Nos. 2020-1912, 2020-1914, 2020-1934, 2020-1936, 2020-1938, 2020-1954, 2020-1955, 2020-2020, 2020-2037

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.

Appeal Nos. 2020-1912, 2020-1914, on appeal from the Court of Federal Claims in No. 1:13-cv-00465-MMS, Chief Judge Margaret M. Sweeney
[Additional captions on the inside cover and following pages]

CROSS-APPEAL AND RESPONSE BRIEF FOR UNITED STATES

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Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-1934, on appeal from the 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.

Appeal No. 2020-1936, on appeal from the Court of Federal Claims
in No. 1:18-cv-00529-MMS, Chief Judge Margaret M. Sweeney

AKANTHOS OPPORTUNITY FUND, L.P.,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-1938, on appeal from the 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.

Appeal No. 2020-1954, on appeal from the Court of Federal Claims in No. 1:18-cv-00370-MMS, Chief Judge Margaret M. Sweeney

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CSS, LLC,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-1955, on appeal from the Court of Federal Claims in No. 1:18-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.

Appeal No. 2020-2020, on appeal from the 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, on Behalf of Themselves and All Others Similarly Situated, BRYNDON FISHER, BRUCE REID, ERICK SHIPMON, AMERICAN EUROPEAN INSURANCE COMPANY, FRANCIS J. DENNIS,
Plaintiffs,

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-2037, on appeal from the Court of Federal Claims in No. 1:13-cv-00466-MMS, Chief Judge Margaret M. Sweeney

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STATEMENT OF RELATED CASES

The following are companion cases pending in this Court: *Fairholme Funds, Inc. v. United States*, Nos. 20-1912 & 20-1914; *Owl Creek Asia I, L.P. v. United States*, No. 20-1934; *Mason Capital L.P. v. United States*, No. 20-1936; *Akanthos Opportunity Fund L.P. v. United States*, No. 20-1938; *Appaloosa Investment Limited Partnership Inc. v. United States*, No. 20-1954; *CSS, LLC v. United States*, No. 20-1955; *Arrowood Indemnity Co. v. United States*, No. 20-2020; *Cacciapalle v. United States,* No. 20-2037; and *Washington Federal v. United States*, No. 20-2190.

The following are related cases pending in the Court of Federal Claims: *Fisher v. United States*, No. 13-608C, *petition to appeal denied*, No. 20-138 (Fed. Cir.); *Reid v. United States*, No. 14-152C, *petition to appeal denied*, No. 20-139 (Fed. Cir.); *Rafter v. United States*, No. 14-740C; *683 Capital Partners, LP v. United States*, No. 18-711C; *Patt v. United States*, No. 18-712C; *Wazee Street Opportunity Fund IV LP*, No. 18-1124C; *Highfields Capital I LP v. United States*, No. 18-1150C; *CRS Master Fund, L.P. v. United States*, No. 18-1155C; *Perry Capital LLC v. United States*, No. 18-1226C; *Quinn Opportunities Master LP v. United States*, No. 18-1240; *Angel v. United States*, No. 20-737.

The *Fairholme* action has previously been before the Court on the following occasions:

(1) *In re Sammons*, No. 17-102 (November 28, 2016) (per curiam order denying mandamus petition) (Post, C.J., Moore, Chen, JJ.) (unpublished)

(2) *In re United States*, Nos. 17-104 & 17-1122, 678 F. App'x 981 (January 30, 2017) (order granting in part mandamus petition) (Dyk, O'Malley, Wallach, JJ.)

(3) *Fairholme Funds, Inc. v. United States*, No. 17-1015, 681 F. App'x 945 (March 14, 2017) (per curiam opinion affirming denial of motion to intervene) (Lourie, O'Malley, Taranto, JJ.)

(4) *Fairholme Funds, Inc. v. United States*, Nos. 20-121 & 20-122, 810 F. App'x 907 (June 18, 2020) (order granting petitions for permission to appeal interlocutory order) (O'Malley, Wallach, Stoll, JJ.)

On December 9, 2020, the United States Supreme Court heard oral argument in two consolidated cases, *Collins v. Mnuchin*, Nos. 19-422 & 19-563, that likely will directly affect this Court's decision in the pending appeals.

STATEMENT OF JURISDICTION

Plaintiffs in all cases invoked the Court of Federal Claims' jurisdiction under 28 U.S.C. § 1491(a)(1). The government disagrees with plaintiffs' contention that the Court of Federal Claims had jurisdiction under 28 U.S.C. § 1491(a)(1) over these cases.

The Court of Federal Claims entered an order dismissing the complaint in part in the *Fairholme* case on December 6, 2019. The court certified that order for interlocutory appeal on March 9, 2020, under 28 U.S.C. § 1292(d)(2). On June 18, 2020, this Court granted the parties' cross-petitions for permission for an interlocutory appeal.

The Court of Federal Claims entered orders dismissing the complaints in the *Owl Creek*, *Arrowood*, and *Cacciapalle* cases on June 8, 2020, May 15, 2020, and June 26, 2020, respectively. Plaintiffs in those case filed timely notices of appeal. This Court has jurisdiction over those appeals under 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

Congress enacted the Housing and Economic Recovery Act of 2008 (HERA) to rescue the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the enterprises), which stood on the brink of collapse. The legislation created the Federal Housing Finance Agency (FHFA) and authorized it to act as conservator or receiver for the enterprises. Congress also authorized the Treasury Department to invest in the enterprises to

provide the extraordinary infusion of taxpayer funds that would be necessary to ensure their viability. Upon its appointment as conservator, FHFA, acting on behalf of the enterprises, immediately entered into a stock purchase agreement with the Treasury Department, under which Treasury made billions of dollars in emergency capital available to the enterprises and received preferred, non-voting shares of their stock. Fannie Mae and Freddie Mac agreed to pay Treasury a quarterly dividend in the amount of 10% of the total amount of funds drawn from Treasury. The enterprises were frequently unable to pay these dividends, however, without drawing on Treasury's capital commitment.

In 2012, FHFA as conservator and Treasury adopted the Third Amendment to the stock purchase agreement, which replaced the fixed 10% dividend with a formula by which the enterprises would pay Treasury an amount equal to their quarterly net worth (above an agreed upon capital buffer), however much or little that might be.

Plaintiffs in these several lawsuits are present or former shareholders in the enterprises. They challenge the Third Amendment as a taking or an illegal exaction, a breach of contract, and a breach of fiduciary duty. Plaintiffs assert their claims as direct claims on their own behalf and as derivative claims on behalf of the enterprises. The Court of Federal Claims recognized that plaintiffs' claims turned on the actions of FHFA as conservator and thus could proceed only if FHFA retained its governmental identity when acting as conservator. The court concluded that it did so, stating that a conservator, unlike a receiver, does not step into the shoes of the failing

private financial institution. The court held that plaintiffs' claims were derivative, regardless of how they were pled, and dismissed the direct claims accordingly. Regarding plaintiffs' derivative claims, the court recognized that HERA had transferred to the conservator all "rights, titles, powers, and privileges" of the enterprises and their shareholders with respect to the enterprises, 12 U.S.C. § 4617(b)(2)(A)(i), including the shareholders' right to bring derivative claims. It held, however, that it was necessary to permit plaintiffs to bring a derivative suit because of a purported conflict of interest arising out of the fact that the conservator could not be expected to bring suit against itself.

The questions presented by the appeals and cross-appeals are:

1. Whether the Court of Federal Claims lacked jurisdiction over plaintiffs' claims because FHFA, when acting as conservator, is not the United States.

2. Whether the Court of Federal Claims lacked jurisdiction over most of plaintiffs' claims because those claims are derivative, however pled, and are thus barred by HERA's provision transferring shareholder rights to FHFA during a conservatorship.

3. Whether plaintiffs' breach-of-contract, breach-of-fiduciary-duty, and related claims are barred for additional reasons set out by the Court of Federal Claims.

4. Whether the Court of Federal Claims correctly held that plaintiffs who did not own shares in the enterprises at the time of the Third Amendment could not pursue a takings claim.

STATEMENT OF THE CASE

I. Factual Background

A. Fannie Mae and Freddie Mac

Congress created Fannie Mae and Freddie Mac to, among other things, provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. *See* 12 U.S.C. § 1716(4). The enterprises finance these purchases by borrowing money in the credit markets and by packaging many of the loans they buy into mortgage-backed securities, which they sell to investors. Appx2.

Although the enterprises are private, publicly traded companies, they have long benefited from the perception that the federal government would honor their obligations should they experience financial difficulties. *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 215 (D.D.C. 2014). This perception has allowed the enterprises to obtain credit, purchase mortgages, and make guarantees at lower prices than would otherwise be possible. *Id.*

B. The 2008 Housing Crisis and HERA

With the 2008 collapse of the housing market, the enterprises experienced overwhelming losses due to risky mortgage purchases and a dramatic increase in default rates on residential mortgages. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599 (D.C. Cir. 2017); *see also DeKalb County v. FHFA*, 741 F.3d 795, 798 (7th Cir. 2013) (From 1995 through the early 2000s, the enterprises "bought risky mortgages and got

caught up in the housing bubble; and when the bubble burst found [themselves] owning an immense inventory of defaulted and overvalued subprime mortgages.").

The enterprises lost more in 2008 ($108 billion) than they had earned in the preceding 37 years combined ($95 billion). Office of Inspector General (OIG), FHFA, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 5 (Mar. 20, 2013).[1] As a result, the enterprises faced capital shortfalls. *Perry Capital*, 864 F.3d at 599; *see also* OIG, FHFA, *White Paper: FHFA–OIG's Current Assessment of FHFA's Conservatorships of Fannie Mae and Freddie Mac* 11 (Mar. 28, 2012) (*OIG Report*).[2] Private investors were unwilling to provide the enterprises with the capital they needed to weather their losses and avoid receivership and liquidation. *Perry Capital*, 864 F.3d at 601. At the time, the enterprises owned or guaranteed over $5 trillion of residential mortgage assets, representing nearly half of the United States mortgage market. *Id.* at 599. Their failure would have had catastrophic effects on the national housing market and economy.

In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654. *See* Appx2. The legislation created FHFA as an independent agency to supervise and regulate the enterprises and granted FHFA the authority to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a). FHFA's authority to appoint itself conservator or receiver

[1] https://www.fhfaoig.gov/Content/Files/WPR-2013-002_2.pdf
[2] https://www.fhfaoig.gov/Content/Files/WPR-2012-001.pdf

is generally discretionary, *id.* § 4617(a)(2), but it must place the enterprises into receivership if it determines that the enterprises' assets have been worth less than their obligations for 60 calendar days, *id.* § 4617(a)(4). The statute provides that the enterprises may sue "for an order requiring [FHFA] to remove itself as conservator or receiver" but only if they challenge the appointment "within 30 days of such appointment." *Id.* § 4617(a)(5)(A).

HERA provides that FHFA, as conservator or receiver, "immediately succeed[s] to—(i) all rights, titles, powers, and privileges of the [enterprises] and of any stockholder, officer, or director of such [enterprises] with respect to the [enterprises.]" 12 U.S.C. § 4617(b)(2)(A)(i). The legislation authorizes FHFA, as conservator, to "take such action as may be—(i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]." *Id.* § 4617(b)(2)(D). HERA also permits FHFA as conservator to take actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the enterprises. *Id.* § 4617(a)(2). HERA further states that FHFA, when acting as conservator, may exercise its statutory authority in a manner "which the Agency determines is in the best interests of the regulated entity or the Agency." *Id.* § 4617(b)(2)(J)(ii). Finally, HERA contains an anti-injunction provision, which provides that "[e]xcept as provided in this section or at the request of the Director, no

court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." *Id.* § 4617(f).

Recognizing that an enormous commitment of taxpayer funds could be required to save the enterprises, Congress also amended the enterprises' statutory charters to authorize Treasury (1) to "purchase any obligations and other securities issued by" the enterprises upon "Treasury's specific determination that the terms of the purchase would 'protect the taxpayer,'" *Perry Capital*, 864 F.3d at 600, and (2) to "exercise any rights received in connection with such purchases." 12 U.S.C. §§ 1455(*l*)(1)(A), (2)(A), 1719(g)(1)(A), (B). Treasury's authority to purchase securities issued by the enterprises expired on December 31, 2009; its authority to exercise any rights received in connection with past purchases has no expiration date. *Id.* §§ 1455(*l*)(4), 1719(g)(4). Congress's authorization "made it possible for Treasury to buy large amounts of Fannie and Freddie stock, and thereby infuse them with massive amounts of capital to ensure their continued liquidity and stability." *Perry Capital*, 864 F.3d at 600.

C. Conservatorship and the Preferred Stock Purchase Agreements

1. FHFA placed the enterprises in conservatorship on September 6, 2008. Appx4. One day later, Treasury purchased senior preferred stock in each entity. *Id.*

Under the Preferred Stock Purchase Agreements (purchase agreements),[3] Treasury committed to provide up to $100 billion in taxpayer funds to each enterprise to maintain their solvency by ensuring that their assets were at least equal to their liabilities. Appx4-5. In other words, Treasury provided each enterprise with a $100 billion capital commitment, which the enterprises could draw on any time their liabilities exceeded their assets at the end of the quarter. The commitment thus ensured that the enterprises would remain solvent and not subject to mandatory receivership (at least until their losses exceeded $100 billion per enterprise).

In exchange for this massive and essential support, and to ensure that the terms of the purchase "protect the taxpayer," 12 U.S.C. §§ 1455(*l*), 1719(g), the purchase agreements provided that Treasury would receive various forms of compensation, including preferred stock with an initial liquidation preference of $1 billion that would increase dollar-for-dollar when an enterprise drew on Treasury's funding commitment, quarterly dividends equal to 10% of Treasury's liquidation preference, warrants to purchase common stock, and periodic commitment fees. Appx5.[4]

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[3] The purchase agreements, the amendments to those agreements, and Treasury' preferred stock certificates are available at https://www.fhfa.gov/Conservatorship/Pages/Senior-Preferred-Stock-Purchase-Agreements.aspx. For the Court's convenience, the government has filed a supplemental appendix containing the Treasury/Fannie Mae purchase agreement, Treasury's Fannie Mae stock certificate, and the Third Amendment.

[4] "A liquidation preference is a priority right to receive distributions from the [enterprises'] assets in the event they are dissolved." *Perry Capital*, 70 F. Supp. 3d at 216 n.6.

As the enterprises' financial losses continued to mount, Treasury's initial funding commitment of $100 billion per enterprise proved inadequate. In May 2009, the conservator and Treasury amended the purchase agreements for the first time to double Treasury's funding commitment to $200 billion for each enterprise. Appx5.

In December 2009, in the face of ongoing losses, the conservator and Treasury agreed to a second amendment that eliminated the specific dollar cap on Treasury's funding commitment, allowing the enterprises to draw unlimited amounts from Treasury to cure net-worth deficits until the end of 2012. Appx5. At the end of 2012, however, Treasury's funding commitment would become fixed. *See OIG Report* at 6 n.6.

2. As of June 30, 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment, making Treasury's liquidation preference $189.5 billion, including the initial $1 billion-per-enterprise senior liquidation preference. Under the terms of the original purchase agreements, the enterprises' dividend obligations to Treasury were thus nearly $19 billion per year. *Perry Capital*, 864 F.3d at 602.

Between 2009 and 2011, the enterprises routinely failed to earn sufficient income to pay the quarterly dividend owed to Treasury. *Perry Capital*, 864 F.3d at 598, 601. The enterprises thus drew on Treasury's funding commitment to pay those dividends. *Id.* at 598. Through the first quarter of 2012, the enterprises had drawn $26 billion just to pay the dividends they owed Treasury. *Perry Capital*, 70 F. Supp. 3d

at 217-18. Those draws increased Treasury's liquidation preference, thus increasing the amount of dividends the enterprises owed Treasury. As their SEC filings reflect, the enterprises anticipated that they would not be able to pay their 10% dividends to Treasury without drawing on Treasury's funding commitment in the future. *See* Fannie Mae, 2012 Q2 Quarterly Report (Fannie Mae 10-Q) (Aug. 8, 2012) at 12;[5] Freddie Mac, 2012 Q2 Quarterly Report (Freddie Mac 10-Q) (Aug. 7, 2012) at 10;[6] *Perry Capital*, 864 F.3d at 601. Indeed, the $11.7 billion Fannie Mae owed annually was more than it had made in any year of its existence. *See* Fannie Mae 10-Q at 4. The $7.2 billion that Freddie Mac owed annually was more than it had made in all but one year of its existence. Freddie Mac 10-Q at 8.

D. The Third Amendment

By June 2012, Treasury had committed $444.5 billion to support the enterprises. As noted, the enterprises had, at that point, drawn $187.5 billion from that commitment. Under the Second Amendment to the purchase agreements, each draw increased Treasury's commitment on a dollar-for-dollar basis; thus, a draw did not reduce the size of the remaining commitment. But that state of affairs would cease at the end of 2012. At that point, the commitment would become fixed, and any future draws would reduce the size of the remaining commitment. To protect the

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[5] Available at https://www.fanniemae.com/media/26546/display.

[6] Available at http://www.freddiemac.com/investors/financials/sec-filings.html.

remaining commitment, Treasury and FHFA determined it was necessary to end the cycle of the enterprises paying dividends by drawing on Treasury's commitment.

In August 2012, Treasury and FHFA agreed to modify the purchase agreements a third time. This "Third Amendment" ended the draws-to-pay-dividends cycle by replacing the previous fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth for the quarter exceeds a capital buffer. Appx6; *see also* Appx15 (noting that the Third Amendment "eliminated the risk of the Enterprises consuming all of their financial lifeline (Treasury's funding commitment) through cash-dividend payments or entering a cycle of an ever-increasing liquidation preference"). Accordingly, if an enterprise has a negative net worth for a particular quarter, it pays no dividend and thus need not draw upon Treasury's funding commitment to satisfy its dividend obligations. Treasury also agreed to suspend the periodic commitment fee it was owed under the original purchase agreements going forward. *Id.*

By exchanging a fixed dividend for a variable one, Treasury accepted greater risk. In a given quarter it might receive greater dividends than under the 10% formula. But it might also receive dividends that would be less than it would have received under the 10% formula. Indeed, Treasury received less in dividends in 2015 ($15.8 billion) and in 2016 ($14.6 billion) than it would have under the original 10%

fixed dividend ($18.9 billion). FHFA, *Table 2: Dividends on Enterprise Draws from Treasury*;[7] *Perry Capital*, 864 F.3d at 602.

In 2013 and 2014, however, the variable dividend was greater because the enterprises' net worth increased, due partly to a rebound in housing prices and, more importantly, to non-recurring events, including the enterprises' one-time recognition of deferred tax assets. OIG, FHFA, *The Continued Profitability of Fannie Mae and Freddie Mac Is Not Assured* 7-8 (Mar. 18, 2015).[8]

E. January 14, 2021 Amendment

The Third Amendment was modified by letter agreements in 2017 and 2019.[9] Those agreements increased the capital buffer that the enterprises were permitted to retain before paying Treasury dividends. On January 14, 2021, Treasury and FHFA agreed to a further amendment of the purchase agreements. *See* U.S. Dep't of Treasury, *Treasury Department and FHFA Amend Terms of Preferred Stock Purchase Agreements for Fannie Mae and Freddie Mac* (Jan. 14, 2021).[10] Under the amendment, Treasury has agreed to forgo further cash dividends until the enterprises build sufficient capital to meet regulatory requirements, a build-up that is expected to take

[7] https://www.fhfa.gov/DataTools/Downloads/Documents/HPI/Market-Data/Table_2.pdf

[8] http://www.fhfaoig.gov/Content/Files/WPR-2015-001.pdf

[9] https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-from-FHFA-Director-Melvin-L-Watt-on-Capital-Reserve-for-Fannie-Mae-and-Freddie-Mac.aspx; https://home.treasury.gov/news/press-releases/sm786.

[10] https://home.treasury.gov/news/press-releases/sm1236

several years. *Id.* Once the enterprises begin paying dividends to Treasury again, moreover, they will not be required to pay Treasury funds from the capital that they have amassed. The agreement also sets forth the conditions under which Treasury will agree that the enterprises may exit conservatorship and allows the enterprises to raise capital through the issuance of common stock when certain conditions are met. *Id.*

II. Prior Proceedings

Fannie Mae and Freddie Mac shareholders have brought numerous suits challenging the Third Amendment, in both the Court of Federal Claims and in district courts around the country. Plaintiffs in these ten consolidated appeals brought suit in the Court of Federal Claims beginning in 2013. Other shareholder suits remain pending in the Court of Federal Claims.

Collectively, shareholders in these appeals assert claims both directly on their own behalf and derivatively on behalf of the enterprises. *See, e.g.*, Appx10-11. Plaintiffs allege direct claims for an unconstitutional taking of their property without just compensation or, in the alternative, an illegal exaction. They also assert direct breach-of-fiduciary-duty claims alleging that the Third Amendment constituted a breach of fiduciary duties that FHFA and/or Treasury owed to the enterprises' shareholders. They further assert that, in entering the Third Amendment, FHFA breached an implied-in-fact contract between the enterprises and FHFA, under which FHFA purportedly agreed to operate the enterprises for the benefit of shareholders.

Another set of plaintiffs alleges that the Third Amendment breached their contractual rights under their stock certificates and that, in transferring shareholder rights to FHFA during conservatorship, HERA's Succession Clause itself authorized an unconstitutional taking. Several of the shareholders also asserted many of the same claims derivatively on behalf of the enterprises—*e.g.*, they assert that the Third Amendment constituted a taking of the enterprises' property without compensation, in violation of the Fifth Amendment.

After plaintiffs filed their complaints, the Court of Federal Claims permitted extensive discovery conducted over several years on a number of threshold issues, including whether FHFA was acting at Treasury's direction when it entered into the Third Amendment. Following that discovery, the government filed an omnibus motion to dismiss the operative complaints in these consolidated appeals. The Court of Federal Claims addressed that motion by first considering whether to dismiss the complaint in one of the cases, *Fairholme Funds, Inc. v. United States*, No. 13-465C, which the court treated as a test case.

A. Court of Federal Claims Dismisses *Fairholme* Complaint In Part

On December 13, 2019, the court granted in part and denied in part the government's motion to dismiss the *Fairholme* Complaint. Appx1-50.

