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.

2020-1912, -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.

2020-1934

Appeal 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.

2020-1936

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.

2020-1938

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.

2020-1954

Appeal from the United States Court of Federal Claims in No. 1:18-cv-00370-MMS, Chief Judge Margaret M. Sweeney.

CSS, LLC,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

2020-1955

Appeal from the United States Court of Federal Claims in No. 1:18-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.
2020-2020

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, 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

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

JOINT SUPPLEMENTAL BRIEF OF THE PLAINTIFF-APPELLANT PRIVATE SHAREHOLDERS REGARDING *COLLINS*

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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Attorney for Plaintiffs-Appellants Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-1934; 20-1936; 20-1938; 20-1954; 20-1955

Short Case Caption Owl Creek Asia I, L.P., v. U.S.

Filing Party/Entity Owl Creek Asia I, L.P., (see attachment A)

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: 07/16/2021

Signature: /s/ Bruce S. Bennett

Name: Bruce S. Bennett

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. ☐ None/Not Applicable	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
Owl Creek Asia I, L.P.	None	None
Owl Creek Asia II, L.P.	None	None
Owl Creek I, L.P.	None	None
Owl Creek II, L.P.	None	None
Owl Creek Asia Master Fund, Ltd.	None	None
Owl Creek Credit Opportunities Master Fund, L.P.	None	None
Owl Creek Overseas Master Fund, Ltd.	None	None
Owl Creek SRI Master Fund, Ltd.	None	None
Mason Capital L.P.	None	None
Mason Capital Master Fund L.P.	None	None
Akanthos Opportunity Fund, L.P.	None	None
Appaloosa Investment Limited Partnership I	None	None

☑ 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

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

Fairholme Funds, Inc., et al. v. United States, Nos. 20-1912, 1914 (Fed. Cir.); 13-465 (Fed. Cl.)	Cacciapalle v. United States, No. 20-2037(Fed. Cir.); 13-466 (Fed. Cl.)	Arrowood Indem. Co. v. United States, No, 20-2020 (Fed. Cir.); 13-689 (Fed. Cl.)
Rafter v. United States, No. 14-740 (Fed. Cl.)	Washington Federal v. United States, No. 20-2190 (Fed. Cir.); 13-385 (Fed. Cl.)	Fisher v. United States, 13-608 (Fed. Cl.)

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

ATTACHMENT A

(Filing Party/Entity Continued)

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.; and CSS, LLC

ATTACHMENT B

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.
Palomino Fund Ltd.	None	None
Palomino Master Ltd.	None	None
Azteca Partners LLC	None	Palomino Fund Ltd., not a publicly held company, owns 100% of Palomino Master Ltd.'s stock.
CSS, LLC	None	None

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-2037

Short Case Caption Cacciapalle v. United States

Filing Party/Entity Joseph Cacciapalle

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: 07/16/2021

Signature: /s/ Hamish P.M. Hume

Name: Hamish P.M. Hume

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. ☑ None/Not Applicable	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
Joseph Cacciapalle		

☐ Additional pages attached

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☐ None/Not Applicable ☐ Additional pages attached

Todd Thomas, Boies Schiller Flexner LLP	Grant D. Goodhart, III, Kessler Topaz Meltzer & Check, LLP	Charles J. Piven, Brower Piven
Eric L. Zagar, Kessler Topaz Meltzer & Check, LLP	Jeremy A. Lieberman, Pomerantz LLP	Michael J. Barry, Grant & Eisenhofer P.A.
Lee D. Rudy, Kessler Topaz Meltzer & Check, LLP	Patrick V. Dahlstrom, Pomerantz LLP	

