IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

FAIRHOLME FUNDS, INC., ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND, ANDREW T. BARRETT,

Plaintiffs-Appellants,

v.

UNITED STATES

Defendant-Cross-Appellant.

Nos. 20-1912, 20-1914

Appeals from the United States Court of Federal Claims in
No. 1:13-cv-00465-MMS, Chief Judge Margaret M. Sweeney

OWL CREEK ASIA I, L.P., OWL CREEK ASIA II, L.P., OWL CREEK I, L.P., OWL CREEK II, L.P., OWL CREEK ASIA MASTER FUND, LTD., OWL CREEK CREDIT OPPORTUNITIES MASTER FUND, L.P., OWL CREEK OVERSEAS MASTER FUND, LTD., OWL CREEK SRI MASTER FUND, LTD.,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

No. 20-1934

Appeals from the United States Court of Federal Claims in
No. 1:18-cv-00281-MMS, Chief Judge Margaret M. Sweeney

MASON CAPITAL L.P., MASON CAPITAL MASTER FUND L.P.,
Plaintiffs-Appellants,

v.

UNITED STATES
Defendant-Appellee.

20-1936

Appeal from the United States Court of Federal Claims in
No. 1:18-cv-00529-MMS, Chief Judge Margaret M. Sweeney

AKANTHOS OPPORTUNITY FUND, L.P.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

20-1938

Appeal from the United States Court of Federal Claims in
No. 1:18-cv-00369-MMS, Chief Judge Margaret M. Sweeney

APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, PALOMINO MASTER LTD., AZTECA PARTNERS LLC, PALOMINO FUND LTD.,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

20-1954

Appeal from the United States Court of Federal Claims in
No. 1:18-cv-00670-MMS, Chief Judge Margaret M. Sweeney.

CSS, LLC,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellant.

20-1955

Appeal from the United States Court of Federal Claims in
No. 1:13-cv-00371-MMS, Chief Judge Margaret M. Sweeney.

ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

20-2020

Appeal from the United States Court of Federal Claims in No. 1:13-cv-00698-MMS, Chief Judge Margaret M. Sweeney

JOSEPH CACCIAPALLE,
Plaintiff-Appellant,

MELVIN BAREISS,
Plaintiff

v.

UNITED STATES,
Defendant- Appellee.

2020-2037

Appeal from the United States Court of Federal Claims in No. 1:13-cv-00466-MMS, Chief Judge Margaret M. Sweeney.

BRIEF OF *AMICI CURIAE* BRYNDON FISHER, BRUCE REID, AND ERICK SHIPMON IN SUPPORT OF NEITHER PARTY

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number	2020-1912, -1914 (and companion cases)
Short Case Caption	Fairholme Funds v. U.S.
Filing Party/Entity	Amici Bryndon Fisher, Bruce Reid, and Erick Shipmon

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/30/20

Signature: /s/ Noah Schubert

Name: Noah Schubert

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.
☐ None/Not Applicable	☐ None/Not Applicable	☑ None/Not Applicable
Bryndon Fisher	Federal National Mortgage Association and Federal Home Loan Mortgage Corporation	
Bruce Reid	Federal National Mortgage Association and Federal Home Loan Mortgage Corporation	
Erick Shipmon	Federal National Mortgage Association	

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Edward F. Haber	Miranda P. Kolbe	

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☑ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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RELATED CASES

- *Fairholme Funds, Inc. et al. v. United States*, Nos. 20-1912 & 20-1914 (Fed. Cir.)
- *Owl Creek Asia Master Fund, Ltd. v. United States*, No. 20-1934 (Fed. Cir.)
- *Mason Capital Master Fund L.P. v. United States*, No. 20-1936 (Fed. Cir.)
- *Acanthus Opportunity Fund, LP v. United States*, No. 20-1938 (Fed. Cir.)
- *Appaloosa Inv. Ltd. v. United States*, No. 20-1954 (Fed. Cir.)
- *CSS, LLC v. United States*, No. 20-1955 (Fed. Cir.)
- *Arrowood Indem. Co. v. United States*, No. 20-2020 (Fed. Cir.)
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INTEREST OF *AMICI CURIAE*[1]

Bryndon Fisher and Bruce Reid are each shareholders in both Fannie Mae and Freddie Mac, and Erick Shipmon is a shareholder in Fannie Mae. *Amici* are plaintiffs in actions pending in the United States Court of Federal Claims (Case Nos. 13-608C, 14-152C) in which, as shareholders, they assert derivative claims on behalf of Fannie Mae and Freddie Mac against the United States for (i) an unlawful taking without just compensation in violation of the Fifth Amendment of the U.S. Constitution; (ii) an illegal exaction in violation of the Fifth Amendment of the U.S. Constitution; and (iii) breach of fiduciary duty. The injury upon which *amici* 's claims are based is the harm to Fannie Mae and Freddie Mac (the "GSEs") caused by the Third Amendment.

Specifically, *amici* were the first shareholders to assert derivative claims on behalf of Fannie Mae in connection with the Net Worth Sweep, and they are the only shareholders among the twelve related actions pending in the Court of Federal Claims who have consistently and exclusively asserted derivative claims. Shareholders in other cases, including *Fairholme,* in contrast, added derivative claims only years later, after a series of decisions from other courts holding the

[1] No counsel for a party has authored this brief in whole or in part, and no party or person other than *amici curiae* and their counsel has contributed money intended to fund preparing or submitting this brief. *See* Fed. R. App. Proc. 29.

harms Fannie Mae and Freddie Mac experienced from the Net Worth Sweep were derivative, not direct.

