IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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**FAIRHOLME FUNDS, INC., ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND, ANDREW T. BARRETT,**
*Plaintiffs-Appellants*,

v.

**UNITED STATES,**
*Defendant-Cross-Appellant.*

2020-1912, -1914

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

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**OWL CREEK ASIA I, L.P., OWL CREEK ASIA II, L.P., OWL CREEK I, L.P., OWL CREEK II, L.P., OWL CREEK ASIA MASTER FUND, LTD., OWL CREEK CREDIT OPPORTUNITIES MASTER FUND, L.P., OWL CREEK OVERSEAS MASTER FUND, LTD., OWL CREEK SRI MASTER FUND, LTD.,**
*Plaintiffs-Appellants*,

v.

**UNITED STATES,**
*Defendant-Appellee.*

2020-1934

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

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

v.

**UNITED STATES,**
*Defendant-Appellee.*

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2020-1936

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

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

v.

**UNITED STATES,**
*Defendant-Appellee.*

2020-1938

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

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

v.

**UNITED STATES,**
*Defendant-Appellee.*

2020-1954

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Appeal from the United States 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-Appellant.*

2020-1955

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Appeal from the United States 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.*

2020-2020

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

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**JOSEPH CACCIAPALLE,**
*Plaintiff-Appellant,*

**MELVIN BAREISS, 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.*

2020-2037

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

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**JOINT REPLY BRIEF OF THE PLAINTIFF-APPELLANT PRIVATE SHAREHOLDERS**

The Plaintiff-Appellant Private Shareholders are: 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, Owl Creek Asia I, L.P., Owl Creek Asia II, L.P., Owl Creek I, L.P., Owl Creek II, L.P., Owl Creek Asia Master Fund, Ltd., Owl Creek Credit Opportunities Master Fund, L.P., Owl Creek Overseas Master Fund, Ltd., Owl Creek SRI Master Fund, Ltd., Mason Capital L.P., Mason Capital Master Fund L.P., Akanthos Opportunity Fund, L.P., Appaloosa Investment Limited Partnership I, Palomino Master Ltd., Azteca Partners LLC, Palomino Fund Ltd., CSS, LLC, Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited, and Joseph Cacciapalle

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## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Private Shareholders established in their opening brief that their claims based on the government's unprecedented expropriation of their equity in the Companies for the direct benefit of Treasury are "against the United States" for purposes of jurisdiction under the Tucker Act, are direct claims for standing considerations, and state claims for breaches of fiduciary duty and contract. The government's responses fail to grapple at all with most of the Private Shareholders' arguments and otherwise unavailingly rely on factual assertions contrary to the operative complaints, inapposite legal premises, and misconstrued snippets of cases.

**I.** Given the government's Statement of the Case and points it sprinkles through its Argument in its Response Brief,[1] the Court could be forgiven for thinking that these appeals involve whether the Net Worth Sweep was a good idea for the Companies or the U.S. Treasury as shareholder (or maybe both), regardless of its wipeout of the Private Shareholders.[2] But, on the government's motion to dismiss, the facts are fixed by the operative complaints, and the primary questions are at the threshold—jurisdiction under the Tucker Act, and statutory standing.

---

[1] [ECF 43] ("Gov. Resp. Br.").

[2] Capitalized terms not defined herein have the meaning given in the *Corrected Joint Opening Br. of the Pl.-Appellant Private Shareholders* [ECF 40] ("Jt. Br."). Cases mentioned are cited and discussed in the Joint Brief and below.

**II.** As to statutory jurisdiction—whether the Private Shareholders' claims challenging the joint action of the Agency and Treasury really are "against the United States"—there are a host of distinct grounds, previewed in the Private Shareholders' opening Joint Brief, why the answer is Yes, as the lower court held: such as the simple text of HERA; the Supreme Court's precedent in *Lebron*; and this Court's precedents in *Slattery*, *Lion Raisins*, *Hendler*, and *A&D Auto*. The government does not seriously grapple with any of this (it never mentions the primary text of HERA or *Lebron*). Instead, it stands on a "step into shoes" metaphor that does not mean what the government thinks it means and for which it lacks authority in this or any similar context.

**III.** The government is similarly unresponsive on standing—whether the Private Shareholders' direct claims, seeking money damages *for themselves* for the harm the Net Worth Sweep inflicted *on them*, really are direct. Most remarkably, the government just ignores the Private Shareholders' argument, supported by ample authority, that their claims are direct simply because the Net Worth Sweep effected a reallocation of equity *among* Company shareholders. It also fails to engage with the plain directness, under federal as well as Delaware law, of a claim by property owners that the government has taken their property for itself. It invokes this Court's decision in *Starr* without acknowledging the critical differences that there, unlike here, the government was not a shareholder (or controller) and, correspondingly, the

harm here was not to all shareholders *pro rata*. And, while purporting to answer the Private Shareholders' alternative argument under Delaware's "dual nature" doctrine, it ignores key points and language, particularly in *Gentile* and *El Paso Pipeline*.

**IV.** Although the government at times presents itself as a quintessential conservator, it strains to avoid the corollary that a conservatorship, here "founded on" the terms of HERA, carries a fiduciary duty to the conserved company and its shareholders, instead invoking authority on "bare trusts" whose facts are far removed from the express statutory text and complete government control here. It similarly strains to avoid the implications of Treasury's choosing to make itself, by any rational measure, a controlling shareholder in the Companies, particularly (as Treasury itself recognized) through warrants to obtain a supermajority of common stock at any time, for pennies. That it did so produced a fiduciary duty, "founded on" the initial Stock Purchase Agreements that created the control. Thus, the Tucker Act doubly confers jurisdiction over Private Shareholders' fiduciary-duty claims.

**V.** The government imposed the conservatorships by consent—*only* consent—which, as the Court of Federal Claims recognized, is not a mere regulatory act. And the government does not dispute that, under HERA, consent that included an agreement not to eviscerate Private Shareholders in favor of Treasury as shareholder enabled the government to pre-empt shareholder suits challenging

imposition of the conservatorship. That is (at least plausibly) a contract and one as to which the Private Shareholders are the obvious third-party beneficiaries.

**VI.** The foregoing encompasses the arguments of all plaintiffs in the nine related cases together before this Court (excluding *Washington Federal*), consistent with their opening Joint Brief and in accordance with this Court's Orders dated October 5, 2020. *See* Jt. Br. 1. The Court should affirm the holding that the Private Shareholders' direct claims are against the United States; reverse the holding that their direct claims are barred as derivative; and reverse the dismissal of the fiduciary-duty and third-party-beneficiary claims. In addition, some Private Shareholders have distinct issues, which they raise here, in Section VI, in lieu of separate supplemental replies. The plaintiffs in *Fairholme* and *Cacciapalle* each present two such issues.

In *Fairholme*, the government cross-appeals from the lower court's refusal to dismiss derivative claims under HERA's "Succession Clause," 12 U.S.C. § 4617(b)(2)(A). But as the lower court recognized, this Court ruled in *First Hartford* that shareholder derivative claims against federal conservators and receivers may proceed under a materially identical statute when the conservator or receiver faces a manifest conflict of interest. *First Hartford* is binding Federal Circuit precedent, and the government's desperate attempts to distinguish it fail. The government is also wrong when it asserts that issue preclusion provides a legitimate basis for disregarding *First Hartford* and following the D.C. Circuit's contrary

decision in *Perry Capital*. The plaintiff who presses derivative claims in *Fairholme* was not a party in *Perry Capital*, and in any event the issues in that case and this one are different.

The government does not grapple, in any serious way, with the *Fairholme* Plaintiffs' demonstration that the CFC erred in ruling that those plaintiffs who purchased the Companies' stock after the date of the Third Amendment lacked standing to pursue direct takings claims, limiting itself to little more than its invocation of the general principle, derived from cases involving direct condemnations, seizures, and physical invasions of property, that a claimant must *ordinarily* own the property at the time of a taking to have standing. The government's superficial analysis ignores the numerous precedents cautioning against the rote application of such blanket, one-size-fits-all takings rules, and it also ignores the special nature of property interests at issue in this case—interests inhering in stock ownership—as well as the nature of the government's interference with those property interests. And the government offers nothing but generalities and inapposite case law in response to the *Fairholme* Plaintiffs' allegation that, in addition to the taking that occurred when the Third Amendment was signed, the government engaged in an ongoing expropriation of property with each subsequent dividend payment that was made to Treasury pursuant to the Third Amendment.

# ARGUMENT

## I. THE COURT IS REQUIRED TO ASSUME THE TRUTH OF THE WELL-PLEADED FACTUAL ALLEGATIONS IN THE PRIVATE SHAREHOLDERS' COMPLAINTS.

There is no more fundamental rule of civil procedure than that a complaint's well-pleaded factual allegations must be taken as true for a motion to dismiss. These appeals come to the Court on motions to dismiss, yet the government's brief repeatedly violates this most basic rule of civil procedure:

| **Government's Brief** | **Private Shareholders' Complaints** |
|---|---|
| In 2008, the Companies "stood on the brink of collapse," and an "extraordinary infusion of taxpayer funds" was "necessary to ensure their viability." Gov. Resp. Br. 1–2. | In 2008, "both Companies continued to generate enough cash to easily pay their debts." Appx401 (*Fairholme* Compl.); *see also* Appx497 (*Owl Creek* Compl.); Appx739 (*Arrowood* Compl.); Appx811 (*Cacciapalle* Compl.). "[D]espite arguments to the contrary by lawyers for the Agencies in litigation related to the Net Worth Sweep, the Companies were not on the precipice of failure in 2008." Appx403 (*Fairholme* Compl.); Appx740 (*Arrowood* Compl.). |
| "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." Gov. Resp. Br. 4. | "While banks and other financial institutions involved in the mortgage markets had heavily invested in increasingly risky mortgages in the years leading up to the financial crisis, Fannie and Freddie had taken a more conservative approach that meant the mortgages they insured . . . were far safer than those insured by the nation's largest banks." Appx401–402 (*Fairholme* Compl.); *see also* Appx739 (*Arrowood* Compl.); Appx812 (*Cacciapalle* Compl.). |

| Government's Brief | Private Shareholders' Complaints |
| --- | --- |
| "Treasury's initial funding commitment of $100 billion per enterprise proved inadequate." Gov. Resp. Br. 9. | The Companies' draws on Treasury's funding commitment resulted from "unjustifiable accounting assumptions about the Companies' future prospects." Appx442 (*Fairholme* Compl.); Appx756-757 (*Arrowood* Compl.). "Had the Companies' net worth been properly calculated under Generally Accepted Accounting Principles," no draws would have been necessary because "their liabilities would never have exceeded their assets." *Id.; see also* Appx818 (*Cacciapalle* Compl.). |
| Prior to the Net Worth Sweep, the Companies "were frequently unable to pay [Treasury's] dividends . . . without drawing on Treasury's capital commitment." Gov. Resp. Br. 2. | The Companies "never were required to pay a cash dividend to Treasury but rather had the discretion to pay dividends in kind." Appx416–417 (*Fairholme* Compl.); *see also* Appx517 (*Owl Creek* Compl.); Appx520 (*Owl Creek* Compl.); Appx750 (*Arrowood* Compl); Appx816 (*Cacciapalle* Compl.). |
| Prior to the Net Worth Sweep, "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." Gov. Resp. Br. 10. | "Companies anticipated that they would be able to pay their 10% dividends to Treasury without drawing on Treasury's funding commitment in the future." Appx436 (*Fairholme* Compl.); *see also* Appx504 (*Owl Creek* Compl.); Appx 516 (*Owl Creek* Compl.); Appx770 (*Arrowood* Compl.); Appx820 (*Cacciapalle* Compl.). |
| "To protect the remaining commitment, Treasury and FHFA determined it was necessary to end the cycle of the enterprises paying dividends by drawing on Treasury's commitment." Gov. Resp. Br. 10–11. | "[T]he real intent behind the Sweep Amendment [was] to benefit the government at the expense of the Junior Preferred stockholders." Appx520 (*Owl Creek* Compl.); *see also* Appx453 (*Fairholme* Compl.); Appx787 (*Arrowood* Compl.); Appx824 (*Cacciapalle* Compl.). |

| **Government's Brief** | **Private Shareholders' Complaints** |
|---|---|
| The Net Worth Sweep "ensur[ed] [the Companies'] ongoing access to vital yet hard-to-come-by capital." Gov. Resp. Br. 35 (quoting *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 607 (D.C. Cir. 2017)). | "[T]he Net Worth Sweep increases the chances of further draws on Treasury's funding commitment" because "the lack of retained capital combined with mark-to-market volatility from the Companies' derivatives portfolio has the effect of increasing the likelihood of negative net worth." Appx453 (*Fairholme* Compl.); Appx786 (*Arrowood* Compl.) (cleaned up). Fannie Mae's Chief Financial Officer testified that her reaction to the Net Worth Sweep was that "it was probably a desire not to allow capital to build up within the enterprises and not to allow the enterprises to recapitalize themselves." Appx512 (*Owl Creek Compl.* Compl.); Appx782 (*Arrowood* Compl.); Appx827–828 (*Cacciapalle* Compl.). |

The government seeks to base its tendentious version of the "factual background" not, as it must, on the well-pleaded factual allegations of the complaints that are actually before this Court, but instead largely on its selective reading of decisions from other cases. When the first lawsuit challenging the Net Worth Sweep on statutory grounds was filed in 2013, the government submitted what proved to be a grossly incomplete administrative record and moved for summary judgment. The materials the government selectively included in that record purported to support the same narrative that the government presents in its brief, in which the Net Worth Sweep was necessary because the Companies' poor financial outlook supposedly trapped them in a vicious cycle of drawing on Treasury's funding commitment to pay Treasury's dividends. The D.C. Circuit was the first court of appeals to reject a

statutory challenge to the Net Worth Sweep, and in doing so it described the facts in accordance with the government's narrative. *See Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599–601, 607 (D.C. Cir. 2017).

Meanwhile, in contemporaneous litigation in the Court of Federal Claims, the government was ordered to produce documents relevant to its decision to impose the Net Worth Sweep. Those documents, many of which are described in the Private Shareholders' complaints (as amended after the production of those documents), tell a very different story. Among other things, they reveal:

- In the weeks before the Net Worth Sweep was announced, Fannie shared financial projections with both FHFA and Treasury showing that it would be able to pay a 10% cash dividend on the Government Stock well into the future. Appx451 (*Fairholme* Compl.); Appx505 (*Owl Creek* Compl.); Appx784–785 (*Arrowood* Compl.).

- The same day that Fannie's Chief Financial Officer told senior Treasury officials that Fannie anticipated making accounting adjustments that would cause it to report an additional $50 billion in profits within the next year, an FHFA official wrote that Treasury was making a "renewed push" to impose the Net Worth Sweep. Appx454 (*Fairholme* Compl.); Appx511 (*Owl Creek* Compl.); Appx787 (*Arrowood* Compl.).

- Treasury internally described the purpose of the Net Worth Sweep this way: "By taking all [the Companies'] profits going forward, we are making clear that [they] will ***not*** ever be allowed to return to profitable entities." Appx395 (*Fairholme* Compl.); Appx512 (*Owl Creek* Compl.); Appx733 (*Arrowood* Compl.).

- A White House official involved with the Net Worth Sweep privately told a commentator that he was "exactly right on substance and intent" when he said that "[t]he most significant issue here is whether Fannie and Freddie will come back to life because their profits will enable them to re-capitalize themselves and then it will look as though it is feasible for them

> to return as private companies backed by the government. . . . What the Treasury Department seems to be doing here . . . is to deprive them of all their capital so that doesn't happen." Appx450 (*Fairholme* Compl.); Appx514 (*Owl Creek* Compl.); Appx733 (*Arrowood* Compl.).

The Private Shareholders used these and other documents obtained through discovery to make detailed factual allegations in their amended complaints to show that that the Net Worth Sweep was "designed to raise general revenue and further policy goals of the [government] at the expense of the Companies and their shareholders." Appx451 (*Fairholme* Compl.); Appx784 (*Arrowood* Compl.); Appx507 (*Owl Creek* Compl.) ("[Net Worth Sweep] provided Treasury an expected and actual windfall of billions of dollars per year without the need for any appropriation from Congress"). Yet the government's brief fails to credit those factual allegations when urging dismissal on the pleadings.

Given the issues in this appeal, the facts the government seeks to improperly introduce through its extra-complaint counter-narrative should not matter, but that the government offers them suggests it may view the matter differently. The Court should not be misled by the government's efforts to bolster its disputed factual narrative with quotations from *Jacobs v. FHFA*, 908 F.3d 884 (3d Cir. 2018), and *Perry Capital*, 864 F.3d 591. Whatever the complaints in those cases said, in these appeals the Court is obliged to accept the well-pleaded factual allegations in the Private Shareholders' complaints.

## II. THE PRIVATE SHAREHOLDERS' CLAIMS CHALLENGING THE NET WORTH SWEEP ARE "AGAINST THE UNITED STATES" AND THUS WITHIN THE COURT OF FEDERAL CLAIMS' JURISDICTION UNDER THE TUCKER ACT.

The government contends that the claims of the Private Shareholders are not "against the United States," and therefore that the Court of Federal Claims lacked jurisdiction under the Tucker Act. 28 U.S.C. § 1491(a)(1). The claims allege (among other things) that two agencies of the United States violated the federal Constitution in agreeing between themselves to the Net Worth Sweep, thereby injuring the Private Shareholders. The government offers no meaningful response to the several independent reasons, which the Private Shareholders previewed in their Joint Opening Brief, why such claims are, just as pleaded, "against the United States" and thus within the lower court's jurisdiction, and the arguments the government instead makes fail.

### A. The Government Fails To Meaningfully Address The Grounds For Holding The Private Shareholders' Claims To Be "Against The United States" Because The Agency Is An Arm Of The United States.

The Tucker Act effects "a broad waiver of immunity for claims against the government." *Slattery v. United States*, 635 F.3d 1298, 1320 (Fed. Cir. 2011) (*en banc*) ("*Slattery II*"). Among its key functions is to provide a forum where property owners may seek redress whenever, under the Constitution, the federal government must pay just compensation for a taking. Although the scope of Tucker Act jurisdiction is ultimately a question of statutory interpretation and therefore "within

Congress's control," *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995), the Act's history and purpose leave little doubt that, if an entity acts as the federal government as a matter of constitutional law, it is "the United States" within the statute's meaning, 28 U.S.C. § 1491. The Supreme Court, consistent with this background, has "always assumed that the Tucker Act is an implied promise to pay just compensation which individual laws need not reiterate." *Preseault v. I.C.C.*, 494 U.S. 1, 13 (1990); *see Slattery II*, 635 F.3d at 1301–04, 1309–10 (similar, surveying history of Tucker Act, including application to government instrumentalities). Here, as a matter of constitutional law, the Agency is the federal government, including as conservator, and in any event Congress in HERA has confirmed the Agency's status as part of the United States, as has the Agency itself in the context of the Net Worth Sweep.