1. Threshold Issues

a. The Conservator's Governmental Status

The Court of Federal Claims first considered whether the *Fairholme* plaintiffs had asserted claims against the United States, as the Tucker Act requires. Appx14; *see also* Appx12 (citing 28 U.S.C. § 1491(a)(1)). The court concluded that Treasury's mere involvement as a counterparty to the Third Amendment was insufficient to establish that plaintiffs had asserted claims against the United States. Appx14. Because FHFA as conservator of the enterprises agreed to the Third Amendment on the enterprises' behalf and because the *Fairholme* plaintiffs' claims were directed at FHFA's actions as conservator, the court concluded that plaintiffs' claims could proceed under the Tucker Act only if FHFA's actions as conservator were attributable to the United States. Appx14.

The court rejected a number of the *Fairholme* plaintiffs' theories as to why FHFA as conservator is the United States. The court first held that FHFA did not exceed its statutory conservatorship authority when it entered into the Third Amendment and thus was not acting in a regulatory or other non-conservator governmental capacity when it agreed to the amendment. Appx15.

The court then rejected plaintiffs' claim that Treasury or FHFA as regulator coerced FHFA as conservator into agreeing to the Third Amendment. Appx18-19. Despite lengthy discovery, the sole evidence of purported coercion cited by plaintiffs was the allegation that Treasury had proposed the Third Amendment. Appx18. Like

other courts to consider the question, the court found that that allegation "did not come close to a reasonable inference" that FHFA "considered itself bound to do whatever Treasury ordered." Appx18. As the court explained, the "Amendments were executed by sophisticated parties, and many agreements arise from a party's proposal being accepted by the other party." Appx18.

For similar reasons, the court rejected the *Fairholme* plaintiffs' claim that FHFA was Treasury's agent. Appx19-20. The court emphasized that plaintiffs had not "alleged facts establishing that Treasury exercised the control over FHFA [as conservator] that is necessary for an agency relationship." Appx19. That conclusion, moreover, was consistent with HERA, which mandates that FHFA as conservator "shall not be subject to the direction or supervision of any other agency of the United States," 12 U.S.C. § 4617(a)(7). Appx19.

The court nevertheless held that FHFA is the United States for present purposes. Appx24. The court recognized that under established law FHFA steps into the shoes of the enterprises and sheds its government character when it acts as receiver. Appx21-24. The Court of Federal Claims relied, however, on the district court decision in *Sisti v. FHFA*, 324 F. Supp. 3d 273, 282-83 (D.R.I. 2018), to conclude that FHFA does not step into the enterprises' shoes when it acts as conservator, reasoning that, in such circumstances, FHFA owes a "fiduciary duty running to the corporation itself." Appx24 (*quoting Sisti,* 324 F. Supp. 3d at 282-83). Because FHFA as conservator owed a duty to the enterprises, the court stated, it

could not have stepped into the enterprises' shoes. On this basis, the court concluded that plaintiffs had stated claims against the United States within its Tucker Act jurisdiction.

b. Whether HERA's Succession Clause Barred Derivative Claims

The Court of Federal Claims recognized that it was necessary to determine whether the *Fairholme* plaintiffs' claims were derivative claims brought on behalf of the enterprises or direct claims brought on plaintiffs' own behalf. Appx38-41. The court also recognized that the substance of the claims—and not plaintiffs' characterizations—would be determinative.

The court concluded that the *Fairholme* plaintiffs' allegedly "direct" claims, including that the Third Amendment amounted to an uncompensated taking of their personal property or an illegal exaction, were "actually derivative in nature." Appx38-41. The court recognized that the "gravamen of each [of plaintiffs'] claim[s] is the same: The government, via the [Third] Amendment, compelled the Enterprises to overpay Treasury." Appx40. In other words, plaintiffs' claims were rooted in the alleged "expropriation of the *Enterprises*' assets via compulsory payments of all [of the *Enterprises'*] profits" to Treasury. Appx40. The enterprises thus experienced the harm and would recover any remedy. Appx40. The court further explained that plaintiffs could not "transform their substantively derivative claims into direct claims by merely alleging that, as a result of [the Third Amendment], they were deprived of their

stockholder rights to receive dividends or liquidation payments." Appx40. Such harms were merely the "unavoidable" and derivative result of the "reduction in value of the entire corporate entity." Appx40.

The court was then required to determine whether plaintiffs could assert derivative claims notwithstanding HERA's Succession Clause, which transfers all shareholder "rights, titles, powers and privileges" to FHFA during a conservatorship, 12 U.S.C. § 4617(b)(2)(A). Appx43-45. Consistent with the view of every other court to consider the question, the court recognized that the Succession Clause transferred to FHFA the shareholders' right to bring derivative suits during a conservatorship. Appx43-44. The court further stated that, if it were "writing on a blank slate," Appx44, that would end the matter.

The court stated, however, that this Court's decision in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1282 (Fed. Cir. 1999), dictated a different conclusion. The court believed that the reasoning of *First Hartford* required it to imply an exception to the Succession Clause that would disregard the transfer of shareholder rights and permit shareholders to bring derivative suits when FHFA as conservator faces a conflict of interest in evaluating whether to bring suit. Appx44-45. The court declared that such a conflict existed here because, in the court's view, FHFA as conservator could challenge the Third Amendment only by bringing suit against itself. Appx45.

c. Additional Reasons for Dismissing Plaintiffs' Claims

The Court of Federal Claims noted additional reasons for dismissing some of the *Fairholme* plaintiffs' direct claims. The court determined that it lacked jurisdiction over plaintiffs' direct breach-of-fiduciary-duty claims because, to the extent such duties existed, they arose out of tort law and not out of a contract or money-mandating statute. Appx30-33. The court also concluded it lacked jurisdiction over plaintiffs' direct breach-of-implied-contract claims, which alleged that FHFA breached an implied-in-fact contract between FHFA and the enterprises when it agreed to the Third Amendment. Appx34. The court reasoned that, even if such a contract existed, plaintiffs were not third-party beneficiaries of that contract, and thus lacked any right to bring suit directly to enforce it. Appx34. The court also held that it lacked jurisdiction to consider direct takings claims brought by shareholders who purchased their stock after the Third Amendment. Appx36-37. The court reasoned that shareholders who did not own stock on the date of the purported taking (*i.e,* on the date the Third Amendment took effect) lacked standing to challenge that alleged taking. Appx37-38.

2. Merits

Having concluded that the *Fairholme* plaintiffs' derivative (but not direct) claims could proceed, the court next considered whether plaintiffs' allegations with respect to those derivative claims were sufficient to survive a motion to dismiss. Appx45-46. The court concluded that plaintiffs had sufficiently alleged a derivative illegal exaction

claim (based on FHFA's purportedly unconstitutional structure and its alleged violation of certain regulations). Appx46-47. The court did not address the validity of plaintiffs' derivative takings claim except to state that it could proceed in tandem with the illegal exaction claim. The court also held that plaintiffs plausibly alleged a derivative breach-of-contract claim based on an implied contract that allegedly arose at the outset of the conservatorships under which FHFA agreed to preserve and conserve the enterprises' assets in exchange for the enterprises' boards consenting to the conservatorships. Appx47. The court further concluded that plaintiffs' derivative breach-of-fiduciary duty claims could proceed based on its belief that the government did not challenge those claims on the merits. Appx29 n.22.

In sum, the court dismissed all of the *Fairholme* plaintiffs' direct claims, but permitted the derivative takings claims, illegal exaction claims, fiduciary duty claims, and implied-in-fact contract claims to go forward.

B. Interlocutory Appeal of *Fairholme Funds*

The *Fairholme* plaintiffs and the government both moved to certify the *Fairholme* decision for interlocutory appeal. The Court of Federal Claims granted the motions, and this Court granted both parties' petitions for permission to appeal, *see* Order, Nos. 20-121, 20-122 (June 18, 2020). The certified questions raised by the *Fairholme* plaintiffs are:

> (1) Whether the court lacks subject-matter jurisdiction over plaintiffs' direct claims for breach of fiduciary duty and breach of implied-in-fact contracts.

> (2) Whether plaintiffs who purchased stock in Fannie and Freddie after the PSPA Amendments lack standing to pursue their direct takings claim.
>
> (3) Whether plaintiffs lack standing to pursue their self-styled direct claims because those claims are substantively derivative in nature.

Appx49. The certified questions raised by the government are:

> (1) Whether plaintiffs have standing to assert derivative claims notwithstanding HERA's succession clause.
>
> (2) Whether the FHFA's actions as conservator are attributable to the United States such that the court possesses subject-matter jurisdiction to entertain plaintiffs' derivative takings and illegal exaction claims.
>
> (3) Whether plaintiffs' allegations that the FHFA entered into an implied-in-fact contract with the Enterprises to operate the conservatorships for shareholder benefit fail as a matter of law.

Appx49-50.

C. Dismissal of Related Cases

1. In the interim, the Court of Federal Claims ordered supplemental briefing in the pending related cases as to the applicability of its holdings in *Fairholme*. As relevant here, the court granted the government's motion to dismiss the related cases that raised only direct claims on behalf of shareholders. *See* Appx51 (*Owl Creek*), Appx83 (*Mason*), Appx114 (*Akanthos*), Appx146 (*Appaloosa*), Appx178 (*CSS*), Appx209 (*Arrowood*), Appx243 (*Cacciapalle*). The court based most of those dismissals on its conclusion in *Fairholme* that it lacked jurisdiction over purportedly direct

shareholder claims, either because those claims sounded in tort or because they were substantively derivative. *See, e.g.*, Appx69-78; Appx232-241.

In one case, *Cacciapalle v. United States*, No. 13-466C (Fed. Cl.), plaintiffs raised two unique direct claims that the court rejected for reasons independent of its *Fairholme* decision. Appx266-267. First, the *Cacciapalle* plaintiffs argued that the lack of a conflict-of-interest exception in the Succession Clause meant the transfer of their right to bring derivative claims to FHFA during a conservatorship was a taking of their property, in violation of the Fifth Amendment. Appx266-267. The court dismissed that claim on the ground that plaintiffs were attempting to make an impermissible collateral attack on the D.C. Circuit's decision in *Perry Capital v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017). Appx266-267.

Second, the *Cacciapalle* plaintiffs brought breach-of-contract claims based on the alleged breach of the shareholder contracts between themselves and the enterprises. Appx275-277. The Court of Federal Claims concluded that the United States was not a party to those contracts and thus the court lacked jurisdiction under the Tucker Act to entertain claims that those contracts were breached. Appx277-278.

2. Plaintiffs in these cases appealed as of right from the Court of Federal Claims' judgments dismissing their complaints. This Court consolidated the *Owl Creek* (No. 20-1934), *Mason* (No. 20-1936), *Akanthos* (No. 20-1938), *Appaloosa* (No. 20-1954), and *CSS* appeals (No. 20-1955) (the *Owl Creek* cases). And the Court designated the *Fairholme* cases, *Owl Creek* cases, *Arrowood* case (No. 20-2020), and

Cacciapalle case (No. 20-2037) as companion cases. Plaintiffs in these consolidated and companion cases filed a joint opening brief, and the *Fairholme*, *Arrowood*, and *Cacciapalle* plaintiffs filed supplemental briefs.

This Court also designated *Washington Federal v. United States,* No. 20-2190, another shareholder suit, as a companion case. The *Washington Federal* plaintiffs, however, filed a separate opening brief, and the government will file a separate response.

SUMMARY OF ARGUMENT

During the 2008 economic crisis, Fannie Mae and Freddie Mac experienced unprecedented financial losses and capital shortfalls. Their collapse would have had intolerable consequences for the housing market and the economy generally. Against that backdrop, Congress enacted HERA, which created the Federal Housing Finance Agency, and authorized it to act as conservator for the enterprises or, if necessary, as receiver. To provide the enormous sums necessary to ensure the enterprises' viability, Congress empowered Treasury to purchase stock in the enterprises to infuse capital. To protect the taxpayer funds thus put at risk, and to maximize the likelihood of the enterprises' recovery, Congress sought to minimize challenges to the conservator's operations of the enterprises, including a bar on any suit "to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." 12 U.S.C. § 4617(f). It also precluded the possibility of derivative suits by shareholders in the statute's "Succession Clause," which provides that FHFA "shall, as conservator or

receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the [enterprises], and of any stockholder, officer, or director of [the enterprises]." *Id.* § 4617(b)(2)(A)(i).

When Treasury's original commitment of capital proved inadequate, FHFA as conservator and Treasury executed two amendments that more than doubled Treasury's commitment. The Third Amendment, which gave rise to these lawsuits, was executed in 2012 to alter the formula for paying the dividends the enterprise owed to Treasury under the purchase agreements. Prior to the Third Amendment, Treasury received dividends based on 10% of the total amount drawn on its commitment. The enterprises were repeatedly unable to pay these dividends without further drawing on Treasury's commitment, which increased the amount of the next quarterly dividend. The Third Amendment substituted a formula under which the dividends owed to Treasury would equal the enterprises' net worth in a particular quarter (less a capital buffer). The impact of the new formula on dividends has varied over time. In some quarters, dividends have been less than would have been the case under the Second Amendment, in others they have been greater. As relevant to the genesis of these suits, however, in some of the first quarters following execution of the amendment, the dividends to Treasury rose sharply, in large part due to non-recurring events, including the enterprises' one-time recognition of deferred tax assets.

Plaintiffs in these suits assert various claims, but all seek damages on the basis of the Third Amendment and its change to the dividend formula. The Court of

Federal Claims lacked jurisdiction over these claims for two threshold reasons that require dismissal of virtually all the claims at issue in plaintiffs' appeals, as well as dismissal of the claims that are the subject of the government's cross-appeal.

I. First, with the exception of two minor claims dismissed on other grounds, all plaintiffs' claims target FHFA's decision as conservator to enter into the Third Amendment. Thus, unless FHFA's actions as conservator can be attributed to the government, these are not claims "against the United States," 28 U.S.C. § 1491(a)(1), over which the court could exercise jurisdiction.

As conservator or receiver, FHFA "steps into [the private enterprises'] shoes, shedding its government character and becoming a private party." *Meridian Invs. Inc. v. Freddie Mac*, 855 F.3d 573, 579 (4th Cir. 2017). As conservator, FHFA succeeds to the powers of the enterprises' officers and directors and uses these nongovernmental powers to manage the business affairs of the enterprises in place of those officers and directors. In this capacity, FHFA acting as conservator is no more the United States than the FDIC is when it acts as receiver or than would be the case if FHFA were itself required to act as receiver.

The Court of Federal Claims rejected all but one of plaintiffs' grounds for attributing the conservator's actions to the United States. The court correctly rejected the contention that FHFA exceeded its statutory authority when it entered into the Third Amendment. It also rightly found no merit in plaintiffs' argument that Treasury coerced FHFA into entering the Third Amendment or that FHFA was

acting as Treasury's agent. Plaintiffs offered no evidence of coercion, and HERA itself expressly bars federal agencies form "direct[ing] or supervis[ing]" FHFA's actions as conservator. 12 U.S.C. § 4617(a)(7).

The court also recognized that FHFA would not retain its governmental character if it assumed the role of receiver of the enterprises. It concluded, however, that the same principles do not apply when FHFA acts as conservator, on the ground that a conservator owes fiduciary duties to the corporation. The court did not explain why the existence of fiduciary duties would indicate that a conservator does not step into the shoes of the corporation. Indeed, insofar as FHFA as conservator has fiduciary duties to the enterprises, such duties would not differentiate it from the enterprises' private officers and directors, who themselves owe fiduciary duties to the enterprises when acting on their behalf. The court's distinction is also irreconcilable with HERA itself, which does not distinguish between conservators and receivers; the Succession Clause quoted above transfers the same private powers and authorities to FHFA whether FHFA acts as "conservator *or* receiver." 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added).

II. Plaintiffs' claims fail at the threshold for a second, independent reason. As the Court of Federal Claims recognized, plaintiffs' claims are substantively derivative in nature whether they are characterized as such or styled as direct claims. Virtually all of plaintiffs' takings and illegal exaction claims and their breach-of-contract and fiduciary-duty claims challenge the Third Amendment and assert that the Third

Amendment deprived the enterprises' of their net worth and their ability to accumulate capital. That is an asserted injury to the corporation, the remedy for which would require the return of funds to the enterprises—a classic derivative claim. That some plaintiffs assertedly experienced injury to the value of their stock does not alter the nature of their claims.

The court correctly held that plaintiffs lack standing to assert derivative claims belonging to the corporation on their own behalf. It also recognized that a straightforward reading of HERA's Succession Clause would preclude plaintiffs from bringing a derivative suit on the enterprises' behalf. Indeed, the Succession Clause "plainly transfers [to FHFA the] shareholders' ability to bring derivative suits on behalf of the Companies." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 623 (D.C. Cir. 2017). Accordingly, the Court of Federal Claims stated that if it were "writing on a blank slate," Appx44, it would conclude that plaintiffs' derivative claims were barred.

The court erred in concluding that a different result was compelled by this Court's decision in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1282 (Fed. Cir. 1999), which recognized a "very narrow" conflict-of-interest exception in a case involving FDIC acting as receiver. Recognizing the prospect that FHFA and Treasury would enter agreements involving billions of dollars of taxpayer money, Congress enacted the Succession Clause—which admits of no exceptions—to protect the taxpayers' interest and the prospects for ensuring the enterprises' viability.

Permitting shareholders to challenge those agreements would defeat both the plain terms and the clear purpose of the statute.

The rationale for the conflict-of-interest exception that this Court adopted in *First Hartford* would, in any event, be inapplicable here. The Court in that case found a conflict of interest on the ground that the receiver could not be expected to sue itself. FHFA, like any other conservator or receiver, could bring suit against the United States or Treasury to challenge the Third Amendment or decline to honor the enterprises' obligations under the amendment, forcing Treasury to sue the enterprises. It would not be required to sue itself.

III. These threshold grounds require dismissal of virtually all of plaintiffs' claims. Several of plaintiffs' claims, including claims raised in both their appeal and in the government's cross-appeal, should be dismissed for additional reasons.

A. Plaintiffs assert both direct and derivative claims based on FHFA's alleged breach of a purported implied-in-fact contract between FHFA and the enterprises. The Court of Federal Claims correctly dismissed the direct claims, but permitted the derivative claims to proceed. Allowing the derivative claim to proceed was a mistake for the reasons stated above.

In addition, were the Court to reach the question, no basis exists for a breach-of-implied-in-fact-contract claim whether derivative or direct. Plaintiffs assert that an implied contract came into being at the outset of the conservatorships, under which FHFA promised to conserve and preserve the enterprises' assets and operate the

enterprises for shareholder benefit in exchange for the enterprises' consent to conservatorship. Plaintiffs offer no allegations to support this implausible claim beyond conclusory legal assertions. FHFA did not require the consent of the enterprises to initiate the conservatorships. Moreover, HERA defines FHFA's responsibilities during a conservatorship, and FHFA likely could not agree to conditions that conflicted with those responsibilities even if it wanted to. Plaintiffs nevertheless would have the Court take on faith their implausible assertion that the boards of the enterprises, which faced mounting losses, would have demanded and received such binding assurances from FHFA that were never reduced to writing. That invitation should be declined.

B. The Court of Federal Claims properly dismissed the *Cacciapalle* plaintiffs' unique contract claims based on their stock certificates. The United States is not and has never been a party to the plaintiffs' stock certificates, which are contracts between plaintiffs and the enterprises. Plaintiffs accordingly lack standing to sue the government for breach of those certificates.

C. Plaintiffs asserted direct as well as derivative breach-of-fiduciary-duty claims. The Court of Federal Claims held that the derivative claims could go forward, a conclusion that was erroneous for the reasons discussed above.

In any event, the claims, however pled, are without basis. As relevant here, the United States is only subject to those fiduciary duties it specifically adopts by statute and only if the statute is money-mandating. Neither condition exists here. HERA

imposes no duty on FHFA or Treasury to act in the best interests of shareholders. To the contrary, HERA makes clear that shareholder interests are not paramount. And the statute plainly does not mandate payment based on these asserted duties.

D. As discussed above, the Court of Federal Claims recognized that plaintiffs' takings claims are derivative and not direct, and it also recognized that such claims would be precluded by HERA's Succession Clause absent a conflict-of-interest exception. The court also recognized that the district court in *Perry Capital* rejected the *Cacciapalle* plaintiffs' contention that HERA's Succession Clause contained a conflict-of-interest exception that would permit them to bring a derivative suit, a holding that was affirmed on appeal and is now final. That holding bars all plaintiffs, but certainly the *Cacciapalle* plaintiffs, who were also the plaintiffs in *Perry Capital*, from re-litigating the conflict-of-interest exception issue here. The *Cacciapalle* plaintiffs now argue that if HERA is interpreted to preclude derivative suits, it effects an unconstitutional taking. The Court of Federal Claims correctly held that plaintiffs' attempt to re-litigate an issue on which they lost was unavailing. And the claim would not succeed on its own terms; among other things, the right to bring a derivative suit on behalf of a corporation had not vested and is not, in any event, a property interest protected by the Fifth Amendment.

IV. The Court of Federal Claims correctly dismissed the takings claims of shareholders who did not own enterprise stock at the time of the Third Amendment. "It is axiomatic that only persons with a valid property interest *at the time of the taking*

are entitled to compensation." *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1263 (Fed. Cir. 2017). Neither law nor logic supports the conclusion that plaintiffs who sold their stock before the execution of the Third Amendment or who purchased stock after the alleged taking, with full knowledge that the taking occurred (and at a price reflecting that taking), should be permitted to pursue compensation for the taking.

STANDARD OF REVIEW

This Court reviews de novo both the Court of Federal Claims' grant or denial of a motion to dismiss for lack of jurisdiction, *Maher v. United States,* 314 F.3d 600, 603 (Fed. Cir. 2002), and its grant or denial of a motion to dismiss for failure to state a claim, *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1376 (Fed. Cir. 2000).

ARGUMENT

I. The Court of Federal Claims Lacked Jurisdiction over Plaintiffs' Claims Because the Actions of the FHFA as Conservator Are Not Attributable to the United States.

Plaintiffs have asserted a variety of claims, but, with minor exceptions, all challenge the same transaction: FHFA's agreement, as conservator, to the Third Amendment to the initial purchase agreements. The Tucker Act grants jurisdiction to the Court of Federal Claims over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). The various challenges to the Third Amendment can thus

proceed only if they are properly characterized as claims against the United States within the scope of this jurisdictional provision.

Plaintiffs have advanced two principal arguments to meet this threshold requirement. First, they urge that FHFA acting as conservator retains its status as an agency of the United States. Second, they urge that regardless of the conservator's governmental status, the Third Amendment is an action of the United States on the theory that Treasury coerced the conservator's agreement or made the conservator its agent.