This case is of particular interest to *amici* because the certified issues may have a direct and potentially dispositive impact on *amici* 's pending claims against the United States. Specifically, one question now before the Court is whether the "succession clause" of the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. § 4617(b)(2)(A), precludes shareholders of Fannie Mae and Freddie Mac from challenging the Third Amendment. If the Court decides that derivative claims relating to the Third Amendment are barred by the succession clause, then *amici* 's pending claims would likely be barred as well.

That question, in turn, raises important subsidiary questions, including whether shareholder claims relating to the Third Amendment are derivative, and also, the circumstances in which Congress may, by statute, deny injured parties any judicial forum for a constitutional claim. The *Fairholme* plaintiffs appeal a related question: "[w]hehter [the *Fairholme*] plaintiffs lack standing to pursue their self-styled direct claims because those claims are substantively derivative in nature." Although framed as a question of standing for direct claims, the question confronts directly, again, a key issue: whether the Court of Federal Claims was correct to decide that claims relating to the Third Amendment are derivative rather than direct. If the Court, at the urging of the Private Shareholders, decides that claims

arising from the Third Amendment are direct and not derivative, then *amici*'s claims would be barred.

Finally, an additional certified question—whether the FHFA-C's actions are attributable to the United States such that the Court of Federal Claims possesses subject matter jurisdiction—is also very likely dispositive of *amici*'s claims.

Notably, the need for *amici* to be heard has become acute with the filing of the opening brief of the Private Shareholders. The only shareholder with a pending appeal who asserts a derivative claim—one of the *Fairholme* plaintiffs—resisted *amici's* participation in this appeal by arguing the *Fairholme* plaintiffs would fully defend the Court of Federal Claims decision upholding derivative claims. *See* Case No. 1:13-cv-00608-MMS, ECF No. 76-1 (Ct. Fed. Cl.). The *Fairholme* plaintiffs derided as "baseless" *amici's* concern that the *Fariholme* plaintiffs were conflicted and would favor their direct claims on appeal. *Id.* at 1. The Private Shareholders opening brief, however, has shown that *amici*'s concerns were warranted. Rather than defending the favorable decision of the Court of Federal Claims upholding shareholder derivative claims relating to the Third Amendment, Private Shareholders focus almost exclusively on reviving their direct claims. As a result, *amici* are the only shareholders who can fully and adequately represent the interests of the derivative claims on behalf of the Enterprises. Their voice in this appeal is now critical.

SUMMARY OF THE ARGUMENT

Before the Court may resolve whether the succession clause of the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. § 4617(b)(2)(A), precludes shareholders from asserting derivative claims on behalf of Fannie Mae and Freddie Mac challenging the Third Amendment, the Court must first address the predicate question of whether such claims are direct or derivative. On this question, the Court of Federal Claims was correct to hold—given the nature of the claims asserted, the injury upon which the shareholders' claims are based, and the available remedies—that the claims are derivative.

The Court of Federal Claims likewise correctly held that HERA's succession clause does not displace established corporate law under which shareholders may pursue a derivative action when those in control of the corporation face a manifest conflict of interest in deciding whether to bring suit. The text and statutory history of HERA reveals no Congressional intent to displace longstanding corporate law permitting shareholders to bring derivative suits when the parties in control of a corporation face a conflict of interest. To the contrary, the origin of the succession clause reflects Congress's intent to *preserve* such shareholder rights under those circumstances.

Specifically, Congress adopted the operative terms of HERA's succession clause from the Financial Institutions Reform, Recovery, and Enforcement Act of

1989 ("FIRREA"). Prior to the enactment of HERA, courts, including this Court, construed FIRREA consistently to permit derivative actions during a conservatorship or receivership of a bank where the conservator or receiver faces a manifest conflict of interest that prevents it from objectively determining whether to bring suit. Rather than draft HERA to diverge from this established, existing precedent, Congress copied into HERA the precise operative terms from FIRREA, thereby adopting the existing law that construed those operative terms. This Court is bound by that precedent.

Moreover, any construction of HERA that would bar all judicial remedies for constitutional claims (what the Government advocates) would present serious constitutional issues. If the succession clause were construed to bar all derivative suits on behalf of Fannie Mae and Freddie Mac, including the derivative takings and illegal exaction claims asserted by *amici* in the Court of Federal Claims, such a construction would deny shareholders any remedy for the Government's unconstitutional actions. The law is clear that for a court to construe a statute to deny a remedy for a constitutional claim, there must be a heightened showing that Congress specifically intended to deny a judicial forum for such a claim. The Government made no such showing here. Nor could it. The statute contains no clear statement rejecting the existing judicial construction of FIRREA or precluding derivative claims brought based on a conflict of interest.

Even if there were evidence of a specific Congressional intent to foreclose all judicial remedies for the shareholders' constitutional claim, this would simply render HERA unconstitutional as applied. Indeed, the due process and takings clauses of the Fifth Amendment do not permit Congress to abrogate all remedies for violation of a party's constitutional rights.

