

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 - - - - - X  
4 PERRY CAPITAL LLC, FOR AND ON :  
5 BEHALF OF INVESTMENT FUNDS :  
6 FOR WHICH IT ACTS AS :  
7 INVESTMENT MANAGER, :  
8 Appellant, :  
9 v. : No. 14-5243, et al.  
10 JACOB J. LEW, IN HIS OFFICIAL :  
11 CAPACITY AS THE SECRETARY OF :  
12 THE DEPARTMENT OF THE :  
13 TREASURY, ET AL., :  
14 Appellees. :  
15 - - - - - X

13 Friday, April 15, 2016  
14 Washington, D.C.

15 The above-entitled matter came on for oral argument  
16 pursuant to notice.

17 BEFORE:

18 CIRCUIT JUDGES BROWN AND MILLETT, AND SENIOR  
19 CIRCUIT JUDGE GINSBURG

20 APPEARANCES:

21 ON BEHALF OF THE APPELLANT:  
22 THEODORE B. OLSON, ESQ.  
23 HAMISH P.M. HUME, ESQ.

24 ON BEHALF OF THE APPELLEES:  
25 HOWARD N. CAYNE, ESQ.  
MARK B. STERN, ESQ.

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P R O C E E D I N G S

1  
2 THE CLERK: Case number 14-5243, et al., Perry  
3 Capital LLC, for and on Behalf of Investment Funds for which  
4 it Acts as Investment Manager, Appellant v. Jacob J. Lew, in  
5 his Official Capacity as the Secretary of the Department of  
6 the Treasury, et al.. Mr. Olson, the Institute for  
7 Institutional Plaintiffs Perry Capital, LLC, et al.; Mr.  
8 Hume for Class Plaintiffs; Mr. Cayne for FHFA; and Mr. Stern  
9 for Jacob J. Lew.

10 JUDGE BROWN: Good morning, Mr. Olson.

11 ORAL ARGUMENT OF THEODORE B. OLSON, ESQ.

12 ON BEHALF OF THE INSTITUTIONAL PLAINTIFFS

13 PERRY CAPITAL LLC, ET AL.

14 MR. OLSON: Good morning, Your Honor, may it  
15 please the Court. The net worth sweep which is at the  
16 center of this case was a massive, we submit lawless  
17 government expropriation of Fanny Mae and Freddie Mac, two  
18 publicly held companies pretending to act as a conservator,  
19 which is required by law, to conserve and preserve the  
20 assets, and rehabilitate these companies to a sound and  
21 solvent condition. The net worth sweep, and the name really  
22 says it all, net worth sweep systematically drained these  
23 entities of all value, leaving in its wake two unsolved,  
24 unsound, and insolvent zombies, a golden goose for the  
25 Treasury, and utterly worthless for the individuals and

1 institutions who in good faith invested in them. If private  
2 individuals, we submit, had done this to public companies  
3 what the United States Government has done here, the SEC,  
4 the Justice Department would be investigating and perhaps  
5 prosecuting.

6           In September of 2008 the FHFA named itself the  
7 Conservator of Fannie and Freddie, under the statute  
8 pursuant to which it acted it was required to preserve the  
9 assets, conserve the situation of those companies, and put  
10 each in a sound and solvent condition, and rehabilitate  
11 them, that is in the statute pursuant to which the FHFA  
12 purported to act. And in its regulations, which have been  
13 cited in the brief, the Agency describes the primary  
14 objective, the essential function, and the statutory charge  
15 of a Conservator is to keep the enterprise going, and bring  
16 it back to life to the extent that it needs resuscitation.  
17 A Conservator is under the statute, under the regulations,  
18 under the same statute the FDIA that governs the FDIC, and  
19 decades of tradition and common law a conservator is a  
20 trustee for the assets of its ward. It has responsibility  
21 to retain the rights of the institution that it's  
22 protecting, and when this conservatorship was created the  
23 FHFA put out a press release with questions and answers  
24 describing what its role would be, this is at pages 2441  
25 through 2443 of the Joint Appendix, it answers these same

1 questions about conserving and preserving, and sound and  
2 solvent, and under a conservatorship it says the company is  
3 not liquidated, there are no plans to liquidate the company,  
4 and a stockholder's rights, the company, the stockholders  
5 will retain their financial worth in the institution. Then  
6 a few years later on August 17, 2012 the net worth sweep was  
7 announced, and it did exactly the opposite of what a  
8 conservator is responsible by law, tradition, and regulation  
9 to do, it basically decided to wipe out all the value of  
10 Fannie and Freddie and make them wards of the State.

11 JUDGE GINSBURG: What was the stock selling for at  
12 that point?

13 MR. OLSON: The price of the stock?

14 JUDGE GINSBURG: Yes.

15 MR. OLSON: I don't know the answer to that. I  
16 don't know, I'm not even sure whether it's in the briefs,  
17 and I'm not sure I would argue that it wouldn't be relevant.  
18 The institutions unquestionably had been in difficult  
19 straits, but the record is now clear, and it is, has been  
20 clear for quite some time that the entities have turned the  
21 corner and were moving towards a profitable position.  
22 What --

23 JUDGE MILLETT: Well, is that accurate? You're  
24 talking about 2013, my understanding is that they've either,  
25 their profits have gone down markedly and that at least

1 Freddie Mac has been losing money again, is that accurate or  
2 inaccurate?

3 MR. OLSON: What I understand the case to be is  
4 that the institutions are because of the deferred tax assets  
5 that have been put in place that the entities have both  
6 produced and returned to the Treasury over \$50 billion of  
7 the amounts that the Treasury has put into it --

8 JUDGE MILLETT: No, there was a big amount of  
9 money in 2013 that 2014, 2015 after those tax credits were  
10 taken out of the picture they've been back in this position  
11 where the amount of profits that they're making may or may  
12 not fluctuate above or below the amount of dividend that  
13 they would owe to Treasury each year, and in fact, Freddie  
14 Mac lost money in the third quarter of 2015.

15 MR. OLSON: The dividends could have been paid in  
16 kind, which is something that the, our opponents overlook,  
17 that would increase the liquidation preference, but it would  
18 have preserved the capital of the institution.

19 JUDGE MILLETT: Well, surely that decision whether  
20 to require dividends in cash or in kind is exactly the type  
21 of judgment that's going to be conferred on the Agency's  
22 conservator that we could superintend, would you agree with  
23 that?

24 MR. OLSON: Well, but what we're talking about  
25 here is the --

1           JUDGE MILLETT: But would you agree that we  
2 certainly couldn't say, we couldn't say the conservator  
3 erred and enjoined them, or a declaratory judgment, they  
4 should have done a liquidation rather than preference rather  
5 than cash.

6           MR. OLSON: We submit that what they were is  
7 making a mistake because they were assuming because of the  
8 10 percent cash dividend that that would impair the capital  
9 of the institutions, and would drive them further towards  
10 insolvency.

11           JUDGE MILLETT: I guess I'm going to try one  
12 more --

13           JUDGE GINSBURG: Well, they were inferring that  
14 from --

15           MR. OLSON: Whereas that was not, that was not  
16 necessary.

17           JUDGE GINSBURG: They were inferring that from the  
18 pattern of continued losses, and I think twice maybe more  
19 times in which the GSEs borrowed the money simply to pay it  
20 back as a dividend, right?

21           MR. OLSON: Well, the payment of the 10 percent  
22 dividend did not have to be done, not a cash dividend.

23           JUDGE GINSBURG: I understand that, but --

24           MR. OLSON: Could have been done --

25           JUDGE GINSBURG: -- Judge Millett just covered

1 that with you, that's true, but that's a discretionary  
2 decision that's hardly our role --

3 MR. OLSON: But if it --

4 JUDGE GINSBURG: -- to second guess.

5 MR. OLSON: If that discretionary decision was  
6 being used to act in a way that a conservator does not act,  
7 then there is the right of this Court under the APA, and  
8 other circumstances to take judicial review of the fact that  
9 the statute required the conservator to do one set of  
10 things, and the net worth sweep does precisely the opposite.

11 JUDGE MILLETT: All right.

12 JUDGE GINSBURG: Take you back. You made  
13 reference to the potential realization of the tax benefits,  
14 now, it's not entirely clear to me, it looks like the tax  
15 benefit here is essentially a loss carried forward, is that  
16 right?

17 MR. OLSON: Yes --

18 JUDGE GINSBURG: Okay. Okay.

19 MR. OLSON: -- that's one way to put it.

20 JUDGE GINSBURG: Okay. So, if the Agency, if the  
21 GSEs are going to continue to realize losses they will not  
22 happen to be in a position to get the benefit of the carry  
23 forward --

24 MR. OLSON: Well, that's only a benefit up to a  
25 point, what the Government did was prevent the agencies, the

1 entities from utilizing that --

2 JUDGE GINSBURG: I understand that. So, I want to  
3 put ourselves in the position of the FHFA prior to, just  
4 prior to the Third Amendment, and at that point as I  
5 understand it the GSEs have been pretty consistently losing  
6 money, the prospect of realizing anything on the tax credits  
7 because there will be profitable quarters in the projected  
8 future, is looking like 2013, 2014, somewhere in that range,  
9 there's a handwritten note on a document suggesting, a  
10 Treasury document suggesting that, right?

11 MR. OLSON: Well, the record is fairly  
12 substantial, especially in conjunction with the recently  
13 unsealed documents that were made available --

14 JUDGE GINSBURG: Right, right.

15 MR. OLSON: -- to us just recently that the former  
16 ex-CFO McFarland of Fannie specifically said there was  
17 likelihood of \$50 billion --

18 JUDGE GINSBURG: Yes.

19 MR. OLSON: -- profits at the --

20 JUDGE GINSBURG: Okay.

21 MR. OLSON: -- end of the year. The testimony is  
22 that the corner had been turned because the housing market  
23 had been turned, and at that point --

24 JUDGE GINSBURG: That was the GSEs estimate, not  
25 Treasury's. Treasury had a very pessimistic view of this

1 throughout the whole period.

2 MR. OLSON: That is -- the record pretty much was  
3 the Grant Thornton, which was an expert for --

4 JUDGE GINSBURG: Right.

5 MR. OLSON: -- the Treasury Department --

6 JUDGE GINSBURG: They had that, they had that  
7 before them.

8 MR. OLSON: -- said the corner has been turned.  
9 What we submit --

10 JUDGE GINSBURG: Well, Grant Thornton, wait a  
11 minute, Grant Thornton gave them a very pessimistic outlook  
12 for the long term.

13 MR. OLSON: But during that, right immediately  
14 around the time, these documents make it clear that at the  
15 time, shortly before the decision was made, which was made  
16 in 2012, in August, McFarland said that she gives the report  
17 to the Treasury Department, says the corner has been turned,  
18 there's a profitable prospect ahead, and at that --

19 JUDGE GINSBURG: She actually -- let me quote her  
20 on that, because she didn't say I said it, she said I would  
21 have said that, right? She's trying to recall what happened  
22 at this meeting some couple of years earlier. She said  
23 well, I would have mentioned that.

24 MR. OLSON: Well, I think the record is more clear  
25 than that, Judge Ginsburg, and I think what the record

1 supports the proposition that the Treasury at that point  
2 seeing what other people were being able to see, including  
3 investors, that these institutions have turned the corner,  
4 and if they had been not eliminated from the possibility of  
5 ever being solvent by a net worth sweep that that was, that  
6 the institutions had turned profitable --

7 JUDGE MILLETT: Well, I think what you're talking  
8 about seeing is there's a short-term and a long-term  
9 problem, and there were competing views it looks like  
10 within --

11 JUDGE GINSBURG: Right.

12 JUDGE MILLETT: -- the Government about what these  
13 prospects were, and reality has confirmed that, and a lot of  
14 what folks were talking about was the short term profits  
15 that would be made when they carried forward and were able  
16 to take advantage of that tax benefit, which is done, it  
17 expired at this point, and they now, the concern as a  
18 conservator was if you have this cycle of drawing money to  
19 pay dividends right, you know, from the right pocket and  
20 putting it back into the left pocket it was going to  
21 increase --

22 MR. OLSON: Well, this is not what a --

23 JUDGE MILLETT: -- continue the problem.

24 MR. OLSON: -- this is not what a conservator is  
25 required by law to do, and the Treasury --

1           JUDGE MILLETT:  It's not that it's required by  
2 law, it's a conservator permitted by law to say the scheme  
3 that is in place under the PSPAs and the First and Second  
4 Amendment isn't going to work in the long-term, it's only  
5 going to increase the amount of money that they owe, they're  
6 going to keep, like I said, taking money, borrowing money  
7 just to pay us back money, and instead, we need to come up  
8 with a new solution, and that new solution says you will  
9 give us all those profits whatever they are, if they're zero  
10 we get nothing for the money that we're loaning you and the  
11 risk that we're exposed to.  And if they're --

12           MR. OLSON:  I want to make --

13           JUDGE MILLETT:  -- less than our \$19 billion  
14 dividend we will have to suffer that loss, but if it's more  
15 we will get the benefit of it, what's not, how is that not  
16 within the discretion of a conservator?

17           MR. OLSON:  I want to answer that, I want to make  
18 sure that I reserve the time that I was hoping to reserve  
19 for rebuttal.

20           JUDGE MILLETT:  You'll be fine.

21           MR. OLSON:  The answer is that to the extent that  
22 the decision was made at that time, and we submit the  
23 decision was made at that time by the Treasury Department,  
24 we can use this to deal with our budget concerns, and that  
25 they at that point stopped being a conservator.  The

1 Treasury Department's release -- and by the way, the FHA  
2 decision is supposed to be made without the supervision or  
3 direction of the Treasury Department. The announcements  
4 that were made at the time make it clear that the Treasury  
5 Department was directing whether the FHFA was doing at that  
6 time, they specifically said this is going to expedite the  
7 wind down of Freddie and Fannie, and we are going to now  
8 make sure that the institutions can be liquidated. So, what  
9 they were doing was changing --

10 JUDGE MILLETT: See, I think as I read the record  
11 it's more complicated and nuanced than that, and that is  
12 that an awful lot of folks both on Capitol Hill and within  
13 the Executive Branch think that we cannot go back to the  
14 pre-2008 situation here, but we, FHFA are not, we're not the  
15 ones to make that call, or is Treasury by itself, and so  
16 what we will do, we do not want to liquidate these two  
17 entities, that would be extraordinarily damaging to the  
18 economy --

19 MR. OLSON: So, we want to --

20 JUDGE MILLETT: -- we're going to hold them, we're  
21 going to hold them, and we're going to keep things in a  
22 stable condition until the policy makers make a decision.

23 MR. OLSON: This is not --

24 JUDGE MILLETT: What's wrong with that?

25 MR. OLSON: That's not sound and solvent. The

1 statute requires keeping institutions sound and solvent.

2 JUDGE MILLETT: It's sounding solvent, you told me  
3 they're making all this money, that sounds like the  
4 definition of sound and solvent.

5 MR. OLSON: Not if the conservator which is  
6 supposed to be acting as a trustee, a fiduciary to the  
7 entities decides I will take all of the profits and give it  
8 to the Treasury Department.

9 JUDGE MILLETT: Well, a fiduciary to whom, because  
10 this statute is different, it doesn't say a fiduciary to  
11 stockholders, it's a fiduciary serving the best interests of  
12 the entity or the agency.

13 MR. OLSON: No, I submit that that reference,  
14 which is under incidental powers in the statute itself,  
15 doesn't provide a conservator to act in its own best  
16 interests, or in the interests of --

17 JUDGE MILLETT: Well, what does it mean? What  
18 does it mean if it doesn't say they can't take something in  
19 the interests of the agency?

20 MR. OLSON: Well, it can, and are incidental --

21 JUDGE MILLETT: I think the FDIC has the same  
22 language.

23 MR. OLSON: Well, that would swallow up all the  
24 responsibilities that conservators have had for centuries --

25 JUDGE GINSBURG: Well, it does, this is a statute

1 that reads out the fiduciary duty by that provision.

2 MR. OLSON: I submit that it does not, Judge  
3 Ginsburg, and I think that would be an error. If the Court  
4 came to the conclusion that that reference, an incident  
5 powers, which is also in the FDIA, would allow the  
6 conservator who is supposed to bring according to the  
7 statute conserve and preserve and sound and solvent, and  
8 rehabilitate the agency --

9 JUDGE GINSBURG: Suppose the --

10 MR. OLSON: -- it would swallow up all those  
11 words.

12 JUDGE GINSBURG: Suppose the FDIA is facing a  
13 troubled bank of enormous proportions, one of the largest  
14 banks in the country, and it says we could, we're acting as  
15 conservator here, we could perform the ordinary duties of a  
16 conservator, but it would so impair the reserves of the FDIC  
17 that it would be a danger to all of the insured depositors  
18 around the country, and so, we're going to act to a degree  
19 in our own interests, rather than solely in the interest of  
20 the troubled institution?

21 MR. OLSON: At that point I think if you read the  
22 statute as a whole, and if you look at the way the FDIA and  
23 the FDIC have operated all these many years there's a choice  
24 then to decide to move to a position of a receivership, and  
25 then wind down the entity, which is what Treasury said it

1 was going to do.

2 JUDGE GINSBURG: Well, that's right, and they're  
3 still, in their capacity as conservator they haven't yet  
4 pulled the trigger as a liquidator, right?

5 MR. OLSON: Well, they're pulling the trigger --

6 JUDGE GINSBURG: As a receiver.

7 MR. OLSON: -- but they're not admitting it, and  
8 they're still supposed to be acting as a conservator, and  
9 then they decide no, we're going to take --

10 JUDGE GINSBURG: Just go back, I have your point,  
11 just go back a moment to what Judge Millett was saying about  
12 the somewhat conflicting views of the long-term outlook, I  
13 think there was consensus that there would be a lot of  
14 fluctuation, volatility over any period of time for the  
15 GSEs, but the, what's the date of the Third Amendment, the  
16 17th?

17 MR. OLSON: August 17 --

18 JUDGE GINSBURG: Seventeenth.

19 MR. OLSON: -- 2012.

20 JUDGE GINSBURG: Okay. So, on the eighth, I think  
21 it's the eighth of August, the two GSEs, the ninth, issued,  
22 one's on the eighth, one's on the ninth, they're 10-Qs,  
23 right? And the 10-Qs say we do not expect to generate net  
24 income or comprehensive income in excess of our annual  
25 dividend obligation to the Treasury over the long term. We

1 also expect that over time our dividend obligation to  
2 Treasury will increasingly drive our future draws under the  
3 senior preferred stock purchase agreement. So, the week  
4 before, whatever it is, 10 days before the trigger is pulled  
5 both of the GSEs go out with their 10-Qs and say we have no  
6 future.

