "any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver," *ibid.*, and petitioners' APA and common-law claims seeking injunctive or declaratory relief fall squarely within that bar. FHFA's decision to enter into the Third Amendment involved the "management of Fannie's and Freddie's assets, debt load, and contractual dividend obligations during their ongoing business operation," functions that sit at the "core" of FHFA's conservatorship powers. Pet. App. 20a. Because the equitable relief sought by petitioners would "restrain or affect" the exercise of FHFA's conservatorship functions, Section 4617(f) prohibits courts from granting that relief. And even assuming that Section 4617(f) allows judicial review in the rare case where FHFA acts beyond its statutory or constitutional authorities, that exception is inapplicable here, since FHFA acted within its powers as conservator when it entered into the Third Amendment. *Id.* at 22a-23a.

HERA gives FHFA a broad array of powers when acting as conservator, including the power to "take over the assets of and operate" the enterprises, to "conduct all business" of the enterprises, to "preserve and conserve the assets and property" of the enterprises, and to "transfer or sell any asset or liability" of the enterprises. 12 U.S.C. 4617(b)(2)(B) and (G). More generally, FHFA as conservator is authorized to "take such action as may be * * * necessary to put the [enterprises] in a sound and solvent condition," and to undertake any action "appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]." 12 U.S.C.

4617(b)(2)(D). FHFA may take these actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the enterprises. 12 U.S.C. 4617(a)(2). And when exercising these powers, FHFA is authorized to take actions that it determines are "in the best interests of the [enterprises] *or the Agency*." 12 U.S.C. 4617(b)(2)(J)(ii) (emphasis added).

"FHFA's execution of the Third Amendment falls squarely within its statutory authority to '[o]perate the [enterprises],' 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)." Pet. App. 26a (some brackets in original). FHFA's decision to enter into the Third Amendment involved "quintessential conservatorship tasks designed to keep the [enterprises] operational," including "[r]enegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come by capital." *Ibid.*

At the time of the Third Amendment in 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment and thus owed Treasury almost $19 billion in dividends each year. Pet. App. 12a. Through the first quarter of 2012, the enterprises had drawn more than $26 billion from the commitment just to pay their annual dividends to Treasury. *Id.* at 132a. The draws increased Treasury's liquidation preference, which in turn increased the amount of dividends the enterprises owed; they also threatened to diminish Treasury's remaining commitment, which became fixed at the end of 2012.

By replacing a 10% fixed dividend obligation with a variable one, the Third Amendment ended this cycle. It

thus reduced the risk that the enterprises would exhaust Treasury's commitment prematurely, ensured that the enterprises would remain solvent for the foreseeable future, and provided certainty to the financial markets from which the enterprises raise funds. In finding entry into the Third Amendment to be within FHFA's authority, the court of appeals simply recognized FHFA's power as conservator to manage the enterprises' financial obligations and assets in a manner aimed at ensuring the enterprises' ongoing viability. Petitioners' characterization of the Third Amendment as "giv[ing] away" the enterprises' assets (Perry Pet. 21) ignores the $258 billion ongoing commitment from Treasury that is keeping the enterprises afloat.

Petitioners' challenge rests on a disagreement with the manner in which FHFA executed its duties as conservator of the GSEs. Pet. App. 42a. Petitioners 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. As the court of appeals recognized, Section 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." *Id.* at 43a. 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." *Id.* at 26a; 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."); see also *Bank of Am. Nat'l Ass'n* v. *Colonial*

Bank, 604 F.3d 1239, 1244 (11th Cir. 2010) (FIRREA's anti-injunction provision barred plaintiffs' claim, because claim was merely an allegation of "FDIC's improper performance of its legitimate receivership functions").

Petitioners construe HERA as requiring FHFA to "preserve and conserve" the enterprises' assets and to make the enterprises "sound and solvent." Perry Pet. 21-23; Fairholme Pet. 28-32. That interpretation is at odds with HERA's text, see Pet. App. 25a (noting that the relevant statutory provisions employ the permissive "may" rather than the obligatory "shall"), and it is in any event irrelevant. Section 4617(f) would bar petitioners' claims "[e]ven if [HERA] did impose" the mandatory duties petitioners assert, because it precludes a court from second-guessing FHFA's decision about *how* to perform its broadly-defined duties, whether those duties are mandatory or discretionary. *Id.* at 29a.

