Nos. 19-422 & 19-563

IN THE

Supreme Court of the United States

PATRICK J. COLLINS, ET AL.

v.

STEVEN T. MNUCHIN,
SECRETARY OF THE TREASURY, ET AL.

STEVEN T. MNUCHIN,
SECRETARY OF THE TREASURY, ET AL.

V.

PATRICK J. COLLINS, ET AL.

**BRIEF FOR *AMICI CURIAE*,
INSTITUTIONAL INVESTORS IN
FANNIE MAE AND FREDDIE MAC,
IN SUPPORT OF
PATRICK J. COLLINS, ET AL.**

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Institutional Investors in Fannie Mae and Freddie Mac, listed in the attached Appendix of *Amici*, are eighteen investment funds, which have substantial interests in the fundamental questions of administrative and corporate law that these cases present. In particular, *amici* seek to ensure that the government's overreach in nationalizing Fannie Mae and Freddie Mac (the Companies) by agreeing—with itself—to the Net Worth Sweep on the Companies' behalf and for its own benefit is subject to judicial review, and for the correct reasons. More broadly, *amici* have ongoing interests in ensuring, and seek to ensure, that federal agencies cannot act lawlessly against private persons and their property with impunity, as our government "is, emphatically, and truly, a government of the people." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819). Accordingly, *amici*'s brief focuses on the first question presented in the parties' briefs, involving the "Succession Clause" in 12 U.S.C. § 4617(b)(2)(A).

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[1] The parties have provided the Court blanket consent to the filing of *amicus* briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Pointing to the Succession Clause of the Housing and Economic Recovery Act of 2008 (HERA), the government claims it can take over two thriving, private companies; cut all private shareholders out from the companies' substantial profits; and enrich itself as a shareholder with those profits to the tune of hundreds of billions of dollars—all without having to answer to the private shareholders in court.

The government is wrong. The "historic practice whereby courts review agency action" ensures that statutes like HERA do not become "blank checks drawn to the credit of some administrative officer." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 671-73 (1986) (citation omitted). And as the en banc Fifth Circuit correctly held, the Plaintiffs here, wiped-out shareholders in the Companies, assert a statutory claim for violating HERA that, under the Administrative Procedure Act (APA), belongs to *them*—not to the Companies. Accordingly, the Succession Clause does not bar Plaintiffs' claim, and the government's illicit conduct must face judicial review.

I. Most fundamentally, Plaintiffs have a cause of action under the terms and settled principles of the APA. Backed by a longstanding presumption of judicial review, the APA creates a broad cause of action by which any "aggrieved" "person," having Article III standing, who is even arguably within the underlying statute's "zone of interests" may challenge final agency action. 5 U.S.C. § 702. Plaintiffs, as shareholders of companies in government conservatorship under HERA, easily satisfy this test—a conclusion the en banc Fifth Circuit reached without dissent and that the government does not challenge before this Court. Because these APA principles govern here and give Plaintiffs their own cause of action, they have a "direct" claim; HERA's Succession Clause is not at issue; and the corporate-law shareholder-standing rules the government invokes are beside the point.

II. But even if this Court were to unnecessarily analyze Plaintiffs' statutory claim under those corporate-law rules, the government still would be wrong. Under controlling federal law (and state-law principles from which federal law may draw), Plaintiffs' claim still is direct, not derivative. The applicable law is well established: When a corporation (particularly through a controlling shareholder or control group) rearranges the relationship of classes of shareholders to the detriment of some, a shareholder in a disadvantaged class is harmed, regardless of whether the rearrangement harmed the corporation, and thus has a direct claim.

That is what happened here. By government action during the Companies' (ongoing) government conservatorship, the Net Worth Sweep essentially created a new class of stock for the Department of the Treasury (a shareholder) that directly expropriated essentially all value from the other shareholders, including Plaintiffs. The Sweep transferred the value of Plaintiffs' stock directly to Treasury and effectively removed Plaintiffs from the Companies' capital structures, thus harming Plaintiffs directly, regardless of the Sweep's (deleterious) effect on the Companies' rehabilitation. The Plaintiffs suffered a direct harm and have a direct claim. Thus, to the extent that the Succession Clause bars derivative claims as defined by corporate law, it still does not stand in Plaintiffs' way.

ARGUMENT

I. Under Settled Law, The APA Gives Plaintiffs A Cause Of Action To Challenge The Final Agency Action Under HERA That Injured Them.

Plaintiffs have a cause of action to obtain judicial review of the Net Worth Sweep—final action of the Federal Housing Finance Agency (FHFA) that injured them—because they indisputably have Article III standing and properly "assert rights under the APA." Pet. App. 30. HERA's Succession Clause, which says nothing about judicial review, thus does not bar Plaintiffs' statutory claim. The en banc court of appeals so held without dissent, and this Court should affirm. Pet. App. 28-35.

As explained below, (A) the APA's arguable-zone-of-interests test governs here, not corporate-law principles; (B) it is undisputed that Plaintiffs have Article III standing and that their interests are at least arguably within the zone of interests that HERA protects or regulates, which means the APA grants them a cause of action on their own behalf; and (C) the government's contrary arguments as to the governing standard are incorrect.