7 MR. OLSON: And at the same time, and this is  
8 reinforced by the documents that were recently unsealed,  
9 that there were projections because of the deferred tax  
10 assets, and the availability they were soon to be released  
11 would make a completely different picture. It's not a  
12 coincidence, we submit --

13 JUDGE MILLETT: A completely different picture for  
14 how long?

15 MR. OLSON: For the foreseeable future. This  
16 was --

17 JUDGE MILLETT: Not the foreseeable future, for  
18 2012/2013.

19 MR. OLSON: Well, the proof is in the pudding.

20 JUDGE GINSBURG: Are you talking about the  
21 McFarland statement?

22 MR. OLSON: These entities have returned \$50  
23 billion to the Treasury more than the Treasury put into  
24 these institutions. And the other thing is that what was  
25 done at the net worth sweep --

1 JUDGE GINSBURG: No, that's doesn't follow, it  
2 doesn't necessarily mean more, it's just \$50 billion --

3 MR. OLSON: In excess.

4 JUDGE GINSBURG: -- toward the commitment, towards  
5 paying down the commitment.

6 MR. OLSON: The commitment, this -- the amount  
7 that has been returned exceeds by \$50 billion.

8 JUDGE GINSBURG: As of now, is that what you're  
9 saying?

10 MR. OLSON: That's --

11 JUDGE GINSBURG: As of now?

12 MR. OLSON: -- \$58 billion, I think.

13 JUDGE GINSBURG: Okay. So, that's post record,  
14 but fair enough. Okay.

15 MR. OLSON: Yes. I think that it is in --

16 JUDGE GINSBURG: All right. But the only  
17 optimistic scenario here is what McFarland relays, correct?

18 MR. OLSON: No, I believe that if you look at the  
19 Ugoletti deposition, the Jeff Foster who was a Treasury  
20 official --

21 JUDGE GINSBURG: Ugoletti takes us to a very  
22 interesting point. Are you still maintaining that the  
23 record was inadequate before the District Court?

24 MR. OLSON: Absolutely, the record was inadequate,  
25 it was not only inadequate, it was misleading, it was

1 incomplete.

2 JUDGE GINSBURG: So, you want to basically invoke  
3 *Overton Park*?

4 MR. OLSON: Yes.

5 JUDGE GINSBURG: Okay.

6 MR. OLSON: *Overton Park* requires a full and  
7 complete administrative record, we did not --

8 JUDGE GINSBURG: Is that your opening salvo?

9 MR. OLSON: Pardon me?

10 JUDGE GINSBURG: Is that your first argument and  
11 first preference here?

12 MR. OLSON: No, our first, our preference is that  
13 this Court recognize that what was done in August of 2012  
14 was directly contrary to the responsibilities of the Agency  
15 acting at the direction of the Treasury which was against  
16 the statute.

17 JUDGE GINSBURG: I don't see how that's consistent  
18 with saying the record's inadequate.

19 MR. OLSON: Well, we have learned enough to know  
20 that, where the record was nonetheless inaccurate we, we're  
21 learning more things --

22 JUDGE GINSBURG: I think what's happened is that  
23 with what we've learned is that there was another view  
24 somewhere out there.

25 MR. OLSON: And the view, as the picture started

1 to become rosier, and as the deferred tax assets became  
2 available to be released to change the financial condition  
3 the Treasury Department --

4 JUDGE GINSBURG: Well, that was after --

5 MR. OLSON: -- said instead of --

6 JUDGE GINSBURG: That was after the Third  
7 Amendment.

8 MR. OLSON: -- rehabilitating the companies we  
9 will take --

10 JUDGE GINSBURG: Okay.

11 MR. OLSON: -- all of their net worth in  
12 perpetuity and make it impossible for them to be  
13 rehabilitated.

14 JUDGE GINSBURG: So, you would like, though, to  
15 depose Ugoletti, right?

16 MR. OLSON: Pardon?

17 JUDGE GINSBURG: You would like to depose  
18 Ugoletti?

19 MR. OLSON: Well, of course we would, and --

20 JUDGE GINSBURG: And you'd like the notes of  
21 meetings, and you'd like the e-mail traffic?

22 MR. OLSON: We would like the administrative  
23 record to be complete, but in addition to that we believe  
24 that there is enough in this record to show that what the  
25 FHFA did at that time was not justified pursuant to the

1 reasons that they gave, the downward spiral had stopped.

2 JUDGE GINSBURG: Okay, but if the record's  
3 incomplete, completing the record may reverse that inference  
4 that you just suggest we drop.

5 MR. OLSON: Well, at minimum we're in -- I agree  
6 that at minimum we're entitled to a complete administrative  
7 record, not just somebody's summary of administrative  
8 record, and that's *Overton Park*, and other decisions of this  
9 Court. But there is enough to know --

10 JUDGE MILLETT: Well, the reason they didn't do  
11 the ordinary record here is they said that it's just, APA  
12 review is injunctive and declaratory, and that's in the  
13 teeth of 4617(f), we can't have that, so what's the point of  
14 bringing the record forward? I think that's their  
15 explanation.

16 MR. OLSON: Well, that is what they're saying, but  
17 the *County of Sonoma* case specifically says that when the  
18 conservator acts beyond and contrary to its responsibilities  
19 as a conservator then 4617 does not preclude review.

20 JUDGE MILLETT: Right. And so what exactly is the  
21 test we're supposed to apply for acting beyond their  
22 authority as conservator? It can't be violated the --

23 MR. OLSON: Right.

24 JUDGE MILLETT: -- statute of the APA or it would  
25 be a pointless provision. You have to show --

1 MR. OLSON: Well, it also would be --

2 JUDGE MILLETT: -- success to get an injunction.

3 MR. OLSON: -- a provision that would eliminate  
4 any judicial review, the courts have --

5 JUDGE MILLETT: So, what is your definition? What  
6 is the standard?

7 MR. OLSON: Our definition is when they're not  
8 acting as a conservator, if you're buying and selling  
9 assets, operating the business in a way designed to  
10 rehabilitate, then you're acting as a conservator, but  
11 you're not acting as a --

12 JUDGE MILLETT: So, what action did they do here  
13 that -- let me give you a hypothetical. If there had been  
14 no deferred tax asset issue, and so as it turned out Fannie  
15 Mae and Freddie Mac never made at any time between 2008 and  
16 the present, or 2012 when the Third Amendment came in, in  
17 the present never made a profit --

18 MR. OLSON: Well, when you --

19 JUDGE MILLETT: -- if they adopted the Third  
20 Amendment and there were no profits, so all they did was  
21 protect Fannie Mae and Freddie Mac from more and more debt,  
22 would that be consistent with being a conservator?

23 MR. OLSON: No, it would not be consistent with  
24 being a conservator because --

25 JUDGE MILLETT: Why would it not?

1 MR. OLSON: -- it wasn't an act towards  
2 rehabilitating the entities, they --

3 JUDGE MILLETT: It was stopping the hemorrhaging,  
4 if they were just going to keep, imagine they just keep  
5 losing money, or if they get profits that are less than the  
6 \$19 billion they owe --

7 MR. OLSON: They made it impossible, they made it  
8 impossible, Your Honor, for these entities to operate. If  
9 you can imagine in the private sector taking a corporation  
10 that for, or a bank for which you have responsibility to  
11 rehabilitate, to keep it sound and solvent, then issue a  
12 decree saying I'm going to take all of your profits and give  
13 them to my uncle, or to give them to my friend, and so you  
14 can't operate in that normal way, we're going to, we're  
15 going to --

16 JUDGE MILLETT: Yes, but we have a different  
17 statute here that let's --

18 JUDGE BROWN: But --

19 JUDGE MILLETT: I'm sorry.

20 JUDGE BROWN: I'm sorry. I was just going to say  
21 Judge Millett is asking a hypothetical.

22 MR. OLSON: Yes, I know.

23 JUDGE BROWN: And the hypothetical is let's assume  
24 that when Treasury gave up its right to dividends the  
25 entities were not profitable. So, in fact, they would have

1 been getting nothing because there were no net profits.

2 MR. OLSON: They would still have had the right,  
3 Judge Brown, of providing that dividend in kind, which would  
4 have increased the liquidation preference, but it would have  
5 preserved the capital of the entities.

6 JUDGE BROWN: Yes. No, but we're assuming that  
7 they did the Third Amendment, it just wasn't successful,  
8 that is to say they gave up their right to the dividend and  
9 simply said we're going to take whatever is generated as net  
10 profit to these entities, but nothing was generated. And  
11 the question is, in other words, does the argument that they  
12 were not acting as a proper conservator depend on the fact  
13 that they were in fact profitable?

14 MR. OLSON: It depends -- no, it doesn't. It  
15 depends upon whether the actions taken were calculated, and  
16 had the purpose of keeping the institutions in a sound and  
17 solvent condition, and were intended to rehabilitate the  
18 entities. What was intended --

19 JUDGE MILLETT: And so if they knew they were  
20 going to keep --

21 MR. OLSON: -- and the Treasury --

22 JUDGE MILLETT: I'm sorry, if they knew they were  
23 going to keep, or they expected they were going to keep  
24 either losing money or having profits that were going to  
25 fall short of the dividends owed, if that was their

1 understanding how could it not be consistent with managing,  
2 or trying to get it into some sound and solvent situation to  
3 say you don't have to pay the dividends --

4 MR. OLSON: You cannot --

5 JUDGE MILLETT: -- just give us what you can --

6 MR. OLSON: You can never get --

7 JUDGE MILLETT: -- give us what you can --

8 MR. OLSON: -- into a sound and solvent situation  
9 if every nickel of profit you make is given to someone else.  
10 You cannot possibly, yet --

11 JUDGE GINSBURG: No, that's clearly true. Go  
12 ahead.

13 MR. OLSON: Pardon?

14 JUDGE GINSBURG: I think that's clearly true.

15 MR. OLSON: And the Treasury specifically said --

16 JUDGE GINSBURG: But they could avoid further  
17 spiraling down, right?

18 MR. OLSON: Well, the record I think suggests that  
19 the downward spiral, the death spiral, whatever they've  
20 called it, is not justified by the record. We haven't  
21 explored all of that, but basically, the Treasury said  
22 itself at the time of August of 2012 we're going to make  
23 sure that the tax payers get everything, and the  
24 stockholders get nothing. That was their intention. Their  
25 intention was --

1 JUDGE GINSBURG: And they said in compensation  
2 for --

3 MR. OLSON: -- to wind it down --

4 JUDGE GINSBURG: -- in compensation for the risk  
5 we've taken.

6 MR. OLSON: But that was not being acting as a  
7 conservator. If they could have decided, if they had to  
8 move to a position of liquidating, you know, to a  
9 receivership, which is also permitted by these statutes, by  
10 this same statute that we're talking about, you could move  
11 to a receivership which is essentially what they did, but  
12 they would then have to pay attention to the rights of  
13 stockholders and creditors.

14 JUDGE GINSBURG: This press release you're talking  
15 about, that's from the Treasury, right?

16 MR. OLSON: Yes.

17 JUDGE GINSBURG: They're a creditor. What's the  
18 difference what the creditor says about what the conservator  
19 is doing?

20 MR. OLSON: The Treasury is saying what it is  
21 doing as participating with the FHFA as implementing the net  
22 worth sweep.

23 JUDGE GINSBURG: Did the conservator ever say  
24 this?

25 MR. OLSON: Pardon me?

1 JUDGE GINSBURG: Did the conservator say this, or  
2 just the Treasury?

3 MR. OLSON: It's other documents that the  
4 conservator is saying it's the same thing, and the Treasury  
5 is saying we and the FHFA are doing these things.

6 JUDGE GINSBURG: That's the --

7 MR. OLSON: This is one government --

8 JUDGE GINSBURG: So, Treasury is saying that? The  
9 conservator is the FHFA, doesn't it say that?

10 MR. OLSON: And the conservator has done X, which  
11 is inconsistent with being or any reasonable  
12 interpretation --

13 JUDGE GINSBURG: Okay.

14 MR. OLSON: -- of what conservators do, and --

15 JUDGE GINSBURG: Okay, but --

16 MR. OLSON: -- it is doing it in -- the --

17 JUDGE GINSBURG: But you attribute it to both of  
18 them, this intention, stated intention to wind down.

19 MR. OLSON: This is a motion to dismiss that Judge  
20 Lamberth granted. The allegations of the complaint must be  
21 taken as true. We believe that to the extent that we have a  
22 record it demonstrates that the FHFA and the Treasury  
23 Department were doing this together, they saying it that  
24 they're doing it together, those allegations must be taken  
25 as true, the Judge decided, the District Court decided with

1 all due respect that he decided various different things  
2 with respect to purpose and other evidentiary things that  
3 were not in the record, decided those in favor of the  
4 Government, rendered its judgment and dismissed the  
5 complaint, which without providing an administrative record.

6 JUDGE GINSBURG: Let me ask you a question --

7 JUDGE BROWN: Well, let me --

8 JUDGE GINSBURG: -- am I -- I'm sorry, go ahead.

9 JUDGE BROWN: Sorry. I wanted to ask you about  
10 something that the District Court does here, which is to say  
11 that these roles, conservator and receiver, are not  
12 hermetically sealed in that they can sort of flow one into  
13 the other, obviously, you don't agree with that, but my  
14 question is what is it in the statute that you think  
15 precludes that kind of morphing from one to the other?

16 MR. OLSON: Well, I think that you can become, you  
17 can decide that the role no longer is appropriate as a  
18 conservator, and then you must be a receiver.

19 JUDGE BROWN: Okay.

20 MR. OLSON: But the receiver, if you're acting as  
21 a receiver you can't just say we're doing it and then not  
22 respond to the responsibilities in the statute. The statute  
23 specifically says in Section J acting, all powers  
24 specifically granted to conservators or receivers,  
25 respectively. The powers of a receiver are antithetical to

1 the powers of a conservator. When you're acting as a  
2 receiver you have a responsibility to stockholders, to  
3 creditors to behave in a certain way, to provide certain  
4 notices, to recognize certain obligations, and to deal with  
5 it in a certain way. So, you can change --

6 JUDGE MILLETT: Well, when you say that, I guess I  
7 want to be precise, what exactly is it that your clients  
8 would get if a court were to declare the FHFA as having been  
9 a subroset (phonetic sp.) receiver since the Third  
10 Amendment, what would they get that they don't have?

11 MR. OLSON: The net worth sweep is an invalid,  
12 arbitrary, capricious, lawless administrative action under  
13 the APA --

14 JUDGE MILLETT: Is it lawless as -- would it be  
15 lawless if done as a receiver but not a conservator?

16 MR. OLSON: They would have to, well, they would  
17 have to behave in a different way, they can't --

18 JUDGE MILLETT: Well, I know, and that's what I'm  
19 asking you, I'm asking you is the relief you want here an  
20 injunction undoing the Third Amendment and sending all these  
21 hundreds of billions of dollars back to Fannie Mae and  
22 Freddie Mac --

23 MR. OLSON: Well, see --

24 JUDGE MILLETT: -- or, I really want to finish  
25 this, or is it a declaration that as of the Third Amendment

1 they were actually a receiver and you needed notice?

2 MR. OLSON: No. That action under those  
3 circumstances when it was acting in its role as a  
4 conservator was against the law, it was against --

5 JUDGE MILLETT: Was it against the law, or was it  
6 that they should have shifted, they should have -- they  
7 could have done it, could they have done it as a receiver if  
8 they said we're taking this into receivership, here we go,  
9 and given you your notice could they have done it, or would  
10 it have been unlawful as receivers?

11 MR. OLSON: They would have had to go through  
12 certain steps articulated in the statute, they did not do  
13 that, Judge Millett, what they have to do, you can't just  
14 say okay, I wanted to do it under some other statute and so  
15 that's okay.

16 JUDGE MILLETT: Well, no it's the same statute,  
17 let's be clear about that. What I'm hypothesizing here is  
18 that the mistake is not, as you would say, doing this as a  
19 conservator because you can't do with a mistake is they said  
20 we're doing it as a receivership, but what they failed to do  
21 was the notice and statutory requirements, so as a remedy of  
22 them that it's unlawful for a receiver to do this as well,  
23 or is it just that there's some notice and procedural  
24 requirements that should have been undertaken?

25 MR. OLSON: Not just notice and procedural

1 requirements, recognition of the assets, recognition of the  
2 rights, recognition of property rights of creditors and  
3 stockholders, and that sort of thing. So, you can't just  
4 say well, they should have done it as a receiver, but what  
5 the --

6 JUDGE MILLETT: So, they couldn't have done it as  
7 a receiver, either?

8 MR. OLSON: -- net worth sweep is not the act of a  
9 receiver, it might have been something because they wanted  
10 to wind down the entities, that they could have transited  
11 into the other level of responsibility and complied with the  
12 laws and requirements there, they did not do that. What  
13 we're seeking --

14 JUDGE MILLETT: What about creating a limited life  
15 entity?

16 MR. OLSON: Well, that's a different type --

17 JUDGE MILLETT: No, but he does a receiver and you  
18 kind of keep the company going for a couple of years, and,  
19 again, I know that doesn't fit the model of what happened  
20 here, but they surely would have the authority to have done  
21 that.

22 MR. OLSON: It does not fit the model, it is not  
23 what those statutory provisions were intended to do, and we  
24 addressed that in the reply brief.

25 JUDGE MILLETT: So, just what is the remedy that

1 you want here for this?

2 MR. OLSON: The remedy is that what the, the  
3 remedy that the APA provides, the action of the net worth  
4 sweep in August of 2012 was illegal, not justified by the  
5 statute, arbitrary, capricious, and inconsistent with what  
6 they were telling the world that they were actually doing,  
7 and therefore it has to be set aside. Now, the details of  
8 how --

9 JUDGE MILLETT: And how -- not details, what  
10 happens if one sets aside the Third Amendment, what happens?

11 MR. OLSON: The implementation of that decision is  
12 obviously something that the District Court would have to  
13 work out, and that's why I said details, I mean, they're  
14 important details.

15 JUDGE MILLETT: Well, your clients must have  
16 something to, I mean, they have to have standing, so they  
17 must think there's some remedy they would get out of this,  
18 what's the remedy --

19 MR. OLSON: Yes, we -- the remedy is --

20 JUDGE MILLETT: -- that they're going to get?

21 MR. OLSON: -- that once the net worth sweep is  
22 set aside the financial circumstances of these people that  
23 invested in this company believing the statements that the  
24 Government was giving them about we won't liquidate, as a  
25 conservator we don't intend to liquidate. Those

1 representations that people in the marketplace relied upon,  
2 they're entitled to the fulfillment of those rights that  
3 they had at that time, when the Government acted  
4 arbitrarily, illegally beyond its powers that has to be  
5 taken away, and we have to go back to that point. And to  
6 the extent that there are aspects of the implementation of  
7 that to be worked out that's why we have District Courts to  
8 do that sort of thing. But what this Court's  
9 responsibility, I submit, is to recognize that what happened  
10 at that time in August of 2012 was beyond the power of the  
11 FHFA under the statutes pursuant to which it was operating,  
12 it was supposed to be operating, and it said it was  
13 operating. It was illegal, it was unlawful.

14 JUDGE MILLETT: And what you say makes it -- just  
15 I want to be crystal clear, what they violated, you say, is  
16 the requirement that they manage it, and progress it toward  
17 a sound and solvent condition?

18 MR. OLSON: And preserve and conserve the assets  
19 and rehabilitate the entity. This is not something I'm  
20 making up --

21 JUDGE MILLETT: Is rehabilitate the --

22 MR. OLSON: -- it's in the statute.

23 JUDGE MILLETT: Is, where's rehabilitate?

24 MR. OLSON: Rehabilitate the agency to a sound and  
25 solvent condition. This is not something that I've come up

1 with, this is in the statute, it's in the regulations that  
2 the Agency itself has put out, it's in the statement of what  
3 the Agency said it was going to do when it --

4 JUDGE MILLETT: I'm sorry, I'm -- yes.

5 MR. OLSON: -- took this step back in 2008, and  
6 did everything that was --

7 JUDGE MILLETT: I'm sorry, but I'm --

8 MR. OLSON: -- directly --

9 JUDGE MILLETT: Sorry, I just want to make sure,  
10 because I do want to make sure I've got it right. Where it  
11 says that they have a -- I take it you mean by rehabilitate  
12 is to make it profitable again for private investors?