Finally, the Court of Federal Claims was correct in concluding that the FHFA did not shed its government character in its actions as conservator for the GSEs. In addition to the court's legal analysis of the role of a conservator, its decision is bolstered by factual reality. As reflected by the Government's own repeated admissions in related litigation, the FHFA-C knowingly embraced and prioritized its governmental role when acting as conservator—and in particular, when it acceded to the Net Worth Sweep.

ARGUMENT

A. The Shareholder Claims Are Derivative.

The question of whether shareholders' claims are direct or derivative lies at the center of this appeal, both as a component of the question of whether HERA's succession clause bars shareholder claims, and more directly through the question presented by the *Fairholme* plaintiffs as to whether such claims are "substantively

derivative in nature." The Court of Federal Claims correctly held that shareholder claims that challenge the Third Amendment are derivative.

1. The Applicable Law on Resolving Whether a Claim Is Direct or Derivative.

Where a shareholder's claims arise under federal law (as with shareholders' takings and illegal exaction claims), federal law governs whether the claims are direct or derivative. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 (1991).[2]

Under federal law, however, there is a "presumption that state law should be incorporated into federal common law" unless doing so in a particular context "would frustrate specific objectives of the federal programs." *Kamen*, 500 U.S. at 98. This presumption "is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Id.* "Corporation law is one such area." *Id.*; *see also Burks v. Lasker*, 441 U.S. 471, 478 (1979).

In any event, in resolving whether a claim is direct or derivative, federal law aligns with Delaware law. *Franchise Tax Bd. of Cal. v. Alcan Aluminum, Ltd.*, 493 U.S. 331, 336–37 (1990) (holding that only "shareholder[s] with a direct, personal

[2] As to any claims arising under state law, such state law provides the applicable standard for resolving whether claims are direct or derivative. *AHW Inv. P'ship v. Citigroup, Inc.,* 806 F.3d 695, 699 (2d Cir. 2015). Therefore, the for the reasons explained in the accompanying text, the same standard applies to all shareholder claims relating to the Third Amendment.

interest in a cause of action," rather than "injuries [that] are entirely derivative of their ownership interests" in a corporation, can bring actions directly").[3]

The leading Delaware decision as to whether claims are direct or derivative is *Tooley v. Donaldson Lufkin & Jenrett, Inc.*, 845 A.2d 1031 (Del. 2004). There, the Delaware Supreme Court held that the two core questions relevant to distinguishing between direct and derivative claims are "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Id.* at 1033.

With respect to the first prong of *Tooley*—who suffered the alleged harm, "claims of corporate overpayment are treated as causing harm solely to the corporation, and thus, are regarded as derivative." *Gentile v. Rosette*, 906 A.2d 91, 99 (Del. 2006); *J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 818 (Del. Ch. 2005) (claim for corporate overpayment is derivative). Both shareholders and the company may be harmed by a single transaction, but the relevant question in determining if a shareholder has a direct claim is whether "an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation." *Agostino*

[3] Shareholders' claims concerning Fannie Mae and Freddie Mac are governed by Delaware and Virginia law, respectively, because their corporate charters so designate. *Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 408–09 (7th Cir. 2018).

v. Hicks, 845 A.2d 1110, 1122 (Del. Ch. 2004); *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1260 (Del. 2016) (relevant question is whether the stockholder "can prevail without showing an injury to the corporation") (quoting *Tooley*, 845 A.2d at 1039).

Of course, shareholders are, in some sense, always adversely affected by corporate overpayments, as overpayments reduce the value of shareholders' interest in the company. But, such "dilution in value of the corporation's stock … is merely the unavoidable result … of the reduction in value of the entire corporate entity." *Gentile*, 906 A.2d at 99. Such a harm, although real, is derivative.

The rationale of holding corporate overpayment claims to be derivative, not direct, stems from the foundation of derivative standing. Delaware law affords standing to shareholders to bring derivative lawsuits in part because a shareholder's "status as a shareholder provides an interest and incentive to obtain legal redress for the benefit of the corporation." *Alabama By-Products Corp. v. Ede & Co. ex. Rel. Shearso*, 657 A.2d 254, 265 (Del. 1995). The equitable standing rule for derivative actions "recognize[s] the truth that the stockholders are *ultimately* the only beneficiaries; …their rights are really, though indirectly, protected by remedies given to the corporation …." *Schoon v. Smith*, 953 A.2d 196, 201 n.10 (Del. 2008) (quotation omitted; emphasis in original). Hence, shareholders who assert derivative claims always have suffered some sort of injury

to their own interests; that injury is what confers them standing to sue. That shareholders suffer, indirectly at least, some injury whenever the corporation suffers an injury cannot mean that shareholders always have a direct claim whenever their interests are negatively affected. Were that the case, derivative claims would always also be direct claims. *Tooley* and other abundant authority confirm that a shareholder injury, in the abstract, is not sufficient to assert a direct claim; the shareholder must show an injury that is *distinct from the injury to the company*, or that a contract or statute specifically affords a remedy to the shareholder, *to the exclusion of the company*.[4]

2. The Claims Here Are Derivative.

Under *Tooley*, shareholder claims arising from the Third Amendment are derivative, not direct.