A. The APA's Arguable-Zone-Of-Interests Test Governs, Rendering Corporate-Law Principles Inapposite.

The en banc Fifth Circuit got it right: The APA's longstanding arguable-zone-of-interests test governs whether Plaintiffs may challenge the government's final agency action in court, because Plaintiffs' cause of action arises under the APA. *See* Pet. App. 28-35. Accordingly, not only are the government's assertions under state corporate-law principles incorrect (*see infra* § II), but they are also, more simply, beside the point. If Plaintiffs satisfy the APA's judicial-review prerequisites, the cause of action they assert belongs to *them*, personally, not the Companies. That should be the end of the matter. *Cf. Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1140 (Del. 2016) (declining to "convert a direct claim that another state's law has granted" to a stockholder into a claim of the corporation).

1. Start where the court of appeals did, with the APA's plain text. "[Plaintiffs'] cause of action" asserts "rights under the APA"—specifically, rights under 5 U.S.C. § 702. Pet. App. 30. Section 702 broadly commands that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, *is entitled to judicial review thereof*." 5 U.S.C. § 702 (emphasis added). And as the government itself appears to acknowledge (at 26), this Court has—for half a century—"construed [§ 702] extremely broadly to allow a plaintiff" with Article III standing "to sue for violations of a statutory … provision so long as the plaintiff can demonstrate that her suit seeks to protect interests that 'arguably' fall within the 'zone of interests' protected by that provision." Wright & Miller, 33 Fed. Prac. & Proc. § 8302 (2d ed. 2020); *see Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) ("[A] person suing under the APA must satisfy not only Article III's standing requirements, but an additional [zone-of-interests] test …."); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970) (establishing arguable-zone-of-interests test under the APA and noting "trend … toward enlargement of the class of people who may protest administrative action").

The APA's arguable-zone-of-interests test is therefore the "guide for deciding whether, in view of Congress' evident intent [in the APA] to make agency action presumptively reviewable, a particular plaintiff" with Article III standing "should be heard to complain of a particular agency decision." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987). The test is not "especially demanding," and this Court has "conspicuously included the word 'arguably' in [it] to indicate that the benefit of any doubt goes to the plaintiff." *Patchak*, 567 U.S. at 225. Indeed, the test "forecloses suit only when a plaintiff's interests are so *marginally* related to or inconsistent with the purposes *implicit* in the statute that it cannot *reasonably* be *assumed* that Congress intended to permit the suit." *Id.* (emphases added).

As this Court has explained, this "lenient approach is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (given Congress's intention in the APA to "cover a broad spectrum of administrative actions," the APA's "generous review provisions must be given a hospitable interpretation"), *abrogated on unrelated grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Therefore, § 702's lenient zone-of-interests test, on its own terms, strongly favors judicial review for individuals aggrieved by agency action.

But there is more. This Court has also long recognized that the text of the immediately preceding section of the APA, 5 U.S.C. § 701(a), establishes a "basic *presumption* of judicial review for one suffering legal wrong because of agency action." *Dep't of Homeland Sec. v. Regents of Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (emphasis added); *see also Bowen*, 476 U.S. at 670-72 (describing the presumption's foundation).

Section 701(a) says the APA's judicial-review provisions apply "except to the extent that … statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). Given this language, and again for at least half a century, this Court has held that § 701(a) "embodies the basic presumption of judicial review," and that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to [such] review" for aggrieved individuals. *Abbott Labs.*, 387 U.S. at 140-41; *see also Barlow v. Collins*, 397 U.S. 159, 166-67 (1970) (stating that APA "judicial review" is "the rule, and nonreviewability an exception which must be demonstrated" and "is not lightly to be inferred").

2. These principles do not change simply because the plaintiff is a shareholder of a corporation. As Plaintiffs explain (at 18-20), this Court rejected an almost-identical argument in *American Power & Light Co. v. SEC*, 325 U.S. 385 (1945), decided one year before the APA's enactment. There, the Court permitted a "stockholder entitled to dividends" (indeed, the sole stockholder) to challenge an agency order that had a "direct adverse effect" on it under a statute that, like the APA, allowed "person[s] aggrieved" to seek judicial review.

Id. at 388-89. The Court did not concern itself with "the usual criteria of standing to sue" as a possible reason to deny the stockholder "the benefit of [court] review" of the order against the corporation, *id.* at 390, and rejected the dissent's argument that the test was "to be drawn from traditional legal principles" concerning shareholder standing, *id.* at 393-94 (Murphy, J., dissenting). The government here seeks to resurrect that rejected argument, in the face of not only *American Power* itself but also over fifty years of APA precedent consistent with it. *See also Clarke*, 479 U.S. at 400 n.16 (illustrating the "difference made by the APA" by contrasting non-APA case declining to imply cause of action for shareholders seeking recovery of corporate funds).

Accordingly, to establish that they have a cause of action *of their own* under the APA, Plaintiffs need demonstrate only that they have Article III standing and satisfy the APA's judicial-review prerequisites by themselves being arguably within HERA's zone of interests. If so, HERA's Succession Clause is irrelevant, regardless of the extent to which it transfers to the FHFA-as-conservator shareholder claims *on behalf of a corporation* and regardless of whether the Plaintiffs' claim might be so understood if assessed under corporate law instead of the APA (*but see infra* § II). Plaintiffs therefore may challenge the government's final agency action. The government's invocation of corporate-law principles is unsound and should be rejected.

