ORAL ARGUMENT NOT YET SCHEDULED

Nos. 14-5243 (L), 14-5254 (con.), 14-5260 (con.), 14-5262 (con.)

United States Court of Appeals for the District of Columbia Circuit

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal From The U.S. District Court
For The District Of Columbia
Case No. 1:13-cv-01025-RCL (Lamberth, J.)

Brief Of Louise Rafter, Josephine And Stephen Rattien, And Pershing Square Capital Management, L.P. As Amici Curiae In Support Of Appellants And Reversal

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici: Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Initial Opening Brief for Institutional Plaintiffs and the Initial Opening Brief for Class Plaintiffs. This brief is submitted on behalf of the following Amici:

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

B. Rulings Under Review: Accurate references to the rulings at issue appear in the Initial Opening Brief for Institutional Plaintiffs and the Initial Opening Brief for Class Plaintiffs.

C. Related Cases: Accurate references to related cases appear in the Initial Opening Brief for Institutional Plaintiffs and the Initial Opening Brief for Class Plaintiffs.

CORPORATE DISCLOSURE STATEMENT

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

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GLOSSARY

Amici	Louise Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, L.P.
Appellants	The Institutional Plaintiffs (as defined in the Institutional Plaintiffs' Glossary) and the Class Plaintiffs (as defined in the Class Plaintiffs' Glossary)
The Companies	Fannie Mae and Freddie Mac
Fannie Mae, or **Fannie**	Federal National Mortgage Association
FHFA	Federal Housing Finance Agency
FIRREA	Financial Institutions Reform, Recovery, and Enforcement Act
Freddie Mac, or **Freddie**	Federal Home Loan Mortgage Corporation
HERA	The Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654 (2008)
Inst.Pl.Br.	The Institutional Plaintiffs' Opening Brief
Net Worth Sweeps, or **Sweeps**	The acts by which Fannie Mae and Freddie Mac transfer their net worth to Treasury every quarter (less a capital reserve that declines until reaching zero in 2018), in accordance with the Third Amendment to the Senior Preferred Stock Purchase Agreements entered into between Treasury and FHFA on August 17, 2012
Op.##	District Court's Memorandum Opinion (Dkt. 1:13-cv-1025, ECF No. 51)
RTC	Resolution Trust Corporation
T####	Treasury's Administrative Record (Dkt. 1:13-cv-1025, ECF No. 26)
Treasury	United States Department of the Treasury

INTEREST OF AMICI CURIAE[1]

Amici Louise Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, L.P. are common shareholders of Fannie and Freddie. 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. Pershing Square is the Companies' largest common shareholder, with an approximate 10% stake in the outstanding common stock of each.

Amici have a direct and distinct interest in this appeal. Their own complaint challenging the Net Worth Sweeps is pending in the Court of Federal Claims. *Rafter v. United States*, No. 14-740 (Fed. Cl. Aug. 14, 2014). That complaint includes Fifth Amendment takings claims.

Amici respectfully submit this brief in support of reversal to address the key takings issues that must inform this Court's statutory interpretation.

STATUTES

The applicable statutes are contained in the Institutional Plaintiffs' Addendum of Pertinent Authorities.

[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.

INTRODUCTION

This is a straightforward statutory-interpretation case. Appellants have shown that HERA's plain text and ordinary canons of construction reflect common sense: A conservator conserves. It cannot siphon off and expropriate, each quarter, all profits of a company it is supposed to conserve. Through the Net Worth Sweeps, FHFA acts as an anti-conservator. The Net Worth Sweeps thus plainly exceed and are contrary to FHFA's statutorily-prescribed authority as conservator.

The constitutional-avoidance canon reinforces this plain reading of HERA. Indeed, it would compel the Court to adopt that reading even if the opposite view had any merit. The canon's function is well-established: "'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (citation omitted); *Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696, 701-02 (D.C. Cir. 1997).

Adopting the Government's and the district court's interpretation of HERA and permitting the Net Worth Sweeps to continue would give rise to takings claims under the Fifth Amendment. The Sweeps are quintessential direct appropriations of Amici's and other shareholders' property by the Government. Even if analyzed under the rubric for regulatory takings, the Net Worth Sweeps require just compensation.

The district court's contrary opinion on the takings issue was substantively incorrect, and its potential ramifications are astounding. According to that court, once the Government places an entity into conservatorship or receivership, it has *carte blanche* to do whatever it wants with the entity's assets, including—as this case demonstrates—extracting every cent of profit for its own use. That result contradicts Fifth Amendment jurisprudence.

As shown below, the Net Worth Sweeps are takings in violation of the Fifth Amendment. *At the very least*, they raise serious questions under the Takings Clause. The avoidance canon thus requires the common-sense conclusion that the Sweeps exceed and contradict the conservator's statutory powers and limits. *E.g.*, *Waterview*, 105 F.3d 696.

