No. 2020-2190

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WASHINGTON FEDERAL, MICHAEL MCCREDY BAKER, CITY OF AUSTIN POLICE RETIREMENT SYSTEM, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

On Appeal from the Court of Federal Claims
The Honorable Margaret M. Sweeney, Chief Judge
No. 1:13-cv-00385-MMS

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The forced imposition of the 2008 conservatorships over two companies that were *not* insolvent, and did not need a bailout, is at the core of this action and not the Third Amendment, imposed years later, which is being litigated in the consolidated Related Actions. Notwithstanding this difference, in arguing that the Washington Federal Plaintiffs lack standing to bring this action based on the rulings in the Related Actions, the Government treats this case as little more than an afterthought. Due to the very different factual underpinnings of both actions, however, a different standing analysis applies here. Thus, whatever the outcome of standing in the Related Actions, for the reasons set forth below, the Washington Federal Plaintiffs have standing to adjudicate their takings and illegal exaction claims.

Indeed, if the Government's narrow view of standing were correct, the net result would be *no* forum for Fannie and Freddie shareholders to be heard on their constitutional claims. The Government identifies no justification for wholly denying standing (whether called direct, derivative, or something else). The dismissal for lack of standing should be reversed.[1]

[1] Capitalized and abbreviated terms (*e.g.*, CFC for Court of Federal Claims) have the same meaning as in the Principal Brief.

II. ARGUMENT

A. The Government cannot ignore well-pled factual allegations of coercion unique to this case that establish standing.

The Washington Federal Plaintiffs' well-pled allegations of the coercive Government conduct effectuating a taking of private property not only support a Fifth Amendment claim but also establish, *a fortiori*, standing to assert it. The Government, however, takes the remarkable position that the Washington Federal Plaintiffs' allegations are conclusory and, therefore, they have failed to establish standing. Most significantly, the Government says the First Amended Complaint ("FAC") offers "no factual allegations that remotely support" a finding that the Boards' consent in 2008 was obtained through "intimidation and coercion." Corrected Response Brief for the United States ("RB") at 32 (bold and capitalization omitted). This factual allegation, the Government posits, is akin to an "unadorned, the-defendant-unlawfully-harmed-me accusation" the Supreme Court held plainly insufficient. *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

This Court, however, for "purposes of a motion to dismiss … must take all of the factual allegations in the complaint as true." *Iqbal*, 556 U.S. at 678. Just as the Supreme Court does not "'countenance … dismissals based on a judge's disbelief of a complaint's factual allegations,'" the

Government's predictable disagreement with the facts alleged in the FAC is for summary judgment or trial, not now. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted).

The Response Brief flouts these basic limitations. Drawing from various on-line sources and court decisions involving *other* Fannie and Freddie shareholders, the Government reimagines the FAC by offering a ten-page "factual background," which it then uses to conclude that standing is lacking. RB at 3-12 (bold and capitalization omitted). The Government's presentation of its preferred view of the facts does not *once* cite, or even acknowledge, the pleading this Court is called upon to examine. Appx82 (FAC).

The Government urges exactly what is forbidden. A motion to dismiss does not permit "a bespoke factual record, tailor-made to suit the needs of defendants." *Goel v. Bunge, Ltd.*, 820 F.3d 554, 560 (2d Cir. 2016). In an attack on the FAC's legal sufficiency, there is no place for the Government's "alternative view of the facts." *Garnitschnig v. Horovitz*, 48 F. Supp. 3d 820, 828 (D. Md. 2014). As Justice Alito put the matter, "at the pleading stage, we are required to credit plaintiffs' allegations rather than

defendants' responses." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1421 (3d Cir. 1997).[2]

The Government brushes aside two key factual underpinnings of the Washington Federal Plaintiffs' takings and illegal exaction claims, which are pled with specificity, that are crucial to establish standing: (1) Fannie and Freddie were forced into conservatorships so they could be used to stabilize the national mortgage market and not because either company needed a bailout; and (2) the Boards' assent to the Government takeover was coerced, not consensual. *See* Appellants' Principal Brief ("PB") at 7-16. A few examples underscore that these allegations are well-pled.

