Appeal No. 2015-5100

United States Court of Appeals

for the

Federal Circuit

ANTHONY PISZEL,

Plaintiff-Appellant,

– v. –

UNITED STATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
IN CASE NO. 1:14-CV-00691-LKG, LYDIA KAY GRIGGSBY, JUDGE

BRIEF ON BEHALF OF *AMICI CURIAE* LOUISE RAFTER, JOSEPHINE AND STEPHEN RATTIEN, AND PERSHING SQUARE CAPITAL MANAGEMENT, L.P. IN SUPPORT OF NEITHER PARTY

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CERTIFICATE OF INTEREST

Counsel for the amici curiae certifies the following:

1. The full name of every party or amicus represented by me is:

   Louise Rafter, Stephen Rattien, Josephine Rattien, and Pershing Square Capital Management, L.P.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   The parties named above in (1) are the real parties in interest.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   Pershing Square Capital Management, L.P. does not have a parent company, and there are no publicly held companies that own 10 percent or more of the stock of Pershing Square Capital Management, L.P.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court are:

   Gregory P. Joseph, Mara Leventhal, Sandra M. Lipsman, Christopher J. Stanley, Gregory O. Tuttle, Joseph Hage Aaronson LLC.

August 25, 2015
Date

/s/ Gregory P. Joseph
Gregory P. Joseph

cc: William E. Donnelly, Esq., James K. Goldfarb, Esq., Michael V. Rella, Esq., David A. Harrington, Esq.

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INTEREST OF AMICI CURIAE[1]

Amici Louise Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, L.P. ("**Pershing Square**" and, collectively, "**Amici**") are common shareholders of the Federal National Mortgage Association ("**Fannie**") and the Federal Home Loan Mortgage Corporation ("**Freddie**," and collectively, the "**Companies**"). Mrs. Rafter, a retired nurse, owns Fannie common stock. Mrs. Rattien, a retired psychiatric social worker and inner-city school counselor, and Dr. Rattien, a retired senior science and technology policy manager, jointly own Fannie common stock. Funds managed by Pershing Square together constitute the Companies' largest common shareholder, with an approximate 10% stake in the outstanding common stock of each.

Amici have a direct and significant interest in the instant appeal from *Piszel v. United States*, 121 Fed. Cl. 793 (2015) ("***Piszel***" or the "**Opinion**"). Like Plaintiff-Appellant Anthony Piszel ("**Appellant**"), Amici have asserted a takings claim under the Fifth Amendment — theirs, against the Federal Housing Finance Agency ("**FHFA**") and the Department of Treasury ("**Treasury**," and collectively, the "**Government**") — in connection with FHFA's conservatorship of the Companies in the United States Court of Federal Claims. *See* Verified Complaint,

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity — other than Amici or their counsel — financially contribute to its preparation or submission.

Louise Rafter, et al. v. United States, No. 1:14-cv-00740-MMS (Fed. Cl. Aug. 14, 2014), ECF No. 1 (the "***Rafter* Complaint**").

The *Rafter* Complaint challenges the Government's unlawful appropriation of hundreds of billions of dollars amounting to the entire net worth of the Companies by means of an August 2012 amendment to a senior preferred stock purchase agreement between each Company and Treasury, which replaced the 10% coupon on senior preferred stock issued by each Company to Treasury ("**Government Preferred Stock**") with quarterly dividends that stripped the Companies of their entire net worth (the "**Net Worth Sweep Dividends**"). To the extent the Opinion relied on *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014), *appeal docketed*, No. 14-5243 (D.C. Cir. 2015) — which (i) erroneously rejected, in dicta, a Fifth Amendment takings claim challenging the same Net Worth Sweep Dividends notwithstanding the D.C. District Court's lack of subject matter jurisdiction, and (ii) misconstrued and misapplied this Court's holdings in *Golden Pacific Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994), and *California Housing Securities, Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992) — Amici have a substantial interest in bringing these errors to this Court's attention.

The source of Amici's authority to file is their accompanying Motion for Leave to File an *Amicus Curiae* Brief pursuant to FED. R. APP. P. 29(b), should leave be granted.

