

No. 20-121  
[Fed. Cl. No. 13-cv-465]

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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FAIRHOLME FUNDS, INC., et al.,  
Plaintiffs-Respondents

v.

UNITED STATES,  
Defendant-Petitioner.

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RESPONSE TO PETITION FOR PERMISSION TO APPEAL AN  
INTERLOCUTORY ORDER OF THE COURT OF FEDERAL CLAIMS  
DATED MARCH 9, 2020, IN CASE NO. 13-cv-465  
PURSUANT TO 28 U.S.C. § 1292(d)

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Pursuant to this Court's order of March 30, 2020, the United States responds to the petition for review pursuant to 28 U.S.C. 1292(d) filed by Fairholme Funds, et al.

1. The Court of Federal Claims, on March 9, 2019, certified three questions posed by the government related to the court's partial denial of the government's motion to dismiss, and also certified three questions proposed by plaintiffs, related to certain plaintiffs' standing and to the court's disposition of plaintiffs' purported direct claims. Appx85-Appx89. As discussed in the United States' petition for review, resolution of the question whether plaintiffs have standing to assert derivative claims notwithstanding the statutory provision transferring all shareholder rights to the Federal Housing Finance Agency (FHFA) during the conservatorship may resolve this litigation entirely. And if the Court accepts the government's argument that the actions of FHFA as conservator cannot support Tucker Act jurisdiction, at a minimum plaintiffs' illegal exaction and takings claims will be dismissed. Resolution of the third question—whether plaintiffs' allegations that FHFA entered into an implied-in-fact contract with the enterprises to operate the conservatorships for shareholder benefit fail as a matter of law—would result in the dismissal of an important subset of claims.

2. Resolution of the issues proposed by plaintiffs does not have the potential to resolve the litigation. If the Court grants the government's petition, however, it is appropriate that the Court grant plaintiffs' petitions as well. The Court will be able to address all questions which the trial court has concluded

warrant this Court's review to the extent that it proves necessary to do so.

Accordingly, consistent with the position taken in the trial court, the United States does not oppose the grant of plaintiffs' petition.

Respectfully submitted,

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APRIL 2020

## CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the word limit of Federal Rule of Appellate Procedure 5(c)(1) and Federal Circuit Rule 5 because the response was generated by a computer and contains 638 words. I further certify that this filing complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Abby C. Wright  
Abby C. Wright

**CERTIFICATE OF SERVICE**

I hereby certify that on April 6, 2020, I electronically filed the foregoing document via the CM/ECF system. Service will be accomplished by CM/ECF.

s/ Abby C. Wright

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