Thus, contrary to petitioners' contention (Perry Pet. 21), the court of appeals' analysis of HERA's use of the permissive "may" was not the "lynchpin" of its decision. The court cited HERA's permissive language primarily to emphasize that HERA does not require FHFA to take the particular course of action that petitioners advocate. Pet. App. 25a. As the court explained, even if HERA did impose a mandatory duty to preserve and conserve the enterprises' assets, "nothing in [HERA] 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." *Id.* at 29a. Indeed, HERA authorizes FHFA, as conservator, to make significant changes to the enterprises' operations. For example, HERA states that FHFA may "be appointed conservator or receiver for the purpose

of reorganizing, rehabilitating, or winding up the affairs of a [GSE]." 12 U.S.C. 4617(a)(2). That "textual authority to reorganize and rehabilitate the Companies * * * forecloses any argument that [HERA] made the *status quo ante* a statutorily compelled end game." Pet. App. 31a. In short, whether FHFA's authority to preserve and conserve the enterprises' assets is viewed as mandatory or discretionary, HERA did not prohibit FHFA from prioritizing the preservation of vital, taxpayer-funded capital over the build-up of self-financed capital. See also *id.* at 38a.

Like the dissent below, petitioners urge that the Third Amendment was a "*de facto* liquidation" and thus the act of a receiver, not a conservator. Fairholme Pet. 34-37; Perry Pet. 20, 22. But "[t]he proof that no *de facto* liquidation occurred is in the pudding." Pet. App. 33a. Five years after the Third Amendment, the enterprises "remain fully operational entities with combined operating assets of $5 trillion." *Id.* at 34a; see Fannie Mae, *Form 10-K, Annual Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2016*, at 55; Freddie Mac, *Form 10-K, Annual Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2016*, 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." Pet. App. 14a. Fannie Mae and Freddie Mac thus have not been liquidated. *Id.* at 33a.

Petitioners are also wrong in asserting that the Third Amendment has left the GSEs "perpetually on the brink of insolvency," Fairholme Pet. 23, and has

failed to "assure[] 'the future viability of the institution[s],'" Perry Pet. 26 (citation omitted). Section 4617(f) bars a court from second-guessing whether a particular action taken by FHFA as conservator furthers the enterprises' soundness and solvency. In any event, the Third Amendment has not left the enterprises on the edge of failure. To the contrary, by helping preserve Treasury's $258 billion remaining commitment, the Third Amendment ensures that the GSEs have a capital backstop sufficient to cover any near-term losses, to weather another housing-market downturn, and to maintain market confidence. Treasury's commitment has allowed the enterprises to remain operational and assures their financial stability and solvency, regardless of how the commitment is treated on the enterprises' balance sheets.

Petitioners contend (Perry Pet. 23-30) that, in agreeing to the Third Amendment, FHFA failed to act as a common-law conservator would have. But "Congress explicitly delegated to FHFA conservator authority that exceeds the customary meaning of the term," *Robinson*, 876 F.3d at 229, and Section 4617(f) bars petitioners' claims so long as the Third Amendment involved the exercise of those statutorily-defined powers and functions, see Pet. App. 38a-39a. *Inter alia*, HERA permits FHFA to take actions as conservator that are in FHFA's own best interests, 12 U.S.C. 4617(b)(2)(J)(ii), and to strike deals with Treasury that are designed to "protect the taxpayer" and to "provide stability to the financial markets," 12 U.S.C. 1455(*l*)(1)(B), 1719(g)(1)(B). Pet. App. 38a. FHFA thus "is not a traditional conservator" because "the express powers granted to FHFA by HERA conflict with the customary meaning of the term 'conservator.'" *Robinson*, 876 F.3d at 228-230.

2. The court of appeals also correctly held that Section 4617(f) bars a court from enjoining Treasury's participation in the Third Amendment. Section 4617(f) prohibits judicial relief that would "restrain or affect" FHFA's exercise of its conservatorship powers. 12 U.S.C. 4617(f). 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 [on FHFA's exercise of its conservator powers] as if the injunction operated directly on FHFA," Pet. App. 45a, an injunction against Treasury would "restrain or affect" FHFA's exercise of its conservatorship powers, and is therefore barred. See *Robinson*, 876 F.3d at 228 ("Although § 4617(f) specifically addresses FHFA, that provision also forecloses claims against Treasury that seek imposition of equitable relief that would restrain or affect FHFA's powers or functions as conservator.").[12] Courts applying FIRREA's analogous anti-injunction provision have likewise uniformly concluded that the provision "precludes a court order against a third party which would affect the FDIC as receiver, particularly where the relief would have the same practical result as an order directed against the FDIC in that capacity." *Hindes* v. *FDIC*, 137 F.3d 148, 160-161 (3d Cir. 1998); see *Dittmer Props., L.P.* v. *FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013); *Telematics Int'l*,