B. Because Plaintiffs Undisputedly Have Article III Standing And Satisfy The APA's Judicial-Review Prerequisites, Their APA Claim Belongs To Them, Not To The Companies.

Plaintiffs easily satisfy these tests.

1. At the threshold, the government does not challenge Plaintiffs' Article III standing to contest the legality of its action in this case. It thus impliedly concedes that the Net Worth Sweep that the government imposed on the Companies caused Plaintiffs, shareholders of the Companies, "an injury in fact that is concrete, particularized, and actual or imminent." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020).

Nor does the government dispute that its action constituted final agency action. *See* 5 U.S.C. §§ 702, 704; *see also, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct 1807, 1813 (2016). Indeed, the government "assum[es] that a contract adopted by the conservator qualifies as 'agency action' reviewable under the APA." Gov't Br. 25 (quoting 5 U.S.C. § 702).

2. The government also does not challenge—in any way—the en banc court of appeals' conclusion that Plaintiffs "are within the zone of interests protected by [HERA's] enumeration of conservator powers." Pet. App. 34; *see* Gov't Br. 25-29. It is right not to do so: There is no plausible argument that the interests that Plaintiffs assert as shareholders of companies under HERA conservatorship "are so marginally related to or inconsistent with the purposes implicit in [HERA] that it cannot reasonably be assumed that Congress intended to permit the suit." *Patchak*, 567 U.S. at 225.

The analysis is straightforward. The statutory provision on which Plaintiffs rely states that FHFA, "as conservator," will "preserve and conserve the assets and property of" the Companies. 12 U.S.C. § 4617(b)(2)(D). As the court of appeals explained, shareholders like Plaintiffs "ordinarily have a claim on the 'assets and property' that a conservator is empowered to 'preserve and conserve.'" Pet. App. 33. Yet here, Plaintiffs allege, the Net Worth Sweep excluded them from benefiting from the Companies' "assets and property," as the Sweep cut them off from the Companies' profits by diverting them to the government. *See* Pet. App. 33 n.106 (citing Compl. ¶ 114). The interests that Plaintiffs assert are therefore at least "arguably within the zone of interests to be protected" by HERA—and "the benefit of any doubt" on that question "goes to" Plaintiffs. *Patchak*, 567 U.S. at 224-25. Thus, this APA claim belongs to Plaintiffs—not the Companies—and HERA's Succession Clause does not stand in its way.

3. Indeed, if the APA's "basic presumption of judicial review for one suffering legal wrong because of agency action" is to have any meaning, this Court should give it force in this case. *Regents of Univ. of California*, 140 S. Ct. at 1905. Under the government's position, the only "plaintiff" that could challenge the agency action in dispute would be *the agency itself*. As the Companies' conservator, FHFA has (among other things) "succeed[ed] to … all rights, titles, powers, and privileges" of the Companies, including a Company's right to sue on a cause of action it has. 12 U.S.C. § 4617(b)(2)(A)(i). The government is hardly going to (nor could it) sue *itself*, to challenge *its own* decisionmaking. Consequently, rejecting Plaintiffs' APA challenge to the Net Worth Sweep would effectively insulate that agency action from judicial review under the APA. The Court should reject that result and affirm the en banc Fifth Circuit's well-supported conclusions under the APA.

C. The Government's Arguments For Barring The Cause Of Action For Agency Review That The APA Grants To Plaintiffs Are Ill-Founded.

The government resists these straight-forward conclusions, but its arguments are not persuasive.

1. The government, first, contends (at 25-27) that the Fifth Circuit's zone-of-interests analysis "contradicts the APA's text." The government, however, both concedes that a "person is 'adversely affected or aggrieved' within the meaning of [§ 702] … if his asserted interest is 'arguably within the zone of interests to be protected or regulated' by the statute allegedly violated," Gov't Br. 26 (quoting *Clarke*, 479 U.S. at 395-96); and fails to mention § 701's text-based presumption favoring judicial review, *see supra* §§ I.A & I.B.3. The government thus leaves much of the relevant textual analysis unchallenged.

Indeed, the government's *sole* textual argument rests on the final sentence of 5 U.S.C. § 702—the proviso—which says "[n]othing herein … affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." According to the government, "restrictions" on derivative suits "imposed by [HERA's] succession clause constitute 'other limitations on judicial review'" and "also constitute 'other appropriate legal or equitable ground[s]' for dismissing the suit or denying relief." Gov't Br. 27.

But what "restrictions?" Nothing in the Succession Clause *explicitly* imposes "limitations" on the right of APA judicial review for aggrieved persons or creates a "duty of the court to dismiss [this APA] action or deny relief." 5 U.S.C. § 702; *see* 12 U.S.C. § 4617(b)(2)(A)(i) (Succession Clause); *see also Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("Nothing in the [statute at issue] expressly precludes review under the APA"); *Abbott Labs.*, 387 U.S. at 141 ("The Government relies on no explicit statutory authority for its argument that … review is unavailable"). Nor does "anything in the statutory scheme sugges[t]" an *implicit* "purpose" to preclude APA judicial review for persons aggrieved by agency action and otherwise arguably within the zone of interests. *Bennett*, 520 U.S. at 175. The government accordingly falls short of the "clear and convincing evidence" it would need were it to overcome the APA's plain language and longstanding presumption of the right to judicial review for those injured by final agency action—a "right … too important to be excluded on such slender and indeterminate evidence of legislative intent." *Bowen*, 476 U.S. at 674.