The Court of Federal Claims correctly rejected plaintiffs' claim that FHFA is at all times a federal agency and can never shed its governmental character. Appx21-23. It also correctly rejected plaintiffs' attempts to assert claims against the United States on the theory that Treasury coerced FHFA's agreement to the Third Amendment or made the conservator its agent. Appx18-20. The court further recognized that FHFA would not retain its governmental character if it were acting as receiver of the enterprises. Appx24. But, as we show below, the court erred in concluding that FHFA retains its governmental character as conservator. Just as it does when functioning as receiver, FHFA as conservator steps into the private shoes of the enterprises and is not the United States for Tucker Act purposes.[11]

[11] Two claims, dismissed by the Court of Federal Claims on other grounds, might arguably state claims not based entirely on the conduct of FHFA as conservator. One claim asserts that Treasury breached an alleged fiduciary duty to

A. FHFA Is Not the United States When Acting as Conservator.

1. It is black-letter law that "an entity may be governmental for one purpose and nongovernmental for another." *Alley v. Resolution Tr. Corp.*, 984 F.2d 1201, 1206 (D.C. Cir. 1993); *United States ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016). Consistent with that principle, courts have long emphasized the important distinction between an agency acting as conservator or receiver and an agency acting as a regulator. When acting as a conservator or receiver, FHFA (and its analogues) "steps into [the private enterprises'] shoes, shedding its government character and also becoming a private party." *Meridian Invs. Inc. v. Freddie Mac*, 855 F.3d 573, 579 (4th Cir. 2017); *see also Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017) (HERA's Succession Clause "evinces Congress's intention to have the FHFA step into Fannie Mae's private shoes" when it acts as conservator, thereby shedding its government character); *Adams*, 813 F.3d at 1261 (The conservatorship "places FHFA in the shoes of Fannie Mae and Freddie Mac, and gives the FHFA their rights and duties, not the other way around."); *Federal Home Loan Mortg. Corp. v. Gaines*, 589 F. App'x 314, 316 (6th Cir. 2014) (rejecting argument that "FHFA's conservatorship converted Freddie Mac from a private actor to a state actor"); *see also O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994) ("FDIC as receiver 'steps into the shoes' of a

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shareholders. Cons. Br. 81-88. The second claim asserts that, in the absence of a conflict-of-interest exception, HERA's Succession Clause effects a taking of a shareholder's right to assert a derivative claim. *See* Cacciapalle Br. 16-23. These claims are discuss below *infra* Part III.

failed S & L."); *United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497, 502-03 (3d Cir. 2017) (The Small Business Administration, when acting as receiver, "steps into the private status of the entity."); *United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994) ("The Resolution Trust Corporation as receiver of an insolvent financial institution stands in the shoes of the bank" and, as a result, "the RTC stands as a private, non-governmental entity, and is not the Government.").

That FHFA as conservator sheds its government character is evident from HERA's text and from the tasks FHFA performs as conservator, which are not governmental in nature. HERA's Succession Clause provides that FHFA, as conservator or receiver, "immediately succeed[s] to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i); *see also id.* § 4617(b)(2)(B) (FHFA may, as conservator or receiver, "take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity."). HERA thus plainly provides that FHFA steps into the shoes of the enterprises' officers and directors, taking over their powers and functions.

When "operat[ing]" the enterprises and "conduct[ing]" their business, moreover, FHFA as conservator engages in activities that are not governmental in character. In agreeing to the Third Amendment, for example, FHFA undertook the "quintessential conservatorship tasks" of "[r]enegotiating dividend agreements,

managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 607 (D.C. Cir. 2017). Such tasks are the hallmarks of a private financial manager. *See Jacobs v. FHFA*, 908 F.3d 884, 890 (3d Cir. 2018) ("The Third Amendment is in essence a renegotiation of an existing lending agreement," a "traditional power of corporate officers or directors."); *Saxton v. FHFA*, 901 F.3d 954, 960-61 (8th Cir. 2018) (FHFA "renegotiat[ed] an existing lending agreement," an action "within the heartland of powers vested in the officers or board of directors of any corporation."). These activities bear no resemblance to the regulatory activities and enforcement actions that characterize the exercise of governmental power. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010).

Plaintiffs are thus wrong in suggesting that the "'normal' activities" FHFA undertakes as conservator are "indisputably governmental." Cons. Br. 67. To the contrary, FHFA's normal activities as conservator involve the operation of the enterprises and the conduct of their business. And there is no dispute that the enterprises' ordinary business activities are not governmental in character. *See, e.g.*, *Herron*, 861 F.3d at 168 (noting that it is undisputed that Fannie Mae is a private entity and not a government actor); Appx2 (noting that the enterprises are "for-profit companies owned by private shareholders").

The non-governmental nature of FHFA's actions as conservator accords with historical practice. Federal regulators appointed private entities to be conservators

and receivers of troubled financial institutions until the advent of the FDIC, and may continue to appoint private entities as receivers for banks that are not federally insured. *See* 12 U.S.C. § 191; 12 C.F.R. § 51.2; *see also* 1 FDIC, *Managing the Crisis*: *The FDIC and RTC Experience* 212-13 (1998).[12] State law also generally authorizes the appointment of private entities to serve as receivers for failed banks. 1 FDIC at 213-15.

2. The Court of Federal Claims rejected the extensive precedent holding that a federal agency, when acting as conservator, is not the United States. Appx24-25. Relying on a single district court decision, *Sisti v. FHFA*, 324 F. Supp. 3d 273 (D.R.I. 2018), which is currently on appeal, No. 20-2026 (1st Cir.), the court concluded that, while an agency as receiver steps into the shoes of a private entity, an agency as conservator does not. Appx25. Like the district court in *Sisti*, the court believed that a conservator does not step into the shoes of the private entity because, supposedly unlike a receiver, a conservator owes fiduciary duties "to the entity." Appx24; *see also* Cons. Br. 64-67.

The Court of Federal Claims' conclusion is at odds with basic principles of corporation law. Even assuming FHFA as conservator owes fiduciary duties to the enterprises—and, to be clear, it does not—that fact would not distinguish FHFA from the enterprises' private officers and directors. A corporation "can only act

[12] https://go.usa.gov/xAGj8

through its officers and agents." *Borough of Alpine v. United States*, 923 F.2d 170, 172-73 (Fed. Cir. 1991). The acts of the officers and agents taken on behalf of the corporation are thus the acts of the corporation. Moreover, a corporation's officers and other agents owe fiduciary duties to the corporation when acting on the corporation's behalf. *See, e.g.*, *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255, 264 (2d Cir. 1984) (discussing the duties of care and loyalty that board members owe to a corporation when they act on the corporation's behalf); Cons. Br. 64-65. But the mere fact that the officer owes a fiduciary duty to the corporation does not alter the nature of the action taken. It remains the action of the corporation.

The same is true with respect to actions taken by FHFA as conservator. The actions it takes on behalf of the enterprises remain the actions of the enterprises, even assuming FHFA, like the enterprises' officers and directors, owes fiduciary duties to the enterprises when conducting the enterprises' business. Indeed, to the extent FHFA owes fiduciary duties to the enterprises as conservator, it would result entirely from the fact that FHFA has assumed the powers and authorities of the organization's officers and directors.

The error in the Court of Federal Claims' conservator/receiver distinction is evident for additional reasons. As noted, the court concluded that a receiver steps into the shoes of a private entity, while a conservator does not. That conclusion cannot be squared with the text of HERA's Succession Clause, the statutory provision that "evinces Congress's intention to have the FHFA step into Fannie Mae's private

shoes." *Herron*, 861 F.3d at 169; *O'Melveny & Myers*, 512 U.S. at 86. The Succession Clause provides that FHFA immediately succeeds to the rights of an enterprises' shareholders, officers, and directors when appointed "as conservator or receiver." 12 U.S.C. § 4617(b)(2)(A). The provision does not distinguish between FHFA's appointment as conservator and its appointment as receiver. If, as several courts have held (and the Court of Federal Claims agreed, Appx20-21), the Succession Clause indicates that FHFA steps into the shoes of the enterprises, then the Clause's plain language makes clear that FHFA steps into the enterprises' shoes when appointed as *either* conservator or receiver.

In concluding that FHFA as conservator does not step into the shoes of the enterprises because it owes fiduciary duties to the enterprises, the Court of Federal Claims, like the district court in *Sisti*, relied primarily on a student law review note that posited that Treasury's ownership of common stock warrants makes it "a 'dominant shareholder," and "dominant shareholders are widely recognized to have fiduciary duties running to the corporation, unlike to creditors, as is the case for [a] receiver." Brian Goldman, *The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State Action*, 17 J. Bus. & Sec. L. 11, 26 (2016); Appx25 (citing *id.*); *Sisti*, 324 F. Supp. 3d at 283 n.9 (citing *id.*); Cons. Br. 65 (citing *id.*). As discussed *infra* pp. 61-66, this characterization of Treasury's role is incorrect. Treasury is not, and has never been, a controlling shareholder of the enterprises. *See also* Appx32 n.27 (concluding that Treasury was not a controlling shareholder). Regardless, whether *Treasury* might, as a

purportedly dominant shareholder, owe fiduciary duties to the enterprises has no conceivable bearing on whether *FHFA as conservator* (which does not own the warrants and is not a dominant shareholder) retains its government character as conservator. Thus, the dominant-shareholder premise underlying the Court of Federal Claims' and the *Sisti* court's analysis is plainly invalid.

Plaintiffs also make the plainly mistaken argument (Cons. Br. 61-62) that FHFA as conservator is the government merely because FHFA was created by Congress as a federal agency, with a director appointed by the President. FDIC is likewise a federal agency created by Congress for a public purpose, with directors who are appointed by the President. *See* 12 U.S.C. § 1813(z) (FDIC is a "Federal banking agency"); *id.* § 1812(a)(1) (FDIC's board consists of the Comptroller of Currency, the Director of the Consumer Financial Protection Bureau, and three individuals appointed by the President, with the advice and consent of the Senate.). Yet courts, including this one, have long recognized that the FDIC (and similar agencies) is generally not the government, despite its status as a government agency, when acting as receiver of a private financial institution. *See Slattery v. United States*, 583 F.3d 800, 826 (Fed. Cir. 2009). And, as noted above, several courts have also specifically concluded that FHFA as conservator of the enterprises is not the federal government in various contexts. Unless every one of those courts erred in so concluding, an entity's mere status as a federal agency is insufficient to render it the United States for all purposes.

In short, the Court of Federal Claims plainly erred in concluding that FHFA as conservator does not step into the shoes of the private enterprises but instead retains its governmental character. HERA's text, the nature of the activities FHFA undertakes as conservator, and judicial and historical precedent all establish that FHFA sheds its governmental character when it is appointed conservator of an enterprise.

B. The Court of Federal Claims Correctly Held That Plaintiffs' Claims Were Not Claims Against the United States Based on Plaintiffs' Theory That Treasury Coerced FHFA or Made FHFA Its Agent.

In the Court of Federal Claims and in their opening brief, plaintiffs offer an array of additional reasons why FHFA should be considered the United States when it acts as conservator. None has merit.

1. Plaintiffs argued in the trial court that FHFA's action were attributable to Treasury because, when it agreed to the Third Amendment, FHFA was acting as Treasury's agent. Appx19. Plaintiffs relatedly argued below that Treasury coerced FHFA into agreeing to the Third Amendment. Appx18-19.

The Court of Federal Claims correctly rejected both contentions. Appx19-21. "An essential element of agency is the principal's right to control the agent's actions." *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01, cmt. f (Am. Law. Inst. 2005)). As the court found, Treasury had no right to control FHFA's actions with respect to the Third Amendment. Indeed, HERA

expressly provides that, when acting as conservator or receiver, FHFA "shall not be subject to the direction or supervision of any other agency of the United States." 12 U.S.C. § 4617(a)(7). As the Sixth Circuit explained, § 4617(a)(7) "specifically functions to remove obstacles to FHFA's exercise of conservator powers." *Robinson v. FHFA*, 876 F.3d 220, 233 (6th Cir. 2017). While the initial purchase agreements provided Treasury with certain contractual rights, nothing in those agreements or HERA required FHFA as conservator to agree to the Third Amendment (or any other amendment) at Treasury's direction. *See* Appx19. Put simply, FHFA is a "sophisticated part[y]" that agreed to the Third Amendment of its own volition, not as Treasury's agent. Appx18; *see also, e.g.*, *B & G Enters., Ltd. v. United States*, 220 F.3d 1318, 1323 (Fed. Cir. 2000) ("California did not act as an agent of the United States by enacting the section 22960 vending machine restrictions and [] the United States is therefore not responsible for that law's interference with B & G's vending machine contracts as a matter of law.").

Plaintiffs' assertion that Treasury coerced FHFA into agreeing to the Third Amendment is similarly insubstantial. Despite years of discovery, the sole evidence that plaintiffs mustered in support of their claim that Treasury coerced FHFA into agreeing to the amendment is that FHFA accepted the amendment proposed by Treasury without making a counteroffer. Appx18. As the Court of Federal Claims and other courts have concluded, such allegations do not "come close to a reasonable inference that [the] FHFA [as conservator] considered itself bound to do whatever

Treasury ordered." Appx18 (quoting *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 226 (D.D.C. 2014)). That a party accepts a contract amendment that it believes to be in its best interests is not evidence that the counterparty was coerced against its will into accepting the amendment. *See Roberts v. FHFA*, 889 F.3d 397, 406 (7th Cir. 2018) ("Even if, as the complaint alleges, Treasury officials made statements suggesting that Treasury was in the driver's seat and had to convince the Agency to come along for the ride, such behavior alone would not" establish that Treasury forced FHFA to accept the amendment.).

The lack of an agency relationship between FHFA and Treasury and the absence of evidence that Treasury coerced FHFA into agreeing to the Third Amendment distinguishes this case from those relied on by plaintiffs. *See* Cons. Br. 61-71. In *Lion Raisins, Inc. v. United States*, 416 F.3d 1356 (Fed Cir. 2005), for example, (discussed at Cons. Br. 62) the plaintiffs challenged alleged takings by the Raisin Administrative Committee. 416 F.3d at 1362. This Court concluded that the plaintiffs' takings claim was "against the United States," and thus fell within the Tucker Act's grant of jurisdiction, *id.*, based on the undisputed fact that the Committee "was an agent of the United States," a fact that the government "confirmed" at oral argument. *Id.* at 1364. Indeed, as the decision makes clear, there could be little serious dispute that the Raisin Advisory Committee was "an arm[] of the government" that was "essential for the performance of governmental functions." *Id.* at 1363 (quoting *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942)).

Plaintiffs' reliance on *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), is similarly misplaced. *See* Cons. Br. 68-69. In *Hendler*, the Environmental Protection Agency issued an order authorizing and directing the State of California to dig wells on the plaintiffs' property in connection with a joint federal-state cleanup of a Superfund site. 952 F.2d at 1367, 1374. This Court held that because California acted pursuant to the EPA's Order and in coordination with EPA, "[i]t follows that their activities within the scope of the Order are attributable to the Federal Government for purposes of takings law just as are the activities of EPA itself." *Id.* at 1378-79.

Unlike the State of California in *Hendler*, FHFA did not agree to the Third Amendment at Treasury's direction or under Treasury's authority. As conservator of the enterprises, FHFA exercised its rights on behalf of the enterprises under the initial purchase agreements to renegotiate the Agreements' terms. *See Perry Capital*, 864 F.3d at 607 (FHFA renegotiated the enterprises' dividend obligations to ensure ongoing access to vital capital). It did so independently of Treasury, except insofar as any contract requires the agreement of two parties. Contrary to plaintiffs' contention (Cons. Br. 68-69), FHFA's and Treasury's arms-length agreement to the Third Amendment bears no resemblance to the "coordinate and coordinated" activities of EPA and California in *Hendler*, in which the two governments acted as one to clean up a hazardous waste site.

For the same reasons, plaintiffs derive no support from this Court's decision in *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014). Cons. Br. 70-71.

In the relevant passage of *A&D Auto Sales*, this Court stated the uncontroversial principle that the United States may be liable for a taking of property by a third party if "the third party [wa]s acting as the government's agent or the government's influence over the third party was coercive rather than merely persuasive." 748 F.3d at 1154; *see also id.* at 1155-56 (declining to decide whether coercion existed in light of the "paucity of information" in the record). As explained above, FHFA was not acting as Treasury's agent and plaintiffs' allegations fall far short of establishing that Treasury coerced FHFA into agreeing to the Third Amendment.

Slattery v. United States, 583 F.3d 800 (Fed. Cir. 2009), opinion re-instated following en banc review 635 F.3d 1298 (2011), also casts no doubt on the conclusion that FHFA is not the government when serving as conservator. *Slattery* involved an unusual situation in which the FDIC allegedly decided to keep for itself the monetary surplus it obtained from a bank liquidation following a receivership, rather than pay the surplus to shareholders, as FDIC was statutorily required to do. *Id.* at 827-28; *see also* 12 U.S.C. § 1821(d)(11)(A). This Court recognized the principle that the FDIC as receiver "generally is not considered the United States for the Tucker Act purposes," 582 F.3d at 826, but noted that "FDIC as receiver" might qualify as "'the government' depend[ing] on the context of the claim," *id.* at 827. The Court emphasized that the FDIC's alleged conduct—keeping money that a statutory provision, 12 U.S.C. § 1821(d)(11)(A), required FDIC to pay to shareholders—did not fall within "the standard receivership situation in which the receiver is enforcing the rights or

defending claims and paying the bills of the seized bank." 583 F.3d at 827-28. Instead, in the "context" of the "specific" claim in *Slattery*—FDIC's retention of the proceeds of a liquidation—suggested that the FDIC was acting in a governmental capacity and not on behalf of the failed bank.

By contrast, FHFA's negotiation of, and agreement to, the Third Amendment were "quintessential conservatorship tasks." *Perry Capital*, 864 F.3d at 607. As the Court of Federal Claims noted in joining the "growing consensus" among courts, FHFA as conservator acted well-within its statutory conservatorship authority when it agreed to the Third Amendment. Appx16 (citing cases). The context of plaintiffs' claims—a challenge to the Third Amendment that FHFA agreed to as conservator—thus confirms that plaintiffs are challenging actions FHFA took in its nongovernmental capacity as the operator of the private enterprises.

2. Correctly holding that FHFA as conservator acted independently and was not coerced by Treasury, the Court of Federal Claims also properly rejected plaintiffs' claims that Treasury's role as counterparty to the Third Amendment was, without more, sufficient to provide it with jurisdiction over plaintiffs' claims.

When the government "bargain[s] with private actors for the provision or procurement of goods and services," it does so in a commercial or "proprietary" capacity, not as a sovereign, even where the government entered into the contract "in pursuit of a larger governmental objective." *A&D Auto Sales*, 748 F.3d at 1156 (citing cases); *see also Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed.

Cir. 2001) ("[T]he Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity."). In such circumstances, no takings claim exists; "remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights." *Hughes Commc'ns*, 271 F.3d at 1070.

In this case, Treasury negotiated the initial purchase agreements and their amendments in its proprietary capacity. It "obtained certain rights," including the right to dividends, and "incurred certain responsibilities," a nearly half-trillion dollar commitment of taxpayer funds. *Hughes Commc'ns*, 271 F.3d at 1070. The bargains Treasury struck with FHFA as an investor in the enterprises' preferred stock were commercial transactions that do not give rise to a takings claim. And any claim that FHFA entered an unlawful or wasteful deal with Treasury would be properly directed at FHFA, not Treasury.

Moreover, several of plaintiffs' claims, even on their face, do not in any way implicate Treasury. For example, plaintiffs' breach-of-contract claims rest entirely on an implied-in-fact contract FHFA purportedly entered into with the enterprises' boards, *see* Cons. Br. 29, or on the shareholders' preferred stock certificates, Cacciapalle Br. 15. Treasury is not a party to either contract and played no role in their formation or execution. Even assuming that those contracts exist and were breached, it was FHFA as conservator that breached them. Similarly, it was FHFA's actions as conservator that plaintiffs allege were illegal, not Treasury's.

In short, if FHFA was not the United States when, as conservator of the enterprises, it entered into the Third Amendment—and it was not—plaintiffs' claims must be dismissed. Treasury's role as contractual counterparty is of no moment.

* * *

Because FHFA acting as conservator was not the United States when it entered into the Third Amendment, the Court of Federal Claims lacked jurisdiction under the Tucker Act over all claims challenging the FHFA's actions as conservator with respect to the Third Amendment, including plaintiffs' takings and illegal exaction claims. This Court should therefore direct the Court of Federal Claims to dismiss the derivative claims it permitted to go forward. Moreover, recognizing the status of FHFA as conservator provides an alternative basis to affirm the court's dismissal of the allegedly direct claims challenging the actions of FHFA as conservator. *Datascope Corp. v. SMEC, Inc.,* 879 F.2d 820, 822 n.1 (Fed. Cir. 1989) ("Appellees always have the right to assert alternative grounds for affirming the judgment that are supported by the record.").

II. Plaintiffs' Claims Are, with Minor Exceptions, Derivative and Thus Barred by HERA's Succession Clause.

As discussed in the previous section, the actions of FHFA as conservator are not actions of the United States, and the Court of Federal Claims for that reason lacked jurisdiction over all plaintiffs' claims challenging FHFA's actions as conservator with respect to the Third Amendment.

The court lacked jurisdiction over plaintiffs' claims for the independent reason that shareholders cannot assert derivative actions on behalf of the enterprises by virtue of HERA's Succession Clause. As the court recognized, all of plaintiffs' claims, with minor exceptions, are derivative, whether styled as derivative or direct. Appx.28-41. The court therefore correctly dismissed plaintiffs' self-styled direct claims because plaintiffs lack standing to assert on their own behalf claims that actually belong to the enterprises. Appx38-41.

The court also recognized that permitting derivative claims to go forward would be inconsistent with the text of HERA's Succession Clause, which provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately 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); Appx43-44. This Succession Clause "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits," *Perry Capital*, 864 F.3d at 623; *see also, e.g.*, *Roberts*, 889 F.3d at 408 (Succession Clause transfers to FHFA "the sole right to bring derivative actions on behalf of" the enterprises.).