The district court held that it lacked jurisdiction over any takings claims. Op.43. Having reached this conclusion, the court had no power to "proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).[2] This Court accordingly also lacks jurisdiction to adjudicate any takings claims directly here. The Takings Clause, however, must guide the Court's resolution of the statutory question that *is* properly presented.

[2] "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.*

Neither Appellants nor Amici challenge FHFA's appointment as conservator, only its belated imposition of the confiscatory Net Worth Sweeps. Amici do not deny that the Companies were in a weakened condition during the financial crisis of 2007-08. The Government, however, made the carefully considered decision to place them into conservatorship, apparently believing they could be restored to strength with some assistance. Having made that financial and public-policy judgment, the Government obligated itself to abide by statutorily-limited powers and duties. The Government also protected itself with carefully prescribed, stringent terms—including warrants to purchase 79.9% of each Company's common stock, quarterly dividend payments at an annual rate of 10% in cash or 12% in kind, and a first-priority liquidation preference—just like a private lender choosing to assist a struggling company that it believes could recover.

With the Net Worth Sweeps, however, the Government has abandoned the limitations Congress placed on the conservator's powers and responsibilities, choosing instead simply to take the Companies' entire net worth every quarter (less a diminishing capital reserve that zeroes out by 2018). It is as if the lender, having assisted the struggling company, then tried to take the entire company once it regained its footing. The owners obviously would have a basis for objecting; the lender's prior assistance does not give it a right to anything more than what it required as a condition of making the loan. In the same way, the Government's initial assistance to the Companies in no way supports its subsequent decision to seize everything they earn, every quarter. It is this change in course that gives rise to Appellants' and Amici's claims.

ARGUMENT

I. The Court Must Interpret HERA So As To Avoid Serious Constitutional Questions Under The Takings Clause.

A. The central question on appeal is whether HERA authorizes FHFA, as the Companies' conservator, to take all of the Companies' profits, each quarter, in perpetuity, and sweep them to Treasury. The Court must determine whether in so doing FHFA acts "beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions." *Nat'l Trust for Historic Pres. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring) (referring to 12 U.S.C. § 1821(j)); *see also, e.g.*, *Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013).

Appellants demonstrate why the plain text of HERA, interpreted according to ordinary canons of construction, shows that the Net Worth Sweeps violate the Government's statutory powers and functions. (Inst.Pl.Br. 33-43.) The most common definition of the word *conservator* is a "guardian, protector, or preserver." *Conservator*, Black's Law Dictionary (10th ed. 2014). Stripping the Companies of their profits, much less for the Government's own use, runs directly contrary to this role.

Congress incorporated this plain meaning into HERA, as the statute, read as a whole, confirms. *See generally* 2A *Sutherland's Statutes and*

Statutory Construction § 47.02 (7th ed. 2014). HERA authorizes FHFA to place the Companies into either conservatorship or receivership in certain circumstances. It carefully distinguishes between FHFA's powers as a conservator and as a receiver, delineating that as a conservator, FHFA's powers include such action as may be necessary to "put the [Companies] in a sound and solvent condition," "carry on" their business, and "*preserve and conserve*" their "*assets and property*." 12 U.S.C. § 4617(b)(2)(D) (emphases added). HERA gives a conservator no authority to expropriate the Companies' net worth, which would be manifestly contrary to those powers the statute *does* accord.

In contrast, it is only as a receiver—and not as a conservator—that FHFA receives the "additional power[]" to "place [the Companies] in liquidation." 12 U.S.C. § 4617(b)(2)(E). Even then, however, HERA does not authorize the Net Worth Sweeps. Moreover, FHFA's appointment as receiver would trigger a host of substantive and procedural protections for shareholders. Receivership, for example, carries an immediate right to judicial review. HERA also spells out a detailed process and prioritization for a receiver to determine claims against a Company, preserving shareholders' rights to the Companies' residual value and again including a right to judicial review. 12 U.S.C. § 4617(b)(2)(E), (b)(2)(K)(i), (b)(3), (c)(1)(D). Thus, by stripping the Companies of all profits while holding them in conservatorship, the Government not only is violating the conservator's statutory powers, but is doing so in a way that purposefully avoids the statutory protections Congress established for a liquidation under a receivership—including judicial review.

B. Even if the textual analysis set forth above were insufficient to resolve the interpretive questions under HERA, the canon of constitutional avoidance would compel the conclusion that the Net Worth Sweeps are contrary to FHFA's statutory powers as conservator.

