No. 97-1960

In the Supreme Court of the United States

OCTOBER TERM, 1997

LAFAYETTE FEDERAL CREDIT UNION, ET AL., PETITIONERS

v.

NATIONAL CREDIT UNION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly dismissed petitioners' complaint seeking to set aside the conservatorship and liquidation of a federal credit union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 133 F.3d 915 (Table). The opinion of the district court (Pet. App. 4a-19a) is reported at 960 F. Supp. 999.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1998. A petition for rehearing was denied on March 6, 1998. Pet. App. 20a-21a. The petition for a writ of certiorari was filed on June 4, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent National Credit Union Administration (NCUA) has authority and responsibility for regulating and supervising the Nation's federally chartered credit unions and state chartered credit unions that are federally insured. NCUA is managed by the National Credit Union Administration Board (Board or NCUA Board). 12 U.S.C. 1752a(a) and (b). The Federal Credit Union Act (FCUA or Act), 12 U.S.C. 1751 *et seq.*, confers broad powers upon the NCUA Board to oversee the affairs of credit unions within its purview. This case involves the Board's exercise of its powers regarding conservatorship and liquidation with respect to one of those credit unions.

1. The FCUA gives the NCUA Board statutory authority to place credit unions into conservatorship in specified circumstances: "The Board may, *ex parte* without notice, appoint itself as conservator and immediately take possession and control of the business and assets of any insured credit union in any case in which * * * the Board determines that such action is necessary to conserve the assets of any insured credit union or to protect the [National Credit Union Share Insurance] Fund or the interests of the members of such insured credit union." 12 U.S.C. 1786(h)(1)(A); see also 12 U.S.C. 1786(h)(1)(B)-(D).

The Act further provides an exclusive mechanism for judicial review of an NCUA Board order placing a credit union into conservatorship. A credit union that is placed into conservatorship may seek judicial relief within ten days of the conservatorship order, and no court may take any action outside that ten-day window to affect the Board's powers as conservator:

> Not later than ten days after the date on which the Board takes possession and control of the business and assets of an insured credit union pursuant to paragraph (1), such insured credit union may apply to the United States district court for the judicial district in which the principal office of such insured credit union is located or the United States District Court for the District of Columbia, for an order requiring the Board to show cause why it should not be enjoined from continuing such possession and control. *Except as provided in this paragraph, no court may take any action, except at the request of the Board by regulation or order, to restrain or affect the exercise of powers or functions of the Board as conservator.*

12 U.S.C. 1786(h)(3) (emphasis added).

In addition to granting powers regarding conservatorship, the FCUA authorizes the NCUA Board to place a credit union into liquidation based on the Board's finding that the credit union is insolvent. See 12 U.S.C. 1787(a)(1)(A). Once the Board appoints itself liquidating agent, the Act provides a comprehensive administrative claims procedure for persons to assert their rights with respect to the credit union's assets. An administrative claim must be submitted to NCUA within 90 days of the Board's becoming liquidating agent. Within 60 days of an adverse agency decision, an aggrieved party may challenge the NCUA action in district court or appeal within the agency to the NCUA Board. Adverse Board determinations are subject to judicial review as well. See 12 U.S.C. 1787(b)(3)-(7). Other than that procedure specified in the FCUA, the courts do not have

jurisdiction over any action seeking a determination of rights with respect to the credit union's assets:

> (D) Limitation on judicial review
>
> *Except as otherwise provided in this subsection, no court shall have jurisdiction over —*
>
> (i) *any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any credit union for which the Board has been appointed liquidating agent,* including assets which the Board may acquire from itself as such liquidating agent; or
>
> (ii) any claim relating to any act or omission of such credit union or the Board as liquidating agent.

12 U.S.C. 1787(b)(13)(D) (emphasis added).

2. This case arises from the conservatorship and liquidation of Capital Corporate Federal Credit Union (CapCorp), a federally chartered corporate credit union. As a "corporate," CapCorp's members were other credit unions, rather than natural persons, and its primary purpose was to serve as a liquidity facility for its members. As of December 1994, CapCorp had about 450 members and total assets in excess of $1 billion. C.A. App. 41.