The government's reliance on *Darby v. Cisneros*, 509 U.S. 137 (1993), is unavailing. Indeed, this Court there *rejected* the government's argument that "federal courts have the authority" under § 702's proviso "to require that a plaintiff exhaust available administrative remedies before seeking judicial review under the [APA]," as "neither the statute nor agency rules *specifically mandate[d]* exhaustion as a prerequisite to judicial review." *Id.* at 138 (emphasis added); *see id.* at 152-

53. So too here: The Succession Clause does not "specifically mandate" dismissal or preclude APA judicial review for persons to whom the APA gives a cause of action, meaning this Court must read it as not doing so. *Id.* at 138 (emphasis added).

2. Moving away from statutory text, the government next says (at 25, 27-28) that the court of appeals' APA analysis "conflicts with this Court's precedents." The government, however, establishes no "conflict."

Indeed, the government cites just *one* decision of this Court to support its asserted conflict: *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006). *See* Gov't Br. 27. *Domino's*, however, did not involve the APA in any way; and it merely barred the "sole shareholder and president" of a corporation from seeking relief for race discrimination under 42 U.S.C. § 1981 due to a contract between the corporation and a third party, as the claim plainly belonged to the corporation. 546 U.S. at 472, 474-80 (emphasis added). Here, in contrast, the APA claim *belongs to Plaintiffs*—not the Companies—under the APA's arguable-zone-of-interests test and presumption of judicial review. *Supra* § I.B. *Domino's* thus does not control. And if anything, it is the government's position that "conflicts" with this Court's precedents, as the government fails to contend with *American Power*, 325 U.S. 385, explained *supra* (§ I.A) and in Plaintiffs' brief (at 18-20).

3. Last, the government resorts to policy arguments. It says (at 25, 28-29) that the Fifth Circuit's APA analysis, if sanctioned, would lead to "untenable" results. That is so, the government says (at 28), because a "person who owns a single share in a corporation could bring an APA claim challenging agency action that injures the corporation, even if the action causes no injury to the shareholder beyond an indirect, contingent reduction in the value of his share, and even if the corporation's directors and officers decide that a suit would not advance the corporation's interests."

This policy argument is greatly overstated and overlooks important considerations. Indeed, this Court rejected it in *American Power*, where the dissent likewise predicted "unfortunate consequences" and "no limit to which … stockholders may harass" the agency. 325 U.S. at 396 (Murphy, J., dissenting). Moreover, the Court could, if concerned from a policy perspective, affirm Plaintiffs' APA standing on the peculiar facts presented (where the government controls the corporation), leaving supposed "untenable consequences" for consideration in future cases, as explained below.

a. To start, the law already provides several preconditions to APA judicial review. The first is constitutional standing, as "[a]n APA claim [still] must be justiciable." Pet. App. 30-31; *see also Patchak*, 567 U.S. at 224 ("[A] person suing under the APA must satisfy … Article III's standing requirements"). "[S]tanding inquiries are," of course, "inherently fact-specific." *Navajo Nation v. Dep't of Interior*, 876 F.3d 1144, 1161 (9th Cir. 2017). For future APA cases, courts are well equipped to determine, based on the facts before them, whether a shareholder asserting only an "indirect, contingent reduction in the value of his share," Gov't Br. 28, has "demonstrate[d] … an injury in fact that is concrete, particularized, and actual or imminent," *Thole*, 140 S. Ct. at 1618. That is not a problem in this case, however; the government correctly does not challenge Plaintiffs' injury or any other aspect of their constitutional standing to challenge the Net Worth Sweep. *See supra* § I.B.

Additional preconditions include the APA's requirements of (1) "final agency action" (2) "for which there is no other adequate remedy in a court," 5 U.S.C. § 704; *see, e.g.*, *Hawkes Co.*, 136 S. Ct at 1813; *Bennett*, 520 U.S. at 161-62. These requirements, too, turn on fact-specific inquiries, and courts in future cases are again well equipped to decide, on the facts presented, whether the government's examples—an agency's "levying of a regulatory fee," "denial of a subsidy," or "imposition of an asset divestment order" on a corporation—satisfy these prerequisites. Gov't Br. 28. Here again, this is not in dispute, because the government "assum[es] that a contract adopted by the conservator qualifies as 'agency action' reviewable under the APA." Gov't Br. 25 (quoting 5 U.S.C. § 702).

