Via ECF

Michael E. Gans
Clerk of Court
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
St. Louis, MO 63102

Re:  Saxton v. Federal Housing Finance Agency, No. 17-1727

Dear Mr. Gans:

The Court should not follow the Seventh Circuit’s opinion in Roberts v. FHFA, which fails to engage with Judge Brown’s dissenting opinion in Perry Capital and the most powerful arguments in favor of Plaintiffs’ position.

When Congress says that an agency “may” do one thing, it does not simultaneously give the agency license to do the opposite. See Brief of Plaintiffs-Appellants at 20 (May 24, 2017). Like the Perry Capital majority, the Seventh Circuit was unable to identify a provision of HERA that affirmatively grants FHFA a conservatorship power to siphon essentially all of the Companies’ capital into the federal government’s coffers. Nor can the Seventh Circuit’s interpretation of HERA as granting unlimited discretionary authority to FHFA as conservator be reconciled with common sense, let alone the avalanche of statements by FHFA itself over the last decade acknowledging that Section 4617(b)(2)(D) prescribes the agency’s mandatory conservatorship mission. See id. at 21–22.

The Seventh Circuit also went seriously astray in concluding that FHFA’s adoption of the Net Worth Sweep must be upheld so long as it “could have
believed” that it was serving the purpose of conserving the Companies’ assets. 
Roberts Op. at 12 (May 3, 2018). The court in Roberts was obliged, as is this 
Court, to accept as true the well-pled (and amply supported) factual allegations of 
the complaint, not to conjure purposes that contradict those detailed in the 
complaint, Compl. ¶¶ 15–16, 19, 90, 119 (JA24–26, 55, 68–69), and, indeed, 
admitted publicly by the Government itself when it adopted the Sweep, see Compl. 
¶ 117 (JA67).

The Seventh Circuit was also wrong to treat shareholder challenges to the 
of Plaintiffs-Appellants at 43–53. FHFA did not succeed to Plaintiffs’ right to 
bring this direct APA claim, and in any event the Court should not read HERA to 
make vindication of Plaintiffs’ rights contingent on FHFA’s willingness to sue 
itself.

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper

Counsel for Appellants

cc: Counsel of Record (by ECF)