**1.** The Supreme Court in *Lebron* set out three criteria that make an entity part of the Federal Government for purposes of the Constitution: (1) being created by special law, (2) to further governmental objectives, (3) with the government retaining permanent authority to appoint a majority of its directors. Jt. Br. § II.A, at 61–62; *see Corr v. Metrop. Wash. Airports Auth.*, 702 F.3d 1334, 1336–37 (Fed. Cir. 2012) (looking to *Lebron* to determine whether entity was United States for Little Tucker Act). Significantly, *Lebron* applied those factors and concluded that Amtrak is *categorically* a part of the federal government for constitutional purposes; it did

not matter that the constitutional claim challenged Amtrak's terms for leasing billboard space, as many private businesses do. *See Lebron*, 513 U.S. at 400; *cf. id.* (O'Connor, J., dissenting, viewing terms as "private business judgment").

As the Private Shareholders explained in their opening brief, the Agency satisfies all three of the *Lebron* criteria. Jt. Br. § II.A, at 62. It exercises powers specially conferred by a federal statute (HERA); claims sweeping statutory authority to prioritize federal interests and otherwise exists to further federal housing policy; and operates under the permanent control of a federal officer—its presidentially appointed Director. Irrespective of whether the Agency acts as "conservator," "regulator," or in some other capacity, it satisfies all three of the *Lebron* factors and is therefore the government as a matter of constitutional law. *See Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 51 (2015); *Lebron*, 513 U.S. at 392. Ultimately, the undeniable "practical reality of federal control and supervision" over the Agency through the Director is dispositive, and that reality is just as true and dispositive of the Agency as conservator as in any other role. *Dep't of Transp.*, 575 U.S. at 55. "That the Congress chose to call it a [conservator] does not alter its characteristics so as to make it something other than what it actually is. . . . ," an agency of the United States. *Lebron*, 513 U.S. at 393 (quoting *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946), addressing statutory status of corporation as to which Congress was silent; ellipsis in *Lebron*); *see Slattery II*, 635 F.3d at 1315

(same). And analogous precedent of this Court, *Lion Raisins, Inc. v. United States*, 416 F.3d 1356 (Fed. Cir. 2005), confirms this conclusion. *See* Jt. Br. § II.A, at 62–63.

Indeed, in *Collins v. Mnuchin*, the *en banc* Fifth Circuit held (by a 12-4 vote) that the Agency's actions as conservator in this very context—imposing the Net Worth Sweep—are attributable to the federal government for purposes of the Constitution. 938 F.3d 553, 590 (5th Cir. 2019), *cert. granted*, Nos. 19-422 & -1953 (U.S. July 9, 2020); *see id.* at 591 n.1. Finding guidance in this Court's decision in *Slattery v. United States*, 583 F.3d 800, 827 (Fed. Cir. 2009) ("*Slattery I*"), *reinstated in relevant part, Slattery II*, 635 F.3d at 1300, 1321, the Fifth Circuit recognized that the Agency "is a federal agency, empowered by a federal statute, enriching the federal government," and that it therefore "adopted the Third Amendment with federal governmental power." *Collins*, 938 F.3d at 590. Although the government has asked the Supreme Court to reverse the Fifth Circuit on this point (*Collins* was argued Dec. 9, 2020), that court was correct under controlling Supreme Court precedent, and its logic carries over to the jurisdictional question here.

The government disputes neither the relevance of *Lebron* nor the Agency's satisfaction of all three elements. It evades the questions—never citing *Lebron*—notwithstanding the Private Shareholders' argument. *See* Jt. Br. 27; Jt. Br. § II.A, at 61–62. It invokes (some of) the decisions addressing the *merits* of the Net Worth

Sweep under HERA, in challenges under the Administrative Procedure Act. *See* Gov. Resp. Br. 34–35. (It omits *Collins*, which involves both an APA claim and a constitutional claim.) Apart, however, from such suits' dependence on the Net Worth Sweep's being "agency action," 5 U.S.C. § 702, which hardly helps the government, those are no more relevant here than were, in *Lebron*, the merits of Amtrak's decision to reject a billboard. The government does at least cite *Lion Raisins*, but its mere case summary is beside the point: The point is that, under HERA, the Agency—including as conservator, and however one conceives that role—is *at least* as much an arm of the United States as the Raisins Administrative Committee was. Jt. Br. § II.A, at 62–63. The government offers only the irrelevant assertion that the Agency—at all times, including as conservator, directed by a *principal officer* of the United States—might not be an agent of *another part* of the United States, Treasury, directed by a different principal officer. *See id.* at 63 (pointing out this distinction). In sum, the Agency's status as a unit of the federal government for purposes of the Constitution is beyond dispute and suffices to make the Private Shareholders' claims "against the United States" under the Tucker Act.

**2.** If the straightforward analysis under *Lebron* left any doubt about the Agency's governmental status, that doubt would be resolved in the Private Shareholders' favor because Congress in several provisions of HERA has made clear its intention for the Agency to be part of the United States, regardless of whether it

is acting as conservator. *See* Jt. Br. § II.A, at 61. When Congress specifies that an entity is the federal government, that "is assuredly dispositive" of whether the entity's actions are attributable to "the United States" under a statute, including the Tucker Act. *Lebron*, 513 U.S. at 392; *see U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 492 (D.C. Cir. 2004) (Roberts, J.) (recognizing that, when Congress "expressly provided" that an entity "*was* an agency and instrumentality of the United States," that was conclusive for provision of federal False Claims Act to apply) (internal quotation marks omitted; favorably cited in *Dep't of Transp.*, 575 U.S. at 51). That is the case here.

*First*, Congress in the Agency's organic provision in HERA has made the "Federal Housing Finance Agency" "an independent agency of the Federal Government" of the United States, and added no exclusion for when the Agency acts under its HERA authority as conservator of one of its handful of "regulated entit[ies]" defined in HERA. § 4511(a)[3]; *see* § 4502(20); § 4617(a)(1)[4]; *see FHFA v. Royal Bank of Scotland Grp. PLC*, 2012 WL 3580522, *2 (D. Conn. Aug. 17,

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[3] Section citations are of Title 12, U.S.C., unless otherwise indicated.

[4] Similarly, the Director's annual reporting obligation to Congress, in the same subchapter as § 4511, encompasses his actions as conservator, as he must describe all "actions taken, and being undertaken, . . . to carry out" Chapter 46 (of Title 12), which includes § 4617. § 4521(a)(1). And the Director's authority to issue subpoenas and then have "the Attorney General of the United States" enforce them encompasses the Agency as conservator. § 4588(c); *see* § 4617(b)(2)(I).

2012) (quoting § 4511(a) in holding Agency as conservator to be a "public" plaintiff, "[l]ike the SEC," under federal statute); *see also Collins*, 938 F.3d at 590 (noting based on § 4511(a) that "Congress empowered FHFA as a federal agency," within the Executive Branch even when a conservator). The "legislation creating the agency" particularly bears on whether it "should be treated as the United States," and Congress was clear. *Pieczenik v. Domantis*, 120 F. App'x 317, 319 (Fed. Cir. 2005).

The government barely acknowledges this sub-section's existence. It never quotes it, much less addresses it. *Cf.* Gov. Resp. Br. 5 (generally citing § 4511, in Statement of the Case); *id.* at 34 (omitting § 4511 when purporting to argue against jurisdiction "from HERA's text"); *id.* at 39 (perhaps alluding to § 4511).

*Second*, if such statutory language nevertheless allowed a doubt about the governmental status of this "agency of the Federal Government" when it is carrying out its federal statutory authority as conservator (rather than any other of its federal statutory authority), Congress eliminated it by indicating elsewhere in HERA that the Agency in executing that role remains an "agency of the United States." § 4617(a)(7). Congress did so in directing that, "[w]hen acting as *conservator* or receiver, *the Agency* shall not be subject to the direction of any *other agency* of the United States or any State in the exercise of the rights, powers, and privileges of the

Agency." *Id.* (emphases added). Pairing such language with § 4511(a), this Court should "have no doubt" of statutory jurisdiction. *Lebron*, 513 U.S. at 392.

The government does, unlike with § 4511(a), acknowledge the existence of § 4617(a)(7), but elides it in its jurisdictional arguments. *E.g.*, Gov. Resp. Br. 26 (selectively quoting in jurisdictional summary); *id.* at 34 (omitting when purporting to argue "from HERA's text"); *id.* at 41 (discussing only in context of Treasury's authority over Agency). In any event, in entering into the Net Worth Sweep, the Agency was "exercis[ing] . . . the rights, powers, and privileges of the Agency," and thus this provision confirms its status, in so doing, as a federal agency. § 4617(a)(7); *see* § 4617(b) ("Powers and duties of the Agency as conservator or receiver"). Although the government in emphasizing what is known as the succession clause (§ 4617(b)(2)(A)) may mean to obfuscate this, it ultimately recognizes that § 4617(a)(7) applies, by invoking its protection (while cropping its language). *Compare* Gov. Resp. Br. 25, 34, *with id.* at 16, 41, 62. The government does also lead with the platitude that "an entity may be governmental for one purpose and nongovernmental for another," but overlooks that this general concession by counsel came in a case in which, unlike here, Congress had not spoken on the status of the entity. *Id.* at 33 (quoting *Alley v. RTC*, 984 F.2d 1201, 1206 (D.C. Cir. 1993)); *see* 984 F.2d at 1206 ("Unsurprisingly, ERISA's text and legislative history do not

address whether an entity like FADA falls within the governmental plan exemption.”).

*Third*, Congress also in HERA, in the same section as § 4617(a)(7), *did* give the Agency, when acting under its authority as conservator, special protections in facing litigation, while *not* protecting it from being subject to suit as part of the United States Government. Congress (a) included an anti-injunction provision, under which, as a general rule, “no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or receiver”; (b) allowed an “action” to be brought in a “United States district court” to enjoin the Agency’s appointing itself “as conservator,” but time-limited such actions to 30 days; and (c), in the succession clause, barred some shareholder derivative suits once the Agency becomes a “conservator.” § 4617(f), –(a)(5), & –(b)(2)(A).

All of these special protections—as to this very Agency, in this very role—not only show that Congress hardly made the Agency a *private* actor when conservator, but also confirm that, if Congress had wanted courts to consider the Agency as conservator *not* “the United States” in a suit challenging its actions, even though Congress had twice said it *was*, Congress knew how to do so. To judicially add a *fourth* protection (exemption from direct claims for damages in the Court of Federal Claims) would be an “[a]textual judicial supplementation . . . when, as here, Congress has shown that it knows how to” act on this subject. *Rotkiske v. Klemm*,

140 S. Ct. 355, 361 (2019); *see Royal Bank of Scotland*, 2012 WL 3580522, at *2 (noting anti-injunction provision's "explicit limitation," in holding Agency as conservator to be "public" plaintiff, akin to SEC, under federal statute); *see also Slattery II*, 635 F.3d at 1315 ("withdrawal of Tucker Act jurisdiction . . . must be specific and unambiguous").

The government *touts* these provisions, and proclaims their purpose of "minimiz[ing] challenges." Gov. Resp. Br. 23–24 (quoting anti-injunction provision and succession clause); *see*, *e.g.*, *id.* at 6 (quoting all three), 26 (mentioning succession clause in summary of jurisdictional argument, merely to argue that it "does not distinguish between conservators and receivers"), 27 (invoking succession clause as bar to Private Shareholders' supposedly substantively derivative claims), & 34 (invoking succession clause as primary "text" bearing on jurisdiction, without mentioning § 4511(a) or § 4617(a)(7)). It even contends these provisions show that in HERA "Congress considered and expressly addressed the extent to which suits would be permitted," yet it never addresses their implication for the statutory jurisdictional question here. *Id.* at 72.

The government does also at times present itself as having, in imposing the Net Worth Sweep, done nothing more than exercise the ordinary powers of a traditional conservator. Gov. Resp. Br. 34–36. Such posturing is belied by the extraordinary statutory powers that the government has claimed it enjoys, and

invoked in defending the Net Worth Sweep, in this and other litigation. *See also id.* at 36 (denying applicability of ordinary fiduciary duties); 89–91 (emphasizing "public interest," and "public nature and immense importance" of imposing conservatorship); Jt. Br. § II.A, at 67. The government fails to explain how it could be a non-government actor while authorized to take into account "public" policy. And this sometime government characterization also contradicts the Private Shareholders' factual allegations. *See*, *e.g.*, Appx394 (*Fairholme* Compl.) (alleging Net Worth Sweep was adopted "out of concern that the Companies would make *too much*," complicating "the Administration's plans to keep Fannie and Freddie in perpetual conservatorship and to prevent their private shareholders from seeing any return on their investments"). Indeed, there is a real question whether the Agency acted beyond its statutory authorization in imposing the Net Worth Sweep, as alleged (in the alternative) in the Private Shareholders' illegal-exaction claims, in which case its action would be even more remote from that of a traditional conservator and thus even more obviously that of a governmental actor. Although the government promotes a "growing consensus among courts" that "FHFA as conservator acted well-within its statutory conservatorship authority," it neglects to mention that, as noted above (*supra* § II.A.1), this very question is pending before the Supreme Court, in *Collins*. Gov. Resp. Br. 45.

The government in any event is incorrect in suggesting that, historically, federal conservators and receivers for financial institutions were understood as private, nongovernmental actors. Gov. Resp. Br. 35–36. The first receivers for financial institutions under a federal statute were, the Supreme Court recognized, "agent[s] and officer[s] of the United States." *Ex parte Chetwood*, 165 U.S. 443, 458 (1897); *see also Price v. Abbot*, 17 F. 506, 507–07 (C.C.D. Mass. 1883) (Gray, Circuit Justice); *cf. Collins*, 938 F.3d at 590 ("every conservator or receiver relies on some public authority, whether court or agency").

**3.** Although the government vigorously argues that the Agency's actions *as conservator* are not attributable to the United States, it does not appear to dispute that the Agency's actions *as regulator* are. At an absolute minimum, the Private Shareholders may sue the United States under the Tucker Act for the Agency's regulatory actions, and the Net Worth Sweep depends on such actions: It could not have begun without the Agency's blessing as regulator, and by regulation every Net Worth Sweep dividend payment has received the Agency's approval as regulator. *See* 12 C.F.R. § 123.12(a), (b).

Moreover, given how the Agency has chosen to structure its operations, there are no clear lines distinguishing when the Agency acts "as conservator" and "as regulator." Unlike the FDIC, which historically has maintained a firewall between personnel who act in its different capacities, the Agency does not silo its

conservatorship and regulatory functions but instead permits the same policymakers to act simultaneously on behalf of the Agency in both capacities. *See* Appx411 (*Fairholme* Compl.). This blending of roles helped to produce the Net Worth Sweep, as the Agency signed an agreement on behalf of the Companies that pursued the "governmental" objective of winding down the Companies. *Perry Capital*, 864 F.3d at 608. Irrespective of whether the Agency's actions as conservator are attributable to the government as a general matter, the government is responsible for the Net Worth Sweep given federal regulators' "pervasive entwinement" with the conservator. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001). For all of these reasons, the Agency's status, even considered on its own, suffices to make the Private Shareholders' claims "against the United States."

### B. The Government Fails To Meaningfully Address Precedent Showing The Private Shareholders' Claims Also To Be "Against The United States" Because Of The Joint Action Of The Agency And Treasury.

This Court's precedent in *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), provides an analogous—indeed, *a fortiori*—ground for finding that the Agency is the United States in agreeing to, and being sued for, the Net Worth Sweep. Jt. Br. § II.B, at 68–70. The government misses the point of this case, much as it does with the Court's precedents in *Lion Raisins* and *Slattery* (discussed above).

*Hendler*'s applicability does not depend on whether the Agency was acting "at Treasury's direction or under Treasury's authority" (Gov. Resp. Br. 43), as

*Hendler* did not turn on whether California was acting at the EPA's direction or under its authority. *Hendler*, 952 F.3d at 1378 (unnecessary for State to have been agent of United States); *see id.* at 1367 (EPA acted "in conjunction with" State); *id.* at 1369–70 (EPA order under authority of CERCLA "grant[e]d itself and the State of California access," and each installed wells); *id.* at 1374 (referring to "the EPA/state activities"). What matters is that the Private Shareholders' suit, like the plaintiffs' suit in *Hendler*, is challenging a single government "undertaking," the Net Worth Sweep, accomplished by two government entities acting in coordination and by agreement, each of which was acting "under the authority granted by" federal legislation, indeed, the same legislation (here, HERA; there, CERCLA). *Id.* at 1378–79; *cf. Dep't of Transp.*, 135 S. Ct. at 1231–33 (holding Amtrak to be part of federal government for constitutional non-delegation claim, where federal law gave it "joint authority" with Federal Railroad Administration to develop certain standards). The government here, just as in *Hendler*, is arguing that one of the "parts" of that undertaking cannot be attributed to "the United States" or the "Federal Government," and it is wrong here just as it was there. 952 F.3d at 1367, 1379.

### C. The Government Fails To Meaningfully Address Precedent Showing The Private Shareholders' Claims To Be "Against The United States" Simply Because Of Treasury's Involvement.

Similarly, under this Court's precedent in *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014)—which also applies *a fortiori*—the

undisputed involvement of Treasury, indisputably part of the United States, in the single, joint undertaking that the Private Shareholders challenge also suffices to make this suit "against the United States." Jt. Br. § II.C, at 70–72.

The government does not really respond, as it did not below (and the court below did not address this argument either, Jt. Br. § II.C, at 71–72), primarily, it seems, relying on its inaccurate characterization of the Private Shareholders' constitutional claims as "based entirely on the conduct of FHFA as conservator." Gov. Resp. Br. 32 n.11. It does mention questions of coercion, but in *A&D Auto* those went to the merits (because Treasury allegedly acted through private car manufacturers, not another federal agency), not jurisdiction. *Id.* at 44; *see* 748 F.3d at 1153–56. It briefly mentions "Treasury's role as counterparty" to the Net Worth Sweep but ignores that role's jurisdictional implication by again lapsing into a merits argument—not even citing, much less discussing, this Court's acknowledgement of jurisdiction in *A&D Auto*.[5] *See* Gov. Resp. Br. 45; *A&D Auto*, 748 F.3d at 1149 n.4. (It nevertheless does elsewhere ask the Court to accept that the Agency might pursue a takings claim against Treasury, challenging the Net Worth Sweep to which the

[5] In any event, the government's merits argument relies on *Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060 (Fed. Cir. 2001), but this Court there just rejected Hughes's post-trial seeking of takings-based damages on top of its damages for the United States' breach of a contract with Hughes. *Id.* at 1070. Here, the government's "proprietary counterparty" merits argument fails just as it did in *A&D Auto*, 748 F.3d at 1156, in which this Court, among other things, distinguished *Hughes*.

Agency agreed. Gov. Resp. Br. 82–83.) In *A&D Auto*, Treasury was an essential party to the challenged financing agreements; Treasury was part of the United States; and that was enough for jurisdiction. So here, Treasury was an essential party to the challenged Net Worth Sweep agreement; Treasury is still part of the United States; and that is again enough for jurisdiction—although it is hardly all, because, unlike in *A&D Auto*, here the "counterparty" (the Agency) too is the United States.

### D. The Government's Primary Argument—That The Agency "Steps Into The Shoes" Of The Companies And Thereby Ceases To Be "The United States"—Depends On Inapplicable Authority And Overlooks And Misstates Other Authority.

Apart from its inadequate or absent responses to arguments for jurisdiction, the government emphasizes an argument of its own: that claims challenging the constitutionality of actions in which the Agency as conservator played a part cannot be "against the United States" because the Agency, as conservator, "stepped into the shoes" of the regulated entities it took over and thereby also "shed" its ordinary identity as an agency of the United States. This argument-by-metaphor is pervasive, undergirding both the government's primary argument against jurisdiction and its critique of the Court of Federal Claims' ground for finding jurisdiction. *E.g.*, Gov. Resp. Br. 2, 16, 25, 32, 33–34, 36–38, 40.