First, the Government begins its false narrative by pointing to the Companies' losses in 2008—a year when virtually every financial institution suffered large if not unprecedented losses—and suggests these losses undeniably necessitated a takeover. RB at 3. But the Government itself came to the exact *opposite* conclusion immediately prior to imposing the conservatorships. Merely two weeks before the conservatorships, FHFA sent letters to both Fannie and Freddie advising (consistent with prior

[2] The Government's tactical shift is surprising after taking as true, in its motion to dismiss, many facts alleged (at least related to the Net Worth Sweep). *Cf.* Defendant's Amended Omnibus Motion to Dismiss, No. 13-385C, ECF No. 64 at 7-12 (Ct. Cl. Oct. 1, 2018).

assurances in the summer of 2008, Appx107-109¶¶54-57) that the Companies were adequately capitalized. Appx109¶58; Appx110¶61. Just ten days before imposition of the conservatorships, BlackRock likewise advised Government officials that Freddie's "long-term solvency does not appear endangered … even in stress case." Appx110¶61. The Government never addresses these key facts that contradict its unsupported rescue narrative.

Second, as to coercion, the Government asserts there was none, as a matter of law, because the directors of Fannie and Freddie had an "incentive to consent" due to possible indemnity. RB at 32. But this impermissibly views the FAC "in the light most favorable" to the Government. *Rack Room Shoes v. United States*, 718 F.3d 1370, 1376 (Fed. Cir. 2013). The Government ignores, as alleged, the lack of any meaningful choice contained in the 24-hour ultimatum presented to the directors to agree or face conservatorships imposed by force. Appx123-124¶¶92-93, 95. According to previously undisclosed Treasury documents, the day before FHFA announced the conservatorships, its Director James Lockhart, Treasury Secretary Henry Paulson, and Federal Reserve Chairman Ben Bernanke met with the Companies' directors not to obtain consent but "to tell them what will happen." Appx123¶92. As Secretary Paulson informed

President George W. Bush at the time: "We're going to move quickly and take them by surprise. The first sound they'll hear is their heads hitting the floor." Appx111¶64. It is hard to imagine a more vivid description of the coercive process by which the Government obtained agreement.

The Government's repeated and unsupported assertion that the conservatorships were imposed to rescue the Companies is an effective diversion that is easy to accept as true on its face because it seems so plausible given the events surrounding the 2008 financial crisis. By creating this rescue narrative, the Government has strategically, and effectively, diverted attention from the damning allegations in the hope they will be disregarded as "doubtful in fact"—put bluntly, the Court should simply choose not to accept these assertions as true. *Twombly*, 550 U.S. at 555.

To be sure, no reasonable citizen *wants* to believe that Government officials addressing the 2008 financial crisis would orchestrate a massive takeover of two companies on a false pretense, when the Government itself had concluded that Fannie and Freddie were *not* at risk of insolvency. This remarkable event becomes slightly easier to understand when considered in the context of the public benefit that was created by using these Companies after the takeover to provide broad support to the nation's economy, by

absorbing the losses of numerous other financial institutions. This factor, however, does not absolve the Government from its constitutional obligation to compensate the Companies' shareholders who suffered the brunt of the burden created by using the Companies for this purpose.

Aside from the procedural assumption of truth, there is every reason to credit the Washington Federal Plaintiffs' allegations. The FAC's precise factual account is drawn primarily from documents prepared or otherwise in the custody of the United States government—whether federal officials, agencies or private outside advisors. The documents came to light through jurisdictional discovery, which the Government strongly resisted in a prolonged effort to keep this information from being revealed. Appx96 n.1. As part of its unrelenting resistance to comply with discovery requests, the Government even contended that the disclosure of these internal deliberations preceding the conservatorships would have a "'destabilizing effect on the nation's housing market and economy.'" Opinion & Order, No. 13-465C, ECF No. 72 at 2 (Ct. Cl. July 16, 2014). With the relevance undeniable, however, the CFC allowed limited discovery (even, then, greatly illuminating) subject to a stringent protective order. *Id.* at 4.

