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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Cross-Appellant.

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

SUPPLEMENTAL REPLY BRIEF FOR THE UNITED STATES

BRIAN M. BOYNTON
Acting Assistant Attorney General

MARK B. STERN
ABBY C. WRIGHT
GERARD SINZDAK
KYLE T. EDWARDS
Attorneys, Appellate Staff
Civil Division, Room 7242
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-0718

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.

Appeal No. 2020-1934, on appeal from the Court of Federal Claims in No. 1:18-cv-00281-MMS, Chief Judge Margaret M. Sweeney

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MASON CAPITAL L.P., MASON CAPITAL MASTER FUND L.P.,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

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

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AKANTHOS OPPORTUNITY FUND, L.P.,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal No. 2020-1938, on appeal from the Court of Federal Claims in No. 1:18-cv-00369-MMS, Chief Judge Margaret M. Sweeney

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

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-1954, on appeal from the Court of Federal Claims in No. 1:18-cv-00670-MMS, Chief Judge Margaret M. Sweeney

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CSS, LLC,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-1955, on appeal from the Court of Federal Claims in No. 1:13-cv-00371-MMS, Chief Judge Margaret M. Sweeney

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

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-2020, on appeal from the Court of Federal Claims in No. 1:13-cv-00698-MMS, Chief Judge Margaret M. Sweeney

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JOSEPH CACCIAPALLE,
Plaintiff-Appellant,
MELVIN BAREISS, on Behalf of Themselves and All Others Similarly Situated, BRYNDON FISHER, BRUCE REID, ERICK SHIPMON, AMERICAN EUROPEAN INSURANCE COMPANY, FRANCIS J. DENNIS,
Plaintiffs,

v.

UNITED STATES,
Defendant-Appellee.

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

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The Supreme Court's decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), forecloses several of plaintiffs' claims, confirms that plaintiffs lack the authority to bring their derivative claims in light of the Recovery Act's Succession Clause, and is consistent with the conclusion that FHFA as conservator is not the United States when it enters into financial transactions on the enterprises' behalf. *See* Gov't Supp. Br. 1-20. Plaintiffs' various attempts to interpret *Collins* to their benefit fail to grapple with the import of its analysis and the clear language of the decision and, instead, rely on statements divorced from the analytical framework in which they appear.

I. *Collins* Accords With The Conclusion That The Conservator Is Not The United States When Conducting the Enterprises' Business Affairs

The Supreme Court in *Collins* resolved an issue regarding the separation of powers created by the for-cause removal restriction on the FHFA's Director. The Court concluded that the restriction was impermissible, and was impermissible regardless of the functions being performed by the Director. Plaintiffs would mistakenly extrapolate from this holding a broad decree that FHFA as conservator should be deemed a governmental entity for all constitutional and statutory purposes when conducting the business of the enterprises. Pls. Supp. Br. 1-7. In their view, the many cases holding that the conservator is not a government actor when conducting the business activities of the enterprises are no longer good law. As those cases indicate, plaintiffs' view could have sweeping implications for the enterprises with respect to *Bivens* liability, the applicability of the False Claims Act, the

requirements of due process, and the governing statute of limitations. *See, e.g., Montilla v. FNMA*, 999 F.3d 751, 756 (1st Cir. 2021) (due process claim based on foreclosure of an unpaid mortgage); *Herron v. FNMA*, 861 F.3d 160 (D.C. Cir. 2017) (*Bivens* claim based on the hiring and firing of employees); *Meridian Inv. Inc. v. FHLMC*, 855 F.3d 573 (4th Cir. 2017) (statute of limitations dispute in case arising from the sale of financial instruments); *United States ex rel. Adams v. Aurora Loan Servs, Inc.*, 813 F.3d 1259 (9th Cir. 2016) (attempt to assert FCA claim based on lenders' certifications that mortgages were clear of liens). Nothing in the Supreme Court's reasoning supports that result.

Whether an entity—including a government entity—should be deemed a governmental actor depends on the "context." *Hall v. Am. Nat. Red Cross*, 86 F.3d 919, 922-23 (9th Cir. 1996) (the Red Cross qualifies as the United States for constitutional tax immunity purposes, but not when managing its programs). Thus, the Tennessee Valley Authority (TVA) is the government when it "exercises the power of eminent domain," but not when "producing and supplying electric power," *Thacker v. Tennessee Valley Authority*, 139 S. Ct. 1435, 1443 (2019), and States are treated as private actors for various constitutional and statutory purposes when they act as "market participants," *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (2008).