INTRODUCTION[2]

Amici have asserted takings claims in the Court of Federal Claims. Amici's claims arose in August 2012, when the Government replaced the Treasury's 10% coupon on the Government Preferred Stock issued by Fannie and Freddie with quarterly Net Worth Sweep Dividends, ostensibly under the authority of the Housing and Economic Recovery Act of 2008 ("**HERA**"). Defying HERA's mandate to maintain the Companies in "a sound and solvent condition," 12 U.S.C. §§ 1455(l)(1)(B), 1719(g)(1)(B), 4617(b)(2)(D), the Net Worth Sweep Dividends strip the Companies of their entire net worth, in furtherance of Treasury's admitted intention to confiscate "every dollar of earnings that Fannie Mae and Freddie Mac generate" and "expedite the wind down" of two of the largest — and now highly profitable — privately owned financial institutions in the world. As of September 2015, the Companies will have paid to Treasury approximately $132.1 billion more in Net Worth Sweep Dividend payments than they would have paid on the prior 10% coupon over the same time period. The Government's unauthorized act

[2] Emphasis has been added to, and internal quotations, brackets and citations omitted from, quoted material in this brief, except as indicated.

arrogated to itself all present and future earnings of the Companies and deprives Amici and other parties of the value of their property interests in the Companies.

The instant appeal similarly concerns a takings claim, though not one based on the Net Worth Sweep Dividends challenged by Amici. Appellant, Freddie's former CFO, claims that the disallowance of contractual benefits to which he was entitled after FHFA terminated him "without cause" effected a taking in violation of the Fifth Amendment. The Opinion below held that Appellant "fails to state a plausible takings claim" and reasoned that Appellant "simply could not have had a cognizable property interest in the severance compensation called for under his employment agreement" given "the regulatory environment at the time he entered into his employment agreement, and the authority that federal regulators had to prohibit executive compensation." *Piszel*, 121 Fed. Cl. at 803, 805.

In reaching this conclusion, the Opinion relied in part on *Perry*, 70 F. Supp. 3d 208, a D.C. District Court decision that dismissed claims challenging the Net Worth Sweep Dividends, including a takings claim. The Opinion quoted *Perry*'s misstatement of this Circuit's precedents, *Golden Pacific* and *California Housing*, as "stand[ing] for the general notion that investors have no right to exclude the government from their alleged property interests when the regulated institution in which they own shares is placed into conservatorship or receivership." *Piszel*, 121 Fed. Cl. at 804 (quoting *Perry*, 70 F. Supp. 3d at 242). This *Perry* excerpt directly

preceded and informed the Opinion's conclusion that Appellant "lacked the fundamental right to exclude the government from his property rights under his employment agreement when the FHFA placed Freddie Mac into conservatorship." *Piszel*, 121 Fed. Cl. at 804 (citing *California Housing* and *Perry*). Significantly, *Perry* relied on the same mischaracterization of *Golden Pacific* and *California Housing* to substantiate its manifestly erroneous conclusion that FHFA's conservatorship "extinguished" the shareholders' property interests in Fannie and Freddie in their entirety. *Perry*, 70 F. Supp. 3d at 242.

To the extent the Opinion explicitly or implicitly adopts *Perry*'s extraordinary conclusion that the Government has blanket authority to confiscate the assets of regulated private corporations and their shareholders in federal conservatorship, it cannot stand for the following reasons:

- First, *Perry* fundamentally misconstrues and misapplies *Golden Pacific* and *California Housing*, which stand for the far more limited proposition that investors in an entity subject to a regulatory regime that authorizes federal conservatorship or receivership have no property right to prevent the Government from imposing a conservatorship or receivership pursuant to that authority. *See Golden Pac.*, 15 F.3d at 1074; *Cal. Hous.*, 959 F.2d at 959. *See infra* at §A.1.

- Second, *Perry* utterly ignores other precedents from this Circuit — and the plain text of HERA — which expressly recognize that property interests survive the imposition of receivership in analogous circumstances. *See, e.g.*, *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1287-88, 1296 (Fed. Cir. 1999); *Bailey v. United States*, 341 F.3d 1342, 1347 (Fed. Cir. 2003). *See infra* at §A.2.

- Third, the Opinion relies on portions of *Perry* which are mere dicta of a district court with no precedential authority in the Court of Federal Claims or in this Circuit. *See infra* at §A.3.

- Fourth, reliance on *Perry* is not necessary to resolve the narrow takings issue presented on this appeal: whether Appellant had a historically rooted expectation that the Government would not alter the terms of his employment contract. *See infra* at §B.