The avoidance canon applies with full force when the Takings Clause is the implicated constitutional provision. This Court's decision in *Waterview*, invoking the avoidance canon to interpret a statute involving oversight of the mortgage-finance industry, makes this clear. Like FHFA here, the RTC in *Waterview* interpreted its charter statute (FIRREA) as permitting it to ignore underlying property rights in its disposition of a regulated entity's assets. 105 F.3d at 701. This Court, however, concluded that reading FIRREA "to permit a federal agency acting as conservator or receiver to sell assets in disregard of all pre-receivership rights[] raises significant constitutional questions under the takings clause." *Id.* The Court thus adopted a "reading of the statute [that] avoids th[ose] question[s]." *Id.* at 702.[3]

[3] The avoidance canon trumps *Chevron* deference. Courts "only defer … to agency interpretations of statutes that, *applying the normal 'tools of statutory construction*,' are ambiguous." *I.N.S. v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (quoting *Chevron USA, Inc. v. N.R.D.C., Inc.*, 467 U.S. 837, 843 n.9 (1984) (emphasis added)). Since the avoidance canon resolves any possible ambiguity in HERA, there is no "gap for the agency to fill." 467 U.S. at 843.

The Net Worth Sweeps raise constitutional questions that are even more threatening to Fifth Amendment rights than were the RTC's actions in *Waterview*. There, it was an "open question" whether the right at issue—"an option to purchase land"—was protectable property under the Fifth Amendment. *Id.* at 701-02. It also was "not at all clear" that the RTC's conduct had caused the plaintiff to "sustain[] any compensable damages." *Id.* at 702. Here, in contrast, the property right at issue is well-established and the harm is demonstrably compensable. *Infra.*

Indeed, the need for avoidance is *magnified* where the Takings Clause is implicated, given that Clause's role in protecting the separation of powers. As this Court has recognized, when an agency's interpretation of a statute would raise questions under the Takings Clause, "use of a narrowing construction prevents executive encroachment on Congress's exclusive powers to raise revenue and to appropriate funds." *Bell Atl. Tel. Companies v. F.C.C.*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). These concerns are acutely applicable here; with each Net Worth Sweep, Treasury raises off-budget revenue without appropriation by Congress or (it claims) judicial oversight.

Accordingly, because "property interests cannot be regulated out of existence without compensation," the avoidance canon further buttresses Appellants' argument that HERA does not authorize the Net Worth Sweeps. *Waterview*, 105 F.3d at 702.

II. The Net Worth Sweeps Are Takings Without Compensation.

The Government's interpretation of HERA as authorizing the Net Worth Sweeps "raises significant constitutional questions under the takings clause." *Id.* at 701. The Court must interpret HERA to avoid these questions. *Id.; United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982) (invoking canon to avoid reading of Bankruptcy Act that would destroy pre-enactment property rights and give rise to takings claims).

A. *Conservatorships Do Not Eliminate Shareholders' Property Interest In Their Stock.*

The district court correctly recognized that shareholders have a property interest in their stock even if the company they own is subject to the possibility of a conservatorship, and consequently, they have a right to assert a takings claim if a conservatorship is improperly imposed. (Op.45 n.50.) The district court nonetheless illogically concluded that, although shareholders have a property interest in challenging improper *appointment* of a conservator, they have no right to challenge even blatantly improper *actions by* a conservator.

According to the district court, this counterintuitive rule comes from two Federal Circuit cases purportedly establishing that, at the moment a conservator is properly appointed, shareholders' property rights are somehow extinguished. (Op.45.) Consequently, the conservator can literally do anything it wants with a company's assets, and for any reason—the conservator's "motives are irrelevant"—because shareholders "possess no cognizable property interests" after appointment of a conservator. (*Id.*) Thus, the district court's ruling would apparently allow a conservator to use a company's assets to build highways, subsidize agriculture, or perhaps even buy the conservator a beach house; any obligations to restore the company to solvency and to conserve its assets and property can be blithely ignored.

This view is contrary to basic property rights, HERA, and the very cases the district court relied upon.

1. The district court's distinction between improper conservatorships and improper acts *by* a conservator makes no sense. As the court recognized, shareholders have a property right to stop a conservator from *wrongly* intruding on an entity. The court thus rightly rejected the "alarmist assertion" that the Government can take over stable entities. (Op.45 n.51.) A conservator's intrusion, however, does not end with its appointment; the intrusion continues with the conservator's actions. Thus, just as shareholders have a right to resist jeopardizing the economic value of their stock by an improper appointment of a conservator, so too may they resist *evisceration* of the economic value of their stock by improper conservator acts that bleed the company dry while in the legally mandated process of *regaining* stability.[4] Abusing a conserva-

[4] This is true even in the more extreme situation of liquidation. In bankruptcy, a corporation's equity owners retain any liquidation surplus. *A fortiori*, an owner whose company is put into conservatorship—for the express purpose of being restored to solvency—retains an interest in that property throughout the life of the conservatorship.

torship contrary to the conservator's statutory authority is no different from improperly imposing one in the first place. The entire purpose of a conservatorship is to nurse a company back to health so that it can again provide value to its constituents, including its shareholders. It would make no sense for Congress to subject companies to this onerous process if it did not intend the owners to end up with a stabilized institution once the conservatorship ended.