This Court's decision in *Starr International Co. v. United States*, 856 F.3d 953 (Fed. Cir. 2017), is directly on point. *Starr* concerned the Government's investment in AIG at the height of the financial crisis. AIG, like Fannie and Freddie, is a publicly traded company, to which regulators paid close attention during the 2008 recession, given AIG's size and importance to the economy. *Id.* at 958. Much like Fannie and Freddie, AIG received an infusion of capital from the

[4] The law of Virginia, the state in which Freddie Mac is incorporated, applies the same principles as *Tooley*. *See Simmons v. Miller*, 544 S.E.2d 666, 674 (Va. 2001).
.

Government, and as part of that infusion, the Government took a 79.9% equity stake in AIG. *Id.* at 958–59. Although the particulars of the Government's investment in AIG are different than the Government's investment in the GSEs, the core of the shareholders' claims there was the same as here: the Government's conduct "amounted to an attempt to 'steal the business.'" *Id.* at 960.

In *Starr*, the Court of Federal Claims held a trial on the shareholders' direct claims, having dismissed the derivative claims earlier in the case. *Id.* at 962. The court held that the Government's acquisition of equity was not authorized under the Federal Reserve Act, and therefore, the transaction was an illegal exaction. *Id.* at 962. The court, however, found that the shareholders suffered no damages. *Id.* Both parties appealed.

On appeal, this Court focused on whether the shareholders' claims were direct or derivative, applying *Tooley*. As to the first prong of *Tooley*—who suffered the alleged harm—the Court emphasized that "claims of corporate overpayment are treated as causing harm solely to the corporation, and thus, are regarded as derivative." *Id.* at 967. Despite the shareholders' protestations in *Starr* that the Government's conduct was designed to enrich itself as a shareholder at the expense of non-government shareholders (the identical argument the Private Shareholders make here), the Court held that the plaintiffs' claims that the Government took AIG's assets for itself were derivative. *Id.*

The core complaint of the Private Shareholders is the same as the complaint of AIG's shareholders in *Starr*—the Government took advantage of the financial crisis to effectively nationalize a private company for the Government's own public use. The injury shareholders allege is that, through the Third Amendment, the GSEs' profits were diverted to the Government. The Third Amendment no doubt indirectly adversely affected Fannie's and Freddie's shareholders, but such effects were the "unavoidable result" of the reduction in value to the GSEs that occurred as a result of the Government taking all of the GSEs' future net profits.

The injury occurred to the GSEs, which are the entities that paid the money over to the Government as required by the Third Amendment. Had the GSEs not been required by the Third Amendment to pay all their net profits to the Government, the Private Shareholders would not have been injured, as that value would have remained with the company, and the value would only indirectly flow to them. Because the Private Shareholders' injuries in lost share value, and possibly lost dividends due to the unavailability of any funds to pay them, are entirely dependent upon the prior injury to the GSEs, their claims are derivative.

The Court of Federal Claims therefore correctly held that "[t]he direct-versus-derivative inquiry 'turns on the plaintiffs' injury.'" Appx39 (quoting *Pagan v. Calderon*, 448 F.3d 16, 30 (1st Cir. 2006)). The various attempts the *Fairholme* plaintiffs make to recast their injury as direct rather than derivative fail because, as

the Court of Federal Claims found, their arguments do not square with the facts. *Id*. Those facts reveal that Private Shareholders' claims are, in substance, claims that the Government caused the GSEs "to overpay treasury." These are "classic derivative claims."Appx40 (quoting *Roberts*, 889 F.3d at 409). Private Shareholders' own characterization of the facts surrounding the Third Amendment are telling. They argue here that the Net Worth Sweep "require[ed] the Companies to pay to Treasury their entire net worth," and that the Government "expropriated not just [the GSEs'] future earnings but also their retained capital." *Id.* But Private Shareholders do not explain how both the GSEs can suffer the admitted injury the they describe and how they could have suffered a distinct injury for the same loss. The reality is there was a single injury, and the parties immediately injured were the GSEs, not their shareholders.

With respect to the second prong of *Tooley*—who would receive the benefit of any recovery—the recovery here would flow to the GSEs since the GSEs are the entities which paid the net worth sweep to the Government. The return of those payments necessarily must to go to the parties that paid them—the GSEs. *See Starr*, 856 F.3d at 972 (holding that any duty under the takings clause flowed to "the corporation in the context of an equity transaction that affects all preexisting shareholders collaterally").

Two courts of appeal have held that the shareholders' claims predicated on the Third Amendment are derivative. On this issue, those courts' reasoning is sound. The Seventh Circuit in *Roberts* observed that shareholders' complaint was that "the net worth dividend illegally dissipated corporate assets by transferring them to the Treasury," which is a "classic derivative claim[]." 889 F.3d at 409. The essential harm described in *Roberts* is the same as here: the Third Amendment unlawfully transferred the GSEs' assets to the Government.

