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

REPLY IN SUPPORT OF MOTION ON BEHALF OF LOUISE RAFTER, JOSEPHINE AND STEPHEN RATTIEN, AND PERSHING SQUARE CAPITAL MANAGEMENT, L.P. FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF 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.

Amici respectfully submit this reply brief in further support of their Motion for Leave to File an Amicus Curiae Brief in Support of Neither Party ("**Motion**").[1]

The Government's Response in Opposition to Amici's Motion ("**Response**") concedes, as it must, Amici have the requisite "interest" — "as a litigant" in *Rafter*, a separate takings case challenging the Net Worth Sweep Dividends (Response at 3, 6) — to seek leave to file an amicus brief pursuant to FED. R. APP. P. 29(b). The Government's attempt to undermine the propriety of Amici's interest and the relevance of their proposed brief cannot be reconciled with the fact — conveniently omitted from its Response — that the Government has already argued to the Court of Federal Claims that, "[i]f affirmed on appeal, [the Opinion below] will become binding precedent bearing upon" another takings challenge to the Net Worth Sweep Dividends. *See* Defendant's Notice of Supplemental Authority at 3, *Fairholme Funds, Inc., et al. v. United States*, No. 13-465C (Fed. Cl. June 24, 2015), ECF No. 167 (attached as Exhibit A). The Government cannot dispute that Amici's proposed brief properly alerts the Court to the potential implications of this appeal in the context of takings issues regarding the Net Worth Sweep Dividends, and fails to identify any duplicative arguments presented by Amici, or

[1] All terms and short form citations defined in the Motion are adopted in this Reply. Emphasis has been added to, and internal quotations, brackets and citations omitted from, quoted material in this brief, except as indicated.

any tangible burden imposed by their brief. Amici thus respectfully request that their Motion be granted.

A. AMICI'S INTEREST IN THE APPEAL IS UNDISPUTED

As demonstrated in its Motion (at 2-4), Amici's pending takings claim challenging the Net Worth Sweep Dividends in *Rafter* gives them a substantial interest in bringing the Opinion's unnecessary reliance on *Perry* — including *Perry*'s erroneous dicta rejecting a takings claim and its misreading of Federal Circuit precedent — to this Court's attention. Far from disputing that interest, the Government concedes Amici's "interest in the outcome of their own litigation," but argues that this interest should be rejected under FED. R. APP. P. 29(b)(1) because it is "partisan." Response at 3, 5. The Government is wrong.

The Government's contention that Amici's interest subverts the "traditional[]" and "[h]istorical[]" role of an amicus to provide "impartial information" to the Court, *id*. at 3, "became outdated long ago" and cannot be "square[d] with" FED. R. APP. P. 29(b)(1)'s "require[ment] that an amicus have an interest in the case." *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J., in chambers). Appellate courts instead require that amici have an interest and routinely permit amicus filings where amici's direct or pecuniary interests may be affected by the outcome of the appeal. *See, e.g.*, *id.* ("the notion that an amicus cannot be a person who has pecuniary

interest in the outcome also flies in the face of current appellate practice"); *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1454 n.11 (6th Cir. 1988) (leave to file granted given "the possibility that the interest of amicus could be affected by the outcome of this case").

Even cases cited by the Government (*see* Response at 4-6) acknowledge the propriety of allowing amicus briefs where, as here, amici are litigants in another case that may be affected by the outcome of the current appeal. *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) ("An amicus brief should normally be allowed when … the amicus has an interest in some other case that may be affected by the decision in the present case."); *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (court should accept amicus briefs "when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may … materially affect that interest").