Accordingly, Amici respectfully urge this Court to reject the Opinion insofar as it relied on *Perry* and *Perry*'s misreading of this Court's holdings in *Golden Pacific* and *California Housing* and to limit its holding to the narrow issues presented under this Circuit's controlling precedents.

ARGUMENT

A. THE COURT OF FEDERAL CLAIMS' RELIANCE ON *PERRY* WAS ERRONEOUS

In its Opinion, the Court of Federal Claims relied — erroneously — on dicta in *Perry* for the proposition that "*Golden Pacific* and *California Housing* stand for the general notion that investors have no right to exclude the government from their alleged property interests when the regulated institution in which they own shares is placed into conservatorship or receivership." *Piszel*, 121 Fed. Cl. at 804 (quoting *Perry*, 70 F. Supp. 3d at 242). The passage quoted by the Opinion precedes *Perry*'s determination that it does not matter *what* FHFA does as conservator, or *why*, because FHFA's conservatorship "extinguished" the shareholders' property interests in their entirety, and no Government misconduct — no matter how egregious or pervasive the indicia of self-dealing — could

"revive already eliminated cognizable property interests." *Perry*, 70 F. Supp. 3d at 242.

But *Perry*'s astonishing determination that the Government has *carte blanche* to take the assets of private corporations and their shareholders after a conservatorship is in place radically misstates this Court's holdings in *Golden Pacific* and *California Housing*. Those decisions, as well as this Court's other precedents, all recognize property interests that survive the imposition of a federal conservatorship or receivership. Moreover, *Perry*'s conclusion was mere dicta from the D.C. District Court, with no precedential value in the Court of Federal Claims, much less in this Circuit. Accordingly, Amici urge this Court to reject the Opinion's erroneous reliance on *Perry*.

1. *Perry* Misconstrues *Golden Pacific* and *California Housing*

In *Golden Pacific* and *California Housing*, this Court held that, where a longstanding regulatory regime authorizes federal conservatorship or receivership of an entity, the entity's investors lack the property right to exclude the Government from rightfully exercising that express authority. *See Golden Pac.*, 15 F.3d at 1074 ("[T]he Comptroller simply enforced portions of an extensive regulatory scheme . . . when the Comptroller could legally . . . place it in receivership. . . ."); *Cal. Hous.*, 959 F.2d at 959 ("Saratoga gave the government the right . . . to place Saratoga in conservatorship or receivership when

warranted."). Neither case suggests, much less holds, that all property rights in an entity subject to federal conservatorship automatically expire upon the imposition of a federal conservatorship, as *Perry* incorrectly concluded. *Perry*, 70 F. Supp. 3d at 242 (holding that Net Worth Sweep Dividends were "executed during a period of conservatorship and, thus, after the plaintiffs' property interests . . . were extinguished"). Accordingly, the Opinion erred insofar as it relied on *Perry* for this proposition.

Golden Pacific and *California Housing* each considered a far more limited question: whether shareholders of statutorily regulated financial institutions — a bank and a savings and loan association, respectively — lacked the requisite property interests to support a Fifth Amendment takings claim based solely on the Government's act of placing the institutions into conservatorship or receivership. *See Cal. Hous.*, 959 F.2d at 957 ("The sole contention of CHS on appeal is that the actions of [the Office of Thrift Supervision], in appointing the [Resolution Trust Corporation] as conservator and receiver . . . resulted in a permanent occupation and physical taking . . . in violation of the . . . taking clause."); *Golden Pac.*, 15 F.3d at 1070 ("The Claims Court held that the actions of the Comptroller in declaring the Bank insolvent and placing the Bank in [Federal Deposit Insurance Company ('**FDIC**')] receivership did not constitute a compensable taking under the Fifth Amendment.").

In both cases, this Court held that, because the regulatory schemes at issue had historically authorized the government to "impose a conservatorship or receivership," the plaintiffs lacked "the fundamental right to exclude the government from [their] property at those times when the government could legally impose a conservatorship or receivership." *Id.* at 1073; *Cal. Hous.*, 959 F.2d at 958. Those plaintiffs thus "understood, with what may only be viewed as a historically rooted expectation, that the federal government would take possession of its premises and holdings as conservator or receiver" under certain circumstances. *Id. See also Golden Pac.*, 15 F.3d at 1073-74. The plaintiffs lacked — and had always lacked — one particular "stick[] in the bundle of rights" associated with their property rights: the right to resist (or expect compensation for) legally imposed conservatorships or receiverships. *Cal. Hous.*, 959 F.2d at 958; *see also Golden Pac.*, 15 F.3d at 1074 ("[T]he Bank did not have the right to exclude the Comptroller.").

