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**ORAL ARGUMENT HAS NOT BEEN SCHEDULED**

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**In The United States Court of Appeals  
For The District of Columbia Circuit**

No. 14-5243 (L), 14-5254 (con.), 14-5260 (con.), 14-5262 (con.)

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PERRY CAPITAL LLC, for and on behalf of  
investment funds for which it acts as investment manager,

*Plaintiffs-Appellant,*

v.

JACOB J. LEW, in his official capacity as the  
Secretary of the Department of the Treasury, *et al.*,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
For the District of Columbia, Case No. 1:13-cv-01025-RCL

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**BRIEF OF THE NATIONAL BLACK CHAMBER OF COMMERCE  
AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY**

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July 6, 2015

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**CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), *amicus curiae* the National Black Chamber of Commerce (“NBCC”), certifies the following:

A. Parties and Amici

Except for the NBCC and any other *amici* who have not yet entered an appearance in this appeal, all the parties before this Court are identified in Appellant’s brief.

B. Rulings Under Review

Appellant’s brief correctly identifies the rulings under review.

C. Related Cases

This case has not previously been before this Court or any other court and the NBCC is not aware of any related cases pending in this or any other court that are not already consolidated with this one.

**RULE 26.1 DISCLOSURE STATEMENT**

The NBCC is a nonprofit corporation located in Washington, D.C. The NBCC has no parent corporation and the NBCC has issued no stock.

Dated: July 6, 2015

/s/ Pierre H. Bergeron  
Counsel for Amicus Curiae

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**STATEMENT OF INTEREST OF AMICUS AND AUTHORITY TO FILE**

*Amicus curiae* the National Black Chamber of Commerce (“NBCC”) is a nonprofit, nonpartisan organization dedicated to the economic empowerment of African-American communities through entrepreneurship.<sup>1</sup> Incorporated in 1993, the NBCC represents nearly 100,000 African-American owned businesses and advocates on behalf of the 2.1 million black-owned businesses in the United States. The NBCC has more than 190 affiliated chapters located throughout the nation, as well as international affiliates in, among others, the Bahamas, Brazil, Colombia, Ghana, and Jamaica.

Because the NBCC is dedicated to creating economically-thriving African-American communities, it is extremely concerned about the prospect that the Federal Housing Finance Agency (“FHFA”) will effectively eliminate Fannie Mae and Freddie Mac. The NBCC believes that without those corporations providing for affordable credit, African-Americans will be disproportionately unable to obtain conventional mortgages. Thus, if the FHFA is allowed to complete its attempted liquidation of Fannie Mae and Freddie Mac, affordable credit may well dissipate for minorities (who already have a very

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<sup>1</sup> Pursuant to Rule 29(c)(5), the NBCC affirms that no counsel for a party authored this brief in whole or in part and no person other than the NBCC contributed to its preparation or submission. Appellees have not yet consented to this brief; the NBCC has therefore moved for leave to file under Rule 29(b).

difficult time obtaining loans). The NBCC therefore asks this Court to consider these interests in the course of its deliberations on this case.

### **STATUTES AND REGULATIONS INVOLVED**

Relevant statutory and regulatory provisions are contained in the Appellant's brief and addendum.

### **STATEMENT OF THE CASE**

The NBCC defers to the parties' description of the facts and procedural history.

### **SUMMARY OF ARGUMENT**

This case involves the federal government's attempt to liquidate and ultimately nationalize Fannie Mae and Freddie Mac. If unabated, the actions of the Treasury Department and the FHFA will ensure that Fannie Mae and Freddie Mac are perpetually on the brink of insolvency. Indeed, the Treasury Department has publicly acknowledged that the actions challenged here are targeted toward “expedit[ing] the wind down of Fannie Mae and Freddie Mac,” and that Fannie and Freddie “will not be allowed to retain profits, rebuild capital, [or] return to the market in their prior form.”<sup>2</sup>

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<sup>2</sup> Dep't of Treasury, Press Release: *Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac* (Aug. 17, 2012), at <http://www.treasury.gov/press-center/press-releases/Pages/tg1684.aspx> (“2012 Treasury Press Release”).