13 MR. OLSON: Well, A(2)(B), A(b)(2), rather, (d),  
14 powers of a conservator, the agency shall take such actions  
15 that may be necessary to put the regulated entity in a sound  
16 and solvent condition, that's (i), little, and then small  
17 (i)(2), appropriate to carry out the business of the  
18 regulated entity, and preserve and conserve the assets and  
19 the property --

20 JUDGE MILLETT: Right.

21 MR. OLSON: -- of the regulated entity. That --

22 JUDGE MILLETT: And if they thought, again, this  
23 is hypothetical, I'm not fighting with your record  
24 materials, if they thought there were not going to be any  
25 profits were have to stop the hemorrhaging, we have to stop

1 the hemorrhaging, there's never going to be enough profits  
2 we think in the foreseeable future to pay the dividends, and  
3 so they do the Third Amendment on that basis, would that not  
4 count --

5 MR. OLSON: The Third Amendment was, this is  
6 another part of the record and the brief and the arguments,  
7 there was essentially a stock purchased, they went from  
8 being a creditor to a holder of all of the common stock by  
9 having the ability to take all of the assets. That ability  
10 to do that was restricted under HERA, H-E-R-A, the statute  
11 to end at the end of 2009. What they did in 2012 was  
12 inconsistent with that limitation on their authority.

13 JUDGE MILLETT: That's your purchase argument, I  
14 want to stay focused --

15 MR. OLSON: But to answer your --

16 JUDGE MILLETT: -- I want to -- that's your  
17 argument about the sunset provision, right? That's what  
18 you're talking about is your, your argument about Treasury  
19 violating the sunset provision, that's --

20 MR. OLSON: Yes.

21 JUDGE MILLETT: Right. I still want to get back  
22 on (2)(d) here, A(2)(d), and that is if they thought that  
23 there weren't going to be any profits, or maybe there'd be a  
24 blip for one year for tax credits, but that going forward it  
25 was going to be hemorrhaging with that could you take these

1 measures --

2 MR. OLSON: No --

3 JUDGE MILLETT: -- and would that constitute, as  
4 sound and solvent as this thing can be by stopping the  
5 hemorrhaging and carrying on the business and conserving the  
6 assets by stopping the hemorrhaging.

7 MR. OLSON: No, they weren't stopping the  
8 hemorrhage --

9 JUDGE MILLETT: If they were in my hypothetical,  
10 my hypothetical, not --

11 MR. OLSON: But your hypothetical makes up facts  
12 that are directly contrary to the record. The  
13 hemorrhaging --

14 JUDGE MILLETT: That's what hypotheticals do.

15 MR. OLSON: The hemorrhaging was --

16 JUDGE MILLETT: That's what hypotheticals do.

17 Come on. I want to know when you talk about what it means  
18 to keep something in a sound and solvent condition, and  
19 conserving the assets, if they don't think there's going to  
20 be a pattern of profits, and there's going to be more  
21 hemorrhaging than profits could they take a step like this?  
22 I know you say that isn't this case and that's the problem  
23 here, and the record, you have your record arguments about  
24 that, but could it ever be consistent with a conservator's  
25 duties under the statute to stop the hemorrhaging by saying

1 just give us whatever you can pay each year, we won't demand  
2 more than whatever you can pay?

3 MR. OLSON: No. My answer to that is that they  
4 would at that point decided to wind down the entity, which  
5 is what they said they did in August of 2012. They've made  
6 the step to wind down the entity, at that point they should  
7 have said we were wrong acting as a conservator, which by  
8 the way the facts suggests it was working, but we, yes,  
9 under your hypothetical they could say we were wrong, we now  
10 want to wind down the entity, which is what they said they  
11 were doing with the net worth sweep, and we're going to have  
12 to move to the provisions in the same statute that provide  
13 for a receivership and liquidation of the company. That's  
14 what they said in 2008 they weren't going to do as a  
15 conservator.

16 JUDGE MILLETT: Okay. Just to be clear, so if  
17 your -- just to make sure I understand this, your position  
18 is if they made this determination that we can't, they're  
19 just never going to get to a point of consistent profits  
20 then they can't conserve it anymore, that once they've made  
21 that judgment they have to go to receivership --

22 MR. OLSON: They have --

23 JUDGE MILLETT: -- is that what I hear you saying?

24 MR. OLSON: Yes, that's the other authority that  
25 the FHFA has under this provision of the laws of the United

1 States. They can act as a conservator, or they can act as a  
2 receiver. Being a receiver is not a conservator; being a  
3 conservator is not a receiver. If they had decided under  
4 that hypothetical that that was something that needed to be  
5 done they had to move into another pattern, operate under  
6 the procedures of the statute to give them powers of  
7 receiver, and give rights to other people that are affected  
8 by that decision. They didn't do that, they didn't do that.

9 JUDGE GINSBURG: So, throughout this period and  
10 when the Third Amendment was entered into as I recall the  
11 combined portfolios of the two GSEs was roughly \$5 trillion,  
12 is that right? Yes. So, suppose that a supplemented record  
13 would reveal that the Treasury and the FHFA were of the view  
14 that there's no way to liquidate a \$5 trillion portfolio,  
15 all of the possible purchasers of pieces of this portfolio  
16 could not muster \$5 trillion, so we're going to have to wind  
17 it down till we get to a stage where it's practical to  
18 liquidate, and that will happen assuming they don't make  
19 profits that no one expects them to make, that will happen  
20 with this sweep, at least that way it'll happen within a few  
21 years and then we'll be able to liquidate.

22 MR. OLSON: What I think you're asking me then  
23 what should they have done under our theory?

24 JUDGE GINSBURG: And indeed, what they did do  
25 wouldn't have a benign explanation.

1 MR. OLSON: Well, the --

2 JUDGE GINSBURG: A lawful explanation.

3 MR. OLSON: I submit that the record supports the  
4 proposition, the record that we have so far supports the  
5 proposition that they saw the pot at the end of the, pot of  
6 gold at the end of the rainbow, they decided we're going to  
7 take that away from the stockholders and we're going to give  
8 it to the Treasury Department because we have a budget  
9 deficit, and this is going to be a big help, the record --

10 JUDGE GINSBURG: Well, the only person who saw a  
11 pot at the, of gold at the end of the rainbow was possibly  
12 Ms. McFarland.

13 MR. OLSON: Well, it wasn't just Ms. --

14 JUDGE GINSBURG: The 10-Qs don't say it.

15 MR. OLSON: And it is supported by what happened  
16 subsequently to that.

17 JUDGE GINSBURG: That can't reflect what their --

18 MR. OLSON: Well, well --

19 JUDGE GINSBURG: -- motivation was.

20 MR. OLSON: -- if we're speculating about the  
21 future we, and the record does support that, and the \$58  
22 billion that I mentioned is subsequent to that, but it was,  
23 part of the record does support that there was a point which  
24 the amount coming into the Treasury exceeded the amount that  
25 the Treasury had put into the GSEs.

1 JUDGE GINSBURG: Sometime after the Third  
2 Amendment.

3 MR. OLSON: Yes, but based upon what you could  
4 see, based upon the 10Ks that were at the end of the year,  
5 and so forth, the information was available, people saw that  
6 the housing market had turned around by then, by 2012,  
7 things had changed enormously, and we believe --

8 JUDGE GINSBURG: Well, not so much that there was  
9 unanimity, we still had the, the 10-Qs, we had the Grant  
10 Thornton report, all of that, which was September of 2011,  
11 at least the date will work, but the report was done March,  
12 or June of 2012.

13 MR. OLSON: Well, what you -- what the --

14 JUDGE GINSBURG: But so, before the District Court  
15 when you were seeking to supplement the administrative  
16 record, as I recall one of your arguments was, and maybe  
17 your principle argument was we need to know why, what their  
18 explanation is for why they did, so the District Judge said  
19 their motivation is not relevant --

20 MR. OLSON: Yes.

21 JUDGE GINSBURG: -- to the question of whether  
22 they conformed to the law or did not.

23 MR. OLSON: Yes.

24 JUDGE GINSBURG: You said it is relevant.

25 MR. OLSON: Yes.

1 JUDGE GINSBURG: And so, if we fully explore that,  
2 if you get an opportunity fully to explore that I'm saying  
3 isn't it possible that one of the things one could turn up  
4 is an entirely lawful explanation? Because --

5 MR. OLSON: I don't believe it's going to happen.

6 JUDGE GINSBURG: -- liquidation at that scale was  
7 not practical, and that only by winding it down to a  
8 practical scale could they ever appoint themselves receiver.

9 MR. OLSON: I don't believe that that's what we'll  
10 find out, Your Honor. But you said is it possible, I  
11 suppose it's possible, but that's what happens when we're  
12 both speculating about what's in a record that had been  
13 denied to us.

14 JUDGE GINSBURG: Exactly right. Exactly right.  
15 So, the question of motivation could cut either way here, it  
16 might not be irrelevant.

17 MR. OLSON: It certainly is relevant with respect  
18 to whether an entity is operating in a fiduciary capacity as  
19 a conservator, because a conservator has, and the --

20 JUDGE GINSBURG: Yes --

21 MR. OLSON: -- agency --

22 JUDGE GINSBURG: -- motivation is relevant to that  
23 you're saying?

24 MR. OLSON: Yes.

25 JUDGE GINSBURG: Yes. Yes. Okay.

1 MR. OLSON: Yes.

2 JUDGE GINSBURG: The District Judge disagreed with  
3 that.

4 MR. OLSON: Yes.

5 JUDGE GINSBURG: You have constructed one, and  
6 I've constructed another scenario in which it is relevant.

7 MR. OLSON: Yes.

8 JUDGE GINSBURG: Okay.

9 MR. OLSON: Yes. I agree with that.

10 JUDGE GINSBURG: I don't know why we should go any  
11 further than that.

12 MR. OLSON: Well, perhaps. I think that you have  
13 enough, and I'll, I think I've taxed your patience, Judge  
14 Brown, so I will sit down.

15 JUDGE GINSBURG: That's not what I meant, but I,  
16 but --

17 MR. OLSON: I think you have enough to decide that  
18 the net worth sweep was not what it was said to be, and it  
19 was not consistent with acting as a conservator. I think  
20 you have enough. But at minimum we're entitled to have a  
21 record that we can try this, and we're entitled to have a  
22 District Court decision that accepts as true the allegations  
23 of the complaint so that we can go forward.

24 JUDGE BROWN: Thank you.

25 ORAL ARGUMENT OF HAMISH P.M. HUME, ESQ.

1 ON BEHALF OF THE CLASS PLAINTIFFS

2 MR. HUME: Good morning, Your Honors, may it  
3 please the Court. This is Hamish Hume from Boies, Schiller  
4 & Flexner representing the Class of private preferred and  
5 common shareholders of Fannie and Freddie. Your Honors, the  
6 Class advances claims of breach of contract, breach of  
7 fiduciary duty, common law claims.

8 We've just heard a lot about a very important APA  
9 claim, but our claims are not APA claims. I would urge the  
10 Court to free itself from the confines of the APA in  
11 considering our common law claims, because we are not  
12 limited to the concept of an administrative record, or the  
13 concept of whether the Agency acted reasonably within the  
14 confines of the statute. The question --

15 JUDGE MILLETT: How can fiduciary duty claims,  
16 common law fiduciary duty claims survive a statute that  
17 first assigns all titles, power, and privileges, and rights  
18 of stockholders to FHFA, and provides that any actions the  
19 Agency, can be taken by the Agency if they determine it to  
20 be the in the best interests of the regulated entity or the  
21 Agency, how can a common law fiduciary claim survive that?

22 MR. HUME: Well, let me answer that first with a  
23 derivative claim, and then the direct claim, if I might.  
24 With respect to a derivative fiduciary duty claim there are  
25 two courts of appeal, the Federal Circuit and the Ninth

1 Circuit that both held that the identical statute in FIRREA  
2 allowed a derivative claim because of the manifest conflict  
3 of interest, when there's a manifest conflict of interest  
4 between the conservator and whoever it's being asked to sue.  
5 That was well established from 1999 onwards, and it was no  
6 small decision, it led to a whole slew of cases in the  
7 *Winstar* litigation worth billions of dollars in which  
8 private shareholders were permitted to pursue both  
9 derivative and direct claims, because the *First Hartford*  
10 (phonetic sp.) decision didn't just allow the derivative  
11 claim when there was a manifest conflict, but also allowed  
12 shareholders to pursue a direct claim at page 1288 to 1289  
13 of that Federal Circuit decision. And it was a huge deal,  
14 it led to these *Winstar* cases that went on and on and on,  
15 seeking billions of dollars, and collecting billions of  
16 dollars from the Government, Congress knew that when it  
17 enacted HERA, and it enacted the identical statute in HERA  
18 knowing that. And on page 27 of our opening brief we cite  
19 two decisions of this Court, *City of Donaire* (phonetic sp.)  
20 *v. FAA*, and *Gordon v. Capitol Police*, both of which say  
21 unequivocally that when Congress adopts a statute that's  
22 identical in wording to a prior statute, and that's been  
23 interpreted by the courts, that generally indicates that  
24 Congress adopted the judicial interpretation. Our friends,  
25 the Defendants, the Appellees, never respond to those cases,

1 they say nothing about them. In fact, the FHFA embraces  
2 that concept in its brief, and says in trying to argue with  
3 the APA case says that Congress has blessed the Third  
4 Amendment because it enacted the Consolidated Appropriations  
5 Act of 2016, which sort of talked about the Third Amendment,  
6 talked about where the money would be spent, and didn't say  
7 anything bad about the Third Amendment, so they embraced the  
8 proposition that Congress knows what's going on, and when  
9 Congress adopts an identical statute it embraces what the  
10 courts have said about it, and the courts have said where  
11 there's a manifest conflict of interest then you can bring -  
12 -

13 JUDGE MILLETT: Two courts have said. Two courts  
14 have said.

15 MR. HUME: Two courts have said that --

16 JUDGE MILLETT: Two courts have said.

17 MR. HUME: -- and no court has rejected it other  
18 than Judge Lamberth below. So --

19 JUDGE MILLETT: I'm just trying to figure out how,  
20 what the conflict of interest is when they're entitled to  
21 act in the Agency's best interests, as much --

22 MR. HUME: Well, first of all --

23 JUDGE MILLETT: -- as the entities and the whole  
24 point of shareholder derivatives is deemed to be a conflict  
25 of interest, I just don't understand how it works.

1           MR. HUME: Judge Millett, I'm glad you asked that  
2 question, because one error in Judge Lamberth's reasoning  
3 that I don't think we, I clearly identified in our briefs it  
4 is absolutely not correct to say that the exception swallows  
5 the rule here, it is absolutely not correct to say that  
6 derivative suits only exist when there's a conflict of  
7 interest. This Court's decision in *Kellmer* is a perfect  
8 illustration, it was a derivative case in which there was no  
9 conflict of interest, it's just that the company chose in  
10 its decision, in its business judgment that it wasn't worth  
11 suing Franklin Raines and the other officers, the  
12 shareholders disagreed. It wasn't a conflict of interest,  
13 let alone a manifest inescapable conflict of interest, just  
14 a difference of judgment, that's why the derivative claim  
15 generally exists.

16           So, there are lots of instances in which  
17 derivative claims couldn't be brought by shareholders and  
18 would be the decision of the conservator. But when you're  
19 asking the conservator to sue itself you have gone through  
20 the looking glass into a world of absurdity if you say that  
21 shareholders cannot bring that claim, and that's what the  
22 *First Hartford* --

23           JUDGE MILLETT: But it's okay to make a decision  
24 in the interest of itself.

25           MR. HUME: I'm sorry, Judge Millett?

1           JUDGE MILLETT:  When the Agency is the  
2 conservator, and the Agency can make a decision in the  
3 interests of the Agency then it's okay.  It seems to me the  
4 statute is saying that's not a conflict of interest.

5           MR. HUME:  The statute --

6           JUDGE MILLETT:  If they take actions as long as  
7 they're in the best interests of the entity, or the Agency.  
8 And so, then to sue on the grounds that well, they won't sue  
9 because they made a decision in the best interests of  
10 themselves, the Agency doesn't seem to grapple with how  
11 these two sections intersect.

12           MR. HUME:  I don't think it's possible to read the  
13 statute as conferring on the FHFA the authority to decide  
14 whether or not to sue itself for violating fiduciary duties.  
15 It says, the succession provision says that the FHFA as  
16 conservator succeeds to the rights, powers, and privileges  
17 of the company with respect to the regulated entities and  
18 its assets.  I would submit that the textual -- I think,  
19 Judge Millett, maybe what you're asking is where in the  
20 statute can I attach this notion of a manifest conflict of  
21 interest exception, and I would suggest the word conservator  
22 may be the place to put it because if they're not acting as  
23 a, if the question is whether they violated their fiduciary  
24 duties then the real question is whether they can sit as  
25 judge and jury over that claim.  I would concede that the

1 statute doesn't talk about an exception, and the courts have  
2 read it in, in fact, *First Hartford* doesn't really even talk  
3 about it as an exception, it simply says there's no way  
4 Congress could have intended that if there's a manifest  
5 conflict of interest, then the derivative claim is possible.

6           And I think that the backdrop to that is a  
7 constitutional avoidance doctrine, because you can't read  
8 the statute to do something that would be an obvious due  
9 process violation, there's a whole string of Supreme Court  
10 cases going back to the 1920s --

11           JUDGE MILLETT: Due process isn't taking of  
12 property? Due process taking --

13           MR. HUME: Yes, and, but also the inability to  
14 advance your own claim, and I think if, I would refer the  
15 Court to the Plaintiff's --

16           JUDGE MILLETT: Well, I don't see what -- the  
17 inability to advance your own claim if it's not your own  
18 claim is not --

19           MR. HUME: Fair enough.

20           JUDGE MILLETT: -- a due process problem unless  
21 the argument is that they took your claim, which is --

22           MR. HUME: Yes.

23           JUDGE MILLETT: -- back to taking of property,  
24 right? So, that's the only constitutional --

25           MR. HUME: I think for the derivative claim that

1 constitutional avoidance issue may depend in part on whether  
2 there's also a direct claim that could be brought. All I'm  
3 saying is I think the courts have suggested there may be a  
4 due process issue, as well, in the *First Hartford* case. If  
5 I could --

6 JUDGE MILLETT: And then on the --

7 MR. HUME: If I could just --

8 JUDGE GINSBURG: Are you a party to the takings  
9 case in the claims court?

10 MR. HUME: Yes, I am.

11 JUDGE MILLETT: Well, your direct claim, I just  
12 didn't see you raising that below in the District Court.

13 MR. HUME: Yes, I understand --

14 JUDGE MILLETT: Can you tell me where you did?

15 MR. HUME: I think, all I would say is this, Judge  
16 Millett, in count seven of our complaint we did refer to a  
17 fiduciary duty to shareholders four different times.

18 JUDGE MILLETT: I'm sorry. Yes. Yes. Fiduciary  
19 duty to shareholders.

20 MR. HUME: Yes. I would concede that the clarity  
21 with which we pled a direct claim, and the clarity with  
22 which we briefed it left something to be desired, but did  
23 allege --

24 JUDGE MILLETT: No, but you can tell me where you  
25 raised it not so clearly.

1           MR. HUME: Your Honor, I think it's paragraphs  
2 377, it's in, if you look at count seven of our complaint  
3 you will see a reference four different times, I can give  
4 you the exact cites if you would like.