Plaintiffs fail to address the crucial distinctions between the issue presented here and the issue before the Court in *Collins,* which determined the Court's mode of analysis. When evaluating separation-of-powers challenges, the Supreme Court

considers the full range of functions performed by the relevant actor, and not the specific action that harmed plaintiffs. *See* Gov't Supp. Br. 14-17. Thus, as plaintiffs note (Pls. Supp. Br. 3), the Court in *Collins* considered it relevant that the FHFA Director can place the enterprises into conservatorship, issue subpoenas, and promulgate regulations, *Collins*, 141 S. Ct. at 1785-86, even though none of those powers were implicated by the Director's agreement to the Third Amendment.

Outside the separation-of-powers context, the Supreme Court employs a functional analysis that focuses on the governmental character of the action at issue rather than on whether the entity itself is governmental for purposes such as the Appointments Clause or the separation of powers. *See* Gov't Supp. Br. 16-17 (citing examples); *see also Hall*, 86 F.3d at 922-23. Here, the challenged action—FHFA's agreement to the Third Amendment on the enterprises' behalf—did not involve the exercise of a "traditionally governmental function[]." *Thacker*, 139 S. Ct. at 1439. On the contrary, FHFA undertook the "quintessential conservatorship tasks" of "[r]enegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 607 (D.C. Cir. 2017). As the Supreme Court summarized in *Collins,* absent the renegotiation of the enterprises' dividend obligations to Treasury, "there was a realistic possibility that the companies would have consumed some or all of [Treasury's] remaining capital commitment in order to pay their dividend obligations." *Collins,* 141 S. Ct. at 1777. By negotiating the Third

Amendment, FHFA "eliminated [the] risk" the enterprises would draw on Treasury's commitment to pay dividends and "ensured that all of Treasury's capital was available to backstop the companies' operations during difficult quarters." *Id.* FHFA's renegotiation of the enterprises' obligations involved the use of "traditional power[s] of corporate officers or directors." *Jacobs v. FHFA*, 908 F.3d 884, 890 (3d Cir. 2018).

Plaintiffs emphasize (Pls. Supp. Br. 3) the Supreme Court's statement that FHFA's Director must interpret a "special statute"—the Recovery Act—to determine "the standards that govern its work." *Collins*, 141 S. Ct. at 1785. Whatever significance that fact may have in a separation-of-powers analysis, it has no bearing on the question whether an entity is the government for other purposes. Like FHFA's Director, the TVA's board must interpret a "special statute"—the TVA Act of 1933, 16 U.S.C. § 831—to determine the "standards that govern its work." So too must the Red Cross's officers and directors. *See* 36 U.S.C. § 300101 *et seq.* Indeed, the enterprises themselves were created by special statutes that their officers and directors were required to interpret. *See* 12 U.S.C. §§ 1452 *et seq.*, 1717 *et seq.*

For similar reasons, plaintiffs err when they assert that FHFA should be deemed a government actor in agreeing to the Third Amendment because the conservator is authorized to consider the interests of "the Agency and, by extension, the public it serves." Pls. Supp. Br. at 7 (quoting *Collins*, 141 S. Ct. at 1776-77). Quoting *Collins*, Plaintiffs emphasize that "the Agency as conservator is authorized by a 'special law' (the Recovery Act) to 'serve public interests,' by ensuring 'a stable

secondary mortgage market.'" Pls. Supp. Br. 7. Even assuming FHFA's authority in this regard differs from that of a common-law conservator, it does not distinguish FHFA as conservator from the enterprises' private officers and directors. Like the conservator, the enterprises' officers and directors are authorized by special laws (the enterprises' federal charters) to take actions necessary "to provide stability in the secondary market for residential mortgages." *See* 12 U.S.C. §§ 1451 note, 1716. That FHFA's authority aligns with that of the enterprises' private directors underscores that its actions taken on the enterprises' behalf are private in character.

More generally, the fact that an entity acts to promote the public interest does not mean its actions are governmental. For example, a State is considered a private actor when it performs "commercial activit[y]," even if it does so in pursuit of "a civic objective." *Davis*, 553 U.S. at 347-48. Federally-chartered corporations like the TVA and Red Cross are similarly considered private actors when engaged in non-governmental activities even though they are directed to undertake those activities in pursuit of public objectives. *See, e.g.*, 16 U.S.C. § 831h-1; 36 U.S.C. §§ 300102, 300105; *see also* Gov't Supp. Br. 19 (for-profit corporations can pursue public objectives).

