IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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

Plaintiffs-Appellants,

v.

UNITED STATES

Defendant-Cross-Appellant.

Nos. 20-1912, 20-1914

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

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

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

No. 20-1934

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

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

v.

UNITED STATES
Defendant-Appellee.

20-1936

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

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

v.

UNITED STATES,
Defendant-Appellee.

20-1938

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

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

v.

UNITED STATES,
Defendant-Appellee.

20-1954

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

CSS, LLC,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellant.

20-1955

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

ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

20-2020

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

JOSEPH CACCIAPALLE,
Plaintiff-Appellant,

MELVIN BAREISS,
Plaintiff

v.

UNITED STATES,
Defendant- Appellee.

2020-2037

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

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* BRYNDON FISHER, BRUCE REID, AND ERICK SHIPMON IN SUPPORT OF NEITHER PARTY

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number	2020-1912, -1914 (and companion cases)
Short Case Caption	Fairholme Funds v. U.S.
Filing Party/Entity	Amici Bryndon Fisher, Bruce Reid, and Erick Shipmon

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/30/20

Signature: /s/ Noah Schubert

Name: Noah Schubert

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.
☐ None/Not Applicable	☐ None/Not Applicable	☑ None/Not Applicable
Bryndon Fisher	Federal National Mortgage Association and Federal Home Loan Mortgage Corporation	
Bruce Reid	Federal National Mortgage Association and Federal Home Loan Mortgage Corporation	
Erick Shipmon	Federal National Mortgage Association	

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Edward F. Haber	Miranda P. Kolbe	

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☑ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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RELATED CASES

- *Fairholme Funds, Inc. et al. v. United States*, Nos. 20-1912 & 20-1914 (Fed. Cir.)
- *Owl Creek Asia Master Fund, Ltd. v. United States*, No. 20-1934 (Fed. Cir.)
- *Mason Capital Master Fund L.P. v. United States*, No. 20-1936 (Fed. Cir.)
- *Acanthus Opportunity Fund, LP v. United States*, No. 20-1938 (Fed. Cir.)
- *Appaloosa Inv. Ltd. v. United States*, No. 20-1954 (Fed. Cir.)
- *CSS, LLC v. United States*, No. 20-1955 (Fed. Cir.)
- *Arrowood Indem. Co. v. United States*, No. 20-2020 (Fed. Cir.)
- *Cacciapalle v. United States*, No. 20-2037 (Fed. Cir.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Rules

INTEREST OF *AMICI CURIAE*[1]

Bryndon Fisher and Bruce Reid are each shareholders in both Fannie Mae and Freddie Mac, and Erick Shipmon is a shareholder in Fannie Mae. *Amici* are plaintiffs in actions pending in the United States Court of Federal Claims (Case Nos. 13-608C, 14-152C) in which, as shareholders, they assert derivative claims on behalf of Fannie Mae and Freddie Mac (the "GSEs") against the United States for (i) an unlawful taking without just compensation in violation of the Fifth Amendment of the U.S. Constitution; (ii) an illegal exaction in violation of the Fifth Amendment of the U.S. Constitution; and (iii) breach of fiduciary duty.

Amici set forth their interest in their initial brief,[2] but in summary, *amici* are the principal advocates for the GSEs' derivative claims. This is confirmed by the omnibus brief the "Private Shareholders" filed in this appeal, in which the shareholders devote the bulk of their brief to a defense of their dismissed direct claims, not the derivative claims that the Court of Federal Claims upheld.[3] The shareholders in particular present no argument in response to the Government's

[1] No counsel for a party has authored this brief in whole or in part, and no party or person other than *amici curiae* and their counsel has contributed money intended to fund preparing or submitting this brief. *See* Fed. R. App. Proc. 29.

[2] *See* Brief of *Amici Curiae* Bryndon Fisher, Bruce Reid, and Erick Shipmon in Support of Neither Party, filed Oct. 30, 2020 ("Initial Amicus Br.") at 1–3.