5           JUDGE GINSBURG: Four references to what?

6           MR. HUME: To, in paragraph 176, 177, and 180,  
7 twice in 176 --

8           JUDGE MILLETT: I'm sorry, which page of the J.A.  
9 are you on? I'm sorry.

10          MR. HUME: This is, I don't have the J.A. cite,  
11 but it's in our third amended complaint. But before I delay  
12 you too long I'm simply saying that we say fiduciary owed to  
13 the shareholders four different times in those three  
14 paragraphs. We briefed a derivative claim. We would submit  
15 two things, Your Honors, on our direct fiduciary breach  
16 claim, first, under the lenient notice pleadings, maybe  
17 three things, first under notice pleading I think we said  
18 enough; second, that's especially true in light of the fact  
19 that the Delaware courts in the *Gatz* case and the *Gentile*  
20 case, which are both cited repeatedly in our briefs and  
21 other briefs, have recognized that in some situations a  
22 fiduciary breach claim can be both direct and derivative,  
23 modifying to some degree the *Tully* decision, and that's  
24 exactly --

25          JUDGE MILLETT: Did you brief this to the District

1 Court? So, you -- it's not in your complaint, did you brief  
2 it to the District Court?

3 MR. HUME: We did not.

4 JUDGE GINSBURG: Did you brief this as a separate  
5 matter as you have here, the claim that the net worth sweep  
6 violates, pardon me, that there was a breach of the implied  
7 covenant of good faith?

8 MR. HUME: Yes.

9 JUDGE GINSBURG: You did brief that?

10 MR. HUME: Yes, and I'd like to turn to the --

11 JUDGE GINSBURG: If successful that would be fully  
12 adequate to, for the relief that you would claim as a  
13 fiduciary.

14 MR. HUME: I think that's probably correct, Judge  
15 Ginsburg, there are --

16 JUDGE GINSBURG: So, the argument would be that  
17 okay, they have dual loyalties here, unlike an ordinary  
18 fiduciary, unlike a Delaware fiduciary, but like the FDIC,  
19 and they have to administer that inherent conflict in good  
20 faith.

21 MR. HUME: Absolutely. And in fact, if I could,  
22 if I may just finish the questions on the direct claim,  
23 Judge Millett, this Court does have the authority, its  
24 discretion rarely exercised to allow us to amend, to add a  
25 direct claim, and the citation for that is *DKT Memorial Fund*

1 *v. Agency for International Development*, 810 F.2d 1236 at  
2 1239. If the Court thinks it's necessary after full  
3 consideration that we amend, we ask to amend, but it may not  
4 be because our think our breach of contract claim, or breach  
5 of implied covenant claim clearly must survive and the  
6 decision will be reversed.

7           In considering our contract claims, Your Honors,  
8 we would urge the Court to look at the substance, the basic  
9 economic substance of what happened, and not accept the  
10 highly formalistic argument of the Defendant/Appellees, and  
11 respectfully of the District Court below.

12           Here's the basic economic substance of what  
13 happened, under the original PSPA, the Treasury Department  
14 had senior preferred stock entitling it to get a couple of  
15 10 percent every year on the full amount of its investment,  
16 plus an extra \$2 billion. It also had a right to buy 80  
17 percent of the common stock of these two companies for a  
18 nominal price, and everyone keeps saying a nominal price, I  
19 looked it up and if my math is correct the nominal price is  
20 about \$10,000 to \$15,000 for 80 percent of Fannie and  
21 Freddie. That stock's worth --

22           JUDGE GINSBURG: Do you know what the market value  
23 was at the time?

24           MR. HUME: I know that the preferred stock, the  
25 junior preferred stock, I know that the preferred stock

1 before the Third Amendment was trading at about just over \$2  
2 billion, between \$2 and \$3 billion market cap. I don't  
3 know --

4 JUDGE GINSBURG: About 15 cents a share.

5 MR. HUME: I don't know the per share price, and I  
6 don't know if from September of '08, but I'm confident it  
7 was more than \$15,000. And I'm very confident that in a  
8 liquidation it would have been worth more than that.

9 But in any event, the original structure was that,  
10 which is revealing first of all in showing the Treasury was  
11 a stockholder, all the stuff you're hearing about there are  
12 no stockholders, stockholders have nothing, stockholders are  
13 gone, they're wiped off the face of the planet, it's not  
14 true at all. The Treasury is a stockholder, they put in  
15 their agreement a choice of law clause, a venue clause,  
16 where they're going to litigate, they're a stockholder, they  
17 have rights as a stockholder, they can litigate as a  
18 stockholder, they're entitled to dividends as a stockholder.  
19 First preferred senior, 10 percent, then 80 percent of the  
20 common, that is clearly saying that if, if the companies  
21 make enough money to pay dividends in excess of 10 percent,  
22 and if they decide to do so they first have to pay the  
23 junior preferred, whose total cumulative dividend if paid,  
24 there are different coupon rates, but it's a total face  
25 amount of \$35 billion, their coupon would maybe be some are

1 at five percent, some are at eight percent, at seven percent  
2 it would maybe be \$2.7 billion. Okay? Then if Treasury  
3 wanted more it can take the \$10,000 or \$15,000 by 80 percent  
4 of the common and get 80 percent of it in the rest of the  
5 dividends. So, here's what happened, the companies did  
6 become profitable, Susan McFarland did think that \$50  
7 billion tax, preferred tax would be reversed, and sorry, but  
8 I read the August 9th, 2012 projections differently than the  
9 Court, I would urge the Court to look at them, they were  
10 conservative compared to what happened, but they were still  
11 optimistic. Those two documents submitted with the seven --

12 JUDGE GINSBURG: Wait a minute. When you say  
13 August 9 documents --

14 MR. HUME: There's an August 9, 2012 projection,  
15 and an August 11, 2012 projection.

16 JUDGE GINSBURG: Are these the 10-Qs, or are these  
17 something else?

18 MR. HUME: No, they're internal Fannie  
19 projections, and they show a projection of when the  
20 dividends will exceed the draws, in 2019 for one enterprise  
21 and 2020 for the other. Now, it turned out --

22 JUDGE GINSBURG: Namely when?

23 MR. HUME: I'm sorry?

24 JUDGE GINSBURG: You said it shows when they would  
25 exceed, when was that? What are they projecting?

1 MR. HUME: The projection was made in, right  
2 before the Third Amendment.

3 JUDGE GINSBURG: Yes. And projected?

4 MR. HUME: Projected that they're going to have  
5 gotten more money back than they put in in dividends alone.

6 JUDGE GINSBURG: By?

7 MR. HUME: By 2019 or 2020. So, they're not  
8 projecting a death spiral, they're projecting a recovering  
9 Fannie and Freddie that are going to be hugely profitable.  
10 Now, they underestimated how profitable, but they knew they  
11 were going to be profitable.

12 JUDGE GINSBURG: Just to one's point, these  
13 documents are, are these the recently unsealed documents?

14 MR. HUME: That's correct. And I have them,  
15 unfortunately, by the exhibit numbers they were given in the  
16 Court of Federal Claims where they were Exhibits G and H,  
17 but basically, that means they were the fifth and sixth of  
18 the seven documents in order. They had different exhibit  
19 numbers from the --

20 JUDGE GINSBURG: Do you have dates on them?

21 MR. HUME: What's that?

22 JUDGE GINSBURG: Do you have the dates on them?

23 MR. HUME: Yes, the first one is August 9th, 2012,  
24 and the second is August 11th, 2012.

25 JUDGE GINSBURG: So, the August 9, 2012 document

1 is Fannie Mae's projection, right?

2 MR. HUME: That's right.

3 JUDGE GINSBURG: And the 11th is what?

4 MR. HUME: It's an e-mail from David Benson of  
5 Fannie to somebody at Treasury really sending the same  
6 projections.

7 JUDGE GINSBURG: Okay. So, they're -- and Freddie  
8 is not --

9 MR. HUME: But they --

10 JUDGE GINSBURG: -- in this picture?

11 MR. HUME: Freddie is in it. I don't know why  
12 it's coming from Fannie only, but the projections are for  
13 Freddie, as well, they're just a page with both projections.

14 JUDGE GINSBURG: Okay.

15 MR. HUME: In fact, Freddie has better  
16 projections, they're destined to have returned more money  
17 than any money drawn down by 2019. Now, here's what  
18 actually happened, then, so --

19 JUDGE MILLETT: Virginia law for Freddie Mac,  
20 though, is different than Delaware law, right?

21 MR. HUME: I'm sorry, Judge Millett, I --

22 JUDGE MILLETT: Isn't Virginia law different than  
23 Delaware law for Freddie Mac?

24 MR. HUME: I don't think it's different in any  
25 material respect here, and I haven't heard the Defendants

1 argue that it is.

2 JUDGE MILLETT: I thought that's why this was  
3 coming at us from Fannie Mae, because that's where you had  
4 precedent and you didn't have it from, for Freddie Mac in  
5 Virginia, am I wrong?

6 MR. HUME: I don't -- I'm sorry, I don't --

7 JUDGE MILLETT: Okay.

8 MR. HUME: -- understand the question. The  
9 projections were coming from Fannie, it's true that Freddie  
10 is subject to Virginia law and Fannie is subject to Delaware  
11 law.

12 JUDGE MILLETT: And are they the same for purposes  
13 of contract claims, implied covenants claims, and fiduciary  
14 duty claims, direct and indirect?

15 MR. HUME: Yes, I think -- yes, I think they are  
16 the same for contract and implied covenant. I am not aware  
17 of a difference with those respects. On fiduciary duty  
18 Virginia may be a little tougher on the direct fiduciary  
19 duty claim than Delaware.

20 JUDGE MILLETT: And then -- I'm sorry, were you  
21 done answering Judge --

22 MR. HUME: Well, if I --

23 JUDGE MILLETT: I want to let you finish answering  
24 him and then I have another question.

25 MR. HUME: If I might, I would like to just finish

1 sort of the presentation of the core substance of what  
2 happened because I've explained the original structure --

3 JUDGE MILLETT: Well, then I want to get back, if  
4 that's what you're doing, on the contract. You don't  
5 challenge the PSPAs?

6 MR. HUME: That's correct.

7 JUDGE MILLETT: And do the PSPAs provide that the  
8 entities could not make any distributions of capital  
9 otherwise until Treasury stock was paid off?

10 MR. HUME: No, I don't think they say that you  
11 can't make a distribution until the stock is paid off. It  
12 says it can't make a redemption, it can't make a redemption  
13 of the Treasury stock until the stock is paid off.

14 JUDGE MILLETT: What I have is the enterprise  
15 isn't -- tell me if I'm wrong, from J.A. 2451, they may not  
16 declare or pay any dividend, preferred or otherwise, or make  
17 any other distribution by reduction of capital or otherwise,  
18 whether in cash, property, securities, or a combination  
19 thereof, other than to Treasury, until Treasury is paid off,  
20 am I misunderstanding that?

21 MR. HUME: I think Treasury has the right to  
22 consent to it. I think that's -- Treasury has to consent to  
23 any dividend that is paid.

24 JUDGE MILLETT: And they haven't done that.

25 MR. HUME: They haven't done that.

1           JUDGE MILLETT: So, but how does this affect your  
2 contract claim to dividends?

3           MR. HUME: It makes it contingent.

4           JUDGE MILLETT: Huh?

5           MR. HUME: It simply makes it contingent because,  
6 listen, here's what -- all dividend rights are contingent,  
7 in fact, even if you read the senior preferred stock  
8 agreement the Treasury's dividend rights were contingent on  
9 the board declaring them, all dividends in the private stock  
10 market.

11           JUDGE MILLETT: And Congress has now declared,  
12 passed a law that they can't pay these dividends either,  
13 correct?

14           MR. HUME: No, I'm not aware of --

15           JUDGE MILLETT: They can't even pay --

16           MR. HUME: No, no.

17           JUDGE MILLETT: The 2016 Act prevents them from  
18 paying back Treasury --

19           MR. HUME: No.

20           JUDGE MILLETT: Treasury can't even sell its stock  
21 or have it satisfied, correct?

22           MR. HUME: No, the 2016 statute does not say that  
23 they cannot pay dividends to private shareholders.

24           JUDGE MILLETT: No, no. No. You have this  
25 provision that says you've got to pay Treasury, you've got

1 to buy Treasury off first, and then the 2016 Act says  
2 Treasury, you can't sell anything, and so I'm trying to  
3 figure out how those together leave you with much of any  
4 contract claim. It seems it's less than contingent at this  
5 point. But if I'm misunderstanding please tell me.

6 MR. HUME: Well, I'm not sure I'm understanding  
7 the relevance of the Appropriations Act. What we're saying  
8 is that the basic substance of what happened here is that in  
9 the three years after the Third Amendment dividends were  
10 paid from the enterprises to Treasury of \$130 billion, okay?  
11 If dividends had been paid pursuant to the original  
12 agreement, 10 percent would have gone as senior preferred  
13 stock to the Treasury, and -- sorry, and the 130 is in  
14 excess of the 10 percent, so the 130 dividends that would  
15 have been paid at most, again, we don't know the exact  
16 amount of the preferred dividend, but it would have been  
17 somewhere between six and nine, let's call it seven and a  
18 half, the remainder, 122 or so, would have been divided  
19 80/20 between the common, so Treasury still would have  
20 gotten \$100 billion of the 130, they just didn't want to  
21 give the private shareholders anything, so they leapfrogged,  
22 there are mandatory dividend rights in the contracts.

23 And by the way, Judge Millett, if there's  
24 something in that Appropriations Act that's inconsistent  
25 then it would be a breach. But the mandatory dividends

1 rights say you cannot pay anyone junior to us, the junior  
2 preferred say don't pay anyone junior to us until you pay  
3 us, and that's exactly what the Third Amendment did, it gave  
4 \$130 billion to the Treasury beyond its senior preferred  
5 dividend, some of that had to come to the junior preferred.  
6 Then the common have a provision in their contract that says  
7 you have to pay us ratably with any stock that's equal to  
8 us, well, their stock is by definition equal to the common  
9 stock the Treasury would have gotten, so they should have  
10 gotten paid. That's the substance of what happened, and  
11 their answer to it is, and it's rather galling, there's no  
12 breach of contract because the written terms of the share  
13 certificates of the private shareholders have not been  
14 altered. Well, thanks a lot, we still have a piece of paper  
15 with the same words on it, but the words are being  
16 completely disregarded. The words say you're not going to  
17 pay a dividend more than the 10 percent senior preferred to  
18 the Treasury without paying us first, and people invested on  
19 that. Then they went and said through another, just  
20 basically asserted through an amendment, they could have  
21 done it through a bylaw, it doesn't matter, it's a breach  
22 either way no matter how they do it they said we're going to  
23 pay dividends to Treasury beyond its 10 percent, hundreds of  
24 billions of dollars beyond its 10 percent, without paying  
25 you first, even though your contract says that you have to

1 get paid first, that's a breach. And it's also a breach for  
2 the common not to pay them ratably.

3 In addition, if you look at the substance of all  
4 that, there's no way to contest the fact that they  
5 materially, adversely harm the interests of these private  
6 shareholders without giving them a vote, and their contracts  
7 entitle them to a two-thirds vote for any such change.

8 Again, especially when there's an implied covenant  
9 claim, the Delaware and Virginia courts would look at  
10 substance and not get caught up in formalisms. And I think  
11 what you're going to hear from the Defendants is a lot of  
12 formalism. It should be substance, not form that governs  
13 this case, and there are cases that say that, I would refer  
14 the Court to the *Winston v. Mandor* Delaware case on page six  
15 of our reply brief, and another case, *Price v. State Farm*,  
16 2013 Delaware Superior Lexus 102 explicitly says that when  
17 there's an applied covenant claim Delaware courts look at  
18 substance over form.

19 JUDGE MILLETT: How does applied covenant work,  
20 though, when you've got, when they can take interest,  
21 actions in the interest of the agency, as well as the  
22 entity? Are there cases that tell us how us how that would  
23 work?

24 MR. HUME: Well, that's what I was trying to say  
25 at the beginning, that whether the actions were taken in a

1 good faith effort to help the enterprises, and help the  
2 agency, or help the tax payer, they still have an implied  
3 covenant to respect the terms of their contracts that they  
4 assumed with the private shareholders. And so, this whole  
5 issue of motive that the Court was asking Mr. Olson about --

6 JUDGE MILLETT: Yes, but this case isn't, and  
7 albeit another context where the Supreme Court has explained  
8 that when the United States has a fiduciary duty, that  
9 fiduciary duty is infused with its right to acts as  
10 sovereign, and acting in its sovereign interests is  
11 consistent with its fiduciary duties, the fiduciary duty for  
12 governmental entities is just not the same as it might be  
13 for a private fiduciary.

14 MR. HUME: Yes, we encountered --

15 JUDGE MILLETT: And so --

16 MR. HUME: -- that in the *Starr* case in the Second  
17 Circuit, but there's a big difference here, the FHFA has  
18 vigorously asserted, or the Department of Justice has  
19 asserted on its behalf that it is not the Government. In  
20 the Court of Federal Claims takings case, which Judge --

21 JUDGE MILLETT: Well, but I bet you disagree with  
22 it.

23 MR. HUME: Well, we're saying --

24 JUDGE MILLETT: Yes. Yes.

25 MR. HUME: -- we're saying, yes, we are saying

1 that they are the Government, and this was --

2 JUDGE MILLETT: Okay.

3 MR. HUME: -- two Government agencies colluding,  
4 but they can't have it both ways, okay, they can't say we're  
5 not the Government, you can't sure us for takings --

6 JUDGE MILLETT: Nor can you.

7 MR. HUME: -- but over here in District Court --

8 JUDGE MILLETT: Right, but you can't have it both  
9 ways, either, so if we're going to assume --

10 MR. HUME: I'm pretty sure if I get it one way  
11 I'll win.

12 JUDGE MILLETT: Well, that's what I'm asking you  
13 is if you, on an applied --

14 MR. HUME: I only need one way to win.

15 JUDGE MILLETT: So --

16 MR. HUME: They need to have it both ways for me  
17 not to win.

18 JUDGE MILLETT: -- if they are the United States  
19 for these purposes a federal agency for these purposes, and  
20 can take actions in the interest of the agency, and the  
21 interest of the United States is sovereign then how could  
22 there be a breach of the implied covenant of good faith on  
23 this contract --

24 MR. HUME: Well, I think, you know what I think at  
25 most --

1           JUDGE MILLETT:  -- when it's all conditional  
2 rights on Treasury's decisions anyhow?

3           MR. HUME:  At most what that would lead to, Judge,  
4 and they haven't really argued this, but at most what that  
5 would leave you, Judge Millett, is that we'd have to bring  
6 this implied covenant and breach of contract case in the  
7 Court of Federal Claims, that's the most it would mean,  
8 because there's plenty of cases in the Court of Federal  
9 Claims with implied covenant claims.  The United States  
10 Government can breach a contract and be sued for money, and  
11 it can breach the implied covenant, that happens in the  
12 Court of Federal Claims.  So, I think the line of  
13 questioning you have simply says, is about which court I  
14 need to go to.

15           JUDGE MILLETT:  And so, since you think the United  
16 States, and then does that mean you agree the contract  
17 claims should be here?

18           MR. HUME:  No, because they haven't claimed  
19 immunity, and we --

20           JUDGE MILLETT:  Well, that would be  
21 jurisdictional.

22           MR. HUME:  The Court did have jurisdiction over,  
23 because they didn't claim any immunity, and they're not the  
24 Government.

25           JUDGE MILLETT:  If they are the United States then

1 you're alleging a breach of contract with the United States  
2 then they, as you seem to be arguing in the Court of Federal  
3 Claims, then the contract claims need to be there, too.

4 MR. HUME: We explained in the very first two  
5 pages of our complaint in this case, in the original  
6 complaint that to some degree, to the extent we're suing  
7 FHFA we're doing it as an alternative claim. The system set  
8 up by Congress requires the -- normally an alternative claim  
9 would be in the same case, the system created by Congress  
10 requires us to do it this way, that if you agree you're the  
11 Government it's a taking, if you're going to try to say  
12 you're not the Government then we have to be in District  
13 Court. And by the way, if you are the Government we may  
14 have more claims in the Court of Federal Claims.