On January 31, 1995, the NCUA Board issued an Order of Conservatorship (Order) placing CapCorp into conservatorship and appointing itself conservator pursuant to 12 U.S.C. 1786(h)(1). C.A. App. 78-81. The Order incorporated by reference the Board's

Confidential Statement of Grounds for Conservatorship. C.A. App. 78, 83. The latter document explained that a substantial portion of CapCorp's assets was invested in mortgage-backed securities known as "Collateralized Mortgage Obligations"; that this securities portfolio was sensitive to changes in interest rates and had already incurred unrealized losses of $100 million; that further losses were possible if interest rates continued to rise; that CapCorp had already borrowed in excess of its legal borrowing limit in order to meet the liquidity needs of its members; and that there was concern about a possible run on CapCorp's accounts. C.A. App. 83-84.

The Order of Conservatorship also contained an express finding that CapCorp was insolvent. C.A. App. 83. Based on that finding and the other grounds articulated, the Board's Order expressly authorized NCUA, as conservator of CapCorp, to liquidate any and all of CapCorp's assets. C.A. App. 79. The Order explained that "[a] period of conservatorship will permit NCUA, as conservator of CapCorp, to pursue merger and purchase and assumption opportunities designed to dispose of CapCorp's investment losses." C.A. App. 84.

CapCorp's board of directors was served with and received the Order of Conservatorship, including the Confidential Statement Of Grounds For Conservatorship, on the day it was issued. C.A. App. 82, 85. The Order expressly advised CapCorp of its right to seek judicial review of the Order within ten days, as is provided by 12 U.S.C. 1786(h)(3). C.A. App. 81. CapCorp brought no action for judicial review.

Within ten business days of January 31, 1995, in its capacity as conservator of CapCorp pursuant to the Order of Conservatorship, NCUA auctioned a sub-

stantial portion of CapCorp's securities portfolio. C.A. App. 47. It sold substantially all of the remainder of CapCorp's portfolio by February 21, 1995. C.A. App. 47. On April 12, 1995, the NCUA Board appointed itself liquidating agent for CapCorp, and approved a purchase and assumption of CapCorp into Mid-Atlantic Corporate Federal Credit Union effective April 28, 1995. C.A. App. 48, 129.

3. Petitioners are 94 of CapCorp's approximately 450 former credit union members. Petitioners held special "Membership Capital Share Deposits" in CapCorp, which CapCorp denominated "Preferred Capital Shares." See 12 C.F.R. 704.2 (1997). "Preferred Capital Shares" earned a higher rate of interest than regular credit union share accounts, but were not insured.[1]

In November 1996—almost two years after CapCorp was placed into conservatorship, and more than eighteen months after the Board appointed itself liquidating agent for CapCorp—petitioners commenced this action in federal district court. C.A. App. 20-54. Petitioners complained that they had incurred monetary losses as a result of CapCorp's conservatorship and liquidation because they had not recovered the full value of their uninsured accounts. C.A. App. 47. Their complaint further asserted that each of the premises underlying the Board's January 31, 1995, conservatorship order was erroneous. C.A. App. 44. In particular, the complaint alleged that CapCorp was not insolvent and that its portfolio of collateralized mortgage obligations was not a risky investment.

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[1] Regular federal credit union share accounts are insured up to $100,000 through the National Credit Union Share Insurance Fund. See 12 U.S.C. 1781, 1783 (1994 & Supp. II 1996).