Flies on the wall could do little better than the highly probative evidence of coercion, pled verbatim on many points from the Government's

own documents. In its ongoing effort to distract from these allegations, the Government now refers to a "further amendment" to the stock purchase agreements in January 2021, after the appeals were taken, supposedly softening the bite of the Net Worth Sweep. RB at 12. This has nothing to do with whether the CFC erred on standing based on the record before it last year. Any stock purchase amendment in 2021, moreover, provides little solace to the Washington Federal Plaintiffs, whose rights were infringed upon in 2008 by the forced takeover of the Companies.

The elaborate allegations of coercion are just the sort of "detailed factual allegations" *not* required to state a claim for relief. *Iqbal*, 556 U.S. at 678. In contrast to the Related Actions, coercion is at the factual heart of this case because the Boards' consent was the *only* HERA precondition possibly authorizing the conservatorships. The other statutory prerequisites were not satisfied. *See* PB at 16-17. As discussed below, well-pled allegations of coercive government conduct facilitating a taking of private property support a Fifth Amendment claim and also establish, *a fortiori*, standing to assert it.

Finally, to clarify a potentially muddled point, the Government questions whether a takings violation may be based on, as alleged, FHFA acting in excess of its statutory authority under HERA. RB at 24; *see*

Appx118-120¶¶82-84. The answer is yes. To be precise, a takings claim may be grounded on Government conduct that was *authorized* but *unlawful*—in this case, conservatorships allegedly imposed in excess of HERA. This type of claim is a taking, not illegal exaction, where government officials acted, as here, "within the general scope of their [official] duties," but nonetheless beyond their statutory powers. *Del-Rio Drilling Programs, Inc. v. U.S.*, 146 F.3d 1358, 1362 (Fed. Cir. 1998).

The touchstone distinguishing a taking from an illegal exaction is whether the challenged governmental action was *unauthorized* "*ultra vires* conduct" by the officials involved. *Id.* The Washington Federal Plaintiffs are not alleging, for instance, that Secretary Paulson or other high-level officials acted outside their official duties on a frolic. This would be *illegal* government conduct that "cannot create a claim against the Government" for a Fifth Amendment taking. *Id.*

B. Under this Court's precedent, the Washington Federal Plaintiffs have standing to pursue a takings claim grounded on coercive governmental conduct.

Although cited by all shareholder plaintiffs including in the Related Actions, the Government fails to grapple with the basis for the jurisdictional ruling in *A&D Auto Sales, Inc. v. U.S.*, 748 F.3d 1142 (Fed. Cir. 2014), which involved allegations of government coercion resulting in a taking. As

discussed above, the Government used coercion to obtain the Boards' consent to the takeover—a core allegation of the Washington Federal Plaintiffs.

The parties disagree on why, but each side describes the Washington Federal Plaintiffs' claims as "unique." *See* RB at 33; PB at 29. *A&D Auto* similarly involved "unique" facts and "issues that have not been decided before," arising from the bailouts of General Motors and Chrysler following the 2008 financial crisis. 748 F.3d at 1147, 1150. The claimants asserting a takings violation were former auto dealers who, like the Washington Federal Plaintiffs, saw their rights nullified by coercive governmental action. The dealers' franchises were terminated in the auto bankruptcies. *Id.* at 1147. As relevant here, the dealers alleged that "the government coerced GM and Chrysler into terminating the franchise agreements" by mandating termination of those agreements "as a condition of financial assistance." *Id.* at 1154.