Significantly, the other appellate cases on which the Government relies (*see* Response at 3-7) either do not address motions for leave to file amicus briefs, *see Amoco Oil Co. v. United States*, 234 F.3d 1374, 1377-78 (Fed. Cir. 2000) (holding that issue raised only by amicus curiae at the trial court does not preserve the issue on appeal); *United States v. State of Michigan*, 940 F.2d 143, 166 (6th Cir. 1991) (permitting amicus to "continue[] participation in this action in the traditional role

of amicus curiae, and [to] . . . argue its adversarial position either orally or by written briefs," but holding district court erred in allowing amicus curiae to exercise rights equal to the "named party/real party [of] interest"), or are otherwise distinguishable. *See In re Opprecht*, 868 F.2d 1264, 1265 (Fed. Cir. 1989) (denying motion to intervene or file amicus brief in appeal from Patent and Trademark Office proceeding where Congress expressly limited participation of third parties and third party offered no additional arguments or issues); Order at 2, *Yankee Atomic Elec. Co. v. United States*, No. 07-5025 (Fed. Cir. Aug. 3, 2007), Dkt. Nos. 31-32 (summary denial of motion for leave to file amicus brief).[2]

B. AMICI'S BRIEF IS RELEVANT AND DESIRABLE

The Government cannot credibly dispute that Amici's proposed brief addresses matters relevant to this appeal. Just two months ago, in one of the "closely-related actions" challenging FHFA and Treasury's Net Worth Sweep, *id.* at 1, the Government took exactly the opposite position by bringing the Opinion —

[2] The district court cases on which the Government relies are likewise unavailing or inapposite. *See Leigh v. Engle*, 535 F.Supp. 418, 422 (N.D. Ill. 1982) (noting that, unlike "appellate levels of the federal judiciary [where] the institution of the amicus curiae brief has moved from neutrality to partisanship … [and] may be useful in a reviewing court … it is not proper in a trial court.") (Response at 3); *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 285 (1996) (denying amici leave to file where both "Plaintiff and defendant [ ] have strongly opposed movants' request") (Response at 4); *Am. Satellite Co. v. United States*, 22 Cl. Ct. 547, 548, 549 (1991) (denying leave to file where amicus was "intimately involved in the facts and circumstances leading to the pending lawsuit … [and] offer[ed] to add to the factual background") (Response at 4, 5).

including its reading of *Golden Pacific* and *California Housing*, as informed by *Perry* — to the attention of the Court of Federal Claims as supplemental authority in support of the Government's pending dismissal motion in that case. *See* Exhibit A at 3. There, the Government expressly stated that the Opinion bears directly on takings claims challenging the Net Worth Sweep: "If affirmed on appeal, *Piszel* will become binding precedent bearing upon Fairholme's takings claim in this case." *Id.*[3] The Government cannot maintain before the Court of Federal Claims that the issues in this appeal may prove dispositive of Amici's claims and simultaneously seek to bar Amici's submission to this Court on the grounds that the same issues are "immaterial." Response at 6.

Moreover, the Government's contention that there "has been no showing that Mr. Piszel needs the assistance of *amicus curiae* on this appeal" is a red herring. Response at 6. Amici are well aware that both parties are more than adequately represented by highly able counsel. But appellate courts have long dispensed with the idea that an amicus seeking leave must show that a party is either unrepresented or inadequately represented. *See Neonatology*, 293 F.3d at 132 ("denying motions for leave to file an amicus brief whenever the party

[3] The Government also fails to mention its own reliance on *Perry* below. *See* Defendant's Motion to Dismiss at 17-20, (Fed. Cl. Nov. 25, 2014), ECF No. 11 (citing *Perry*, *passim*; "for purposes of establishing a cognizable property interest, Mr. Piszel[]. . . is indistinguishable from the stockholders[]. . . in *Golden Pacific*, *California Housing*, and *Perry Capital*").

supported is adequately represented would . . . deprive the court of valuable assistance"); *cf. Bush v. Viterna*, 740 F.2d 350, 358-59 (5th Cir. 1984) (third party's role as amicus is "more appropriate than an intervention with full-party status" where defendant's interests were already "adequately represented"). Nor does Amici's neutral brief support Appellant. Rather, as the proposed brief makes clear, Amici take no position on whether, under this Circuit's precedent, Mr. Piszel adequately stated a takings claim in light of the existing regulatory environment governing executive compensation. *See* Amicus Brief at 18-19.