Finally, the APA's zone-of-interests test itself checks against these alleged "untenable consequences." Indeed, it was *designed* to do so. In crafting the test, this Court "implicitly recognized the potential for disruption inherent in allowing every party adversely affected by agency action to seek judicial review," and it "struck the balance in a manner favoring review, but excluding those would-be plaintiffs not even arguably within the zone of interests to be protected or regulated by the statute." *Clarke*, 479 U.S. at 397. The APA test is "additional" to Article III standing; and while, as discussed above, it is not "especially demanding," it has teeth. *Patchak*, 567 U.S. at 225. Courts can and do dismiss APA challenges that fail it. *See, e.g.*, *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 945 (9th

Cir. 2005) (dismissing because "purely economic injury" not "intertwined with an environmental interest" did not fall within "zone of interests" of National Environmental Policy Act); *Courtney v. Smith*, 297 F.3d 455, 460-67 (6th Cir. 2002) (dismissing where civil employees at Air Force base seeking to retain employment did not fall within "zone of interests" of budget and procurement statutes).

b. It is the government's proposed rule that would lead to "untenable consequences." As the government would have it, a shareholder could (1) be injured and otherwise have Article III standing, (2) challenge final agency action for which no other adequate remedy exists, and (3) raise issues that fall within the statute's zone of interests—and yet *still* be precluded from seeking judicial review, based simply on the vagaries of corporate governance. *See* Gov't Br. 28 (stating that a "corporation's directors and officers" might "decide that a suit would not advance the corporation's interests"). And the flipside of the government's parade of horribles is that, because all shareholders are likely to be similarly situated, *all* of them would be equally barred from challenging the agency action at hand.

Worse, in cases like this one, in which the agency at issue dominates the corporation—the Companies' "directors and officers" have been quite powerless to "decide" whether to sue, Gov't Br. 28—*no one* could challenge the agency's action, thus effectively insulating it from APA judicial review. At bottom, then, the government is asking the Court to hold that it would be better to have the certainty of zero lawsuits by persons injured by final agency action than to have the possibility of too many.

The consequence of that position? Further concentration of power—indeed, *unreviewable* power—in agencies, "spread[ing] the spores of the ever-expanding administrative state." *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment). And derogation of what Chief Justice Marshall called the "very essence of civil liberty": "the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 163 (1803) (quoted in *Bowen*, 476 U.S. at 670).

A suit under the APA does nothing more than seek to compel a federal agency to follow Congress's directives—something Congress is generally presumed to want. *See, e.g., Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015). That federal agencies might face additional lawsuits by injured plaintiffs to compel the agencies to follow the law might trouble the Executive Branch lawyers at the Department of Justice, but, from the standpoint of the Legislative Branch (and the public), it is generally a benefit. When Congress enacted the APA, it had reason for liberalizing who could seek judicial review, and that policy rationale applies here.

The Court should reject the government's arguments and affirm the en banc Fifth Circuit's faithful application of this Court's APA precedents.

II. In Any Event, Plaintiffs Also Have A "Direct" Claim Under Settled Corporate-Law Principles.

For the reasons just explained, corporate-law principles do not control whether the Plaintiffs have an

APA cause of action to review the government's violation of HERA that effectively removed them from the Companies' capital structure and transferred their stock to the government. So there is no need for the Court to delve into those principles here. But in any event, Plaintiffs' claim is direct under corporate law.

This case challenges a one-of-a-kind expropriation of equity, held by non-controlling shareholders in U.S. government-controlled corporations, by and for the benefit of the U.S.-government shareholder. The Plaintiffs lost substantial equity, which the government took for itself under the challenged Net Worth Sweep, and for which the Plaintiffs bring claims on their own behalf. As Judge Willet noted for the en banc Fifth Circuit below, the government's action benefitted a "single shareholder" at the expense of the other shareholders. Pet. App. 5. And this harm that discriminates among shareholders exists regardless of whether the government's action harmed or even (somehow) helped the Companies themselves: An entity that controls a corporation may readily grab all its profits and shares without damaging the corporation itself, and might even prefer that. Here, the Net Worth Sweep effectively created a new class of stock for that single shareholder—Treasury—that transferred to Treasury the stock held by all other shareholders, including Plaintiffs. Although the Net Worth Sweep also harmed the Companies, the transfer and resulting harm to the non-government shareholders do not depend on that harm to the Companies.

Under controlling federal law (and under state-law principles from which federal law might draw), these claims by (some) shareholders are direct, not derivative. "Prudential standing" depends on the precise claims asserted and the entities who assert them. Here, the claim that the non-government shareholders assert does not apply *pro rata* to all shareholders, as truly derivative claims would. The shareholders who are seeking APA review have individual rights that differ from and are independent of rights and resulting claims that the Companies might have themselves had (were they not under the government's complete control). Plaintiffs seek to vindicate their own rights and invalidate government action that unquestionably harms their direct interests. Thus, even under corporate-law principles, Plaintiffs' claim is direct.

A. Under Controlling Federal Law, Reallocation Of Equity Among Current Shareholders Gives Rise To Direct Claims By Harmed Shareholders.

1. As a general rule, a plaintiff should be asserting "his own legal rights and interests," not resting "his claim to relief on the legal rights or interests of third parties." *Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990) (citation omitted). Sometimes, a shareholder in a corporation will seek to bring a suit "founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 528 (1984). When "the right claimed by the shareholder is one the corporation could itself have enforced in court," the suit by the shareholder is "derivative"—to distinguish it from an ordinary, "direct" claim of the shareholder—and therefore subject to various constraints. *Id.* at 529–34.