[12] In agreeing with the district court below that Section 4617(f) barred an injunction against Treasury's participation in the Third Amendment, the Sixth Circuit in *Robinson* noted that two district courts had concluded that FHFA could be enjoined from entering the Third Amendment, notwithstanding Section 4617(f), if Treasury had exceeded its authority under HERA. See 876 F.3d at 228 n.5. The Sixth Circuit found it unnecessary to decide whether Section 4617(f) would allow an injunction in those circumstances because Treasury had not exceeded its authority under HERA. *Ibid.*

Inc. v. *NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992).

Petitioners invoke (Fairholme Pet. 37) the presumption favoring judicial review of agency action. But that 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). Section 4617(f) expressly precludes any judicial action that would "restrain or affect" FHFA's exercise of its conservatorship powers. 12 U.S.C. 4617(f). The court below, moreover, did not hold that FHFA's conduct was wholly insulated from judicial scrutiny. The court simply held that judicial review was limited to the question whether FHFA had exceeded its statutory and constitutional authority, and did not extend to the *manner* in which FHFA had exercised those powers. See Pet. App. 23a-25a.

3. The court of appeals also correctly held that HERA's Succession Clause, 12 U.S.C. 4617(b)(2)(A)(i), does not include an implicit conflict-of-interest exception. Pet. App. 63a-64a. That provision states that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to * * * all rights, titles, powers, and privileges of the [enterprises], and of any stockholder, officer, or director of [the enterprises] with respect to the [enterprises] and the assets of the [enterprises]." 12 U.S.C. 4617(b)(2)(A)(i). The court concluded, and petitioners do not dispute, that Section 4617(b)(2)(A)(i) "plainly transfers [to FHFA the] shareholders' ability to bring derivative suits on behalf of" the enterprises. Pet. App. 63a (citation omitted; brackets in original).

Petitioners argue (Cacciapalle Pet. 24-31) that the enterprises' shareholders should nevertheless be permitted

to file their own derivative suits when FHFA has a conflict of interest. The court of appeals correctly rejected that argument as having no basis in the statutory text. See Pet. App. 67a-68a; see also *Kellmer* v. *Raines*, 674 F.3d 848, 851 (D.C. Cir. 2012) ("Congress * * * transferred everything it could to the [conservator]" through Section 4617(b)(2)(A)(i)) (citation omitted; brackets in original). The court explained that "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." Pet. App. 67a-68a (citation and internal quotation marks omitted).

Petitioners' criticisms of the court of appeals' analysis (Cacciapalle Pet. 24-31) lack merit. Petitioners are wrong in asserting (*id.* at 24) that the court's construction of the Succession Clause "is inconsistent with the text and structure of the statute." As explained above, petitioners seek to imply an unwritten exception into HERA's plain language. The court of appeals correctly declined to take that step and instead read the statute as written.

Petitioners' reliance (Cacciapalle Pet. 25) on 12 U.S.C. 4617(a)(5) is likewise misplaced. Section 4617(a)(5) gave the enterprises a 30-day window to file a lawsuit challenging FHFA's appointment as conservator or receiver. Congress's express conferral of that limited right simply underscores the absence of any continuing right to bring suit on behalf of the GSEs during the remainder of the conservatorship. Cf. *United States* v. *Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others.").

Petitioners are also wrong in asserting (Cacciapalle Pet. 26-28) that Congress, in enacting HERA, should be presumed to have adopted the conflict-of-interest exception that some courts had previously read into FIRREA. See *Delta Sav. Bank* v. *United States*, 265 F.3d 1017, 1023-1024 (9th Cir. 2001), cert. denied, 534 U.S. 1082 (2002); *First Hartford Corp. Pension Plan & Trust* v. *United States*, 194 F.3d 1279, 1294-1295 (Fed. Cir. 1999). "[W]here the law is plain"—as it is here—"subsequent reenactment does not constitute an adoption" of a judicial interpretation, *Brown* v. *Gardner*, 513 U.S. 115, 121 (1994) (citation omitted). And "two circuit court decisions do not so clearly 'settle[ ] the meaning of [the] existing statutory provision' in FIRREA that [this Court] must conclude the Congress intended *sub silentio* to incorporate those rulings into [HERA]." Pet. App. 67a (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v* v. *Dabit*, 547 U.S. 71, 85 (2006)) (first two sets of brackets in original); see *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 351 (2005).