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

Fairholme Funds, Inc , et al v United States, No 20-1912, 1914 (Fed Cir), No 13-465C (Fed Cl),	Arrowood Indem Co v United States, No 20-2020 (Fed Cir), 13-689 (Fed Cl)	Washington Fed. v. United States, No. 13-385C (Fed. Cl.), No. 20-2190 (Fed. Cir.)
Rafter v. United States, No. 14-740 (Fed. Cl.)	Akanthos Opportunity Fund v. United States, No. 20-1938 (Fed. Cir.), 18-369C (Fed. Cl.),	Fisher v. United States, No. 20-138 (Fed. Cir.), No. 13-608C (Fed. Cl.)
Reid v United States, No 20-139 (Fed Cir), No 14-152C (Fed Cl)	Owl Creek v. United States, No. 20-1934 (Fed. Cir.), No. 18-281C (Fed. Cl.)	Appaloosa Inv. v. United States, No. 20-1954 (Fed. Cir.), No. 18-370C (Fed. Cl.)

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

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ATTACHEMENT TO CERTIFICATE OF INTEREST

Case Number: 20-2037

Short Case Caption: Cacciapalle v. United States

Filing Party/Entity: Joseph Cacciapalle

5. Related Cases (continued):

Arrowood Indemnity v. United States, No. 20-2020 (Fed. Cir.), No. 13-698 (Fed. Cl.)

CSS LC v. United States, No. 20-1955 (Fed. Cir.), No. 18-371C (Fed. Cl.)

Mason Capital LLP v. United States, No. 20-1936 (Fed. Cir.), No. 18-529C (Fed. Cl.)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-1912 & 20-1914

Short Case Caption Fairholme Funds, Inc., et al. v. The United States

Filing Party/Entity Appellants, Fairholme Funds, Inc., et al. (see Attachment A)

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: 07/16/2021

Signature: /s/Charles J. Cooper

Name: Charles J. Cooper

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).
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☐ None/Not Applicable	☐ None/Not Applicable	☐ None/Not Applicable
Fairholme Funds, Inc.	None	None
The Fairholme Fund	Fairholme Funds, Inc.	None
Acadia Insurance Company	None	W.R. Berkley Corporation
Admiral Indemnity Company	None	W.R. Berkley Corporation
Admiral Insurance Company	None	W.R. Berkley Corporation
Berkley Insurance Company	None	W.R. Berkley Corporation
Berkley Regional Insurance Company	None	W.R. Berkley Corporation
Carolina Casualty Insurance Company	None	W.R. Berkley Corporation
Continental Western Insurance Company	None	W.R. Berkley Corporation
Midwest Employers Casualty Insurance Company	None	W.R. Berkley Corporation
Nautilus Insurance Company	None	W.R. Berkley Corporation
Preferred Employers Insurance Company	None	W.R. Berkley Corporation

☑ 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

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

Washington Federal v. United States, No. 13-385 (Fed. Cl.)	Cacciapalle v. United States, No. 13-466 (Fed. Cl.)	Fisher v. United States, No. 20-138 (Fed . Cir.)
Arrowood Indem Co v United States, No 13-698 (Fed Cl)	Reid v. United States, No. 20-139 (Fed. Cir.)	Rafter v. United States, No. 14-740 (Fed. Cl.)
Owl Creek Asia Master Fund, Ltd v United States, No 20-1934 (Fed Cir)	Akanthos Opportunity Fund, LP. v. United States, No. 20-1938 (Fed. Cir.)	Appaloosa Inv. Ltd. v. United States, No. 20-1954 (Fed. Cir.)