Finally, the Response identifies no duplication of arguments by Appellant in Amici's brief, or any associated burden to the Court or the parties, because there are none. Whereas Appellant seeks to distinguish his case on its facts from *Perry*, *Golden Pacific* and *California Housing*, *see* Appellant's Br. p. 37-38 and n. 9 — which the Government will no doubt dispute — Amici point out to this Court that *Perry*'s analysis is incorrect and misconstrues *Golden Pacific* and *California Housing*. *See generally* Amicus Brief. Unlike Appellant, Amici's brief also emphasizes that *Perry*'s broad constitutional dicta and its misreading of this Court's precedent are unnecessary to the disposition of this appeal, which can (and should) be resolved — for either party — on far narrower grounds. Finally, since the Response already concedes that *Perry* is "not binding on this Court," and the Government has already briefed *Perry*'s purported relevance below, *see* n. 3,

supra, the Government's supposed "burden of study and the preparation of a possible response" is non-existent. Response at 6.

CONCLUSION

The proposed brief's unique and desirable perspective, Amici respectfully submit, lies in alerting this Court "to possible implications of the appeal" — implications the Government has already attempted to capitalize on in the Court of Federal Claims — and ensuring that its resolution does not "inadvertently stray into issues that need not be decided in this case." *Neonatology*, 293 F.3d at 133-34. *See also Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found., Ltd. P'ship*, No. 626, 2000 WL 1300430, at *1 (Fed. Cir. Sept. 1, 2000) (granting leave to file amicus because the issue raised "affects not only this case, but many other cases as well"). *See also* Motion at 4. For the foregoing reasons, and the additional reasons set forth in the Motion, Amici respectfully request that the Court grant their motion for leave to file the proposed amicus brief in this appeal.

Dated: September 3, 2015

Respectfully submitted,

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Exhibit A

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., *et al.*,	)	
	)	
Plaintiffs,	)	No. 13-465C
	)	(Judge Sweeney)
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY

The United States respectfully submits this notice of supplemental authority to alert the Court to the recent opinion and pending appeal in *Piszel v. United States*, No. 14-691C, 2015 WL 3654399 (Fed. Cl. June 12, 2015), No. 15-5100 (Fed. Cir.). Ex. A. As described below, *Piszel* is persuasive authority that supports arguments raised in our pending motion to dismiss. Should the Federal Circuit affirm the court's decision in *Piszel*, that decision would become binding precedent bearing upon this Court's disposition of *Fairholme* and the other lawsuits brought by shareholders of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises) who allege that actions taken by the Federal Housing Finance Agency (FHFA) effected an illegal exaction or Fifth Amendment taking of their shareholder rights.

In *Piszel*, the court dismissed illegal exaction and takings claims arising out of the conservatorship of Freddie Mac. The plaintiff, Anthony Piszel, served as the Chief Financial Officer of the company from 2006 until September 2008. A few weeks after FHFA placed the Enterprises into conservatorship, the Director of FHFA instructed Freddie Mac to terminate Mr. Piszel without cause and to withhold the "golden parachute" severance compensation promised to him under his employment contract with the company. In his complaint, Mr. Piszel

alleged that FHFA's actions constituted either an illegal exaction or a Fifth Amendment taking of his contract right under his employment agreement.

The court disagreed, holding that Mr. Piszel failed to state a plausible claim under either theory. With respect to the illegal exaction claim, the court held that he could not show that any money "was improperly paid, exacted, or taken from [him]" and turned over to the Government either directly or "in effect." *Piszel*, at 8-10. ("What distinguishes an illegal exaction from a . . . breach of contract claim is that in an illegal exaction case the claimant has paid money over to the government that he once had in his pocket, and in a . . . breach of contract claim the claimant is seeking payment of money the claimant has never received." *Id.* at 10.