15 And I would keep in mind, also, that our breach of  
16 contract claims, I don't want to be read, I don't want the  
17 record to reflect that I've conceded too readily that the  
18 Defendants on the FHFA side here are governmental because  
19 Fannie and Freddie still exist, the FHFA is their  
20 conservator, it runs them, but Fannie and Freddie are  
21 private entities, they are still getting sued in District  
22 Courts around the country, and I think the balance of the  
23 case law is that they don't get to assert immunity. So,  
24 those two entities are still liable for breach of contract,  
25 and I don't actually envision any scenario in which we have

1 to sue them in the Court of Federal Claims, so I think our  
2 claims against them really do belong in District Court not  
3 just as an alternative claim, but because Fannie and Freddie  
4 are not the Government. The FHFA is a Government agency,  
5 but the entities it's running are not.

6 JUDGE GINSBURG: The Government isn't a Delaware  
7 corporation, amazing.

8 MR. HUME: We're not -- not yet. Given its  
9 exceptional money-making abilities it might decide to issue  
10 stock, I don't know. But the -- we're not suing the  
11 Treasury for -- well, we are suing the Treasury for breach  
12 of fiduciary duty, but we're not suing them for breach of  
13 contract.

14 JUDGE BROWN: All right.

15 MR. HUME: Thank you very much, Your Honor.

16 JUDGE BROWN: Thank you, Mr. Hume.

17 JUDGE GINSBURG: Can we take a break?

18 JUDGE BROWN: Excuse me. We're going to, the  
19 Court is going to take a brief recess before the Government  
20 starts. Thank you.

21 JUDGE GINSBURG: We may or may not be back.

22 (Whereupon, a brief recess was taken.)

23 MR. CAYNE: May I proceed?

24 JUDGE BROWN: Yes.

25 ORAL ARGUMENT OF HOWARD N. CAYNE, ESQ.

1 ON BEHALF OF THE FHFA

2 MR. CAYNE: May it please the Court, Howard Cayne  
3 for Federal Housing Finance Agency, Fannie Mae, and Freddie  
4 Mac. Your Honors, Judge Lamberth's decision should be  
5 affirmed actually now based on a notice we were provided by  
6 the Court earlier today for three independent reasons,  
7 first, a statutory jurisdictional bar precludes review of  
8 Plaintiff's claim, in addition to the bar laid out in our  
9 statute, Your Honors, the statute reference in the Court  
10 notice to Counsel also fully precludes each and every claim  
11 in this matter seeking relief, Your Honors.

12 JUDGE GINSBURG: So, you overlooked a dispositive  
13 jurisdictional bar to this case?

14 MR. CAYNE: I'm sorry, Your Honor?

15 JUDGE GINSBURG: You overlooked a dispositive  
16 judicial --

17 MR. CAYNE: Your Honor --

18 JUDGE GINSBURG: I mean, a jurisdictional bar?

19 MR. CAYNE: Your Honor, as is many litigations  
20 this case morphed over time.

21 JUDGE GINSBURG: More morphing.

22 MR. CAYNE: And I would, I said to my colleagues I  
23 applauded the member of the Panel, or the Clerk who saw  
24 this, but it just supplements what we have said, because let  
25 me just get to --

1           JUDGE GINSBURG: So, you're saying the equitable,  
2 pardon me, the Third Amendment, that's what we're talking  
3 about, right, the Third Amendment was a discretionary  
4 supervisory action?

5           MR. CAYNE: No, Your Honor, let me --

6           JUDGE GINSBURG: Okay, go ahead.

7           MR. CAYNE: -- tell, say to the Court, and this is  
8 what wasn't so clear in the complaints, but as the case has  
9 developed and we heard this morning, Plaintiffs essentially  
10 allege that the FHFA is violating all sorts of rules, laws,  
11 regulations, safe and sound banking practices by allowing  
12 these institutions to operate with as little as zero  
13 capital, that is the point that this statute gets to, Your  
14 Honor, because as you Court will know from the statute, it  
15 says that the, if the Agency as regulator, and again, Your  
16 Honor, when we filed out papers we were focusing on the  
17 conservatorship allegations in the complaints, but when the  
18 Agency is regulator, reclassifies or changes capital  
19 classification, that might be challenge, but beyond that  
20 anything relating to a changed capital classification  
21 according to the statute is not subject, it may not be  
22 affected in any way by an order of any court. So, what we  
23 have here at the outset in 2008 at the time the institutions  
24 were put into conservatorship, a new capital paradigm was  
25 established, and that capital paradigm said as long, by the

1 Director of the Agency as regulator, and that capital  
2 paradigm said as long as these institutions are not forced  
3 into mandatory receivership they may operate. And the new  
4 paradigm was rather than requiring them to maintain eight  
5 percent, five percent, six percent capital, whatever the  
6 standard was as a normal banking institution, it was  
7 determined that as long as the Treasury commitment was out  
8 there ready to come in to cure any insolvency, which as the  
9 Court knows if the institutions were insolvent for more than  
10 60 days the Agency would have been forced to place them into  
11 mandatory receivership, so the new paradigm was we'll have  
12 the 100, 200, eventually Treasury committed to 467 billion,  
13 nearly a half a trillion dollars to support these  
14 enterprises, and the regulator made the regulatory decision  
15 that we will, the Agency will allow that to satisfy capital  
16 standards. So, again, this, it was not challenged at the  
17 time, and so what the statute says is that this action by  
18 the Agency as regulator to establish a new capital paradigm  
19 for the duration of the conservatorships may not be affected  
20 by injunction or otherwise in any manner, it's similar to  
21 the banking cite in here, and the banking cite is 12 U.S.C.  
22 1818(i), no court may effect by injunction or otherwise a  
23 cease and desist order that has been issued. What was  
24 happening there, and there's case law on this, this  
25 provision essentially parrots what are called on the banking

1 landscape capital directives. Capital directives were first  
2 enacted by Congress in 1983 pursuant to the International  
3 Lending Supervision Act of 1983. And what a capital  
4 directives -- and it was issued, Your Honors, in response to  
5 a Fifth Circuit decision, the Fifth Circuit back in 1983 in  
6 a case called *Comptroller Currency v. First National Bank of*  
7 *Bel Aire* ruled that the Comptroller's cease and desist order  
8 requiring the bank to increase its capital was not supported  
9 by substantial evidence. And to overrule that decision the  
10 Congress enacted what are called capital directives, and  
11 capital directives provide that the agencies, the  
12 comptroller, the FDIC, the Fed, the NCUA, I believe, can  
13 require institutions to maintain whatever capital level they  
14 deem appropriate under the circumstances, and this was the  
15 key point, those determinations are subject to no judicial  
16 review. In 1990 that point that they were subject to no  
17 judicial review was challenged in the Fifth Circuit in a  
18 case called *FDIC v. Bank of Coushatta*, reported at 930 F.2d  
19 1122, and on a three-judge Fifth Circuit panel including the  
20 esteemed Judge John Minor Wisdom, the Court ruled that the  
21 statute comported with due process. There's a lengthy  
22 analysis, and the statute, the capital directive statute at  
23 issue there that provided no judicial review to banks, when  
24 the agencies changed, increased, decreased their capital  
25 guidelines was not subject to judicial review. Your Honors,

1 that is precisely what is implicated by the statute that the  
2 Court has referenced.

3 JUDGE MILLETT: And so your view here is that  
4 they're challenging this what you call capital paradigm of,  
5 that was created here of, in the Third Amendment getting rid  
6 of obligations that the GSEs had under the prior amendments,  
7 and the PSPAs and replacing them with this just pay us  
8 whatever you can each month, that's a new capital paradigm  
9 decision by the Director?

10 MR. CAYNE: No, what I'm referring to, Your Honor,  
11 is the, it's throughout their briefs, it came up in my  
12 esteemed colleague Mr. Olson's presentation many times that  
13 we, the Agency is driving these institutions out of  
14 business. It's allegedly not allowing them to grow capital,  
15 it's keeping them at zero, how can that be? Well, the  
16 reason that can be is the paradigm, the new capital program  
17 that never has been challenged that was established in 2008  
18 sets precisely that, an action was taken by the Director at  
19 that time, in September, 2008, that said going forward the  
20 normal capital classifications, whatever the percentage was,  
21 I don't recall, three, four, five, six, seven, eight percent  
22 no longer applied. Instead, we're going to have this new  
23 paradigm, and the new paradigm is, and we all have to  
24 understand, much of the presentation by my colleagues, it's  
25 like we're dealing with this fabulously successful financial

1 institution, and the shareholders are being stripped of  
2 their rights. Well, what we're dealing with are  
3 institutions which we all recall that in 2008 were on the  
4 verge of insolvency, and they were threatened with  
5 receivership, which would have had massively adverse  
6 consequences on the national mortgage markets, so Congress  
7 passed special legislation, and this legislation, getting,  
8 and I apologize for just skipping a bit, but this  
9 legislation is with respect to the matters that we hear  
10 about, conflicts. This legislation was actually included in  
11 the charter acts, the charter act of Fannie Mae, the charter  
12 act of Freddie Mac, so this is both federal law, and this is  
13 in the governing corporate instruments of these  
14 institutions, this ability, authority of Treasury to infuse  
15 massive amounts of tax payer dollars, and so what we have in  
16 this --

17 JUDGE MILLETT: Well, so their argument is as I  
18 understand it is that the paradigm that you had was in 2008  
19 and going forward to, up to and through the Third Amendment  
20 the Director's decision was no way do we want this going  
21 into mandatory receivership, no way do we want that  
22 happening, we must prevent that from happening, we do not  
23 want receivership because of the enormous consequences that  
24 would have for the economy, the Treasury, hook up the hose  
25 and we're going to have the money running in and do whatever

1 we have to avoid, we can to, whatever we have to do to avoid  
2 receivership, is that --

3 MR. CAYNE: Yes.

4 JUDGE MILLETT: And that was their decision, the  
5 Director's decision as conservator, that's what was going on  
6 here?

7 MR. CAYNE: That was the, the agreement, Your  
8 Honor, was executed between the enterprises, so it was, the  
9 enterprises and Treasury, so it was authorized by the  
10 Federal Housing Finance Agency in its capacity as  
11 conservator. And getting back to Judge Ginsburg's question,  
12 that's why our briefs rely on the withdrawal of jurisdiction  
13 that would apply or bar a court from effecting the  
14 operations of a conservator.

15 With respect to the Court's inquiry to Counsel  
16 this morning, the reason I'm referring to the FHFA as  
17 regulator is it was the FHFA as regulator that made the  
18 regulatory decision that going forward the capital tests  
19 that previously had applied to these enterprises were off  
20 the boards for the indefinite future, for the duration of  
21 the conservatorship. Instead, as I said, the Agency as  
22 regulator in that capacity authorized this new capital  
23 paradigm, which is Treasury, the conservator on behalf of  
24 the enterprises will enter into an agreement with the  
25 Department of Treasury pursuant to which the Department will

1 commit literally hundreds of billions of tax dollars to the  
2 infusion and to the support of these enterprises, and that  
3 will satisfy any capital requirement we as regulators  
4 believe is necessary. And my points simply with respect to  
5 the Court's inquiry is the whole range of relief being  
6 sought by Plaintiffs here were granted, but directly  
7 contradict, undermine, effectively set aside that regulatory  
8 decision by the Agency. What, just one specific, what my  
9 esteemed colleague Mr. Olson is asking for is that the Court  
10 issue some type of relief to force these enterprises to  
11 increase their capital to some arbitrary level. Well,  
12 again, that may happen or not, but it's not consistent with  
13 the action taken by the Director which focuses on keeping  
14 these entities in business, and the Court had, there was  
15 much back and forth in the context of fiduciary powers,  
16 fiduciary interest relating to the statutory provision that  
17 the Agency as conservator now can take action in the best  
18 interests of the enterprises, or in the best interests of  
19 the Agency.

20           If I may submit, what that means is these are very  
21 unique creatures, they are, as the Court has noted, massive  
22 financial institutions, but these are not comparable to  
23 standalone banks, or standalone savings and loans, because  
24 Congress had a more fundamental purpose, Congress' purpose  
25 in enacting and authorizing these financial institutions

1 wasn't just to have two more banks, it was to provide  
2 support to facilitate the operation of the national mortgage  
3 markets, that was a policy decision by Congress. Congress  
4 considered it absolutely essential that those markets  
5 operate, and they operate efficiently, and that was the  
6 purpose for these enterprises.

7           So, under circumstances such as 2008, now,  
8 whenever, the conservator may well determine well, I have a  
9 particular choice to make, I can run things to try to make  
10 this a profitable, more profitable, or I can run things to  
11 maximize the ability of the enterprise to facilitate the  
12 operation of those markets. Congress made the policy  
13 judgment to allow the conservator without interference by  
14 shareholders, with all respect, without interference by the  
15 judiciary to make that decision. And what we have here,  
16 getting back to what's being challenged, again, we have to  
17 look everything in the context, what is -- we have here are  
18 the shareholders are effectively asking this Court to  
19 override the conservator's judgment, and this is judgment  
20 Congress decided this is the agency, this is the expert, we  
21 want to rely on the agency, and the agency is conservator.  
22 The net effect of what is being asked of this Court is to  
23 second guess the decisions made by the conservator on how it  
24 will handle, marshal, administer this nearly half a trillion  
25 dollars of tax payer funds. And again, the record is clear,

1 and I'll refer to the statute in a moment, Congress put that  
2 money in clearly not to benefit shareholders of an  
3 institution that months later became insolvent, they put it  
4 in because the bottom had fallen out of the world, and the  
5 United States' national economy, and Congress believed, this  
6 is their, in their judgment that if the national mortgage  
7 market fails, becomes non-operational, that will just make a  
8 horrible situation so much worse, and that is why --

9           JUDGE MILLETT: Well, I think what they would say  
10 is what's happening here, or they have said is this  
11 situation what the FHFA is doing doesn't look like what  
12 conservators usually do, it doesn't look like they're  
13 getting it back in a solvent condition if it can never have  
14 a penny profit. And on the other hand, you're not, the  
15 liquidation hasn't started, you're sort of in this limbo on  
16 life support here, and trying to figure out how that fits  
17 into the statutory scheme as to what, because Congress did  
18 choose to call them conservators and distinguish  
19 conservators from receivers, so how do you deal with that?

20           MR. CAYNE: But, Your Honor, this, everything  
21 that's happening goes to really I'll call it the heartland,  
22 the heartland of the conservator's statutory powers. And  
23 there was a lot of discussion that conservators and  
24 receivers are polar opposites, they have a whole different  
25 set of powers and duties, that's just not the case. Except

1 for the fact that a receiver is authorized by statute to  
2 liquidate, the statutory powers of both are identical, you  
3 just have to look at the statute to see that, they both have  
4 the power to operate, just every term is the same except,  
5 then there's a follow up provision, additional powers of  
6 receiver, and it says the receiver can liquidate. But what  
7 we're having here --

8 JUDGE MILLETT: Well, the receiver has some other  
9 obligations, too, right? About notice.

10 MR. CAYNE: Well, in a liquidation, of course,  
11 Congress made an exception to the succession statute,  
12 because the succession statute applies both to the  
13 conservator and to the receiver, so in other words, in a  
14 conservatorship or in a receivership all the powers of the  
15 shareholders, the officers, the directors, anything over the  
16 assets, the powers, anything related to the institution for  
17 both a conservator and a receiver is by operation of law  
18 assigned to the conservator or the receiver upon the  
19 institution of any of those situations, the institution of a  
20 receivership, an institution of a conservatorship. As we  
21 point out in our briefs, when all of that is assigned to,  
22 transferred to, when the conservator succeeds to it there is  
23 no exception to that, the conservator succeeds to  
24 everything. But in contrast in receivership there is a  
25 single exception, and the single exception is in

1 receivership notwithstanding the fact that everything has  
2 also been transferred to the receiver, claimants against the  
3 institution, including shareholders, may file administrative  
4 claims pursuant to a comprehensive claim process established  
5 by the statute with ultimate review in the Federal Courts,  
6 and that really deals with many of the arguments about  
7 conflicts and looking for exceptions, Congress knew how to  
8 draw an exception on these statutes when it wanted. In  
9 receivership it did give an exception, and the exception was  
10 a claimant can file a claim in receivership. In  
11 conservatorship, which may lead or often leads to  
12 receivership, claims cannot be filed.

13           But, Your Honor, I apologize for digressing  
14 because the Court's question was about what is a conservator  
15 authorized to do, and there's a lot of papers filed, well,  
16 this doesn't look like any conservatorship any of the filers  
17 had ever seen, well, it's different because there have never  
18 institutions with, as the courts indicate, \$5 trillion of  
19 assets that were becoming insolvent. And typically in the  
20 bank context an institution that is failing may sometimes be  
21 put in conservatorship to give the regulator a chance to  
22 determine can this business be saved. Sometimes it can,  
23 usually it can't, and when it can't then it goes to  
24 receivership. But there is nothing in the bank statutes or  
25 in our statute that says the regulator has to determine

1 within blank days, blank weeks, blank years how long the  
2 conservatorship will last. But when you go back to the  
3 underlying reason that motivated Congress to authorize these  
4 enterprises to empower them that we want to facilitate the  
5 operation of the national mortgage markets, then it's very  
6 understandable, then it's very consistent. These entities  
7 are being operated in conservatorship for the purpose of  
8 facilitating those markets. As the Court now knows, we have  
9 affirmative legislation from Congress that says at least  
10 through 2018 we want this status to stay, we don't want  
11 anything changed, we want these entities to remain in  
12 conservatorship until we, Congress, decide what the next  
13 step is. And that, Your Honor, refers, relates back to a  
14 question you asked earlier about statements made by Congress  
15 about what happens next, and then Congress also said even  
16 after 2018 please understand that it is the sense of  
17 Congress that this status should continue until we,  
18 Congress, get around to doing something about it.

19           And just another aspect of that, when you think  
20 about what Congress did there, Congress by statute  
21 essentially, directly mandated that the Department of  
22 Treasury continue to hold the shares it holds today at least  
23 under 2018. So, Congress is telling Treasury continue to  
24 hold the shares, these shares which are governed by the  
25 Third Amendment now until that date. To me, and I know they

1 put in a couple of statements from legislative history, you  
2 can't understand that provision without recognizing that  
3 Congress was in fact signing off on the current structure of  
4 the shares because we know from the regulators they thought  
5 the --

6 JUDGE MILLETT: Well, put that aside, what does  
7 the 2016 Act direction, how would that affect any remedy  
8 that's asked for in this case? Or not at all?