In such situations, the harm the corporation suffered will also harm every stockholder, *pro rata*, and a claim based on this pass-through harm is usually considered "indirect." *E.g.*, *American Power*, 325 U.S. at 393 & 396 (Murphy, J., dissenting) (referring to "the indirect harm which may result to every stockholder from harm to the corporation" (quoting *Pittsburgh & W.V. Ry. Co. v. United States*, 281 U.S. 479, 487 (1930))). That is, "injury to the corporation" produces injury "to the whole body of its stock or property without any severance or distribution among individual holders." *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998); *see id.* at 700 (holding allegation to involve "an injury that fell on every stockholder, majority and minority alike, and fell on each on a per share basis"); *see also Starr Int'l Co. v. United States*, 856 F.3d 953, 964 n.16 (Fed. Cir. 2017) (noting that "each AIG shareholder was affected in a proportional measure" by alleged wrong by government).

However, even when, under a given set of facts, a corporation would have a cause of action "to enforce the rights of the corporation," a shareholder might still be able to sue on its own behalf—if it can show "a direct, personal interest in [that] cause of action," *Alcan,* 493 U.S. at 336; *see Starr,* 856 F.3d at 966 (same), or simply a distinct harm and resulting distinct claim from those facts, *Pareto*, 139 F.3d at 699 ("an action may lie both derivatively and individually based on the same conduct"); *see* American Law Institute: Principles of Corporate Governance § 7.01(c), cmt. f (observing that "a direct action is not precluded simply because the facts also give rise to a derivative action").

2. When a corporation rearranges rights among its stockholders (on its own initiative or particularly at the behest of a controller), it does not necessarily harm itself. But it does necessarily harm some stockholders at the expense of others (unless they receive appropriate compensation).

This creates a direct claim for the harmed shareholders, under a straightforward application of these general principles. More than sixty years ago, in a portion of a dissent with which the majority did not disagree (nor has this Court since), Justice Frankfurter stated the rule for such cases: "[I]f a corporation rearranges the relationship of different classes of security holders to the detriment of one class, a stockholder in the disadvantaged class may proceed against the corporation as a defendant to protect his own legal interest." *Swanson v. Traer*, 354 U.S. 91, 99 (1957) (Frankfurter, J., dissenting).

Similarly, *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 160 (1957), illustrates the rule. Two controlling shareholders caused their corporation to exchange existing preferred stock (worth $33 million) for new preferred stock (worth $48 million), a transaction that benefited the controlling shareholders while simultaneously reducing the proportionate interests of common shareholders. After regulators approved the transaction, minority shareholders sued, arguing that the transaction violated shareholder-rights provisions of the Investment Company Act.

In holding that the suit could go forward, this Court in *Alleghany* explained, drawing on these background concepts, that the transaction did not involve simply "the indirect harm which may result to every stockholder from harm to the corporation." 353 U.S. at 160 (quoting *Pittsburgh & W. Va. Ry. Co.*, 281 U.S. at 487). Indeed, it was not clear there was any harm to the corporation. Regardless, the conduct of the controlling shareholders imposed distinct harms on the "minority common stockholders," who could therefore maintain a direct action. *Id.* at 158; *see also Pittsburgh & W.V. Ry. Co.*, 281 U.S. at 487 (cases of "reorganization … deal with the interests of investors" and thus are proper subjects for direct suits.); *Strougo v. Bassini*, 282 F.3d 162, 175 (2d Cir. 2002) (holding claim of "reallocation of equity value" to be direct, under federal law informed by Maryland law); 12B FLETCHER CYCLOPEDIA OF THE LAW OF CORPS. § 5908 (2020) (reciting among examples of direct claims shareholder challenges to "recapitalization, redemption, or similar transactions unfairly affect[ing] minority shareholders").

B. Similarly, Under Persuasive Delaware Law, Reallocations Of Equity Among Current Shareholders Give Rise To Direct Claims By Harmed Shareholders.

1. Delaware corporate law, which can inform the applicable federal law in this context, is to the same effect. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97-98 (1991) (recognizing that, although the contours of a federal cause of action are "necessarily federal," it "does not follow" that they "must be wholly the product of a federal court's own devising"). Initially, claims that "only the [plaintiff] can assert" are of course direct claims belonging to those plaintiffs. The question is simply what the cause of action is and, under the law creating it, to whom that cause of action belongs. If it belongs to a shareholder, and not to the corporation, it is direct, without any further analysis needed. *Citigroup*, 140 A.3d at 1138. Therefore, the "initial question" must be: "[D]oes the plaintiff seek to bring a claim belonging to her personally or one belonging to the corporation itself?" *Id.* at 1127.

Delaware also recognizes the significance, for identifying a direct claim in the context of a suit by a shareholder, of whether the harm alleged by a shareholder was "shared equally by all stockholders." *Citigroup*, 140 A.3d at 1140 n.74. Generally speaking, "[i]n order to state a direct claim, the plaintiff must have suffered some individualized harm not suffered by all of the stockholders at large." *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008).

2. Sometimes, as Delaware courts (like federal courts) "have long recognized," "the same set of facts can give rise to both a direct claim and a derivative claim." *Gentile v. Rossette*, 906 A.2d 91, 99 n.19 (Del. 2006) (quoting *Grimes v. Donald*, 673 A.2d 1207, 1212 (Del. 1996)). One such situation involves claims for breach of fiduciary duty, given that, under background corporate law, a director or officer has a duty to both the corporation and its shareholders. *E.g.*, *Citigroup*, 140 A.3d at 1139; *see Daily Income Fund*, 464 U.S. at 535 n.11. In such situations, "[a] stockholder who is directly injured … retain[s] the right to bring an individual action for injuries affecting his or her legal rights as a stockholder." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004). "[W]hether a stockholder's claim is derivative or direct" turns on "(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.