Importantly, this Court reaffirmed precedent that governmental coercion could effectuate a taking requiring just compensation under the Fifth Amendment. When public officials place "irresistible pressure" on private entities to "turn [] property over to the United States," it creates a taking. *Id.* at 1155 (citation omitted). This touchstone calls to mind the

"death grip" suddenly placed on the Fannie and Freddie Boards when the Government forced the Companies into conservatorship. Appx200.

After reiterating that governmental coercion "may create takings liability," this Court rejected dismissal at the pleading stage and remanded for further proceedings on the merits. *A&D Auto*, 748 F.3d at 1154, 1159. Notably for this appeal, jurisdiction to hear the dealers' Fifth Amendment claims was a given. After moving to dismiss for "lack of subject matter jurisdiction," the Government dropped the issue on appeal and, to obviate any doubt on remand, this Court stated that "we see no lack of subject matter jurisdiction in the Claims Court." *Id.* at 1149 n.4.[3]

As in *A&D Auto*, taking their well-pled allegations of coercion as true, the Washington Federal Plaintiffs' standing to be heard on the merits of their claims should present no issue. The same conclusion follows under other legal theories.

[3] In particular, similar to the posture here, the Government urged dismissal in *A&D Auto* for lack of Article III standing. *See* Defendant's Motion to Dismiss Plaintiffs' Amended Complaint, No. 1:10-cv-00647-RHH, ECF No. 24 at 26-27 n.13 (Ct. Cl. June 17, 2011).

C. The Government acknowledges that the shareholder right to vote abrogated by the conservatorships in 2008 is a direct claim.

A&D Auto illustrates that standing to be heard on a takings claim does not hinge on labels. Standing there was driven by the substantive rights infringed but, admittedly, *A&D Auto* did not involve the vexing direct/derivative distinction featuring prominently in corporate law. Even assuming this distinction applies to *all* shareholder Fifth Amendment taking claims, the Government's response to this appeal confirms that the Washington Federal Plaintiffs have asserted a direct claim.

As noted, the conservatorships eliminated rights that are part and parcel of shareholder ownership, including the ability to vote on matters concerning the management and welfare of the Companies. *See* PB at 14, 34, 39-40. Perhaps most striking about its brief, the Government all but concedes that elimination of the shareholder right to vote on corporate affairs presents a direct claim.

By the Government's grudging description, the Washington Federal Plaintiffs "temporarily lost certain contractual rights" including "the right to vote on certain corporate matters." RB at 36. By any measure, twelve years (and counting) is a long time for "temporary" governmental control. Even putting this aside, the Government makes what can fairly be called a

concession: "Insofar as plaintiffs' takings and illegal exaction claims rely *solely* on the temporary transfer of their shareholder rights to FHFA during the conservatorships, it may be assumed for purposes of argument that their claims might arguably be direct claims." RB at 37. In support of its assertion, the Government quotes the *Fletcher* corporate law treatise for the general proposition that "direct claims include claims that the corporation has 'depriv[ed] [particular] shareholders of their right to vote.'" *Id.*

Although unexpected, the Government's pivot does not come out of left field. The Response Brief, filed after the Supreme Court oral argument in *Collins v. Mnuchin*, is carefully consistent with an express concession made at that hearing.

In response to questioning, the Solicitor General agreed that infringing on a shareholder's right to vote is a direct injury. The following colloquy occurred:

> JUSTICE THOMAS:
>
> [G]ive us another example of what a direct [claim] would look like rather than a derivative.
>
> MR. MOOPPAN [SOLICITOR GENERAL]:
>
> So direct claims are claims where the injury to the shareholder is—doesn't turn on a harm to the corporation. So, for example, if shareholders are injured in their right to vote, that doesn't implicate the rights of the corporation. *It is a direct shareholder claim.*

Collins v. Mnuchin, Tr. at 9, No. 19-563 (U.S. Dec. 9, 2020) (emphasis added). Justice Thomas then reiterated his understanding, based on the Solicitor General's position, that "the right to vote on corporate matters is a direct claim." *Id.* at 10.