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

ATTACHMENT A

List of Parties Represented by Counsel

Fairholme Funds, Inc., The Fairholme Fund, 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, and Andrew T. Barrett

ATTACHMENT B

1. Represented Entities (continued)	2. Real Party in Interest.	3. Parent Corporations and Stockholders.
Andrew T. Barrett	None	None

ATTACHMENT C

Related Cases (continued)

CSS, LLC v. United States, No. 20-1955 (Fed. Cir.); Mason Capital Master Fund L.P. v. United States, No. 20-1936 (Fed. Cir.)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-2020

Short Case Caption Arrowood Indemnity Company v. US

Filing Party/Entity Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited

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: 07/16/2021

Signature: /s/ Richard M. Zuckerman

Name: Richard M. Zuckerman

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
Arrowood Indemnity Company	Not Applicable	Arrowpoint Group, Inc.
"	"	Arrowpoint Capital Corp.
Arrowood Surplus Lines Insurance Company	Arrowood Indemnity Company	Transverse Insurance Group LLC
Financial Structures Limited	Not Applicable	Arrowood Indemnity Company

☐ 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

Michael H. Barr	Sandra D. Hauser	Drew W. Marrocco
Kiran Patel		

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

Washington Fed. v. US, 13-385C (Fed. Cl.), 20-2190 (Fed.Cir.)	Fisher v. US, 13-608C (Fed. Cl.), 20-138 (Fed. Cir.)	Fairholme Funds v. US, 13-465C (Fed. Cl.), 20-1912, 1914 (Fed. Cir.)
Cacciapalle v. US, 13-466C (Fed. Cl.), 20-2037 (Fed. Cir.)	Reid v. US, 14-152C (Fed Cl.), 20-139 (Fed. Cir.)	Rafter v. US, 14-740C (Fed. Cl.)
Owl Creek v. US, 18-281C (Fed. Cl.), 20-1934 (Fed. Cir.)	Akanthos Opp. v. US, 18-369C (Fed. Cl.), 20-1938 (Fed. Cir.)	Appaloosa Inv. v. US, 18-370C (Fed. Cl.), 20-1954 (Fed. Cir.)

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

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Attachment to Certificate of Interest

Case No. 20-2020

Short Case Caption: Arrowood Indemnity Company v. US

Filing Parties: Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited

5. Related Cases (cont'd)

CSS LLC v US, 18-371C (Fed. Cl.), 20-1955 (Fed. Cir.)

Mason Capital LP v. US, 18-529C (Fed. Cl.), 20-1936 (Fed. Cir.)

The Supreme Court's June 23 decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), confirms that the Private Shareholders'[1] direct claims (1) are "against the United States" (as the Court of Federal Claims held) and thus within the Court of Federal Claims' jurisdiction under the Tucker Act, and (2) are direct claims conferring standing on the Private Shareholders (contrary to the Court of Federal Claims' erroneous holding). And *Collins* is fatal to the government's arguments for dismissal of the derivative claims in *Fairholme*.

ARGUMENT

I. *COLLINS* CONFIRMS THAT THE PRIVATE SHAREHOLDERS' CLAIMS ARE "AGAINST THE UNITED STATES."

The Supreme Court in *Collins* confirmed what the *en banc* Fifth Circuit in *Collins* and the Private Shareholders here have all said: "the [Federal Housing Finance] Agency 'is a federal agency, empowered by a federal statute, enriching the federal government,'" and it "'adopted the [Net Worth Sweep] with federal governmental power,'" as an actor of the United States. Jt. Reply § II.A.1, at 14 (quoting *Collins v. Mnuchin*, 938 F.3d 553, 590 (5th Cir. 2019) (*en banc*)). The Supreme Court found the Agency's authority under the Recovery Act, including as conservator, to clearly involve federal executive action, and singled out *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994)—on which the government here relies—as irrelevant. The Supreme Court further recognized that, in

[1] Capitalized terms not defined herein have the meaning given in the *Corrected Joint Opening Brief of the Plaintiff-Appellant Private Shareholders* [ECF 40] ("Jt. Br.").

adopting the Net Worth Sweep under the Recovery Act, the Agency was carrying out a federal government function that it could reasonably have concluded was in the public interest, not acting as an ordinary conservator and thus arguably private.

A. *Collins*, in recognizing that the Agency-as-conservator is an Executive Branch actor, directly rejected the government's primary argument that the Net Worth Sweep was not imposed by the United States.

