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 (cross-appeal)

MOTION TO HOLD APPEALS IN ABEYANCE

The United States respectfully requests that this Court hold this appeal and cross-appeal and several companion appeals in abeyance until the Supreme Court issues its decision in *Mnuchin v. Collins*, No. 19-563, and *Collins v. Mnuchin*, No. 19-422 (collectively, *Collins*). In *Collins*, the Supreme Court will address statutory and constitutional challenges to the same transaction that plaintiffs challenge here: the third amendment to a financing agreement between the Department of the Treasury

and the Federal Housing Finance Agency (FHFA)—acting as conservator for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). In resolving those challenges, the Supreme Court is virtually certain to decide one or more issues central to these appeals, and its decision is likely to substantially affect this Court's resolution of these cases. The government therefore respectfully asks this Court to hold these and the companion appeals in abeyance.

Counsel for the government contacted counsel for plaintiffs in these and the companion appeals. Some plaintiffs oppose this motion, while others are undecided. No plaintiffs consent to this motion.

1. These appeals concern a 2012 amendment to agreements between the Department of the Treasury and Fannie Mae and Freddie Mac that were executed in 2008 to maintain their solvency. In those agreements and their amendments, Treasury committed to investing hundreds of billions of taxpayer dollars in the enterprises in exchange for dividends and other rights. Plaintiffs, shareholders in Fannie Mae and Freddie Mac, allege that the third amendment to those agreements constituted a taking of their property, an illegal exaction, a breach of an implied-in-fact contract, and a breach of fiduciary duty.

On December 6, 2019, the Court of Federal Claims issued an order granting in part and denying in part the government's motion to dismiss plaintiffs' complaint in *Fairholme Funds, Inc. v. United States*, No. 13-465C. The Court of Federal Claims

certified that order for interlocutory appeal, and, on June 18, 2020, this Court granted the government's and plaintiffs' cross-petitions for permission to appeal the district court's order.

Based on its reasoning in *Fairholme Funds*, the Court of Federal Claims subsequently entered judgments dismissing the complaints in a number of companion cases brought by other Fannie Mae and Freddie Mac shareholders. Plaintiffs in some of those cases have appealed, and others are likely to do so. Seven of those appeals have been docketed in this Court. *See* Nos. 20-1934, 20-1936, 20-1938, 20-1954, 20-1955, 20-2020, and 20-2037. In two other cases, the Court of Federal Claims denied the government's motion to dismiss and certified its decision for interlocutory appeal. The plaintiffs in those cases have petitioned this Court to permit their appeal. *See* Nos. 20-138, 20-139. In total therefore, in addition to the appeals by the United States and Fairholme Funds, there will be at least seven appeals from final judgments and possibly two additional interlocutory appeals.

2. The Court of Federal Claims' December 6, 2019 Order now on appeal presents a variety of issues relating to the merits of plaintiffs' challenges to the third amendment and the Court of Federal Claims' jurisdiction over those challenges. Several of these concern the application of the Housing and Economic Recovery Act's (HERA) shareholder succession provision—which transfers all shareholder rights to FHFA during a conservatorship. 12 U.S.C. 4617(b)(2)(A)(i). The Court of Federal Claims recognized this provision generally bars shareholders from bringing

derivative claims. *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1, 49 (Fed. Cl. 2019). It also agreed with the government that plaintiffs' takings, illegal exaction, and other claims, though nominally labeled as direct claims, were "substantively derivative in nature." *Id.* at 45. But the court nevertheless held that the succession clause contains an implied conflict-of-interest exception that permitted plaintiffs to pursue their derivative claims here. *Id.*

The Court of Federal Claims also rejected another critical threshold argument raised by the government. The government explained that the court lacked jurisdiction under the Tucker Act because, when acting as conservator, FHFA "steps into the shoes" of Fannie Mae and Freddie (which are private companies) and "sheds its government character." *Fairholme Funds*, 147 Fed. Cl. at 31. The Court of Federal Claims concluded otherwise, reasoning that FHFA as conservator does not "step into the shoes" of the private enterprises, but instead remains a "distinct" governmental entity. *Id.* at 34.

Regarding the merits of plaintiffs' claims, the Court of Federal Claims held that FHFA "acted within its statutory authority when it entered into" the third amendment. *Fairholme Funds*, 147 Fed. Cl. at 27. But it nonetheless concluded that plaintiffs' illegal exaction claim could proceed because plaintiffs had plausibly alleged that FHFA is unconstitutionally structured and that, as a result, it lacked authority to enter into the third amendment. *Id.* at 52.

In sum, the Court of Federal Claims' order presents several significant jurisdictional and merits questions, including (1) whether plaintiffs' claims are direct or derivative in nature; (2) whether plaintiffs can pursue their derivative claims notwithstanding HERA's shareholder succession clause; (3) whether FHFA as conservator is a government actor; (4) whether FHFA acted within its statutory authority when it agreed to the third amendment; and (5) whether FHFA is constitutionally structured and, if not, whether FHFA lacked the authority to enter into the third amendment.