2. The district court's view that shareholders' property interests are extinguished by a conservator's appointment is unsupported by—indeed, contrary to—*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). Neither decision could possibly have established a rule that shareholders lack a compensable property right to resist improper actions by a properly appointed conservator, because both cases involved challenges to being *placed* into conservatorship or receivership—not to allegedly improper conservator actions.[5]

Moreover, the reasoning of those decisions clearly *confirms* a property right to challenge manifestly improper conservator actions. As the district court itself recognized, these cases merely state that, because shareholders knew about the "specter of conservatorship" when they

[5] Because neither Appellants nor Amici challenge FHFA's appointment as conservator, the analogy would be if, in *Golden Pacific* and *California Housing*, the Government seized profits from ongoing, solvent banks, rather than taking over *insolvent* entities to protect creditors.

purchased the stock, this deprived them of the normal "right to exclude the government from [their] property at those times when the government could *legally* impose a conservatorship." (Op.43-44 (quoting *Golden Pac.*, 15 F.3d at 1074 (emphasis added)).) Thus, shareholders' property interests in the stock did not give them a right to resist a proper, *legal* receivership: they "could not have reasonably expected that the government 'would fail to enforce the applicable statutes and regulations,'" and so such *valid* enforcement actions "could not possibly have interfered with a reasonable investment-backed expectation." 15 F.3d at 1074.[6] Nor could the shareholders invoke a *per se* rule against *physical* invasions of real property merely because the banks' physical property (the buildings) was seized as a consequence of this proper receivership.

[6] Indeed, in both decisions, the Federal Circuit repeatedly emphasized that its conclusion applied only to actions taken by a *proper* receiver. *See id.* ("*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." (emphases added)); *id.* ("The actions of the Comptroller simply enforced 'portions of an extensive regulatory scheme ….'" (citation omitted)); *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 (noting that a district court had concluded that the Comptroller of the Currency acted "within the scope of his statutory authority"); *Cal. Housing*, 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 …." (emphases added)); *id.* at 959 ("Saratoga gave the government the right, among other rights, to place Saratoga in conservatorship or receivership *when warranted*." (emphasis added)); *id.* ("Saratoga … foresaw the government's occupation of its premises *under the circumstances present here* …." (emphasis added)).

Id. at 1073-74; *Cal Housing*, 959 F.2d at 958. Obviously, if the shareholders had no right to resist seizure of the money in the bank's vaults, they had no separate right to forestall seizure of the vaults themselves simply because they are real property.

The key distinction in the Federal Circuit cases, then, is between *proper*, legal conservatorships and *improper*, illegal ones—not between a conservator's appointment and its later actions. There is no hint in either opinion that shareholders lack the right to challenge an *improper* conservator, or that a right to challenge statute-violating government action somehow evaporates post-appointment. At the most basic level, either of those outcomes would be illogical and contrary to the very nature of "conservatorship." A conservator's job is to protect and preserve the value of property interests, including those of the shareholders.

In sum, *Golden Pacific* and *California Housing* make clear that shareholders possess property interests in their stock relative to conservators or receivers, which is why both courts assessed the plaintiffs' "reasonable investment-backed expectations" under the regulatory-takings test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Under that analysis, both courts determined that it was perfectly consistent with the "applicable statutes and regulations" for the entities to be placed in receivership. Here, however, the Net Worth Sweeps run directly *contrary* to the applicable statute (and to federal conservatorship law and the practice of federal conservators more generally). Appellants and Amici have a right to challenge the Government's taking of their property through improper conservator actions, just as the shareholders in *Golden Pacific* and *California Housing* had a right to challenge the improper appointment of a receiver.[7]

3. This is particularly obvious because HERA establishes not just standards for when a conservator can be appointed, but also limits on the conservator's powers and duties. 12 U.S.C. § 4617(a)(3), (b)(2)(D). Thus, just as shareholders would have the right to object if a conservator were appointed for a stable entity, they have a right to object to conservator actions that violate the statutory duty to attempt to restore an entity to stability and preserve its assets.

Indeed, in the early years of the conservatorships, even FHFA readily recognized these common-sense constraints on its powers, and the continuing property rights of the shareholders. When FHFA placed the Companies into conservatorship, it publicly underscored that "[s]tockholders will continue to retain *all rights in the stock's financial worth*." FHFA, *Questions and Answers on Conservatorship* (Sept. 7,

[7] Accordingly, the district court erred in reading those decisions as establishing that shareholders lack any property interest. Instead, they merely rejected an *absolute* interest in *real property* under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which would have required just compensation even for a perfectly legal conservatorship. Indeed, it is only because shareholders have a property interest in their stock that, as the district court acknowledged, they can *sell* that stock. (Op.48.)