Petitioners also assert (Cacciapalle Pet. 28-31) that the court of appeals' decision "raises serious constitutional questions" that could be avoided if an implicit conflict-of-interest exception is read into the Succession Clause. *Id.* at 28. The canon of constitutional avoidance "has no application in the absence of statutory ambiguity." *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 134-135 (2002) (citation omitted). HERA's Succession Clause unambiguously transfers all shareholder rights, including the right to bring derivative suits, to FHFA during a conservatorship.

In any event, the Succession Clause raises none of the constitutional questions petitioners posit. Petitioners assert (Cacciapalle Pet. 28) that "a cause of action is

a species of property" protected by the Fifth Amendment. But in a shareholder derivative suit, the cause of action belongs to the corporation, not to the shareholders. See *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991). None of the decisions on which petitioners rely suggests that the right to bring a derivative suit to enforce a corporation's cause of action is a protected property interest. Even outside of HERA, the shareholder standing rule "generally prohibits shareholders from initiating actions to enforce the rights of the corporation." *Franchise Tax Bd.* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990).

Contrary to petitioners' assertion (Cacciapalle Pet. 29), the court of appeals' interpretation of the Succession Clause does not "strip[] plaintiffs of the right to any judicial forum for their constitutional claims." Although the Succession Clause bars shareholders from filing suits to enforce constitutional claims belonging to the GSEs, FHFA retains the right to bring such claims. And even if the shareholders had direct constitutional claims that were personal to them, the court's decision expressly allows such claims to proceed. See Pet. App. 68a.

HERA's Succession Clause likewise raises no meaningful federalism concerns. See Cacciapalle Pet. 30-31. An Act of Congress that regulates a federal agency's conservatorship of federally chartered entities, created to serve federal purposes and backed by federal funds, does not intrude on any prerogative of the States. The Succession Clause precludes shareholders from bringing claims on behalf of the GSEs. Even assuming that the Clause "preempts" state-law claims, federal preemption of state tort law is a well-established feature of

our constitutional system. See, *e.g.*, *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 330 (2008).

Finally, petitioners contend (Cacciapalle Pet. 31) that the court of appeals' interpretation of the Succession Clause violates common-law principles incorporated into HERA. In enacting HERA, however, Congress defined by statute the rights and duties of FHFA as conservator, rather than leaving those matters to be resolved under common-law rules. And, as explained above, HERA transferred from the GSEs' shareholders to FHFA the right to pursue derivative actions on behalf of the enterprises when in conservatorship. Those directives supersede the common-law rules that would otherwise govern petitioners' efforts to pursue derivative suits.

B. The Court Of Appeals' Decision Does Not Conflict With Any Decision Of Another Court Of Appeals

1. The court of appeals' conclusion that Section 4617(f) bars petitioners' claims for injunctive and declaratory relief is consistent with the holdings of all the other federal courts that have considered the question. See *Robinson*, *supra*; *Collins* v. *FHFA*, 254 F. Supp. 3d 841, 846 (S.D. Tex. 2017), appeal pending, No. 17-20364 (5th Cir. docketed May 30, 2017); *Saxton* v. *FHFA*, 245 F. Supp. 3d 1063, 1078 (N.D. Iowa 2017), appeal pending No. 17-1727 (8th Cir. docketed May 4, 2017); *Roberts* v. *FHFA*, 243 F. Supp. 3d 950, 963 (N.D. Ill. 2017), appeal pending No. 17-1880 (7th Cir. argued Oct. 30, 2017); *Continental W. Ins. Co.* v. *FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015).

Contrary to petitioners' contention (Perry Pet. 14-16), the decision below does not conflict with *County of Sonoma*, *supra*, or *Leon County* v. *FHFA*, 700 F.3d 1273 (11th Cir. 2012). The question in those cases was

whether FHFA had issued a particular directive in its capacity as conservator of the GSEs (in which case it was not required to provide notice and comment), or in its capacity as regulator of the enterprises (in which case notice and comment would have been required). *Leon County*, 700 F.3d at 1278; *County of Sonoma*, 710 F.3d at 992. That question is not presented here, since petitioners have never suggested that FHFA entered into the Third Amendment in its capacity as regulator of the GSEs.