According to the complaint, the NCUA Board's findings to the contrary were mistaken and based on inaccurate and incomplete information supplied by NCUA staff. C.A. App. 44-45. The complaint alleged that, for those reasons, the conservatorship and ensuing liquidation of CapCorp's assets should not have occurred and were "unlawful, arbitrary, and capricious." *Ibid.*

Although petitioners had not filed an administrative claim asserting any rights in connection with CapCorp's assets, their complaint further asserted that they possessed "ownership interests in CapCorp's assets, including but not limited to each and every security owned by CapCorp prior to the liquidation of CapCorp's portfolio." C.A. App. 49-50. Petitioners alleged that the conservatorship of CapCorp and liquidation of its assets therefore resulted in a "deprivation of [their] property without due process of law in violation of the Fifth Amendment." C.A. App. 53.

As a remedy, petitioners sought injunctive and declaratory relief under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*; their complaint did not invoke the district court's jurisdiction under the Federal Tort Claims Act, 28 U.S.C. 1346(b) (Supp. II 1996) and 2671-2680, and petitioners sought no tort damages. C.A. App. 40. Asserting that "equity demands the return of the assets imprudently, improperly, unlawfully, arbitrarily, and capriciously liquidated," C.A. App. 50, the complaint prayed that the entire liquidated portfolio of CapCorp's securities be "equitably reconstitut[ed]," C.A. App. 49, and that CapCorp be restored to the condition that it was in immediately prior to issuance of the Order of Conservatorship on January 31, 1995. C.A. App. 53.

The district court dismissed petitioners' complaint for lack of subject matter jurisdiction. Pet. App. 4a-19a. The court held that, under 12 U.S.C. 1786(h)(3), it lacked authority to grant the equitable relief requested, because CapCorp had failed to challenge the conservatorship order within the statutory 10-day window. Pet. App. 17a. In addition, the court held that the complaint was independently barred because petitioners had never made an administrative claim before the agency. Pet. App. 16a. Noting that the exhaustion requirement in 12 U.S.C. 1787(b)(13)(D) is jurisdictional, Pet. App. 14a-15a, the court ruled that petitioners' failure to invoke their administrative remedies deprived it of jurisdiction to hear their claims in the first instance. Finally, the court rejected petitioners' procedural due process claim on its merits. Pet. App. 17a-18a. The court observed that this was not a case in which Congress had failed to provide adequate procedures; rather, Congress had provided applicable administrative and judicial review mechanisms but "neither Plaintiffs nor CapCorp availed themselves of [them]." Pet. App. 18a. Thus, the court concluded, petitioners' allegation under the Fifth Amendment failed to state a claim upon which relief could be granted.[2]

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[2] Responding to petitioners' suggestion that a taking had arisen in conjunction with the alleged Due Process violation, the district court also noted that "it is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver to take control of the bank's assets." Pet. App. 18a (quoting *Branch* v. *United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995), cert. denied, 117 S. Ct. 55 (1996)). The petition raises no takings issue.

In a short, unpublished decision, a unanimous panel of the court of appeals "affirm[ed] on the reasoning of the district court." Pet. App. 3a.

ARGUMENT

Petitioners contend that the NCUA Board's conservatorship and ensuing liquidation of CapCorp were unlawful and arbitrary and capricious. The district court rejected petitioners' claims on both procedural and substantive grounds, and the court of appeals affirmed for the reasons stated by the district court. The judgment of the court of appeals is correct and is not in conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted.

1. Petitioners filed a complaint contending that the Board's underlying premises—that CapCorp was insolvent and had an unduly risky investment portfolio—were mistaken and based on incomplete and inaccurate information supplied by NCUA staff. C.A. App. 44-45. Their complaint, which was filed long after the NCUA Board undertook the liquidation of CapCorp (see pp. 4-6, *supra*) demanded that the assets sold by the conservator be returned and that CapCorp be restored to the same condition that it was in prior to the imposition of the conservatorship on January 31, 1995. C.A. App. 53.