2008) (emphasis added). In congressional testimony later that month, FHFA's director stated that FHFA would act as a conservator only "until [the Companies] are stabilized." *Turmoil in U.S. Credit Markets: Hearing Before Senate Committee on Banking, Housing, and Urban Affairs*, 2008 WL 4325397 (2008) (statement of James B. Lockhart III).

In 2009, FHFA's director again emphasized that "[a]s the conservator, FHFA's most important goal is to *preserve the assets* of Fannie Mae and Freddie Mac over the conservatorship period. That is our *statutory responsibility*." *The Present Condition and Future Status of Fannie Mae and Freddie Mac: Hearing Before the Subcomm. of Capital Markets, Ins. & Gov't Sponsored Enters of H. Comm. on Fin. Servs.*, 111th Cong. 11 (2009) (statement of James B. Lockhart, III) (emphases added).

FHFA again recognized shareholders' continuing rights when it promulgated a rule implementing HERA's conservatorship and receivership provisions in June 2011. In its rulemaking notice, FHFA explained that HERA did not authorize it as conservator to deplete an entity's assets:

> As one of the primary objectives of conservatorship of a regulated entity would be restoring that regulated entity to a sound and solvent condition, allowing capital distributions to deplete the entity's conservatorship assets would be *inconsistent with the agency's statutory goals*, as they would result in removing capital at a time when the Conservator is charged with rehabilitating the regulated entity.

76 Fed. Reg. 35724, 35727 (June 20, 2011) (emphasis added). Several months later, FHFA's director told the Senate: "*By law*, the conservatorships are intended to rehabilitate the [Companies] *as private firms*."

Letter from Edward J. DeMarco, Dir., FHFA, to Senate (Nov. 10, 2011) (emphases added).

4. This common-sense reading of HERA was and remains correct.

It is undisputed that the common stock is not terminated under conservatorship. Common shareholders retain the same ownership claim to the Companies as before, which includes the same position in the queue relative to, for example, creditors or preferred shareholders.

Shareholders have a constitutionally protected property interest in any surplus—even a contingent surplus—from a Government-administered receivership. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1288, 1296 (Fed. Cir. 1999) (following *California Housing* to hold that shareholder in regulated entity can raise takings claim because it "has a property interest in any eventual liquidation surplus"). Therefore, contrary to the district court's position below that rights are extinguished, even in the receivership context a receiver could not liquidate a company and then simply take any liquidation surplus—which is legally shareholders' property—without being subject to takings claims. *A fortiori*, the Government cannot, in a *conservatorship*, strip from common shareholders all economic value in their stock—contrary to the conservator's explicit statutory mandate and powers—and then assert that it is not subject to takings claims.

The creation and execution of the Net Worth Sweeps do not present the question whether FHFA properly exercised its discretion as conservator. Stripping the Companies of all of their profits every quarter and sweeping those profits to Treasury is an utter abandonment of the statutory powers and limits of the conservator. Amici and other shareholders manifestly have property rights in their proportional ownership of the Companies. Where the Government has acted contrary to its statutory charge and powers as conservator, they have the ability to protect those rights through takings claims.

B. *The Net Worth Sweeps Constitute Takings Under Any Mode Of Analysis.*

There are three ways the Government commits a taking: by directly appropriating property, physically invading real property, or regulating owners' use of their property. *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 537 (2005). The first two are "paradigmatic taking[s]": the Government *takes* property, in the most literal sense. *Id.* A regulatory taking, by contrast, does not involve actually seizing anything; rather, the Government regulates how the owner can use that property, diminishing the property's value. Given that the owner retains possession, and that virtually every regulation affects someone's property use, the Supreme Court has declined to hold that any regulation constitutes a taking. Instead, the question is whether a regulation "goes too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). A regulation will go "too far" if it deprives a property owner of all economically beneficial use, and therefore is "tantamount to a direct appropriation or ouster," or if it fails the three-part *Penn Central* balancing test. *Lingle*, 544 U.S. at 537-39.

The district court's foundational error lay in its misunderstanding of this framework, and in its view that the paradigmatic taking can only occur when real property is involved. (Op.47-48.) That notion finds no support in the law.

In *Lingle*, the Supreme Court expressly recognized that the "paradigmatic taking" can be *either* "a direct government appropriation *or* physical invasion of private property." 544 U.S. at 537 (emphasis added). The Court has long eschewed the view that only real property can be subject to a paradigmatic taking—indeed, just this Term, it forcefully rejected any such distinction. In *Horne v. Department of Agriculture*, after surveying the Takings Clause's history and its own jurisprudence, the Court reaffirmed "the established rule of treating direct appropriations of real and personal property alike." No. 14-275, slip op. at 8 (U.S. June 22, 2015). "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Id.* at 5.