The Court of Federal Claims erred in concluding that, notwithstanding HERA's Succession Clause, it was required to permit plaintiffs' derivative suits to go forward based on the conflict-of-interest exception implied to a different statute in this Court's *First Hartford* decision. Appx44-45. In establishing the conditions for the

rescue of the enterprises, Congress ensured that the operation of the conservatorship would not be subject to suits of this kind. Permitting plaintiffs' derivative claims to go forward would thus contravene a critical part of the multi-faceted structure of the rescue statute.

A. Plaintiffs' Claims Are Derivative, Whether Styled as Derivative or Direct.

Plaintiffs assert that their takings, illegal exaction, and other claims can be pled as "direct" claims and, as such, can be asserted consistent with HERA's Succession Clause. Cons. Br. 30-60. The Court of Federal Claims correctly rejected that characterization. Appx38-41.

1. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Thus, legal harms committed against a corporation give rise to claims belonging to the corporation itself, and shareholder suits seeking to enforce those claims are derivative. *See, e.g.*, *First Annapolis Bancorp, Inc. v. United States*, 644 F.3d 1367, 1373 (Fed. Cir. 2011). A claim is "direct" when "the duty breached was owed to the stockholder" and the stockholder "can prevail without showing an injury to the corporation." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004)). A claim is "derivative" if the harm to the shareholder is the byproduct of some injury to the corporate body as a whole. *Id.*

The determination whether a federal-law claim is direct or derivative is governed by federal law. *See Starr Int'l Co. v. United States*, 856 F.3d 953, 965-66 (Fed. Cir. 2017); 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1821 (3d ed. 2020). Where standing turns on the "allocation of governing power within [a] corporation," however, federal law often looks to state-law principles. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991); *Starr Int'l*, 856 F.3d at 965-66.

The principles for distinguishing direct from derivative claims are well established and consistent across federal and state law. As this Court has explained, the analysis is governed by two questions: "(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)?" *Starr Int'l*, 856 F.3d at 966 (quoting *Tooley*, 845 A.2d at 1033); *see also* 12B William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations ch. 58, § 5911 (2020) (Fletcher) (hornbook test for whether a claim is derivative or directs turns on (1) "who suffered the alleged harm" and (2) "who would receive the benefit of any recovery").

Applying the two-part test, courts have recognized a broad range of suits as derivative. For example, claims involving "improper" corporate transactions, "waste of corporate assets," corporate overpayment, or "impairment or destruction of the business of the corporation" all belong to the corporation rather than to the shareholder. Fletcher § 5923. Thus, "claims that [defendants] caused the company to

enter into a series of 'unfair' transactions that have 'involved self-dealing' and 'diverting assets' are fundamentally claims belonging to the corporation and to [shareholders] only derivatively." *Cowin v. Bresler*, 741 F.2d 410, 416 (D.C. Cir. 1984); *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) ("Pareto's allegations—that the directors breached their duties of care and loyalty by failing to safeguard Barbary Coast's assets and equity, mismanaging its operations, [and] improperly placing it into voluntary receivership . . . describe a direct injury to the bank, not the individual stockholders."). In such cases, the corporation suffers the harm, and any recovery would flow to the corporate treasury.

In contrast, direct claims include claims that the corporation has "depriv[ed] [particular] shareholders of their right to vote," "wrongful[ly] refus[ed] to issue a certificate of stock" to a shareholder, or has denied a shareholder his right "to obtain inspection of corporate books or records." Fletcher § 5915. In such cases, the shareholder suffers a harm as an individual separate and apart from any harm to the corporation, and the shareholder would directly receive any recovery.

As particularly relevant here, claims regarding "diminution in the value of corporate stock resulting from some depreciation or injury to corporate assets is a direct injury only to the corporation; it is merely an indirect or incidental injury to an individual shareholder." Fletcher § 5913; *see also, e.g.*, *Gaff v. FDIC*, 814 F.2d 311, 318 (6th Cir. 1987) ("Gaff primarily claims that his shares in the failed bank became totally worthless as a result of the defendants' conduct. . . . [A] diminution in the value of

stock is merely indirect harm to a shareholder and does not bestow upon a shareholder the standing to bring a direct cause of action."); *Hometown Fin. Inc. v. United States*, 56 Fed. Cl. 477, 486 (Fed. Cl. 2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends.") (citing cases).

2. Plaintiffs' claims rest on a central underlying allegation: that the Third Amendment resulted in the unlawful transfer of *the enterprises*' net worth to Treasury. *See, e.g.*, Appx395 (Fairholme Compl.) (Under the Third Amendment, "*Fannie and Freddie* . . . have been forced to pay substantially all of [their profits] as 'dividends' to the federal government"); Appx437 ("[T]he Net Worth Sweep entitles Treasury to all—100%—of the *Companies*' existing net worth and future profits); Appx446 (Under the Third Amendment, "[t]he *Companies* . . . are not allowed to retain capital but instead must pay nearly *their* entire net worth over to Treasury as a *quarterly* dividend.")); Appx487 (*Owl Creek* Compl.) ("Through the operation of the Sweep Amendment, the United States has expropriated hundreds of billions of dollars in net worth *from the Companies*."); Appx489 (The Third Amendment appropriated the *Companies'* net worth in perpetuity); Appx726 (*Arrowood* Compl.) (The Third Amendment "forc[ed] these publicly-traded, shareholder-owned *Companies* to turn over *their* entire net worth") (emphases added in each instance). These are plainly allegations of harm to the corporation, not to the shareholders as individuals. As the

Seventh Circuit explained, claims that the Third Amendment "illegally dissipated corporate assets by transferring them to Treasury" are "classic derivative claims." *Roberts*, 889 F.3d at 409.

Plaintiffs' related allegations are to the same effect. For example, plaintiffs allege that "[t]he effect of the Net Worth Sweep is thus to force the *Companies* to operate in perpetuity on the brink of insolvency and to prohibit them from operating in a safe and sound manner." Appx446 (emphasis added); *see also* Appx733 (The Third Amendment prevents "*Fannie and Freddie*" from "using [*their*] profits to prudently build capital reserves and prepare to exit conservatorship.") (emphases added). Plaintiffs similarly assert that the "*Companies*' inability to build capital reserves under the Net Worth Sweep [i]s a 'serious risk' that erodes investor confidence in the *Companies*," Appx446, and that "the Net Worth Sweep guarantees that *Fannie and Freddie* can never be rehabilitated to a sound and solvent condition," Appx445 (emphasis added).

Plaintiffs' complaints also allege harms to the shareholders—for instance, the reduction in the value of their shares and the depletion of corporate assets from which they could be paid dividends. *See, e.g.*, Appx439, ¶ 117. As previously noted, such allegations do not establish a direct claim. Indeed, every claim asserting a loss of value to a corporation would be direct on that theory. But claims of corporate overpayment, waste, and mismanagement—including claims that a corporate manager's actions bankrupted the company and rendered a shareholder's dividend

and other rights "totally worthless," *Gaff*, 814 F.2d at 318—have long been recognized as derivative claims, Fletcher § 5923. Such claims, like plaintiffs' claims here, fail the requirement that "[t]he stockholder's claimed direct injury must be independent of any alleged injury to the corporation." *Tooley*, 845 A.2d at 1039; *see also* Fletcher § 5913 ("[S]hareholders cannot sue in their own names and on their own behalf to recover for a loss resulting from depreciation of the value of their stock as a result of the injury to the corporation."); *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981) (Stockholders cannot "maintain an action to redress an injury to the corporation even though the value of their stock is impaired as a result of the injury.").

As is generally the case with derivative claims, the asserted injury to the corporation would be redressed by a remedy directed to the corporation, not to its individual shareholders. If, as plaintiffs assert, the Third Amendment constituted a governmental taking of the enterprises' net worth unlawfully or without just compensation, any remedy would be determined with respect to the asserted losses of the enterprises and would require payment for those losses to the enterprises. It would not be determined by the incidental asserted losses of shareholders or paid directly to them. Accordingly, plaintiffs rightly do not allege that the Third Amendment deprived them of funds to which they were entitled. They assert, instead, that in transferring the enterprises' net worth to Treasury, the Third Amendment has prevented the enterprises from "prudently build[ing] capital reserves

and prepar[ing] to exit conservatorship." Appx395. Those are plainly asserted harms to the corporations, with any remedy directed to the corporations.

Plaintiffs are mistaken when they suggest (Cons. Br. 41-42; Arrowood Br. 23) that compensating the enterprises would not remedy the alleged harm to the enterprises because any damages Treasury was ordered to pay to the enterprises would increase the enterprises' net worth and thus be immediately swept back to Treasury under the Third Amendment. Plaintiffs offer no basis for the supposition that the United States "would flout . . . a judgment [in the enterprises' favor] by taking a second time the same assets it has been ordered to return." Br. of Amici Curiae Bryndon Fisher et al. 14-15. And even if the government attempted such an end run, it would be futile, as the government would presumably be ordered to repay the recaptured funds to the enterprises. In any event, under the amendment to the purchase agreements executed on January 14, 2021, the enterprises are permitted to build substantial internal capital that will not have to be paid to Treasury. Under that agreement, damages awarded to the enterprises would increase their net worth and would not be swept back to Treasury.

In short, plaintiffs allege harm to (and through) the enterprises and seek relief that would properly flow to the corporations, not to shareholders directly. The claims here parallel in relevant respects those in *Starr International*, in which this Court held that a shareholder challenge to the terms of the government's bailout of the American International Group (AIG) asserted a derivative claim belonging to the

corporation. 856 F.3d at 963-73. The AIG shareholders argued that the terms of the government's bailout, which required AIG to issue stock to the government in exchange for an $85 billion loan, were unlawful and constituted an illegal exaction of the corporation's and the shareholders' economic interests. *See id.* at 959, 961. This Court held that the AIG shareholders' claims were "quintessentially" derivative because they were "dependent on an injury to the corporation [(the alleged loss in value from the unlawful loan)], and any remedy [(the unwinding of the loan)] would flow to AIG." *Id.* at 967. As the Court explained, where "any dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in the value of the entire corporate entity," the harm is "solely to the corporation" and "[t]he proper remedy" is to "restor[e]. . . the improperly reduced value" to the corporation. *Id.* at 967. That is precisely the case here; plaintiffs' claims are "dependent on an injury" to the enterprises and "any remedy would flow" to the enterprises, via restoration to the enterprises of their improperly taken net worth. *Id.*

3. Plaintiffs fail to come to grips with the uniform authority establishing the derivative nature of their claims, and offer contentions that reflect various errors of fact and law.

Plaintiffs assert that their taking and illegal exaction claims are direct because they allege that Treasury unlawfully acquired their personal "rights to dividends and other distributions." Cons. Br. 31; Arrowood Br. 17-20. That is plainly incorrect. The Third Amendment did not transfer to Treasury the shareholders' rights to

dividends or other distributions. Should the enterprises declare a dividend payable to all shareholders in the future, plaintiffs would receive their proportionate share.

Plaintiffs' erroneous assertion mirrors an argument advanced by the plaintiffs in *Starr International*. There, plaintiffs argued that the government's acquisition of 80% of AIG's stock was "indistinguishable from a physical seizure of four out of every five shares of [shareholders'] stock" and should therefore be treated as an acquisition of plaintiffs' property. *Starr Int'l*, 856 F.3d at 967. This Court rejected the plaintiffs' attempted recharacterization of the government's actions. *Id.* The Court recognized that there was a "material difference" between the government's seizure of an existing shareholder's stock certificates and associated rights (which would support a direct shareholder claim) and the government's acquisition of new economic rights from the company (which affects shareholders only derivatively). *Id.*

That reasoning is equally applicable here. Treasury did not acquire plaintiffs' economic, voting, or other rights. FHFA and Treasury instead agreed on an amendment to the manner in which the enterprises would fulfill payment obligations that originated in the original purchase agreement. Insofar as Treasury acquired a right, it was plainly an economic right from the companies themselves—*i.e.*, a right to a dividend equal to the enterprises' quarterly net worth (above a capital buffer). The enterprises' net worth belongs to the corporation, not the shareholders. *See Commissioner v. Gordon*, 391 U.S. 83, 88-89 (1968) (the "accumulated earnings and profits" of a company are "corporate property"); Fletcher § 5321 ("[T]he assets of a

corporation belong to the corporation and not to its shareholders."). As discussed above, even assuming that the Third Amendment reduced the value of plaintiffs' stock and depleted corporate assets that the enterprises might have used to pay dividends to shareholders, that fact does not transform plaintiffs' derivative claims into direct ones. *See supra* Part II.

Plaintiffs' hypotheticals (Cons. Br. 38-40) underscore the derivative nature of their asserted harms. Plaintiffs note (Cons. Br. 38) that, in the first quarter of 2013, Fannie Mae paid Treasury $59.4 billion in dividends pursuant to the Third Amendment. Plaintiffs further assert that, under the original 10% fixed dividend rate, Fannie Mae would have paid $2.9 billion to Treasury, leaving $56.5 billion in funds from which Fannie Mae could have paid a dividend to other shareholders. *Id.*[13] As discussed, however, every claim regarding a diminution of corporate value could be cast in these terms—*i.e.*, a corporate transaction left the corporation with less money to pay shareholders.

Plaintiffs' attempt to make the possibility of dividends the basis of a direct claim also disregards the absence of any enforceable right to a dividend. On the

[13] Plaintiffs wrongly assert that the original purchase agreements "required" Treasury to share dividend payments with private shareholders. Cons. Br. 37. To the contrary, the original purchase agreements—which plaintiffs do not challenge here—barred the enterprises from "declar[ing] or pay[ing] any dividend (preferred or otherwise)" without Treasury's consent. Preferred Stock Purchase Agreements § 5.1, https://go.usa.gov/xUyCz (Fannie Mae); https://go.usa.gov/xUyCu (Freddie Mac). Treasury was thus not required to share dividend payments with private shareholders.

contrary, the initial purchase agreements barred the enterprises from paying dividends to shareholders absent Treasury's approval. *See* Senior Preferred Stock Purchase Agreement § 5.1, https://go.usa.gov/xUyCz (Fannie Mae); https://go.usa.gov/xUyCu (Freddie Mac). And, as the D.C. Circuit explained, "plaintiffs have no enforceable right to dividends because the[ir] [stock] certificates accord the Companies complete discretion to declare or withhold dividends." *Perry Capital*, 864 F.3d at 629; *see also* Fletcher § 5321 ("[S]hareholders have no legal right to share in the corporation's profits unless the directors declare a dividend.").

Under plaintiffs' reasoning, they would have been equally entitled to assert a direct claim with regard to the dividend payments required under the Second Amendment. In the years prior to the Third Amendment, the enterprises often earned less than the 10% dividend they owed Treasury. *Perry Capital*, 864 F.3d at 601. In fact, the $19 billion the enterprises owed Treasury annually under the original 10% fixed dividend structure was more than the enterprises had made in all but one year of their existence. *See supra* p. 5. Thus, under the 10% fixed dividend rate, the enterprises' dividend payments to Treasury often exhausted their net worth, leaving them unable to build internal capital or pay dividends to other shareholders. Plaintiffs might just as well have claimed that the exhaustion of the enterprises' property left the enterprises without funds to pay dividends to other shareholders or to use for other purposes. That claim would plainly concern alleged harm to the corporation, not a

harm that is personal to the shareholders. Plaintiffs' arguments with respect to the Third Amendment are no different.[14]

B. Plaintiffs' Claims Are Not "Dual Natured" Under Delaware Law.

As explained above, a claim that the corporation entered into a "transact[ion] with a controller on allegedly unfair terms" is typically a derivative claim, even if it depletes the corporation's assets at the expense of minority shareholders. *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016).

Delaware law recognizes a narrow exception to that rule for cases in which "a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value"; and "the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006). To the extent that "the harm resulting from the overpayment is not confined to an equal dilution of the economic value and

[14] Plaintiffs' also hypothesize (Cons. Br. 39-40) a counterfactual amendment under which the enterprises could decide for themselves whether or not to pay their net-worth dividend to Treasury each quarter. Plaintiffs then assert that, under this hypothetical amendment, plaintiffs would "clearly have had a direct claim" because the amendment would not have injured the companies (who could choose not to pay dividends). Cons. Br. 40. Plaintiffs' counterfactual hypothetical is both irrelevant and nonsensical. If the enterprises choose to pay no dividends at all and retain their net worth, then the government plainly has not taken or exacted any property. If, on the other hand, the enterprises choose to pay the net-worth dividend to Treasury then the enterprises experience the same alleged harm as under the Third Amendment.

voting power of each of the corporation's outstanding shares," minority shareholders may bring a direct claim to recover for that additional quantum of harm. *Id.* The Delaware Supreme Court has emphasized "that the extraction of solely economic value from the minority by a controlling stockholder" does not alone constitute "direct injury" under the dual-nature doctrine; a dilution of voting rights is also required. *El Paso Pipeline*, 152 A.3d at 1264.

The "dual nature" doctrine is premised on the notion that a controlling shareholder, by virtue of his or her control over the corporation, owes a fiduciary duty to minority shareholders. *Gatz v. Ponsoldt*, 925 A.2d 1265, 1281 (Del. 2007). A direct claim arises when the controlling shareholder violates that fiduciary duty by "exercis[ing] its control over the corporate machinery to cause an expropriation of economic value and voting power from the [minority] shareholders." *Id.*

Plaintiffs contend (Cons. Br. 48-52) that the dual-nature doctrine applies to their claims because Treasury was a controlling shareholder at the time of the Third Amendment and used its control over the companies to expropriate plaintiffs' economic rights, thereby breaching a fiduciary duty Treasury purportedly owed to the enterprise's other shareholders. This argument fails at every turn.

First, Treasury is not and has never been a controlling shareholder. A controlling shareholder owns "a majority of a corporation's voting power," or at least enough voting power to enjoy "'effective control.'" *Olenik v. Lodzinski*, 208 A.3d 704, 718 (Del. 2019); *see also Sheldon v. Pinto Tech. Ventures LP*, 220 A.3d 245, 251 (Del.

2019) ("[A] stockholder could be found a controller under Delaware law: where the stockholder (1) owns more than 50% of the voting power of a corporation or (2) owns less than 50% of the voting power of the corporation but *exercises control* over the business affairs of the corporation."). Far from giving Treasury enough voting power to control the enterprises, the preferred stock agreements provide that Treasury has "no voting rights" and that its shares "shall not have any voting powers." Stock Certificates § 5.[15]

Second, Treasury does not have effective control over the enterprises' "corporate machinery," *Gatz*, 925 A.2d at 1281, or its "business affairs," *Sheldon*, 220 A.3d at 251. HERA itself makes clear that, "[w]hen acting as conservator or receiver, [FHFA] shall not be subject to the direction or supervision of any other agency of the United States." 12 U.S.C. § 4617(a)(7). Consistent with that directive, Treasury does not sit on the enterprises' boards of directors, and its preferred stock contracts give it no say in the selection of the enterprises' board members, in the hiring of the enterprises' management, or in the conduct of the enterprises' day-to-day operations.

Plaintiffs' argument boils down to the contention that Treasury can exert influence as a result of its commitment of several hundred billion dollars in capital that is "vital," *Perry Capital*, 864 F.3d at 610, to the enterprises. This Court has made clear, however, that "such [financial] leverage," even "in a take-it-or-leave-it scenario,"

[15] Available at https://www.fhfa.gov/Conservatorship/Pages/Senior-Preferred-Stock-Purchase-Agreements.aspx.

does not demonstrate the type of control necessary to give rise to a direct controlling-shareholder claim. *Starr Int'l*, 856 F.3d at 968-69.

Third, even apart from these fundamental problems with the attempt to invoke the very limited dual-nature exception, plaintiffs' dual-natured argument would fail because Treasury does not owe a fiduciary duty to the enterprises' shareholders akin to that owed to minority stockholders by majority stockholders who exercise "control over the corporate machinery." *Gatz*, 925 A.2d at 1281. In enacting HERA, Congress made clear that Treasury did not enter into a fiduciary relationship with the enterprises' shareholders when it purchased the enterprises' preferred stock. In authorizing Treasury to invest in the enterprises, Congress mandated that Treasury act to "protect the taxpayer," 12 U.S.C. § 1719(g)(1)(B)(iii), and consider the "need for preferences or priorities regarding payments to the Government," *id.* § 1719(g)(1)(C)(i). Treasury, as the government, was charged with protecting the interests of the taxpayer and the government in its agreements with the conservator. Those obligations preclude any suggestion that Treasury owed common-law fiduciary duties to the enterprises' shareholders that required it act in their best interests.

Even if HERA itself were not absolutely clear, it would be necessary to decline plaintiffs' invitation to impose fiduciary duties by reference to state law or common law principles. Cons. Br. 83-84. "[T]he United States is only subject to those fiduciary duties that it specifically accepts by statute or regulation." *Hopi Tribe v. United States*, 782 F.3d 662, 667-68 (Fed. Cir. 2015). Thus, "common-law [doctrines]

standing alone, including those premised on control, are not enough to establish a particular fiduciary duty of the United States." *Id.*; *see also infra* Part III.C.[16]

Fourth, under Delaware law, a dual-natured claim arises only where a transaction improperly "transfers . . . both economic value *and* voting power from the minority stockholders to the controlling stockholder." *El Paso Pipeline*, 152 A.3d at 1263 (emphasis in original). "[T]he extraction of solely economic value from the minority by a controlling stockholder" is insufficient. *Id.* at 1264. The Third Amendment did not transfer voting rights (or any other form of control) from the minority shareholders to Treasury. Treasury does not possess and has never possessed any voting rights in the enterprises. Because plaintiffs allege only that the Third Amendment resulted in the transfer of the economic value of their shares to Treasury and did not "increas[e] [Treasury's] control at the expense of the" minority shareholders, *id.*, their claims are not direct under the dual-nature doctrine.

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[16] Plaintiffs' argue (Cons. Br. 84-88) that, for federal income tax purposes, Treasury took an "ownership" interest in the enterprises when it purchased preferred stock in the companies. Their point is difficult to grasp. As an initial matter, no principle of tax law cited by plaintiff imposes fiduciary duties on Treasury vis-a-vis plaintiffs. Moreover, it is not disputed that Treasury acquired an ownership interest in the enterprises when it became a preferred stockholder. Although irrelevant to the issue of ownership in this case, plaintiffs' discussion suggests that some doubt might exist regarding Treasury's ownership status for tax purposes. Treasury does not pay federal income taxes, and the upshot of plaintiffs' argument appears to be that the Internal Revenue Service exempted Treasury's preferred-stock purchase from the relevant regulations, meaning that, for tax purposes, Treasury's purchase did *not* qualify as an "ownership change." Cons. Br. 86-87.