The D.C. Circuit reached a similar conclusion with respect to shareholders' claim for breach of fiduciary duty. *Perry Capital LLC ex rel. Inv. Funds v. Mnuchin*, 864 F.3d 591, 626–27 (D.C. Cir. 2017). That court, applying *Tooley*, emphasized the remedies the shareholders sought, including rescission of the Third Amendment and a declaration that the Third Amendment was not in the best interests of the GSEs, was relief that would accrue directly to the GSEs, not their shareholders. *Id.*

The appellant-shareholders' only response to the notion that the proper remedy would be the Government's return of the assets the Government extracted from the GSEs is that *assuming the Third Amendment remains in place*, any assets returned by the Government would immediately be turned back over to the Government, per the Third Amendment. Appellant-Shareholders Br. at 42. If the result of this litigation, however, is a judgment that the Third Amendment

represents a taking without just compensation or an illegal exaction, it necessarily follows that the assets taken must return to the company and stay there. The notion that the Government would flout such a judgment by taking a second time the same assets it has been ordered to return is absurd.

In short, the decision of Court of Federal Claims was correct: claims arising from the Third Amendment are derivative.

B. HERA's Succession Clause Does Not Bar Shareholder Derivative Claims Where FHFA Faces a Manifest Conflict of Interest.

Proceeding from the premise that the shareholders' claims are derivative—a proposition with which *amici* agree—the Government argues those derivative claims are barred by the "succession clause" of HERA, 12 U.S.C. § 4617(b)(2)(A)(i). The Government is wrong. The Court of Federal Claims correctly decided, based on the established judicial construction of the operative terms of the succession clause at the time of HERA's passage (including binding precedent from this Court), that shareholders could maintain derivative claims because the FHFA faced a manifest conflict of interest.

1. Precedent and HERA's Legislative History Confirm that HERA Permits Derivative Suits When FHFA Faces a Manifest Conflict of Interest.

When Congress enacted HERA, it did not write on a blank slate. Instead, HERA borrows directly from a substantively identical provision of the Financial

Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").

FIRREA provides that the FDIC:

> *shall, as conservator or receiver, and by operation of law, succeed to … all rights, titles, powers, and privileges* of the insured depository institution, and *of any stockholder*, member, accountholder, depositor, officer, or director of such institution *with respect to* the institution and *the assets of* the institution.

12 U.S.C. § 1821(d)(2)(A)(i) (emphasis added).

HERA's succession clause provides that FHFA:

> shall, as conservator or receiver, and by operation of law, … succeed to … all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity.

12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added).

The operative terms of HERA's succession are word-for-word identical to FIRREA's succession clause. The only changed words are those that identify the parties to whom the clause applies—HERA refers to the "regulated entity" (i.e., Fannie Mae and Freddie Mac), while FIRREA referred to an "insured depository institution." The *substance* of the succession clause in the two statutes is identical.

At the time Congress enacted HERA, FIRREA's succession clause did *not* displace existing corporate law pursuant to which shareholders may maintain derivative suits where the company's managers or directors face a manifest conflict of interest. The leading case was from this Court, *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1282–84 (Fed. Cir. 1999). There, a

bank shareholder alleged the FDIC breached contracts with the bank and committed unconstitutional takings by raising bank capital requirements during receivership beyond the levels to which the FDIC had previously agreed. The Court of Federal Claims held that FIRREA's succession clause precluded shareholders from maintaining any derivative claims. *Id.* at 1294. This Court reversed, holding that where the FDIC faces a manifest conflict of interest in deciding whether to sue, FIRREA's succession clause does not bar shareholders from maintaining a derivative suit. The Court explained:

> We agree with the Court of Federal Claims that, as a general proposition, the FDIC's statutory receivership authority includes the right to control the prosecution of legal claims on behalf of the insured depository institution now in its receivership. However, the very object of the derivative suit mechanism is to permit shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation.

Id. at 1295. The Court found that such a manifest conflict of interest existed because "FDIC was asked to decide on behalf of the depository institution in receivership whether it should sue the federal government based upon a breach of contract, which, if proven, was caused by the FDIC itself." *Id.*

First Hartford reflects established law under FIRREA. The Ninth Circuit reached the same conclusion prior to the enactment of HERA in *Delta Savings Bank v. United States*, 265 F.3d 1017, 1022–24 (9th Cir. 2001) (permitting derivative suit notwithstanding FIRREA succession clause given "significant and

manifest" conflict of interest FDIC faced in bringing lawsuit "against one of its closely-related, sister agencies").[5]

Although some courts have recognized that FIRREA's succession clause transfers to the FDIC the right to bring derivative claims *in general*,[6] no court has rejected *First Hartford's* holding that FIRREA preserved corporate law that permits shareholders to pursue derivative claims where the entity managing the company faces a conflict of interest.

Had Congress intended to diverge from the established construction of FIRREA and categorically preclude all derivative claims regardless of any conflict of interest, it could have, through HERA, disavowed any conflict of interest exception or otherwise specified through express statutory language its divergence from *First Hartford*, *Delta Savings*, and other decisions under FIRREA. Congress, however, chose not to. Congress's decision to instead copy FIRREA's succession clause means HERA should be construed consistently with FIRREA's established judicial construction. *Merrill Lynch Pierce Fenner & Smith Inc. v. Dabit*, 547 U.S.

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[5] Courts from other circuits were in accord. *In re Fed. Home Loan Mtg. Corp. Deriv. Litig.*, 643 F. Supp. 2d 790, 797–98 (E.D. Va. 2009) (recognizing conflict of interest exception but finding no conflict); *Branch v. FDIC*, 825 F. Supp. 384, 404–05 (D. Mass. 1993) (FIRREA "does not alter the settled rule that shareholders of failed national banks may assert derivative claims").