The Supreme Court in *Collins* held unconstitutional the Recovery Act's restriction on the President's authority to remove the Director of the Agency. In so holding, the Court concluded that the Agency, in carrying out the Recovery Act, wields executive power, including in connection with the Net Worth Sweep. The Court thus directly rejected the government's primary argument against jurisdiction here—that when the Agency acts as conservator it only "steps into the shoes" of a Company (a metaphor born from *O'Melveny*) and, as a result, "takes on the status of a private party" and "does not wield executive power." *Collins*, 141 S. Ct. at 1785; *see* Jt. Reply § II.D.

First, the Supreme Court confirmed that the Agency does exercise executive power even when acting as conservator. This is because "even when [the Agency] acts as conservator or receiver, [the Agency's] authority stems from a special statute, [the Recovery Act], not the laws that generally govern conservators and receivers." *Collins*, 141 S. Ct. at 1785. That "special statute" grants the Agency powers that "differ critically from those of most conservators and receivers." *Id*. The Recovery Act (i) permits the conservator to "subordinate the best interests of the company to its own best interests and those of the public," (ii) protects the conservator's business decisions (even ones

that are not "particularly good") from judicial review, (iii) empowers the conservator to issue a "'regulation or order' requiring stockholders, directors, and officers to exercise certain functions," (iv) allows the conservator to issue subpoenas, and (v) allows the conservator to both place a Company into conservatorship and appoint itself conservator. *Id*. at 1785–86; *see id.* at 1778. The Court also noted that the Agency's actions with respect to the Companies "could have an immediate impact on millions of private individuals and the economy at large." *Id*. at 1785. And it recognized the Agency as a "unit of the Federal Government" based on the text of the Recovery Act. *Id*. at 1782.

More fundamentally, in determining what it can do under this "special statute" and "the standards that govern its work," the Agency is "[i]nterpreting a law enacted by Congress to implement the legislative mandate." *Id*. at 1785. That, the Court concluded, is "*the very essence of 'execution' of the law*." *Id.* (emphasis added); *see also Id*. at 1792 (Thomas, J. concurring) ("The only statutory powers assigned to the Director are executive."). The Agency therefore "clearly exercises executive power." *Id*. at 1786.

This is what the Private Shareholders have argued in support of Tucker Act jurisdiction—that the statutory text of the Recovery Act and the powers it grants to the Agency "show that Congress hardly made the Agency a *private* actor when conservator." Jt. Reply § II.A.2, at 19; *see id.* at 32 n.6 (contrasting Agency with FDIC). Rather, it is part of the United States.

Second, and more specifically, the Supreme Court also recognized that the Net Worth Sweep itself was an executive action. In concluding that the shareholders had

standing for their constitutional claim, the Court observed that the Net Worth Sweep is "similar" to the "executive act" at issue in *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. __ (2020), as well as the "agency oversight" at issue in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477 (2010). *Collins*, 141 S. Ct. at 1779; *see also id.* 1778 n.23 (describing director's "implementing the [Net Worth Sweep]" as one of the "responsibilities of his office").

Notably, the Supreme Court further recognized the joint action of the Agency and Treasury in the single undertaking of transferring the Private Shareholders' property to Treasury (the United States) for a public purpose under the authority of a federal statute. The Court noted that the Agency and Treasury together "consistently reevaluated the stock purchasing agreements," *id*. at 1781; and that they together "decided to amend" them to adopt the Net Worth Sweep purportedly "to serve public interests," resulting in Treasury's receiving from the Companies over the next four years "at least $124 billion more than the companies would have had to pay" under the pre-Net Worth Sweep terms, *id.* at 1774; *see id.* at 1773, 1776. That joint action—a "single government 'undertaking' . . . accomplished by two government entities acting in coordination and by agreement," under authority granted by a federal statute—is, under this Court's precedent, a further basis for finding Tucker Act jurisdiction, as the Private Shareholders have explained. *E.g.*, Jt. Reply § II.B, at 24 (discussing *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991)).