This is most assuredly the law. Because corporate directors oversee the "welfare of the whole enterprise" and wield great authority over corporate activities and decisions, the need to balance this power through shareholder democracy is paramount. *Obasi Inv. LTD v. Tibet Pharm., Inc.*, 931 F.3d 179, 185 (3d Cir. 2019) (citation omitted). As a potent check on directors' authority, "if shareholders are unhappy with directors, they can vote them out for any reason (or no reason)." *Id.* (citation omitted).

On the standing issue, which sidetracked this case in the CFC, the Government's concession on the nature of voting rights should suffice for at least reversal in part. Still, though, the Government continues with its theme that corporate overpayment or dilution of shareholder value (meaning adverse impact on the stock price in the aggregate) states a classic derivative claim. Untethered to facts, this is only a general proposition. Under the circumstances here, there is a crucial difference dictating that the Washington Federal Plaintiffs' claims are direct.

Contrary to the Government's assumption, the Washington Federal Plaintiffs do *not* allege that "'diminution in the value of corporate stock result[ed] from some depreciation or injury to corporate assets'" of Fannie and Freddie. RB at 26 (quoting *Fletcher, Law of Corporations* § 5913). Rather, the plummeting shareholder value on September 7, 2008 (and after) resulted from the watershed event—conservatorship—abruptly terminating the panoply of *individual* rights the Washington Federal Plaintiffs enjoyed as Fannie and Freddie shareholders. *See, e.g.,* Appx98-99¶¶30-33; Appx112¶66; Appx114-116¶73; Appx116-118¶¶77-81; Appx153-156¶¶185-189; Appx165-168¶¶217-225. Because their damages result from the elimination of rights individual, and personal in nature, this is not a classic case of dilution making the claims derivative.

To keep matters in context, these aspects of direct standing are not presented in the Related Actions. There is no allegation in the consolidated *Fairholme* appeal that the Net Worth Sweep infringed on voting rights. Likewise, the fulcrum moment of imposing the conservatorships in 2008, so adversely consequential for the Washington Federal Plaintiffs, is not central to the Related Actions. As a result, the Court could hold that direct standing exists in this action but not necessarily in one or more of the Related Actions on the facts alleged there.

More broadly, the Government is mistaken that the direct/derivative distinction presents a binary judicial choice in determining shareholder standing. One form of action does not exclude the other. 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) ("dual nature" doctrine). When the alleged misconduct causes injuries "both to the shareholder and to the corporation," a stockholder has "the right to bring direct and derivative actions simultaneously." 12B William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 5908 (2020).

D. The Government's few decisions involving failed banks do not undermine shareholder standing here.

Although just in passing, the Government cites three cases for a sweeping proposition: "This Court has squarely rejected the notion that the government's appointment of a conservator or receiver can give rise to a takings claim, even where the appointment was allegedly improper." RB at 37. The three cases the Government relies on involved run-of-the mill bank receiverships to protect the public from banks that were in serious financial distress and were actually, or about to become, insolvent (indeed, runs on the bank by depositors due to imminent collapse). These decisions do not remotely support the Government's broad categorical rule. And, more

importantly, they are not on point with respect to the unique facts, arguably unprecedented, of this case.

In *Golden Pac. Bancorp v. U.S.*, 15 F.3d 1066 (Fed. Cir. 1994), this Court addressed not a conservatorship, but a receivership, and standing was not at issue. *See Golden Pac. Bancorp v. U.S.*, 25 Cl. Ct. 768, 771 n.3 (Cl. Ct. 1992), *aff'd*, 15 F.3d 1066 (Fed. Cir. 1994). By definition, a company put into receivership is beyond financial rehabilitation. *See* 12 U.S.C. § 4617(a) (criteria for mandatory receivership). There is no factual similarity between that case and the situation here, other than the Government's repeated, and unsupported, assertion that the Companies needed to be rescued. But, as noted above, the Government's own documented findings, just days before the imposition of the conservatorships, make clear that the Companies were in no such financial distress. This finding was backed by the independent findings of BlackRock.[4]

In *California Hous. Sec., Inc. v. U.S.*, 959 F.2d 955 (Fed. Cir. 1992), the claimant seeking Fifth Amendment relief was the sole owner of the failed bank, not individual investors like the Washington Federal Plaintiffs.