Regarding the first criterion under *Tooley*, a court considers "whether the stockholder has demonstrated that he or she has suffered an injury that is not dependent on an injury to the corporation." *Id.* at 1036. It does not follow, however, either logically or under the case law, that a shareholder must show that the action did *not* also harm the corporation. *See, e.g., Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007) (concluding "that the claims … are not exclusively derivative and could be brought directly"); *Gentile*, 906 A.2d at 99 (explaining that some claims are "both derivative and direct"). Again, when, to take an easy example, a corporation simply removes a shareholder from its capital structure, the overall transaction might or might not, depending on the details, harm (or help) the corporation, but, regardless, it does harm the removed shareholder.

And in the context of claims by common shareholders in connection with an alleged corporate overpayment, the Delaware Supreme Court has recognized one particular scenario that does present both direct shareholder claims and claims on behalf of the corporation. In *Gatz*, for example, that court, en banc, unanimously explained (drawing on two of its precedents, one before and one after *Tooley*) that "a species of corporate overpayment claim" is both direct and derivative if "(1) a controlling shareholder causes the corporation to issue excessive shares for assets of a lesser value" (which of course works a harm on the corporation), "and (2) the exchange produces an increase of shares owned by the controlling shareholder and 'a corresponding decrease' in shares owned by the minority shareholders" (which shifts the corporate harm away from a *pro rata* effect on every shareholder). 925

A.2d at 1278. A direct shareholder claim exists (even though the corporation suffered a harm and also has a claim) because the transaction involved "an improper transfer—or expropriation—of economic value and voting power from the [minority] shareholders to the majority or controlling stockholder." *Id.* The resulting harm is not confined to an "equal dilution of the economic value and voting power" of all shareholders: Minority "shareholders are harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefited." *Id.*

3. In these cases, and particularly a subsequent case the government cites (at 21), *El Paso Pipeline GP Co., LLC v. Brinckerhoff,* 152 A.3d 1248 (Del. 2016), the Delaware Supreme Court has flagged the loss of voting power as a consideration. That recognition helps to illustrate the broader rule, rather than itself being an (arbitrary) requirement.

The court in *El Paso Pipeline* held, based on a limited-partnership agreement, that a limited partner's claim of overpayment against the general partner was not direct but rather belonged to the partnership. Initially, then, the case turned (in relevant part) on whether and how to apply *Tooley* and extend the rule of *Gatz* and *Gentile*, developed as background law for corporations, "in the limited-partnership context"—in which (a) conflicts of interest between the general partner and limited partners are inherent; (b) any duties owed to the limited partners are purely contractual, not common-law fiduciary duties such as the duties that corporate directors, officers, and controllers bear; and (c) that contract (the partnership agreement) determines both how to address the inherent conflicts of interest and who has a given cause of action. *Id.* at 1251; *see id.* at 1260 ("[C]ases involving limited partnerships often present unique facts relating to the provisions and structure of the limited partnership agreement and how it defines the rights and responsibilities of the limited partners"). In the corporate context itself, the principles of *Tooley*, *Gentile*, and *Gatz* continue to directly control. *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 251 (Del. 2019).

More to the point, the limited partner only alleged loss to the partnership, and, thus, any harm he suffered was just "in the form of the proportionally reduced value of his units." *El Paso Pipeline*, 152 A.3d at 1261. The Delaware Supreme Court unsurprisingly emphasized this, drawing on the general rule in the corporate context: "Where all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative." *Id.*[2] Indeed, the case had gone to trial, and the limited partner "presented evidence of harm *only* as to the Partnership, not to the individual unitholders." *Id.*; *see also id.* at 1265 ("Brinckerhoff never presented evidence at trial of specific harm suffered by the limited partners, as the Court of Chancery stated").

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[2] More precisely, when *not* all of the shareholders are harmed in the same way, *pro rata*, the harm is direct, but when they *are* all harmed *pro rata*, the harm is likely derivative but might not be. *Tooley*, 845 A.2d at 1037 (stating that, although "an injury to the corporation tends to diminish each share of stock equally," a "direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, without the claim thereby becoming" derivative).

Beyond that, the limited partner also did not allege "that the Partnership's overpayment increased the General Partner's or the Parent's control at the expense of the limited partners." *Id.* at 1264. In "declin[ing] to further expand [the dual-nature claim doctrine] in the limited partnership context," the court emphasized that "there was no plausible argument that the transaction had the effect of increasing the voting power or control of the general partner at the expense of the unaffiliated unitholders. From the start, the derivative plaintiff has sought only monetary relief for the limited partnership." *Id.* at 1251.

In the context of an overpayment claim that did not even include an allegation (much less proof) of harm to the limited partner distinct from harm to the partnership, it made sense to highlight the absence of loss of control as well. Similarly, in the context of a claim by a common stockholder, if there were a loss of voting power, that would be a simple way to show a harm that the stockholder suffered independently of any harm to the corporation (and, which is the same thing, that did not harm every shareholder proportionally). Reallocation of voting power among shareholders does not harm the corporation, whereas, as discussed above, reallocation of economic value among shareholders might be accompanied by (even if not depending on) harm to the corporation, presenting a less clear picture. But an indicator is not a requirement; it can be sufficient without being necessary.