Petitioners' complaint is plainly barred by 12 U.S.C. 1786(h)(3). That provision establishes a specific procedure for obtaining judicial review of NCUA conservatorships and expressly states that the specified procedure is exclusive. Only the credit union under conservatorship, through its board of directors—not its members or any other persons—may seek judicial review, and such an action must be

brought within ten days of the date on which the conservatorship order is issued. 12 U.S.C. 1786(h)(3).[3] CapCorp—a billion-dollar financial institution whose directors were senior executives of its member credit unions and who at all times had the full benefit of legal counsel—decided not to challenge the NCUA Board's determination within the required ten-day period. The statute precludes this subsequent action to undo the conservatorship brought two years after the fact by some of CapCorp's members.[4]

Petitioners make three arguments to the contrary, each of which lacks merit. First, petitioners assert that, as Capcorp's members, they have "derivative" standing to challenge CapCorp's conservatorship. See Pet. 6-7. That proposition, even if accurate, does not cure the procedural default. The exclusive means to challenge the conservatorship was to bring suit within ten days. Even if, as they suggest, petitioners had standing to bring a derivative action on CapCorp's behalf, they brought no such action within the

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[3] Those requirements and limitations are not unusual. See Pet. 12 n.8. Similar provisions are contained in the parallel statutory schemes applicable to other financial institution regulatory agencies. See, *e.g.*, 12 U.S.C. 1464(d)(2)(B), 1464(d)(2)(D) (Office of Thrift Supervision (OTS)); 12 U.S.C. 1821(c)(7), 1821(g) (Federal Deposit Insurance Corporation (FDIC)). See also 12 U.S.C. 1787(g).

[4] While the merits of petitioners' case are not at issue, we call to the Court's attention that petitioners' references to the merits are incorrect. In particular, petitioners' "Statement of the Case" suggests that a report prepared by the staff of a congressional subcommittee demonstrates that NCUA's actions regarding CapCorp were improper. See Pet. 2-4. In fact, the cited document expressly states that "this report does *not* review the appropriateness of NCUA action regarding CapCorp." C.A. App. 63 n.28 (emphasis added).

required ten-day period. This lawsuit was filed out of time, regardless of any question of petitioners' "derivative" standing.

Second, petitioners contend that compliance with 12 U.S.C. 1786(h)(3) was not required because CapCorp was not properly informed of the nature of the conservatorship at the time the conservatorship was imposed. See Pet. 10. That fact-based contention is belied by the record. CapCorp's board of directors was served with and received the NCUA Board's Order of Conservatorship on the day it was issued—January 31, 1995. C.A. App. 82, 85. The Order expressly stated that CapCorp was being placed immediately into conservatorship because the NCUA Board had found, *inter alia*, that CapCorp was insolvent and that its investment portfolio was excessively risky. C.A. App. 78, 83-84. The Order also explicitly advised that the NCUA Board had appointed itself conservator and authorized the liquidation of any and all of CapCorp's assets during the conservatorship. C.A. App. 78, 79. Finally, the Order specifically apprised CapCorp of its right to seek judicial review of the Order within ten days under 12 U.S.C. 1786(h)(3). C.A. App. 81. CapCorp and its members thus unquestionably received proper, timely notice of the Board's action.

Third, petitioners contend that 12 U.S.C. 1786(h)(3) is inapplicable because their complaint was filed after CapCorp's conservatorship had come to an end. See Pet. 8-10.[5] That contention disregards the statutory

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[5] The conservatorship ended on April 12, 1995, when the NCUA Board appointed itself liquidating agent of CapCorp and approved the purchase and assumption of CapCorp by another institution. See p. 5, *supra*.

text, which bars *any* court action seeking "to restrain or affect the exercise of powers or functions of the Board as conservator," with the sole exception of actions for judicial review properly brought by the credit union itself within the statutory ten-day window. 12 U.S.C. 1786(h)(3). Petitioners' complaint sought sweeping injunctive and declaratory relief to set aside the appointment and all of the subsequent actions of NCUA as CapCorp's conservator. If granted, that relief plainly would have "affected" the exercise of NCUA's powers as conservator; indeed, it would have undone everything that NCUA did as conservator of CapCorp.