The Supreme Court in *Collins* also observed that the federal defendants there argued that the Recovery Act's constitutional infirmity in restricting removal of the Director was harmless as to the Net Worth Sweep because "[the President] 'retained the power to supervise the [Net Worth Sweep's] adoption . . . because *FHFA's counterparty to the Amendment was Treasury—an executive department* led by a Secretary subject to removal at will by the President.'" *Collins*, 141 S. Ct. at 1789 (quoting federal defendants' brief); *see also id*. at 1802 (Kagan, J., concurring in relevant part). What the federal defendants there admitted, and the Court highlighted—"the undisputed involvement of Treasury, indisputably part of the United States"—is, under this Court's precedent, yet another basis for finding Tucker Act jurisdiction here. *See also* Jt. Reply § II.C, at 24–25 (citing *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014)).

Third, the Supreme Court specifically rejected the government's arguments based on *O'Melveny*. The Court described those arguments as "far afield" from the issues in *Collins*. *Collins*, 141 S. Ct. at 1786 n.20. In doing so, the Court explained that its *O'Melveny* decision only "held that state law, not federal common law, governed an attribute of the FDIC's status as receiver for an insolvent savings bank" (whether knowledge of bank officers' misconduct should be imputed to the FDIC), and thus "sheds *no light* on the nature of the [Agency's] distinctive authority as conservator under the Recovery Act." *Id.* (emphasis added). Indeed, the Supreme Court in *Collins* spurned *O'Melveny* over the dissent of two justices who made the same "steps into the shoes"

argument that the government has consistently made here. *Compare id*. at 1806 (Sotomayor, J. dissenting), *with* Jt. Reply § II.D, at 26–28.

The Court of Federal Claims (without the benefit of *Collins*) reached the same conclusion, as to the Agency as conservator. And it was right to accordingly find that the Private Shareholders' claims were against the United States. *E.g.* Jt. Reply § II.D, at 29 (explaining that *O'Melveny* is inapplicable because there "[t]he 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"); *cf. Collins*, 141 S. Ct. at 1776 n.12 (recognizing that, under the Recovery Act, the "roles of conservator and receiver are very different").

B. *Collins* recognizes that the Agency, in imposing the Net Worth Sweep, was carrying out a government function.

The Supreme Court in *Collins* also held that the Agency as conservator acted within its authority under the Recovery Act in imposing the Net Worth Sweep, while dismissing a challenge to the Net Worth Sweep under the Administrative Procedure Act. In so holding, the Court further reinforced the existence of Tucker Act jurisdiction here, by confirming that the Agency in imposing the Net Worth Sweep was carrying out a public, government function—doing the things "the United States" does.

The key to the *Collins* court's reasoning in this respect was what it viewed as the "distinctive feature of an FHFA conservatorship" by which the Agency "may aim to rehabilitate [a Company] in a way that, while not in the best interests of the regulated entity, is beneficial to *the Agency* and, by extension, *the public* it serves." *Collins*, 141

S. Ct. at 1776 (emphases added). Rather than acting, like "any other" conservator, in "the best interests" of the entity to be conserved, the Agency as conservator is authorized by a "special law" (the Recovery Act) to "serve public interests," by ensuring "a stable secondary mortgage market" for "members of the public." *Id*. at 1777. In pursuing that public end, the Agency has no obligation to make "the best, or even a particularly good, business decision" for the entity to be conserved. *Id*. at 1778. Indeed, in the context of the Net Worth Sweep, the Court held, the Agency could use that special authority to cause the Companies to "relinquish nearly all their net worth," ensuring "that they would *never* be able to build up their own capital buffers, pay back Treasury's investment, and exit conservatorship." *Id*. at 1777 (emphasis added). That evisceration of the traits of a private, for-profit, shareholder-owned company was permissible under the Recovery Act in the name of the public good of protecting "market stability." *Id.*; *see id.* at 1765.