Plaintiffs wrongly assert (Cons. Br. 53) that the "[d]ilution of voting rights" is "not a necessary precondition" for stating a direct claim under Delaware's dual-nature doctrine. That assertion cannot be squared with the plain language of the Delaware Supreme Court's decision in *El Paso Pipeline*. There, the Delaware Supreme Court stated, in no uncertain terms, that it was unwilling to "expand the universe of claims that can be asserted 'dually' to hold here that the extraction of solely economic value from the minority by a controlling stockholder constitutes direct injury." *El Paso Pipeline*, 152 A.3d at 1264. Such an "expan[sion]" of the dual-nature doctrine, the Court further explained, would be inconsistent with the *Tooley* framework for determining when a claim is direct and when it is derivative and would overwhelm basic principles of Delaware corporation's law. *Id.* Plaintiffs' suggestion that a dilution of voting power is not a prerequisite for stating a direct claim asks this Court to disregard the unambiguous holding of the Delaware Supreme Court.

The Delaware Supreme Court had good reason to cabin the dual-nature doctrine to instances in which a controlling party expropriates voting rights from minority shareholders. As the Court explained, permitting shareholders to sue directly based solely on alleged economic injuries would "largely swallow the rule that claims of corporate overpayment are derivative by permitting stockholders to maintain a suit directly whenever the corporation transacts with a controller on allegedly unfair terms." *El Paso Pipeline*, 152 A.3d at 1264. Any claim of corporate overpayment or waste can be recharacterized as a claim that the corporate managers or their

contractual counterparty expropriated the economic value of the company's shareholders (by depriving them of potential dividends). To avoid converting all such derivative claims into direct claims, the Delaware Supreme Court correctly recognized that, to qualify as a direct claim under the dual-nature doctrine, the party benefiting from the transaction must expropriate voting rights from the minority stockholders, thus gaining greater control of the corporation than it previously had. *See also Roberts*, 889 F.3d at 409 n.1 (recognizing that, for a claim to qualify as direct under Delaware's dual-nature doctrine, there must be an "unlawful transfer of *control*" to the majority shareholder, and concluding that no such transfer of voting rights or control occurred via the Third Amendment). In short, it is not "pure formalism" (Cons. Br. 56) to require a loss of voting control. Such loss of control differentiates a dual-natured claim from the classic derivative claim of corporate overpayment.[17]

Plaintiffs ask this Court to distinguish *El Paso Pipeline* on various grounds that do not survive even cursory scrutiny of the decision. They suggest (Cons. Br. 53-54) that the decision is limited to limited partnerships, and that in "the corporate context itself, the principles of *Tooley*, *Gentile,* and *Gatz* continue to directly control." Cons. Br. 54. The Delaware Supreme Court made clear, however, that it was applying the

[17] The Court of Federal Claims also correctly recognized, Appx39, that the Third Amendment "did not involve the issuance of new shares" of stock to Treasury, let alone the issuance of "excessive shares." Appx39; *Gentile*, 906 A.2d at 100. That Treasury did not "cause[] the [enterprises] to issue 'excessive' shares," 906 A.2d at 100, underscores that Treasury did not gain any additional control over the enterprises and is yet another reason plaintiffs' dual-natured argument fails.

traditional *Tooley/Gentile/Gatz* framework for determining whether a claim is direct, derivative, or dual-natured, and it rejected the contention that a different rule should apply to limited partnerships. *See El Paso Pipeline*, 152 A.3d at 1262. Thus, the Court was stating a general rule—applicable to all corporate types—when it stated that it was not willing "to further expand the universe of claims that can be asserted 'dually' to hold here that the extraction of solely economic value from the minority by a controlling stockholder constitutes direct injury." *Id.* at 1264.[18]

Plaintiffs likewise err in asserting (Cons. Br. 54-55) that *El Paso Pipeline* is distinguishable because the alleged harm was not independent of the harm to the corporation. But, as discussed above, that is clearly the case here: any decline in the economic value of plaintiffs' shares is in no sense independent of the harm to the enterprises.

Plaintiffs are also incorrect to the extent they suggest (Cons. Br. 48-49) that their claims are dual-natured because FHFA, as conservator, controlled the business affairs of the enterprises at the time of the Third Amendment. A complaint that a corporation's management has not acted in the best interests of the corporation is the paradigmatic derivative claim. FHFA was not a controlling shareholder (or a

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[18] Plaintiffs state that the Delaware Supreme Court has rejected the argument that "a reduction in voting power needs to be 'material,' meaning dropping from majority to minority." Cons. Br. 55 (*quoting Gentile*, 906 A.2d at 101-02). Plaintiffs' assertion is no help to them here, as they have failed to establish *any* dilution of their voting power.

shareholder of any kind). The Third Amendment did not "increase[] [FHFA's] control" of the enterprises "at the expense of the" minority stockholders. *See El Paso Pipeline*, 152 A.3d at 1264. FHFA possessed the same rights to direct the enterprises' corporate affairs after the Third Amendment as it did before the Third Amendment. Again, the only injury plaintiffs' allegedly experienced was a loss of economic value due to the depletion of the enterprises' assets. A claim based on such an injury is "solely derivative." *Id.* at 1260.

The Delaware Supreme Court's decision in *Gatz,* on which plaintiffs seek to rely (Cons. Br. 44-45), illustrates the type of circumstance which can give rise to a direct shareholder claim under the dual-nature doctrine and underscores that plaintiffs' claims here are not direct claims. In *Gatz*, a corporation's controlling shareholder used his voting and other stockholder powers to name the directors of the corporation's board and to install himself as the corporation's CEO. 925 A.2d at 1268-69. The defendant then used his control over the corporation's board to "caus[e] the corporation to issue 'excessive' shares of stock" to himself at depressed values, which resulted in the "expropriation of voting power and economic value from the [minority] shareholders by and to the controlling shareholder." *Id.* at 1278. In such a circumstance, the Court explained, the dilution of the minority shareholder's "voting power and economic value" can give rise to a direct claim against the controlling shareholder.

None of the circumstances present in *Gatz* exists here. Treasury did not take advantage of its status as a shareholder to force the enterprises to issue new stock to Treasury at deflated prices, thereby diluting the voting rights and economic value of other shareholders. Instead, it renegotiated its existing contractual rights, in a way that allegedly depleted the enterprises' assets. That is a derivative claim. It makes no difference that Treasury was a shareholder at the time of the relevant transaction. *See, e.g.*, *Cowin*, 741 F.2d at 412, 416 (claim that controlling shareholders diverted corporate assets "at the expense of the minority" shareholders was a claim that "fundamentally" belonged "to the corporation" and could be raised by the plaintiff shareholder "only derivatively"); *Frank v. Hadesman & Frank, Inc.*, 83 F.3d 158, 159-60 (7th Cir. 1996) (claim by one shareholder that another shareholder "hollowed out" the corporation by "making off with the corporation's business" was derivative claim); *Kennedy v. Venrock Assocs.*, 348 F.3d 584, 591 (7th Cir. 2003) (explaining that it is black-letter corporation law that, if a person "steals a corporation's assets, the corporation is the victim of the wrong and owns the cause of action against the thief," and that it makes no difference whether "the thief is a complete outsider," "a preferred shareholder," or someone else; regardless, stealing corporate assets "injures the corporation, and the right of redress therefore belongs to the corporation").

C. Plaintiffs Get Matters Backwards in Asserting That Allowing Their Claims To Proceed Would Advance "Important Federal Interests."

Plaintiffs assert (Cons. Br. 57-59) that, even if their claims are derivative under principles of state and federal corporation law, this Court should allow their claims to proceed nonetheless because doing so would be consistent with "important federal interests." The asserted "important federal interests" are largely a restatement of the arguments plaintiffs advance to urge that their suit is direct, with the added twist that these arguments should prevail even if their claims are not direct under otherwise applicable principles. Plaintiffs' suggestion that this Court should abandon established federal and state law principles in favor of a standardless "federal interest" inquiry is wrong on many levels.

The relevant important federal interests are those embodied in HERA, which rescued the enterprises and helped restore them to viability. Congress put vast amounts of taxpayer money at risk to accomplish that result and made clear that allowing shareholders to bring suits challenging actions taken by the conservator was antithetical to federal interests. Congress did not enact special provisions to permit shareholder suits that are plainly derivative under recognized corporate law doctrine. Instead, Congress transferred to the conservator "*all* rights, titles, powers, and privileges . . . of any stockholder" to the enterprises without exception. 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added); *see also id.* § 4617(b)(2)(B)(i) (FHFA as conservator operates the enterprises with "all the powers of the shareholders"). As

the D.C. Circuit explained, "Congress . . . transferred everything it could to the [conservator]" through § 4617(b)(2)(A)(i). *Kellmer v. Raines,* 674 F.3d 848, 851 (D.C. Cir. 2012). That provision alone is dispositive of plaintiffs' assertion that "important federal interests" dictate that they should be able to circumvent applicable legal standards and pursue a derivative suit on behalf of the enterprises.

Congress's concern that the conservator not be subject to shareholder claims regarding the operation of the conservatorship is underscored by HERA's provision that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator." 12 U.S.C. § 4617(f). Congress thus sought to prohibit claims involving the "second-guess[ing]" of "FHFA's business judgment." *Perry Capital*, 864 F.3d at 615; *see also id.* at 607 (Although the stockholders "no doubt disagree about the necessity and fiscal wisdom of the Third Amendment[,] . . . Congress could not have been clearer about leaving those hard operational calls to FHFA's managerial judgment.").

HERA also quite clearly did not place the interests of shareholders above those of the taxpayer and the housing market when it authorized the conservator to take actions that are "in the best interests of the [enterprises] or the Agency." 12 U.S.C. § 4617(b)(2)(J)(ii). The same priorities are reflected in Congress's directive to Treasury to invest in the enterprises where such an investment was necessary to "provide stability to the financial markets" and would "protect the taxpayer." 12 U.S.C. § 1455(*l*)(1)(B)(i), (iii), 1719(g)(1)(B)(i), (iii).

Plaintiffs note that § 4617(a)(5) provides that the enterprises may file suit to challenge FHFA's appointment as conservator within 30 days of the appointment, from which they infer that the provision "contemplates a shareholder derivative suit against FHFA during [the] conservatorship." Fairholme Br. 27. On the contrary, however, the provision further underscores that Congress considered and expressly addressed the extent to which suits would be permitted. Congress granted the enterprises and their shareholders the right to bring suit in a 30-day period following the conservator's appointment and otherwise conferred no such right. "When Congress provides exceptions in a statute, it does not follow that courts have authority to create others." *United States v. Johnson*, 529 U.S. 53, 58 (2000). By expressly providing for suit within a 30-day window, Congress plainly intended to bar such suits at other times.

Plaintiffs suggest (Cons. Br. 57-58) that the "extraordinary and unprecedented" circumstances of this case should allow them to pursue their suit. That assertion, too, highlights the impropriety of their contention that the Court should carve out a special rule that would allow them to assert their interests. Plaintiffs are correct that this case is unique in that Treasury provided the enterprises with taxpayer-funded "capital infusions of unprecedented proportions." *Perry Capital*, 864 F.3d at 613. To protect that investment and maximize its chances of success, Congress precluded suits of this kind.

Plaintiffs offer the novel assertion (Cons. Br. 58) that this Court should not apply the principles of Delaware corporation law because that law was "not developed to address government action." But the rules governing when a shareholder's claim is direct or derivative are consistent across federal and state law and are no different when a shareholder seeks to challenge government action, as this Court's decision in *Starr International* illustrates. *Starr Int'l*, 856 F.3d at 966 (concluding, under Delaware and federal law, that the plaintiff-shareholders' claims challenging the government's bailout of AIG were derivative); *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336-38 (1990). And plaintiffs' attempt to characterize their claims as "direct" depends primarily on their (mistaken) invocation of the dual-natured exception recognized in limited circumstances by the Delaware Supreme Court.

Plaintiffs likewise miss the mark (Cons. Br. 58-59) when they state that the ordinary doctrine of shareholder standing is a "prudential" one. Plaintiffs are correct that shareholder standing is not an Article III standing requirement. That provides no basis for disregarding the important and long-established principles that it embodies, principles of which Congress would have been aware in enacting HERA. In any event, the government's arguments here do not rely on prudential shareholder standing doctrine: Congress barred shareholders from bringing derivative suits during a conservatorship via HERA's Succession Clause, and there is nothing "prudential" about that provision. *See* 12 U.S.C. § 4617(b)(2)(A)(i).

D. The Succession Clause Does Not Include a Conflict-of-Interest Exception That Would Permit Plaintiffs To Bring a Derivative Suit Challenging the Third Amendment.

As explained, the Court of Federal Claims correctly determined that plaintiffs' claims are solely derivative, and that they therefore cannot be pursued as direct claims. And it is undisputed that HERA's Succession Clause generally transfers a shareholder's right to bring derivative suits to FHFA during a conservatorship. Having recognized that plaintiffs' claims are derivative, the court should have dismissed them accordingly. The court erred, however, in believing that it was compelled to read an implied conflict-of-interest exception into HERA's Succession Clause that permits plaintiffs to bring derivative claims on behalf of the enterprises to challenge the conservator's transaction with Treasury. Appx44-45.

1. As a threshold matter, plaintiffs are barred by issue preclusion from advancing the argument that HERA's Succession Clause includes a conflict-of-interest exception. Issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). And "a judgment rendered in a shareholder-derivative lawsuit will preclude subsequent litigation [of that issue] by the corporation and its shareholders." *Cottrell v. Duke*, 737 F.3d 1238, 1243 (8th Cir. 2013); *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) ("Furthermore, in shareholder derivative actions arising under Federal Rule of Civil Procedure 23.1, parties and their privies

include the corporation and all nonparty shareholders.”); *Sonus Networks, Inc. v. Ahmed*, 499 F.3d 47, 63 (1st Cir. 2007) (rejecting assertion that plaintiffs lacked privity with plaintiffs in a prior derivative action because “[i]t is a matter of black-letter law that the plaintiff in a derivative suit represents the corporation, which is the real party in interest”); *United States v. LTV Corp.*, 746 F.2d 51, 53 n.5 (D.C. Cir. 1984).

The question whether HERA’s Succession Clause includes a conflict-of-interest exception was litigated and resolved against all enterprise shareholders in *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 229-30 (D.D.C. 2014). Addressing an expressly derivative breach of fiduciary duty claim brought by enterprise shareholders, the district court in *Perry Capital* concluded that (1) HERA’s Succession Clause bars derivative suits; and (2) no conflict-of-interest exception to that provision exists. *Id.* Those conclusions, both of which were necessary to the court’s dismissal of the relevant derivative claims, were affirmed by the court of appeals. *See Perry Capital*, 864 F.3d at 625 (“We therefore conclude the Succession Clause does not permit shareholders to bring derivative suits on behalf of the Companies even where the FHFA will not bring a derivative suit due to a conflict of interest.”). It is irrelevant that the derivative claims that the court addressed in *Perry Capital* were not takings or illegal exaction claims. Issue preclusion applies “even if the issue recurs in the context of a different claim.” *Taylor*, 553 U.S. at 892. Because the issue whether § 4617(b)(2)(A)(i) includes a conflict-of-interest exception was fully litigated and

decided on the merits against enterprise shareholders in previous derivative litigation, plaintiffs cannot re-litigate it in pursuit of their derivative claims here.

The Court of Federal Claims agreed that plaintiffs here are "attempting to litigate the same issue that was actually litigated and necessarily decided in *Perry* [*Capital*]." Appx42. The court nonetheless concluded that plaintiffs were not barred from re-litigating the conflict-of-interest exception issue because, in the court's view, plaintiffs' interests here were not adequately represented by the plaintiffs in *Perry Capital*. Appx42.

That is clearly not the case. With respect to the question whether HERA's succession provision includes an implicit conflict-of-interest exception, plaintiffs' interests are fully aligned with those of the plaintiff-shareholders in *Perry Capital*. Indeed, the plaintiffs in *Perry Capital* made the same arguments plaintiffs make here, citing the identical precedent to support their assertion that a conflict-of-interest exception exists. *Compare* Fairholme Br. 22-31 with Mem. in. Opp'n at 32-35, *In re: Fannie Mae/Freddie Mac*, No. 13-1288 (D.D.C. Mar. 21, 2014), and Class.Pl.Br. at 23-24, *Perry Capital v. Mnuchin*, No. 14-5243 (D.C. Cir. June 30, 2015). Moreover, many of the plaintiffs in this litigation were also plaintiffs in *Perry Capital*, represented by the same counsel both times.

The Court of Federal Claims mistakenly concluded that the plaintiffs in *Perry Capital* did not adequately represent the interests of other shareholders because the district court in *Perry Capital* concluded that the plaintiffs could not assert derivative

claims in light of HERA's Succession Clause. That *Perry Capital* resolved a threshold question in the government's favor, however, in no way suggests that those plaintiffs did not adequately represent the interests of all shareholders on the question of whether the Succession Clause includes a conflict-of-interest exception.

The First Circuit's analysis in *Sonus Networks* further highlights the trial court's error here. 499 F.3d at 64. The First Circuit in that case held that issue preclusion barred the shareholder plaintiffs from re-litigating the same threshold question decided against other shareholders in a previous state court derivative suit. The state court in the previous case concluded that the plaintiffs were barred from brining a derivative suit because they had not asked the corporation's board to bring suit and making such a demand would not have been futile. *Id.* at 71. The First Circuit concluded that the plaintiffs in the federal suit were bound by the earlier court's determination on the demand-futility question. *Id.*

Like plaintiffs here, the plaintiffs in *Sonus Networks* argued that issue preclusion did not apply because the shareholders in the previous suit were not adequate representatives of the plaintiffs in the *Sonus Networks* case. 499 F.3d at 64. That was so, plaintiffs claimed, because, in resolving the demand-futility question, the state court had not reached the merits of the shareholders' claims but had, instead, "only [resolved] the question of whether the [previous shareholders] should be permitted to bring suit on behalf of the corporation." *Id.* at 64. In rejecting that argument, the First Circuit explained that the state court's ruling against the shareholders on a

threshold ground that precluded the derivative action did not mean that the prior plaintiffs were inadequate representatives. *Id.* The First Circuit emphasized that the particular threshold legal issue was "the same no matter which shareholder served as nominal plaintiff." *Id.* Thus, absent evidence that the particular prior plaintiffs were inadequate in representing shareholders' views on the issue, issue preclusion barred subsequent shareholders from raising the same issue in a later derivative suit. *Id.*

The First Circuit's logic applies with full force here. The threshold question whether HERA's Succession Clause bars shareholders from bringing derivative suits or instead includes a conflict-of-interest exception, like the demand-futility question in *Sonus Networks*, is "the same [issue] no matter which shareholder served as nominal plaintiff." 499 F.3d at 64. That the *Perry Capital* plaintiffs did not prevail on that issue does not mean their representation was inadequate.

2.a. Plaintiffs' argument that the Succession Clause should be read to include an implied conflict-of-interest exception that would permit shareholders to challenge the Third Amendment on behalf of the enterprises is, in any event, without merit, as several courts have concluded. *See Perry Capital*, 864 F.3d at 625 (concluding that HERA's Succession Clause does not include a conflict-of-interest exception); *see also Roberts*, 889 F.3d at 409-10 (same).

The Court of Federal Claims mistakenly believed that this Court's decision in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999), required it to imply a conflict-of-interest exception in HERA's Succession

Clause. It likewise erred in concluding that such an exception, if it existed, would apply to plaintiffs' claims. Appx44-45.

In *First Hartford*, this Court addressed the FDIC's statutory receivership authority under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which included "the right to control the prosecution of legal claims on behalf of the insured depository institution now in its receivership[.]" 194 F.3d at 1295. The Court concluded that this authority included a "very narrow" conflict-of-interest exception that allowed the plaintiff-shareholders to bring a derivative claim under the specific circumstances presented. *Id.*

This Court should not extend the *First Hartford* exception to HERA. HERA's Succession Clause by its terms admits of no exceptions. *See Kellmer*, 674 F.3d at 851 ("Congress has transferred everything it could to the [conservator]" through § 4617(b)(2)(A)(i).). "Its language is clear and absolute," *Roberts*, 889 F.3d at 409, and implying a conflict-of-interest exception would be flatly at odds with its purpose. *Perry Capital*, 864 F.3d at 625 (explaining that it "makes little sense" to adopt an exception at odds with the "purpose" of the Succession Clause and inconsistent with its "plain statutory text").

Moreover, whereas FIRREA applies broadly to a range of potential receiverships for a variety of financial institutions, HERA addresses the conservatorship or receivership of the two enterprises central to the United States housing market, who were themselves created by Congress and who required an

extraordinary commitment of taxpayer funds. When Congress enacted HERA and its Succession Clause, it was fully aware that the conservator would likely turn to Treasury for essential capital, and it authorized Treasury to invest in the enterprises. *See* 12 U.S.C. § 1455(*l*)(1)(B)(i), (iii), 1719(g)(1)(B)(i), (iii). If Congress believed that these dealings created a conflict of interest that should permit suit by shareholders, it would have said so. Instead, it did the opposite; it transferred "all rights, titles, powers, and privileges" of the enterprises' shareholders to FHFA. 12 U.S.C. § 4617(b)(2)(A)(i).

As discussed, the intention to bar all shareholder suits is confirmed by other statutory provisions, including the narrow, express exception that provides the enterprises with a 30-day window to file a lawsuit challenging FHFA's appointment as conservator or receiver. Another narrow exception permits shareholder participation in the statutory claims process in the event of the enterprises' liquidation. 12 U.S.C. § 4617(b)(2)(K)(i). That Congress expressly granted shareholders and the enterprises these narrow post-conservatorship rights only underscores that the enterprises and their shareholders do not otherwise retain the right to bring suit on behalf of the enterprises during a conservatorship.[19]

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[19] Plaintiffs claim that the Succession Clause "terminate[d]" their right to bring derivative suits. Fairholme Br. 26 (emphasis omitted). That is wrong. The Succession Clause transferred the shareholders' right to bring a derivative suit to FHFA during the conservatorship, 12 U.S.C. § 4617(b)(2)(A), just as it transferred all other shareholder rights to FHFA as conservator. None of the rights have been terminated.