Petitioners incorrectly assert (Pet. 9) that the Tenth Circuit's decision in *Franklin Savings Ass'n* v. *OTS*, 35 F.3d 1466 (1994), is to the contrary. The Tenth Circuit there held that judicial review was unavailable to set aside OTS's determination to replace a conservator with a receiver. The Tenth Circuit noted that any perceived harshness flowing from its ruling was alleviated by the fact that "post-action suits do not affect or restrain the exercise of powers or functions of the agency actors" and are therefore not barred. *Id.* at 1472 n.7.

Petitioners seize upon the reference to "post-action suits," suggesting that it stands for the proposition that after-the-fact actions for equitable relief are permitted. See Pet. 9. But that is not what the Tenth Circuit said. Rather, that court held that statutory clauses like 12 U.S.C. 1786(h)(3) "have consistently been read as anti-injunction provisions." *Franklin*, 35 F.3d at 1472 n.7. Those provisions, the court observed, "block parties from seeking temporary restraining orders, injunctions, and declaratory judgments against the banking agencies,"

ibid., but "do not seem to block" suits "challenging governmental action after-the-fact *and seeking compensation for wrongs committed*," *id*. at 1472 (emphasis added). Thus, the court drew a distinction between claims for equitable relief, which are barred, and claims for money damages, which are not foreclosed.

That distinction, which petitioners overlook, disposes of their argument. As noted, the complaint in this case did not invoke the district court's jurisdiction under the Federal Tort Claims Act and sought no tort damages. Petitioners sought only injunctive and declaratory relief, which is barred by 12 U.S.C. 1786(h)(3). See *Franklin*, 35 F.3d at 1472 n.7 ("These [anti-injunction] sections block parties from seeking temporary restraining orders, injunctions, and declaratory judgments against the banking agencies."); *In re Landmark Land Co.*, 973 F.2d 283, 290 (4th Cir. 1992) ("the anti-injunction provision specifically precludes *equitable* interference") (emphasis added).

Petitioners conclude that "[i]f the district court's opinion and the Fourth Circuit's * * * affirmance are allowed to stand," the result will be to "eliminate effective judicial review." Pet. 5-6. There is no basis for that assertion. Section 1786(h)(3) provides a full opportunity for the affected credit union to challenge the premises underlying a conservatorship order within ten days of its issuance. Moreover, Section 1786(h)(3) imposes no bar on an otherwise viable claim for monetary relief. Contrary to petitioners' portrayal, the statutory procedures provided by Con-

gress allow for meaningful judicial review; they were simply not invoked in this case.[6]

2. The court of appeals and the district court correctly concluded that petitioners' complaint was jurisdictionally barred for a second, independent reason: petitioners failed to exhaust their administrative remedies. That fact-bound determination also does not warrant further review.

Congress has provided a comprehensive procedure for asserting rights with respect to the assets of a credit union for which the NCUA Board has been appointed liquidating agent. See 12 U.S.C. 1787(b). Any interested party claiming such rights must submit an administrative claim to the agency within specified time frames. Judicial review is then available, but only if an administrative claim has been filed in accordance with statutory requirements. "Except as otherwise provided in this subsection, no court shall have jurisdiction over * * * any action seeking a determination of rights with respect to, the assets of any credit union for which the Board has been appointed liquidating agent." 12 U.S.C. 1787(b)(13)(D).

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[6] Petitioners posit a scenario in which the NCUA Board appoints itself conservator, waits ten days, and then without warning begins to engage in *ultra vires* conduct. Petitioners suggest that injunctive relief would be available in such circumstances. See Pet. 9; see also Pet. 6 (banking agencies could "impose a conservatorship, wait 10 days, and then claim immunity from judicial review no matter what harms they wreak"). That question is not presented here. This case does not involve any *ultra vires* conduct, see pp. 17-19, *infra*, and, as we have shown, CapCorp received proper, timely notice of the conservatorship on the day it was imposed.