**1.** The "stand in the shoes" metaphor is inapt, on multiple grounds.

*First,* the government primarily invokes decisions of other circuits using such language in discussing the Agency's conservatorship, but in none was the holding

on the status of the Agency. Those cases determined the status of *the Companies*: Because Congress chartered them, and did so to accomplish "governmental objectives for the national housing market," the issue was *Lebron*'s third criterion ("permanent government control"). *Herron v. Fannie Mae*, 861 F.3d 160, 167–68 (D.C. Cir. 2017). These cases rejected the argument that, because the Agency is a government agency, its conservatorship "converted" a Company "into a government actor" as well. *Id.* at 168; *see id.* at 169 ("In conclusion, the conservatorship over Fannie Mae did not create the type of permanent government control that is required under *Lebron* . . . ."); *Meridian Invs. Inc. v. Freddie Mac*, 855 F.3d 573, 578 (4th Cir. 2017) ("The only question here, therefore, is whether Defendants' actions have transformed Freddie Mac into a government instrumentality."); *U.S. ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016) ("Nor does the . . . Agency's conservatorship transform Fannie Mae and Freddie Mac into federal instrumentalities."). The government elsewhere admits this, at least as to *Adams*. Gov. Resp. Br. 102.

That the Agency as conservator of a regulated entity does not *impart* its governmental character to the regulated entity hardly establishes that the Agency as conservator *loses* (or "sheds") its own governmental character. That government's stepping into shoes does not transform the shoes hardly speaks to whether it transforms the feet of the one stepping into them. Indeed, the D.C. Circuit in *Herron*

repeatedly recognized that the conservatorship gave "the government" control, just not "the type" *Lebron* would require to transform Fannie Mae into a governmental entity. 861 F.3d at 169. The government here cites no case holding that the *Agency* ceases to be the United States because it is employing (or "wearing") its HERA authority as conservator rather than some other HERA authority.

If the Agency did accomplish such a transformation simply due to taking on a Company's rights and powers, then HERA's succession clause would be at odds with the provisions of HERA, discussed above in § II.A, that state and show that the Agency as conservator remains an agency of the United States. In construing a statute, however, courts "should adopt that sense of words which best harmonizes with context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). This Court can readily do so by reading HERA as providing that, when the Agency "succeed[s] to" a conserved Company's rights, it does not thereby, under the Tucker Act, give up its own character as an agency of the United States.

Nor, *second*, does the shoe metaphor's origin help the government. The origin is *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), which the government emphasized below but, here, only folds into two string-citations. *See* Gov. Resp. Br. 33, 38. Rightly so: *O'Melveny* involved neither the Agency nor a conservator, but rather the FDIC as receiver. Nor did it present a question whether a receiver was part of the United States, or whether an agency might avoid suit, or whether any

constitutional claim could proceed. The Supreme Court simply declined to invent pre-emptive federal common law for a failed S&L's state-law claim, which the FDIC had brought for it. *See* 512 U.S. at 80–81, 83, 87; *see also Houston Oil & Ref., Inc. v. FERC*, 95 F.3d 1126, 1136 (Fed. Cir. 1996) (so describing *O'Melveny*). That is why the D.C. Circuit, in later holding that "the FDIC as Receiver counts as the United States for the Tucker Act," disregarded *O'Melveny*: "Creating federal common law is one thing, applying a federal statute quite another." *Auction Co. of Am. v. FDIC*, 132 F.3d 746, 749–50 (D.C. Cir. 1997), *reh'g denied*, 141 F.3d 1198, 1199 (D.C. Cir. 1998) (reiterating holding); *see Citizens Cent. Bancorp, Inc. v. United States*, 2017 WL 10544024, *4 (Fed. Cl. Sept. 7, 2017) (in holding FDIC to be United States in suit over receivership, reasoning that a "singular phrase of dicta espoused in a choice-of-law case" does not determine "this Court's Tucker Act jurisdiction"). This Court, in turn, has looked to *Auction Co.*, without mentioning *O'Melveny*, in determining when an entity was the United States. *See Corr*, 702 F.3d at 1336; *Slattery I*, 583 F.3d at 827; *see also Pieczenik*, 120 F. App'x at 319 (disregarding *O'Melveny* and favorably citing *Auction Co.*).

*Third,* the government otherwise makes much of the FDIC, but overlooks or misunderstands precedent, context, and statutes. It cites *Slattery I* for the proposition that the FDIC "is generally not the government . . . when acting as a receiver of a private financial institution." Gov. Resp. Br. 39. But this Court there actually

recognized (based on *Auction Co.*, among other cases) that, although "the context of the claim" matters, "the FDIC does *not* automatically lose its governmental status when it acts as receiver for a bank that it has seized in its governmental role," and it held that the FDIC-as-receiver *was* the United States on the claim at issue. 583 F.3d at 827–28 (emphasis added); *see Slattery II*, 635 F.3d at 1319 (generally stating that "[t]he FDIC is an agency of the United States" and pointing to, among other things, its power to "liquidate or otherwise resolve failed or failing banks"); Jt. Br. § II.A, at 65–66. And here, the Agency very much acts as conservator for Companies it seized "in its governmental role," under a ground Congress expressly gave it for taking over entities it regulates. *See Collins*, 938 F.3d at 590 (viewing *Slattery I* as analogous and holding that Agency exercised governmental power when it imposed the Net Worth Sweep).

As to "the context of the claim," it would be one thing for a federal instrumentality to be deemed not the United States when it is a plaintiff bringing a private party's claim (as in *O'Melveny* itself)—especially when it is a plaintiff bringing such a claim against the United States (as, ultimately, in the *Winstar* cases, *see Frazer v. United States*, 288 F.3d 1347, 1354 (Fed. Cir. 2002)). It would be quite another to disregard federal status when an instrumentality is a defendant sued over its own actions—especially actions alleged to have violated the Constitution. *See Auction Co.*, 132 F.3d at 750 n.1 (noting that contract was not "inherit[ed] . . . from

defunct depositories”). The government does not cite any authority relying on *O’Melveny* to hold, or otherwise holding, that the FDIC is *not* the United States for a constitutional challenge to its action. *See Slattery I*, 583 F.3d at 862–28 (refusing to distinguish *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999), which involved a takings claim against FDIC); *see also Citizens Cent. Bancorp.*, 2017 WL 10544024, at *6 (finding FDIC as receiver generally “too inundated in governmental control mechanisms to conclude it is not acting ‘on behalf of the United States’ or ‘on authority of the United States’”) (*quoting Slattery II*, 635 F.3d at 1301, 1315); *cf. FDIC v. Meyer*, 510 U.S. 471, 483–86 (1994) (treating predecessor of FDIC as federal agency in assessing constitutional claim by S&L employee fired in receivership). Much less that the Agency is not the United States for a constitutional challenge to its action.

In any event, in the organic statute establishing the FDIC, Congress included no blanket statement that it is a federal agency, as it did in HERA for the Agency. *Compare* § 1811(a), *with* § 4511(a). Instead, it elsewhere more narrowly provided that (1) the FDIC shall be an agency “for purposes of” being a plaintiff in federal district courts under 28 U.S.C. § 1345, and that (2) the FDIC shall be included in the defined term “Federal banking agency,” along with the Comptroller of the Currency

and the Federal Reserve Board. §§ 1819(b)(1) & 1813(z); *see* Gov. Resp. Br. 39. It thus left statutory space that distinguishes the FDIC from the Agency.[6]

**2.** Even if the government's favorite metaphor might have some purchase in the context of receivers (particularly FDIC receivers), it would not, as the court below recognized, carry over to the Agency as conservator. The Private Shareholders already explained why the Court of Federal Claims was correct on this. Jt. Br. § II.A, at 64–67. The government disparages the holding, but its attacks fail.

*First*, the government begins by invoking "the extensive precedent holding that a federal agency, when acting as conservator, is not the United States." Gov. Resp. Br. 36. But the government does not cite *any* such precedent there, nor, as discussed above, does it earlier in its brief. The "extensive precedent" does not exist.

*Second*, the government next disparages the Court of Federal Claims for "[r]elying on a single district court decision, *Sisti v. FHFA*, 324 F. Supp. 3d 273 (D. R.I. 2018), which is currently on appeal." Gov. Resp. Br. 36. But this overlooks much: *Sisti* relied on other decisions, particularly *Royal Bank of Scotland*—which the Private Shareholders discussed in their opening brief yet the government does

[6] In addition, the Agency is, of course, an actual agency, not a corporation like the FDIC; it appoints itself conservator or receiver, as an incident of its regulatory duties over the Companies, not being appointed by others, *see* § 1821(c); Congress has focused its authority on overseeing two federally sponsored companies with federal duties, not extending it to myriad purely private entities; and it has no stake in the Companies, not insuring them, *see* § 1821(a). The government seems to largely agree on the difference. *See* Gov. Resp. Br. 79, 119.

not address or even cite. *See* Jt. Br. § II.A, at 61, 66–67. In turn, *Sisti* has been followed on this distinction, in *Phoenix Bond & Indem. Co. v. FDIC*, 2020 WL 7223710 (N.D. Ill. Dec. 8, 2020), which the government also does not mention. And the Seventh Circuit in *DeKalb County v. FHFA*, earlier determined that, as long as the Companies' "*conservator is the United States*, and the assets and income in question are those of entities charged with a federal duty (that of promoting the federal policy of encouraging home ownership), *the conservator's suit against a state's tax collector is a suit by the United States*"; thus, the Agency as conservator could use the federal-instrumentality exception in the Tax Injunction Act, which generally bars such suits. 741 F.3d 795, 804 (7th Cir. 2013) (emphases added); *see Phoenix Bond*, 2020 WL 7223710, at *4 (noting that exception is narrowly construed, and citing *DeKalb County*). The government is familiar with *DeKalb County*, because it cited it here as background, yet it ignores it when disparaging the Court of Federal Claims' jurisdictional holding. *See* Gov. Resp. Br. 4.

*Third*, the government asserts that "the Court of Federal Claims' conclusion is at odds with basic principles of corporation law," but it does not point to any such principles with which it is at odds. Gov. Resp. Br. 36–37. The few high-level principles it does mention are not inconsistent with what the court said. *See id.* That Treasury is a controlling shareholder (Jt. Br. § I.D, at 49; *id.* § III.B, at 84–88; *infra* § IV.B), while it reinforces the conclusion based on the Agency's status as

conservator (because Treasury is also the United States), is not essential to it, as is evident from the Private Shareholders' discussion in their opening brief. Jt. Br. § II.A, at 64–67; Jt. Br. § III.A, at 78; *see* Gov. Resp. Br. 38. In sum, the Private Shareholders' suit is against the United States, and the Court of Federal Claims has jurisdiction under the Tucker Act.

## III. THE PRIVATE SHAREHOLDERS HAVE STANDING TO ASSERT DIRECT CLAIMS FOR THE TAKING OF THEIR PROPERTY.

In their opening brief, the Private Shareholders established that the Net Worth Sweep effected a complete expropriation—a wipeout—of their equity and associated rights and transferred that equity directly to a government shareholder, Treasury. Indeed, at a recent oral argument, several Justices of the Supreme Court referred to this as a "nationalization" of the Companies. *Collins v. Mnuchin*, Dec. 9, 2020 Tr. 12:12–22; 19:21–24, No. 19-563 (U.S.). In imposing the Net Worth Sweep, the Agency, working hand-in-hand with Treasury, eliminated, among other things, the Private Shareholders' liquidation rights and ability to receive any dividends and took those rights for the government.

This unprecedented reallocation of the rights of the Private Shareholders gives rise to direct claims. The harm associated with this reallocation of rights is to the Private Shareholders, not the Companies. That harm, moreover, exists independently of any different harm to the Companies. To nationalize a company does not necessarily harm the company, even though it certainly harms its owners. And the

Private Shareholders seek redress for that harm through money damages that would be paid to them to compensate for the loss of the value of their equity and associated rights, not payments to the Companies (which under the current capital structure would, perversely, redound to the benefit of the government shareholder, not the Private Shareholders).

The government's response fixates upon immaterial snippets of cases, but fails to come to grips with the reality of the Net Worth Sweep and its direct effects on the Private Shareholders. Whether viewed under federal or state law, this wiping out of the Private Shareholders' equity rights gives rise to direct claims, particularly given that the Net Worth Sweep provided no new capital and that the beneficiary of the restructuring was another shareholder, Treasury.

Indeed, the government fails to respond to the Private Shareholders' independent argument that such a reallocation of equity necessarily gives rise to direct claims, a failure that should be conclusive for standing. And it, in any event, cannot answer the logic that the Private Shareholders seek direct redress for the government's taking of their property, a harm to them. Likewise, the government fails to confront the reality that in substance Treasury is by itself, and especially along with the Agency, a controlling shareholder for purposes of Delaware's dual-nature doctrine, such that an appropriation of equity from minority shareholders, as

here, gives rise to direct claims, even if there also could be derivative claims based on the harm to the Companies.

Moreover, the government's arguments all improperly conflate the merits with the threshold issue of standing. In deciding issues of standing, the Court should simply look at whether "the plaintiff has alleged a 'colorable' or 'arguable' claim that the defendant has invaded a legally protected interest," and should not conflate the issue of standing with the ultimate merits. *CHKRS, LLC v. Dublin*, 984 F.3d 483, 489 (6th Cir. 2021) (citing *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1264 (Fed. Cir. 2017)).

### A. The Government Fails To Address The Private Shareholders' Argument That Reallocations Of Equity Give Rise To Direct Claims.

In their opening brief, the Private Shareholders showed that, as a special form of corporate reorganization, reallocations of equity among shareholders give rise to direct claims. Jt. Br. § I.C, at 42–46. The rule, as restated most succinctly by Justice Frankfurter in *Swanson v. Traer*, is this: "If a corporation rearranges the relationship of different classes of security holders to the detriment of one class, a stockholder in the disadvantaged class may proceed against the corporation as a defendant to protect his own legal interest." 354 U.S. 91, 99 (1957) (Frankfurter, J., dissenting). In such situations, a shareholder necessarily has a direct harm, because she, by definition, suffers "some individualized harm *not suffered by all* of the stockholders

at large." *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008) (emphasis added). As the Private Shareholders detailed, this rule has been applied consistently in both federal and Delaware cases. *See, e.g.*, *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 160 (1957) (transaction benefitting the controlling shareholders while simultaneously reducing the proportionate interests of common shareholders imposed distinct harms on the "minority common stockholders"); *Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007) (holding that minority shareholders had direct claim where transaction "produce[d] an increase of shares owned by the controlling shareholder and 'a corresponding decrease' in shares owned by the minority shareholders," a harm not falling on all shareholders *pro rata*); *see also* Jt. Br. § I.C, at 43 & n.6 (collecting other federal and Delaware cases). That rule also is reflected in a leading treatise on corporation law. *See* Jt. Br. § I.C, at 43 & n.6 (quoting 12B *Fletcher Cyclopedia of the Law of Corps.* §§ 5980 & 5922).

Here, of course, the Net Worth Sweep effectively reallocated the equity from the Private Shareholders to Treasury. And it did so completely, by wiping out the equity of the Private Shareholders and transferring that equity *in toto* to Treasury as a shareholder. This historic "nationalization" of the Companies is as extreme and complete an example of a corporate reallocation of equity as is possible. The Private Shareholders thus have direct claims to redress that reallocation.

The government does not respond to this reallocation argument. It does not address *Swanson*, or *Feldman*, or *Alleghany* in any way, not even citing them. Nor does it cite, much less address, any other of the cases and authority the Private Shareholders collected, with the sole exception of *Gatz*. And it mentions *Gatz* only in the context of the different arguments regarding Delaware's "dual-nature" doctrine. Gov. Resp. Br. 61–63, 68–69. Accordingly, the government has waived any response to the reallocation argument. *See, e.g.*, *CardSoft, LLC v. VeriFone, Inc.*, 807 F.3d 1346, 1353 (Fed. Cir. 2015) (granting judgment on claim because "[a]rguments that are not appropriately developed in a party's briefing may be deemed waived"; appellee had "effectively conceded" argument by failing to address it in its brief; and "consequently," appellee "ha[d] waived this argument"). On this basis, without the need for more, this Court should reverse the Court of Federal Claims and hold that the Private Shareholders' claims are direct.

### B. The Government Fails To Refute That Private Shareholders Have Pleaded Direct Claims Under Federal Law By Alleging That The Government Transferred Their Property Rights To Itself.

The government cherry picks quotes from the Private Shareholders' complaints and ignores their arguments of direct harm, asserting that their "claims rest on a central underlying allegation: that the Third Amendment resulted in the unlawful transfer of *the enterprises*' net worth to Treasury." Gov. Resp. Br. 52 (emphasis in original). But the gravamen of the Private Shareholders' direct claims

is not that the Companies suffered an injury. Rather, it is that (a) before the Net Worth Sweep, the Private Shareholders enjoyed all of the rights associated with their investment including the right to receive a dividend in any quarter in which a dividend was paid beyond the 10% dividend payable to Treasury under the original PSPAs, but (b) after the Net Worth Sweep, the Private Shareholders' rights were transferred to Treasury, wiping out the Private Shareholders' property interests and granting Treasury, among other things, the *sole* right to all future distributions. *See* Appx823 (*Cacciapalle* Complaint alleging that effect of Third Amendment was "to eliminate any possibility that private shareholders would ever receive anything"), *id.* ("As Treasury stated on the day of the announcement, the Third Amendment was intended to ensure that 'every dollar of earnings that Fannie Mae and Freddie Mac generate will benefit taxpayers' – *i.e.*, not the private preferred stockholders."). The government provides no reason why these allegations that the Private Shareholders' rights were transferred to the government shareholder do not amount to a direct injury under federal law.

*First*, as explained in the Private Shareholders' opening brief, shareholders have a direct claim if they have "a direct personal interest in a cause of action." *Starr Int'l Co., Inc. v. United States*, 856 F.3d 953, 966 (Fed. Cir. 2017) (quoting *Franchise Tax Bd. Of Calif. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990)); Jt. Br. § I.A, at 30–33. This is why the D.C. Circuit determined that plaintiffs' claims

for breach of their contracts with the Companies were "obviously direct because they belong to the [shareholders] and are ones that only [the shareholders] can assert." *Perry Capital*, 864 F.3d at 628 (internal quotation marks omitted).