[3] *See* Non-Confidential Joint Opening Brief of the Plaintiff-Appellant Private Shareholders, filed October 23, 2020 ("Shareholders Br.") at 30–60.

principal challenge to the derivative claims based on HERA's succession clause. (The *Fairholme* plaintiffs addressed this issue only in a supplemental brief.[4])

Amici submit this brief to further address critical legal issues on appeal to which the other shareholders afford only limited attention—in particular, the serious constitutional issues with which this Court is confronted with respect to the Government's position on HERA's succession clause. As *amici* explained in their initial brief, the scope of HERA's succession clause may be dispositive of *amici*'s claims, which survived the Government's motion to dismiss in the Court of Federal Claims. Because the prosecution of this appeal has confirmed that *amici* are the principal and perhaps only true defenders of shareholders' derivative claims concerning the Net Worth Sweep, their voice in this appeal remains essential.

SUPPLEMENTAL ARGUMENT

In their initial brief, *amici* responded in depth to the Government's argument that HERA's succession clause bars all shareholder derivative claims arising from the Third Amendment. *Amici* will not repeat those arguments here but focus on one important issue the Government largely ignores: the serious constitutional problem that would result if the Court were to construe HERA's succession clause to deny a

[4] *See* Supplemental Opening Brief of Plaintiffs-Appellants Fairholme Funds, Inc. et al., filed October 23, 2020 ("*Fairholme* Supp. Br.") at 30–31.

judicial remedy for the GSEs' takings and illegal exaction claims, which arise directly from the 5th Amendment to the U.S. Constitution.

Because the GSEs' takings and illegal exaction claims arise from the Constitution, they cannot be eliminated by statute or by the FHFA's actions. The Supremacy Clause, U.S. Const. art. VI cl. 2, prohibits that outcome. Congress's inability to invalidate the GSEs' takings and illegal exaction claims leads to two critical conclusions:

First, the Court must, if at all possible, construe HERA not to deny a judicial remedy for any taking or illegal exaction of the GSEs' property. This is the doctrine of "constitutional avoidance."[5] A constitutionally permissible construction of HERA is plainly available here, as this Court has already construed the identical terms of FIRREA to permit shareholder derivative claims where the government entity controlling a company faces a conflict of interest. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999).

[5] That the claims here arise directly from the Constitution is also important to the Government's issue preclusion argument. The courts in *Perry* and *Roberts* did not address whether the succession clause could bar derivative actions for claims arising directly from the Constitution (no such claims were asserted there). *Perry Capital LLC ex rel. Inv. Funds v. Mnuchin*, 864 F.3d 591, 602–03, 623–25 (D.C. Cir. 2017); *Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 402, 408–10 (7th Cir. 2018). The *Perry* decision in fact suggests that the D.C. Circuit would have construed HERA's succession clause differently had constitutional claims been in play, as it specifically construed a different provision of HERA (the anti-injunction clause) to permit constitutional claims despite broad statutory language similar to the succession clause. 864 F.3d at 613–14.

Although this Court did not ground its decision in *First Hartford* on the doctrine of constitutional avoidance, that doctrine indicates that at least with respect to shareholders' takings and illegal exaction claims, *First Hartford* must be followed even if other constructions of HERA are permissible or even more persuasive. *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (holding that "when constitutional questions are in issue, the availability of judicial review is presumed"); *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 671 n.12 (1986) (construing a statute to "avoid[] the serious constitutional question that would arise if we construed [the statute] to deny a judicial forum for constitutional claims ….").

Second, if this Court discards *First Hartford* and concludes that the ***only*** permissible interpretation of HERA bars all derivative claims without exception, then the Court should rule that HERA is unconstitutional as applied to the GSEs' takings and illegal exaction claims. This is because HERA would, as applied, eliminate by statute a remedy guaranteed by the Constitution, an impermissible outcome. *Barlett v. Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987) ("[A] statutory provision precluding all judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right…. [S]uch a 'limitation on the

jurisdiction of both state and federal courts to review the constitutionality of federal [action] would be [an] unconstitutional' infringement of due process.").