In arguing that a circuit conflict exists, petitioners observe that, under *Leon County* and *County of Sonoma*, FHFA cannot invoke Section 4617(f)'s bar on judicial review "by merely labelling its actions with a conservator stamp." Perry Pet. 15 (quoting *Leon County*, 700 F.3d at 1278). Petitioners assert that the court below, by contrast, "embraced exactly the type of 'conservator stamp' analysis that the Eleventh Circuit explained would be insufficient to foreclose judicial review." *Id.* at 15; see *id.* at 15-16 (stating that the "D.C. Circuit's analysis does not permit a reviewing court to look behind FHFA's assertion of conservatorship authority").

That argument reflects a misperception of the D.C. Circuit's decision. The court of appeals explained that HERA's anti-injunction provision "would not apply if [FHFA] 'has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted powers or functions.'" Pet. App. 22a-23a (citation omitted). That rule is substantially equivalent to the standard articulated by the Ninth and Eleventh Circuits. See *County of Sonoma*, 710 F.3d at 992 (Section 4617(f) "is inapplicable when FHFA acts beyond the scope of its conservator power."); *Leon County*, 700 F.3d

at 1278 ("[I]f the FHFA were to act beyond statutory or constitutional bounds," Section 4617(f) "would not bar judicial oversight or review of its actions").

The court of appeals analyzed at length whether that exception to Section 4617(f)'s bar on judicial review applied to FHFA's negotiation of the Third Amendment. The court ultimately concluded that the exception was inapplicable because FHFA's execution of the Third Amendment fell within FHFA's conservatorship authority under HERA. See Pet. App. 23a-42a. As its thorough analysis reveals, the court of appeals did not suggest that FHFA's labelling of an activity with a "conservator stamp" was sufficient to preclude judicial review under Section 4617(f). The court's interpretation and analysis of Section 4617(f) is consistent not only with the Ninth and Eleventh Circuits' approach to the provision, but also with the reasoning of every court of appeals to consider HERA's anti-injunction provision or its FIRREA analogue. See, *e.g.*, *Robinson*, 876 F.3d at 227-233; *Town of Babylon* v. *FHFA*, 699 F.3d 221, 227-228 (2d Cir. 2012); *Dittmer Props.*, 708 F.3d at 1017; *Bank of Am. Nat'l Ass'n*, 604 F.3d at 1243; *Courtney* v. *Halleran*, 485 F.3d 942, 948-949 (7th Cir. 2007), cert. denied, 552 U.S. 1184 (2008); *Ward* v. *Resolution Trust Corp.*, 996 F.2d 99, 102-103 (5th Cir. 1993) (per curiam); *United Liberty Life Ins. Co.* v. *Ryan*, 985 F.2d 1320, 1328-1329 (6th Cir. 1993); *Gross* v. *Bell Sav. Bank PA SA*, 974 F.2d 403, 407-408 (3d Cir. 1992); *In re Landmark Land Co. of Okla., Inc.*, 973 F.2d 283, 290 (4th Cir. 1992); *Telematics Int'l*, 967 F.2d at 705-706.

2. The Cacciapalle petitioners argue (Pet. 17-23) that the D.C. Circuit's conclusion that HERA's Succes-

sion Clause lacks an implicit conflict-of-interest exception conflicts with *Delta Savings Bank*, *supra*, and *First Hartford*, *supra*. Petitioners are mistaken.

As petitioners acknowledge (Cacciapalle Pet. 18-19), the courts in *Delta Savings Bank* and *First Hartford* addressed a different question about a different statute. Those cases involved the analogous succession provision contained in FIRREA, 12 U.S.C. 1821(d)(2)(A). Although the two courts determined that the FIRREA provision includes an implicit "manifest conflict of interest" exception, they described that exception as "limited," *First Hartford*, 194 F.3d at 1295, and as permitting shareholders to file derivative suits on behalf of a bank in conservatorship only in a "very narrow range of circumstances," *Delta Savings Bank*, 265 F.3d at 1022 (citation omitted). Neither court of appeals has addressed the question whether a similar exception exists in HERA's Succession Clause or would apply in the circumstances presented here.