The NBCC writes to emphasize the negative impact that this course of action will have on people of color, and particularly on African-Americans. Over the past five years, the privately-owned, publicly-traded Fannie Mae and Freddie Mac have been central to bringing stability to the federal housing market, following a national credit crisis that was especially harsh for minority communities hit disproportionately by foreclosures. Yet even as the market has rebounded, limited access to credit remains a serious problem for African-Americans and other minorities. Under the FHFA's conservatorship, African-Americans have been disproportionately unable to get conventional mortgages and the "homeownership gap" between Whites and Blacks has exacerbated.

Fannie Mae and Freddie Mac play a vital role in minority communities by expanding access to credit and ensuring affordable housing. If allowed to stand, the Government's "Net Worth Sweep" and winding down of Fannie and Freddie will damage those communities by drying up credit and denying African-Americans and other minorities the opportunity – and dream – of home ownership.

## **ARGUMENT**

### **I. The Attempted Liquidation Of Fannie Mae And Freddie Mac Will Significantly Reduce Home Ownership By African-Americans.**

The Treasury Department and the FHFA plan to drive Fannie Mae and Freddie Mac into insolvency and, ultimately, nationalize them both—objectives that this Court should not countenance. Acknowledging its designs, the Treasury

Department has described the Net Worth Sweep as designed to “expedite the wind down” of those companies while preventing Fannie and Freddie from “return[ing] to the market in their prior form.” 2012 Treasury Press Release. If the district court’s decision is allowed to stand, Fannie and Freddie “will not be allowed to retain profits [or] rebuild capital.” *Id.* In short, they will be forced to operate on the edge of insolvency – even though they would otherwise post billions of dollars in profits annually – until they are subsumed by the federal government. *Cf.* Fannie Mae 2013 10-K at 2 (Feb. 21, 2014), *at:* [www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2013/10k\\_2013.pdf](http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2013/10k_2013.pdf) (showing a 2013 cumulative net income of \$84 billion); Freddie Mac 2013 10-K at 1 (Feb. 27, 2014), *at:* [www.freddiemac.com/investors/er/pdf/10k\\_022714.pdf](http://www.freddiemac.com/investors/er/pdf/10k_022714.pdf) (showing a 2013 cumulative net income of \$51.6 billion).

Liquidating Fannie Mae and Freddie Mac will greatly alter the financial landscape and will decrease the availability of credit to African-Americans and other minorities and low-income families. There is *already* a shocking gap in home ownership rates. If the district court’s decision stands, home ownership may become unattainable for large segments of these communities. The NBCC

respectfully submits that home ownership is central to the American Dream, not a privilege reserved for the fortunate few.<sup>3</sup>

**A. Home Mortgages Are Increasingly Scarce In Black Communities Because African-Americans Do Not Have Full Access To The National Mortgage Market.**

The mortgage market already fails to provide equal credit access to communities of color and low-income families. Subprime lenders targeted Black communities for predatory mortgage loans, meaning that the impact of the foreclosure crisis fell disproportionately on African-Americans. Many Black families lost their life savings as housing prices plummeted and lenders refused to refinance loans in African-American neighborhoods. While others have regained access to credit after the financial crisis, African-Americans are increasingly shut out.

The share of home mortgages going to Black consumers has dropped nearly every year since 2006, from 8.7% of all mortgages to just 4.8% in 2013. N. Bhutta & D. Ringo, *The 2013 Home Mortgage Disclosure Data* at Table 2, 100 Federal Reserve Bulletin 6 (Nov. 2014), *at*: [www.federalreserve.gov/pubs/bulletin/2014/pdf/2013\\_HMDA.pdf](http://www.federalreserve.gov/pubs/bulletin/2014/pdf/2013_HMDA.pdf). Moreover, African-Americans are also increasingly shut out of the conventional mortgage market, including loans from Fannie Mae

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<sup>3</sup> See Harold Ford, Jr., *A Simple Way to Boost Homeownership – End Conservatorship of Fannie Mae and Freddie Mac* (Dec. 18, 2014), *at* [www.rollcall.com/news/a\\_simple\\_way\\_to\\_boost\\_homeownership\\_end\\_conservatorship\\_of\\_fannie\\_mae\\_and-238877-1.html](http://www.rollcall.com/news/a_simple_way_to_boost_homeownership_end_conservatorship_of_fannie_mae_and-238877-1.html).

and Freddie Mac. Unfortunately, the FHFA's conservatorship of Fannie and Freddie has perpetuated these problems. The total percentage of government-backed loans has declined from 54% to 38% in recent years, in favor of conventional bank loans enabled by Fannie and Freddie. Yet African-Americans have not been able to fully participate in those conventional loans, and still receive over 70% of their loans from the Federal Housing Administration ("FHA") or similar programs. *Id.* at 2-3.