[6] *See*, *e.g.*, *Pareto v. FDIC*, 139 F.3d 696, 700–01 (9th Cir. 1998) (holding FIRREA's succession clause precludes derivative suits in general but declining to consider "what claims … interested parties may have against the FDIC should it commit some wrongdoing" because "[t]hat issue [was] not before [the court]").

71, 85 (2006) ("[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates … the intent to incorporate its … judicial interpretations as well.") (internal quotations omitted).

2. HERA's Structure and Other Provisions Confirm that the Succession Clause Does Not Present an Absolute Bar to All Shareholder Claims.

Even aside from statutory context, the Government's construction of HERA's succession clause—leaving shareholders with zero rights—is untenable in light of the structure of HERA and its other provisions. The Government itself does not argue that the succession clause transfers literally "all rights … and privileges …. of any stockholder"; the Government concedes *sub silentio* that any direct claims shareholders could have are *not* transferred to the FHFA, even though such claims are "rights" of "stockholders."[7]

Multiple provisions of HERA confirm that § 4617(b)(2)(A) cannot categorically extinguish "all" shareholders' rights. For example, HERA expressly provides that stockholders retain important economic rights, including rights to future

[7] In its initial motion to dismiss, the Government argued that HERA's succession clause transferred literally *all* shareholder rights to FHFA, including any direct claims. *See* ECF No. 20 at 22 ("HERA, in granting FHFA all shareholder rights, makes no distinction between individual and derivative rights….") ("ECF __" refers to the ECF entries in *Fairholme* in the Court of Federal Claims). In its amended motion to dismiss—the motion that resulted in this appeal—the Government abandoned its argument that the succession clause bars direct claims,

distributions and to participate in a statutory claims process regarding the GSEs' residual assets. *See* 12 U.S.C. § 4617(b)(2)(K)(i); 12 U.S.C. § 4617(c)(1). If HERA transferred "all" stockholder "rights, titles, powers and privileges" to FHFA without exception (which it did not), then the stockholders' rights to residual assets would accrue to FHFA, and there would have been no need to include stockholders in any claims process. *See Branch*, 825 F. Supp. at 404–05 (analyzing similar terms of FIRREA to hold that "despite its strong language, [the succession clause of FIRREA] does not transfer all incidents of stock ownership").

Similarly, HERA expressly provides that during conservatorship, a "regulated entity" may sue "for an order requiring the Agency to remove itself as conservator." 12 U.S.C. § 4617(a)(5)(A). Since FHFA controls Fannie and Freddie during conservatorship and cannot sue itself, this provision would be meaningless if HERA transferred all of the GSEs' rights to FHFA.

3. HERA Cannot Be Construed to Bar Remedies for Constitutional Violations that Have Injured the GSEs.

Any construction of HERA that categorically wipes out all rights of shareholders would raise serious constitutional concerns because it would effectively preclude judicial review of constitutional violations. The Supreme Court has explained:

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arguing instead that all shareholder claims relating to the Third Amendment are derivative and are therefore barred by the succession clause. ECF 421 at 26–37.

> [It is a] well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the "extraordinary" step of foreclosing jurisdiction unless Congress's intent to do so is manifested by "clear and convincing" evidence.

Califano v. Sanders, 430 U.S. 99, 109 (1977).

Applying this principle, the Supreme Court has consistently construed statutes not to preclude judicial remedies for constitutional claims, even if a literal application of the statute would dictate a different result. *See*, *e.g., South Carolina v. Regan*, 465 U.S. 367, 380 (1984) (holding that despite Anti-Injunction Act's literal terms, it "cannot bar [an] action" if as a result, the party "will be unable to utilize any statutory procedure to contest the constitutionality of" the action).

Notably, a decision the Government contends supports its position on the succession clause, *Perry Capital*, confirmed this important principle of statutory construction with respect to a different provision of HERA. The D.C. Circuit noted, in discussing HERA's "anti-injunction clause," that:

> [T]he [anti-injunction clause] only limits judicial remedies (barring injunctive, declaratory, and other equitable relief) after a court determines that the actions taken fall within the scope of statutory authority. *The Act does not prevent … constitutional claims (none are raised here) ….*

864 F.3d at 613–14 (emphasis added).

In excluding "constitutional claims" from the anti-injunction clause's scope, the D.C. Circuit cited prior decisions from the same court, in which it had held that FIRREA's similar anti-injunction clause could not preclude remedies for

constitutional violations. *Nat'l Trust for Historic Pres. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994). In *National Trust*, the court of appeals correctly held that although FIRREA's anti-injunction clause "bar[s] courts from restraining or affecting the exercise of powers or functions of the [FDIC] as a conservator or a receiver," the clause must be construed to except from this general rule the situation where the FDIC "*has acted or proposes to act beyond, or contrary to, its … constitutionally permitted … powers ….*" *Id.* at 470, 472 (*per curiam* opinion adopting concurrence of Wald, J. as part of opinion) (emphasis added). That holding, in turn, was based on the Supreme Court's decision in *South Carolina v. Regan*, discussed *supra*, in which the Court reiterated the principle that statutes should not be construed to deny remedies for constitutional violations.