In both *Golden Pacific* and *California Housing*, this Court came to the unremarkable conclusion that, where a longstanding regulatory regime authorizes federal conservatorship or receivership, an investor lacks — *ex ante* — the property right to exclude the government from rightfully imposing such a

conservatorship or receivership.[3] This comports with well-established takings jurisprudence, which takes into account existing rules and background principles that inform the property interest at stake. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) ("[T]he existence of a property interest is determined by reference to existing rules or understandings . . . ."); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) ("background principles of the State's law of property and nuisance already [in] place" may "inhere in the title itself").

It does not follow, and no court — other than *Perry* — has ever held, that because a company's shareholders lacked the specific property right to exclude the government from imposing a conservatorship or receivership, *all* other pre-existing property rights enjoyed by shareholders are forfeited by a conservatorship, and thus any actions taken under the guise of an authorized conservatorship — including the expropriation of all investor equity — do not implicate the Fifth

[3] Indeed, this Court repeatedly emphasized that its holding was limited to challenges to the lawful *imposition* of a receivership or conservatorship. *See, e.g.*, *Golden Pac.*, 15 F.3d at 1074 ("At those times when the Comptroller could *legally* inspect the Bank or *place it in receivership*, the Bank . . . was unable to exclude the government from its property."); *id.* ("Golden Pacific's expectations could only have been that the FDIC would exert control over the Bank's assets if the Comptroller became satisfied that the Bank was insolvent and chose to place it in receivership."); *id.* at 1069 (the Comptroller acted "within the scope of his statutory authority" in "placing [the Bank] in receivership"); *Cal. Hous.*, 959 F.2d at 958 ("Saratoga lacked the fundamental right to exclude the government from its property at those times when the government could legally impose a conservatorship or receivership on Saratoga."); *id.* at 959 ("Saratoga gave the government the right, among other rights, to place Saratoga in conservatorship or receivership when warranted.").

Amendment. In *Perry*, and in the lawsuit brought by Amici, the unconstitutional taking lies not in the imposition of FHFA's conservatorship, but in the Government's unauthorized, unprecedented, and ongoing act of sweeping all Company profits to itself.[4]

Shareholders of Fannie and Freddie may have had a "historically rooted expectation[] that the federal government would take possession of [Fannie and Freddie] as conservator" if certain statutory criteria were met. *Cal. Hous.*, 959 F.2d at 958. But nothing in the existing regulatory regime, or the historical role of federal conservatorships, remotely suggests — much less creates the expectation — that the Government could use its role as conservator to nullify their entire property interest and seize all of the Company's profits for itself. *See* 12 U.S.C. §§ 4617(b)(2)(D)(i)-(ii) and § 4617(b)(2)(B)(iv) (FHFA's powers as conservator include such action as may be necessary to "put the [Companies] in a sound and solvent condition," "carry on [its] business" and "preserve and conserve" its

[4] In addition to misreading this Court's precedent, *Perry*'s reasoning is simply illogical. *Perry* held that Fannie and Freddie shareholders had a "cognizable property interest within the meaning of the Takings Clause *before conservatorship*," but "only los[t] their cognizable property interests when [the Companies were placed] in conservatorship." *Perry*, 70 F. Supp. 3d at 241 n.50. But this Court held precisely the opposite in *Golden Pacific* and *California Housing*: the shareholders *never had* the historically rooted property interest to exclude the government from imposing a conservatorship or receivership under certain circumstances; that is why their imposition was not a taking. Because no "sticks in the bundle" were forfeited by the acts of imposing conservatorship or receivership, no property interest was taken, and the Fifth Amendment was not implicated.

"assets and property"); *Conservatorship and Receivership*, 76 Fed. Reg. 35,724, 35,726-27 (June 20, 2011) (FHFA's "statutory mission" as conservator is to "preserve and conserve the institution's assets" and "restore soundness and solvency"); *Conservator*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "conservator" as a "guardian, protector or preserver").