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[4] The Government insists the conservatorships are not permanent but, well over a decade later, the seizure of corporate control endures with the Government—as the shareholder plaintiffs in the Related Actions have detailed—continuing to profit immensely from the Net Worth Sweep.

Id. at 955. This Court included a footnote analyzing standing but, in light of the contrasting nature of the claimants, the standing discussion there sheds no light here (the Government does not contend otherwise). *Id.* at 957 n.2. If another ground were needed to set *California Housing* apart, the sole owner there did "not make a 'regulatory' taking claim," just a claim for a physical taking. *Id.* at 957 n.1.

Finally, the Government cites *Branch v. U.S.*, 69 F.3d 1571 (Fed. Cir. 1995), for the principle that "it is not a taking for the government to close an insolvent bank and appoint a receiver to take control of the bank's assets." *Id.* at 575. No disagreement there, but that is not this case. As alleged in detail, Fannie and Freddie were financially sound when placed into conservatorships (not receiverships). *See, e.g.,* Appx127-130¶¶103-114; Appx131-136¶¶121-141.

Thus, citing these three cases, the Government yearns to have the Fannie and Freddie conservatorships viewed in a similar light as a failed bank where regulators step in to wind up operations to protect depositors. Setting aside the limited relevance of this comparison on the standing issue, as opposed to the merits of a takings claim, there is *no* similarity between what transpired in this case and the Government's three cited decisions involving failed banks.

The Washington Federal Plaintiffs' claims involve the unique situation where the Government took control of two companies, which were not in financial jeopardy, to use them to provide support for the broader mortgage industry. Although this Government action created a public benefit by supporting an important segment of the nation's economy, it caused significant harm to the Companies' private shareholders. They lost all their rights to control these companies, including the rights of both common and preferred shareholders to vote on corporate matters. Appx98-99¶¶30-33. The Fannie and Freddie conservatorships were, and remain, unprecedented as an unconstitutional taking for a public purpose rather than, as the Government has portrayed, a prudent takeover to rescue the Companies themselves.

E. The 30-day HERA limitation governing corporation actions seeking to unwind a conservatorship does not apply.

After losing on the issue below, the Government renews its argument that this action was untimely. According to the Government, the Washington Federal Plaintiffs needed to seek judicial relief within 30 days of the conservatorships—meaning, no later than October 6, 2008. The Government's position stretches the statute beyond recognition.

As a textual matter, the HERA provision is off-point in three respects:

> If the [FHFA] is appointed conservator or receiver under this section, the *regulated entity* may, within 30 days of such appointment, bring an action in the *United States district court* for the judicial district in which the home office of such regulated entity is located, or in the United States District Court for the District of Columbia, for an order *requiring the [FHFA] to remove itself as conservator* or receiver.

12 U.S.C. § 4617(a)(5)(A) (emphasis added).

The “regulated entity” able to invoke this statute was Fannie or Freddie, not its shareholders. The statute’s time limit applies only to actions in “district court,” not those governing Fifth Amendment takings claims heard exclusively in the CFC. 28 U.S.C. § 1491(a)(1). And the statute speaks only to injunctive relief aiming to “remove” the conservator, which, understandably, should be sought promptly.

The Washington Federal Plaintiffs have no quarrel with the Government’s position that the statute, consistent with *Rith Energy, Inc. v. U.S.*, 247 F.3d 1355 (Fed. Cir. 2001), provides the “*exclusive* means for challenging the *appointment* of the conservator.” RB at 18 (emphasis added). But they are not challenging the appointment of the conservator. To the contrary, the constitutional claims here seek monetary relief for past harm *directly resulting from* the imposition of the conservatorships. Appx98-99¶¶30-33; Appx79-81¶¶217-225. As the CFC concluded, this places jurisdiction and timing squarely under the Tucker Act. Appx9-10.