The Government's argument on the constitutional implications of its construction of HERA completely ignores this critical issue. Responding to other shareholders' weaker argument,[6] the Government insists that the Due Process Clause does not mandate that shareholders "be permitted to bring derivative takings claims" *in general.* Gov Br. 85. This argument ignores the constitutional dimension that comes into play when the underlying claim a shareholder seeks to assert derivatively arises from the Constitution rather than from the common law or a statute. Although Congress may abrogate or limit remedies for a common law or statutory right, it has no such power to abrogate a constitutional right. The relevant question is not whether Due Process requires a conflict-of-interest exception *in general*, but instead, whether construing HERA to preclude such an exception would impermissibly eliminate any remedy for the unconstitutional takings and illegal exactions the Government engaged in here.

[6] Rather than argue that HERA's succession clause cannot constitutionally bar shareholders' derivative claims, the Private Shareholders argue that the Court should resurrect their direct claims because of the possibility that this Court may reverse the Court of Federal Claims' holding with respect to the succession clause, thus requiring dismissal of the derivative claims. *See* Shareholders' Br. at 59–60. The *Fairholme* plaintiffs in a supplemental brief presented a limited version of the constitutional argument *amici* make here. *Fairholme* Supp. Br. 30–31.

The Government's citation to *Yakus v. United States*, 321 U.S. 414 (1944), to argue that procedural restrictions on constitutional claims may be permissible only proves *amici*'s point. *Yakus* affirmed the particular procedural limitations at issue there by reasoning that "[t]here is no constitutional requirement that the [case] be made in one tribunal or another, ***so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process***." *Id.* at 443 (emphasis added). Of course, that is *amici*'s point: the Government's construction of HERA does not merely restrict the ***procedure*** for challenging the Third Amendment; it eliminates ***all*** judicial review of the taking of two private enterprises without just compensation. Under the Government's argument, it could nationalize any private company for any reason, so long as a statute ostensibly allowed it, and foreclose any judicial review of its actions. As *Yakus* and the authorities *amici* cite make amply clear, this outcome is not permissible.

Finally, the Government's argument that the elimination of shareholder derivative claims presents no Due Process problem because "the conservator is not the government," and therefore, "FHFA-C could [have] challenge[d] the Third Amendment on behalf of the enterprises," (Gov. Br. 84–85) relies upon a fallacious factual predicate. The Government's contention that FHFA-C is not the government ignores that the Government itself has taken the exact opposite position when it suited it strategically. As *amici* chronicled in their initial brief, the

Government has argued repeatedly that FHFA-C may operate the GSEs to advance government interests to the detriment of the GSEs (the Government made this argument in order to convince other courts that FHFA-C acted within its statutory authority). In the Government's own words, HERA confers upon FHFA-C broad legal authority in the exercise of its functions as conservator to afford controlling weight to governmental interests such as "'protect[ing] the taxpayer"; "'pursu[ing] the public interest'"; and ensuring "'the stability of the housing financing markets,'" even if the advancement of those interests harms the GSEs. Initial Amicus Br. 27–30. In short, the Government's argument that derivative claims are unnecessary because FHFA-C could act as an "unconflicted representative" of the GSEs is completely inconsistent with its explicit acknowledgement of its conflicted priorities. Far from "shedding" its government character, FHFA-C has openly admitted that it embraced and prioritized its government character when it entered the Third Amendment.

CONCLUSION

For the above reasons and those set forth in the *amici*'s initial brief, the Court should decide that shareholder claims arising from the Third Amendment are derivative in nature, that they are not barred by HERA's succession clause, and that the Court of Federal Claims had jurisdiction because the FHFA-C maintained its government character during the conservatorship of the GSEs.

Dated: February 26, 2021

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CERTIFICATE OF COMPLIANCE

This petition complies with Federal Rule of Appellate Procedure 5(c)(1) because it contains 1,393 words. The petition was prepared using Microsoft Word 2013 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Noah M. Schubert