**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

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

*Plaintiffs-Appellants,*

v.

UNITED STATES

*Defendant-Cross-Appellant.*

Nos. 20-1912, 20-1914

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

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

*Plaintiffs-Appellants*,

v.

UNITED STATES,

*Defendant-Appellee.*

No. 20-1934

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

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

v.

UNITED STATES
*Defendant-Appellee.*

20-1936

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

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

v.

UNITED STATES,
*Defendant-Appellee.*

20-1938

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

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

v.

UNITED STATES,
*Defendant-Appellee.*

20-1954

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

CSS, LLC,
*Plaintiff-Appellant*,

v.

UNITED STATES,
*Defendant-Appellant.*

20-1955

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

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

v.

UNITED STATES,
*Defendant-Appellee*.

20-2020

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

JOSEPH CACCIAPALLE,
*Plaintiff-Appellant*,

MELVIN BAREISS,
*Plaintiff*

v.

UNITED STATES,
Defendant- Appellee.

2020-2037

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

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

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# UNITED STATES COURT OF APPEALS
# FOR THE FEDERAL CIRCUIT

## CERTIFICATE OF INTEREST

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

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

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

Date: 10/30/20

Signature: /s/ Noah Schubert

Name: Noah Schubert

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

| | | |
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| Edward F. Haber | Miranda P. Kolbe | |
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**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).

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**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).

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## RELATED CASES

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

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## INTEREST OF *AMICI CURIAE*[1]

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

*Amici* set forth their interest in their initial brief,[2] but in summary, *amici* are the principal advocates for the GSEs' derivative claims. The Private Shareholders—the plaintiffs who are parties to this appeal—focus on resuscitating their dismissed direct claims rather than affirming the derivative claims the Court of Federal Claims upheld. *Amici* submit this brief to defend the derivative claims against arguments the Private Shareholders and the Government have made in their respective supplemental briefs addressing the Supreme Court's recent decision in

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

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

*Collins v. Yellen*, 141 S. Ct. 1761 (2021). Specifically, in the supplemental briefs, the Private Shareholders wrongly contend that *Collins* confirms shareholder claims relating to the Net Worth Sweep are direct. The Government contends, likewise wrongly, that *Collins* confirms that HERA's Succession Clause bars such claims.

These legally incorrect arguments, if accepted, may be dispositive to *amici*'s claims, which survived the Government's motion to dismiss in the Court of Federal Claims. Because the prosecution of this appeal has confirmed that *amici* are the only true defenders of shareholders' derivative claims concerning the Net Worth Sweep, *amici* submit this brief to advocate for the interests of the GSEs.

## SUPPLEMENTAL ARGUMENT

*Collins* resolved neither whether shareholder claims arising from the Net Worth Sweep are direct or derivative nor whether the HERA's succession clause bars such claims. *Collins* held that with respect to the claim there—a challenge on separation-of-powers grounds to a restriction on the President's power to remove the FHFA Director—"everyone in this county" has standing to assert such a claim. *Id.* at 1781. The Court held that HERA's succession clause did not bar such claims because the plaintiffs' claims were not dependent upon their status as shareholders. *Id.* Because the claims were ultimately not shareholder claims at all, the Court bypassed the question of whether any "shareholder" claims were direct or

derivative and whether HERA's succession clause barred any such shareholder claims. The Court did not discuss those issues, either in its holdings or even dicta.

Notwithstanding that *Collins* neither addressed nor resolved either issue, both the Private Shareholders and the Government attempt to spin *Collins* as having decided these issues, citing out-of-context passages that neither answer nor suggest an answer to these questions.

## I. The *Collins* Court Did Not Hold or Imply that Shareholder Claims Arising from the Net Worth Sweep Are Direct.

The Private Shareholders contend that "*Collins* acknowledges the simple, direct nature of the harm alleged by the *Collins* plaintiffs." PS Supp. Br.[3] at 9. *Collins* said no such thing. *Collins* nowhere addresses whether any shareholder claims arising from the Net Worth Sweep are derivative or direct. It does not discuss the issue or cite or apply the case law pertinent to resolving whether the claims are derivative or direct. *Collins* had no occasion to address this issue because it found that everyone in the United States had standing to bring the claims asserted there. Therefore, it had no occasion to evaluate the nature of any shareholder claim.

The Private Shareholders focus on a few sentences in *Collins* where the Court repeats the *Collins* plaintiffs' characterization of their own claims.

[3] "PS Supp. Br." refers to the Private Shareholders' Supplemental Brief Regarding *Collins*, filed July 16, 2021.

Specifically, the Court observed that "the *shareholders claim* that the FHFA transferred the value of their property rights in Fannie Mae and Freddie Mac to Treasury." *Collins*, 141 S. Ct. at 1779 (emphasis added). The Court, however, did not endorse that characterization or analyze its relevance to the question of whether shareholder claims are direct.