Plaintiffs emphasize (Pls. Supp. Br. 8) the undisputed point that FHFA is a federal agency under *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995). The question here, however, is whether the conservatorship transforms the actions of the private enterprises into government action. It does not. *See* Gov't Opening Br. 9-10.

Plaintiffs also err in finding significance in the Supreme Court's observation

that FHFA as conservator and Treasury were "counterpart[ies] to the Amendment" who "decided to amend" their stock-purchase contracts after "reevaluat[ing]" the performance of those contracts. *See* Pls. Supp. Br. 4-5 (quoting *Collins*, 141 S. Ct. at 1773, 1781, 1789). That Treasury was a counterparty to the original agreements and its amendments does not transform the amendments into the type of "joint action" at issue in cases such as *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), and the Supreme Court did not suggest otherwise. And plaintiffs' reliance on *Hendler* itself fails for the reasons discussed in our opening brief. *See* Gov't Opening Br. 40-45.[1]

II. *Collins* Underscores That Plaintiffs' Claims Are Fundamentally Derivative Claims That Are Barred by the Succession Clause

1. As the Court of Federal Claims held, plaintiffs' self-styled direct claims are in fact derivative claims. *See* Appx38-41; Gov't. Opening Br. 49-69. That is evident from the application of the two-fold inquiry: "(1) who suffered the alleged harm" and "(2) who would receive the benefit of any recovery or other remedy?" *Starr Int'l Co. v. United States*, 856 F.3d 953, 966 (Fed. Cir. 2017). Plaintiffs' claims are premised on the allegation that the Third Amendment unlawfully transferred the enterprises' net worth to Treasury. *See* Gov't Opening Br. 52 (quoting complaints). Such claims—which allege an injury to the corporation and would be redressed by a return of funds to the

[1] Plaintiffs note that the Supreme Court concluded that *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), did not bear on the question whether FHFA's Director exercises executive power for separation-of-powers purposes. *See Collins*, 141 S. Ct. at 1786 n.20. The Court did not suggest that the FHFA as conservator is the government for all purposes and never steps into the enterprises' private shoes.

corporation—are classic derivative claims. *See id.* at 50-51, 69 (citing examples).

Collins underscores the derivative nature of plaintiffs' alleged injury. In describing the burdens imposed by the Third Amendment, the Supreme Court recognized that those burdens fell directly on the enterprises and only indirectly on shareholders. For example, the Court explained that the Third Amendment required "the *companies* . . . to relinquish nearly all *their* net worth, and this made certain that *they* would never be able to build up *their* own capital buffers, pay back Treasury's investment, and exit conservatorship." *Collins*, 141 S. Ct. at 1777 (emphasis added); *see also id.* at 1774. Those are plainly harms to the corporation.

Plaintiffs emphasize the Supreme Court's statement that the Third Amendment "swept the companies' net worth to Treasury and left nothing for their private shareholders." Pls. Supp. Br. 9 (quoting *Collins*, 141 S. Ct. at 1779). But that sentence describes a classic derivative injury. As a result of allegedly improper conduct (such as fraud, waste, or overpayment), a company's net worth is reduced, lowering the enterprises' value and leaving less or no money for shareholders. *See*, *e.g.*, *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) (Allegations "that the directors . . . fail[ed] to safeguard Barbary Coast's assets and equity, mismanage[ed] its operations, [and] improperly plac[ed] it into voluntary receivership . . . describe a direct injury to the bank, not the individual stockholders."); *see also* Gov't Br. 50-51; 69.

Plaintiffs confuse Article III standing and "shareholder standing" when they urge that the Supreme Court's observation that the *Collins* shareholders had Article III

standing demonstrates that their claims here are direct. Pls. Supp. Br. 9-10. The United States has never argued (here or in *Collins)* that plaintiffs lack Article III standing. Shareholders experience a classic "pocketbook injury," *Collins*, 141 S. Ct. at 1779, for Article III purposes when an allegedly improper corporate transaction results in the diminution in the value of their stock. But that pocketbook injury remains a derivative injury and any claim based on that injury is a derivative claim.