Compared to others, African-Americans face greater obstacles accessing conventional loans. Denial rates for conventional mortgages to African-Americans stand at almost three times those for non-Hispanic Whites. *Id.* at 12 & Table 4. And African-Americans also receive loans with far less favorable terms than those of other similarly situated. Even when controlled for income, African-Americans receive more expensive mortgages than their White neighbors. *Id.* at 21, 21 n.34, & 32 ("A comparison of borrowers within the same census tract indicates that black and Hispanic-white borrowers are over 12 percent and over 10 percent, respectively, more likely than non-Hispanic white borrowers to get a higher-priced loan."). Although 12% of the population is African-American, Home Mortgage Disclosure Act data shows they complete just 2% of all successful conventional mortgage applications. S. Olsen, *A House Divided – How Race Colors The Path*

*To Home Ownership, Zillow Real Estate Research (Jan. 15, 2014), at:*  
[www.zillow.com/research/minority-mortgage-access-6127/](http://www.zillow.com/research/minority-mortgage-access-6127/).

The cumulative effect of these problems is staggering. Nationwide, there is a gap of *30 percentage points* between the home ownership rate for Whites (at 72%) and African-Americans (at 42%).<sup>4</sup> In recent years, this gap has grown much larger as the rate of black homeownership fell from 49% in 2004 to 42% last year—a decrease of nearly 15% in the number of black homeowners in just one decade.<sup>5</sup> Studies commissioned by the MacArthur Foundation show that while African Americans are more likely than any other group to aspire to homeownership, but are more likely to be forced to take an additional job or cut household budgets just to afford their current housing.<sup>6</sup> As former Congressman Harold Ford, Jr., noted in an editorial late last year: “Of the 1.3 million conventional loans made in 2012, Latinos received just 69,217 loans, and African-Americans received only 29,405. This alarming disparity is unacceptable.”<sup>7</sup>

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<sup>4</sup> The Baltimore Times, *More Action Needed to Close Homeownership Gap Between Whites and Blacks* (June 23, 2015), at <http://baltimoretimes-online.com/news/2015/jun/23/more-action-needed-close-homeownership-gap-between/>.

<sup>5</sup> See *id.*

<sup>6</sup> Hart Research Associates, *2015 How Housing Matters Survey Findings* (June 12, 2015), at: [http://www.macfound.org/media/files/ME11540-HHM\\_2015\\_Minorities\\_Memo.pdf](http://www.macfound.org/media/files/ME11540-HHM_2015_Minorities_Memo.pdf).

<sup>7</sup> Ford, *A Simple Way to Boost Homeownership*, *supra* note 3.

If the FHFA is allowed to complete its liquidation of Fannie Mae and Freddie Mac, these problems will be not only perpetuated, but also exacerbated. Affordable credit may well disappear, and so will the chances of home ownership in Black communities across the United States.

**B. The Continuing Vitality Of Fannie Mae And Freddie Mac Is Critical To The Availability Of Loans To African-Americans.**

The FHFA's plan to "wind down" Fannie Mae and Freddie Mac would spell disaster for Black communities nationwide. For decades, Fannie and Freddie have supported the national housing market, increasing access to credit and making homeownership affordable for many Americans. Their influence is most widely felt by those who would otherwise have little access to credit: minorities and low-income families. The increase of personal equity from home ownership is vital to economic stability.

In the midst of the financial crisis, Congress enacted the Housing and Economic Recovery Act ("HERA") to "rehabilitate" Fannie Mae and Freddie Mac so they could continue their mission of helping provide fair and reasonably-priced mortgages. 12 U.S.C. § 4617(a)(2), (b)(2)(D). This was done by placing Fannie and Freddie in a conservatorship under the authority of the FHFA. While initially conceived as a temporary arrangement until Fannie and Freddie could return to profitability, that has now happened, and yet the Government has now changed its tune.

