

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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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

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

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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

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

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

v.

UNITED STATES  
*Defendant-Appellee.*

20-1936

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

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

v.

UNITED STATES,  
*Defendant-Appellee.*

20-1938

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

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

v.

UNITED STATES,  
*Defendant-Appellee.*

20-1954

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

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CSS, LLC,  
*Plaintiff-Appellant,*

v.

UNITED STATES,  
*Defendant-Appellant.*

20-1955

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

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ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES  
INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED,

*Plaintiffs-Appellants,*

v.

UNITED STATES,

*Defendant-Appellee.*

20-2020

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

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JOSEPH CACCIAPALLE,

*Plaintiff-Appellant,*

MELVIN BAREISS,

*Plaintiff*

v.

UNITED STATES,

Defendant- Appellee.

2020-2037

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

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**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*  
BRYNDON FISHER, BRUCE REID, AND ERICK SHIPMON  
IN SUPPORT OF NEITHER PARTY**

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FORM 9. Certificate of Interest

Form 9 (p. 1)  
July 2020

**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

**CERTIFICATE OF INTEREST**

<b>Case Number</b>	2020-1912, -1914 (and companion cases)
<b>Short Case Caption</b>	Fairholme Funds v. U.S.
<b>Filing Party/Entity</b>	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

## FORM 9. Certificate of Interest

Form 9 (p. 2)  
July 2020

<b>1. Represented Entities.</b> Fed. Cir. R. 47.4(a)(1).	<b>2. Real Party in Interest.</b> Fed. Cir. R. 47.4(a)(2).	<b>3. Parent Corporations and Stockholders.</b> 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.
<input type="checkbox"/> None/Not Applicable	<input type="checkbox"/> None/Not Applicable	<input checked="" type="checkbox"/> 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

FORM 9. Certificate of Interest

Form 9 (p. 3)  
July 2020

**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


## 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.)
- *Cacciapalle v. United States*,  
No. 20-2037 (Fed. Cir.)

Pursuant to Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29, Bryndon Fisher, Bruce Reid, and Erick Shipmon (“Derivative Plaintiffs”) respectfully move this Court for leave to file the attached *amici curiae* brief in support of neither party in the above-captioned cases. Plaintiffs-Appellants Fairholme Funds, Inc. et al., Owl Creek Asia I., LP et al., Arrowood Indemnity Co. et al., and Defendant-Cross-Appellant the United States consent to the filing of this *amicus* brief. Plaintiff-Appellant Joseph Cacciapalle takes no position on this motion and does not plan to file any opposition to it.

### **STATEMENT OF INTEREST**

As explained in their proposed *amicus* brief, Fisher and Reid are shareholders in Fannie Mae and Freddie Mac, and 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.



On June 22, 2020, *amici* petitioned this Court for permission to appeal the Court of Federal Claims’ certified interlocutory order denying the Government’s motion to dismiss based on the same facts as the above-titled cases (and to consolidate the appeal for briefing and oral argument in this Court). *Fisher et al. v. United States*, No. 20-138, ECF 2. The Government opposed the petition for permission to appeal but stated it had “no objection to their filing an amicus brief in *Fairholme* appeal and cross-appeal.” *Id.*, ECF 13 at 1. This Court denied the petitions “without prejudice to seeking leave to participate in *Fairholme Funds, Inc. v. United States*, Nos. 2020-1912, -1914, as *amici*.” *Id.*, ECF 19 at 2. Accordingly, Derivative Plaintiffs now seek leave to file this *amicus* brief.

### **REASONS TO GRANT THE MOTION FOR LEAVE**

*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. Some shareholders in these appeals, including *Fairholme*, only added derivative claims years later, after a series of decisions from other courts holding the harms Fannie Mae and Freddie Mac experienced from the Net Worth Sweep were derivative, not direct. They do not and cannot fully represent the interests of Derivative Plaintiffs.

These appeals are particularly important 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 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 directly confronts a critical 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.

The need for *amici* to be heard has become particularly acute with the filing of Private Shareholders' opening brief. 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 *Fairholme* 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.

## **CONCLUSION**

For these reasons, Derivative Plaintiffs' motion for leave to file the attached *amici curiae* brief should be granted.

Dated: October 30, 2020

/s/ Noah M. Schubert

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**CERTIFICATE OF COMPLIANCE**

This motion complies with Federal Rule of Appellate Procedure 27(d)(2)(a) because it contains 903 words. The motion was prepared using Microsoft Word 2013 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Noah M. Schubert