Nor does the Government's oft-repeated maxim that participants in a "highly-regulated industry" must enter into business "with eyes open" to the possibility of conservatorship (Defendant-Appellee's Motion to Dismiss at 16, *Piszel v. United States*, No. 1:14-cv-00691-LKG (Fed. Cl. Nov. 25, 2014), ECF No. 11) mean that investors should reasonably expect the complete and uncompensated elimination of their property interests. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003) ("A business that operates in a heavily-regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments. But that does not mean that *all* regulatory changes are reasonably foreseeable or that regulated businesses can have *no* reasonable investment-backed expectations whatsoever.") (emphasis in original); *Arctic King Fisheries, Inc. v. United States*, 59 Fed. Cl. 360, 379 (2004) ("[I]ndividuals operating in highly regulated fields do not forfeit their rights under the Fifth Amendment to the whim of whatever regulation the winds may bring . . . ."); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439

(1982) (even in regulated industry, "the government does not have unlimited power to redefine property rights").

California Housing and *Golden Pacific* have never stood for the proposition that all property rights in institutions subject to the possibility of federal conservatorship automatically expire upon the imposition of a federal conservatorship. *Perry* was wrong to suggest these cases hold otherwise, and the Opinion erred insofar as it relied on *Perry* for this conclusion.

2. Cognizable Property Interests Survive Imposition of a Federal Conservatorship or Receivership

Perry's conclusion that property rights in an entity subject to federal conservatorship automatically expire upon the imposition of such a conservatorship also directly contradicts this Court's controlling precedents, which make it clear that cognizable property interests survive the imposition of receivership in analogous circumstances.

In *First Hartford*, for example, this Court analyzed the same regulatory regime at issue in *California Housing* and held that the shareholders of a bank under federal receivership had a protected property interest, for the purposes of a takings claim, in any "liquidation surplus" left over from the receivership. 194 F.3d at 1287-88, 1296. *First Hartford* explicitly recognized that post-receivership property rights under the Takings Clause were consistent with *California Housing*, which it cited for the proposition that shareholders possessed a "cognizable

property interest in the surplus that would result if the corporation received compensation" in receivership. *Id.* at 1287.

Similarly, in *Bailey*, 341 F.3d at 1347, this Court recognized a shareholder's "property interest in any liquidation surplus" left over from FDIC receivership. *Id*. ("Bailey is correct that he has a property interest in any liquidation surplus."). Notwithstanding that surviving property interest, the Court concluded that no unconstitutional taking had occurred "simply because there [was] no liquidation surplus" left to take. *Id*.[5]

If, as *Perry* suggests, a shareholder's residual property interests in a regulated entity are "extinguished" upon commencement of a federal receivership, the *First Hartford* and *Bailey* plaintiffs would not have had the post-receivership property interests in the liquidation surplus explicitly recognized by those decisions. Thus, *Perry* is clearly incorrect. *First Hartford* and *Bailey* demonstrate that actions by the Government during receivership — *e.g.*, if the government were to deny the liquidation surplus to shareholders — can effect an unconstitutional taking, notwithstanding those plaintiffs' inability to exclude the Government from

[5] *Cf. Slattery v. Roth*, 710 F.3d 1336, 1343 (Fed. Cir. 2013) ("[S]hareholders are the proper recipients of the [FDIC] receivership surplus."); *Golden Pac. Bancorp v. FDIC*, 375 F.3d 196, 201 (2d Cir. 2004) ("In its capacity as receiver, the FDIC steps into the shoes of the failed bank and has a responsibility to marshal the assets of the bank and to distribute them to the bank's creditors and shareholders."); *E.I. du Pont de Nemours & Co. v. FDIC*, 32 F.3d 592, 595 (D.C. Cir. 1994) ("As receiver the FDIC has a responsibility to marshal the assets of the bank and to distribute them to the bank's creditors and shareholders.").

imposing the receivership in the first instance.[6] Nor can *Perry*'s conclusion be reconciled with the text of HERA, which expressly provides that the Companies' shareholders retain certain property interests during receivership. 12 U.S.C. § 4617(b)(2)(K)(i) (recognizing shareholders' "right to payment, satisfaction and other resolution of their claims"), § 4617(c)(1)(D) (providing priority of claims based on Company's "obligation to shareholders . . . arising as a result of their status as shareholder").