More than six years *after* the financial crisis, FHFA now seeks to drain Fannie Mae and Freddie Mac of all of their profits and capital. Instead of rehabilitating and recapitalizing them, FHFA seeks to slowly eliminate them—creating uncertainty that has already harmed minorities seeking loans. Because Congress has not yet found a replacement, FHFA’s decision will yield terrible effects on the availability of affordable housing for minorities. If African-Americans face difficulties securing a conventional mortgage now, it will be exponentially worse after the demise of Fannie and Freddie.

Eliminating Fannie Mae and Freddie Mac will also harm two significant mechanisms created by Congress to support affordable housing. HERA established the Capital Magnet Fund to provide public funds that could attract private investment for affordable housing projects. An initial round of funding in 2010 attracted more \$12 in capital for every \$1 of federal funds provided—and was responsible for creating thousands of affordable homes.<sup>8</sup> HERA also provides for a Housing Trust Fund to help increase and maintain the supply of affordable rental housing and boost homeownership for low-income Americans.

Congress provided that both the Capital Magnet Fund and the Housing Trust Fund would be funded by contributions from Fannie and Freddie. But the FHFA stopped Fannie and Freddie from making their Congressionally-mandated

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<sup>8</sup> Dep’t of Treasury, *Capital Magnet Fund: Interim Impact Assessment* (March 2014), at: [www.cdfifund.gov/docs/2014/CMF/CMF\\_Impact\\_Assessment.pdf](http://www.cdfifund.gov/docs/2014/CMF/CMF_Impact_Assessment.pdf).

contributions to these programs for many years.<sup>9</sup> Unable to deny any longer that Fannie and Freddie had returned to profitability, the FHFA finally allowed those contributions to begin in December 2014.<sup>10</sup> Affordable housing groups estimate that Fannie and Freddie will contribute over \$400 million to these two programs annually, which will result in billions of dollars invested in affordable housing across the nation each year.<sup>11</sup> These two critical programs will significantly increase the housing prospects of millions of Americans. But because Congress did not provide for alternative funding sources for either program, this will only happen if Fannie and Freddie are not eliminated by the FHFA.

The NBCC respectfully submits that liquidation of Fannie Mae and Freddie Mac is neither necessary nor appropriate under the circumstances. A flurry of legislative and regulatory activity—including HERA—were undertaken to course-correct and deal with the problems that originally led to the subprime mortgage crisis. Those efforts have been successful. The conditions that led to the crisis no longer exist. HERA in particular was designed to restore confidence in Fannie and Freddie by strengthening regulations and recapitalizing the companies. *See* 12

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<sup>9</sup> FHFA, *FHFA Statement on the Housing Trust Fund and Capital Magnet Fund* (Dec. 11, 2014), *at:* [www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Statement-on-the-Housing-Trust-Fund-and-Capital-Magnet-Fund.aspx](http://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Statement-on-the-Housing-Trust-Fund-and-Capital-Magnet-Fund.aspx)

<sup>10</sup> *Id.*

<sup>11</sup> Donna Kimura, *What is the Capital Management Fund, Affordable Housing Finance* (Jan. 12, 2015), *at:* [http://www.housingfinance.com/finance/ what-is-the-capital-magnet-fund\\_o](http://www.housingfinance.com/finance/ what-is-the-capital-magnet-fund_o).

U.S.C. §§ 1455(l)(1)(A), 1719(g)(1)(A). And it has worked. Fannie and Freddie have returned to long-term financial stability—but for the Net Worth Sweep challenged in this appeal, they would be posting substantial profits. There is, quite simply, no sound justification for the attempted liquidation

The liquidation of Fannie and Freddie without a suitable alternative will destroy the housing market for minorities and will have a devastating impact on the overall U.S. economy. With rising inequality at the forefront of the national consciousness, this Court should not sanction such a reckless public policy.

### **CONCLUSION**

For the foregoing reasons, the NBCC respectfully requests that the Court consider the impact of the Government's proposed actions on minorities.

Respectfully submitted,

By /s/ Pierre H. Bergeron

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**CERTIFICATE OF COMPLIANCE**

This brief complies with Federal Rules of Appellate Procedure 29(c)-(d) and 32(a)(7)(B)(i). The brief was prepared in Microsoft Word, using Times New Roman 14-point font. According to the word count function, the word count, including footnotes and headings, is 2,215.

By /s/ Pierre H. Bergeron \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served copies on the foregoing brief upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, and all counsel of record are registered users of CM/ECF for this case.

Dated July 6, 2015.

/s/ Pierre H. Bergeron