The Net Worth Sweep revised *existing equity* in a way that gave the government shareholder (Treasury) the right to 100% of all dividends and distributions and eliminated the rights of all other non-government shareholders. In *Starr*, this Court held that the issuance of "new equity" in that case was materially different from the transfer of stock between shareholders and did not amount to a direct injury to shareholders. 856 F.3d at 967. Here, the transfer of all interests from Private Shareholders to Treasury is categorically different from the 80% *pro rata* reduction in dividend rights across all shareholders in *Starr*. Moreover, there is no "new equity" or infusion of capital here, as there was in *Starr*. And if the Net Worth Sweep were somehow equivalent to an issuance of "new equity," that would be tantamount to holding that it was unlawful, as Congress set a deadline of December 31, 2009, for Treasury to acquire equity in the Companies (*see* Gov. Resp. Br. 7). Thus, because the Private Shareholders' property rights in their stock, which they obviously owned directly, have been "wiped out" and transferred to Treasury, they have a direct claim to remedy that injury.[7]

[7] As noted below (*infra* § III.D), *Starr* is also distinguishable because at the time of the challenged transaction, the government was not a shareholder. Here, the government was an existing shareholder at the time of the Net Worth Sweep and the

In the only place where the government comes close to confronting the Private Shareholders' argument that the Net Worth Sweep transferred their property rights to Treasury, it resorts to a naked denial followed by a false statement, saying: "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." Gov. Resp. Br. 56–57. The government provides no citation in support, nor could it. Any declaration of a dividend "payable to all shareholders" would violate the Net Worth Sweep's mandate that Treasury be paid *100%* of the Companies' "Net Worth Amount" minus the "Applicable Capital Reserve." SAppx28. And the "Applicable Capital Reserve," which has been set substantially below what the Companies need to sustain their operations (thereby maximizing the value of the net worth "sweep" to Treasury),[8] cannot be used to pay a dividend to private shareholders. Thus, the

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challenged transaction only injured non-government shareholders while benefiting the government shareholder.

[8] In addition, the full amount of any Applicable Capital Reserve must be added to Treasury's Liquidation Preference (which is over $187 billion). Dec. 21, 2017, Letter Agreement at p. 13 ("Increase in Liquidation Preference"); Sept. 27, 2019, Letter Agreement at p. 3 ("Increase in Liquidation Preference"). This continues as the Companies start to build capital reserves under the January 14, 2021, amendment: Each increase in capital reserve correspondingly increases Treasury's Liquidation Preference. The size of Treasury's Liquidation Preference ensures that even in the event of a liquidation, private shareholders will receive nothing.

Net Worth Sweep left *no possibility* for the Companies to ever pay a dividend to Private Shareholders.

The Supreme Court's takings jurisprudence further underscores the existence of a direct claim here because a government action that deprives property of virtually 100% of its value is a "categorical taking," whereas regulations with lesser impacts require case-by-case analysis. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). While the Private Shareholders have standing to bring direct claims regardless of whether the taking here is "categorical" and "per se" (as it should be) or subject to the "regulatory takings" standard, the *Lucas* decision confirms that shareholders must have standing here. The Supreme Court's recognition in *Lucas* of the distinct nature of a total deprivation demonstrates that the government is wrong to conflate a total deprivation of rights with a mere dilution in value.

*Second*, while the government mischaracterizes the Private Shareholders' allegations and argues that they set up the Net Worth Sweep as nothing more than an "overpayment," the Private Shareholders' allegations must be taken as true, as discussed above in Section I. *See A & D Auto,* 748 F.3d at 1147 (noting that on motion to dismiss, court accepts plaintiffs' "well-pleaded allegations as true"). And those allegations, collected in their opening brief, show direct harm not depending on an overpayment. *See* Jt. Br. § I.B, at 36–37. Accordingly, because the Private

Shareholders have properly alleged that the Net Worth Sweep transferred their property rights to Treasury, they have alleged direct claims.[9]

### C. The Government's Response As To The *Tooley* Standard Under Delaware Law Ignores The Substance Of The Transaction And The Realities Of Any Damages Award.

While this Court need not look further than federal law to conclude that the Private Shareholders' claims are direct, state law also compels that conclusion. The government again selectively quotes from the Private Shareholders' complaints, arguing that they only plead injuries to the Companies and that those injuries would be redressed by a remedy directed to the Companies. Gov. Resp. Br. 53–54. However, contrary to the government's claims, the Private Shareholders properly allege that (1) they personally suffered the alleged harm, and (2) they would receive the benefit of any recovery. *See Tooley v. Donaldson, Lufkin & Jenrette*, 845 A.2d 1031, 1033 (Del. 2004).

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[9] Much of the Government's opposition is simply an insistence that the only characterization of the Net Worth Sweep is an "overpayment" transaction. But that is incorrect. The Net Worth Sweep is properly characterized as a transfer of the dividend and distribution rights owned by Private Shareholders to the Treasury. Moreover, Private Shareholders have properly and plausibly alleged that this is the actual impact of the Net Worth Sweep. The Court must accept this properly alleged characterization of the Net Worth Sweep in upholding the standing of Private Shareholders to bring direct claims for the Taking of property that they themselves owned. *CHKRS*, 984 F.3d at 489 (where "plaintiff has alleged a 'colorable' or 'arguable' claim" that the defendant has taken plaintiff's property, the plaintiff has standing) (citing *Reoforce*, 853 F.3d at 1264).

### 1. *The Private Shareholders' Loss Of 100% Of Their Rights Is A Direct Injury That Is Independent Of Any Injury To The Companies.*

The government argues that if the Private Shareholders have a direct claim in this case, then every time there is a "corporate overpayment," there will be a direct shareholder claim.[10] This ignores the distinction between the pro rata *dilution* of a shareholder's economic rights and the total *transfer* of those rights to another shareholder. In many overpayment cases, courts find that the shareholders did not suffer a distinct injury because "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, of which each share of equity represents an equal fraction." *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006). In other words, where a corporation overpays, its value is reduced and, in turn, the value of each share of stock is reduced. But where, as here, a subset of shareholders had 100% of their rights given to another shareholder, the shareholders whose rights were taken suffer a direct injury because their interests have been permanently separated from

[10] Gov Resp. Br. 53 ("every claim asserting a loss of value to a corporation would be direct on that theory"); *id*. at 58 ("every claim regarding a diminution of corporate value could be cast in these terms"); *id*. at 59 ("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" because it left the enterprises without funds to pay dividends in certain quarters).

those of the corporation; a return of assets to the corporation does nothing to benefit those divested shareholders.

The Private Shareholders illustrated this by a hypothetical example in the opening brief (taken from the oral argument below): If the Net Worth Sweep had been the same in all respects except it had allowed the Companies to build capital before paying "Net Worth Sweep" dividends to Treasury, the Companies would not have been injured, but the Private Shareholders still would have been directly injured in exactly the same manner. The government relegates its response to a footnote stating that, "[i]f 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." Gov. Resp. Br. 60 n.14. But this assertion as to the Companies refuses to see the Private Shareholders' loss of their rights, a personal injury to them that does not depend on injury to the Companies. So long as the New Worth Sweep provides (as it does) that any future dividends or other distributions must be paid only to Treasury, the Private Shareholders suffer the same direct injury irrespective of whether the dividend sweeps to Treasury are immediate or indefinitely deferred, which merely determines when or whether the Companies may be separately injured. Thus, under both the actual and the hypothetical New Worth Sweep, Private Shareholders suffer the same direct injury: the total loss of 100% of their rights.[11]

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[11] The government notably does not address the taking of the liquidation

### 2. *The Private Shareholders' Injury Could Not Be Redressed By Payment To The Companies.*

The government asserts that the Private Shareholders are "mistaken" to suggest that compensating the Companies would not remedy any harm because there is "no basis for the supposition that the United States 'would flout'" a federal judgment and, if it did, a court would presumably order it to repay the recaptured funds. Gov. Resp. Br. 55. The government further argues that under the January 14, 2021, amendment to the Treasury SPAs, "the enterprises are permitted to build substantial internal capital that will not have to be paid to Treasury." *Id.*

*First*, the January 14, 2021, amendment actually reinforces that the Private Shareholders' have suffered a direct injury that cannot be remedied by a payment to the Companies. Allowing the Companies to build up more capital does not restore the rights that have been taken from the Private Shareholders.

*Second*, and relatedly, payment to the Companies would not redress the direct injury the Net Worth Sweep caused to shareholders, because any damages award to the Companies would increase the Companies' net worth and increase Treasury's "net worth sweep" dividends. Jt. Br. § I.B, at 41–42. The government never

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preference in this section. The entitlement to all assets in liquidation no matter their value additionally demonstrates the distinct nature of the injury, because it would apply even where there is no corporation and because the shareholders are injured regardless of whether the Companies were overpaid, underpaid, or given fair value for giving away all claims to their assets.

addresses the point that, for money to become available to Private Shareholders, one of two things is required: (a) injunctive relief to change the terms of the Net Worth Sweep, or (b) a direct recovery of damages by the Private Shareholders.

Moreover, through their direct claims, the Private Shareholders seek a recovery completely different from anything the Companies could or would seek in a derivative action. The Private Shareholders do not seek recovery of the amounts paid to Treasury under the Net Worth Sweep. Instead, they seek just compensation equal to the fair market value of the property rights that the Net Worth Sweep took from them and gave to Treasury. That is an entirely separate remedy from anything the Companies could seek, and it reflects the amounts that should be awarded to the Private Shareholders as compensation for the independent harm they, and they alone, suffered.

### D. The Government Fails To Refute The Private Shareholders' Showing That Their Claims Also Are Direct Under Delaware's "Dual-Nature" Doctrine.

In the opening brief, the Private Shareholders showed that, while their claims do not have to be "dual nature" to be direct, their claims are also direct under this doctrine. Jt. Br. § I.D, at 46–57. That doctrine works out the Delaware courts' longstanding recognition that "the same set of facts can give rise both to a direct claim and a derivative claim." *Grimes v. Donald*, 673 A.2d 1207, 1212 (Del. 1996), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *see*

*Branzan Alternative Inv. Fund, LLLP v. Bank of New York Mellon Tr.*, 2015 WL 5693562, at *3 (D. Colo. Sept. 29, 2015) (explaining that under Delaware law "one set of facts may give rise to two separate harms and thus two separate claims, one derivative and the other direct"). Under the dual-nature doctrine, minority-shareholder claims based on transactions that harm both minority shareholders and the corporation as a whole are direct when (1) a controlling shareholder or control group harms the company, and (2) that harm does not fall equally on all shareholders, such as where the transaction "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." *Starr*, 856 F.3d at 968 (quoting *Gentile*, 906 A.2d at 100); *see Gatz*, 925 A.2d at 1278 (restating rule).

These requirements are plainly satisfied here. *First*, at the time of the Net Worth Sweep, the Companies were (as they had been for four years) under the domination of the United States, via the Agency as conservator of the Companies and Treasury as shareholder of the Companies under the strictures of the Treasury SPAs. So the government indisputably "exercise[d] direction over the business and affairs of the corporation." *Starr*, 856 F.3d at 969; *see* Jt. Br. § I.D, at 48–49. Indeed, that was the only way it, on both sides of the transaction, could impose the one-sided terms of the Net Worth Sweep. *Second*, the effect of the Net Worth Sweep was to

transfer the Private Shareholders' equity to the United States (Treasury) as shareholder—to the harm of the Private Shareholders. That disproportionate harm to the Private Shareholders in favor of the government shareholder is exactly what gives rise to direct claims under Delaware's dual-nature doctrine.

**1.** In response, the government mischaracterizes both the Private Shareholders' arguments and the relevant cases. The government first argues that Treasury is not a controlling shareholder, and, thus, that the dual-nature doctrine supposedly does not apply. Gov. Resp. Br. 61–63. But the government's argument is both incorrect and beside the point.

Tellingly, the government never disputes the key point here, which is that the government *writ large*, through the combination of the Agency and Treasury, obviously controlled the Companies. And under the dual-nature doctrine, that actual "direction over the business and affairs of the corporation" is enough. *Starr*, 856 F.3d at 969; *see* Jt. Br. § I.D, at 49–50. While the precise facts in this case are unprecedented, it is unimaginable that the Delaware courts would hold the dual-nature doctrine inapplicable to the actions of two government agencies, working together, to entirely expropriate minority shareholder equity rights and hand them over to one of the government agencies, already a shareholder and contributing no new capital.

The government is in any event incorrect that Treasury itself was not a controlling shareholder. The Treasury SPAs gave Treasury the right to acquire 79.9% of the common stock in the Companies for a nominal value at any time. Appx415–418; Appx498–499. Whether or not Treasury formally exercised that right, it by itself made Treasury in substance a controlling shareholder. Treasury acknowledged this at the time of the original SPAs, through its Internal Revenue Service's special treatment of Treasury's acquisition right, although the government now professes not to understand its own acknowledgement that it had control. *See* Jt. Br. § III.B, at 84–88; Gov. Resp. Br. 64 n.16; *infra* § IV.B. Moreover, the Treasury SPAs directly gave Treasury discretion to prevent or allow numerous transactions. Appx419–421; Appx499; Appx753–754; Jt. Br. at 11. And Treasury and the Agency had an at least close relationship with respect to the Companies. All of this together gave Treasury more than sufficient influence over the management of the Companies to qualify as a controlling shareholder.

The government does cite *Starr* to assert that Treasury's extreme "financial leverage" is insufficient to make it a controlling shareholder. Gov. Resp. Br. 62–63. But the government ignores the critical distinguishing factors that made the claim in *Starr* not direct, even though the Private Shareholders already detailed them (Jt. Br. § I.D, at 49–52): (1) At the time of the *Starr* transaction, the government was not a shareholder. *See Starr*, 856 F.3d at 969–72. The dual-nature doctrine did not apply

because the *Starr* transaction did not involve a provision of equity to a controlling shareholder, but a provision of equity to an outsider in exchange for a substantial infusion of new capital. (2) Accordingly, the transaction in *Starr* affected all of the existing shareholders *pro rata*. As this Court explained, "[t]here is a material difference between a new issuance of equity and a transfer of existing stock from one party to another. Newly issued equity necessarily results in 'an equal dilution of the economic value and voting power of each of the corporation's outstanding shares.'" *Id.* at 967 (quoting *Gentile*, 906 A.2d at 100).

The circumstances here could not be more different. The Net Worth Sweep involved no new capital paid to the Companies and no equity newly issued by the Companies. Rather it simply expropriated equity from the Private Shareholders and gave it to Treasury, which was already a controlling shareholder—on its own and certainly when combined with the Agency.

The government also briefly argues that the Agency was not a controlling shareholder, and that, somehow, the dual-nature doctrine therefore does not apply. Gov. Resp. Br. 67. But the Private Shareholders do not argue that the Agency was itself a controlling shareholder. Rather, they argue that the combination of two government agencies, Treasury and the Agency, together was a "control group" that expropriated the Private Shareholders' equity and transferred it directly to Treasury.

Again, the government has not responded to this argument that the government *writ large* was a control group.

**2.** The government next urges that Treasury owes no fiduciary duties to the Private Shareholders. Gov. Resp. Br. 63–64. This argument likewise is both incorrect and irrelevant.

To begin with, the dual-nature doctrine does not require that a controlling shareholder owe fiduciary duties to minority shareholders. Rather, the doctrine applies when a shareholder *either* has effective control *or* owes fiduciary duties. *Starr*, 856 F.3d at 968 ("Delaware case law has consistently held that a party has control only if it acts as a fiduciary, such as a majority stockholder or insider director, *or* actually exercises direction over the business and affairs of the corporation.") (emphasis added). Since Treasury (on its own and in conjunction with the Agency) did "actually exercis[e] direction" over the business and affairs of the Companies, whether it also took on fiduciary duties is beside the point for this purpose.

The government also has only flawed and unpersuasive arguments (contrary to the language of HERA) that the Agency does not owe fiduciary duties as a conservator, *infra* § IV.A., and it again simply ignores the Private Shareholders' argument that Treasury and the Agency, working together, collectively owe fiduciary duties to the Private Shareholders.

Moreover, Treasury assumed traditional common-law fiduciary duties to minority shareholders when it acquired its interests in the Companies. *See Meridian Investments*, 855 F.3d at 579 ("when the government acquires an ownership interest in a corporation, it acts—and is treated—as any other shareholder"); *infra* § IV.B. But, even if that were not true, Treasury owes a duty under the Fifth Amendment not to take property without just compensation or in violation of law. So once it acted to take the Private Shareholders' property, it took on the duty to pay just compensation, which it violated. The government ignores this point, which was raised in the opening brief (at 58).

**3.** The government next goes to great lengths to urge that the dual-nature doctrine requires a dilution in "voting power" to apply. Gov. Resp. Br. 64–67. Yet the government largely fails to respond to the Private Shareholders' key points showing why this is not so (Jt. Br. § I.D, at 52–57).

The government says that the Delaware Supreme Court's decision in *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1263 (Del. 2016), makes dilution in voting power a necessary element of a dual-nature claim. But that case says no such thing. *El Paso Pipeline*, in the course of describing the dual-nature doctrine, merely described the circumstances in the seminal *Gentile* case, which did involve a loss of both economic value and voting power. *See id.* But, while a loss of voting power can show a direct harm (particularly where common stock is diluted), it is by

no means essential for the dual-nature doctrine. Neither *El Paso Pipeline* nor *Gentile* said or held otherwise.

*Gentile*, rather, made clear that voting power is *not* an essential element of a dual-nature claim. *Gentile* expressly and unanimously rejected the Chancery Court's holding in that case that a reduction in voting power needs to be "material," meaning dropping from majority to minority. 906 A.2d at 101–02. It explained: "A rule that focuses on the degree or extent of the expropriation, and requires that the expropriation attain a certain level before the minority stockholders may seek a judicial remedy directly, denigrates the gravity of the fiduciary breach and condones overreaching by fiduciaries." *Id.* at 102. Yet reducing voting power that already is in the minority means reducing voting power that is useless for controlling the company (particularly when, as in *Gentile* itself, a majority shareholder exists, *id.* at 95). Accordingly, loss of "control" or "voting power" cannot be the real question. Rather, a loss of (even non-controlling) voting power is simply a marginal piece of the plaintiff's overall discriminatory, and thus direct, economic injury. But it is not essential. The government fails to grapple with the implication of this holding of *Gentile*, and even suggests (directly contrary to it) that loss of voting power must involve a loss of "voting control," citing not a Delaware decision but rather *Roberts v. FHFA*, 889 F.3d 397, 409 n.1 (7th Cir. 2018), which only describes some

Delaware cases as "generally involving transfers of control" or other factors. Gov. Resp. Br. 66 & 67 n.18.

Critically, if voting power were essential, holders of preferred stock without voting rights could not bring a dual-nature claim, but Delaware law permits such claims. *See MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *13 (Del. Ch. May 5, 2010) (applying the same dual-nature test to preferred stock with no voting rights); *see also Oliveira v. Sugarman*, 152 A.3d 728, 747–79 (Md. 2017) (recognizing that, under Delaware law, a direct claim exists "when minority shareholders have suffered a substantial decrease in the value of their stock due to share dilution" for the benefit of a majority shareholder). The government once again fails entirely to address this argument, which was made in the opening brief (at 53, 55–56).

As also explained in the opening brief (at 53–55), *El Paso Pipeline* is inapposite for a host of reasons, which the government would brush aside (Gov. Resp. Br. 65–67), but which are critical to understanding that decision. The government is correct that the court in *El Paso Pipeline* was concerned about expanding the dual-nature doctrine, not, however, because of any concern about voting power but rather because that case required the court to apply the dual-nature doctrine to the distinct "limited-partnership context." 152 A.3d at 1251. In the corporate context itself, however, the principles of *Tooley*, *Gentile*, and *Gatz* continue to directly control. *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245,

251 (Del. 2019); *see also In re TerraForm Power, Inc. S'holder Litig.*, 2020 WL 6375859 at *16 (Del. Ch. Oct. 30, 2020) ("*El Paso* did not overrule *Gentile*."). Although the Private Shareholders showed and explained, from the *El Paso Pipeline* decision itself, the implications of this context (Jt. Br. § I.D, at 53–54), the government ignores the court's own language.