Like the shareholders' property interests in a liquidation surplus recognized in *First Hartford* and *Bailey*, Amici's property interest in the entirety of the Companies' residual value lost due to the Net Worth Sweep Dividends — as well as the Appellant's property interest in severance payments due under his

[6] The Government's concession below that a "conservatorship" is "the rough equivalent of bankruptcy for a regulated financial institution," (Defendant-Appellee's Reply in Support of Its Motion to Dismiss at 1, *Piszel v. United States*, No. 1:14-cv-00691-LKG (Fed. Cl. Mar. 10, 2015), ECF No. 22), further confirms that analogous controlling precedents recognizing surviving property interests in a bankrupt entity are likewise applicable. *See A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014) (rejecting argument that automobile dealerships who had contracts with General Motors and Chrysler LLC had no takings claims arising from the bankruptcies of those companies); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935) (bankruptcy statute depriving bank of pre-existing contractual rights was a taking; "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."). *See also Plymouth Mills, Inc. v. FDIC*, 876 F. Supp. 439, 442 (E.D.N.Y. 1995) (noting that Congress's conservatorship and receivership scheme for financial institutions under the Federal Deposit Insurance Act was modeled on bankruptcy law); H.R. REP. NO. 110-142, at 90 (2007) (HERA's "conservatorship and receivership provisions were modeled after similar provisions in the Federal Deposit Insurance Act that apply to federally insured depository institutions").

employment agreement — are not extinguished simply because the Companies were placed into conservatorship. Instead, those property interests must be individually analyzed in light of "existing rules or understandings" to determine whether an unconstitutional taking has occurred. *Lucas*, 505 U.S. at 1030. *Perry*'s sweeping conclusion that all interests in Fannie and Freddie expired in their entirety on the date of FHFA's conservatorship thus flouts this Court's precedent, and common sense. The Opinion's reliance on *Perry* should not be affirmed.

3. ***Perry*'s Takings Holding Was Non-Precedential Dicta**

The Court of Federal Claims also erred in relying on *Perry*'s erroneous restatement of *Golden Pacific* and *California Housing* because it was pure dicta from a court with no subject matter jurisdiction over any takings claims and no precedential authority.

Under the Big Tucker Act, 28 U.S.C. § 1491(a), district courts presented with claims seeking monetary damages in excess of the Little Tucker Act's limit of $10,000, 28 U.S.C. § 1346(a)(2), are required to transfer the case to the Court of Federal Claims without "examin[ing] the merits . . . a task which Congress entrusted exclusively (in the first instance) to a court specially created for that purpose." *Jan's Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1309 (Fed. Cir. 2008) ("A contrary rule would seriously undermine Congress's decision to vest the Court of Federal Claims with exclusive jurisdiction . . . ."). In *Perry*, however, the

District Court held that it lacked subject matter jurisdiction over the takings claim because the plaintiffs had not adequately "waive[d] claims exceeding $10,000," but did not transfer the case. 70 F. Supp. 3d at 240. Instead, *Perry* impermissibly examined the merits of plaintiffs' takings claim and "dismissed on alternative grounds" — finding a failure to allege "a cognizable property interest." *Id.*

Perry's analysis of the merits of the takings claim — including its discussion of *Golden Pacific* and *California Housing* — was neither proper, nor necessary to the decision and, as such, is dicta entitled to little weight. *See Nat'l Am. Ins. Co. v. United States*, 498 F.3d 1301, 1306 (Fed. Cir. 2007) (declining to follow dicta and defining dicta as "statements made by a court that are unnecessary to the decision in the case"). S*ee also Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 n.12 (11th Cir. 2004) (where court "concluded that [it] lacked jurisdiction in the matter" its comments on the merits of the case "w[ere] pure dicta"); *Ziegler v. Indian River Cty*, 64 F.3d 470, 476 (9th Cir. 1995) (district court's statements regarding the merits "were dicta and of no force or effect because they were made after a finding of no jurisdiction.").[7]

[7] As Judge Pierre N. Leval of the Second Circuit has observed, one "weakness of law made through dicta is that there is no available correction mechanism. No appeal may be taken from the assertion of an erroneous legal rule in dictum." Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1262 (2006). This weakness is at work here — while the *Perry* decision is being appealed, no party has raised its dicta on takings in the appeal. *See* Initial Opening Brief for Class Plaintiffs at 2 n.1, *In re Fannie Mae/Freddie*

The Opinion's reliance on *Perry*'s dicta is even more problematic because it is beyond cavil that a decision issued by the D.C. District Court is not controlling authority in the Court of Federal Claims (and is certainly not controlling authority in this Circuit). *See Chou v. Univ. of Chi.*, 254 F.3d 1347, 1358 (Fed. Cir. 2001) ("We are not bound by the decisions of district courts . . . ."). *See also Ill. High Sch. Ass'n v. GTE Vantage Inc.*, 99 F.3d 244, 247 (7th Cir. 1996) ("District court decisions have little weight as precedents — dicta in those decisions even less.").