With respect to the takings claim, the court held on two independent grounds that Mr. Piszel failed to state a plausible claim. First, relying upon the Federal Circuit's "instructive" holdings in *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1073-74 (Fed. Cir. 1994), and *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 957 (Fed. Cir. 1992), *cert. denied*, 113 S. Ct. 324 (1992), the court held that Mr. Piszel did not have a cognizable property interest in his severance compensation package because Freddie Mac was subject to pervasive government supervision and regulation, including the possibility of conservatorship, at the time Mr. Piszel entered into his employment contract in 2006. The court read those Federal Circuit decisions as holding that "the shareholders of statutorily regulated financial institutions lack[] the requisite property interests to support a takings claim." *Piszel*, at 13. The court emphasized that FHFA (and its predecessor, the Office of Federal Housing Enterprise Oversight (OFHEO)) had at all relevant times (that is, both before and after the enactment of the Housing and Economic Recovery Act (HERA)) possessed extensive statutory authority to regulate, among other things, executive compensation. *Piszel*, at 13-15 (citing 12 U.S.C. § 4620(a) (1992); 12 U.S.C.

§ 4518(a) (1992); 12 U.S.C. § 4617(b)(2)(A)(i) (2008)). That broad authority included, the court explained, the power to place the Enterprises into "conservatorship under which the regulatory agency succeeds to 'all the powers of the shareholders, directors, and officers of the enterprise.'" *Id.* at 13-14 (citing 12 U.S.C. § 4620(a) (1992).

Second, the court held that, even if Mr. Piszel could allege a cognizable property interest, his regulatory takings claim failed as a matter of law under the standard regulatory takings analysis established by the Supreme Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978). *Piszel*, at 16-17. Specifically, the court held that, given the pervasive and long-standing Government regulation of the Enterprises, Mr. Piszel could not have possessed a reasonable, investment-backed expectation to receive his severance compensation in the event that FHFA placed Freddie Mac in conservatorship. *Id.* at 16. Importantly, the court stated that no amount of discovery could alter this result. *Id.* at 18.

If affirmed on appeal, *Piszel* will become binding precedent bearing upon Fairholme's takings claim in this case. First, like Mr. Piszel, Fairholme challenges an action by FHFA taken pursuant to the broad grant of regulatory authority in HERA. *See* Compl. ¶¶ 76-79, 84-85. In our motion to dismiss, we demonstrated, among other things, that Fairholme cannot state a plausible Fifth Amendment takings claim because shareholders in the Enterprises do not possess a legally-cognizable property interest. Def. Mot. to Dismiss at 28-32, Dec. 9, 2013, ECF No. 20. This is because shareholders in the Enterprises – like executives at the Enterprises, such as Mr. Piszel – voluntarily enter into a highly-regulated industry subject to Government control. *Id.* at 31. Second, we demonstrated in our motion to dismiss that Fairholme cannot allege a plausible regulatory taking because shareholders lack a reasonable, investment-backed expectation of compensation for any loss of shareholder rights. *Id*. at 33-37.

Although *Piszel* does not involve a shareholder claim, its reasoning is applicable in that context. Indeed, in *Golden Pacific* and *California Housing*, upon which the *Piszel* court extensively relied, the Federal Circuit rejected claims alleging a taking of shareholder interests. Both Mr. Piszel and shareholders in the Enterprises voluntarily entered a heavily-regulated industry subject to Government control. Given the likelihood that the Federal Circuit's disposition of the appeal will result in binding precedent of importance to this case, the appeal in *Piszel* is an additional reason that all proceedings in this action should be stayed.[1]

Respectfully submitted,

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June 24, 2015

Attorneys for Defendant

[1] We acknowledge the Court's oral statement, made during the January 28, 2015 status conference, that it intends to deny our motion to stay proceedings in this case pending the resolution of the District of Columbia Circuit appeals in *Perry Capital LLC v. Lew*. Unlike *Perry Capital*, however, *Piszel* is pending in the Federal Circuit and will be binding precedent on this Court.

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 **September 3, 2015**, Counsel for Appellant has authorized me to electronically file the foregoing **Reply in Support of Motion on Behalf of *Amici Curiae* Louise Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, L.P. for Leave to File an *Amicus Curiae* Brief 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 court's CM/ECF system.

/s/ Robyn Cocho
Counsel Press