The Court did find that such allegations satisfy Article III's requirements that the plaintiff suffer an injury in fact traceable to alleged wrongdoing. The Private Shareholders view this as equivalent to a finding that their claims are direct, buth *Collins* said no such thing. The Private Shareholders conflate the requirements for Article III standing with a finding that a claim is direct.

The mere fact that a shareholder meets the basic requirements for alleging an "injury in fact" does not mean the shareholder's claim is direct. Even if a claim is derivative, a shareholder has still suffered an injury in fact, albeit an indirect one. That indirect injury is what provides a shareholder standing to assert a derivative claim. That is, the law affords standing to shareholders to sue derivatively because a shareholder's "status as a shareholder provides an interest and incentive to obtain legal redress for the benefit of the corporation." *Ala. By-Products Corp. v. Ede & Co. ex. Rel. Shearso*, 657 A.2d 254, 265 (Del. 1995). Equitable standing for derivative actions "recognize[s] the truth that the stockholders are ultimately the only beneficiaries; that their rights are really, though indirectly, protected by

remedies given to the corporation ….” *Schoon v. Smith*, 953 A.2d 196, 201 n.10 (Del. 2008) (quotation omitted; emphasis in original).

Put another way, shareholders who assert derivative claims, by definition, meet the minimum Article III requirement for “injury in fact”; that injury confers them standing to sue derivatively. Shareholders suffer, indirectly at least, some “injury in fact” whenever the corporation suffers an injury, but of course, this does not mean that shareholders always have a direct claim. Were that the case, all claims arising from harm to a company would be direct claims.

The seminal case law drawing the line between direct and derivative claims confirms that pleading a shareholder’s injury-in-fact does not establish a direct claim. The Delaware Supreme Court explained in *Grimes v. Donald*:

> To pursue a direct action, the stock-holder plaintiff must allege more than an injury [to the plaintiff] resulting from a wrong to the corporation…. The plaintiff must state a claim for an injury which is separate and distinct from that suffered by other shareholders,…or a wrong involving a contractual right of a shareholder…which exists independently of any right of the corporation.

673 A.2d 1207, 1213 (Del. 1996) (quotations omitted). The Delaware Supreme Court later affirmed this principle in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), explaining:

> [A]n injury to the corporation tends to diminish each share of stock equally because corporate assets or their value is diminished. In that sense, the *indirect* injury to the stockholders arising out of harm to the corporation comes about solely by virtue of their stockholders. It does not arise out of any independent or direct harm to the stockholders, individually.

*Id.* at 1037 (emphasis in original). That is, shareholders suffer an injury even where the claim is derivative. *See also Agostini v. Hicks*, 845 A.2d 1110, 1121, 1124 (Del. Ch. 2004) (holding that claim is derivative even though the shareholder "plaintiff has suffered an injury" in the form of "a devaluation of his stock," as that injury is not "independent of any injury to the corporation") (quotations omitted).

Critically, although *Collins* recognized that "the *shareholders claim* that the FHFA transferred the value of their property rights in Fannie Mae and Freddie Mac to Treasury," the Court described the GSEs as the entities that suffered the immediate harm from the Net Worth Sweep. *Collins*, 141 S. Ct. at 1779 (emphasis added). The Court explained that the Net Worth Sweep "swept ***the companies'*** net worth to Treasury and left nothing for private shareholders." *Id.* (emphasis added). That is, the injury to shareholders (that they were "left nothing") resulted indirectly from the transfer of the GSEs' net worth to Treasury. Put another way, the shareholders' harm is derivative of the harm to the GSEs.

The Private Shareholders also insist that *Collins* supports their characterizations that the Net Worth Sweep (i) "transferred to Treasury [their] right to receive dividends and distributions," PS Supp. Br. 10; (ii) "did take [the shareholders'] private interest" in the company, *id.* at 11; and (iii) reallocated equity from one group of shareholders to another, *id.* at 12–13. *Collins* nowhere discusses, let alone endorses, any of these characterizations of the Private

Shareholders' Claims. It instead ties the shareholders' injury to "the variable dividend formula that swept the companies' net worth to Treasury." 1431 S. Ct. at 1779. That is, *Collins*, to the degree it suggests anything, indicates that the shareholders' injury is derivative of the more immediate injury to the GSEs.