Plaintiffs note that the Supreme Court rejected the contention that the Third Amendment was "a step toward liquidation" and stated that the amendment did not "preclude[] the companies from operating at full steam." *Collins*, 141 S. Ct. at 1718. Citing that statement, plaintiffs suggest that the Third Amendment may not have "harm[ed] the compan[ies]." Pls. Supp. Br. 11. It is unclear whether plaintiffs are now suggesting that the Third Amendment saved the enterprises but somehow injured its shareholders. There is no apparent basis for such a theory of injury, and, as the Court of Federal Claims recognized, plaintiffs' theory of injury has always depended on showing injury to the enterprises. In any event, the Supreme Court in *Collins* recognized that the costs of the Third Amendment were borne by the enterprises directly (in the form of lost net worth and an inability to build internal capital, *see supra* p. 7), and the shareholders only derivatively.

Finally, plaintiffs reiterate the mistaken assertion that their claims are direct because the Third Amendment purportedly "*reallocated equity* among existing shareholders, from them to Treasury-as-shareholder." Pls. Supp. Br. 12-13.

Notwithstanding plaintiffs' suggestion to the contrary, the government addressed this argument at length. *See* Gov't Opening Br. 60-69. As we explained, the cases on which plaintiffs rely stand for the proposition that minority shareholders have a direct claim when a controlling shareholder uses the authority it possesses as a controlling shareholder (such as its voting rights and control over a company's board) to obtain greater control (e.g., additional voting rights) over the corporation. *See id.* at 68-69. That is not the case here. Treasury was not a controlling shareholder, has no voting rights, does not control the enterprises' board or business affairs, and did not gain any control of the enterprises. *See id.* at 60-69. Instead, Treasury renegotiated its existing contractual rights in an arms-length transaction, in a manner that allegedly depleted the enterprises assets. *See id.* at 69. That is a derivative claim. It is black-letter corporation law that if a person "steals a corporation's assets, the corporation is the victim of the wrong and owns the cause of action against the thief." *Kennedy v. Venrock Assocs.*, 348 F.3d 584, 591 (7th Cir. 2003). It makes no difference whether "the thief is a complete outsider" or an existing "preferred shareholder." *Id.*; *see also El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1260-65 (Del. 2016) (although improper corporate transaction allegedly "enriched" a general partner "at the expense of" minority partners, minority partners' claim was nonetheless derivative).

2. Plaintiffs note that "*Collins* held that the Succession Clause only applies when plaintiffs assert rights that are "distinctive to shareholders of Fannie Mae and Freddie Mac." Pls. Supp. Br. 14 (quoting 141 S. Ct. at 1781). That is correct: And

because the right to bring a derivative claim on the enterprises' behalf is, by definition, distinctive to enterprise shareholders and is a right of the stockholders with respect to the enterprises, it is plainly covered by the Succession Clause.

Plaintiffs nevertheless urge that, like "the constitutional right asserted by the plaintiffs in *Collins*," they are asserting "constitutional rights that are 'shared by everyone in this country.'" Pls. Supp. Br. 14 (quoting *Collins*, 141 S. Ct. at 1781). Plaintiffs do not elaborate on this inexplicable assertion. The right to bring a derivative claim on a corporation's behalf—whether a derivative statutory claim or constitutional claim—is a right distinctive to shareholders of that corporation, and is most certainly not shared by everyone in the nation.

Plaintiffs observe (Pls. Supp. Br. 14) that *Collins* left "undisturbed" this Court's decision in *First Hartford Corp.* The Supreme Court's decision does not refer to *First Hartford,* and its holding, as plaintiffs appear to acknowledge, rests entirely on the fact that the separation of powers concerns at issue were, unlike derivative claims, not "distinctive to shareholders." *Collins*, 141 S. Ct. at 1781.

Collins does not "foreclose[]" the government's argument that issue preclusion prevents plaintiffs from relitigating the question whether the Recovery Act's Succession Clause includes a conflict-of-interest exception. Pls. Supp. Br. 13. The Supreme Court rejected the *Collins* shareholders' statutory and constitutional claims without considering whether they were derivative or whether a purported conflict of interest would permit derivative claims to proceed. *See Collins*, 141 S. Ct. at 1776-81.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

/s/ Gerard Sinzdak
MARK B. STERN
ABBY C. WRIGHT
GERARD SINZDAK
KYLE T. EDWARDS
Attorneys, Appellate Staff
Civil Division, Room 7242
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-0718
gerard.j.sinzdak@usdoj.gov

July 2021

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Gerard Sinzdak
Gerard Sinzdak

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 28.1(e)(2)(B) because it contains 10 pages. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Gerard Sinzdak
Gerard Sinzdak