Plaintiffs wrongly argue (Fairholme Br. 23-24) that Congress should be assumed to have implicitly incorporated the *First Hartford* exception in HERA. Such a presumption is not proper where, as here, there is "no direct evidence that Congress ever considered the issue . . . or voiced any views upon it." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971); *see also Brown v. Gardner*, 513 U.S. 115, 121 (1994) (similar). Moreover, as the *Perry Capital* court observed, a small number of "circuit court decisions do not so clearly settle[ ] the meaning of [the] existing statutory provision in FIRREA that we must conclude the Congress intended *sub silentio* to incorporate those rulings into the Recovery Act." 864 F.3d at 625.

Plaintiffs stray even farther afield when they suggest (Fairholme Br. 24) that the Supreme Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), sheds light on Congress's understanding of HERA's Succession Clause. Plaintiffs again offer no indication that Congress considered the *Winstar* cases when it enacted HERA's Succession Clause. In any event, the plaintiffs in *Winstar* were the corporations themselves, not shareholders of the corporations. *Id.* at 858. And, as this Court explained in *First Hartford*, the FDIC intervened in *Winstar* and the related cases *after* the Supreme Court issued its decision in *United States v. Winstar*. *First Hartford*, 194 F.3d at 1295. Once it did intervene, the FDIC then prosecuted the cases against the United States on behalf of the failed institutions it oversaw as receiver. *See, e.g.*, *Ambase Corp. v. United States*, 61 Fed. Cl. 794, 795 (2004). Thus, the Supreme Court in *Winstar* did not address the rights of shareholders to bring derivative claims

on behalf of failed institutions, nor did the Court have any occasion to consider FDIC's rights under FIRREA's analogous succession provision.

b. Even if this Court were to conclude that Congress incorporated *First Hartford*'s limited conflict-of-interest exception into HERA's Succession Clause, that exception would not apply here. This Court emphasized in *First Hartford* that the conflict-of-interest exception it adopted applied only in a "very narrow range of circumstances," 194 F.3d at 1295, and the circumstances in that case bear no resemblance to those here. In *First Hartford*, the Court concluded that shareholders of a failed bank could bring a derivative suit where the alternative would have required FDIC as receiver to bring suit to challenge a pre-receivership action taken by FDIC as regulator. *See id.* In other words, the only possible alternative suit would have involved FDIC as receiver suing FDIC as regulator.

A similar conflict is not present here. To challenge the Third Amendment on behalf of the enterprises, FHFA as conservator would not be required to sue FHFA as regulator or conservator. If FHFA wished to pursue a takings claim on behalf of the enterprises, FHFA as conservator would file suit (in the enterprises' name) against the United States. The FDIC as receiver has pursued many such suits against the United States on behalf of failed banks in receivership. *See, e.g.*, *First Hartford Corp. Pension Plan & Tr. v. United States*, 42 Fed. Cl. 599, 616 (1998) (noting that "[t]he FDIC has intervened in more than 40 *Winstar*-related cases, as receiver, [against the United States], and has originated similar claims against the Government on behalf of failed

depository institutions in receivership.”). If FHFA believed the Third Amendment was unlawful and harmed the enterprises, it could have brought suit against Treasury or simply declined to pay dividends to Treasury, forcing Treasury to bring suit against the enterprises.[20]

The error of the theory underlying the conflict-of-interest exception that plaintiffs successfully urged to the trial court is particularly clear because its logic cannot be cabined. Plaintiffs’ logic would permit shareholders to challenge *any* transaction that FHFA as conservator entered on behalf of the enterprises. In all such cases, FHFA as conservator would be a counter-party to the transaction (on behalf of the enterprises) and, as a participant in the transaction, would purportedly possess a disabling conflict-of-interest. Permitting shareholders to challenge every transaction FHFA enters as conservator would not only run counter to the Succession Clause, but would negate Congress’s clear intention throughout HERA to shield the conservator’s judgment from judicial review.

The *First Hartford* exception is inapplicable for an additional reason. In *First Hartford*, the conduct challenged by the plaintiff-shareholders occurred before the FDIC was appointed receiver. *See* 194 F.3d at 1283-84. By contrast, plaintiffs

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[20]Any hypothesized conflict is further lessened by the fact that FHFA is several directors removed from the director who agreed to the Third Amendment. For the reasons noted, nothing would prevent FHFA’s current Director from bringing suit challenging the validity of the Third Amendment on behalf of the enterprises if the Director believed the Amendment was invalid from its inception.

challenge action taken by FHFA during the conservatorship, in its role as conservator. It is precisely such actions that Congress took pains to shield from second-guessing by shareholders and courts. *See* 12 U.S.C. § 4617(b)(2)(A)(i), (f). Extending the implicit conflict-of-interest exception adopted in *First Hartford* to plaintiffs' suit would thus run counter to HERA's basic design.

3. Plaintiffs make various policy arguments in support of their claim that this Court should recognize an implied exception to the Succession Clause that would permit them to pursue their derivative claims. Fairholme Br. 28-31. Like the policy arguments discussed above to support an exception to governing corporate law principles, these contentions are unavailing.

The general "presumption favoring judicial review of administrative action" (Fairholme Br. 29) has no application here. This is not a suit under the Administrative Procedure Act, and, as discussed above, the conservator is not the government. Even when a statute such as the Administrative Procedure Act creates a presumption in favor of review, moreover, the presumption "is rebuttable" and "fails when a statute's language or structure demonstrates that Congress" intended to preclude review. *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015). Through the Succession Clause and other HERA provisions, Congress demonstrated its clear intent to prohibit shareholders from bringing suit on behalf of the enterprises. Nor does the Succession Clause bar suit against the conservator generally. The Clause precludes shareholders from pursuing derivative claims on behalf of the enterprises.

But it does not bar shareholders from bringing direct claims against the enterprises. *See Perry Capital*, 864 F.3d at 632. Nor does the Clause bar third parties adversely affected by FHFA's actions as conservator from bringing suit.

Plaintiffs similarly err in arguing (Fairholme Br. 30-31) that the Due Process Clause mandates that they be permitted to bring derivative takings claims on behalf of the enterprises, on the ground that Congress cannot constitutionally pass a law "requiring that Fannie and Freddie be represented by a conflicted representative." Fairholme Br. 29-30. For the reasons discussed, FHFA as conservator could challenge the Third Amendment on behalf of the enterprises and it would not be a conflicted representative. Moreover, HERA did not require the enterprises to accept FHFA as their conservator. To the contrary, HERA permits the enterprises to challenge FHFA's appointment as conservator, provided they do so within 30 days. *See* 12 U.S.C. § 4617(a)(5). That § 4617(a)(5) required the enterprises to bring such a challenge within 30 days reflects the need to avoid delay in establishing the validity of FHFA's actions as conservator and the significant adverse consequences that flow from a belated challenge to those actions. Such a scheme satisfies due process. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 435 (1944) (concluding that a statutory scheme that channeled all challenges, including constitutional challenges, to wartime price regulations into an administrative process with a sixty-day filing deadline did not violate due process "in view of the urgency and exigencies of wartime price regulation").

III. Plaintiffs' Claims for Breach of Contract and Breach of Fiduciary Duty Fail for Additional Reasons, As Does Their Claim That a Preclusion of Derivative Suits Itself Constitutes a Taking.

As we have shown, virtually all of plaintiffs' claims should be dismissed for two separate, threshold reasons. First, the actions of FHFA as conservator in agreeing to the purchase agreements and their amendments are not actions of the United States. Second, as the Court of Federal Claims recognized, these claims, regardless of how they were pled, are derivative and not direct. Accordingly, they are barred by HERA's Succession Clause.

Some of these claims are also barred for additional reasons, as is the *Cacciapalle* plaintiffs' unique takings claim.[21]

A. The Implied-in-Fact Contract Claims Fail, Whether Pled as Derivative or Direct.

1. Plaintiffs Fail To State a Derivative Claim That FHFA Breached an Implied-in-Fact Contract with the Enterprises.

Plaintiffs claim that an implied-in-fact contract between FHFA and the boards of the enterprises came into existence when the enterprises entered conservatorship in

[21] Although the Court of Federal Claims rejected the United States' argument that the court lacked jurisdiction under 28 U.S.C. § 1500 over the *Fairholme Funds*, *Cacciapalle*, and *Arrowood* suits, we preserve that argument here for future review, as it would provide an alternate ground to dismiss these suits. Section 1500 provides that "[t]he United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

2008. This theory posits that FHFA promised the enterprises' boards that it would operate the conservatorships in a way that would protect the enterprises' capital and the interests of the enterprises' shareholders in exchange for the enterprises' consent to conservatorship. Appx47. Plaintiffs allege that FHFA breached this implied contract when FHFA entered into the Third Amendment on behalf of the enterprises. For the reasons explained above, the Court of Federal Claims should have dismissed plaintiffs' claim at the threshold. *See supra* Parts I & II. FHFA as conservator (the alleged breacher of the contract) is not the United States for Tucker Act purposes, and plaintiffs' claim is a derivative claim barred by HERA's Succession Clause.

In addition to these bars to suit, plaintiffs fail to plausibly allege the existence of an implied-in-fact contract, thereby defeating their claim for breach of any such contract. Plaintiffs allege that FHFA and the enterprises' boards "entered into an implied-in-fact contract" under which "FHFA if made conservator would 'preserve and conserve [the enterprises'] assets and property,' that its conservatorship would

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Shortly after filing their initial complaints in the Court of Federal Claims, some plaintiffs filed suit against Treasury and other defendants in district court. *See* Compl., *Cacciapalle v. Federal Nat'l Morg. Ass'n*, No. 13-1149, (D.D.C. July 29, 2013) (filed 19 days after Court of Federal Claims suit); Compl., *Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency*, No. 13-1053, (D.D.C. July 10, 2013) (filed one day after Court of Federal Claims suit); Compl., *Arrowood Indemnity Co. v. Federal Nat'l Mortg. Ass'n*, No. 13-1439, (D.D.C. Sept. 20, 2013) (filed two days after Court of Federal Claims suit). Relying on binding precedent in *Tecon Eng'rs, Inc. v. United States,* 343 F.2d 943, 949 (Ct. Cl. 1965), the Court of Federal Claims concluded that 28 U.S.C. § 1500 was not a bar to these suits because plaintiffs filed these suits in the Court of Federal Claims before they filed their district-court suits. Appx12.

continue only until [the enterprises] w[ere] placed in a safe and solvent condition, and that, in exchange, the [boards] would consent to, and not challenge or litigate, such a course of action." Appx481, ¶ 273; Appx483-84, ¶ 283.

This Court has made clear that to establish an implied contract a plaintiff must point to "something more than a cloud of evidence that could be consistent with a contract." *Mola Dev. Corp. v. United States*, 516 F.3d 1370, 1378 (Fed. Cir. 2008) (quoting *D & N Bank v. United States*, 331 F.3d 1374, 1377 (Fed. Cir. 2003)); *see also Grady v. United States*, 656 F. App'x 498, 499-500 (Fed. Cir. 2016). Indeed, a plaintiff must allege facts establishing a "clear indication" of intent to contract and the other elements of a contract. *Mola Dev. Corp.*, 516 F.3d at 1378 (quoting *D & N Bank*, 331 F.3d at 1378).

Plaintiffs have failed to allege even a "cloud of evidence" supporting the existence of a contract, let alone the "clear indication" required by this Court to establish an implied-in-fact contract. Indeed, no allegation remotely supports the proposition that the enterprises consented to conservatorship in exchange for special treatment by the future conservator. Instead, the complaint merely makes the conclusory assertion that FHFA and the enterprises' boards "entered into an implied-in-fact contract." Appx481, ¶ 273; Appx483-84, ¶ 283. Such "[t]hreadbare recitals" of FHFA's "offer" and the boards' "accept[ance]" are not assumed to be true, *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 679 (2009); *see* Appx480-81, ¶¶ 269-270; Appx482-83, ¶¶ 279–280, and nothing in the complaint provides any "clear indication" that FHFA

intended to contract with the enterprises, *Mola Dev. Corp.*, 516 F.3d at 1378 (quoting *D & N Bank*, 331 F.3d at 1378).

The absence of any relevant allegations is altogether unsurprising in the context of FHFA's statutory framework. HERA mandates that FHFA ensure the enterprises operate in a manner consistent with the "public interest," 12 U.S.C. § 4513(a)(1)(B)(v), and, in keeping with that directive, it authorizes the conservator to consider broader interests than those of the enterprises viewed narrowly. *Id.* § 4617(b)(2)(J). To the same end, Congress directed Treasury to invest in the enterprises where such an investment was necessary to "provide stability to the financial markets" and would "protect the taxpayer." *Id.* §§ 1455(*l*)(1)(B)(i), (iii), 1719(g)(1)(B)(i), (iii). Plaintiffs' argument reflects the mistaken premise that FHFA could properly disregard its mandate to protect the public interest by promising to operate the enterprises in conservatorship with solely the private shareholders' interests in mind. FHFA did not and could not abandon its statutory mission and obligations in return for a tacit agreement to forgo suit or for any other reason. And, of course, FHFA had no need to bargain with the enterprises and could have appointed the conservator under several of the other statutory provisions without asking the boards to agree. *Id.* § 4617(a)(3).

Indeed, the assertions of the complaint were intended to support the mistaken theory that FHFA obtained consent to the appointment of the conservator through coercion, rather than bargaining. *See, e.g.,* Appx412, ¶ 64 (alleging that FHFA

"obtained the Companies' consent by threatening to seize them if they did not acquiesce and by informing them that [FHFA and Treasury] had already selected new CEOs and had teams ready to move in and take control"); *id.* (alleging that the boards were "confronted with a Hobson's choice: agree to conservatorship, or they would face 'nasty lawsuits' and Treasury would refuse to provide the Companies with any capital if they needed it"). But if the directors faced a "Hobson's choice," it was not created by FHFA but by the fact that the boards had presided over enterprises now on the brink of collapse whose survival depended on a massive injection of taxpayer money under the terms established by Congress. Moreover, HERA itself provided that FHFA could impose the conservatorships without the boards' consent, 12 U.S.C. § 4617(a)(3), and that directors are immune from suit if they consent to conservatorship, *id.* § 4617(a)(6); those were not coercive threats or offers that FHFA extended. In any event, plaintiffs' allegations that FHFA coerced the enterprises into conservatorship are wholly incompatible with their theory that FHFA bargained with the enterprises to secure their consent.

Given the public nature and immense importance of FHFA's decision to place the enterprises into conservatorship, it also strains credulity to assert that FHFA agreed to limit its conservatorship authority via a contract that neither it nor the enterprises thought worthy of recording. That fact alone renders plaintiffs' claim utterly implausible.

The Court of Federal Claims nevertheless concluded that plaintiffs plausibly alleged that FHFA entered into an implied-in-fact contract when it obtained the boards' consent to conservatorship. The court based this conclusion on its declaration that the complaint includes allegations that FHFA "sought to bargain for the Enterprises' boards' consent to place the Enterprises into conservatorship." Appx48. That is incorrect. As explained, the complaint contains no factual allegations of bargaining or negotiations. Still less does it contain any factual allegations of an agreement of the kind plaintiffs now posit.

Indeed, the only factual allegation cited by the court was the fact that FHFA asked for and received the boards' consent. *See* Appx48. But this fact cannot bear the weight assigned to it. HERA identifies this mechanism as one of several grounds for making the discretionary appointment of the conservator. 12 U.S.C. § 4617(a)(3)(I). The statute does not remotely suggest that in proceeding in this manner FHFA would enter into a contract with the boards. And, as this Court made clear in *Mola Development Corp.*, "[a]n agency's performance of its regulatory or sovereign functions does not create contractual obligations." 516 F.3d at 1378 (quoting *D & N Bank*, 331 F.3d at 1378-79). That FHFA chose to ask for consent, consistent with HERA, in order to perform its regulatory function provides no basis for the Court of Federal Claims' conclusion that plaintiffs adequately alleged the existence of the purported contract.

2. The Court of Federal Claims Correctly Held That It Lacks Jurisdiction over Plaintiffs' Direct Implied-in-Fact Contract Claims.

Plaintiffs' failure to adequately plead an implied-in-fact contract dooms both their direct and derivative implied-in-fact contract claims. Were the Court to reach the question, however, the Court of Federal Claims also correctly held that plaintiffs cannot pursue direct implied-in-fact contract claims because plaintiffs are neither parties to the purported contract nor third-party beneficiaries of it.

The Tucker Act limits the Court of Federal Claims' jurisdiction over contract claims to those based "upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). Ordinarily, then, "a plaintiff must be in privity of contract with the United States" in order "to sue the sovereign on a contract claim." *Pacific Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1350 (Fed. Cir. 2016) (quoting *Anderson v. United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003)). This Court has recognized only "[l]imited exceptions" to the privity requirement, "such as when a party can demonstrate that it was an intended third-party beneficiary under the contract." *Pacific Gas & Elec. Co.*, 838 F.3d at 1350-51.

Plaintiffs' implied-in-fact contract claims are premised on an alleged contract between FHFA and the enterprises. Plaintiffs do not allege that they are parties to this contract. Rather, they invoke the third-party beneficiary exception to the privity requirement, claiming that they were "intended beneficiaries" of the contract. Appx531-32, ¶ 136; *see* Cons. Br. 89-96; Appx34.

"Third party beneficiary status is an 'exceptional privilege' and, to avail oneself of this exceptional privilege, a party must 'at least show that [the contract] was intended for his *direct* benefit.'" *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir.) (alteration in original) (quoting *German All. Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)), *opinion amended on reh'g*, 273 F.3d 1072 (Fed. Cir. 2001). Where shareholders assert third-party beneficiary status, the "contract must express the intent of the promissor to benefit the shareholder *personally, independently of his or her status as a shareholder*." *Castle v. United States*, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting *Glass*, 258 F.3d at 1353-54).

Plaintiffs do not allege any contractual provisions intended to benefit them directly and independently of their status as shareholders. (Indeed, plaintiffs would be hard-pressed to do so given that they do not identify an express contract, let alone one with contractual provisions expressly identifying shareholders as beneficiaries). Plaintiffs assert that FHFA agreed to treat the enterprises in a particular manner when acting as conservator: that FHFA "would aim to 'preserve and conserve the [enterprises'] assets and property,'" "restore the [enterprises] to a 'sound and solvent condition,'" and terminate the conservatorship upon achieving that condition. *See, e.g.*, Appx478, ¶ 260. If those promises existed, they would, as the Court of Federal Claims noted, be "directed at the [e]nterprises," not plaintiffs, and concern only "how the FHFA [as conservator] would operate the [e]nterprises." Appx34, 35. Such promises pertaining to the "treatment" of a company contemplate only "indirect

benefit" to shareholders that "is insufficient to make them third party beneficiaries of a contract." *FDIC v. United States*, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (quotation marks omitted).[22]

Plaintiffs likewise cannot establish third-party beneficiary status on the theory that the enterprises' boards would have considered the effect on shareholders of consenting to conservatorship. *See* Cons. Br. 94. As the Court of Federal Claims explained, "it is of no import that the Enterprises . . . purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, 'every action of a corporation is supposed to benefit its shareholders,' but the 'law has not viewed this general benefit as making every shareholder a third-party beneficiary.'" Appx34 (quoting *Suess v. United States*, 33 Fed. Cl. 89, 94 (1995)). Board members owe fiduciary duties to the company and its shareholders and, for that reason, regularly consider the effect of their decisions on shareholders. If a board's mere consideration of shareholders in entering into a contract were enough to establish third-party beneficiary status, any shareholder could sue directly to enforce contractual rights belonging to the corporation, inverting the hornbook rule that a shareholder does not have direct standing to sue for injury to the corporation and can

[22] The *Owl Creek* plaintiffs cannot demonstrate that FHFA and the enterprises intended to benefit them directly for an additional reason: they did not purchase enterprise stock until "after [FHFA] imposed the conservatorships." Appx489, ¶ 11.

bring only a shareholder derivative suit for such injuries—and even then under limited circumstances. *See supra* Part II.A.

Nor do public statements made by the FHFA Director after the enterprises entered conservatorship show any intent to benefit shareholders personally, Cons. Br. 94, even assuming such public statements could give rise to contractual obligations. The Director explained that FHFA conservatorship is "a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations," and that "FHFA will act as the conservator to operate the Enterprises until they are stabilized." Appx499-500, ¶ 45 (emphasis omitted). These statements concern only how FHFA intended to operate the enterprises and reveal no special consideration of shareholders at all. *See FDIC*, 342 F.3d at 1320. FHFA statements that "the common and all preferred stocks will continue to remain outstanding" and that "[s]tockholders will continue to retain all rights in the stock's financial worth" also fail to support plaintiffs' claim to third-party beneficiary status. Appx499-500, ¶¶ 45, 46 (alteration in original). As the Court of Federal Claims explained, these "factual statements" about the impact of the conservatorships on shareholders' stock "do not reflect that the FHFA intended to confer any specific benefit on plaintiffs independent of their role as shareholders." Appx35.

Plaintiffs are not similarly situated to any of the parties recognized as third-party beneficiaries in the cases on which they rely. *See* Cons. Br. 93-94. In both *Hunter v. Old Ben Coal Co.*, 844 F.2d 428 (7th Cir. 1988), and *Home & City Savings Bank*

v. Rose Associates, I, L.P., 572 N.Y.S.2d 458 (N.Y. App. Div. 1991), a party to an express contract promised to contract directly with third-party shareholders. In *Hunter*, a coal company entered into an option agreement with an association of landowners under which the company agreed to purchase all the coal interests owned by members of the association in a designated area if the company chose to acquire any coal interests in that area. *Hunter*, 844 F.2d at 429-30. Although the coal company exercised the option, it failed to acquire two members' coal interests, and they subsequently sued to enforce the option agreement. *Id.* at 430-31. The Seventh Circuit deemed the members to be third-party beneficiaries of the agreement between the company and the association because the option agreement "was essentially a contract obligating [the coal company] to contract directly with [the coal association's] members," and the agreement "specifically identifi[ed] the members" of the association and "required [the coal company] to make payments directly to the members," not the association, upon exercising the option. *Id.* at 432, 433. *Home & City Savings Bank* concerned a merger agreement in which the acquiring company explicitly promised to buy the acquired company's shareholders' shares at a set rate. 572 N.Y.S.2d at 462. In both *Hunter* and *Home & City Savings Bank*, the explicit promise to deal directly with shareholders demonstrated the "inten[t] by the promisor . . . to directly benefit" the shareholders. *Hunter*, 844 F.2d at 433; *accord Home & City Sav. Bank*, 572 N.Y.S.2d at 462. Here, plaintiffs allege no promise, let alone an explicit or specific promise, by FHFA to contract for their benefit.