Thus, if the Government appropriates private property, whatever its form, there is no need for further inquiry: compensation must be paid. Courts "do not ask … whether [the taking] deprives the owner of all economically valuable use." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002). Nor does it matter whether the Government keeps the property or passes it to some third party. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003).

Accordingly, the Supreme Court has found a taking when, for instance, the Government seized part of a warehouse General Motors had leased (*United States v. Gen. Motors Corp.*, 323 U.S. 373, 382-84 (1945)); when a county took the interest on court fees paid into a bank account (*Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64 (1980)); when a State required lawyers to deposit client funds into IOLTA accounts and transferred the interest to charity (*Brown*, 538 U.S. at 235)[8]; and when Government planes used private airspace to approach a Government airport (*United States v. Causby*, 328 U.S. 256, 267 (1946)).

In all of these cases, the property owner retained economically beneficial use: G.M. kept "some 93,000 square feet" of the warehouse it had leased (323 U.S. at 375); the plaintiffs in *Webb's* and *Brown* recovered their principal (449 U.S. at 158; 538 U.S. at 224); and the *Causby* plaintiff could use his property as anything but a chicken farm (328 U.S. at 259). The Government's actions in each case also served laudable purposes: aiding the wartime effort (*General Motors* and *Causby*), supporting charity (*Brown*), and increasing the public fisc (*Webb's*).

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[8] No compensation was required in *Brown* because, under the challenged program, interest on client funds could be taken only if the funds had been paid into the wrong account—the owner's loss was zero so long as the law was obeyed. *Id.* at 240. This did not change the fact that, if owners *could* have suffered loss under the law, they would have been entitled to compensation. *Id.* at 235.

Those considerations, however, did not change the fact that takings had occurred, because the Government had expropriated private property for itself. *See, e.g.*, *Webb's*, 449 U.S. at 163-64 ("The county's appropriation of the beneficial use of the fund is analogous to the appropriation of the use of private property in *[Causby]*."). The plaintiffs thus did not need to show deprivation of all economically beneficial use or satisfy the *Penn Central* balancing test. Similarly, if the Government took $100 from every U.S. bank account that contained more than that, no one would think it permissible because the Government did not take every cent, or because it gave the money to a worthy cause.

As explained below, the Net Worth Sweeps are direct appropriations requiring just compensation. Even if they are assessed as regulatory takings, however, the result is the same: just compensation is required.

1. The Net Worth Sweeps Are Direct Government Appropriations Of Private Property.

The Net Worth Sweeps epitomize the "paradigmatic taking": "a direct government appropriation … of private property." *Lingle*, 544 U.S. at 537. Each quarter, with no end in sight, the Government takes the Companies' net worth for its own use. Under our Constitution, that is a taking.

This conclusion in no way hinges on whether the Government actually takes legal title to the stock. A taking occurs if the Government takes funds "linked to a specific, identifiable property interest such as a bank account." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013). After all, taking the money in a bank account is no different from taking title to the account; the account is just a mechanism for accessing the money. *Webb's*, 449 U.S. at 163-64; *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998). Similarly, the Government takes the property right created by a contract by withholding the *funds* owed under the contract. *Lynch v. United States*, 292 U.S. 571, 579 (1934). It makes no difference whether the Government allows the owner to keep the piece of paper linked to the funds—*i.e.*, the title to the account or the contract. The property is the financial claim to which the paper entitles its owner. Thus, just compensation is required when the Government impairs that claim, regardless of whether it takes the paper.

The implications for stock ownership are readily apparent. A stock certificate is a mechanism for accessing the economic value that inheres in proportional ownership of the company.[9] A shareholder has a claim on their *pro rata* share of the company's net assets. Moreover, just as the owner of principal in a bank account also owns the interest that accrues on that principal, since interest "follows the principal" (*Webb's*, 449 U.S. at 162), a shareholder owns a proportional claim to increases in the company's value—if the company pays out earnings as dividends

[9] *See* 2 *Cox & Hazen on Corporations* 718 (2d ed. 2003) ("A share of stock is primarily a profit-sharing contract, a unit of interest in the corporation based on a contribution to the corporate capital."); *Golden Pac.*, 15 F.3d at 1073 (recognizing "shares of stock" as "property").

or reinvests them, for example. In either case, the stock grants its holder a property right to benefit proportionately from the company's success.

Here, the Government "direct[ly] appropriat[es]" the Companies' net worth every quarter. *Lingle*, 544 U.S. at 537. If the district court were correct that HERA allows this, the statute would give rise to a clear violation of the Takings Clause, and just compensation would be required.