9 MR. CAYNE: I would suggest it, in and of itself,  
10 and I haven't spent extensive time evaluating this, but it  
11 certainly could be argued that, that we're not relying on  
12 it, but it certainly could be argued that the 2016 Act would  
13 bar this Court from making any change to the attributes of  
14 the shares held by Treasury because Congress has in a  
15 legislative act said Treasury, you must hold these shares as  
16 presently constituted, and if this Court --

17 JUDGE MILLETT: And when you say is presently --

18 MR. CAYNE: -- were to go back to the Second  
19 Amendment that's not what Congress told Treasury to hold.

20 JUDGE MILLETT: Well as presently constituted,  
21 does that mean those shares as presently constitute include  
22 a dividend equal to 100 percent of any profits, is that the  
23 theory, or is it that --

24 MR. CAYNE: No, that's --

25 JUDGE MILLETT: -- they've got their shares,

1 but --

2 MR. CAYNE: No, no, that --

3 JUDGE MILLETT: -- processes could still --

4 MR. CAYNE: -- a term of the shares because,  
5 again, we have to go back to the underlying agreements. The  
6 whole purpose is to --

7 JUDGE MILLETT: But how could that --

8 MR. CAYNE: -- keep the --

9 JUDGE MILLETT: -- be a term of the shares because  
10 they didn't buy any shares in 2016 --

11 MR. CAYNE: I'm sorry?

12 JUDGE MILLETT: -- or they didn't buy any, or  
13 their argument is they didn't acquire any new shares, so --

14 MR. CAYNE: No, no, no, and that's correct, there  
15 were no new shares --

16 JUDGE MILLETT: Right.

17 MR. CAYNE: -- but certain of the terms governing  
18 the shares changed, that's what the Third Amendment did, it  
19 changed some terms. And those terms, and the shares, the  
20 shares that Congress said that Treasury must hold were  
21 governed by the terms of the PSPAs, as amended by the First,  
22 Second, and Third Amendments, so that's what Congress had in  
23 front of it, that's what Congress told Treasury to hold.

24 And also, Your Honor, though, we hear lots of  
25 discussion that this was a takeaway, this is awful, this is

1 a seizure of assets, well, first, as I mentioned, on the  
2 legislation that's part of the charter act it required  
3 Treasury to make a three-step emergency determination before  
4 it agreed to infuse these funds, and that three-step  
5 determination required Treasury to consider market stability  
6 to prevent disruptions in the availability of mortgage  
7 finance, and to protect tax payers. That was it. It wasn't  
8 about protecting shareholders, and -- yes, Your Honor?

9 JUDGE BROWN: But that was Treasury, right? Which  
10 was --

11 MR. CAYNE: No, I'm just saying that --

12 JUDGE BROWN: -- lending its money, and Treasury  
13 was not the conservator as I understand it.

14 MR. CAYNE: That's correct, Your Honor.

15 JUDGE BROWN: Okay.

16 MR. CAYNE: But this is the provision that is in  
17 the charter act of the two enterprises, and it says Treasury  
18 may lend, infuse its money on such terms as Treasury  
19 directs, and it says that the enterprise, now the  
20 conservator, may agree to that. So --

21 JUDGE BROWN: Right. And what they first agreed  
22 to as I understand the Second Amendment, right, was that  
23 they would have dividends, and that they had a warrant to  
24 buy up to 80 percent of the common stock --

25 MR. CAYNE: And Your Honor --

1           JUDGE BROWN: -- is that correct? And so,  
2 presumably Treasury was acting under that mandate when it  
3 made the Second Amendment, right?

4           MR. CAYNE: That's correct. But Your Honor, if I  
5 may respectfully correct something the Court just said, and  
6 I'm not surprised the Court said it because it's consistent  
7 with the presentation of Plaintiffs, when you read, for  
8 example, the class action briefs you would think the  
9 original transaction was the exchange of one stream, the  
10 dividend that was \$19 million, and that was, that is not the  
11 case. There was a second stream, it was called the periodic  
12 commitment fee --

13           JUDGE BROWN: Right.

14           MR. CAYNE: -- and that had been waived for three  
15 years, but the periodic commitment fee, which was a term  
16 included in the initial agreement, was sufficiently  
17 significant that subsequent to the enactment, subsequent to  
18 the execution of these agreements the United States Congress  
19 passed special legislation called the Pay It Back Act that  
20 provided any and every dollar ever paid pursuant to the  
21 periodic commitment fee must be directed to the pay down of  
22 the national debt. And I'm not standing here arguing to the  
23 Court would this have not been more than all the profits, it  
24 would have been less than all the profits, but it's  
25 something that Plaintiff should have presented. If you look

1 at the class action brief you'll see captions, Treasury was  
2 given the right, captions of their full sections, Treasury  
3 was granted the right for all, to all future profits for  
4 zero, no consideration. Well, that's just not true, there  
5 was the \$19 million, and there was this periodic commitment  
6 fee, and if the Court were to look you'll see from 2010  
7 through the time that the Third Amendment was signed there  
8 are a series of letters from the Department of the Treasury  
9 to the Federal Housing Finance Agency, each of which states,  
10 and again, this is inconsistent with any kind of profit grab  
11 going on, each of which states that due to the adverse  
12 economic circumstances of the national mortgage markets we,  
13 the Department of Treasury, waive for this quarter our right  
14 to a fee pursuant to the periodic commitment fee. And just  
15 to look at the terms of that fee it says, and this is right  
16 in the agreement, the periodic commitment fee was intended  
17 to compensate the tax payers for the market value of the  
18 remaining commitment by the Department of Treasury, and we  
19 hear a lot in the briefs and in the discussions this morning  
20 to the effect that well, everything's been paid back and  
21 more, and so this is all behind us, no, no, no, \$189 billion  
22 into the two enterprises is what through today has been  
23 infused, but as of today, and into perpetuity until these  
24 conservatorships have wound down the United States Treasury  
25 remains obligated to infuse up to \$258 billion to assure

1 that these institutions based on something that happens  
2 tomorrow, next week, next year, don't face receivership  
3 again. So, this periodic commitment fee that Class  
4 Plaintiffs ignore, not once do they mention it, it is  
5 supposed, if it was assessed --

6 JUDGE MILLETT: How much would that have been if  
7 it hadn't been waived, or going forward if you didn't have  
8 that abandoned in the Third Amendment how much would that  
9 have been?

10 MR. CAYNE: Your Honor, as I said, I have --

11 JUDGE MILLETT: How much were the ones that you  
12 waived?

13 MR. CAYNE: I'm sorry?

14 JUDGE MILLETT: How much were the commitment fees  
15 that were waived?

16 MR. CAYNE: No, all I -- the commitment fee has  
17 never been determined. All I'm saying is had the Third  
18 Amendment not been executed, Treasury was giving up not only  
19 the right to the \$19 billion, it was giving up the right to  
20 the periodic commitment fee, which was under the terms of  
21 the agreement intended to reflect the value of this --

22 JUDGE MILLETT: No, I understand that, but does  
23 anyone have any sense of how much that would have been  
24 worth?

25 MR. CAYNE: The only sense I have, Your Honor, is

1 the fact that Congress passed the legislation indicates  
2 well, they thought it was worth, it was significant enough  
3 to pass special legislation to do. But to be clear, even if  
4 there wasn't a periodic commitment fee, there's nothing to  
5 examine in this transaction because the great bulk of the  
6 discussion between the Court and Counsel this morning had to  
7 do with well, what does this term mean, and was this a good  
8 deal or a bad deal? Well, I'll stipulate for this purpose  
9 let's just stipulate that it was a bad deal, and in  
10 retrospect something else should have been agreed to. But  
11 this is not an APA case under any arbitrary and capricious,  
12 or other standard, the only issue for this Court to resolve  
13 is whether the conservator exercised the power granted by  
14 Congress, and that in this case is a simple determination  
15 because the conservator exercised the power, the power to  
16 operate the institutions, the power to enter into contract,  
17 when it executed the original agreement in 2008, and that  
18 has never been challenged. And what are we dealing with  
19 her? We're dealing with an amendment --

20 JUDGE BROWN: Well, what if that's not actually  
21 the question here, what if the question is not whether the  
22 conservator exercised the power, but whether the power that  
23 they exercised was the power authorized by the statute, or  
24 whether they acted ultra vires --

25 MR. CAYNE: Right.

1 JUDGE BROWN: -- right?

2 MR. CAYNE: Yes, Your Honor, and the power that  
3 I'm suggesting that was exercised here was the power to  
4 operate the institutions, the determination was made that  
5 without these agreements the institutions couldn't operate  
6 at all because they do into mandatory receivership, and down  
7 the road as laid out in great detail in our colleagues'  
8 briefs from the Department of Justice, a determination was  
9 made that if we leave things as they are there may be a lot  
10 of periods --

11 JUDGE BROWN: Right.

12 MR. CAYNE: -- or some periods where the \$19  
13 billion dividend exceeds the amount of profits for that  
14 year, which will have the effect of reducing the Treasury  
15 commitment, and perhaps shorting the life, giving less  
16 backup support, and that was a, you know, a paradigm of a  
17 business judgment. The business judgment was made by the  
18 conservator that this new arrangement will better allow the  
19 preservation of the commitment. And for purposes of the  
20 Court's analysis I would, the Court should say well, that  
21 was clearly a wrong judgment, maybe the Second Amendment was  
22 better, maybe a Fourth Amendment with a different paradigm  
23 would be better, but that is the heartland of what Congress  
24 said, we are a power that we are investing in the  
25 conservator that we don't want to authorize third parties,

1 or shareholders, or courts to challenges, we want --

2 JUDGE BROWN: All right.

3 MR. CAYNE: -- this to operate as a business.

4 JUDGE BROWN: Mr. Cayne --

5 JUDGE GINSBURG: Mr. Cayne --

6 JUDGE BROWN: -- I think -- did you have a  
7 question?

8 JUDGE GINSBURG: Yes.

9 JUDGE BROWN: Okay.

10 JUDGE GINSBURG: When you started your argument I  
11 thought that you were saying that the only question before  
12 the Court, or the only one we need answer arises under 4623,  
13 okay? And I asked you whether this was a situation in which  
14 there had been a discretionary supervisory action, and I  
15 think you said no, this was a reclassification of the  
16 capital structure.

17 MR. CAYNE: I've spoken way too long and I forget  
18 most of what I've said already, Your Honor, but what I, the  
19 way I would answer your question now --

20 JUDGE GINSBURG: I've been trying to keep it in  
21 mind.

22 MR. CAYNE: Yes, what I would say now what it was  
23 is there used to be a capital system that said the  
24 enterprises had to have capital based on certain percentages  
25 and calculations --

1 JUDGE GINSBURG: Yes.

2 MR. CAYNE: -- and that system was eviscerated,  
3 eliminated as it applied to the enterprises in its totality,  
4 and instead there was a new system, and the new system  
5 was --

6 JUDGE GINSBURG: Yes, I think you used the word  
7 paradigm, right?

8 MR. CAYNE: Yes, it's a new paradigm. Yes.

9 JUDGE GINSBURG: Okay.

10 MR. CAYNE: Yes, Your Honor, I did. The new  
11 paradigm is a Treasury support.

12 JUDGE GINSBURG: But you raised that in connection  
13 or in response to the Court having asked you to address  
14 Section 4623.

15 MR. CAYNE: Yes, Your Honor.

16 JUDGE GINSBURG: Section 4623 contemplated,  
17 addresses two types of decisions, it says a regulated entry  
18 that is not classified as critically under-capitalized and  
19 is the subject of a classification change, that's one  
20 action; or of a discretionary supervisory action taken under  
21 this subchapter by the Director, that's the second one, all  
22 right? Now, I asked you if this was a discretionary  
23 supervisory action, and I thought you said it was a, because  
24 of this paradigm point it was a change in the classification  
25 with respect to its capital.

1 MR. CAYNE: Change in the system that applied  
2 to --

3 JUDGE GINSBURG: Okay, change in the system.

4 MR. CAYNE: -- the measuring -- yes.

5 JUDGE GINSBURG: But what the words are is the  
6 subject of a classification, okay? So, there seems to be in  
7 the statute a whole typology of classifications, adequate  
8 recapitalized, and then under-capitalized, and within that  
9 significantly under-capitalized, critically under-  
10 capitalized, okay?

11 MR. CAYNE: That's correct, Your Honor.

12 JUDGE GINSBURG: Was there a change?

13 MR. CAYNE: Yes, Your Honor, that entire system by  
14 virtue of the Director's action was set aside, there is an  
15 issuance by the Director that says this system doesn't  
16 apply.

17 JUDGE GINSBURG: Setting it aside is not making a  
18 change within the grid, it's moving off that grid, right?

19 MR. CAYNE: Well, I would say that it's before  
20 that change institution you have to comply with this, now  
21 you have to comply with --

22 JUDGE GINSBURG: Okay.

23 MR. CAYNE: -- that.

24 JUDGE GINSBURG: So, if it's not a change in this  
25 menu that's given here then it's a discretionary supervisory

1 action, those are the only two possibilities under 4623, if  
2 you think 4623 is a jurisdictional body.

3 MR. CAYNE: And Your Honor, I'm just at a slight  
4 disadvantage because I didn't know this was going to come  
5 up, I don't have that statute in front of me --

6 JUDGE GINSBURG: Well, you addressed it --

7 MR. CAYNE: But, right --

8 JUDGE GINSBURG: -- with some confidence when you  
9 started.

10 MR. CAYNE: But, right. Well, I read it before I  
11 walked in, Your Honor --

12 JUDGE GINSBURG: Would you like to read it again?

13 MR. CAYNE: -- on an iPhone. But may I?

14 JUDGE GINSBURG: Please.

15 MR. CAYNE: Thank you. Thank you, sir.

16 JUDGE GINSBURG: You're welcome.

17 MR. CAYNE: And --

18 JUDGE GINSBURG: If you ignore my marginal notes.

19 MR. CAYNE: I can't see anything. And what I'm  
20 looking at is --

21 JUDGE MILLETT: I think the question is whether  
22 this is an action of the Director under this subchapter  
23 within --

24 MR. CAYNE: Right.

25 JUDGE MILLETT: -- the meaning of 4623.

1 JUDGE GINSBURG: Supervised revision.

2 MR. CAYNE: Yes, and I'm just looking right now  
3 for the withdrawal language in the statute, Your Honor.

4 JUDGE MILLETT: It's in (d).

5 MR. CAYNE: D? Okay. So, it says the withdrawal,  
6 and this is where I was comparing to the withdrawal under  
7 the capital directives, and under the cease and desist  
8 proceedings for banking agencies where it says except as  
9 provided in this section no court shall have jurisdiction to  
10 effect by injunction or otherwise the issuance or  
11 effectiveness of any classification or action of the  
12 Director under this subchapter. And what I'm suggesting,  
13 Your Honor, is that the issuance of a directive saying  
14 capital classifications no longer apply during  
15 conservatorship was an action under 12 U.S.C. Section 4623  
16 that the Court or any court has no jurisdiction to effect by  
17 injunction or otherwise.

18 JUDGE GINSBURG: But just to be clear, not because  
19 it was a change of classification, but because it was a  
20 supervisory action putting the whole classification scheme  
21 to one side.

22 MR. CAYNE: I wouldn't disagree with that  
23 statement --

24 JUDGE GINSBURG: Okay.

25 MR. CAYNE: -- Your Honor, yes.

1 JUDGE GINSBURG: Okay. Thank you. May I have the  
2 statute back? Thank you.

3 MR. CAYNE: Thank you very much. I should have  
4 been better prepared. I apologize.

5 JUDGE GINSBURG: Well, you didn't have much  
6 notice.

7 JUDGE BROWN: All right.

8 MR. CAYNE: But --

9 JUDGE MILLETT: I think if Counsel wants to submit  
10 supplemental briefs on that, that would be fine.

11 MR. CAYNE: Your Honor, we'd be obviously pleased  
12 to submit supplemental briefs, but we obviously think the  
13 answer is clear, but we'd be happy to document it in  
14 briefing if that would be useful.

15 JUDGE GINSBURG: It may become less clear on  
16 rebuttal.

17 JUDGE BROWN: All right.

18 MR. CAYNE: Unless there are any other  
19 questions --

20 JUDGE BROWN: Mr. Cayne --

21 MR. CAYNE: -- I will sit.

22 JUDGE BROWN: -- we think we understand your  
23 argument. Thank you.

24 MR. CAYNE: Thank you, Your Honor.

25 JUDGE BROWN: Mr. Stern.

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ORAL ARGUMENT OF MARK B. STERN, ESQ.

ON BEHALF OF JACOB J. LEW

MR. STERN: May it please the Court. The Court's been very generous with its time this morning, and I am primarily here at this point to answer the questions that have been raised in the Court's mind by the briefs and the preceding colloquies. Obviously, sort of there's been lots of discussion in and out sort of what sort of the merits of some of these claims in the, to state the obvious the question that's presented by Judge Lamberth's opinion is whether the two critical provisions of HERA, the explicit bar on judicial review, and the transfer of rights provision bar these claims, and the Plaintiffs have advanced a number of theories for why this Court should imply an exception. And I think it's very important that this be sort of seen sort of, an interpreted in light of sort of the particulars of what was before Congress, because yes, this does come from FIRREA, yes the FIRREA case law is relevant, but this is also a very particular kind of instance which was going to be applied, like, and Congress understood what was going to be happening here, this is very different from the broad application of the judicial sort of removal of a general preclusion of review, sort of, in cases that are going to come up, sort of, you know, in a whole variety of unforeseen contexts. And what Congress knew in particular, whatever

1 the, sort of, ultimate scope of these provisions is the one  
2 thing that we know is that this was all enacted as part of  
3 Congress addressing institutions that are indisputably  
4 failing, and this was factorable here today. It all is the  
5 result of this legislation.

6 JUDGE GINSBURG: Well, Plaintiffs have suggested  
7 that there was some internal disagreement as to whether they  
8 were failing, and it wasn't undisputed.

9 MR. STERN: I'm sorry, Your Honor, I was referring  
10 to the original 2008 --

11 JUDGE GINSBURG: I'm sorry. Okay.

12 MR. STERN: -- which sort of just in terms of  
13 trying to understand what, how we should be interpreting  
14 these provisions. Because what Congress, one thing that  
15 Congress understood was that there was going to be sort of  
16 an enormous amount of tax payer money that was going to go  
17 into this at an enormous risk, I mean, looking back at a lot  
18 of the things that happened in 2008 it's easy to forget what  
19 it all looked like to regulators and Congress at the time,  
20 and the extent to which the Government was being criticized  
21 for putting gigantic amounts of money at risk with no  
22 guarantees of return. And one thing Congress understood was  
23 that there was going to be this massive infusion, and it was  
24 going to last for a long time. This Treasury commitment is  
25 crucial, and this also I think is undisputed, this Treasury

1 commitment that remains ongoing, and this is an ongoing risk  
2 to the tax payer, and that's out there. So, the question is  
3 when Congress says we're transferring all the rights of the  
4 shareholders in this institution to the conservator, and  
5 when it says there should be no action to restrain sort of  
6 the conduct of this conservator, did Congress mean for there  
7 to be room for claims that this was sort of a bad feel, this  
8 isn't really the way, you know, that a conservator acts,  
9 this sounds more like somebody who's thinking about putting  
10 sort of like the possibility of liquidation, so maybe that's  
11 sort of kind of a little bit more than we expected from a  
12 conservator. And that is not something that could possibly  
13 have been intended, nor can it possibly be the case that  
14 knowing the stakes that were involved in this that Congress  
15 would contemplate actions for rescission of agreements that  
16 were going to govern this. And one thing that we know is  
17 that Congress knew it was going to be keeping a weather eye  
18 on what was going on. And in 2015 Congress addressing all  
19 the circumstances that are presented here says, and  
20 addresses the purchase agreements as amended, and it notes  
21 like the Third Amendment as well as all the other  
22 amendments, and it says, tells Treasury you've got to hold  
23 on to your preferred stock, you can't sell it, and it's the  
24 sense of Congress that Congress should enact and the  
25 President should sign legislation to determine the fate of

1 Fannie Mae and Freddie Mac.

2 JUDGE GINSBURG: Okay, well --

3 JUDGE MILLETT: Well, how would you answer --

4 JUDGE GINSBURG: -- what -- if the Plaintiffs had  
5 all of the relief they're requesting would it entail the  
6 Treasury selling shares?