Collins thus read the Recovery Act as authorizing the Agency as conservator to operate the Companies for public purposes and without regard to their private status, pursuing their "rehabilitation" and continued operation "in the marketplace" in a unique fashion, as tools of the government. *Id*. at 1776, 1778. The conservatorship power under the Recovery Act, so read, is an adjunct to, and of the same type as, the Agency's regulatory and supervisory powers over the Companies, all indisputably actions of the United States. *See also id*. at 1771–72. Whatever that means for the *Companies'* status, it shows that the *Agency* as conservator may operate, and in the context of the Net Worth Sweep was operating, as the United States to serve the government's interests.

Accordingly, *Collins* further confirms Tucker Act jurisdiction here by reinforcing the Private Shareholders' argument that the Agency is the United States under the rule of *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995). *Lebron* provides that an entity is part of the federal government for constitutional purposes if (i) it was created by special law, (ii) to further governmental objectives, (iii) with the government retaining permanent authority to appoint a majority of its directors. Jt. Reply § II.A.1, at 12. Even before *Collins*, there could be no dispute that the Agency was created by special law, to further governmental objectives, and that the government (the President) retained permanent authority to appoint its sole Director. The Private Shareholders have so argued, and the government has failed to respond. *See* Jt. Reply § II.A.1, at 11–15. But *Collins*, in its reasoning upholding the Net Worth Sweep as authorized by the Recovery Act, starkly confirms the governmental objectives involved in the Agency's conservatorship in general and Net Worth Sweep in particular. Therefore, it also confirms that the Agency, as conservator, was acting as the United States when it imposed the Net Worth Sweep.

II. *COLLINS* CONFIRMS THAT THE PRIVATE SHAREHOLDERS' CLAIMS ARE DIRECT, SEEKING REMEDIES FOR THEMSELVES ON ACCOUNT OF INJURIES TO THEMSELVES, SEPARATE FROM ANY INJURY TO THE COMPANIES.

The Supreme Court's decision in *Collins* also confirms that the Private Shareholders have standing to assert their direct claims for the taking of their property, and thus shows that the Court of Federal Claims erred in holding that those claims were

solely derivative in substance and not available to Private Shareholders suing in their own right. *See* Jt. Br. § I; Jt. Reply § III. *Collins* does so in three respects.

First, *Collins* acknowledges the simple, direct nature of the harm alleged by the *Collins* plaintiffs, as private shareholders of the Companies. In addressing the constitutional claims of the shareholders there (that the Recovery Act's removal restrictions on the Director of the Agency violated the separation of powers), the Court first confirmed the shareholders' Article III standing. To hold that they satisfied the first element—injury in fact—the Court needed just one sentence: "the shareholders claim that the FHFA *transferred the value of their property rights* in Fannie Mae and Freddie Mac *to Treasury*, and that sort of pocketbook injury is a prototypical form of injury in fact." *Collins*, 141 S. Ct. at 1779 (emphasis added). And in holding, in the next sentence, that this prototypical injury was traceable to the Net Worth Sweep, the Supreme Court further explained that the Net Worth Sweep "swept the companies' net worth to Treasury and *left nothing* for their private shareholders." *Id.* (emphasis added). The Court then concluded its standing analysis by restating these two points together: "[T]he shareholders' *concrete injury* flows *directly* from" the Net Worth Sweep. *Id.* (emphasis added).