The other authorities on which plaintiffs' attempt to rely are similarly far afield. The third-party beneficiaries in *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Fed. Cir. 1984), were farmers who were members of water-user associations that contracted with the federal government for the delivery of water. *Id.* at 1573. The allotment of water to each association was determined by a consent decree entered by a federal district court. *Id.* When the farmers sued the government for breach of the consent decree, this Court held that the farmers were proper third-party beneficiaries entitled to bring suit. *Id.* at 1576. As this Court later recognized, the farmers' third-party beneficiary status hinged on the fact that "a specific, identifiable benefit flowed from the government to each farmer under the consent decree," as the farmers "held a 'property right in the water to the extent of their beneficial use thereof.'" *Pacific Gas & Elec. Co.*, 838 F.3d at 1362 (quoting *H.F. Allen Orchards,* 749 F.2d at 1576). Here, plaintiffs are not beneficiaries of such a consent decree nor can they point to any "specific, identifiable benefit" that flows directly to them under the alleged terms of the contract. The only promises they allege concern the treatment of the enterprises.

Similarly, in *Silberberg v. Becker*, 191 A.3d 324 (D.C. 2018), members of two families—the Silberbergs and the Beckers—were the sole shareholders of a corporation that owned and operated two apartment buildings. *Id.* at 328. The Beckers wanted to sell the buildings and terminate the corporation, while the Silberbergs wanted to continue operating the buildings through the corporation. *Id.* To accommodate these divergent interests, the corporation entered into a stock

redemption agreement with the Beckers to redeem their stock and leave the Silberbergs with majority control. *Id.* When the Beckers violated the agreement, the District of Columbia Court of Appeals held that the Silberbergs could sue for breach of the stock redemption agreement as third-party beneficiaries. *Id.* at 333-36. As the court emphasized, the Silberbergs' claim to third-party beneficiary status did "not rely on their mere status as shareholders." *Id.* at 334. Rather, the Silberbergs alleged that the purpose of the agreement was to make them majority shareholders of the corporation so that they could continue to own and operate the buildings. *Id.* That "immediate direct benefit" to the Silberbergs "as a family group," the court explained, was sufficient to allege third-party beneficiary status, unlike any "indirect, speculative benefit" they might derive as shareholders from the corporation profiting from the agreement and generating dividends for them. *Id.* at 334. Plaintiffs here can allege no immediate or direct benefit that in any way resembles the ability to retain family properties or exercise majority control. Their claim instead rests on the indirect and speculative benefit they would receive as shareholders from the way FHFA allegedly promised to treat the enterprises.

Contrary to plaintiffs' contention, collective bargaining principles, applicable to negotiations between employers and employee unions, have no bearing on the third-party beneficiary question in this case, involving the relationship between a statutory conservator and the financial institutions it oversees. *See* Cons. Br. 93 (citing Restatement (Second) of Contracts § 302 illus. 14 (Am. L. Inst. 1981)). Nor do the

principles that plaintiffs would derive from that very different context advance their argument. "The determination whether an individual employee has standing to seek enforcement of a right or duty granted under the collective bargaining agreement turns upon the nature of the right or duty at issue, the test being whether the right sought to be enforced is *'uniquely personal'* to the individual plaintiff or whether it is instead possessed by the *bargaining unit as a whole*." 20 Williston on Contracts § 55:60, Westlaw (4th ed. database updated Nov. 2020) (emphases added) (footnotes omitted). Thus, an employee "discharged without cause in violation of a collective bargaining agreement" may sue under the agreement, but "an individual employee has no standing to sue to compel negotiations over broad subjects of collective bargaining, such as the renegotiation of a new contract or the relocation of a plant," which are enforceable by the union alone. *Id.* Similarly, a shareholder may sue under a contract between a company and the government only when a promise is directed at him "*personally*," *Castle*, 301 F.3d at 1338 (quoting *Glass*, 258 F.3d at 1353-54), not when—as here—the alleged promises concern the broad treatment of the company and stand to benefit the shareholders only indirectly, *FDIC*, 342 F.3d at 1320.

Finally, plaintiffs contend that it was reasonable for them to rely on FHFA's alleged promise to operate the enterprises for shareholders' benefit as manifesting an intention to confer a right on them personally. *See* Cons. Br. 95 (citing Restatement (Second) of Contracts § 302, cmt. d). It was not. Whatever beliefs shareholders may have had about assurances in an implied agreement have no bearing on whether the

alleged agreement "conferred benefits upon [shareholders] personally, apart from their status as shareholders." *Castle*, 301 F.3d at 1338.

B. The *Cacciapalle* Plaintiffs Lack Standing To Bring Their Direct Breach-of-Contract Claims Because the United States Is Not a Party to the *Cacciapalle* Plaintiffs' Stock Certificates.

The *Cacciapalle* plaintiffs allege two additional breach-of-contract claims founded upon stock certificates issued to them by the enterprises. *See* Appx855-57, ¶¶ 149-164; Cacciapalle Br. 24-28. As the Court of Federal Claims held, the United States is not a party to plaintiffs' stock certificates, and plaintiffs accordingly lack standing to sue the government for breach of the certificates. *See* Appx276.

The *Cacciapalle* plaintiffs assert that their stock certificates are contracts setting out plaintiffs' rights to dividends, liquidation preferences, and voting rights, and that they also contain an implied covenant of good faith and fair dealing. *See* Cacciapalle Br. 24-25. They further assert that the Third Amendment breached those contractual terms.

As plaintiffs recognize, however, their stock certificates "constitute contracts between Plaintiffs, on the one hand, and Fannie Mae and Freddie Mac, on the other." Appx855, ¶ 150. The United States is not a party to these alleged contracts. And because "[a] plaintiff must be in privity with the United States to have standing to sue the sovereign on a contract claim," the *Cacciapalle* plaintiffs lack standing to sue the government for breach of their stock certificates. *Sullivan v. United States*, 625 F.3d 1378, 1379 (Fed. Cir. 2010).

Plaintiffs urge, however, that their private stock certificates became government contracts when FHFA assumed conservatorship of the enterprises. They reason that because (1) FHFA retains its governmental character when acting as conservator, and (2) FHFA as conservator succeeded to "all rights, titles, powers, and privileges of [the enterprises]" under HERA's succession clause, 12 U.S.C. § 4617(b)(2)(A)(i), the United States became a party to their stock certificates when FHFA became conservator. Cacciapalle Br. 26-28.

As the Court of Federal Claims explained, plaintiffs' contention is at odds with this Court's holding in *First Hartford Corp. Pension Plan & Trust*, with respect to the direct contract claims in that case. *See* Appx277. In that case, FDIC became receiver for the Dollar Dry Dock Bank (Dollar) in which First Hartford held stock. First Hartford sued the United States seeking, among other things, "rescission . . . of the contract under which First Hartford purchased its shares" of Dollar. *First Hartford*, 194 F.3d at 1295-96. This Court dismissed the plaintiffs' rescission claim for lack of jurisdiction. *Id.* at 1295. This Court emphasized that the stock-purchase contract that First Hartford wished to rescind was a contract between First Hartford and Dollar and the "federal government was not a party to the contract." *Id.* at 1296. Accordingly, First Hartford's rescission claim was not a claim "against the United States." *Id.* That was true even though FDIC became Dollar's receiver subsequent to the stock-purchase agreement, *id.* at 1284, and assumed "all rights and powers of the insured depository institution," *id.* at 1294. Similarly, here the United States was not a

party to plaintiffs' stock certificates and did not become a party to those contracts by virtue of the conservatorship.

Plaintiffs note (Cacciapalle Br. 28) the Court of Federal Claims' holding that conservators, unlike receivers, do not step into the shoes of the corporation and instead retain their governmental character. For the reasons discussed *supra* Part I, that ruling was incorrect. FHFA as conservator steps into the enterprises' shoes just as FHFA as receiver does. But even if FHFA did not do so when acting as conservator, that fact would be of no help to plaintiffs. If FHFA does not step into the shoes of the enterprises when acting as conservator, it cannot possibly be in privity with the enterprises with respect to plaintiffs' stock certificates, which the enterprises agreed to years earlier.

Other cases on which plaintiffs seek to rely likewise do not advance their argument. The Ninth Circuit in *United States ex rel. Adams v. Aurora Loan Services, Inc.*, 813 F.3d 1259 (9th Cir. 2016), rejected assertions that the FHFA conservatorship transformed the enterprises into federal instrumentalities so that their officers were "officers, employees, or agents of the federal government for purposes of the False Claims Act." *Id.* at 1260. The court correctly explained that HERA "place[d] FHFA in the shoes of Fannie Mae and Freddie Mac." *Id.* at 1260-61. But as *First Hartford* makes clear, that did not put the conservator in privity with the enterprises' shareholders, because the shareholders' contracts are still with the enterprises, which are still private entities. Plaintiffs are on no firmer ground in relying on a portion of

Perry Capital in which the D.C. Circuit held that HERA does not preempt state law imposing an implied covenant of good faith and fair dealing on stock certificates. *Perry Capital*, 864 F.3d at 630. That an implied covenant may continue to inhere in plaintiffs' stock certificates does not mean that the United States became a party to those certificates.[23]

C. The Court of Federal Claims Correctly Dismissed the Breach-of-Fiduciary-Duty Claims.

Plaintiffs assert direct as well as derivative claims for breach of fiduciary duty based on the theory that the conservator and/or Treasury breached fiduciary duties they owed to the enterprises or to shareholders. These claims should be dismissed because FHFA acting as conservator is not the United States and because the claims, however pled, are derivative and thus barred by the Succession Clause. If the Court were to reach the issue, however, plaintiffs purportedly direct fiduciary claims should also be dismissed for the additional grounds cited by the Court of Federal Claims.[24]

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[23] Plaintiffs are pursuing an identical breach-of-contract claim against FHFA as conservator of the enterprises in district court, a suit that recognizes that the enterprises, not the United States, are the proper defendants in any suit to enforce plaintiffs' contractual rights under their stock certificates. *See Perry Capital*, 864 F.3d at 625-28.

[24] The Court of Federal Claims determined that the United States had not moved to dismiss the shareholders' *derivative* breach-of-fiduciary duty claims. Appx29 n.22 ("In its notice of arguments, defendant explains that it is arguing in its motion to dismiss for the dismissal of plaintiffs' direct and derivative fiduciary duty claims. After reviewing the motion, it is apparent that defendant only presented argument concerning the direct claim. The court, therefore, reserves judgment on whether it has jurisdiction over the derivative claims."). There is no basis for the Court of

Plaintiffs do not dispute the well-settled principle that "[b]reach of fiduciary duty is generally classified as a tort," *Newby v. United States*, 57 Fed. Cl. 283, 294 (2003) (citing *Regents of Univ. of N.M. v. Knight*, 321 F.3d 1111, 1116 (Fed. Cir. 2003)), and that to proceed under the Tucker Act on a breach-of-fiduciary duty claim, they must identify a contract, statute, or regulation that creates an express fiduciary duty. *See* 28 U.S.C. § 1491(a)(1). The provision must also be money-mandating, meaning that it "can fairly be interpreted as mandating compensation for damages sustained as a result of the breach of the duties [it] impose[s]." *United States v. Mitchell,* 463 U.S. 206, 217 (1983).

1.a. This Court has explained that "the United States is only subject to those fiduciary duties that it specifically accepts by statute or regulation," *Hopi Tribe,* 782 F.3d at 667, and HERA imposes no such duty on the conservator or Treasury. HERA instead provides that FHFA may act in the best interests of "FHFA and the [enterprises]," making no mention of the interests of "shareholders or creditors." *Perry Capital*, 864 F.3d at 608; *see also* 12 U.S.C. § 4617(b)(2)(J); *Jacobs*, 908 F.3d at 893. Similarly, Congress directed Treasury to "provide stability to the financial markets" and "protect the taxpayer" when investing in the enterprises, and here, too, made no

Federal Claims' overly narrow view of the government's motion to dismiss, *see* Appx977-78 (explaining why the court lacked jurisdiction over the breach-of-fiduciary duty claims), but, in any event, the government's arguments set out in Parts I and II of this brief apply to these derivative claims.

reference to shareholders. 12 U.S.C. § 1455(*l*)(1)(B)(i), (iii), 1719(g)(1)(B)(i), (iii). Reference to common law or state law duties cannot alter the terms of the statute.

Plaintiffs mistakenly seek to equate (Cons. Br. 75) the authority contained in § 4617(b)(2)(D) to "take such action as may . . . preserve and conserve the assets" with the imposition of a fiduciary duty to the shareholders. S*ee Perry Capital*, 864 F.3d at 607 ("[T]he most natural reading of [HERA] is that it permits FHFA, but does not compel it in any judicially enforceable sense, to preserve and conserve Fannie's and Freddie's assets."). This provision also makes no reference to shareholders and does not suggest a duty to increase value *for the shareholders*. And plaintiffs acknowledge that § 4617(b)(2)(J) is at most "consistent" with the existence of fiduciary duties running to shareholders, Cons. Br. 76, duties that would exist only if created by other provisions.

Plaintiffs are similarly wide of the mark in seeking to rely on the provision of HERA stating that "[t]o protect the taxpayers, the Secretary of the Treasury shall take into consideration . . . [t]he need to maintain the corporation's status as a private shareholder-owned company." Cons. Br. 76 (alterations in original) (emphasis omitted) (quoting 12 U.S.C. § 1719(g)(1)(C)(v)). That provision likewise imposes no fiduciary duties on the conservator. First, it is addressed to actions by Treasury, not FHFA as conservator. Second, the fact that Congress has determined that it is in the interest of taxpayers to consider maintaining the enterprises as shareholder-owned companies says nothing about any duties owed to the shareholders. And, of course, the enterprises continue as on-going concerns and are still shareholder-owned.

Plaintiffs attempt to make lemonade from lemons by emphasizing that the "best interests" provision of HERA, § 4617(b)(2)(J)—which lists the entities whose interests FHFA as conservator may consider, but makes no mention of shareholders—is codified under the caption referencing an "incidental power" of the conservator. Cons. Br. 75, 77. But Congress specified these as the best interests for the conservator to consider and neither that provision nor any other directs the conservator to consider the interests of shareholders.

Relying primarily on an unpublished district court decision, plaintiffs cite duties they believe the FDIC owes shareholders under FIRREA and urge that FHFA must owe the same duties to its shareholders under HERA. Cons. Br. 73, 77; *see Gibraltar Fin. Corp. v. Federal Home Loan Bank Bd.*, No. 89-cv-3489, 1990 WL 394298, at *2 (C.D. Cal. 1990). In *Gilbraltar,* although the court found that the conservator had assumed fiduciary duties when it stepped into the shoes of the corporation, *id.* at *3, the court dismissed the fiduciary-duty claim because such claims sound in tort and therefore could only be asserted against the United States under the Federal Tort Claims Act, whose administrative claim requirements had not been satisfied. *See id.* at *1, *8 (dismissing second and sixth causes of action, which were claims for breach of fiduciary duty). That ruling accords with the well-settled principle that "[b]reach of fiduciary duty is generally classified as a tort," *Newby v. United States*, 57 Fed. Cl. 283, 294 (2003) (citing *Regents of Univ. of N.M. v. Knight*, 321 F.3d 1111, 1116 (Fed. Cir. 2003)); such claims therefore generally proceed as tort suits, not as suits under the

Tucker Act. *See* 28 U.S.C. § 1491(a)(1); *New America Shipbuilders v. United States,* 871 F.2d 1077, 1079 (Fed. Cir. 1989) ("If the government misconduct alleged was tortious, jurisdiction is not granted the Claims Court under the Tucker Act."). Recognizing this principle, plaintiff-shareholders, including some of the plaintiff-shareholders here, brought suit in the United States District Court for the District of Columbia, claiming that FHFA breached alleged fiduciary duties to enterprises shareholders.[25]

Plaintiffs' citation to *Golden Pacific Bancorp v. FDIC*, 375 F.3d 196, 201 (2d Cir. 2004), is similarly unavailing. The court in that case *rejected* plaintiff's breach-of-fiduciary-duty claim against the FDIC acting as receiver, assuming the existence of a duty (which no party disputed in that case). *Id.* at 201. And the court in *E.I. du Pont de Nemours & Co. v. FDIC*, 32 F.3d 592, 595 (D.C. Cir. 1994), stated only the background principle that "[a]s receiver the FDIC has a responsibility to marshal the assets of the bank and to distribute them to the bank's creditors and shareholders."

Unable to muster any statutory basis for concluding that HERA is a money-mandating statute creating fiduciary duties running from the conservator to the shareholders, plaintiffs' attempt to analogize the conservator's duties to those owed by the United States to Indians and Indian Tribes. Cons. Br. 78. Plaintiffs' suggestion

[25] On appeal, the D.C. Circuit determined that plaintiffs had not pled direct breach-of-fiduciary-duty claims, but left open the question whether such claims could be added to an amended complaint, *Perry Capital*, 864 F.3d at 627. Plaintiffs subsequently amended their complaints, and the district court dismissed those claims on the merits. *See Fairholme Funds, Inc. v. FHFA*, Nos. 13-cv-1053, 13-cv-1439, 2018 WL 4680197 (D.D.C. Sept. 28, 2018).

that the relationship between a conservator and the shareholders of the corporations can in any way be equated to the "general trust relationship between the United States and the Indian people," *Mitchell*, 463 U.S. at 225, is profoundly ahistorical.

More generally, this Court has explained that allegations of "control" are not enough to create fiduciary duties because "the United States is only subject to those fiduciary duties that it specifically accepts by statute or regulation." *Hopi Tribe,* 782 F.3d at 667-68. In *Hopi*, the Court considered a claim for damages connected to the quality of drinking water on the reservation. The Court found that no provision of law created a duty to ensure water quality, *id.* at 668-69, and emphasized that "common-law trust duties standing alone, including those premised on control, are not enough to establish a particular fiduciary duty of the United States," *id.* at 668. In so holding, this Court relied on the Supreme Court's decision in *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009), which made clear that damages for breach of fiduciary duty could not be sought against the United States based on common law trust principles. The Tribe in *Navajo Nation* argued that the government's "'comprehensive control' over coal on Indian land," amounted to assuming a specific duty. *Id.* at 301. In rejecting the claim, the Supreme Court explained that "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated." *Id.* at 302.

1.b. To pursue their claim under the Tucker Act, plaintiffs must demonstrate not only that HERA imposed fiduciary duties but also that it "can fairly be interpreted

as mandating compensation for damages sustained as a result of the breach of the duties" it (purportedly) imposes. *Mitchell,* 463 U.S. at 217. This Court has emphasized that "most statutes do not" qualify as "money-mandating." *Adair v. United States*, 497 F.3d 1244, 1250 (Fed. Cir. 2007). Like most statutes, HERA is not money-mandating.

Plaintiffs' reliance on cases involving Indian Tribes (Cons. Br. 79) is unavailing on this score as well. In *Mitchell*, the Supreme Court interpreted a statute that mandated the sale of timber from Indian trust lands "based upon the Secretary's consideration of 'the needs and best interests of the Indian owner and his heirs'" and specified "that proceeds from such sales [shall] be paid to owners 'or disposed of for their benefit.'" *Mitchell*, 463 U.S. at 224 (quoting 25 U.S.C. § 406(a)). The government did not contest the existence of a duty owed to Indian owners, but argued that the statute was not money-mandating. Disagreeing, the Supreme Court emphasized the "undisputed existence of a general trust relationship between the United States and the Indian people" along with a "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Id.* at 225 (quotation marks omitted). The Court accordingly held that the government could be liable for money damages in the event it failed to act—pursuant to the statute—in the "best interests of the Indian owner and his heirs." *Id.* at 224 (quotation marks omitted). Similarly, in *United States v. White Mountain Apache*, the Supreme Court determined that the government could be liable for money damages

under a statutory mandate that "Fort Apache be 'held by the United States in trust for the White Mountain Apache Tribe.'" 537 U.S. 465, 474-75 (2003).

This Court has recognized that "both *Mitchell* [] and *White Mountain* grounded their fiduciary analysis in statutory language expressly creating a trust relation in a specific property interest." *Samish Indian Nation v. United States*, 419 F.3d 1355, 1368 (Fed. Cir. 2005). In *Samish Indian Nation*, this Court rejected the Tribe's arguments that under *Mitchell* and *White Mountain*, the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450 *et seq*., is money-mandating and may give rise to a claim under the Tucker Act. In so holding, this Court explained that a statute may be money-mandating if it "provide[s] 'clear standards for paying' money to recipients[,] . . .state[s] the 'precise amounts' that must be paid" or compels "payment on satisfaction of certain conditions." 418 F.3d at 1364. This Court held that the "statutory language and structure is not reasonably read as demonstrating congressional intent to establish a damage remedy under the ISDA for non-payment of the underlying benefits." *Id.* at 1366. This Court also rejected the theory that the ISDA created fiduciary duties sufficient to support a claim for damages under the Tucker Act because it did not "expressly creat[e] a trust relation in a specific property interest." *Id.* at 1368.

Like the ISDA, nothing in HERA contemplates the payment of damages. It does not "provide 'clear standards for paying' money to recipients" nor does it "state the 'precise amounts' that must be paid" or compel "payment on satisfaction of

certain conditions." *Samish Indian Nation*, 419 F.3d at 1364. As explained, HERA contains no express instruction that FHFA act in the interests of the shareholders and nothing in HERA creates any implication that FHFA holds the enterprise assets in trust for the shareholders of the enterprises. In contrast, the statute at issue in *Maine Community Health Options v. United States* contained "an unambiguous statutory promise to pay for services rendered to the Government." 140 S. Ct. 1308, 1331 n.14 (2020); *see also Inter-tribal Council of Ariz., Inc. v. United States*, 956 F.3d 1328, 1340-41 (Fed. Cir. 2020) (finding Tucker Act jurisdiction because Arizona-Florida Land Exchange Act, in conjunction with Trust Fund Payment Agreement, expressly required United States to hold in trust security necessary to meet payment obligations after landowner defaulted). HERA contains no analogous promise.

Plaintiffs appear to suggest that a money-mandating provision might be derived from Congress's use of the word "conservator." Cons. Br. 80. It is wholly unclear why that would be the case. If that suggestion were accepted, Congress could never provide for conservatorship without opening the public fisc to claims for breach of fiduciary duties brought by shareholders. And even if, as plaintiffs suggest, state law or the common law of corporations would impose fiduciary duties running from conservators to shareholders, such common law principles are insufficient. *See Hopi,* 782 F.3d at 667-68. And, in any event, HERA would preempt such duties in this case. *See Fairholme*, 2018 WL 4680197.