Indeed, the Delaware Supreme Court in *Gentile* expressly and unanimously rejected the Chancery Court's holding in that case that a reduction in voting power needs to be "material," meaning dropping from majority to minority. 906 A.2d at 101-02. It explained:

"A rule that focuses on the degree or extent of the expropriation, and requires that the expropriation attain a certain level before the minority stockholders may seek a judicial remedy directly, denigrates the gravity of the fiduciary breach and condones overreaching by fiduciaries." *Id.* at 102. Yet reducing voting power that already was in the minority means reducing voting power that was *useless* for controlling the company (particularly when, as in *Gentile* itself, a majority shareholder exists, *id.* at 95). So loss of "control" cannot be the real question. Rather, a loss of (even non-controlling) voting power is a marginal piece of the plaintiff's overall discriminatory, and thus direct, economic harm. The cases' evidentiary observation—describing all that happens when a common shareholder suffers expropriation—do not establish a requirement for a court to acknowledge a direct claim.

Accordingly, although holders of preferred stock lack common voting rights, both the *Tooley* and "dual nature" tests apply to claims by them. *See MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *13 (Del. Ch. May 5, 2010); *see also Oliveira v. Sugarman,* 152 A.3d 728, 747-79 (Md. 2017) (recognizing that, under Delaware law, a direct claim exists "when minority shareholders have suffered a substantial decrease in the value of their stock due to share dilution"). Thus, at least in the corporate context, the dual-nature rules of Delaware law cannot depend on reduced voting rights. What matters is whether the shareholder alleges a harm that does not depend on a harm to the corporation (even if there be such harm), such as one that does not affect all shareholders proportionally.

C. The Plaintiffs Have Direct Claims Against The Government Controller For The Harm It Inflicted On Them To Its Own Benefit As A "Single Shareholder."

Under these principles, and independent of the (correct) APA analysis explained above in § I, the Plaintiffs still have standing to bring their claims, which are direct. Plaintiffs have alleged their own claims, which are distinct from any claims the Companies or FHFA as a conservator would have. (Indeed, they are suing FHFA.) The Net Worth Sweep essentially created a new class of stock for Treasury, a shareholder—and one that, particularly in conjunction with another arm of the government (FHFA), dominated the Companies—that directly expropriated essentially all value from the other shareholders. It transferred the value of Plaintiffs' stock directly to Treasury and effectively removed them from the Companies' capital structures. This transfer harmed the Plaintiffs, just as if the Companies had canceled their stock, and it did so regardless of the Net Worth Sweep's effect on the corporation. That discrimination plainly gives rise to direct claims even under corporate law. (It also distinguishes all three of the government's examples in its parade of horribles. Gov't Br. 28.)

The government's obvious alternative to the Net Worth Sweep brings into sharp relief the discrimination here among the Companies' shareholders. As Plaintiffs' brief notes (at 28-29), Treasury could have exercised the common-stock warrants it had purchased in 2008 in the initial transaction, obtaining 80% of the common equity of the Companies for a nominal price. It still would have received great financial benefit (while continuing to receive its pre-existing dividends under its senior preferred stock), but without discrimination. The economic value of the Companies' profits would not all have gone to the government (so the other shareholders' economic value would not have fallen to zero), and if the Companies, able to retain profits, came to issue any ordinary dividends, those would have benefitted the junior preferred and non-government common stock holders as well. Not content with that, the government decided to take for itself all the value of the Companies, in effect leaving the non-governmental shareholders nothing—except a quintessentially direct harm and claim.

This case is very much like *Allegheny* and *Gatz*. Given that the claims in those cases were direct, they certainly are direct in the more extreme situation here. Just as the conduct of the controlling shareholders in *Allegheny* imposed distinct harms on the "minority common stockholders," 353 U.S. at 158, who could therefore maintain a direct action, so the Net Worth Sweep imposed direct harms on the Plaintiffs here. And just as the harm in *Gatz* was not confined to an "equal dilution of the economic value and voting power" of all shareholders, but minority "shareholders [were] harmed, uniquely and individually, to the same extent that the controlling shareholder [was] (correspondingly) benefited," 925 A.2d at 1278, so Plaintiffs here were harmed uniquely and individually to the same extent that Treasury benefitted.

And any question of voting power is irrelevant here. Given that the Companies were already in conservatorship, with FHFA and Treasury having complete control over them, effective voting power was already at zero. But, as explained above, that does not negate the discriminatory, direct harm to some shareholders from an over $100 billion transfer to a single, government shareholder.

Accordingly, while it is unnecessary to go beyond the governing statutory standing principles applicable to APA claims, the Plaintiffs' statutory claim is direct, and Plaintiffs also have standing when it is analyzed under corporate law.

CONCLUSION

As to Plaintiffs' statutory claim, the Court should affirm.

September 23, 2020

Respectfully submitted,

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APPENDIX OF *AMICI*

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.
Akanthos Opportunity Fund, L.P.
Appaloosa Investment Limited Partnership I
Palomino Master Ltd.
Azteca Partners LLC
Palomino Fund Ltd.
CSS, LLC
CRS Master Fund, L.P.
Cyrus Opportunities Master Fund II, Ltd.
Cyrus Select Opportunities Master Fund, Ltd.
Crescent 1, L.P.