Moreover, the limited partner in *El Paso Pipeline* only alleged loss to the partnership, and, thus, any harm he suffered was just "in the form of the proportionally reduced value of his units." *El Paso Pipeline*, 152 A.3d at 1261. The Delaware Supreme Court notably emphasized this, drawing on the general rule in the corporate context: "Where *all* of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative." *Id.* (emphases added) (quotation omitted). Indeed, the case had gone to trial, and the limited partner "presented evidence of harm *only* as to the Partnership, not to the individual unitholders." 152 A.3d at 1261 (emphasis in original); *see also id.* at 1265 ("Brinckerhoff never presented evidence at trial of specific harm suffered by the limited partners, as the Court of Chancery stated"). Again, the Private Shareholders explained this key aspect of *El Paso Pipeline* (Jt. Br. § I.D, at 54), yet the government ignores it.

Here, however, as explained above, corporations rather than limited partnerships are at issue, and their shareholders were not all harmed *pro rata*, but rather Treasury, the controlling shareholder, directly expropriated the minority Private Shareholders' equity to itself.

**4.** The government argues that *Gatz* and a handful of federal cases show that the dual-nature doctrine does not apply here. Gov. Resp. Br. 68–69. But *Gatz* makes clear both that a direct claim exists where minority "shareholders [were] harmed, uniquely and individually, to the same extent that the controlling shareholder [was] (correspondingly) benefited," and that it is critical when applying the dual-nature doctrine to equitably "look beyond form to the substance of an arrangement." 925 A.2d at 1278, 1280. That the particular transaction in *Gatz* involved a change of control and of voting power does not make such circumstances necessary. To the contrary, as explained above, they are not, and particularly not here, where the substance of the transaction is the expropriation of all of the Private Shareholders' equity directly for the benefit of a controlling shareholder.

The three federal cases the government string-cites at the end of its argument are inapposite at best. The first, *Cowin v. Bresler*, 741 F.2d 410, 416 (D.C. Cir. 1984), involved typical derivative claims of corporate mismanagement that applied *pro rata* to all shareholders, not any unique harm to minority shareholders for the benefit of a controlling shareholder. If anything, *Cowin* supports the directness of

the Private Shareholders' claims, which include the evisceration of their right to dividends. The court there explained that "[w]rongful withholding of dividends, for example, gives rise to an individual cause of action," and added that, since "dividends are an incident of stock ownership, an action to compel the payment of dividends withheld will not inure to the benefit of the corporation; the shareholders alone will gain by a judgment in their favor and, therefore, each shareholder may sue for his own account." *Id.* at 415. *Frank v. Hadesman & Frank, Inc.*, 83 F.3d 158, 159–60 (7th Cir. 1996), involved a sale of assets from one corporation to another, which affected all shareholders of the selling corporation *pro rata*, and thus made the plaintiff's claims classically derivative. Similarly, *Kennedy v. Venrock Assocs*., 348 F.3d 584, 591 (7th Cir. 2003), involved claims of corporate mismanagement related to financing where there was no control group and the harm affected all shareholders *pro rata*. But such claims are very different from the direct expropriation for the benefit of Treasury here.

**5.** Finally, the government ignores that the Takings Clause imposes a distinct constitutional duty. To the extent, notwithstanding the arguments discussed above, that state law principles would deprive the Private Shareholders of standing, they should not override the Private Shareholders' right under the Takings Clause to have a court address the merits of their constitutional claims for the expropriation of their property. Jt. Br. § I.D, at 57–59. And HERA, of course, should be understood

as consistent with the Takings Clause. While the government repeats its claim that the Succession Clause bars "shareholders from bringing derivative suits" (Gov. Resp. Br. 73), it does not dispute that the Private Shareholders are the "best-placed plaintiffs" to sue for the expropriation of their investment. *See* Jt. Br. § I.E, at 59 (quoting, and arguing based on, *N. Shore Gas Co. v. E.P.A.*, 930 F.2d 1239, 1242 (7th Cir. 1992)). That implicit concession recognizes that, despite the government's incredible assertion otherwise (Gov. Resp. Br. 28), the Agency would not in any scenario sue Treasury—particularly not, as here, to challenge an action on which they worked together, hand-in-hand.

## IV. THE UNITED STATES OWED A FIDUCIARY DUTY TO THE PRIVATE SHAREHOLDERS THAT IS "FOUNDED UPON" BOTH A FEDERAL STATUTE AND A CONTRACT.

### A. The Government Ignores That HERA Uses Much More Than "Bare Trust" Language, Both By Its Terms And In Granting The Conservator Total Control Over The Companies.

HERA, in using but not defining the term "conservator," together with granting the government control over the Companies, imposed on the Agency, as conservator, a fiduciary duty to the Companies and their Private Shareholders. Jt. Br. § III.A, at 72–80. The government argues that HERA does not do so, because the provisions requiring the "conservator" to "conserve and preserve" the Companies' assets and rehabilitate the Companies do not specifically mention "shareholders" and because allegations of "control" are not sufficient to establish a

duty. But the government misconstrues the law and accordingly fails to read HERA as a whole.

*First*, a statute that uses trust language in conjunction with granting the United States control over the subject of the trust "evoke[s] the 'commonsense assumption,'" confirmed by common law, that the government accepted a fiduciary duty. *Hopi Tribe v. United States*, 782 F.3d 662, 668 (Fed. Cir. 2015) (discussing *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003)). By contrast, a mere "general trust" or "bare trust" exists when the source of law does not grant a duty with any "specific[ity]" or does not grant control for carrying out the alleged duty. *Id.* at 667, 669; *see id.* at 669–70 (contrasting statute "simultaneously using trust language and authorizing exclusive use of the land" with statute that, as to alleged duty to manage drinking water, never either "refers to drinking water on the reservation" or "instructs the United States to manage" it). It is not the case, from *Hopi Tribe* or otherwise, that, as the government claims, the fiduciary duty must be "express," using magic words. Gov. Resp. Br. 104.

The government does not dispute that the Agency, as conservator, assumes comprehensive control over the Companies. *See* § 4617(b)(2)(A)(i); § 4617(b)(2)(B). Instead, it focuses on whether HERA uses trust language. It repeatedly and specifically does.

Most basically, although the government ignores the question in this context (as opposed to whether HERA is money-mandating, discussed below), HERA repeatedly calls the Agency in its present role a “conservator.” Jt. Br. § III.A, at 74, 76–77. This is not a novel word in the law, and its rich background meaning particularly matters when, as here, Congress did not add any specialized definition. The government does not dispute that “the traditional view of a conservator” is as a “fiduciary.” *Collins*, 938 F.3d at 580. Indeed, a conservator is “like a trustee in a reorganization under Chapter 11 of the Bankruptcy Code.” *DeKalb*, 741 F.3d at 798.

Beyond that foundational term, HERA also allows the Agency to be appointed as conservator “for the purpose of reorganizing” or “rehabilitating” the Companies, and it authorizes the conservator to “take such action as may be . . . necessary to put the regulated entity in a sound and solvent condition” and “appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.” § 4617(a)(2); § 4617(b)(2)(D).

These duties—preserving and conserving assets while rehabilitating to soundness and solvency—are not “bare trust” language as in *Hopi Tribe*. In *Hopi Tribe*, the language simply provided that land be held “in trust for the Hopi Indians” and did not indicate how—or even whether—the government was to manage water resources on the land. 782 F.3d at 669. Thus, the government had no fiduciary duty with respect to water quality. *Id.*

HERA, on the other hand, expressly states that the conservator is to preserve and conserve assets while rehabilitating the Companies, making it more similar to the statute in *White Mountain Apache Tribe*. *See* 537 U.S. at 475 (finding "fair inference that the Government is subject to duties as a trustee and liable in damages" because statute used term "trust" and invested government with authority to use trust corpus). The government misses the mark by arguing that the Private Shareholders' reliance on *White Mountain* and similar cases is "profoundly ahistorical." Gov. Resp. Br. 108. The court in *White Mountain* focused on whether the statute at issue went beyond "a bare trust" and gave the government control; it did not mention any historical relationship between the tribes and the United States. The government's failure to apply the Supreme Court's actual reasoning to the full scope of HERA's language and authority is itself profoundly a-contextual.

Although these provisions of HERA do not expressly mention "shareholders," "common sense" suggests that a duty to "preserve and conserve" a corporation's assets and "rehabilitate" that corporation extends to shareholders. *See Gibraltar Fin. Corp. v. Federal Home Loan Bank Bd.*, No 89-cv-3489, 1990 WL 394298, at *2 (C.D. Cal. 1990). Moreover, FIRREA's incidental powers clause, although misread by the lower court (*see* Jt. Br. § III.A, at 77–78) and an argument not defended by the government, similarly allows the FDIC to act in its interests and omits "shareholders," yet that has not deterred courts from holding that the FDIC as

conservator has a fiduciary duty to shareholders. *See id.*; *Golden Pac. Bancorp v. FDIC*, 375 F.3d 196 (2d Cir. 2004).

The government does not argue that the court's conclusion in *Gibraltar* that a duty arises "where a governmental agency has assumed control of the day-to-day operations of a financial institution and has therefore ventured beyond its normal regulatory or supervisory role" is inapplicable here. 1990 WL 394298, at *2. The government's only response is that in *Gibraltar* the court followed the general rule and held that for purposes of the Federal Tort Claims Act, the claim at issue was a tort claim. Gov. Resp. Br. 106 –07. But whether the fiduciary duty claim in *Gibraltar* was a tort claim for jurisdiction under the Federal Tort Claims Act is beside the point. Here, the Tucker Act simply requires that the fiduciary duty be "founded . . . upon" a federal statute (among other bases), and Private Shareholders allege, as detailed above and in their opening brief, a fiduciary duty founded upon a federal statute, HERA. That was not at issue in *Gibraltar*, and it is enough here. *See Grady v. United States*, 2013 WL 4957344, at *3 (Fed. Cl. July 31, 2013) ("[T]his court has Tucker Act jurisdiction over claims founded on a fiduciary duty the government owes an individual or group of citizens . . . . if it is plain from the relevant statutes or regulations that the government has accepted such a responsibility.") (citing *United States v. Mitchell*, 463 U.S. 206, 224 (1983)).

Similarly, the government notes that the court in *Golden Pacific Bancorp* rejected the plaintiff's breach-of-fiduciary-duty claim, but that was because the plaintiff's evidence "f[e]ll short of what [was] required to defeat [a motion for] summary judgment"—which says nothing about the validity of the Private Shareholders' fiduciary duty claim. 375 F.3d at 202. Accordingly, HERA's trust language, together with the control it grants the government over the Companies (*see* § 4617(b)(2)(A)), imposes a fiduciary duty on the Agency as conservator that runs to the Companies and shareholders.

*Second*, HERA can fairly be interpreted as mandating compensation for a breach of this fiduciary duty it imposes. As this Court recognized in *Samish Indian Nation v. United States* (which the government cites), a statute is money-mandating if it "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." 419 F.3d 1355, 1364 (Fed. Cir. 2005) (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)). Courts have found that a statute is money-mandating where it: (1) provides "clear standards for paying" money; (2) states the "precise amounts" to be paid; or (3) "as interpreted, compel[s] payment on satisfaction of certain conditions." *Id.* But these instances are not exclusive. Rather, the rule is simply that, "[w]here the substantive law is '*reasonably amenable*' to an interpretation 'that it mandates a right of recovery in damages,'" the

statute is money-mandating. *Id.* (quoting *White Mountain Apache Tribe*, 537 U.S. at 469–70) (emphasis added).

Again, "the traditional view of a conservator" is as a "fiduciary," *Collins*, 938 F.3d at 580, and fiduciaries are liable in damages for breaching their duty. Similarly, a Chapter 11 trustee, which is analogous, *DeKalb Cty.*, 741 F.3d at 798, has a fiduciary "obligation to treat all parties fairly" and can be liable in damages for breaching it, *Sherr v. Winkler*, 552 F.2d 1367, 1375 (10th Cir. 1977). Thus, because the statutory term "conservator," reinforced by other language in HERA, defines a fiduciary relationship, as shown above, and HERA expressly gives the government conservator complete control over the Companies, the statute "can fairly be interpreted as mandating compensation" for a breach of the resulting fiduciary duty.

### B. The Government Fails To Refute That Treasury, Via Its Stock Purchase Agreement, Became A Controlling Shareholder With Fiduciary Duties To Private Shareholders.

The initial Stock Purchase Agreements gave Treasury control over the Companies, and, under any reasonable application of corporate law, its various terms made Treasury a controlling shareholder with resulting fiduciary duties to Private Shareholders. Jt. Br. § III.B, at 81–88. It follows that Treasury had a fiduciary duty "founded . . . upon" those contracts, as Treasury itself conceded in other litigation. 28 U.S.C. § 1491(a)(1); Jt. Br. § III.B, at 83. The government contends that Treasury

is not a controlling shareholder and that, even if it were, it would not have fiduciary duties to the Private Shareholders, but its conclusory points fail.

*First*, as discussed above (*supra* § III.D), Treasury is a controlling shareholder of the Companies. And as the Private Shareholders' opening brief explains, Treasury itself recognized that its acquisition of warrants to purchase 79.9% of the Companies' common stock made it a "controlling shareholder" and took steps to exempt the Companies from the tax consequences of its investment. Jt. Br. § III.B, at 86–87. The government's only response is that the "point is difficult to grasp." Gov. Resp. Br. 64 n.16. The point is that Treasury itself has recognized, applying its own tax regulations, that it is a controlling shareholder. The warrants Treasury acquired enable it to purchase a large supermajority of the Companies' shares, at any time, at more than 99.9% below the then-market price (Jt. Br. § III.B, at 86)—clearly resulting in an "ownership change" under its regulations. *See* 26 U.S.C. § 382. Ownership of an option that is overwhelmingly in-the-money is tantamount to current ownership of the underlying equity because it is the economic substance of a transaction, rather than its form, that generally determines its tax consequences. *See, e.g., Comm'r v. Court Holding Co.*, 324 U.S. 331 (1945). As a result, Treasury should be treated as a controlling shareholder that owes fiduciary duties to minority shareholders.

*Second*, just because Treasury in *deciding whether and how to exercise* its temporary authority to purchase stock in the Companies had to "provide stability to the financial markets" and "protect the taxpayer" does not mean that once it *chose to become* a controlling shareholder it did not assume fiduciary duties to shareholders. That is a non-sequitur. Other than the determinations Treasury had to make before investing in the Companies, the government fails to identify any provision in HERA that might preempt Treasury's having duties as a controlling shareholder of the Companies of the sort that any other controlling shareholder would have. *See* Gov. Resp. Br. 104, 112 (citing § 1455(l)(1)(B)(i), (iii), § 1719(g)(1)(B)(i), (iii)). In any event, HERA also provides 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." §1719(g)(1)(C)(v). HERA thus made clear that recognizing a fiduciary duty to private shareholders was not inconsistent with protecting the taxpayer but was, instead, one of the ways that Treasury would protect the taxpayer.

Nor does the government explain why Treasury's fiduciary duties would not be informed by state law, just as (it recognizes) other questions under HERA are. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97–99 (1991); *Starr*, 856 F.3d at 965–66; Gov. Resp. Br. 50. As the Fourth Circuit put it in a case the government twice cites, "when the government acquires an ownership interest in a corporation,

it acts—and is treated—as any other shareholder." *Meridian Investments*, 855 F.3d at 579. After Treasury determined that investing in the Companies was "necessary to" "provide stability to the financial markets" and "protect the taxpayer," it "bought into" the Companies' corporate charters and bylaws, including the corporate law that comes along with them, which imposes fiduciary duties on controllers. *See Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013) ("bylaws . . . constitute part of a binding broader contract among the directors, officers, and stockholders"). The government also does not try to defend the lower court's reasoning that the Tucker Act's waiver of sovereign immunity should be narrowly construed. As a result, Treasury should be treated as any other controlling shareholder with fiduciary duties to Private Shareholders.

## V. PRIVATE SHAREHOLDERS HAVE SUFFICIENTLY PLEADED THAT THEY ARE THIRD-PARTY BENEFICIARIES OF IMPLIED-IN-FACT CONTRACTS BETWEEN THE UNITED STATES AND THE COMPANIES.

### A. Contrary To The Government's Claims, Private Shareholders Alleged Facts Plausibly Establishing Implied-In-Fact Contracts Between The Companies And The United States.

The government argues that the Private Shareholders fail to adequately establish the existence of an implied-in-fact contract because they do not "allege a 'cloud of evidence' . . . let alone the 'clear indication'" required. Gov. Resp. Br. 88. Additionally, it claims that the Agency was simply performing its regulatory function by seeking consent from the Companies, which cannot give rise to

contractual obligations, and that the Agency could not "abandon its statutory mission" in return for a tacit agreement to forgo suit. Gov. Resp. Br. 89, 91. These arguments are all unavailing.

*First*, to survive a Rule 12(b)(6) motion to dismiss, a complaint must simply "contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face,'" not add "detailed factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). As the lower court found, the Private Shareholders' complaints satisfy this standard as to the existence of an implied-in-fact contract between the United States and the Companies. *See Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1, 53 (2019); Jt. Br. § IV at, 90 n.11 (explaining connection between this ruling and the other complaints).

The elements of an implied-in-fact contract are (1) mutuality of intent to contract; (2) unambiguous offer and acceptance; (3) consideration; and (4) actual authority. *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998). A court asks whether the parties' "conduct indicates that" they, "in fact, took upon themselves corresponding obligations and liabilities and, viewed objectively, came to" a "meeting of the minds." *AG Route Seven P'ship v. United States*, 57 Fed. Cl. 521, 528 (2003) (internal quotations omitted), *aff'd*, 104 F. App'x 184 (Fed. Cir. 2004).

In their complaints, the Private Shareholders plead facts plausibly establishing each of these elements. They allege that (1) the Agency intended to contract to avoid any challenge to the imposition of the conservatorship; (2) the Agency offered, and the Boards of the Companies accepted, a conservatorship aimed at preserving and conserving the assets of the Companies; (3) this agreement was supported by "valuable consideration" by the Companies' agreeing to forbear challenging the conservatorship; and (4) the Agency had actual authority to bind the United States. Appx530–532. The complaints note that, if the conservatorships were imposed without the Companies' agreement, the Companies could well file suit challenging the appointment under § 4617(a)(5). Appx531. This is why the Agency bargained for the Boards' consent, intending to contract. *Id.* Although the government invokes *Mola Dev. Corp. v. United States* for the proposition that there must be a "clear indication" to establish the elements (Gov. Resp. Br. 88), it omits that *Mola* was decided on summary judgment, thus under a different standard, involving evidence (and over a dissent), and on claims that neither the lower court nor this one found inadequately pleaded. 516 F.3d 1370, 1378 (Fed. Cir. 2008); *see id.* at 1374–75.