The principal authorities upon which the Government relies to argue that the succession clause should bar derivative claims without exception—*Roberts* and *Perry*—did not address whether the succession clause could be construed to bar derivative claims for constitutional violations (no constitutional claims were asserted in those cases). *Perry*, 864 F.3d at 602–03, 623–25; *Roberts*, 889 F.3d at 402, 408–10.

The Fifth Circuit in *Collins v. Mnuchin*, by contrast, when faced with a constitutional claim (a challenge that FHFA's structure violated the U.S. Constitution), acknowledged that different principles of statutory construction apply;

"[o]nly a 'heightened showing' in the statute may be interpreted to 'deny any judicial forum for a colorable constitutional claim.'" 938 F.3d 554, 587 (5th Cir. 2019), *cert. granted*, 2020 U.S. LEXIS 3555 (U.S. July 9, 2020) (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)). Because the succession clause is devoid of any express language barring a constitutional claim, *Collins* correctly decided that it did not bar the shareholders' constitutional claim. *Id.* This Court should reach the same conclusion for the same reason.

Moreover, the succession clause's use of broad words such as "any" and "all" in providing that FHFA succeeds to "all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder," does not satisfy the heightened showing required to deny judicial remedies for a constitutional claim. The Supreme Court's decision in *Small v. United States*, 544 U.S. 385, 388–89 (2005), is instructive. There, the Court considered whether a statute imposing criminal penalties on a person in possession of gun who was previously "convicted in any court" applied where the convictions were imposed by a foreign court. The Court found that the statute did not apply to foreign convictions. Despite the statute's use of a broad phrase, "any court," the Court held the statute's terms did not overcome the presumption against extraterritorial application of statutes, given the lack of any clear statement in the statute providing for such application. *Id.*

Here, the presumption against the preclusion of judicial remedies for constitutional violations provides an even stronger reason to construe HERA not to eliminate all judicial remedies for such claims; the words "all" and "any" do not overcome that strong presumption. *See also Bob Jones v. Simon*, 416 U.S. 725, 731, 746 (1974) (indicating that the Tax Injunction Act, which provides that "*no* suit for the purpose of restraining the assessment or collection of *any* tax shall be maintained in *any* court," could not be construed to preclude all "access … to judicial review" for a constitutional claim) (emphasis added; quotations omitted).

Even if HERA's succession clause were to meet the "heightened showing" required by *Webster*, the result would be that HERA would be unconstitutional as applied because it would preclude all judicial remedies for a claim arising from the constitution. Although the Supreme Court has suggested that foreclosing judicial review of constitutional claims is permissible upon a "clear and convincing" showing of Congressional intent, it has never found a statute to have met that standard. The Court has, however, suggested that if such a statute did meet that standard, the statute would be unconstitutional. *Bob Jones*, 416 U.S. at 746 ("This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion [that the statute is constitutional] might well be different."); *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 671 n.12 (1986) ("Our disposition avoids the serious constitutional question that would

arise if we construed § 1395ii to deny a judicial forum for constitutional claims….") (quotations omitted); *Webster*, 486 U.S. at 603 ("We require this heightened showing in part to avoid the serious constitutional question that would raise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.") (quotations omitted).

The D.C. Circuit in *Bartlett v. Bowen* summarized well the Supreme Court's jurisprudence on this issue:

> It has become something of a time-honored tradition for the Supreme Court and lower federal courts to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns such preclusion would raise. These cases recognize and seek to accommodate the venerable line of Supreme Court cases that cast doubt on the constitutionality of congressional preclusion of judicial review of constitutional claims.

816 F.2d 695, 699 (D.C. Cir. 1987). Although the Supreme Court has never resolved what happens when a statute meets the heightened showing, lower courts and commentators agree that whatever power Congress may have to restrict the jurisdiction of particular courts, it cannot, consistent with due process, preclude *all* judicial review for a constitutional violation. *Id.* at 703. Again, the D.C. Circuit in *Barlett* explained:

> [A] statutory provision precluding *all* judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right. We have little doubt that such a 'limitation on the jurisdiction of *both* state and federal courts to review the constitutionality of federal [action] would be [an] unconstitutional' infringement of due process.")

Id. (emphasis in original) (quoting M. Reddish, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 7-34 (1980)); *see also Battaglia v. General Motors*, 169 F.2d 254, 257 (2d Cir. 1948) ("[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not exercise that power so as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."); P.R. Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 921 n.113 (1984) ("[A]ll agree that Congress cannot bar all remedies for enforcing federal constitutional rights."); J. Nowak, R. Rotunda & J. Young, CONSTITUTIONAL LAW 41 (3d ed. 1986) ("[U]nder the due process clause of the fifth amendment Congress may not exercise Article III power over the jurisdiction of the courts in order to deprive a party of a right created by the Constitution.").

In short, Congress may not insulate the federal government from liability for illegal exactions and takings without just compensation in violation of the Fifth Amendment of the U.S. Constitution by precluding judicial review of such claims. Permitting the Government to transfer to itself the conflicted decision whether to pursue the constitutional claims against the Government arising from the Third

Amendment would effect this impermissible outcome. It would negate by statute rights guaranteed by the Constitution. This, Congress may not do.

C. The Court of Federal Claims Properly Found that FHFA-C Is the United States for Purposes of Resolving the Court's Jurisdiction.