7 MR. STERN: No, we're not saying that -- I'm sort  
8 of pointing to that, Your Honor, just as a reflection of  
9 what it was that, like, where Congress fits into this.  
10 Congress is overseeing this, and --

11 JUDGE GINSBURG: Okay. But the Congress acts by  
12 enacting a statute, and Mr. Cayne and you both seem to want  
13 to avoid discussing the terms of the statute in any detail,  
14 and viewing this at 30,000 feet looking at the purpose in  
15 2008 and so on, but we have to grapple with the terms of the  
16 statute, part of which was drafted from the FDIA, or through  
17 FIRREA, parts of which were tacked on for this occasion, and  
18 we're stuck with that.

19 MR. STERN: I couldn't agree more, Your Honor.

20 JUDGE GINSBURG: Okay. So, let's --

21 MR. STERN: If we look --

22 JUDGE GINSBURG: -- delve into it.

23 MR. STERN: Right. I mean, let's understand that  
24 the statute itself doesn't contain words that permit this to  
25 go forward, we have to imply exceptions, and in implying

1 that we're, like, it's based on a reliance of courts that  
2 implied exceptions under FIRREA. Now, whether or not  
3 Congress intended to incorporate those exceptions, sort of,  
4 that were judicially implied into this language, there's no  
5 indication that Congress did that, but as we've argued at  
6 length in our brief, if Congress did do that there is no  
7 ultra vires action --

8 JUDGE MILLETT: Well, why wouldn't it be ultra  
9 vires to say the one thing we know a conservator can't do is  
10 adopt a plan by which the companies, the regulated entities  
11 can never actually become solvent, they just will never have  
12 a penny in the bank account, it always goes over to your  
13 Treasury, how can that be, I think that's their argument,  
14 that can't be what a conservator does, and so that can't  
15 fall within 4617(f).

16 MR. STERN: I mean, I think that there are a  
17 couple of answers to that. I'll forget the second answer  
18 after I give my first one.

19 JUDGE GINSBURG: Well, then tell us the second one  
20 first.

21 MR. STERN: I think at this point I may have  
22 forgotten both of them, Your Honor. The, I mean, first the,  
23 when there's a reference to what a conservator can do, that,  
24 and I hate to sort of say we have to look to the nature of  
25 this statute, and this statute what we have is, the purpose

1 of this is to keep Fannie Mae and Freddie Mac performing the  
2 functions that they as government sponsored enterprises were  
3 supposed to be doing. And as Judge Lamberth said, look,  
4 they're not in liquidation, it's now been sort of, like, you  
5 know, three and a half, almost four years since the Third  
6 Amendment was entered into, and there's not been a  
7 liquidation, the enterprises are solvent, the capital,  
8 there, like, is the, and they can proceed this way because  
9 of the enormous, like, underlying commitment of tax payer  
10 money, and that's sort of one level of answer.

11 Another level of answer is that the situation,  
12 like, there are no good answers for exactly how to proceed,  
13 sort of, in this, and it's been Treasury's position, you  
14 know, for a long time that ultimately legislation, you know,  
15 is needed to deal with this, and indeed that was the sense  
16 of the Congress resolution, also. But it's not like there  
17 was sort of like, well, here's the terrific way of  
18 approaching it because one way of doing it was, like,  
19 Treasury going okay, let's, like, we want dividends, you  
20 know, let's do that, you know, that turned out to be for a  
21 long time fairly, sort of, not, sort of, good, the, you  
22 know, for all the reasons, you know, that, you know, we're  
23 discussed in the brief, and, you know, and there was, you  
24 know, that very severe spiral.

25 So, one answer is to go, and the parties could

1 have decided this, sort of, like, right at the beginning  
2 could go look, here's what, you know, we've put a lot of  
3 money on the line, we're going to waive our periodic  
4 commitment fee, we're also entitled to dividends, but we  
5 don't want to put you under, we don't want you making draw  
6 on the commitment, so what we'll do is it's unclear when and  
7 if and to what extent you're ever going to be making  
8 profits, but we will take that risk, and, you know, and  
9 maybe there will be quarters where we do like with Treasury  
10 and the tax payer, like Noel, you know, and then there will  
11 be others where we don't get anything at all. And that,  
12 they could have decided to do that right at the outset. And  
13 in fact, the way that it's played out is that yes, as it  
14 happened there was, like, a big spike, sort of, in 2013,  
15 sort of, in profitability, which was all but largely from  
16 the one time recognition of the tax deferred assets, goes  
17 down notably the next year, the year after that in 2015  
18 would have been paying under the old dividend arrangement  
19 than they were paying under the Third Amendment, and you  
20 don't know what's going to happen. And this Treasury  
21 commitment, like, I mean, part of what the enterprises are  
22 paying for, even though we've waived the periodic commitment  
23 fee, is the enormous amount of money that has been sunk in,  
24 but the fact that there remains on the line sort of this  
25 \$250 billion approximately of tax payer money that the

1 enterprises can draw on, and that is absolutely crucial to  
2 their existence. And this is what these review provisions,  
3 you know, which is what is at issue here, are designed to  
4 protect is no, we don't get to fight about exactly what the  
5 conservator thought was the best way of dealing with this  
6 very difficult situation, and to say well, you know, a  
7 really good conservator would have done something else, I  
8 think that what they did was entirely appropriate and  
9 sensible, but whether you agree or disagree with that, that  
10 goes right to the kinds of things that were meant to be  
11 protected, and don't fall into what anybody would sort of  
12 typically characterize sort of as ultra vires in the sense  
13 that there's an explicit statutory prohibition, and you  
14 stepped over that line. There's nothing like there here  
15 even alleged.

16 JUDGE GINSBURG: Well, the statute does have a  
17 limitation, I mean, the broad discretion of the FHFA here is  
18 to act as necessary and appropriate to conserve as  
19 conservator or as receiver, and the Plaintiffs came in  
20 saying that's not what happened, and you all produced an  
21 incomplete administrative record.

22 MR. STERN: Well, obviously we take issue with  
23 that idea that the administrative record was incomplete.  
24 But certainly what you can't --

25 JUDGE GINSBURG: Well, there are now things that

1 have been produced that were not submitted, right?

2 MR. STERN: I mean, Your Honor, you know, we rest  
3 in, like, in posing the motion to supplement I think we laid  
4 out our position on why it would not be appropriate, and, I  
5 mean, you know, and there are things like, you know, the  
6 statement of the CFO who says well, maybe I would have, you  
7 know, like I would have made a comment. Now, that statement  
8 is from like August, 2012, I believe that's the same CFO who  
9 signed the securities disclosure form that Your Honor was  
10 referring to that, like contained --

11 JUDGE GINSBURG: The 10-Q?

12 MR. STERN: Yes, the 10-Q. That, sort of, like,  
13 contained all the language, you know, that Your Honor read  
14 out loud. And regardless of what she says that, you know,  
15 she might have, like, said to somebody then, she was signing  
16 a form that went to the regulators, and that, the idea that,  
17 like, this wasn't the, sort of the record, you know, or the  
18 kind of thing that was supposed to be looked at, you know,  
19 as opposed to, like, statements that people make, you know,  
20 in discovery that are untested, that are their recollections  
21 about things that were said, I mean, like, that's really not  
22 the way that an administrative record could be put, should  
23 be put together. And that would sort of open up all kinds  
24 of administrative records, the claims that they should be  
25 supplemented.

1           JUDGE GINSBURG: Well, *Overton Park* does that,  
2 doesn't it?

3           MR. STERN: No, I don't think so, Your Honor. I  
4 mean, it's true that *Overton Park* says that if you really  
5 can't figure out what's going on in the case that the Agency  
6 explanation isn't adequate that you can remand to the Agency  
7 or request additional declarations from the Agency. And we  
8 could certainly put in additional declarations, but we think  
9 that what the Agency has said, like, is clear, and this is  
10 sort of a funny kind of APA case, because, remember, this is  
11 coming up in the context of a, sort of amendment to a  
12 purchase agreement. So, this is sort of like the issuance,  
13 like, of rule-making. So, you know, I think that, you know,  
14 it could be that exactly what one expects from an  
15 administrative record might vary.

16           JUDGE GINSBURG: You see, it goes beyond even what  
17 you said, though, Mr. Stern, it says the court may require  
18 the administrative officials who participate in the decision  
19 to give testimony explaining their actions.

20           MR. STERN: Yes, Your Honor, and there also, as  
21 Your Honor is aware, lots of decisions talking about not  
22 having, like, administrative officials call --

23           JUDGE GINSBURG: Well, the District Court  
24 doesn't --

25           MR. STERN: -- for a probing of the --

1 JUDGE GINSBURG: -- do that lightly, of course.

2 MR. STERN: No.

3 JUDGE GINSBURG: It's a last resort.

4 MR. STERN: And there's certainly no basis for  
5 doing it here, because if you, if, look, look, if everybody  
6 knew, which of course they didn't and couldn't, but if  
7 everybody knew in August of 2012 exactly what the pattern  
8 was going to be there would be, you know, for the next three  
9 years, you looked at it, you go well, okay, like, that's  
10 not, like, unlawful, you know, there's no basis for saying  
11 that there should be administrative review even if you  
12 assumed that everybody knew exactly what was going to  
13 happen.

14 JUDGE MILLETT: Well, they would say imagine if,  
15 assume the worst record, administrative record possible, and  
16 that is that it turns out everybody lined up saying woo-hoo,  
17 they're now solvent, and we think they're going to stay  
18 solvent for the next three or four years, let's take, let's  
19 have a new agreement here, and we're going to take all of  
20 that money and leave them not a penny to get back on their  
21 feet with, could a conservator do that? I've just taken the  
22 worst administrative record possible, would that prove their  
23 case that you weren't acting as a conservator?

24 MR. STERN: I mean, I think that a conservator  
25 could do that given the position, like, the extent to which,

1 like, the ongoing Treasury commitment, you know, is crucial,  
2 they could decide that, I mean, but you need to know, I  
3 mean, maybe there's some fact working in that hypothetical  
4 that is extremely problematic, but also, I mean, it should  
5 be clear, even, like, nothing that has been adduced, like,  
6 sort of would support that kind of claim, I mean, like, what  
7 Mr. Olson says, you know, when you asked is, like, would it  
8 make a, would it have made a difference, like, if everything  
9 had gone, like, south, like, in a big way, you know, for the  
10 next few years, and the answer was no. It was, you know,  
11 the -- it's a standalone, I mean, there's, you know, they've  
12 got two variance, one of them is well, you know, they should  
13 have known in 2012 that things were going to be better at  
14 least for awhile, but the more fundamental one is no, this  
15 is just a deal you can't do, doesn't matter how good, like,  
16 it's going to be, how much it's going to advance, sort of,  
17 like, sort of the interests of everybody involved in a very  
18 difficult and perhaps I always hate to say unique, but  
19 perhaps unique situation.

20 JUDGE GINSBURG: The administration took a  
21 position I think a year earlier, I think in 2011, that the  
22 GSE should be wound down, right? There's a white, you know,  
23 you know, a press release or something like that, but then  
24 comes the Third Amendment, and it's now concrete, we're  
25 going to wind down these GSEs, but we're not going to pull

1 the receivership trigger, which would, of course, have  
2 required, we're expecting the liquidation preferences of the  
3 Plaintiffs.

4 MR. STERN: Well, it's not a liquidation, and the  
5 statute, I mean, first of all, the statute specifically  
6 contemplates, like, the wind down as being a power that can  
7 be asserted, like, in the conservatorship, you know. But  
8 it's, like, what --

9 JUDGE GINSBURG: Does it? Where is that?

10 MR. STERN: It's in, it's 4617(a)(2), which allows  
11 the conservator as well as the receiver to take actions for  
12 the purposes of reorganizing, rehabilitating, or winding up  
13 the affairs of the GSEs.

14 JUDGE GINSBURG: Yes, well, as I read that, it's,  
15 the word respectively is implicit in there.

16 MR. STERN: I disagree, Your Honor, because there  
17 are a lot of powers that are set out specifically for the  
18 conservator and the receiver in the statute, this one  
19 doesn't make that. But I think more fundamentally there is,  
20 like what the, I believe that the Third Amendment talks  
21 about an acceleration of, like, the, of like of the  
22 enterprises reducing or retaining mortgage portfolios, and  
23 in that sense that's a kind of winding up. The, like, what  
24 you have in terms just of their ongoing functionality is  
25 not, like, in any sort of particular, sort of, like way,

1 it's winding up, what Treasury does think, you know, is that  
2 given the difficulties that are involved in sort of like a  
3 recapitalization of any conservatorship, and, you know,  
4 we've said this many times that legislation is appropriate.  
5 But --

6 JUDGE GINSBURG: But when the Third Amendment was  
7 announced the Treasury said we're going to wind this thing  
8 down, we're going to kill it, we're going to drive a stake  
9 through its heart, and we're going to salt the earth so it  
10 can never grow back.

11 MR. STERN: I don't remember that language.

12 JUDGE GINSBURG: Yes. You may be confusing it  
13 with Tortego (phonetic sp.). But that was the gist of it,  
14 we're not going to allow it to be recapitalized in any way,  
15 and we're going to look to a future in which the GSEs don't  
16 play a role.

17 MR. STERN: Well, I think what Treasury has said  
18 repeatedly is that it thinks that congressional action is  
19 appropriate, and we've discussed, like, the difficulties of  
20 recapital --

21 JUDGE GINSBURG: But defending the congressional  
22 action it has to live within the statute it's got.

23 MR. STERN: Yes, and it is. I mean, because the  
24 alternatives are not good ones, I mean, it's not, like, what  
25 they had wasn't a good alternative, I mean, that wasn't

1 doing well. What's happened now it's like they're all sort  
2 of things to deal with a very difficult situation, and --

3 JUDGE GINSBURG: Well, I think they had two  
4 alternatives to act as a conservator, which they didn't want  
5 to do, or to act as a receiver, and move towards  
6 liquidation.

7 MR. STERN: No, Your Honor, I don't think that  
8 this is a move towards liquidation, there has not been a  
9 liquidation, and again --

10 JUDGE GINSBURG: Well, they could move slowly  
11 considering the size of the portfolio --

12 MR. STERN: Well, but --

13 JUDGE GINSBURG: -- they would have to move  
14 slowly.

15 MR. STERN: -- and they could legitimately do  
16 that, like, if that's what they wanted to do, they could do  
17 that.

18 JUDGE MILLETT: So, if you're moving --

19 MR. STERN: There's nothing wrong with a  
20 conservator doing that.

21 JUDGE MILLETT: If you're in the moving stage,  
22 you're not yet liquidating, is that something conservators  
23 do, or can only a receiver do the moving to liquidation?

24 MR. STERN: You can move towards a, I mean, a  
25 conservator can properly go, you know, we're going to, like,

1 sort of that this isn't working, we're going, like, we need  
2 to set the stage for liquidation. I don't say that that is  
3 what's happening here at all, I have no reason to believe  
4 that that's the case. I'm just saying that a conservator  
5 could do that, and the statute specifically refers to  
6 rehabilitating, reorganizing, winding, and winding up, those  
7 are all things that you, like, even if it didn't say that --

8 JUDGE MILLETT: How would we know when winding up  
9 stop and liquidation begins?

10 MR. STERN: Because you see a liquidation. I  
11 mean, like, you know, right now this, like, these things,  
12 these enterprises are functioning, they're performing their  
13 statutory purpose, that's what that legislation was all  
14 about. And, like, the stockholders, like, you know, are not  
15 the people who Congress wanted to sort of, like, be able to  
16 come in --

17 JUDGE GINSBURG: All right. Okay.

18 MR. STERN: -- and sue, and that's all that this,  
19 like, case is about is do they get to come in and say I'm  
20 not happy with the way that you guys are dealing with this.

21 JUDGE GINSBURG: Let's say that it said that  
22 directly, the stockholders may not sue, okay? Shareholders  
23 may not sue. That surely means in their capacity as  
24 shareholders, right? Creditors can sue, right? Tradesmen  
25 can sue?

1 MR. STERN: Yes.

2 JUDGE GINSBURG: Okay. So, they've come in in  
3 part asserting what they say are direct claims, not  
4 derivative claims, right? Not in their capacity as a,  
5 not -- in other words, the succession clause succeeds their  
6 rights as shareholders, but their, which would be their  
7 derivative rights.

8 MR. STERN: Well, I mean, again, I mean, the  
9 language is, like, very broad, all rights, titles, powers,  
10 privileges of the regulated entity, of any stockholder,  
11 director with respect to the entity, and the assets of the  
12 regulated entity, I mean, that's really broad. But as we  
13 discuss in our brief, like, these are, I mean, these are  
14 quintessential derivative claims, what they're saying is  
15 that the conservator, like, isn't, like, minding the  
16 store --

17 JUDGE GINSBURG: Well, if it's a --

18 MR. STERN: -- like, in looking after the  
19 enterprises.

20 JUDGE GINSBURG: If it's a quintessential  
21 derivative claim then the relief accrues to the corporation  
22 and not to them, right?

23 MR. STERN: Yes.

24 JUDGE GINSBURG: And they want their liquidation  
25 preferences, that's not an asset of a corporation.

1           MR. STERN: Well, I mean, that's what they say,  
2 but what they want, I mean, yes, I mean, everybody wants  
3 money for themselves sooner or later, I mean, like, you  
4 know, that's always the feature.

5           JUDGE GINSBURG: But the question is whether they  
6 want it directly or through the corporation.

7           MR. STERN: Right, and they want it, but they --

8           JUDGE GINSBURG: They say they want it directly.

9           MR. STERN: What they want is they're saying that  
10 the value of their shares, I mean, like, I mean, they don't,  
11 you know, they don't want this in liquidation, they don't  
12 want liquidation preferences, they want the value of their  
13 shares to go up, you know, they sort of, like, you know, at  
14 this point we're talking largely about speculators, and the  
15 idea of speculation is quite, you know, legitimate, you buy  
16 low, you try to sell high, they're going my shares would be,  
17 like, higher, you know. Fair enough. But Congress has also  
18 said you don't get to bring these lawsuits.

19           JUDGE GINSBURG: Well, they had a preexisting  
20 right to bring the lawsuit, the succession clause takes away  
21 something.

22           MR. STERN: Yes, it takes away.

23           JUDGE GINSBURG: But does it take away a direct  
24 claim? It doesn't take away a, just because a shareholder  
25 is a shareholder doesn't mean that his loss of rights as a

1 shareholder means his loss of rights in any other capacity.  
2 If he were also a tradesman he'd still retain his trade  
3 account.

4 MR. STERN: Yes. That's right. I mean, we're  
5 not -- but what we've got here is sort of something that's  
6 going sort of fundamentally to how the enterprises should be  
7 compensated, or how they should be compensating Treasury. I  
8 mean, and the claims are, like, are derivative of what they  
9 say is the harm to the enterprises, and again --

10 JUDGE GINSBURG: Well, that's a question of  
11 Delaware and Virginia law, correct?

12 MR. STERN: Well, I think it's, I mean, we've  
13 argued and I think correctly in our brief that this is a  
14 matter of federal law, but federal law, like, sort of, I  
15 don't think that there's a --

16 JUDGE MILLETT: Well, the complaint doesn't even  
17 ask, on their shareholder claims does not ask for damages to  
18 them, it asks for compensatory damages and disgorgement in  
19 favor of Fannie Mae. So, that sure sounds like they're not  
20 getting a recovery, correct?

21 MR. STERN: I think it's a derivative claim, Your  
22 Honor.

23 JUDGE MILLETT: All right.

24 JUDGE GINSBURG: Insofar as they want their  
25 liquidation preference they don't get, Fannie Mae doesn't

1 get anything.