The Government cites nothing for its ambitious reading of HERA's 30-day clause as providing that "any dispute as to the *legality* of the appointment must be resolved immediately in the district court." RB at 21 (emphasis added). Congress said no such thing. The Government obsesses on whether the HERA provision is jurisdictional or procedural but, given the unambiguous text, this is another diversionary argument. As the Supreme Court reiterated recently, "when the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1749 (2020). The Washington Federal Plaintiffs' claims were timely because filed "within six years" of when those claims accrued. 28 U.S.C. § 2501.

Applying the 30-day time limit to bar *direct* claims *by shareholders* seeking monetary relief for Fifth Amendment violations would raise serious constitutional concerns. It would preclude any federal court from hearing the various Fannie and Freddie shareholder causes of action (apart from their strength or merit) and, most troubling, close the courthouse doors to federal constitutional claims.

Congress did not create an immunity shield barring judicial scrutiny of regulators' conduct under HERA. The Government does not have the power to effectuate massive wealth transfers from individual Company

shareholders to large financial institutions eager to offload toxic mortgage debt to Fannie and Freddie—eviscerating basic shareholder rights in the process—without any avenue to obtain just compensation for the taking that occurred.

F. With standing and timeliness the only issues addressed to date, the Government does not dispute that remand may be appropriate to plead a viable claim.

In their Principal Brief, the Washington Federal Plaintiffs argued that with the law governing these atypical shareholder actions still coming to rest, remand with leave to amend may be warranted to allow a fair opportunity to state a claim. PB at 41-46. Notice pleading does not "countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11 (2014) (*per curiam*); *see also A & D Auto Sales, Inc.*, 748 F.3d at 1158.

Other than opposing remand to state any shareholder derivative claim, the Government does not disagree with how these principles should be applied here. Indeed, the Government believes the Supreme Court's imminent opinion in *Collins* "likely will directly affect this Court's decision in this appeal." RB at 1. Perhaps but, in any event, if *Collins* supports standing to assert shareholder claims, directly or otherwise, this Court

should so hold and resolve the standing question or, to the extent required, order leave to amend on remand in light of *Collins*.

As its last stab at defeating this action on procedural grounds, the Governments says the Washington Federal Plaintiffs have waived any argument supporting the merits of their taking and illegal exaction claims. RB at 38-39 n.14. This is wrong in several respects.

As the Government admits, the CFC ultimately addressed only "threshold issues" of jurisdiction and standing. RB at 13; *see* Appx10-16, 34. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below"—so, of course, the issue is not waived. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Also instructive, the Supreme Court disapproved in that case of "proceeding beyond the issue of standing to a resolution of the merits." *Id.* at 119.

The same disposition follows here. With the CFC not yet passing upon the merits, there is nothing special about this case that would dictate resolution of the merits for the first time on appeal. As this Court put it recently: "[W]e are a court of review, not of first view." *Meridian Eng'g Co. v. U.S.*, 885 F.3d 1351, 1366-67 (Fed. Cir. 2018) (citation omitted); *accord Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1344 (Fed. Cir. 2001). If the Court holds that the Washington Federal Plaintiffs

have standing, in keeping with its usual practice, remand to decide the merits is the appropriate outcome. *See, e.g., HTC Corp. v. IPCom GmbH & Co., KG*, 667 F.3d 1270, 1281-82 (Fed. Cir. 2012).

III. CONCLUSION

For the reasons stated above, and in Appellants' Principal Brief, the Washington Federal Plaintiffs respectfully ask this Court to reverse or vacate the dismissal and hold they have standing to pursue causes of action to be adjudicated on the merits. If appropriate in light of the disposition, the case should be remanded for leave to amend or other proceedings giving a fair opportunity to state a claim for relief under the controlling legal standards.

DATED: March 8, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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