2. Even If The Net Worth Sweeps Are Assessed As Regulatory Takings, Compensation Is Required.

For the above reasons, the Net Worth Sweeps effect a direct appropriation of private property, and there is no need to turn to regulatory-takings analysis. Even if viewed as a regulatory taking, however, the Sweeps violate the Fifth Amendment.

a. The Sweeps deprive the Companies' shareholders of "*all* economically beneficial use" of their stock, thus obviating any need for *Penn Central* balancing even under the regulatory-takings rubric. *Id.* at 538. The Government alone enjoys the right to participate in the Companies' financial success, leaving shareholders nothing but the certificates.

The district court rejected this on the grounds that shareholders' ability to sell their stock is an economically beneficial use. This is wrong.

First, the ability to sell stock, without more, is not an economically beneficial use. Where the Government has gutted property of its "underlying economic uses," it makes no sense to treat the sale of that property as an economic use. *Lost Tree Vill. Corp. v. United States*, No. 14-5093,

__ F.3d __, 2015 WL 3448943, *5 (Fed. Cir. June 1, 2015). As the Federal Circuit recognized in a land case, "[t]ypical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel." *Id.* So, too, the "typical economic use" of stock enables its holder, an owner of a company, to realize the benefits of the company's economic value, and not just to sell the stock. Selling the right *not* to participate in the Companies' earnings (since the Government takes all of those earnings, in perpetuity) is not an economically beneficial use. Whatever limited value there is in being able to sell the stock, the Government cannot escape its obligation to pay just compensation by leaving property owners a "token interest." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001); *Horne*, slip op. at 9-10.

Second, it is always possible to sell property the Government has rendered *currently* valueless, so long as there is hope that the deprivation will cease and the value will be restored. The Government cannot escape liability for a taking simply because some investors purchase shares in hope that the taking will be reversed. *Lost Tree*, 2015 WL 3448943, *6. Here, the Net Worth Sweep takings could end under court order or because the Government voluntarily ceases the deprivations, perhaps under a new Administration or a congressional enactment requiring such a termination. This obviously does not change the fact that *currently*, the Government is taking private property.

b. Accordingly, there is no need to consider the *Penn Central* balancing test. Even if that test were applied, however, its three factors—(1) "investment-backed expectations"; (2) "economic impact"; and (3) "the character of the governmental action," 438 U.S. at 124—confirm that just compensation is required.

First, for the reasons above, Appellants and Amici have strong "investment-backed expectations" that their ownership stake in the Companies' assets would not be deliberately dissipated by one required to conserve those assets, for the Government's direct benefit. "[T]he existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Phillips*, 524 U.S. at 164.

The district court's decision to the contrary rested on an even more extreme version of its property-interest analysis—namely, that anyone investing in a "closely regulated" industry must expect that the Government could improperly seize their property at its whim. (Op.49-50.) In the court's view, the Companies' stock essentially contained a hidden covenant stating that it would be subject to seizure whenever the Government sees fit, making all shareholders merely conditional owners. This is plainly erroneous for the reasons already stated: investors have no reason to expect that the Government will *violate* its statutory conservatorship duties, and are instead entitled to expect compliance. *Supra* at II.A.

To be sure, the regulatory context can *affect* the reasonableness of investors' expectations. As courts have long recognized, however, the key word in this tautology is *affect*; the regulatory context does not *extinguish* investment-backed expectations: "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." *Cienega Gardens v. United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003) (HUD-subsidized housing)*; see also, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 998 (1984) (pesticides); *United Nuclear Corp. v. United States*, 912 F.2d 1432, 1436 (Fed. Cir. 1990) (uranium mining). Shareholders could not reasonably have expected that FHFA, as purported conservator, would go far beyond its statutorily-prescribed powers, let alone that FHFA could continue down this path indefinitely.

Second, the "economic impact" of the Net Worth Sweeps is total for the common shareholder, the economic value of whose stock is eliminated. This flies in the face of the basic law the Government once recognized, that under HERA common shareholders retain all rights in the stock's financial worth even in conservatorship.

Under the Sweeps, the Companies' net worth is taken every quarter. Shareholders are completely barred from receiving *any* money from the

Companies in the form of dividends, or from realizing the gains that would result if the Companies could reinvest their earnings, or from anything else that could provide economic value to shareholders. The Sweeps do nothing to decrease the Government's liquidation preferences in the Companies, which stand at $189.5 billion. Nor do they affect the Government's warrants to purchase up to 79.9% of each Company's common stock. The upshot is that the Sweeps destroy the common shares' entire economic value, now and until they are stopped.

The Sweeps' scale is vast. The Government has already stripped the Companies of hundreds of billions of dollars, which is more than the amount saved through "sequestration," and more than the annual GDPs of 140 countries. To date, the Government's dividends amount to over $40 billion more than the Government invested in the Companies.