2 MR. STERN: Yes, but the, look, again, that's  
3 like, like anything else that is sort of, you know, like a  
4 derivative of, like, sort of, like, harm, and it's also,  
5 like, so far away from being, like, a ripe claim, and what  
6 they, they don't want, I mean, the purpose of the relief  
7 that's being sought here, like, isn't to put, like, a  
8 directive to put this into liquidation so that they can  
9 realize their liquidation preferences, nobody wants that, I  
10 mean, that, that really, that really isn't what this lawsuit  
11 is about.

12 JUDGE GINSBURG: Well, what they do want is some  
13 sort of preservation of those liquidation preferences for  
14 when and if there's a liquidation, right? Which will have,  
15 as you said, an immediate effect on the price of their  
16 shares.

17 MR. STERN: Well, I mean, their liquidation  
18 preferences, like, haven't been, you know, taken away, I  
19 mean, what, you know, you know, what they've got, they've  
20 got, I mean --

21 JUDGE GINSBURG: What have they got?

22 MR. STERN: You know, look, here's what, what they  
23 have is a lot more than anybody would have had if not for  
24 these deals. I mean, like, you know, I mean, I realize,  
25 like, you know, I'm sort of beating a drum here, but, you

1 know, this is, I mean, in some respects, you know, like the  
2 shareholders are, like, the beneficiaries, and almost the  
3 incidental beneficiaries of a huge tax payer risk, you know,  
4 and what Congress was trying to do was to make sure that  
5 the, that the conservator and Treasury could take the steps  
6 that needed to be taken when everybody knew it was going to  
7 be a difficult time with an ongoing huge Treasury risk at  
8 issue. And we think that these things are really clear.  
9 And I thank you so much for your time.

10 JUDGE BROWN: Thank you. I know that no one had  
11 any time left because we used up all of your time, but we'll  
12 give you back three minutes for rebuttal.

13 ORAL ARGUMENT OF THEODORE B. OLSON, ESQ.  
14 ON BEHALF OF THE INSTITUTIONAL PLAINTIFFS  
15 PERRY CAPITAL LLC, ET AL.

16 MR. OLSON: Thank you, Your Honor. In the first  
17 place, this is who did it, what did they do, and why did  
18 they do it. We know that it was Treasury --

19 JUDGE GINSBURG: All in three minutes.

20 MR. OLSON: -- and FHFA working together, the  
21 record is replete with that, the statute precludes Treasury  
22 from supervising or directing what the FHFA does as with  
23 respect to its position as a conservator. Now, that is one  
24 violation of the statute, and there's a reason for that,  
25 because the FHFA is supposed to act as a fiduciary in its

1 capacity as a conservator, the Treasury would have separate  
2 interests, and it has the interest, and that's all over the  
3 record, too, of the tax payer. And so, that's what happened  
4 here, we saw the Treasury directing something that happened  
5 that they decided that was in the best interest of the tax  
6 payer, and there's plenty of the record that we have,  
7 probably more in the record that we don't have, that this  
8 was done to strip the stockholders of any residual value.

9           Now, when FHFA announced this in the first place  
10 on September 7, 2008 they answered this questionnaire, I  
11 referred to it before, 2443 in the Joint Appendix, the  
12 stockholders will continue to retain all rights in the  
13 stock's financial worth. Now, we find out that they didn't  
14 really intend that, or the Government didn't really intend  
15 that, but that what they also said on the same page, can the  
16 conservator determine to liquidate the company, answer, the  
17 conservator cannot make a determination to liquidate the  
18 company. Now, that is the FHFA determining or articulating  
19 what powers it has as a conservator under the statute that  
20 it administers.

21           Now, what we have is a shell game going on here,  
22 first of all, the Government decides that there's going to  
23 be a conservator and it has specific responsibilities and  
24 duties as a fiduciary acting as a conservator, it also then  
25 says well, we can act as a receiver at the same time, those

1 responsibilities, and those statutory duties are separate,  
2 and if you have, if you're acting as a conservator that is  
3 different than acting as a receiver.

4           What we know now, and I will summarize, that what  
5 the Government did acting together is decide that this was  
6 in its best interests of the tax payer, something that  
7 Congress might have decided to do, and by the way, the  
8 Appropriations Act, the record is quite clear, and we quote  
9 the supervising sponsor of that massive appropriations bill,  
10 it didn't validate or ratify what's going on here, and the  
11 sponsor specifically said so, but what has happened here is  
12 that the Government decided that it would bring these  
13 entities to a close, and it said that repeatedly, to  
14 liquidate them, and to make sure that they have no further  
15 value to the stockholders. They said, the FHFA said in the  
16 *Samuels* case that we quote in our briefs that they are net  
17 worth insolvent now.

18           The, the, since the, since this all took place  
19 there hasn't been a single dollar gone into these entities  
20 from the Treasury. The record is difficult for us to deal  
21 with because the Treasury Department talks about well, there  
22 may be some things in the record, but you really wouldn't be  
23 concerned about those things, the FHFA didn't even try to  
24 produce an administrative record, they did a --

25           JUDGE MILLETT: But you did say your --

1 MR. OLSON: -- they gave us a summary --

2 JUDGE MILLETT: You said your position would be  
3 the same whatever the record showed --

4 MR. OLSON: Well, it would -- we --

5 JUDGE MILLETT: -- on motivation, correct?

6 MR. OLSON: Well, we are entitled to an  
7 administrative record, and to the extent that we are  
8 entitled to that it should be remanded to the District Judge  
9 to insist on a record because --

10 JUDGE MILLETT: It's your position that --

11 MR. OLSON: -- we're entitled to know what  
12 happened and why it happened. But we're also saying --

13 MR. OLSON: But your position wouldn't change,  
14 right?

15 MR. OLSON: We're also saying, Judge Millett,  
16 because on the record that what we do have is we have the  
17 FHFA taking a position that it will be a conservator, we  
18 know they have said in their, it is said in the statute, it  
19 said in their regulation, it said in other things what they  
20 must do, which is to return the entity to a sound and  
21 solvent condition. We know that they haven't done that, we  
22 know that they have done the reverse of that. They've made  
23 it impossible. You can't have a conservator take all of the  
24 assets out of an entity. And the commitment, the Treasury  
25 commitment isn't an asset, they've said that themselves, not

1 under any standards is that an asset. It's a --

2 JUDGE BROWN: Mr. Cayne says that he will  
3 stipulate that maybe the Third Amendment was a bad deal, and  
4 so he says that's just a bad business judgment, so what's  
5 your response to that?

6 MR. OLSON: The response is that it might be a bad  
7 business judgment, and perhaps it was, but it was not the  
8 act of a conservator. And the power that the Government had  
9 is to make judgments with respect to the benefit of the  
10 conservator.

11 With respect to Section F, which we've talked  
12 about here, we referred to the *Leon* case, which specifically  
13 talks about the fact that the FHFA, which is an Eleventh  
14 Circuit decision in 2012, cannot evade judicial scrutiny by  
15 merely labeling its actions with a conservator stamp, and  
16 this is on page 1278 of the Federal Reports. Moreover, if  
17 the FHFA were to act beyond the statutory or constitutional  
18 bounds in a manner that adversely impacted the rights of  
19 others, Section 4617(f) would not bar judicial oversight or  
20 review of the actions, because the position that they're  
21 taking now is that we can do anything we want, and we're  
22 immune from judicial scrutiny, that cannot be, and that is  
23 not what the statute says. Nor the other provisions --

24 JUDGE GINSBURG: I think we have that point. Did  
25 you have a succinct and devastating, and I emphasize

1 succinct, comment on 4623?

2 MR. OLSON: Yes.

3 JUDGE GINSBURG: The jurisdictional --

4 MR. OLSON: We believe it applies to those  
5 sections that are referred to there of 4614, 15, 16, 17, and  
6 the actions of, we have briefed it before.

7 JUDGE GINSBURG: You'll submit on that?

8 MR. OLSON: Well, we will be happy to submit, but  
9 we do not apply, we do not believe it remotely applies to  
10 this situation, and it is incomprehensible that this Agency  
11 never thought to raise what they now say at the suggestion  
12 of the Court that oh, this lawsuit should never have taken  
13 place whatsoever.

14 JUDGE GINSBURG: Yes, well Homer nodded.

15 MR. OLSON: They came to it late. At any rate, we  
16 think that the record needs to be developed, we have an  
17 absolute right under *Overton Park* to look into what the  
18 Government was doing, why it was doing it, the circumstances  
19 of its doing it, but that this is clear, that there, if  
20 you're going to act as a conservator, and the powers of the  
21 Government can't be in the best interests of the agency  
22 which would obliterate all the other provisions in the  
23 statute, the Agency when acting as a conservator may act in  
24 the interests of the agency fulfilling those  
25 responsibilities, but it doesn't rub out all the other

1 statutory provisions. And you look at their regulations in  
2 76 C.F.R. which we've cited, the primary purpose is to  
3 preserve the entity, and return it to a sound and solvent  
4 condition.

5 JUDGE GINSBURG: Enough said.

6 JUDGE BROWN: Thank you.

7 ORAL ARGUMENT OF HAMISH P.M. HUME, ESQ.

8 ON BEHALF OF THE CLASS PLAINTIFFS

9 MR. HUME: Thank you, Your Honors. I'll be very  
10 brief. Mr. Cayne for the FHFA said that the shareholders  
11 have more rights in receivership than conservatorship, that  
12 is not only logically impossible, but irreconcilable with  
13 the statute. 4617B(2)(k)(i) says that it is the act of  
14 putting the entities into receivership, only receivership,  
15 that shall terminate the rights and claims of the  
16 shareholders arising out of their status as shareholders.  
17 That's the action, subject to their payment claims under  
18 C(1)(d), and other provision recognized there that it  
19 constrains, it's a limitation when it goes into receivership  
20 for shareholders. Before that they obviously have more  
21 rights, and it was acknowledged, Mr. Olson, J.A. 2443, I  
22 urge the Court to look at it. Mr. Lockhart, the Director of  
23 FHFA, or the, in their formal written answers say  
24 shareholders continue to retain all rights in the stock's  
25 financial worth. They retain rights in conservatorship to

1 the economic rights of their shares, they can still trade  
2 them, no one said anything that they can't trade, they can  
3 receive dividends if you're the Treasury anyway, a  
4 shareholder has rights in conservatorship.

5 JUDGE MILLETT: Do those rights change under the  
6 PSPAs or their First and Second Amendment?

7 MR. HUME: No.

8 JUDGE MILLETT: They didn't change at all?

9 MR. HUME: No, not that I'm aware of.

10 JUDGE MILLETT: Their order of payment?

11 MR. HUME: I don't think they changed, they were  
12 nullified in the Third Amendment. And Your Honor, to your  
13 question about the original deal on the prohibition on  
14 dividend without Treasury's consent, 5.1 it clearly says  
15 without Treasury's consent, it's not an absolute prohibition  
16 that would allow Treasury to consent, the reason we're not  
17 challenging that --

18 JUDGE MILLETT: All right. So, that's the right  
19 you had coming into the Third Amendment is no dividend  
20 without Treasury's consent, and you don't challenge that?

21 MR. HUME: The reason --

22 JUDGE MILLETT: That's what I was just asking  
23 about it changing.

24 MR. HUME: Yes. The reason we're not challenging  
25 the provision in the original PSPA that says no dividends

1 without Treasury's consent is that is not the thing that has  
2 caused us not to receive dividends.

3 JUDGE MILLETT: No, I understand, but what -- so,  
4 the stockholder interests by the time of the Third Amendment  
5 were that we have a right to a dividend after Treasury is  
6 paid with Treasury's consent?

7 MR. HUME: No, it doesn't say after Treasury has  
8 been paid, it just says with Treasury's consent. It's not  
9 different than any shareholder's right to a dividend, it's  
10 contingent on the people who control the company declaring a  
11 dividend, that's all it says. They have to declare it, and  
12 that's not what happened. The reason we're not challenging  
13 that is that's not the reason we didn't get a dividend.

14 Since I'm running out of time, they say we don't  
15 say anything about the periodic commitment fee, the reason  
16 we don't is they waived that it had no value, it was at best  
17 going to be based on a market value, so at best it creates a  
18 fact issue of what that would be. And I want to be careful  
19 --

20 JUDGE MILLETT: Wait, how can you say it had no  
21 value?

22 MR. HUME: Well, they never, they waived it every  
23 year --

24 JUDGE MILLETT: Well, they waived it, but that  
25 doesn't mean it doesn't have value --

1 MR. HUME: Fair enough.

2 JUDGE MILLETT: -- going forward.

3 MR. HUME: Then it may have had some potential  
4 value, and I want to be careful here because there's  
5 protected information that's with the Court that would  
6 address the issue. I would simply request that the Court  
7 look at Exhibit 34 to the Institutional Plaintiff's motion  
8 for judicial notice. It's a fact issue of what the value  
9 would have been, and it's our position it would have paled  
10 in comparison to the net worth sweep and the hundred billion  
11 dollars, and tens of billions of dollars they've swept over.

12 This debate, Your Honors, just if I could on the  
13 direct claims, when they say we have no rights, and then  
14 they said we have no direct claims, they've never said that  
15 before. Neither they nor the FDIC, no court, as Judge  
16 Easterbrook said, no court has ever held the FIRREA  
17 succession provision, or the HERA succession provision does  
18 that, and numerous courts have allowed it. And they --

19 JUDGE MILLETT: Well, they haven't said it because  
20 you didn't raise it, and your complaint doesn't seek any  
21 relief on it.

22 MR. HUME: No, no, no. No, no, no. Sorry, Judge  
23 Millett. We absolutely raised direct claims. Our breach of  
24 contract claims were unambiguously always --

25 JUDGE MILLETT: Okay. Breach of contract, okay.

1 MR. HUME: -- uniformly direct.

2 JUDGE MILLETT: I was distinguishing, because I  
3 was, you had shareholder claims that were derivative and  
4 direct, and then you, as I took your briefing you also had  
5 contract claims. So, what you're calling direct claims are  
6 the same as your contract claims?

7 MR. HUME: Our contract claims are direct claims.

8 JUDGE MILLETT: Yes.

9 MR. HUME: They have always been direct claims.

10 JUDGE MILLETT: Do you have any direct claims  
11 distinct from those?

12 MR. HUME: We litigated them as direct claims,  
13 they were analyzed as direct claims, and --

14 JUDGE GINSBURG: Because the contract in question  
15 is the certificate of the shares.

16 MR. HUME: Yes, it's --

17 JUDGE MILLETT: Right.

18 MR. HUME: -- a contract between me the  
19 shareholder and you the company. I'm the shareholder, I get  
20 to enforce the contract. It is a direct claim, look at page  
21 six of our reply brief, those kinds of claims are always  
22 analyzed under state law as direct claims. They didn't even  
23 argue this in the District Court, or in any other case, in  
24 *Kellmer*, in the *Barnes* case, see footnote --

25 JUDGE MILLETT: I just want to be, I just want to

1 make sure I'm crystal clear in understanding this --

2 MR. HUME: Yes.

3 JUDGE MILLETT: Is your direct claim, is that just  
4 another way of talking about your contract claims, or do you  
5 use a direct claim label to mean something in addition to  
6 your contract claims?

7 MR. HUME: No.

8 JUDGE MILLETT: I'm sorry?

9 MR. HUME: Let me try to be very clear. Our  
10 breach of contract claims are direct claims. I don't mean  
11 to suggest there's some other amorphous direct claim. Our  
12 breach of contract claims are all direct, breach of  
13 contract, breach of implied covenant. The only issue was  
14 whether we said enough for a direct fiduciary breach claim.  
15 And on that, I'll rest on what I said before, which is we  
16 think we said enough, if not, we ask the right to amend.  
17 But on breach of contract there's no ambiguity at all, those  
18 claims were brought --

19 JUDGE MILLETT: Right.

20 MR. HUME: -- only as direct claims --

21 JUDGE MILLETT: Right.

22 MR. HUME: -- and we asked for damages in  
23 paragraph seven of our prayer for relief, below what Your  
24 Honor just read, Judge Millett --

25 JUDGE MILLETT: Right.

1 MR. HUME: -- we asked for payment --

2 JUDGE MILLETT: For the contract claims, right.

3 MR. HUME: -- directly to the shareholders,  
4 directly, nothing new is through the companies. And that --  
5 just to -- in the *Barnes* case, the *Leven* case, the *Kellmer*  
6 case, the FHFA or the FDIC, whichever it was didn't even try  
7 to intervene on behalf of the direct claims. They admitted  
8 through their conduct that direct claims belong to the  
9 shareholders. They never even took the position in any of  
10 those cases, please see the cases in footnote six on page  
11 four of our reply, and also what happened in *Kellmer*. And  
12 it does, to what we discussed earlier, it does raise a  
13 serious issue of constitutional doubt to even suggest the  
14 shareholders, whom they admit have economic rights and  
15 interests, don't have the ability to come to court to  
16 protect them, that raises serious constitutional issues as  
17 recognized by Judge Easterbrook in the *Leven* case, and the  
18 Plaintiffs in all *Winstar* case, and by Judge Edwards in the  
19 *Waterview* case, and in the, which is cited in the *Pershing*  
20 *Square* Amicus brief, which I --

21 JUDGE MILLETT: Did you raise --

22 MR. HUME: -- strongly commend the Court to look  
23 at, because it --

24 JUDGE MILLETT: Did you raise his constitutional  
25 doubt argument in your opening brief?

1 MR. HUME: Did we?

2 JUDGE MILLETT: In your opening brief? I didn't  
3 see it there.

4 MR. HUME: I don't know whether we did, but the  
5 *Pershing Square* Amicus brief raises it, and it's most  
6 applicable to the direct claims.

7 Finally, Your Honors, this whole debate about  
8 receivership, conservatorship, what on earth should we as a  
9 country do with these two entities? It's fascinating, but  
10 it's irrelevant to the simple fact that the private  
11 shareholders had contractual rights that were breached, and  
12 our friends at the FHFA said well, you didn't do anything to  
13 save, you didn't invest to help rescue this entity, I want  
14 the Court to know that of the \$35 billion of preferred, \$22  
15 billion of it was invested in 2007 and '08 when it was clear  
16 that these entities were distressed, and that can be found  
17 in the record at FHFA 631 and 2062, the document in the  
18 District Court 24-10 at 302 and 560. \$22 billion in those  
19 last two years. Who's going to want to -- and they invested  
20 on the strength of those certificates that said they got  
21 paid before any common, and that's what they've done is  
22 they've taken their common and just converted it up into  
23 their senior preferred in the Third Amendment. Who's going  
24 to want to invest in financially distressed entities that  
25 might go into conservatorship if you recognize the risk of

1 conservatorship, you know they have broad powers, but can  
2 they rescue, make one deal, four years later when the  
3 company is doing better just change the deal so they get all  
4 the money, no one will invest, it'll be terrible for tax  
5 payers and investors. Thank you.

6 JUDGE BROWN: All right. Thank you, Mr. Hume.  
7 The case will be submitted. Do we want supplemental  
8 briefing on 4623?

9 JUDGE GINSBURG: I think we should.

10 JUDGE MILLETT: If they want to submit, yes.

11 JUDGE BROWN: All right. We would like  
12 supplemental briefing on 4623, five pages.

13 JUDGE MILLETT: Five is plenty.

14 JUDGE GINSBURG: Five pages, seven day; 10 pages,  
15 seven days.

16 JUDGE BROWN: Okay. Ten pages, seven days. Thank  
17 you.

18 (Whereupon, at 12:27 p.m., the proceedings were  
19 concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



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Paula Underwood

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April 20, 2016

DEPOSITION SERVICES, INC.