3. The *Collins* case now before the Supreme Court is one of more than a dozen cases filed in district courts seeking to invalidate the Third Amendment on various grounds. Prior to *Collins,* every court of appeals in these cases ruled in favor of the Department of the Treasury and FHFA and directed that the claims be dismissed. *See Jacobs v. Federal Hous. Fin. Agency*, 908 F.3d 884, 889-896 (3d Cir. 2018); *Roberts v. Federal Hous. Fin. Agency*, 889 F.3d 397, 402-406 (7th Cir. 2018); *Saxton v. Federal Hous. Fin. Agency*, 901 F.3d 954, 957-959 (8th Cir. 2018); *Robinson v. Federal Hous. Fin. Agency*, 876 F.3d 220, 227-235 (6th Cir. 2017); *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 604-614 (D.C. Cir. 2017). Another appeal is pending in the Eighth Circuit. *See Bhatti v. Federal Hous. Fin. Agency*, No. 18-2506.

The en banc Fifth Circuit went into conflict with these decisions, and the government petitioned from that holding. The court rejected plaintiffs' contention

that it should set aside the Third Amendment on constitutional grounds, and plaintiffs have petitioned from that ruling.

The cross-petitions present the Supreme Court with the same five issues outlined above that are crucial to the decisions of the Court of Federal Claims in these cases. Like the Court of Federal Claims, the Fifth Circuit concluded that plaintiffs' statutory and constitutional claims were not barred by HERA's shareholder succession clause. *See Collins v. Mnuchin*, 938 F.3d 553, 573-76, 587 (5th Cir. 2019) (en banc). It reached that determination after concluding that the plaintiffs' claims were direct rather than derivative. The Fifth Circuit likewise rejected the government's argument that plaintiffs' constitutional claims failed because the agency does not "exercise government power" when it acts as a conservator of a private enterprise. *Id.* at 590. On the merits, the Fifth Circuit held (contrary to every other court to consider the issue) that FHFA exceeded its statutory authority when it agreed to the third amendment. *See id.* at 576-85. It further concluded that FHFA was unconstitutionally structured, *id.* at 587-89, but that FHFA's unconstitutional structure did not render the third amendment invalid. *Id.* at 591-95.

Each of those issues is now squarely before the Supreme Court. For instance, the second question presented in the government's petition for writ of certiorari was "[w]hether [HERA's] succession clause—under which FHFA, as conservator, inherits the shareholders' rights to bring derivative actions on behalf of the enterprises—precludes the shareholders from challenging the Third Amendment." U.S. Pet.,

Mnuchin v. Collins, No. 19-563 (S. Ct.); *see also id.* at 20-23. The government has also asked the Supreme Court to reverse the Fifth Circuit's holding that FHFA exceeded its statutory authority in agreeing to the Third Amendment. *Id.* at 16-20. And it has asked the Supreme Court to revisit the Fifth Circuit's conclusion that FHFA retains its government character when it acts as conservator. *See* U.S. Opp., *Collins v. Mnuchin*, No. 19-422 (S. Ct.). The plaintiffs in *Collins* successfully petitioned the Supreme Court to review the question whether "FHFA's structure violates the separation of powers," and, if so, whether the third amendment must be invalidated. *See* Pls. Pet., *Collins v. Mnuchin*, No. 19-422 (S. Ct.).

4. This Court should thus place the *Fairholme* appeals and the companion cases in abeyance until the Supreme Court decides the *Collins* case. The Supreme Court is almost certain to resolve one or more issues that are central to the cases now before this Court. At a minimum, the Supreme Court's decision is likely to substantially narrow the issues this Court would be required to decide. For example, if the Supreme Court concludes that plaintiffs' claims are derivative and that they are barred by HERA's succession clause, all of plaintiffs' remaining claims in this litigation would be barred. Similarly, if the Supreme Court were to conclude that FHFA is not a government actor when it acts as a conservator, the Court of Federal Claims would lack jurisdiction over plaintiffs' claims. How the Supreme Court resolves the questions whether FHFA exceeded its statutory authority, whether it is

constitutionally structured, and whether any issues with FHFA's structure require the invalidation of the third amendment are also likely to substantially affect this litigation.

There is no reason for this Court to wade into the complicated thicket of issues these cases present when the Supreme Court is poised to decide one or more of those very issues. It would waste the Court's resources to decide these cases prior to the Supreme Court's decision. And it would needlessly consume the resources of the parties to file briefs that may be overtaken in whole or in part by the Supreme Court's opinion. The number of pending appeals underscores the propriety of placing the appeals into abeyance and avoiding a potential deluge of briefs.

CONCLUSION

For the foregoing reasons, this Court should place the above appeals and companion cases in abeyance until the Supreme Court issues its decision in *Mnuchin v. Collins*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 1,701 words, according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2020, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

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