When it enacted HERA, Congress anticipated that FHFA would turn to Treasury for essential capital if needed, and it authorized Treasury to invest in the enterprises. If Congress had intended FHFA's dealings with Treasury to be subject to challenge by the enterprises' shareholders, it would have expressly granted the 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 both *Delta Savings* and *First Hartford*, moreover, the challenged conduct had occurred *before* the relevant federal regulator was appointed receiver. See *Delta Savings*, 265 F.3d at 1019-1020; *First Hartford*, 194 F.3d at 1283-1284. Petitioners, by contrast, are challenging

FHFA's actions *as conservator*. It is precisely such actions that Congress shielded from second-guessing by shareholders and courts. See 12 U.S.C. 4617(b)(2)(A)(i) and (f). Recognizing an implicit conflict-of-interest exception that would allow petitioners' suit to proceed thus would run counter to HERA's basic design, a circumstance not present in *First Hartford* or *Delta Savings*.

The Federal and Ninth Circuits' emphasis on the "narrow" and "limited" nature of the exception they recognized, *First Hartford*, 194 F.3d at 1295; see *Delta Savings*, 265 F.3d at 1022, is also incompatible with petitioners' basic theory, *i.e.*, that HERA permits shareholders to sue a conservator whenever the conservator allegedly acts improperly and thus would be required to "sue itself" to challenge those actions. Cacciapalle Pet. 15 n.4 (arguing that "there is at least one manifest conflict of interest in this case" because "[p]etitioners' claims against FHFA would require it to sue itself"). Such an exception would permit shareholders to challenge every action FHFA takes as conservator or receiver. Neither the Ninth Circuit nor the Federal Circuit countenanced such an outcome.

In addition, FHFA's dealings with Treasury do not raise the specific type of "manifest conflict of interest" that motivated the Federal and Ninth Circuits to craft an exception to FIRREA's succession provision. In *First Hartford*, the FDIC as receiver would have been required to challenge an action that the FDIC had previously taken as regulator. 194 F.3d at 1295. That "very narrow * * * circumstance[]," *ibid.*, is not present here. Nor are Treasury and FHFA "interdependent entities with managerial and operational overlap" and a "common genesis," as was the case in *Delta Savings Bank*. 265 F.3d at 1022-1023.

C. Petitioners Overstate The Practical Importance Of The Decision Below

Petitioners assert that the court of appeals' decision poses an "[e]xistential [t]hreat" to distressed financial institutions, Perry Pet. 18; "[i]mperils" such institutions' ability to raise private capital, Fairholme Pet. 16; and will destabilize "the nation's overall financial health," *id.* at 16-17. Those fears are unfounded.

Treasury has committed $445 billion in taxpayer funds to the enterprises since 2008, and that commitment (of which $258 billion remains unused) has enabled the GSEs to remain in operation. See Pet. App. 12a; p. 7, *supra*. Treasury's $445 billion commitment was necessary, moreover, only because private investors were unwilling to provide the capital the GSEs required. *Ibid.* Treasury is thus far from a "loot[er]," Perry Pet. 18, or "embezzle[r]," *id.* at 33, of the GSEs' assets. It is the enterprises' "financial-lifeline stockholder," the only stockholder willing and able to fund the GSEs. Pet. App. 42a-43a.

That the court of appeals recognized a conservator's authority to renegotiate the financial obligations an institution owes to such a critical investor, in a manner that assures the institution's "ongoing access to [that] vital yet hard-to-come-by capital," Pet. App. 26a, is neither surprising nor groundbreaking. Petitioners are thus wrong in asserting that the court of appeals' decision will allow a future conservator of a failing financial institution to "do whatever it likes with respect to an institution's assets." Perry Pet. 18; see Fairholme Pet. 19. The court merely recognized a conservator's authority to undertake a "core" conservatorship task: the renegotiation of an enterprise's financial obligations to ensure the enterprise's continued operation.

HERA reflects Congress's response to the unique circumstances surrounding the housing crisis and its impact on Fannie Mae and Freddie Mac—owners or guarantors of half the residential mortgages in the United States. HERA "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 taxpayer' and 'provide[d] stability to the financial markets.'" Pet. App. 39a-40a (quoting 12 U.S.C. 1455, 1719(g)(1)(B)(i) and (iii)) (brackets in original). And, as noted, Treasury's infusion of enormous taxpayer capital occurred precisely because private investors were unwilling to make the immense investment necessary to save the companies. These singular circumstances, which gave rise to the Purchase Agreements and subsequent amendments, readily distinguish this case from a typical conservatorship scenario.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General and Principal Deputy Solicitor General are recused in this case.