The Court of Federal Claims held that it had jurisdiction over shareholder claims relating to the Third Amendment because the FHFA, acting in its role as conservator (i.e., the "FHFA-C"), retained its government character. The court reasoned that under HERA, a conservator does not truly step into the shoes of the GSEs; instead, the conservator functions to "establish control and oversight" of the GSEs, and therefore, retains is government character for purposes of satisfying the Tucker Act requirement that a claim be against the United States.

The Court of Federal Claims' decision was legally correct. The court's legal analysis, however, also reflects factual reality and finds direct, conclusive support both in the Government's own admissions made through arguments in related litigation and in the decisions of other courts that have adopted the Government's arguments. Specifically, the Government in related litigation has repeatedly argued that HERA requires FHFA-C to operate the GSEs for the benefit of the Government and taxpayers even if such operation harms the GSEs. Although the Government made these statements in the context of arguing that it did not act beyond its statutory authority (because HERA, according to the Government, permits FHFA-C to act in the Government's interest), the Government's

contentions reveal that FHFA-C perceived its own duties as running primarily to the Government and taxpayers. Put another way, FHFA-C understood itself as retaining its government character as conservator. For example:

(a) In its opposition to a motion to dismiss in the district court in *Perry*, Case. No. 13-cv-1025 (D.D.C.), Dkt. No. 32 at 5, FHFA argued that "HERA and the Enterprises' charters preempt any fiduciary duties the [FHFA] might owe to shareholders [of the GSEs] to the extent such duties are inconsistent with [FHFA's] responsibility to promote the public mission of the Enterprises: supporting the stability of the housing finance markets." *Perry* Dkt. No. 32.

(b) In the same brief, FHFA argued that it was obligated to help Treasury meet its "statutory obligation" to structure the Third Amendment to "protect the taxpayer," rather than to act in the GSEs' interests. *Id.* at 12.

(c) In the same brief, FHFA argued: "Plaintiffs [in *Perry*] contend that the [FHFA] has a fiduciary duty to promote the interests of the Enterprises' shareholders above any public interests…. [FHFA], however, is subject to an obligation under federal law to pursue the public interest," rather than acting in the GSEs' interests. *Id.* at 55.

(d) In its reply brief on the same motion, FHFA argued: "The [FHFA's] director is obligated to ensure that the Agency acts 'consistent with the public interests,' 12 U.S.C. § 4513(a)(1)(B), and courts have recognized that the public interests may be inconsistent with the interests of private shareholders; in such circumstances, *private interests must yield to the superior federal interest*." Case. No. 13-cv-1025 (D.D.C.), Dkt. No. 42 at 39 (emphasis added).

(e) In its brief on the appeal in *Perry*, FHFA repeated the same mantra: federal law required that the Third Amendment "be structured 'to protect the taxpayer.'" Case No. 14-5243, Document #1602703 at 13 (D.C. Cir.).

(f) In *Roberts*, the Government made the same argument, repeatedly emphasizing FHFA-C's obligation to "protect taxpayers." No. 17-1880 (7th Cir.), Doc. No. 25 at 30–31.

That is, according to the Government itself, HERA imposed special obligations on FHFA-C to act in the interests of the Government, and that Fannie Mae's interests had to "yield" to the Government's "superior" interests in the event those interests diverge. By the Government's own judicial admissions, FHFA-C not only retained its government character; it prioritized it over the GSEs' interests.

These were not passing arguments; the Government's arguments have been expressly adopted to defeat claims in other cases. *Perry*, 864 F.3d at 608 ("Congress, consistent with its concern to protect the public interest, …made a deliberate choice in [HERA] to permit FHFA to act in its own best governmental interests, which may include the taxpaying public's interests."); *Roberts v. Fed. Hous. Fin. Agency*, 243 F. Supp. 3d 950, 962 (N.D. Ill. 2017), *aff'd* 889 F.3d 397 (explaining that through HERA, Congress modified traditional conservatorship role by providing that "FHFA is empowered, in its role as conservator, to act in *its own best interests*") (emphasis in original). By procuring rulings in related litigation that FHFA-C was a government actor, FHFA-C is now estopped from arguing the opposite here.

Finally, the Government's argument, if adopted, would raise serious constitutional issues. It cannot be the case that the Government can nationalize

private companies and seize their assets to "benefit the taxpayer" under the guise of conservatorship, and then immunize itself from liability on the basis that a conservator merely "steps into the shoes" of the entity and therefore is not the United States. Such a contradictory rule would provide a blueprint to insulate takings from constitutional scrutiny; the Government could simply declare a "conservatorship," claim a mandate to benefit taxpayers, take a private company's assets for the benefit of taxpayers, and then claim that because it's a "conservator," there is no Government action. The fallacy is clear. Whatever truth the "stepping into the shoes" metaphor may have in other cases, it contradicts reality here.

CONCLUSION

For the above reasons, the Court should decide that shareholder claims arising from the Third Amendment are derivative in nature, that they are not barred by HERA's succession clause, and that the Court of Federal Claims had jurisdiction because the FHFA-C maintained its government character during the conservatorship of the GSEs.

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CERTIFICATE OF COMPLIANCE

This *amici curiae* brief complies with Federal Circuit Rule 29(b) because it contains 6,797 words. The petition was prepared using Microsoft Word 2013 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Noah M. Schubert