Accordingly, Amici urge this Court to reject the Opinion's reliance on *Perry*'s erroneous and non-precedential dicta.

B. RELIANCE ON *PERRY* IS UNNECESSARY TO RESOLVE THE ISSUE BEFORE THE COURT

A court should "never [] formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring) (collecting cases). But that is exactly the error committed by the Opinion when it endorsed *Perry*'s misreading of *Golden Pacific* and *California Housing*.

Appellant does not challenge FHFA's appointment as conservator. Nor does the instant appeal require adjudication of the scope of Fannie and Freddie shareholders' cognizable property interests following FHFA's conservatorship.

Mac Senior Preferred Stock Purchase Agreement Class Action, No. 14-5243 (D.C. Cir. June 30, 2015), ECF No. 1560310.

Whether Appellant has a property interest in the severance provisions of his employment agreement turns on a narrow question of law — did Appellant have a historically-rooted expectation that the Government would not alter the terms of his contract given that, *inter alia*:

- HERA expressly authorized FHFA to "prohibit [Fannie or Freddie] from providing compensation to any executive officer . . . that is not reasonable (12 U.S.C. § 4518(a)), and specifically, to "prohibit or limit, by regulation or order, any golden parachute payment," 12 U.S.C. § 4518(e)(1); and

- The Federal Housing Enterprises Financial Safety and Soundness Act of 1992 provided the Office of Federal Housing Enterprise Oversight (FHFA's predecessor) the express authority to regulate executive compensation. *See* Pub. L. No. 89-670, § 1318(a), 106 Stat. 3672 (1992) (codified as amended at 12 U.S.C. § 4518(a) (2006)) ("The Director shall prohibit the enterprises from providing compensation to any executive officer of the enterprise that is not reasonable . . . .").

Amici take no position on the answer to this question. But Amici respectfully urge the Court to resolve this narrow constitutional issue on appropriately limited grounds. *See Beer v. United States*, 696 F.3d 1174, 1194 (Fed. Cir. 2012) ("Only if there is no valid narrow constitutional ground available, should the court resolve any broader constitutional question."); *MySpace, Inc. v. GraphOn Corp.*, 672 F.3d 1250, 1260 (Fed. Cir. 2012) ("The Supreme Court has wisely adopted a policy of not deciding cases on broad constitutional grounds when they can be decided on narrower . . . grounds."). The Court need not, and should not, reach for or rely on *Perry*'s unsupported and insupportable assertion

that a federal conservatorship automatically terminates established private property rights and permits the Government to line its own pockets with the regular profits of private companies in perpetuity to resolve the present appeal.

CONCLUSION

Amici respectfully urge the Court to reject the Opinion insofar as it relied on infirm and non-precedential *Perry* dicta.

Dated: August 25, 2015

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

CERTIFICATE OF SERVICE

Anthony Piszel v. United States, No. 2015-5100

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by JOSEPH HAGE AARONSON LLC, Attorneys for Amici Curiae to print this document. I am an employee of Counsel Press.

On **August 25, 2015**, Counsel for Appellant has authorized me to electronically file the foregoing **Brief on Behalf of *Amici Curiae* Louise Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, L.P. in Support of Neither Party** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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In additional, all *Amici Curiae* filings in this case have been served via the courts CM/ECF system.

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I certify that the foregoing brief of *Amici Curiae* complies with the type-volume limitation of FED. R. APP. P. 29 and FED. R. APP. P. 32(a)(7)(B)(i) and contains 4,823 words, excluding the portions of the brief exempted by FED. R. APP. P. 21(a)(7)(B)(iiii) and FED. CIR. R. 32(b).

I certify that this brief complies with the type-face requirements of FED. R. APP. P. 29 and FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this brief has been composed in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman Font.

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