Third, the "character of the governmental action" is naked self-dealing. Although the district court expressly refused to allow the fact-finding that it recognized "would likely [be] need[ed]" to fully assess the character of the Sweeps (Op.50), the flagrancy of the Government's conduct is readily apparent. Through the Sweeps, the Government takes the Companies' profits and puts them in its own coffers. The Sweeps also have the benefit—for the Government—of generating significant off-budget revenue, without political accountability for tax hikes or spending cuts.

The timing of the Net Worth Sweep Amendment bolsters this conclusion. The Government decided to impose the Sweeps just when the Companies returned to strong profitability. By mid-August 2012, both Companies had reported profits for at least the prior two quarters. Neither was drawing on its commitment from Treasury. It also was or should have been evident that accounting principles would require the Companies to greatly increase the value of their assets and decrease their multi-billion-dollar loss reserves, thus recapturing most of the value lost in the preceding years, including the write-down of deferred tax assets. (Both Companies had said as much.)

Moreover, the Net Worth Sweeps achieve what an internal 2010 Treasury memorandum characterized as the Administration's "commitment … [to] ensur[ing] existing common equity holders will not have access to any positive earnings." (T0202.) Since 2008, the Government has held warrants to purchase 79.9% of the Companies' common stock for a nominal price, which were designed to provide the Government "potential future upside." At the moment the Companies became and would continue to be strongly profitable, rather than exercising its warrants, the Government decided just to take all of the Companies' profits, every quarter. In so doing, the Government accomplished two purposes: taking all of that money for itself, in perpetuity, and depriving the common shareholders of any economic value in their shares. Such indications of bad faith only bolster the conclusion that the Government's conduct constitutes a taking. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 333 (noting that "were it not for the findings of the District Court that [the governmental entity] acted diligently and in good faith, we might have concluded that the agency was stalling" and found a taking).

Nonetheless, the Government insists that the Sweeps were necessary to end the so-called "downward spiral" of the Companies borrowing from Treasury to pay Treasury. This rationalization does not withstand even passing scrutiny. Treasury's stock gave it the right to have dividend payments added to its liquidation preference—at a slightly higher rate—instead of continually receiving those dividends in cash. The Government thus had options for responding even when the Companies were unable to pay dividends without drawing on Treasury. In any event, the Companies' inability to timely pay the Government at one time is not a basis for taking their money even when they have no trouble making payments. There is no nexus between the Government's interest in being made whole and its decision to take literally all of the economic value of the Companies' equity. If the "downward spiral" were anything other than a pretext, the Government would have—*at the very least*—terminated the Sweeps when the Companies had paid dividends to Treasury in excess of the amounts they borrowed. That point has long since passed, Treasury having received dividends amounting to over $40 billion more than it invested in the Companies. (Inst.Pl.Br.2.)

In sum, *even if* the Government were not directly appropriating Appellants' and Amici's property, and *even if* it were not depriving them of all economically beneficial use, all three *Penn Central* factors would weigh in favor of finding a regulatory taking. Given "the magnitude of" the Sweeps' "economic impact and the degree to which [they] interfere[] with legitimate property interests," the Government's asserted justifications could not save its case even if credited. *See Lingle*, 544 U.S. at 540 (noting that the first two *Penn Central* factors weigh more heavily in the analysis); *Ruckelshaus*, 467 U.S. at 1005 (the "investment-backed expectations" factor can be "so overwhelming" as to be dispositive).

CONCLUSION

The Net Worth Sweeps violate the Fifth Amendment. However, the Court does not need to make that determination. It suffices that adopting the Government's and the district court's interpretation of HERA would raise profound questions under the Takings Clause. The Court is obligated to avoid those questions if possible. Here, that is easy to do. The Court need only interpret the statute to require FHFA, in its role as conservator, to in fact act as conservator. The decision below should be reversed.

Dated: July 6, 2015

Respectfully submitted,

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CERTIFICATE REGARDING SEPARATE BRIEFING

I am aware that others intend to submit amicus briefs in support of Appellants. I hereby certify, in accordance with D.C. Circuit Rule 29(d), that it is necessary for Amici to file this separate brief in light of their distinct interest in this appeal, given that Amici are pursuing a separate challenge to the Net Worth Sweeps in the Court of Federal Claims. Amici's CFC complaint asserts (among other things) Fifth Amendment takings claims, giving Amici unique insight into the substantial constitutional issues that affect the statutory-interpretation questions Appellants have raised in this appeal. Amici have limited their brief to addressing only this relationship between takings analysis and the statutory-interpretation questions.

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), that this brief complies with the type-volume limitation of Federal Rule 29(d) because it contains 6,947 words (excluding the parts exempted by Federal Rule 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1)), as determined by the word-count function of Microsoft Word.

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it was prepared in 14-point Century Schoolbook font using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify, in accordance with Federal Rule of Appellate Procedure 25(c), that on July 6, 2015, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the Court's CM/ECF system.

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