*Second*, applying *Mola*, the lower court held that the Private Shareholders stated a claim because the "alleged bargaining for consent is the 'something more'" than merely the Agency exercising its regulatory powers "that can support the existence of a contract." Appx48; *see* Appx531 (explaining agreement the Agency

and Companies reached). Even if the Agency might have been able instead to force a conservatorship—which the allegations certainly do not establish, and which the government asserts but never tries to show (Gov. Resp. Br. 89–90)—it actually chose to negotiate an agreement to avoid the risk of litigation. It was not simply performing its regulatory function, akin to the "mere regulatory approval" of a bank merger in *Mola*, a *Winstar* case. 516 F.3d at 1378. And that some of the complaints assert that the Agency coerced the Companies into conservatorship does not negate the allegations that the Agency bargained for the Companies' consent. *See Clewley v. United States*, No. 14-1176C, 2016 WL 692215, at *5 (Fed. Cl. Feb. 22, 2016) ("we cannot discard the complaint on the basis that some allegations in the complaint are viewed by defendant as inconsistent with others").

*Third*, the Private Shareholders do not argue that this contract required the Agency to "abandon its statutory mission" and "disregard its conservatorship with solely the private shareholders' interests in mind" as the government claims. Gov. Resp. Br. 89. To the contrary, the terms of the contract were that the conservator would act within the scope of HERA and the Agency's mission as conservator by conducting a traditional conservatorship—one that would aim to "preserve and conserve the [Companies'] assets and property" and restore the Companies to a "sound and solvent condition" and not destroy private shareholders' rights. *See* § 4617(b)(2)(D); *see also* Appx501 (quoting Director Lockhart stating Agency's

"most important goal [as conservator] is to preserve the assets of the [Companies] . . . . That is our statutory responsibility"). While the government seems to claim that the Agency in seeking consent did not have discretion as conservator to agree on terms of such consent, it is hard to take such claimed fastidiousness seriously given the government's emphasis everywhere else on the breadth of its powers as conservator. *See, e.g., Collins v. Mnuchin*, Br. for the Fed. Parties 34–35, No. 19-563 (U.S.) ("Congress made plain that the conservator enjoys broad 'managerial judgment'") (quoting *Perry Capital*, 864 F.3d at 607-608, 613); *id.* at 15 ("conservator may use a wide range of tools"). The Private Shareholders' complaints therefore plausibly plead the existence of an implied-in-fact contract between the Companies and the United States.

### B. The Government Is Wrong That Its Promises Were Not Plausibly Intended To Directly Benefit Private Shareholders.

The government claims that the Private Shareholders are not third-party beneficiaries of the implied-in-fact contracts because the asserted promises are aimed at the Companies and not the Private Shareholders. Gov. Resp. Br. 92–93. The government acknowledges that third-party beneficiary status arises if "a specific, identifiable benefit flow[s]" to the third party and it does not defend the lower court's reasoning that shareholders can never be third party beneficiaries. *Id.* at 97 (citing *Pac. Gas & Elec. Co.*, 838 F.3d 1341, 1362 (Fed. Cir. 2016)). However, it argues that under the Agency's promises to the Companies, no benefit flows

directly to the shareholders. This ignores the circumstances surrounding the appointment of the conservator and the purpose of the Agency's promises.

As explained in the Private Shareholders' opening brief, in determining whether a contract "reflect[s] the express or implied intention of the parties to benefit the third-party," *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997), a court "should consider the circumstance surrounding the transaction," *Restatement (Second) of Contracts* § 302 rptr's note (1981). The "circumstances" need to "indicate that the promisor intends to give the beneficiary the benefit of the promised performance." *Id.* § 302(1)(b) & (2).

Here, the circumstances indicate that the Agency wanted to avoid any challenge from the Companies—including from the private shareholders on behalf of the Companies—and accordingly made promises to assure private shareholders there was no need to challenge the conservatorships. The complaints allege that, on August 22, 2008, about two weeks before the conservator was appointed, the Agency, in letters to the Companies, found that each Company met all relevant capital requirements. Appx497. This means that the government had affirmatively not purported to find anything that would authorize it to compel a conservatorship. And if shareholders thought a conservator would hurt their interests, they could have sued on behalf of the Companies to challenge the appointment. *See* § 4617(a)(5); *Collins v. Mnuchin*, Br. for the Fed. Parties 30, No. 19-563 (U.S.). It was under these

circumstances that the Agency negotiated for the Companies' consent and made the contemporary (and subsequent) public statements that "common and all preferred stocks will continue to remain outstanding" and "[s]tockholders will continue to retain all rights in the stock's financial worth." Appx499–500. These were not mere "factual statements" about the impact of the conservatorship (Gov. Resp. Br. 95), but rather assurances to shareholders that the conservatorships would not deprive them of their rights, to avoid any challenge by them, a challenge that did not occur.

The government unsuccessfully attempts to distinguish *H.F. Allen Orchards*, 749 F.2d 1571 (Fed. Cir. 1984), arguing that here, the promises "concern the treatment of the enterprises." Gov. Resp. Br. 97. In *Allen Orchards*, this Court determined that farmers were third-party beneficiaries of a consent decree governing the allocation of water rights to districts, because the farmers had a property interest in the water and were "beneficiaries of the irrigation projects." 749 F.2d at 1576. Similarly, the Private Shareholders are third-party beneficiaries of the Agency's promise to carry out a traditional conservatorship in accordance with the common law and HERA because they have a property interest in the form of their stock certificates and accompanying rights and would directly benefit from a traditional conservatorship that did not destroy their interests in favor of government interests.

That direct benefit to the Private Shareholders is similar to the benefit the shareholders received in *Silberberg v. Becker*. *See* 191 A.3d 324, 334 (D.C. 2018)

(becoming majority shareholders was "direct benefit," not "one that is merely a 'benefit deriving by way of [the corporation's] operating at a profit and thus generating dividends'") (quoting *Dow Corning Corp. v. Chemical Design, Inc.*, 3 F. Supp. 2d 361, 366 (W.D.N.Y. 1998)). The court emphasized that the alleged benefit was the opportunity to become a majority shareholder, distinct from benefitting derivatively from the success of the corporation. Likewise, the benefit to Private Shareholders is not that, if the government carried out a traditional conservatorship, it would benefit the Companies and in turn benefit shareholders. It was that, while in a conservatorship controlled by the government (the Agency), which would involve the government (Treasury) as a major shareholder, the government would not destroy the rights of private shareholders. This is a benefit running directly to the Private Shareholders personally, not through the Companies and not to all shareholders, and is therefore not an "indirect and speculative benefit" involving the broad treatment of the Companies.

The point of *Hunter v. Old Ben Coal Co.*, 844 F.2d 428 (7th Cir. 1988), is that there is nothing remarkable about a contract, entered into by a corporation, in which "the shareholder is a person for whose benefit the contract was made." *See* 12B *Fletcher Cyclopedia of the Law of Corps.* § 5911 (2020) (cited by *Home & City Sav. Bank v. Rose Assocs. I, L.P.*, 572 N.Y.S.2d 458, 462 (1991)). In that case, involving rights of shareholders to sell or lease to the corporation's counter-party rights in real

property (mining rights), it was no surprise that there was a written contract explicitly mentioning members, but the decision does not turn on or require this. Rather, the court simply reiterated and applied established law requiring that the parties to the agreement "have manifested in their contract an intention to confer a benefit upon the third party," which did not require the third party "to be specifically named." 844 F.2d at 432. Here, the benefit to the private shareholders did not concern real estate or any interest in purchasing anything but, rather, an interest in simply not losing to the government shareholder their rights to payment under certain circumstances. And in that, it was similar in effect to the contract in *Hunter*, which prevented the counter-party from treating shareholders unequally. *See* 844 F.3d at 433.

Without explanation, the government claims that "[w]hatever beliefs shareholders may have had" have no bearing on whether their reasonable reliance gave rise to third-party beneficiary status. Gov. Resp. Br. 99. But that ignores precedent of this Court, which the Private Shareholders set out in their opening brief: "One way to ascertain" whether a beneficiary is a third-party beneficiary "is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him." *State of Mont.*, 124 F.3d at 1273 ("[t]o determine whether [plaintiff] is an intended third-party beneficiary, therefore, this court must ask if [plaintiff] could have reasonably relied on [the] promise")

(citing *Restatement (Second) of Contracts* § 302(1)(b) cmt. d.). Private Shareholders reasonably relied on the Agency's repeated public statements that a conservatorship would not destroy their interests or rights, which at least plausibly explains why no shareholder sought to challenge the imposition of the conservatorships under section 4617(a)(5) within the 30-day window.

The government also asserts that the *Owl Creek* plaintiffs cannot establish that they are third-party beneficiaries because they purchased stock after the Agency imposed the conservatorships. Gov. Resp. Br. 94 n.22; *see e.g.*, Appx489 ("Owl Creek purchased . . . Stock after the Agency imposed the conservatorship but before . . . Sweep Amendment"). However, to be a third-party beneficiary, a party must only "fall within [the] class clearly intended to be benefited." *State of Mont.*, 124 F.3d at 1273; *see also Hunter*, 844 F.2d at 433 (similar). For example, in *Carlow v. United States*, where a subcontract was entered into after the main contract, the court held, based on *Montana*, 124 F.3d at 1273, that subcontractors were third-party beneficiaries of the main contract because the subcontractors "and those similarly situated were intended beneficiaries of the [ ] contract." 40 Fed. Cl. 773, 774 (1998). Therefore, because private shareholders were intended beneficiaries of the implied-in-fact contracts, the *Owl Creek* plaintiffs, as private shareholders, can establish that they are among the third-party beneficiaries.

## VI. ISSUES SPECIFIC TO SOME OF THE PRIVATE SHAREHOLDERS.

### A. Plaintiffs Who Purchased Shares After The Date Of The Net Worth Sweep May Assert Direct Takings Claims.[12]

In ruling that those plaintiffs who purchased the Companies' stock after the date of the Net Worth Sweep lacked standing to pursue direct takings claims, the Court of Federal Claims erred by limiting its analysis to invoking the general principle that "a claimant must *ordinarily* own the property at the time of a taking to have standing." *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1, 44 (Appx37) (Dec. 6, 2019) (emphasis added). While that principle is usually sufficient to resolve standing issues in cases involving direct condemnations, seizures, or physical invasions of property, the court's mechanical elevation of that rule of thumb into an inflexible command ignored both the numerous precedents cautioning against blanket exclusions from takings liability and the countless ways in which government action can affect the wide variety of property interests protected by the Fifth Amendment. *See Corrected Suppl. Opening Br. of Pls.-Appellants Fairholme Funds, Inc. et al.*, at 9–17 [ECF 45] (Nov. 13, 2020) ("*Fairholme* Br."). The court's analysis also ignored the special nature of property interests inhering in stock ownership, as well as the facts relating to the nature of the government's interference with those property interests. *See id.* at 18–21.

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[12] This section of the reply is submitted solely on behalf of the *Fairholme* Plaintiffs.

Although the government devotes more pages to this issue than did the lower court, its analysis is, ultimately, just as superficial.

**1.** The core of the government's argument, like the lower court's, is its unquestioning invocation of the proposition that "'only persons with a valid property interest at the time of the taking are entitled to compensation.'" Gov. Resp. Br. 121 (citing *Reoforce*, 853 F.3d at 1263). But recitation of that proposition marks only the *beginning* of the analysis, and the government, like the lower court, errs when it elevates that proposition—which has its origin and typically applies in cases where the government directly condemns or permanently physically invades property, *see, e.g.*, *United States v. Dow*, 357 U.S. 17 (1958)—into a blanket rule covering *all* permutations of property interests, and *all* manners by which the government may take those interests.

None of the decisions cited by the government, Gov. Resp. Br. 121, supports its inflexible application of the general principle to the special circumstances of this case. While it is true that the claim advanced in *Maniere v. United States*, 31 Fed. Cl. 410, 421 (1994), involved the alleged taking of an interest in stock, the main issue contested by the parties and addressed by the court was not whether post-taking purchasers had standing, but rather *when* the alleged taking had occurred. Thus, the Court of Federal Claims was not even asked to address or decide the issue currently before the Court. Nor was this Court called upon to address the standing of post-

taking purchasers in *Reoforce*, where there was no dispute that the plaintiff possessed the property at the time of the alleged taking, and the only question was whether the plaintiff needed to also own the property throughout the litigation. 853 F.3d at 1263.[13] And, as noted, *Dow* involved a direct condemnation of real property through the exercise of eminent domain, and thus has little bearing on the questions raised by the alleged taking, by inverse condemnation, of the intangible property interests at issue here.

**2.** Unlike the lower court, the government does at least attempt to deal with Supreme Court decisions—the principal one being *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)—that reject the proposition that subsequent purchasers of property can never advance a takings claim, but its treatment of those decisions is equally superficial. Gov. Resp. Br. 122–23. The government focuses on *Palazzolo*'s discussion of whether a takings challenge to the application of land use regulations was ripe. *Id.* But ripeness was only the *first* of "two threshold considerations" invoked to bar consideration of the merits of that claim, 533 U.S. at 618, and it was the Court's analysis and disposition of the *second* threshold consideration that is

[13] *Reoforce* cited this Court's decision in *Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001), but *Wyatt* does not speak to whether post-taking purchasers may assert a claim. In that case, the plaintiff had voluntarily relinquished any property interest years *before* the final agency decision, denying a mining permit, that was alleged to constitute a permanent taking, and the plaintiff sought to avoid the implications of that relinquishment by arguing for an earlier taking date.

relevant here: its rejection of an asserted "single, sweeping, rule" barring takings challenges to the application of property restrictions where the plaintiff acquired the property after the restrictions went into effect. *Id.* at 626.

The Court stressed that such a one-size-fits-all rule was incompatible with the purposes underlying the Fifth Amendment guarantee of just compensation:

> The Takings Clause . . . in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power[s] is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable *and do not become less so through passage of time or title*.

*Palazzolo,* 533 U.S. at 627 (emphasis added). A "blanket rule" barring takings claims by post-enactment purchasers was thus "too blunt an instrument to accord with the duty [of the State] to compensate for what is taken." *Id.* at 628. *Cf. Anaheim Gardens, L.P. v. United States*, 953 F.3d 1344, 1350 (Fed. Cir. 2020) (discussing *Palazzolo*).

Similarly, in *Nollan v. California Coastal Commission*, the Court rejected the suggestion that a just compensation claim premised on a policy conditioning the approval to develop property on the granting of an access easement should be categorically barred where the plaintiffs "acquired the land well after the Commission had begun to implement its policy." 483 U.S. 825, 833 n.2 (1987). Instead, if "the Commission could not have deprived the prior owners of the

easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.*

*Palazzolo* and *Nollan* are in accord with other precedents emphasizing the flexible, fact-driven nature of the takings analysis. *See, e.g.*, *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002); s*ee also Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 887 (Fed. Cir. 1983). The government's refusal to even acknowledge, much less address, the voluminous caselaw stressing the unsuitability in the Fifth Amendment analysis of blanket exclusionary rules perhaps explains its apparent view that *Palazzolo* and *Nollan* are irrelevant simply and only because this case does not present the exact same set of facts presented in those cases. Gov. Resp. Br. 122–23.[14]

**3.** The government also fails to seriously reckon with *Bailey v. United States*, 78 Fed. Cl. 239 (2007), *denying reconsideration,* 116 Fed. Cl. 310 (2014),

[14] The government in any event overstates matters when it claims that, unlike in *Palazzolo*, post-Sweep purchasers "are not complaining of a regulatory action that took place subsequent to their purchase." Gov. Resp. Br. 123. The government ignores that, as discussed below, the *Fairholme* Plaintiffs have alleged not only that the Net Worth Sweep effected a taking when it was initially put in place, but also that each subsequent dividend payment under the Net Worth Sweep constitutes a taking.

which held that a party had standing to challenge a regulatory taking when the regulation went into effect, and the taking commenced, before the party acquired the property. *See Fairholme* Br. 14–17. The government dismisses *Bailey* with the observation that that case presented different facts from *Palazzolo* and *Nollan* and therefore is a "departure" from those decisions. Gov. Resp. Br. 124–25. It thus does not even attempt to engage with the actual analysis undertaken by the court. That is not surprising, as the reasoning underlying the *Bailey* decision persuasively demonstrates why the general owner-at-the-time-of-taking principle makes perfect sense in cases involving physical seizures, official condemnations, and destruction of property—since in those cases, the owner no longer has a property interest to transfer to a purchaser[15]—but may not make sense when the government takes regulatory actions that severely interfere with the enjoyment of other property interests. 78 Fed. Cl. at 258–64.

In the latter type of case, the taking is often accomplished by the government's issuance of "words on paper" restricting the use or enjoyment of property (*id.* at 272), the effects of which can usually later be redressed or ameliorated through the issuance of more "words on paper." In such cases, it is "the owner at any particular

[15] *See Bailey*, 78 Fed. Cl. at 263 ("It was this ouster of possession, this permanent removal of the property interest, which swapped a suit for compensation, or 'chose in action' not running with the land, in place of a real property interest.").

time . . . who is inconvenienced by the restriction. If that inconvenience is severe enough to amount to a taking, *any owner of the property while the restriction continues should be compensated for the interest taken*." *Id.* at 273 (emphasis added) (footnote omitted). The lower court thus held that just compensation for regulatory takings may be owed "to owners who have acquired their property interests after the onset of the taking, due to the government's ability to transform regulatory takings into temporary ones." *Id.* at 274.

The government does not take issue with *any* of the premises underlying the court's decision in *Bailey*.[16] Nor does it seriously contest that this case presents the same type of fact pattern that under *Bailey* would support claims by post-taking purchasers. Although the government's interference here with the property interests of private shareholders was unquestionably serious, the government did not physically seize, officially condemn, or irrevocably destroy those property interests. Rather, the taking here was effected through the issuance and implementation of "words on paper"—the Net Worth Sweep. And the government could still take

[16] The government does stress that *Bailey* limited its holding to regulatory takings involving real property. Gov. Resp. Br. 125. But the government disputes neither that the rationale underlying that decision applies fully to takings of intangible property, nor that the Supreme Court has since made clear that interests in personal property are as fully protected by the Fifth Amendment as interests in real property. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015).

action, through the issuance of more "words on paper," to reverse or undo the Net Worth Sweep.

In fact, as discussed above, and as the government's own brief emphasizes, the Agency and Treasury just last month *did* issue more "words on paper" implementing amendments to the PSPAs that had the effect of changing some of the terms of the Net Worth Sweep. While those amendments did not modify the essential characteristics of the Net Worth Sweep, the government's ability to easily implement such amendments dramatically underscores the stark differences between the nature of the taking here and takings effected through the exercise of traditional eminent domain powers or through the seizure or permanent physical occupation of property. In short, the essential characteristics of the government's actions here cannot be reconciled with the lower court's and the government's rote application of the "ordinary" rule barring actions by post-taking purchasers. *Cf. CHKRS, LLC v. City of Dublin*, 984 F.3d 483, 492 (6th Cir. Jan. 4, 2021) ("For direct (*as opposed to regulatory*) takings, the Takings Clause *generally* vests the right to compensation solely in the party with a property interest at the time of the taking, not in a party who obtains its property interest after the taking.") (emphases added).