Petitioners' complaint is barred by this "[l]imitation on judicial review." 12 U.S.C. 1787(b)(13)(D). By its terms, the complaint sought a determination of rights with respect to the assets of CapCorp, a credit union for which the Board had been appointed liquidating agent. Indeed, the complaint specifically asserted that petitioners had "ownership interests in CapCorp's assets, including but not limited to each and every security owned by CapCorp prior to the liquidation of CapCorp's portfolio." C.A. App. 49-50. On that basis, petitioners sought an injunction ordering the return of CapCorp's liquidated securities holdings. C.A. App. 49, 53. Petitioners, however, never filed an administrative claim with the NCUA. Therefore, as the courts below properly concluded, the district court had no jurisdiction over this action.

Petitioners' three grounds of disagreement with the courts below are unpersuasive. First, petitioners suggest that the jurisdictional bar set forth in 12 U.S.C. 1787(b)(13)(D) applies only to "creditors" and therefore does not apply to them because they are not "creditors." See Pet. 10. However, as the D.C. Circuit noted in rejecting the same argument in the context of the identical provision applicable to the FDIC (12 U.S.C. 1821(d)(13)(D)), petitioners' argument "does not comport with the statutory language." *Freeman* v. *FDIC*, 56 F.3d 1394, 1400 (D.C. Cir. 1995). "[O]n its face," the limitation on judicial review "applies to *anyone* * * * 'seeking a determination of rights' with respect to the failed institution's assets." *Ibid.* "We therefore hold that the § 1821(d) jurisdictional bar is not limited to claims by 'creditors,' but extends to all claims and actions against, and actions seeking a determination of rights with

respect to, the assets of failed financial institutions." *Id*. at 1402.

Second, petitioners cite the fact that their complaint named NCUA as a defendant not only in its capacity as CapCorp's conservator, but also in its corporate capacity. See Pet. 11-12. Petitioners are correct that a statute barring suit against an agency in its capacity as conservator or receiver does not necessarily preclude an action brought against the agency in its corporate capacity. See *ibid*. (citing *Sierra Club, Lone Star Chapter* v. *FDIC*, 992 F.2d 545, 547 (5th Cir. 1993), and *Rosa* v. *RTC*, 938 F.2d 383, 392 (3d Cir.), cert. denied, 502 U.S. 981 (1991)). But the particular jurisdictional provision at issue here bars "*any* action seeking a determination of rights with respect to, the assets of a[ ] credit union for which the Board has been appointed liquidating agent," 12 U.S.C. 1787(b)(13)(D) (emphasis added), if no administrative claim has been filed. Petitioners' complaint falls within the scope of that provision because petitioners filed no administrative claim. Therefore, the action is barred. It makes no difference that petitioners sued NCUA in its corporate capacity in addition to its capacity as CapCorp's conservator.[7]

Third, petitioners invoke (Pet. 13) the Court's ruling in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996). In that case, financial institutions sued the government for damages based on breach of contract. In contrast, this suit seeks equitable return of

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[7] In any event, the only relevant action taken by NCUA in its corporate capacity with respect to CapCorp was the threshold decision to appoint itself conservator of CapCorp on January 31, 1995. Petitioners' challenge to that decision is plainly barred by 12 U.S.C. 1786(h)(3).

CapCorp's liquidated securities portfolio, based on petitioners' asserted property rights in CapCorp's assets. C.A. App. 49, 53. Because petitioners' "action seek[s] a determination of rights with respect to the assets of a[] credit union for which the Board has been appointed liquidating agent," exhaustion of administrative remedies was required under Section 1787(b)(13)(D). *Winstar* involved no analogous jurisdictional provision and has no bearing on the proper disposition of this case.