The Private Shareholders likewise distort out-of-context passages from *Collins* to suggest that the Supreme Court held that the shareholders' injury "does *not* depend on whether the Net Worth Sweep *also* harmed the *Companies*," PS Supp. Br. 10, and that "*Collins* confirms that the Private Shareholders have sufficiently pleaded injuries that fall directly on *them* as distinct from the Companies," *id.* at 11–12. The passages they cite from *Collins* say no such thing. *First*, the Private Shareholders point to the Court's observation that the Net Worth Sweep did not undermine the operations of the GSEs, which continued to function notwithstanding the Net Worth Sweep. *Id.* at 10. This is a non sequitur. The fact that the Net Worth Sweep did not put the GSEs out of business does not mean that the GSEs were uninjured or that any shareholder injury does not derive from an a more immediate injury to the GSEs. *Second*, for the proposition that *Collins* found injuries "distinct from the [injuries] to the" GSEs, the Private Shareholders cite nothing from *Collins* to support this argument, instead merely citing the Private Shareholders' own prior briefs. *Id.* at 11–12.

Finally, the Private Shareholders argue that because Treasury was the beneficiary of the Net Worth Sweep, and Treasury also was a shareholder, this means that claims arising from the Net Worth Sweep must be direct because it benefited one shareholder over another. That a particular shareholder benefited from a wrongful corporate action does not mean that any claims arising from such wrongdoing are direct. Were this the law, then all claims involving self-dealing transactions by a controlling shareholder would be deemed direct claims. The law, is, in fact, the opposite: such claims are generally deemed derivative claims. *See*, *e.g.*, *Caspian Select Credit Mastser Fund Ltd. v. Gohl*, 2015 Del. Ch. LEXIS 246, *15 (Del. Ch. Sept. 28, 2015) (rejecting "proposition that … a direct claim arises whenever a controlling stockholder extracts and expropriates economic value from a company to its benefit and the minority stockholders' detriment" because such a rule "would largely swallow the rule that claims of corporate overpayment are derivative"); *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.S.*, 2011 Del. Ch. LEXIS 115, *21–22 (Del. Ch. Aug. 5, 2011) (allegations that controlling shareholder used power as such to "shift[] cash" from the company to an affiliate of the shareholder stated solely a derivative claim); *VGS, Inc. v. Castiel*, 2003 Del. Ch. LEXIS 16, *38–39 (Del. Ch. Feb. 28, 2003) (allegations of controlling shareholder "diverting company funds … to his own use" stated a classic derivative claim for "self-dealing").

## II. *Collins* Does Not Support the Government's Position that HERA's Succession Clause Bars Shareholder Derivative Claims Arising from the Net Worth Sweep.

The Government admits that "the Supreme Court had no occasion to address the assertion of derivative claims" (because, as explained above, it concluded the claims belong to "everyone in the country"). Gov. Supp. Br.[4] 12. The Government nonetheless insists that the Court's analysis of separation of powers issues somehow supports its position on HERA's succession clause.

The Government focuses on the Court's holding that HERA's succession clause is limited to claims that are "distinctive to shareholders of Fannie Mae and Freddie Mac," as contrasted with the separation-of-powers claims that anyone may assert. The Government then takes a massive leap to conclude that the claims asserted in the cases before the Court of Federal Claims are "distinctive to shareholders of Fannie Mae and Freddie Mac," and therefore, the HERA bars such claims. *Id.* at 13. *Collins* did not say this, but even if it did, such a holding or dicta would not address *amici's* argument about HERA's succession clause. *Amici* do not contend that their derivative claims are unrelated to their status as shareholders.

Instead, *amici* argue that HERA's succession clause does not apply where the government entity managing the GSEs faces a conflict of interest. That

[4] "Gov. Supp. Br." refers to the Supplemental Brief for the United States, filed July 16, 2021.

conflict-of-interest exception is dictated by precedent (*First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999)), but it is also constitutionally required, given the serious constitutional questions that would arise if HERA were construed to bar any remedy for shareholders' constitutional claims. *See* Initial Amicus Br. at 20–27; Supplemental Brief of *Amici Curiae* Byndon Fisher, Bruce Reid, and Erick Shipmon in Support of Neither Party, filed Mar. 29, 2021, at 2–7.

*Collins* did not discuss or even cite *First Harford*, nor did it discuss the constitutional issues that would arise if a court were to depart from *First Hartford* on any constitutional claims. *Collins* sidestepped these issues entirely. That is, the dispute concerning HERA's succession clause remains the same as it was before *Collins*. The Court must follow *First Hartford* because it is the precedent of this Court. To hold otherwise would render HERA unconstitutional as applied.

## CONCLUSION

For the above reasons and those set forth in the *amici*'s initial and reply briefs, the Court should decide that shareholder claims arising from the Net Worth Sweep are derivative, that HERA's succession clause does not bar them, and that the Court of Federal Claims had jurisdiction because the FHFA-C maintained its government character during the conservatorship of the GSEs.

Dated: July 30, 2021

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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

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