**4.** Unable to offer a meaningful substantive defense of the lower court's decision, the government retreats to speculation that allowing post-Sweep purchasers to bring takings and illegal exaction challenges would result in a

"windfall" to plaintiffs who were supposedly able to buy stock at a "discount." Gov. Resp. Br. 124–25. But the government does not even attempt to address, much less rebut, our response to a similar point made by the lower court. *See Fairholme* Br. 21. As we have discussed, the "windfall" argument ignores that the purchase price of stock sold after the Net Worth Sweep went into effect reflects the market's assessment of the probability that the shares will someday have value as a result of this litigation. In addition, any such "windfall" concerns, even if legitimate, are more appropriately addressed at the remedial stage of the litigation, at which the effect of timing differences in the purchase of stock on the amount of just compensation that may be due may be fully addressed by the parties and considered, on a full record, by the court. Such a necessarily fact-bound inquiry, even assuming it is a relevant consideration, is not fit to be resolved against post-Sweep purchasers as a matter of standing, especially at the motion to dismiss stage. *See CHKRS*, 984 F.3d at 492 (challenge to ability of subsequent purchaser to bring takings claim was a merits, not a standing, argument).[17]

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[17] For this reason, even if the Court were not inclined to definitively rule that post-Sweep purchasers may assert and maintain takings and illegal exaction claims, it should hold that the lower court erred in ruling, at the motion to dismiss stage, that such purchasers lack standing. The lower court's decision to reach out to decide this issue is also problematic because (1) it was unnecessary to do so to reach the merits, as it is undisputed that at least some of the *Fairholme* Plaintiffs have continuously owned stock in the Companies since before the Net Worth Sweep was announced, and (2) future developments concerning the validity and implementation of the Net Worth Sweep could affect the standing analysis. It is worth noting in this regard that

The government's reliance on *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994) and *Anaheim Gardens, L.P. v. United States*, 953 F.3d 1344 (Fed. Cir. 2020), in support of its "windfall" argument (Gov. Resp. Br. 124), is misplaced, as neither decision supports the inflexible rule adopted by the lower court and advanced by the government. Both *Creppel* and *Anaheim Gardens* were decided at the summary judgment stage, and *Anaheim Gardens* emphasized the fact-specific analysis that was required. 953 F.3d at 1350 (noting approvingly that the court "determined, not as a *per se* rule but rather as an evidentiary failure, that [the plaintiff] lacked sufficient evidence [as to investment-backed expectations] to prevail at trial").

**5.** The government also all but ignores that the fact that the property interests at stake here are associated with stock ownership provides a particularly compelling case for not limiting the right to compensation to those who owned property at the time the taking commenced. The government does not dispute that as a matter of state law, any rights that underlay those property interests, including but not limited to any contractual rights, are held by the *current* owners of the Companies' stock. *See Fairholme* Br. 19–20. Nor does it dispute—indeed, it concedes (Gov. Resp. Br. 126–27)—that the District Court for the District of

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if the Supreme Court in *Collins* issues a decision that effectively invalidates the Net Worth Sweep on separation of powers or statutory grounds, permanent takings claims premised on the Net Worth Sweep could become claims for a temporary taking, with potential implications for the analysis of who could bring such claims.

Columbia has held that, for this very reason, contractual rights relating to those stock interests were held by subsequent purchasers. *Fairholme Funds, Inc. v. FHFA*, No. 13-1053 & 13-1288, 2018 WL 4680197, at *8 (D.D.C. Sept. 28, 2018).

The government does not attempt to defend, as a matter of law, logic or common sense, a rule allowing stockholders who purchased shares after the announcement of the Net Worth Sweep to seek to vindicate their *contract* rights, but forbidding those same stockholders from seeking to vindicate their *property* rights. It instead retreats once again to the supposed general principle barring takings claims by subsequent purchasers, and attempts to dismiss any danger that application of that principle here could expose the government to potential double liability. According to the government, the "ability to pursue a breach of contract claim precludes a takings claim founded on interference with the same contractual interests." Gov. Resp. Br. 127. But the only authority relied upon by the government, *Piszel v. United States*, 833 F.3d 1366, 1376–77 (Fed. Cir. 2016), involved a *single* claimant possessing both the contractual and takings claims. *Piszel* simply does not speak to the situation in which, due to differing (indeed, arguably contradictory) standing rules, the contract and takings claims are asserted by *different* claimants.

**6.** Finally, the government does not contest that the *Fairholme* Plaintiffs have alleged not only that a taking occurred when the Net Worth Sweep was signed, but also that each subsequent dividend payment constituted another taking, such that

the government was engaged in an *ongoing* expropriation of property. *Fairholme* Br. 18–19. The government denies that these allegations support the claim that stockholders who bought shares after August 17, 2012, have suffered a taking (Gov. Resp. Br. 125–26), but once again, the authorities it relies on are obviously inapposite.

In *Boling v. United States*, this Court held only that the continuing claim doctrine did not apply to an action alleging an "environmental" taking by a gradual physical process (erosion) allegedly set in motion by a single government action (the digging of a canal). 220 F. 3d 1365, 1373 (Fed. Cir. 2000). In such a case, "there is only a single governmental act that breaches a duty to the plaintiffs." *Id.* at 1374. Similarly, in *Fallini v. United States*, the Court rejected the argument that a single government action (a statute requiring the claimant to provide water to wild horses) led to a new taking each time one of the horses took a sip of water. 56 F.3d 1378, 1382–83 (Fed. Cir. 1995). Because the plaintiffs could "challenge under the Fifth Amendment [only] what the government has done, not what the horses have done," and because the government's action could not "be regarded as recurring with every new drink taken by every wild horse," the suit was time-barred. *Id.* at 1383.

It should go without saying that the facts and allegations in this case are very different. This case is not one in which the government took a single action and then watched nature (whether in the form of erosion or wild horses) take its course. Here,

government actors not only made the decision to amend the PSPAs to radically alter the property interests of the Companies' private shareholders, but they then made a series of subsequent decisions to declare massive dividends to Treasury under the PSPAs. Neither *Boling* nor *Fallini* holds or even suggests that the alleged taking here should be treated like the alleged takings there. To the contrary: *Boling* noted that in cases where the government "owes a continuing duty to the plaintiffs," "each time the government breaches that duty, a new cause of action arises." 220 F.3d at 1373. And *Fallini* both noted that the relevant analysis required the Court "to look to the nature and timing of the governmental action that constituted the alleged taking," and made clear that "[i]f the horses were agents or instrumentalities of the United States government, the analysis of what governmental action constituted the alleged taking might well be different." *Fallini*, 56 F.3d at 1383.

### B. The Lower Court Was Correct To Refuse To Dismiss The Derivative Claims In *Fairholme*.[18]

**1.** Before examining the government's arguments for dismissal of the derivative claims in the *Fairholme* cross-appeal, the Court should take note of one argument that the government never advances: the government did not argue in the CFC or its opening brief to this Court that if the direct claims in these appeals survive, it follows that the derivative claims in *Fairholme* must fail. As the Private

[18] This section of the reply is submitted solely on behalf of the *Fairholme* Plaintiffs.

Shareholders' previous joint brief explained and the government never disputes, sometimes the same set of facts give rise to *both* direct *and* derivative claims. *See* Jt. Br. § I.D, at 47–48; *see also supra* § II.D. Whatever the viability of the direct claims in these appeals, it is undisputed that the complaint in *Fairholme* alleges that the Net Worth Sweep injured Fannie and Freddie. For this reason and the reasons that follow, the derivative claims in *Fairholme* should proceed without regard to how the Court rules on the Private Shareholders' direct claims.

**2.** The government argues that issue preclusion requires the Court to disregard its own decision in *First Hartford* and follow the D.C. Circuit's contrary ruling in *Perry Capital*, which held that HERA's Succession Clause bars shareholder derivative claims even when the Agency is conflicted. Gov. Resp. Br. 74–78. Courts have uniformly rejected similar preclusion arguments by the government in other cases in which shareholders challenged the Net Worth Sweep, *see Rop v. FHFA*, 2020 WL 5361991, at *14–15 (W.D. Mich. Sept. 8, 2020); *Saxton v. FHFA*, 245 F. Supp. 3d 1063, 1075 (N.D. Iowa 2017), and for multiple reasons the CFC was correct to reject the government's argument here.

*First*, issue preclusion only applies when the party against whom the doctrine is invoked "had a full and fair opportunity to litigate the issue in the first action," *Innovad Inc. v. Microsoft Corp.*, 260 F.3d 1326, 1334 (Fed. Cir. 2001), and "[a] person who was not a party to a suit generally has not had" such an opportunity,

*Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Mr. Barrett—the plaintiff shareholder who seeks to advance the derivative claims at issue in the *Fairholme* cross-appeal—was not a party in *Perry Capital*, and he therefore is not bound by the D.C. Circuit's judgment in that case.

To be sure, "in certain limited circumstances, a nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who was a party to the suit." *Id.* at 894 (cleaned up). When a shareholder with authority to represent the corporation in litigation files a derivative lawsuit, this principle can sometimes provide a basis for holding that the corporation and all its shareholders are bound by the resulting judgment. *See Cottrell v. Duke*, 737 F.3d 1238, 1243 (8th Cir. 2013). But as the CFC recognized, that principle does not extend to cases such as *Perry Capital*, in which the putative shareholder derivative action was dismissed on the ground that the shareholders who sued lacked the legal capacity to represent the corporations. *See* Appx42; *Perry Capital,* 864 F.3d at 624–25. It is hornbook law that when a putative shareholder derivative suit is dismissed because the plaintiff lacks "capacity to bring the suit," the plaintiff cannot adequately represent the interests of the corporation and the dismissal "will not bar other stockholders from bringing a derivative action." 7C *Wright & Miller, Fed. Practice & Procedure* § 1840 (3d ed.).[19] The D.C. Circuit in *Perry Capital* held that during

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[19] *Cf. Restatement (Second) of Judgments* § 42, Reporter's Note, cmt. d

conservatorship the Succession Clause prohibits shareholders from representing the Companies in litigation. Because that dismissal was based upon the incapacity of the derivative plaintiffs to represent Fannie and Freddie, it cannot bind the Companies or shareholders who were not parties to the case.

The government's only rejoinder is to say that a corporation and all its shareholders are bound whenever a court dismisses a putative derivative action by resolving "a threshold question in the [defendant's] favor." Gov. Resp. Br. 77. But the lone case the government cites for this sweeping proposition does not support the government's argument. *Sonus Networks, Inc. v. Ahmed*, 499 F.3d 47, 63 (1st Cir. 2007), was a shareholder derivative action concerning certain accounting irregularities at a corporation. In an earlier derivative case brought by different shareholders about the same irregularities, a Massachusetts court had held that the demand futility doctrine did not excuse the shareholders from making a demand on management before suing. *See id.* at 54–55. The First Circuit ruled that the plaintiff shareholders in the second suit were bound by the earlier court's decision on the issue of demand futility. Significantly, the Massachusetts court's ruling did not turn on the legal capacity of the *shareholders* to sue but instead concerned whether corporate *management* should be stripped of its authority to control the litigation "by

("Where the court determines that a representative is not properly constituted as such with respect to all or part of the issues involved, that determination prevents any binding effect as to those issues.").

reason of hostile interest or participation in the alleged wrongdoing." *See* 13 *Fletcher Cyclopedia of the Law of Corps*. § 5965; *Sonus*, 499 F.3d at 64 (explaining that "*if the shareholder can sue on the corporation's behalf*, it follows that the corporation is bound by the results of the suit in subsequent litigation, even if different shareholders prosecute the suits" (emphasis added)). The government is unable to cite any cases in which the rule of *Sonus* has been extended "beyond the demand futility context," and for good reason. *See In re Nine West LBO Sec. Litig.*, 2020 WL 7090277, at *8 (S.D.N.Y. Dec. 4, 2020). When a putative shareholder derivative suit is dismissed on the theory that the plaintiff is legally prohibited from representing the corporation in litigation, the judgment cannot bind the corporation or its other shareholders.

The conclusion that Mr. Barrett is not bound by the judgment in *Perry Capital* is further supported by the Supreme Court's unanimous ruling that where a putative class action is dismissed prior to certification, issue preclusion does not bar absent class members from relitigating the same issues in a subsequent suit. *Smith v. Bayer Corp.*, 564 U.S. 299, 314–18 (2011). Class actions and shareholder derivative suits are closely related procedural mechanisms by which a plaintiff may sue to vindicate the rights of another, *see Ross v. Bernhard*, 396 U.S. 531, 541 (1970), and these procedural mechanisms implicate many of the same due process concerns, *see Nathan v. Rowan*, 651 F.2d 1223, 1227 (6th Cir. 1981) (looking to class action

precedents to determine "the constitutional requirements of due process" when assessing preclusion argument in shareholder derivative suit). Just as due process would not permit absent class members to be bound by a judgment obtained by an inadequate class representative, *see Richards v. Jefferson Cnty.*, 517 U.S. 793, 801 (1996), the Companies cannot as a matter of logic or constitutional law be bound by a judgment dismissing claims on the ground that the plaintiffs lacked the capacity to represent the Companies.

*Second*, issue preclusion only applies if "the issue is *identical* to one decided in the first action," *Innovad Inc.*, 260 F.3d at 1334 (emphasis added), and whether the Succession Clause bars derivative *constitutional* claims is a distinct issue this case presents that was not before the D.C. Circuit in *Perry Capital*. In this case, Mr. Barrett presses, among other claims, derivative claims based upon the Takings Clause and the Due Process Clause's illegal exactions doctrine. In *Perry Capital*, the only derivative claims at issue alleged breaches of non-constitutional fiduciary duties. *See* 864 F.3d at 626. Application of the Succession Clause to Mr. Barrett's derivative constitutional claims presents a distinct issue because it implicates "the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (internal quotation marks omitted). *Webster* requires that Congress provide a clear statement to foreclose judicial review of Mr. Barrett's

constitutional claims, and that requirement was not relevant to any of the claims before the D.C. Circuit in *Perry Capital*. When, as here, "the second action involves application of a different legal standard," the issues are not identical "even though the factual setting of both suits [is] the same." 18 *Wright & Miller, Fed. Practice & Procedure* § 4417 (3d ed.). *Cf. Cybernaut Cap. Mgmt. Ltd. v. Partners Grp. Access Secondary 2008, L.P.*, 2013 WL 4413754, at *2 (S.D.N.Y. Aug. 7, 2013) ("Collateral estoppel is inappropriate when a previous proceeding applied a different statute of limitations or standard of proof.").

A recent federal district court ruling in a constitutional challenge to the Net Worth Sweep vividly illustrates how the issues in this case and *Perry Capital* are not identical. In *Rop v. FHFA*, 2020 WL 5361991 at *16, the court concluded that the constitutional claims before it were derivative and agreed with the D.C. Circuit's opinion in *Perry Capital* that there is no broad "conflict-of-interest" exception to the Succession Clause in HERA. The *Rop* court criticized this Court's decision in *First Hartford*, deeming its reasoning to be "not persuasive." *Id.* Nevertheless, the court ruled that the Succession Clause "does not bar constitutional claims" because the Agency and Treasury could not make the "heightened showing" required to defeat such claims under *Webster*. *Id.* at *17. With a federal court having *agreed* with the D.C. Circuit in *Perry Capital* but nevertheless determined that the Succession Clause

does not bar constitutional challenges to the Net Worth Sweep, it cannot be seriously doubted that this case and *Perry Capital* present different issues.

For closely related reasons, whether the Succession Clause bars derivative constitutional claims is not an issue that was "actually litigated" in *Perry Capital* or that was "essential" to the D.C. Circuit's judgment—two additional requirements for issue preclusion to apply. *Innovad Inc.*, 260 F.3d at 1334. Far from purporting to decide whether the Succession Clause prohibits shareholders from pressing derivative constitutional claims during conservatorship, the D.C. Circuit took care to caution that "no[ ] [constitutional claims] are raised here" and said that HERA "does not prevent" such claims from going forward. *Perry Capital*, 864 F.3d at 614.

*Third*, even when the requirements for issue preclusion are otherwise satisfied, courts have discretion to decline to apply the doctrine when doing so would "inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which [the prior judgment] was based." Restatement (Second) Judgements § 29(7); *see also Montana v. United States*, 440 U.S. 147, 163 (1979) (cautioning against the "[u]nreflective invocation of collateral estoppel" in scenarios in which the defense could freeze the development of legal doctrine); *Chicago Truck Drivers, Helpers & Warehouse Union (Independent) Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 531–32 (7th Cir. 1997). Because Fannie and Freddie are the only corporations with private shareholders to which HERA's Succession Clause applies,

if the government's issue preclusion defense is credited it will threaten to freeze the development of the law in this area by making it impossible for anyone to question the D.C. Circuit's construction of the statute. Issue preclusion "has never been applied to issues of law with the same rigor as to issues of fact," and the defense is disfavored when it would frustrate the ability of the Courts of Appeals to independently weigh in on questions of law that the United States Supreme Court has not decided. *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1086 (9th Cir. 2007). The Court should therefore reject the defense under the unusual circumstances presented here.

This analysis is buttressed by the fact that the judgment the government would have the Court treat as binding is flatly contrary to Federal Circuit precedent. *See Perry Capital*, 864 F.3d at 625 (criticizing and declining to follow this Court's decision in *First Hartford*). Applying issue preclusion would thus come at the cost of the uniform application of the law within this Circuit: shareholders in Fannie and Freddie could not sue derivatively under HERA's Succession Clause in scenarios in which investors in other financial institutions would be entitled to sue derivatively under the materially identical Succession Clause in FIRREA. Issue preclusion ordinarily relieves parties of the burden of litigating issues multiple times, conserves judicial resources, and prevents inconsistent decisions, but none of those purposes would be served by this Court following a D.C. Circuit decision rather than its own

settled precedent. *See United States v. Stauffer Chem. Co.*, 464 U.S. 165, 177–8 (1984) (White, J., concurring) (arguing against "[e]xtending preclusion to circuits that have adopted a contrary rule on the merits"); *Phoenix Cos., Inc. v. Abrahamsen*, 2006 WL 2847812, at *8 (S.D.N.Y. Sept. 28, 2006) (declining to accord preclusive effect to prior ruling that applied Third Circuit precedent in light of contrary Second Circuit precedent). For these reasons, the government's issue preclusion defense should be rejected.

**3.** When the government urges the Court not to "extend" *First Hartford* to a case concerning HERA's Succession Clause, Gov. Resp. Br. 79, what it is really asking the Court to do is issue an opinion refusing to follow *First Hartford* on the ground that it was wrongly decided. This is what HERA's Succession Clause says:

> The Agency 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 . . . 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). And this is the text of the statute the Court interpreted in *First Hartford*:

> The Corporation shall, as conservator or receiver, and by operation of law, succeed to . . . all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder . . . of such institution with respect to the institution and the assets of the institution.

12 U.S.C. § 1821(d)(2)(A).

These two statutes cannot possibly mean different things. Indeed, far less parallelism in statutory text is required to implicate the *in pari materia* canon, under which courts "interpret statutes with similar language that generally address the same subject matter together, 'as if they were one law.' " *Strategic Hous. Fin. Corp. v. United States*, 608 F.3d 1317, 1330 (Fed. Cir. 2010) (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)). This Court already rendered an authoritative construction of FIRREA's Succession Clause in *First Hartford*, and a three-judge panel of this Court is required to honor that decision when interpreting the materially identical language in HERA.