That reasoning provides a close analogy to, and directly supports, the Private Shareholders' explanations of why they have direct claims. The Private Shareholders allege that the Net Worth Sweep "transferred to Treasury 100% of their private-shareholder rights to receive dividends and distributions from the Companies,

eviscerating the economic value of their shares . . . .” Jt. Br. § I, at 30. They then detailed the “transfer to the government of the ownership rights that [they] held,” ownership rights in which they have a “‘direct personal interest.’” *Id.* § I.A, at 33–35 (quoting *Starr*, 856 F.3d at 966). And they showed how the allegations in their complaints provided ample factual bases for that “distinct injury.” *Id.* § I.B, at 36–37. *See also* Jt. Reply § III.B, at 39 (summarizing how “the Private Shareholders’ rights were transferred to Treasury”); *id.* § III.C, at 47 (explaining that the Private Shareholders “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”). Indeed, the Private Shareholders anticipated *Collins*’s reasoning:

- **The Private Shareholders**: “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.” Jt. Reply § III.B, at 40.
- ***Collins***: “[T]he shareholders’ injury is traceable to the FHFA’s adoption and implementation of the third amendment, which is responsible for the variable dividend formula that swept the companies’ net worth to Treasury and left nothing for their private shareholders.” *Collins*, 141 S. Ct. at 1779.

Second, *Collins* further recognized that such a “concrete injury [that] flows directly from” the Net Worth Sweep does *not* depend on whether the Net Worth Sweep *also* harmed the *Companies*. *Id*. While the Court, as noted, agreed that the Net Worth Sweep “left nothing for” private shareholders, *id.*, it rejected the argument that the Net Worth Sweep exceeded the Agency’s authority as conservator as “a step toward ultimate liquidation,” only authorized in a receivership. *Id.* at 1778. The Court reasoned that, even

though the Net Worth Sweep left the Companies "unable to build capital reserves and exit conservatorship," it did not undermine their operations. *Id.* In the Court's view, "[n]othing about the amendment precluded the companies from operating at full steam in the marketplace, and all the available evidence suggests that they did so." *Id.* Indeed, the "immense amounts of wealth" transferred to Treasury—as the Companies "amassed over $200 billion net worth" and Treasury netted "at least $124 billion"—were generated by this "full steam" operation. *Id.* at 1778; *see also id.* at 1774.

Put differently, to *take the private equity interest* in a company is not necessarily to *harm* the company itself—as distinct from harming its *private owners*. The Net Worth Sweep in substance did take that private interest, the Court indicated, under the Recovery Act—in a manner the Agency could have concluded advanced the "public interests" in "ensuring" stability in "the secondary mortgage market." *Id.* at 1776; *see id.* at 1777–78 ("ensuring market stability" and "eliminat[ing] the risk entirely"). It gave the Companies additional financial backing from the government, but took away their private existence—making "certain that they would never be able to build up their own capital buffers, pay back Treasury's investment, and exit conservatorship." *Id.* at 1777. Whether or not there was harm to the Companies, such harm would be distinct from the effect of leaving the "private shareholders" with "nothing," by taking the value of their stock for the purported public good. *Id.* at 1779; *see id.* at 1777.

Collins thus confirms that the Private Shareholders have sufficiently pleaded injuries that fall directly on *them* as distinct from the Companies—whatever the fate of

the Companies. The Private Shareholders' harm "exists independently of any different harm to the Companies" from the Net Worth Sweep. Jt. Reply § III, at 34. That distinction is a key part of the standard analysis for whether a claim is direct or derivative, and confirms the claims' directness here. *See also* Jt. Br. § I.B, at 35–41 (explaining how the direct harm to the Private Shareholders was "distinct from any harm to the Companies") (font altered); *id.* § I.B, at 42 ("Regardless of how this transaction affected Fannie and Freddie, it directly injured private shareholders . . . .").

Finally, *Collins* reinforces the Private Shareholders' additional, more specific argument for standing—that they suffered a direct harm because the Net Worth Sweep *reallocated equity* among existing shareholders, from them to Treasury-as-shareholder. In 2008, Treasury became a shareholder in the Companies by its agreement with the Agency to purchase senior preferred stock; Treasury also received warrants to purchase nearly 80% of common stock for a nominal cost. *E.g., Collins*, 141 S. Ct. at 1772–73. From 2008 to 2012, Treasury was thus one among many shareholders in the Companies. The Net Worth Sweep, however, as the Supreme Court saw, "materially changed the nature of the agreements." *Id.* at 1773. That material change was to institute "the variable dividend formula," which "swept the companies' net worth to Treasury and left nothing for their private shareholders." *Id.* at 1779.