3. Finally, the courts below properly rejected petitioners' due process claim on its merits. As noted, CapCorp had a full opportunity to challenge the conservatorship at its inception under 12 U.S.C. 1786(h)(3). It is well-settled that due process is satisfied where, as here, the affected financial institution has the opportunity to bring a judicial challenge to the conservatorship immediately after it is imposed. See *Fahey* v. *Mallonee*, 332 U.S. 245, 253-254 (1947); *First Fed. Sav. Bank & Trust* v. *Ryan*, 927 F.2d 1345, 1357-1359 (6th Cir.), cert. denied, 502 U.S. 864 (1991); *Bingham* v. *NCUA Bd.*, 927 F.2d 282, 286 n.3 (6th Cir.), cert. denied, 502 U.S. 817 (1991); *Haralson* v. *FHLBB*, 837 F.2d 1123, 1126-1127 (D.C. Cir. 1988); *Woods* v. *FHLBB*, 826 F.2d 1400, 1410 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988); *Fidelity Sav. & Loan Ass'n* v. *FHLBB*, 689 F.2d 803, 811 (9th Cir. 1982), cert. denied, 461 U.S. 914 (1983). The fact that CapCorp opted not to exercise its rights does not undermine that conclusion.

In support of their due process claim, petitioners focus on the fact that, although the NCUA Board determined that CapCorp was insolvent, it did not immediately close CapCorp for liquidation, as it was empowered to do by statute. See 12 U.S.C.

1787(a)(1)(A); see also 12 U.S.C. 1766(a). Instead, on January 31, 1995, the Board appointed itself conservator, and subsequently proceeded to sell some of CapCorp's assets during the conservatorship. Petitioners suggest that the Board's actions were improper because a conservator's role is to "conserve," and, in petitioners' view, selling off a credit union's assets does not qualify as "conserving." See Pet. 14-15.

Petitioners' narrow view of the Board's function as conservator is rebutted by the text of the FCUA. "The Board may, as conservator * * * take *any* action * * * which the Board determines is in the best interests of the credit union, its account holders, or the Board." 12 U.S.C. 1787(b)(2)(J) (emphasis added); see also 12 U.S.C. 1786(h)(8). In fact, a core purpose of the Board's conservatorship authority is "to prevent deterioration of a credit union's operations pending liquidation." See S. Rep. No. 536, 97th Cong., 2d Sess. 51 (1982). Here, the Board found that CapCorp held an extraordinarily large portfolio of interest-rate-sensitive securities, which had already dropped significantly in value. Their value was subject to further decline based on interest-rate fluctuations. Disposing of those volatile assets was therefore essential to stabilizing CapCorp and preventing further losses. C.A. App. 84 ("[CapCorp's] portfolio remains exposed to the risk of incurring greater losses should interest rates continue to rise").

As CapCorp was expressly told on the day the Order of Conservatorship was issued, the purpose of the conservatorship in this case was to provide a period in which the Board could pursue opportunities to consolidate CapCorp's ongoing operations into another, more financially stable institution. C.A.

App. 84 ("A period of conservatorship will permit NCUA, as conservator of CapCorp, to pursue merger and purchase and assumption opportunities"). The Board, in fact, took that step. On April 12, 1995, the Board formally appointed itself liquidating agent of CapCorp and approved the purchase and assumption of CapCorp by another corporate credit union. C.A. App. 129. Nothing in that sequence of events reflects any deviation from applicable statutory procedures.[8]

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[8] We note for the sake of completeness that the Board's separate appointment of itself as liquidating agent on April 12, 1995, may have given rise to a third procedural default in this case, in addition to the above-discussed failures to challenge the conservatorship order within ten days and to make an administrative claim. Like its appointment as conservator, the NCUA Board's appointment as liquidating agent is subject to judicial review, if at all, only within a limited, ten-day period. See 12 U.S.C. 1787(a)(1)(B). We do not concede that CapCorp had any rights under that provision given that it was already in conservatorship when the NCUA Board appointed itself liquidating agent. However, even assuming such rights existed, neither CapCorp nor any of its members acting on its behalf made any attempt to invoke that clause within ten days following the NCUA Board's appointment as liquidating agent on April 12, 1995.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1998