2. Some plaintiffs also allege that Treasury breached fiduciary duties it allegedly owed to other enterprise shareholders. Cons. Br. 81-88. Treasury purportedly took on those fiduciary duties when, according to plaintiffs, it became a controlling shareholder of the enterprises via the initial purchase agreements. The Court of Federal Claims correctly dismissed these breach-of-fiduciary duty claims. *See* Appx69-73.

As explained *supra* pp. 61-67, Treasury is not, and has never been, a controlling shareholder of the enterprises. Moreover, the initial purchase agreements do not impose any specific or express fiduciary duties on Treasury towards shareholders or any other parties. *See Hopi*, 782 F.3d at 677 ("[T]he United States is only subject to those fiduciary duties that it specifically accepts."); *see also* Appx71 (emphasizing that "[p]laintiffs are not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs"). And even if, as plaintiffs suggest, state law or the common law of corporations would impose fiduciary duties running to minority shareholders in situations akin to this one, HERA would preempt such duties in this case. As discussed, HERA makes clear that Treasury is not required to act in the best interests of the enterprises' shareholders. In short, Treasury is not a controlling shareholder of the enterprises, and, even if it were, would not owe fiduciary duties to the enterprises' private shareholders.

D. The Court of Federal Claims Correctly Dismissed the *Cacciapalle* Plaintiffs' Claim That the Preclusion of Derivative Suits Constituted a Taking.

The Court of Federal Claims also correctly rejected the unique takings claim raised by the *Cacciapalle* plaintiffs. Appx266-267. According to the *Cacciapalle* plaintiffs, they previously held a property interest in bringing derivative claims on behalf of the enterprises and, to the extent HERA's Succession Clause bars them from bringing derivative claims on behalf of the enterprises, that property interest was unlawfully taken from them without just compensation. Cacciapalle Br. 16. That claim lacks merit.

The Court of Federal Claims recognized that shareholder derivative claims are precluded by HERA's Succession Clause. But, believing itself bound by this Court's decision in *First Hartford,* the court concluded that claims pled as derivative claims could nevertheless proceed based on an implied conflict-of-interest exception to the Succession Clause. As we have demonstrated, the court erred in implying such an exception. *See supra* Part II.D.

As the government further explained above, all shareholders are barred from re-litigating the question whether HERA contains an implicit conflict-of-interest exception in light of the district court's decision in *Perry Capital* rejecting plaintiffs' position. *See supra* pp. 74-78. Although the Court of Federal Claims declined to hold that most shareholders are precluded from re-litigating the conflict-of-interest issue, it recognized that the *Cacciapalle* plaintiffs *were* bound by the *Perry Capital* court's ruling

because they were the plaintiffs in *Perry Capital*. Appx266-67; *see also* Cacciapalle Br. 18 (describing previous adverse decisions as "definitive rulings as to the application of HERA's Anti-Injunction and Succession Clauses to [the *Cacciapalle*] Plaintiffs' claims").[26]

To circumvent the issue preclusion bar, the *Cacciapalle* plaintiffs now assert that the existence or nonexistence of a conflict-of-interest exception is beside the point because the impairment of their ability to bring derivative claims is itself a taking. Cacciapalle Br. 18.

The Court of Federal Claims correctly rejected the *Cacciapalle* plaintiffs' attempt to recharacterize their argument in this manner. Appx266-67. Plaintiffs made quite clear in their complaint that their quarrel was not with the statute itself: "We do not challenge the succession provision in HERA as a Taking on its face, and we do not claim that the conservatorship was a Taking." Appx837. Instead, "Plaintiffs continue to take the position that the Federal Circuit's decision in *First Hartford* was correct, and therefore HERA cannot be read as taking from the Companies' shareholders the right to bring derivative claims on behalf of the Companies where those claims are against the FHFA or Treasury, given the 'manifest conflict of interest' preventing FHFA from ever bringing such claims." Appx836-37, ¶ 92. In their own words then, HERA

[26] Thus, even if this Court rejects our arguments for broader preclusion on the question of the conflict-of-interest exception, *see supra* pp. 74-78, the *Cacciapalle* plaintiffs are barred from re-litigating this issue.

did *not* unconstitutionally deprive plaintiffs of an ability to assert derivative claims. Their inability to advance a derivative claim is due to the D.C. Circuit's asserted error in rejecting their arguments. *See* Appx836-37, ¶ 92 (alleging that "to the extent that any courts continue to hold that . . . derivative claims are not possible and thereby block the shareholders in Fannie and Freddie from obtaining a full and just recovery for the loss of their shareholder rights," any such "interpretation of HERA, as applied to the facts of these cases" is a taking). But that is just another way of attacking the D.C. Circuit's interpretation of HERA's Succession Clause. *See* Appx267 ("Unfortunately for plaintiffs, the Federal Circuit does not consider collateral attacks on the judgments of other federal courts to be cognizable under this court's jurisdiction over takings claims.").

Plaintiffs' argument is beset with other difficulties. If plaintiffs were actually challenging HERA itself, rather than the D.C. Circuit's ruling, they would be obliged to acknowledge that they suffered no loss when the statute was enacted, or when FHFA became the conservator of the enterprises, and that Congress is free to legislate with regard to the substance of causes of actions and the means by which they may be asserted. The Supreme Court has long recognized that "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York Central R.R. Co. v. White,* 243 U.S. 188, 198 (1917). As this Court has explained, as a general matter, "no 'vested' right attaches until there is a final, unreviewable judgment." *Rogers v. Tristar Prods., Inc.*, 559 F. App'x 1042, 1045 (Fed.

Cir. 2012) (citing *Axel Johnson Inc. v. Arthur Andersen & Co.,* 6 F.3d 78, 84 (1993) ("[N]ot all judgments . . . are final for Fifth Amendment and separation of powers purposes. Rather, a case remains 'pending' and open to legislative alteration, so long as an appeal is pending or the time for filing an appeal has yet to lapse")). "[U]nder most circumstances, Congress can change the rules in the middle of the suit, or even eliminate the cause of action entirely after the case has been filed." *Id.* at 1044-45 (citation omitted); *see also Diane K. ex rel. Tonya K. v. Board of Educ. of City of Chi.*, 847 F.2d 1243, 1247 (7th Cir. 1988) (explaining that "[i]n civil litigation, however, no person has an absolute entitlement to the benefit of legal principles that prevailed at the time the case began, or even at the time of the bulk of the litigation").[27]

This Court has indicated that in rare circumstances an individual's property interest in a cause of action may vest before a plaintiff obtains a final judgment in litigation. *See* Cacciapalle. Br. 22. But as the cases relied on by the *Cacciapalle* plaintiffs illustrate, it is necessary at an absolute minimum that the plaintiff's cause of action has accrued before the government action that impairs or eliminates it. *See, e.g.*, *Abrahim-Youri v. United States*, 139 F.3d 1462, 1465-66 (Fed. Cir. 1997) (acknowledging the extinguishment of a cause of action but rejecting takings claim based on allegations

[27] Plaintiffs' claim that HERA's anti-injunction provision, 12 U.S.C. § 4617(f), effected a taking is even further afield. *See* Cacciapalle Br. 16. It is well-established that a plaintiff does not have a vested property interest in any particular remedy. *See, e.g., Estate of McCall v. United States*, 642 F.3d 944, 951 (11th Cir. 2011) (rejecting takings claim to damages cap).

that a taking occurred when the government settled claims of Americans held hostage in Iran); *Alliance of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) (dismissing on statute-of-limitations suit concerning land physically seized and the later extinguishment of the "legal right to sue for compensation for that land"); *see also Alimanestianu v. United States*, 888 F.3d 1374, 1383-84 (Fed. Cir. 2018) (rejecting takings claim for extinguishment of claim under Libyan Claims Resolution Act). Plaintiffs here challenge an event (the conservatorship that transferred the ability to bring a derivative suit to the conservator) that occurred years before the injury of which they complain (a derivative claim challenging the Third Amendment).

Although other circuits, including the First Circuit, have adopted a more absolute rule requiring a final judgment before a taking may occur, there is no reason to conclude—and *Cacciapalle* plaintiffs have offered none—that this Court would disagree with the First Circuit's holding in *Zucker v. Rodriguez*, 919 F.3d 649, 659 (1st Cir. 2019), that FIRREA's succession clause did not effect a taking of a cause of action. *See id.* ("There is no constitutional problem . . . . The Takings Clause requires the government to provide 'just compensation' before taking private property . . . but only for deprivations of vested property rights, [a]nd, for purposes of the Takings Clause, '[i]t is well established that a party's property right in a cause of action does not vest "until a final, unreviewable judgment has been obtained."'" (alteration in original) (citation omitted)); s*ee also, e.g.*, *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1141 (9th

Cir. 2009) (rejecting claim that the Protecting Lawful Commerce in Arms Act effects an unconstitutional taking).

Plaintiffs' assertion that they were deprived of a protected property interest is particularly anomalous because the right to bring suit to challenge the asserted injury to the corporation is a right not of the shareholders but of the corporation. The Supreme Court has long made clear that "[t]he cause of action which [a plaintiff in a derivative suit] brings before the court is not his own but the corporation's. It is the real party in interest and he is allowed to act in protection of its interest somewhat as a 'next friend' might do for an individual." *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522-23 (1947) (footnote omitted). And, as discussed *supra* Part II, the recovery in a derivative suit is obtained by the corporation, not the shareholders. Even outside the shareholder/corporation context, third parties generally cannot bring claims, including constitutional claims, asserting the rights of others, *see, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004); *see also supra* p. 80 n.19 (explaining that the ability to bring a derivative action was not terminated). There is no sound reason why the Constitution would require that third-party shareholders be permitted to bring suit to enforce the rights of a corporation.

Plaintiffs' taking claim also cannot be squared with this Court's decision in *Golden Pacific Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994), which held that shareholders cannot state a takings claims based on FDIC's appointment as receiver of a failed bank because shareholders in such highly regulated entities lack "the

reasonable investment-backed expectation [that the government would appoint a receiver] necessary to support a Fifth Amendment taking." *Id.* at 1074. Shareholders in Fannie Mae and Freddie Mac—two of the most highly regulated financial institutions in the country, created by Congress and with public charters—likewise have no reasonable investment-backed expectation that they will retain their right to bring a derivative suit on behalf of the enterprises upon the appointment of a conservator.

IV. The Court of Federal Claims Correctly Dismissed the Direct Takings Claims of Plaintiffs Who Did Not Own Stock at the Time of the Third Amendment.

As discussed, the Court of Federal Claims properly dismissed plaintiffs' allegedly direct takings and illegal exaction claims concerning the Third Amendment because those claims are derivative in nature. The court further held that, even if that were not the case, it would be necessary to dismiss the takings claims of plaintiffs who did not hold stock in the enterprises at the time the Third Amendment was executed because those plaintiffs had no property that could have been taken, legally or illegally. Appx36-38. If the Court reaches the question, the dismissal of these plaintiffs' takings and illegal exaction claims should also be affirmed on this alternative ground.

The Court of Federal Claims declined to consider whether the same plaintiffs lack standing to pursue their illegal exaction claims, stating that the government presented only a "nominal argument[]" on this front. Appx36. But the reasons for

concluding that these plaintiffs lack standing to raise direct takings claims apply equally to their attempt to pursue direct illegal exaction claims.

A. The *Fairholme* plaintiffs first assert in a single sentence that it was "premature" for the Court of Federal Claims to decide whether plaintiffs who did not own stock at the time of the Third Amendment have standing because other plaintiffs have continuously owned stock since before the execution of the Third Amendment. *See* Fairholme Br. 9. An argument presented in this cursory fashion is forfeited. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319-20 (Fed. Cir. 2006). In any event, the court was right to reach the question of standing. As the court explained, "[a]lthough courts occasionally reserve judgment on standing issues when at least one claimant has standing, they only do so when each plaintiff is seeking the same relief." Appx36 (citing, *e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 52 (2006), and *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)). As the Court of Federal Claims noted, in the allegedly direct claims asserted here, "each plaintiff is seeking its own monetary relief," and consideration of whether each plaintiff has standing was therefore appropriate. Appx37; *see Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (holding that an intervenor must establish Article III standing if it seeks additional relief beyond what plaintiff requests, "includ[ing] cases in which both the plaintiff and the intervenor seek separate money judgments in their own names").

B. "It is axiomatic that only persons with a valid property interest *at the time of the taking* are entitled to compensation." *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1263 (Fed. Cir. 2017) (quoting *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001)); *see also United States v. Dow*, 357 U.S. 17, 20-21 (1958). Plaintiffs who did not hold stock when the Third Amendment was executed on August 17, 2012, cannot plausibly claim a taking or exaction on the ground that "[t]he Net Worth Sweep expropriated [plaintiffs'] economic interest[s]" in enterprise stock. *E.g.*, Appx461, ¶ 169.[28] The Court of Federal Claims rejected a similar attempt to raise a takings claims following the enactment of FIRREA in 1989 by plaintiffs who did not purchase shares in a savings and loan association affected by the statute until the following year. *See Maniere v. United States*, 31 Fed. Cl. 410 (1994). After the association became insolvent, the plaintiff urged that the statute had effected "a taking of the value of [his] investment." *Id.* at 412. Dismissing the claim, the court

[28] The Court of Federal Claims noted that it lacked sufficient information to determine which plaintiffs did not own stock at the time of the Third Amendment. *See* Appx38. It explained that "[o]rdinarily, the court would seek additional information from the parties to resolve that issue," but declined to do so because it dismissed all plaintiffs' purportedly direct claims on other grounds. *Id.* It is not disputed, however, that several *Fairholme* plaintiffs did not hold stock in the enterprises at the time of the Third Amendment. Some purchased stock only after the Third Amendment was executed; others sold their stock before that date. *See, e.g.*, Appx1023-1026 (admitting in response to government interrogatory that plaintiffs Fairholme Funds, Inc. and Fairholme Fund first purchased enterprise stock in 2013); Appx1030 (admitting that plaintiff Acadia Insurance Co. sold all enterprise stock in 2008).

explained that because "the plaintiff owned no shares of the subject stock on the date of the taking, . . . the plaintiff maintains no standing to sue." *Id.* at 421.

C. The *Fairholme* plaintiffs do not take issue with the fact that, "as a *general* proposition, only those with an interest in property 'at the time' of the taking are entitled to compensation." Fairholme Br. 10. Instead they advance a series of insubstantial attacks on the Court of Federal Claims' application of this Court's settled precedent to the claims of plaintiffs who purchased stock after the Third Amendment. (They make no effort at all to explain why plaintiffs who sold all their enterprise stock before the Third Amendment should be able to maintain their claims.)

Plaintiffs place primary reliance on inapposite decisions concerning landowners who acquired their land after the promulgation of a restrictive land-use regulation. *See* Fairholme Br. 12-17 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); and *Bailey v. United States*, 78 Fed. Cl. 239 (2007)). In *Palazzolo,* for example, a Rhode Island agency responsible for protecting the state's costal lands denied Palazzolo's application to develop his waterfront parcel into a private beach club. *Palazzolo*, 533 U.S. at 614-15. Palazzolo sued, claiming that the agency's wetlands regulations, as applied by the agency to his parcel, constituted a regulatory taking. *Id.* at 615-16. The Supreme Court concluded that petitioner's claim could go forward notwithstanding the fact that he acquired title to his property after the wetlands regulations had issued. The Court explained that in

the context of land use regulation, a takings claim is not "ripe unless 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" *Id.* at 618 (quoting *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), *overruled on other grounds by Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019)). The rule ensures that "a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." *Id.* at 620. Until it has done so, "the extent of the restriction on property is not known and a regulatory taking has not yet been established." *Id.* at 621; *see also Nollan*, 483 U.S. at 833 n.2 (noting that although state agency began policy of conditioning building permits on granting of public-access easement before plaintiffs purchased land, plaintiffs could challenge the post-purchase application of the condition to their permit). The Court contrasted the principles applicable to land regulation to those applicable under the law of eminent domain where "it is a general rule . . . that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser." *Palazzolo*, 533 U.S. at 628. In such a case, "the fact and extent of the taking are known" at the time of the taking. *Id.*

Here, plaintiffs who purchased shares after the execution of the Third Amendment are not complaining of a regulatory action that took place subsequent to their purchase. They purchased their shares after the contract that assertedly constituted a taking or exaction had already been signed. Moreover, as this Court has

observed, "[o]ne who buys with knowledge of a restraint assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a 'taking' would confer a windfall." *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994) (citations omitted); *see also Anaheim Gardens, L.P. v. United States*, 953 F.3d 1344, 1349-51 (Fed. Cir. 2020) (holding that a "sophisticated investor [that] voluntarily purchased its property with knowledge" of a statute eliminating mortgage prepayment option could not proceed on its claim that the statute constituted a takings). As the Court of Federal Claims recognized, the late-purchasing plaintiffs in this case seek precisely such a windfall. *See* Appx37. They bought enterprise stock at a discounted price that reflected the effect of the Third Amendment, and now they seek compensation for the event that led to their bargain purchase. "That result is incompatible with the notion of just compensation that underlies the Fifth Amendment's Takings Clause." *Id.*

The Court of Federal Claims' decision in *Bailey*, on which plaintiffs place considerable reliance, *see* Fairholme Br. 14-17, is a departure from *Palazzolo* and *Nollan*, which it purported to apply. *See Bailey*, 78 Fed. Cl. at 271. *Palazzolo* and *Nollan* permitted landowners to bring a regulatory takings claim where they purchased land after a land-use regulation went into effect but *before* the land-use agency reached a final decision about the application of the regulation to the property at issue. The *Bailey* court, by contrast, permitted a landowner to pursue a takings claim even though he acquired most of the property at issue after the government denied a permit to

develop it. *See id.* at 258. To reach this conclusion, the court reasoned that "regulatory takings are all *potential temporary takings*," because regulatory takings are just "words on paper" that the government can revoke with more "words on paper." *Id.* at 270, 272. Therefore, the court declared, post-regulation purchasers can *always* pursue a claim that the regulation constituted a takings—even when, as in *Bailey* and as here, the application of the challenged regulation to the property at issue was settled before the purchase. That rationale has no basis in *Palazzolo* or *Nollan* and would permit speculators to obtain a windfall. Moreover, although the decision is incorrect on its own terms, it was also expressly limited to regulatory takings involving real property. *Id.* at 270 n.57.

D. Finding no support for their retrospective takings argument, the *Fairholme* plaintiffs assert that each quarterly dividend under the Third Amendment constitutes "another taking." Fairholme Br. 18. Although plaintiffs urge that the Court of Federal Claims "ignore[d]" this alternative argument, *id.*, the court addressed and squarely rejected it: "Simply stated, plaintiffs' direct takings claim accrued on the date of the [Third] Amendment[]—August 17, 2012—and new claims do not accrue for each payment under those agreements." Appx38.

As the court explained, "[t]here is only one taking when a 'single government action causes a series of deleterious effects, even though those effects may extend long after the initial government [action].'" Appx37-38 (alteration in original) (quoting *Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000)). For example, in

Fallini v. United States, 56 F.3d 1378, 1382-83 (Fed. Cir. 1995), this Court held that a statute permitting wild horses to drink water from the plaintiffs' land constituted a single taking that accrued when Congress enacted the statute, rejecting the plaintiffs' theory that a new taking occurred every time a horse took a drink of water.

Here, similarly, "there is one event that caused all of plaintiffs' purported losses: the execution of the PSPA Amendments. It is of no import . . . that, based on the [Third] Amendment[], the Enterprises make regular payments to Treasury because those payments are just the consequences of the PSPA Amendments." Appx38; *see also Maniere*, 31 Fed. Cl. at 421 (concluding that any taking of a shareholder's investment in savings and loan accrued either upon the enactment of FIRREA or the promulgation of accounting regulations, not upon the later insolvency finding).[29]

E. Finally, plaintiffs wrongly assert that the Court of Federal Claims' standing holding exposes the government to double liability. *See* Appx19-21. In plaintiffs'

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[29]In *Eyherabide v. United States*, 345 F.2d 565 (Ct. Cl. 1965), relied on by plaintiffs, landowners complained that they had been temporarily denied the full use of their property over a five-year period because of the activities on an adjoining naval gunnery range. The court emphasized that the taking occurred as a result of the government's "combined and cumulative invasions of different types" over time. *Id.* at 605. Plaintiffs here claim neither a temporary nor a physical taking, and the event that allegedly constituted the taking (the Third Amendment) was a single event with a defined date. In a footnote, plaintiffs also cite to *Hatter v. United States*, 203 F.3d 795 (Fed. Cir. 2000), *aff'd in part, rev'd in part on other grounds by* 532 U.S. 557 (2001), and *Burich v. United States*, 366 F.2d 984 (Ct. Cl. 1966), but neither case involved a takings claim. Both cases concerned the applicability of the "continuing claims" doctrine for statute-of-limitations purposes. *See Hatter*, 203 F.3d at 797-800; *Burich*, 366 F.2d at 986.

concurrent district court litigation, the District Court for the District of Columbia determined that "bargained-for rights related to dividends and liquidation preferences traveled with the shares to subsequent purchasers" of enterprise stock because such rights "inhere in the security" itself. *Fairholme Funds*, 2018 WL 4680197, at *8. Relying on this conclusion, the *Fairholme* plaintiffs contend that post-Third Amendment purchasers inherited the right to assert that the Third Amendment breached these contractual rights. Fairholme Br. 20. Plaintiffs reason that if the right to assert contract claims travels with the stock but the right to assert a takings claim does not, then the government may owe compensation to both the purchaser (for the contract claims) and the seller (for the takings claim). *Id.* at 20-21.

This professed concern that the government may be subject to double liability, even if it were well-founded, would not establish any right to assert takings or illegal exaction claims on the part of plaintiffs who purchased shares after the Third Amendment was executed. In any event, the asserted concern is groundless. As this Court explained in *Piszel*, the ability to pursue a breach of contract claim precludes a takings claim founded on interference with the same contractual interests. *See Piszel v. United States*, 833 F.3d 1366, 1376-77 (Fed. Cir. 2016).

CONCLUSION

For the reasons set out above, this Court should direct the Court of Federal Claim to dismiss the derivative claims it permitted to go forward and affirm the dismissal of plaintiffs' other claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with this Court's order of October 5, 2020, because it contains 32,770 words out of a permitted 58,500 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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