The government does not even attempt to identify a basis in the statutory text for distinguishing HERA from FIRREA, but it does argue in passing that HERA's Succession Clause is different because it "addresses the conservatorship or receivership of the two enterprises central to the United States housing market" rather than applying "broadly to a range of potential receiverships for a variety of financial institutions." Gov. Resp. Br. 79. The government never explains why this distinction should matter when interpreting *the same words* in the two statutes, and it plainly should not. If anything, the importance of Fannie and Freddie cuts against reading HERA to mean something different than FIRREA. FHFA's Director—who helped draft HERA as a Senate Banking Committee staffer—has written that "Congress virtually replicated [FIRREA's] conservatorship and receivership

provisions in part to provide comfort to stakeholders in two of the largest, and most important, U.S. financial institutions." Michael Krimminger & Mark A. Calabria, *The Conservatorships of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles*, CATO INST. at 5 (Feb. 9, 2015), https://bit.ly/3bO8bdg. With the Congress that enacted HERA having consciously borrowed from the text of FIRREA in order to reassure market participants about how any conservatorship for Fannie and Freddie would operate, it would be a serious mistake for the Court to give parallel provisions of the two statutes different constructions.

The government largely misses the point of the Fairholme supplemental brief's discussion of the *Winstar* litigation, which is not that the Supreme Court's decision in *Winstar* "sheds light" on the meaning of HERA's Succession Clause but that Congress should be assumed to have been aware of the important litigation that played out in this Court and the Court of Federal Claims in the years that followed the Supreme Court's ruling. *See* Gov. Resp. Br. 81. The United States was ultimately held liable for *billions* of dollars in damages in that litigation, and some of the plaintiffs who recovered the largest awards could not have prevailed without this Court's ruling that shareholder derivative claims can proceed when the FDIC faces a "manifest conflict of interest." *Ambase Corp. v. United States*, 61 Fed. Cl. 794, 796 (2004) (quoting *First Hartford Corp. Pension Plan & Tr. v. United States*, 194

F.3d 1297, 1295 (Fed. Cir. 1999)). Any reasonably well-informed reader of HERA when the law was passed in 2008 would have been aware of the *Winstar* litigation, and the fact that HERA's sparse legislative history fails to cite *First Hartford* does not make that decision anything less than the seminal ruling that it is.

The government also argues that, even if HERA's Succession Clause permits shareholder derivative lawsuits when FHFA is conflicted, no conflict exists here because "[i]f 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." Gov. Resp. Br. 82. The government never made this argument in the proceedings below, and it is therefore forfeited. The government's argument is also utterly without merit. A careful inspection of the case caption in *First Hartford* reveals that the only defendant in that case was the United States, and this Court nevertheless held that shareholders could sue derivatively because the FDIC faced a "manifest conflict of interest." 194 F.3d at 1295. More fundamentally, the notion that FHFA faces no conflict when deciding whether to challenge a joint FHFA-Treasury action cannot be taken seriously.

The government also half-heartedly argues that *First Hartford* is distinguishable because the plaintiffs in that case challenged conduct by the FDIC that preceded receivership. Gov. Resp. Br. 83–84. But as Fairholme's supplemental brief noted and the government does not deny, nothing in this Court's decision in

*First Hartford* even hints at the possibility that shareholders may only sue derivatively during conservatorship if their claims arose before the conservatorship began. *See* Fairholme Br. 25. To the contrary, the conflict FHFA faces and the need for a viable means by which shareholders may seek redress is even more acute when the challenged FHFA action occurred during conservatorship.

**4.** The government's remaining arguments for dismissal of Mr. Barrett's derivative claims do not even purport to provide a basis for distinguishing *First Hartford* but simply invite the Court to throw its own precedent overboard and interpret the Succession Clause's text anew. A three-judge panel of this Court does not have authority to disregard Federal Circuit precedent, but in any event the government's arguments are meritless.

As a threshold matter, Supreme Court precedent requires a clear statement from Congress before a federal statute may be interpreted to foreclose judicial review of colorable constitutional claims such as those at issue here, *Webster*, 486 U.S. at 603; *see also Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 n.12 (1986); *Johnson v. Robison*, 415 U.S. 361, 366–67 (1974), and HERA's Succession Clause "does not directly address judicial review at all," much less contain "the kind of heightened showing or clear and convincing evidence required for Congress to deny review of constitutional claims," *Collins*, 938 F.3d at 587; *see also Rop*, 2020 WL 5361991 at *17. The government responds by saying that

"HERA did not require the enterprises to accept FHFA as their conservator," Gov. Resp. Br. 85, but that is beside the point. Nowhere in HERA did Congress provide a clear statement that it intended to effectively foreclose judicial review of derivative constitutional claims during conservatorship, and the Companies obviously could not have challenged a taking of their property that began with the Net Worth Sweep in 2012 by filing a lawsuit to block the imposition of conservatorship in 2008.

The government attempts to wave away the presumption favoring the availability of judicial review of administrative action by observing that "[t]his is not a suit under the Administrative Procedure Act," Gov. Resp. Br. 84, but it cites nothing to support its assertion that the presumption is limited to APA cases. Among other things, Mr. Barrett claims that the Net Worth Sweep is an illegal exaction because it was unauthorized by statute, and it would make no sense to refuse to apply the presumption to such a claim merely because his cause of action is grounded in the Due Process Clause rather than the APA.

Fairholme's supplemental brief explained that, under the plain meaning of the word "succeed," FHFA cannot be said to "succeed" to a right it is unable to exercise. Fairholme Br. 26 (quoting 12 U.S.C. § 4617(b)(2)(A)). The government's only response is to say in a footnote that its reading of the Succession Clause does not "terminate" shareholder derivative rights but instead transfers them to FHFA. Gov. Resp. Br. 80 n.19. But the government never comes to terms with the practical and

legal reality that FHFA cannot be expected to file a lawsuit challenging something that FHFA did. *See United States v. Interstate Com. Comm'n*, 337 U.S. 426, 430 (1949) (recognizing the "general principle that no person may sue himself"); *SEC v. Fed. Lab. Rel. Auth.*, 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

The government seeks support for its interpretation of the Succession Clause in 12 U.S.C. § 4617(a)(5), which permits shareholder derivative suits challenging the imposition of conservatorship if they are filed within 30 days. Gov. Resp. Br. 80. The government casts this provision as an express exception to the Succession Clause's general rule prohibiting shareholder derivative suits, but nothing in the statutory text indicates that the drafters perceived any conflict between the two provisions. Elsewhere in Section 4617, when Congress created exceptions to a general rule, it specified that the exception should prevail "notwithstanding" the general rule, 12 U.S.C. §§ 4617(b)(18)(A), (8)(G)(i), (i)(2)(B), or that the general rule was "subject to" the exception, *e.g.*, *id.* §§ 4617(b)(4), (b)(5)(F)(ii), (i)(6)(A). The absence of such language in Section 4617(a)(5)(A) and the Succession Clause shows that Congress understood a shareholder derivative suit against the conservator to be consistent with the Succession Clause's transfer of shareholder rights.

The government also argues that following *First Hartford* would "negate Congress's clear intention throughout HERA to shield the conservator's judgment

from judicial review." Gov. Resp. Br. 83. But the government offers no response to the point, made in Fairholme's supplemental brief, that the express but circumscribed limits on judicial review that appear elsewhere in HERA strongly counsel against interpreting the Succession Clause to include an additional, implicit limitation. Fairholme Br. 27–28. For these reasons as well as those that appear in Fairholme's supplemental brief, the Succession Clause does not provide a valid basis for dismissing Mr. Barrett's derivative claims.

### C. Class Plaintiffs Have A Right To Seek Just Compensation For The Taking Of Their Derivative Claims And Their Injunctive Relief Claims.[20]

The Government takes the position that (a) even though the Net Worth Sweep eviscerates the Private Shareholder rights to future distributions, the only claim that can be brought to challenge the Net Worth Sweep is a derivative claim, and (b) the Private Shareholders cannot bring that derivative claim because the right to bring such a claim has been transferred to FHFA – the very agency that agreed to the Net Worth Sweep, and that will not and cannot bring a claim against itself. Class Plaintiffs disagree with both of those assertions. However, if and to the extent those positions are accepted, the Private Shareholders have a Takings claim for the appropriation of their right to bring derivative claims to seek remedies for the harms

[20] This section of the reply is submitted solely on behalf of the *Cacciapalle* Class Plaintiffs.

caused by the Net Worth Sweep.

In *Perry II*, the D.C. Circuit held that HERA barred the Class Plaintiffs from bringing derivative and injunctive relief claims. Appx266-67. Class Plaintiffs allege that interpreting and applying HERA to deprive shareholders of derivative and injunctive relief claims that seek to remedy the harm caused by the Net Worth Sweep constitutes a Taking of the shareholders' property.

The Government argues that this is "just another way of attacking the D.C. Circuit's interpretation of HERA's Succession Clause," and hence is an impermissible collateral attack. ECF 39 at 115. That is incorrect. There is a difference between arguing that a statute should not be interpreted in a certain way (as Class Plaintiffs argued in *Perry II*), and arguing that such an interpretation, at least as applied to the facts at hand, constitutes a Taking requiring payment of Just Compensation (as Class Plaintiffs argue here). Class Plaintiffs were prohibited by the jurisdictional rules of Title 28 from advancing their Takings claim in *Perry II*. That claim can only be brought in the Court of Federal Claims, and appealed to this Court. 28 U.S.C. 1341(a)(1); 28 U.S.C. 1346(a)(2). Advancing a Takings claim in the only venue where it is permitted is not an improper "collateral attack."

It was therefore reversible error for the Court of Federal Claims to dismiss these claims as improper collateral attacks on *Perry II.* The position of Class Plaintiffs is straightforward and rational, and should be upheld. Where Congress

passes a law that arguably violates the property rights of a private person, that person is entitled to go to district court (and the appropriate court of appeals) to argue that the law should not be interpreted in a manner that deprives them of their rights. If those courts hold that the statute does indeed divest the private person of her rights, then she is entitled to bring a Takings claim in the Court of Federal Claims. That is all Class Plaintiffs have done here, and it would be both erroneous and unjust to dismiss it as improper.

The Government also tries to defend the lower court's dismissal of these claims by arguing that that Class Plaintiffs have no property right in their legal claims. This argument was not addressed by the court below, and is incorrect. In making this argument, the Government completely ignores most of the case law advanced in Class Plaintiffs' opening brief.

First, the Government ignores the Supreme Court's decision in *Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 804 (1996), which expressly stated that the government may not deprive private citizens "of their 'chose in action,' ***which we have held to be a protected property interest in its own right***." *Id.* at 804 (emphasis added) (citing in support *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429–430 (1982); *Phillips Petroleum Co. v. Shutts,* 472 U.S., at 812 (relying on *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950)); *Hansberry v. Lee,* 311 U.S., at 37).

In *Richards*, the Supreme Court also adopted the following language from a prior decision:

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

*Richards*, 517 U.S. at 804 (quoting and citing *Brinkerhoff–Faris Trust & Sav. Co. v. Hill,* 281 U.S. 673, 681-82 (1930)).

Second, the Government ignores this Court's holding that "a cause of action may fall within the definition of property recognized under the Takings Clause" where "the cause of action protects a legally-recognized property interest." *Adams v. United States*, 391 F.3d 1212, 1225-1226 (Fed. Cir. 2004).

Instead of addressing the rulings and the reasoning of the Supreme Court in *Richards* and this Court in *Adams* (and related cases cited by Class Plaintiffs), the Government cites a series of inapposite cases where the cause of action at issue did not protect a legally-recognized property interest.[21] Here, by contrast, the shareholders' right to bring derivative and injunctive relief claims protected the

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[21] *See e.g. Rogers v. Tristar Prods., Inc.*, 559 F. App'x 1042, 1045 (Fed. Cir. 116 Cir. 2012) (rejecting Takings claim where Congress eliminated qui tam actions for patent mismarking); *Diane K. ex rel. Tonya K. v. Board of Educ. of City of Chi.*, 847 F.2d 1243, 1247 (7th Cir. 1988) (stating in connection with a dispute over whether legal fees should be awarded to plaintiffs' counsel in a case involving access to education that "no person has an absolute entitlement to the benefit of legal principles that prevailed at the time the case began").

legally-recognized property interest that shareholders have to dividends and other distributions of the net assets of the Companies – property rights that were established as a matter of longstanding state law, and that were eviscerated by the Net Worth Sweep, which transferred all such rights to the Treasury.

The Government argues that "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." ECF 39 at 138. But the cases cited by the Government in support of this assertion say no such thing.[22] The Government cites no case rejecting a Takings claim because the cause of action that was taken away had not yet accrued.

In any event, at the time the causes of action at issue here accrued, the governing law was this Court's holding in *First Hartford*, which would have allowed Class Plaintiffs to pursue their derivative claims. It was only once the D.C. Circuit reached a different conclusion in *Perry II* that the derivative claims held by Class

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[22] *See Abrahim Youri v. United States*, 139 F.3d 1462, 1465-66 (Fed. Cir. 1997) (rejecting Takings claim from Government settlement of small claims against Iran because "though the choses in action were extinguished, the Government provided an alternative tailored to the circumstances which produced a result as favorable to plaintiffs as could reasonably be expected."); *Alliance of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) (holding that 1941 Treaty had extinguished the claims of descendants of Mexican land grants, and therefore statute of limitations had run); *Alimanestianu v. United States*, 888 F.3d 1374, 1383-84 (Fed. Cir. 2018) (holding that "prohibiting or espousing a litigant's claims by restoring a foreign sovereign's legal immunity is not a physical invasion of property" and also did not constitute a regulatory taking, where plaintiff received $10 million in exchange for extinguishment of claim).

Plaintiffs was extinguished, and that obviously occurred after those derivative claims had accrued.

The Government also asks this Court to follow the decision of the First Circuit in *Zucker v. Rodriguez*, 919 F.3d 649, 659 (1st Cir. 2019). That case held that FIRREA transferred to the FDIC the right of a bank holding company to bring claims relating to a bank which had been seized by the FDIC, and rejected the argument that this interpretation of FIRREA should be avoided based on the doctrine of "constitutional doubt" and the prospect that such an interpretation gave rise to Taking. While the court expressed doubt about the merits of the underlying Takings argument, the First Circuit did not itself have jurisdiction to address any Takings claim, but instead was relying on its interpretation of the plain text of the statute. *Id.* at 658-59. Furthermore, in that case the shareholder's claim was, at least arguably, indirectly protected by the fact that the FDIC could bring the claim itself. Here, by contrast, the FHFA cannot (and obviously would not) bring a claim against itself for entering into the Third Amendment with the Treasury.

The Government cites *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522-23 (1947) to support its assertion that a derivative action belongs to the corporation, and therefore the elimination of a shareholder's right to bring such an action can never be actionable under the Takings Clause. But *Koster* merely addressed the proper venue for a derivative action, and in that context alone relied

on the notion that the action is brought in the name of the company and hence should generally be brought where the company resides. *Id.* It casts no doubt on the proposition that a shareholder's right to bring a derivative claim is protected by the Fifth Amendment. On that point, the Government simply ignores the Delaware case law cited by Class Plaintiffs establishing that the right to bring a derivative claim is a recognized property right incident to the ownership of corporate shares. *See* Supplemental Opening Brief of Class Plaintiffs at Section II(C).

The Government's reliance on *Golden Pacific Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994) is also misplaced. That case addressed whether the shareholders had a reasonable, investment-backed expectation that the government would fail to enforce its regulatory power to seize a failing bank. *Id*. at 1073-74. This case, by contrast, addresses whether the Private Shareholders owned a right to bring legal claims to remedy the appropriation of their shareholder property rights through a naked transfer of wealth to the Treasury that was nowhere contemplated by any statute, regulation, or prior precedent. The seizure of a failed bank pursuant to written regulations cannot serve as an analogy for the decision by Treasury and FHFA to convert a 10% dividend into a 100% dividend.

To accept the Government's position in this case, the Court must accept that shareholders would have no Takings claim if the Government passed a regulation providing that (a) the shareholders of one or more private companies were no longer

ever going to be entitled to receive any dividends or other distributions, and (b) any causes of actions those shareholders might otherwise have to seek redress for the loss of their rights to future dividends were permanently barred. Under such circumstances, the precedents of this Court and the Supreme Court would allow the shareholders to bring a Takings claim, including for the deprivation of the causes of action that would otherwise seek to remedy the loss of their dividend rights. The Court should reverse the dismissal of Count II in Class Plaintiffs' complaint.

### D. There Is Privity Of Contract Between The Class Plaintiffs And The Government For Purposes Of Their Breach Of Contract And Breach Of Implied Covenant Of Good Faith And Fair Dealing Claims.[23]

The plain language of § 4617(b) of HERA provides that the Agency succeeded to "all" of the Companies' rights and obligations, be they contractual, statutory, or otherwise. § 4617(b). The Agency does not and cannot dispute this. Indeed, the Agency admits that "FHFA as conservator steps into the enterprises' shoes just as FHFA as receiver does." Gov. Resp. Br. 102. Yet the Agency argues "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." *Id*. the Agency's argument makes no sense and finds no support in *First Hartford*.

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[23] This section of the reply is submitted solely on behalf of the *Cacciapalle* Class Plaintiffs.

The Agency concedes, as it must, that when it became Fannie and Freddie's conservator, it assumed Fannie and Freddie's contractual obligations, including their obligations to the junior preferred stockholders as set forth in their respective stock certificates. Hence, the Agency cannot dispute that it is in privity with the junior preferred stockholders because assuming the enterprises' contractual obligations to the stockholders is the very definition of "privity". *See Estes Express Lines v. United States*, No. 11-597C, 2017 WL 3393298, at *6 (Fed. Cl. Aug. 8, 2017) (quoting *Privity of Contract*, Black's Law Dictionary (10th ed. 2014)) ("Black's Law Dictionary defines 'privity of contract' to mean '[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so.'").

Instead, the Agency disputes that it is the United States when it acts as conservator and improperly conflates that issue with the issue of privity. As discussed in above (*supra* § II), the Agency retains its governmental character regardless of the specific functions it performs. Consequently, by being in privity with the Agency, the junior preferred stockholders are in privity with the United States, and the Court of Federal Claims erred in holding otherwise and dismissing the claim for lack of jurisdiction.

*First Hartford* supports Class Plaintiffs' argument. In *First Hartford*, this Court held that FDIC as receiver was not in privity with a financial institution for

purposes of a rescission claim because "[a] 'rescission' amounts to the unmaking of a contract or an undoing of it from the beginning and not merely a termination of the contract," and FDIC was not a party to the contract at "the beginning." *First Hartford*, 194 F.3d at 1296 (quoting *First Hartford*, 42 Fed. Cl. at 616 n.26). With regard to a shareholder derivative claim against FDIC for breach of contract, however, this Court in *First Hartford* held that the financial institution was in privity with the United States, and therefore the Court of Federal Claims did have jurisdiction to adjudicate the claim. *Id*. at 1289-94.

Class Plaintiffs' claim against the Agency for breach of contract does not seek "an undoing of it from the beginning," but rather damages for the Agency's breach during the conservatorship. Accordingly, just as the Court of Federal Claims had jurisdiction to adjudicate the breach of contract claim against FDIC in *First Hartford*, so too does it have jurisdiction to adjudicate Class Plaintiffs' breach of contract claim against the Agency. The Court of Federal Claims erred in dismissing the breach of contract claim for lack of jurisdiction, and this Court should reverse that error.

## CONCLUSION

The Court should reverse the Court of Federal Claims' dismissal of the complaints in the *Owl Creek* Actions, *Cacciapalle*, and *Arrowood*, and its dismissal of the direct claims alleged in *Fairholme*.

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# UNITED STATES COURT OF APPEALS
# FOR THE FEDERAL CIRCUIT

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