As the Private Shareholders have detailed, to rearrange a company's capital structure, reallocating equity from one group of current shareholders to another, does not necessarily harm the company but does very much harm the shareholders that lose out.

Settled law establishes this, Jt. Br. § I.C, at 42–45; Jt. Reply § III.A, at 36–37; this is precisely what happened here, Jt. Br § I.C, at 45–46; Jt. Reply § III.A, at 37; and the government "fails to respond," forfeiting this issue, Jt. Reply § III, at 35; *id.* § III.A, at 38. *See also* Jt. Br. § I.B, at 37 (discussing the "injury of total exclusion from the Companies' capital structure"); *id.* at 39 ("all of their economic rights are taken from them and transferred to a dominant shareholder"); *id.* § I.D, at 51–52 (contrasting facts of *Starr*); Jt. Reply § III.C, at 44 ("a subset of shareholders had 100% of their rights given to another shareholder"); *id.* § III.D, at 49 & 57 (same, in context of dual-nature doctrine). *Collins*'s recognition of this obvious characteristic of the Net Worth Sweep confirms that, "[o]n 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." Jt. Reply § III.A, at 38.

III. COLLINS DEFEATS THE GOVERNMENT'S ARGUMENTS FOR DISMISSAL OF DERIVATIVE CONSTITUTIONAL CLAIMS UNDER THE SUCCESSION CLAUSE.

For three reasons, the Supreme Court's decision in *Collins* also is fatal to the government's arguments for dismissal of the derivative claims in *Fairholme*.

First, *Collins* forecloses the government's issue preclusion argument. That argument was premised on the government's contention that whether the Succession Clause "bars shareholders from pursuing derivative constitutional claims is not 'distinct' from the question whether it bars other derivative claims." U.S. Reply Br. 20 (March 26, 2021); *see also* Jt. Reply Br. 95–97. *Collins* held that a constitutional claim could go

forward notwithstanding the Succession Clause while declining to decide whether the Succession Clause barred the plaintiffs' statutory claim. 141 S. Ct. at 1781 & n.16. It follows that derivative constitutional claims like those in this case raise a different issue under the Succession Clause than any issue that the D.C. Circuit decided in *Perry Capital*, which involved no constitutional claims.

Second, *Collins* held that the Succession Clause only applies when plaintiffs assert rights that are "distinctive to shareholders of Fannie Mae and Freddie Mac." *Id.* at 1781. No less than the constitutional right asserted by the plaintiffs in *Collins*, in this case Mr. Barrett asserts constitutional rights that are "shared by everyone in this country." *Id.* The ability to assert such rights, whether directly or derivatively, is not one of the rights that the Succession Clause transfers to the Agency.

Third, although the Solicitor General argued in *Collins* that *First Hartford Corp. Pension Plan & Trust v. U.S.*, 194 F.3d 1279 (Fed. Cir. 1999), was wrongly decided, the Supreme Court left that important precedent undisturbed. Indeed, in admonishing the government for reading the Succession Clause "too broadly" and expressing skepticism of theories that would make the Agency "the only party with authority to challenge" the Agency's actions, *Collins* further reinforced *First Hartford*'s foundations. 141 S. Ct. at 1780. The Succession Clause effects only "a *limited transfer* of stockholders' rights," *id.* (emphasis added), and this Court was correct when it declined to interpret the materially identical provision of FIRREA to *terminate* shareholder rights when a conservator or receiver is conflicted, *see Fairholme* Pls.' Supp. Br. 26–27 (Oct. 23, 2020).

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FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 20-1912 & 20-1914 (cross-appeal)

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