No. 22-

IN THE

Supreme Court of the United States

JOSEPH CACCIAPALLE, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In September 2008, the Federal Housing Finance Agency ("FHFA") placed Fannie Mae and Freddie Mac into conservatorship, and on behalf of each entity entered into a preferred stock purchase agreement ("PSPA") with the U.S. Treasury, under which Treasury received (a) senior preferred stock that would receive a 10% dividend on a principal value equal to $1 billion plus all amounts borrowed from Treasury by Fannie or Freddie, respectively; and (b) warrants to acquire 79.99% of the common stock in each for a nominal price. Under this arrangement, private shareholders in both had the right to receive dividends if and when Treasury received dividends in excess of its 10% senior preferred dividends – i.e., dividends on common stock it acquired through exercising its warrants.

In August 2012, FHFA and Treasury changed the PSPA dividend on Treasury's senior preferred stock from 10% of the stock's principal value to 100% of the net worth of Fannie Mae or Freddie Mac (minus a small reserve that would shrink to zero by 2018), in perpetuity. Under this arrangement, private shareholders in Fannie and Freddie could never receive any dividends no matter how much money they earned, as 100% of all dividends would have to be paid to Treasury. As a result, Treasury has taken roughly $150 billion more than it could have received under the original 10% dividend.

1. Did the Federal Circuit err in barring as "substantively derivative" the claims of private shareholders of Fannie Mae and Freddie Mac for the Taking of their shareholder rights, and the

transfer of 100% of their economic interest to the U.S. Treasury, without making a determination as to whether the private shareholders had identified a valid property right that they directly owned and that the government had taken?

2. Were the rights to future dividends and other distributions held by shareholders cognizable property rights protected by the Takings Clause?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The representative for the class of preferred shareholders in the proceedings below was Joseph Cacciapalle, who was one of the plaintiffs in the Court of Federal Claims action and one of the plaintiff-appellants in the Court of Appeals for the Federal Circuit.

There is no parent company to be disclosed by the class pursuant to Supreme Court Rule 29.6.

The United States was the defendant in the Court of Federal Claims and the defendant-appellee in the Court of Appeals for the Federal Circuit.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Cacciapalle v. United States*, No. 20-2037, U.S. Court of Appeals for the Federal Circuit. Judgment entered Feb. 22, 2022.

- *Cacciapalle v. United States*, No. 13-466C, U.S. Court of Federal Claims. Judgment entered June 26, 2020.

The Federal Circuit also addressed takings challenges to the Net Worth Sweep in the following appeals:

- *Fairholme Funds, Inc. v. United States*, No. 20-1912, U.S. Court of Appeals for the Federal Circuit. Judgment entered Feb. 22, 2022.

- *Owl Creek Asia I, L.P. v. United States*, No. 20-1934, U.S. Court of Appeals for the Federal Circuit. Judgment entered Feb. 22, 2022.

- *Mason Cap. L.P. v. United States*, No. 20-1936, U.S. Court of Appeals for the Federal Circuit. Judgment entered Feb. 22, 2022.

- *Akanthos Opportunity Master Fund, L.P. v. United States*, No. 20-1938, U.S. Court of Appeals for the Federal Circuit. Judgment entered Feb. 22, 2022.

- *Appaloosa Inv. Ltd. P'ship I v. United States*, No. 20-1938, U.S. Court of Appeals for the Federal Circuit. Judgment entered Feb. 22, 2022.

- *CSS, LLC v. United States*, No. 20-1955, U.S. Court of Appeals for the Federal Circuit. Judgment entered Feb. 22, 2022.

- *Arrowood Indem. Co. v. United States*, No. 20-2020, U.S. Court of Appeals for the Federal Circuit. Judgment entered Feb. 22, 2022.

The appeals are related to the following lower court proceedings:

- *Fairholme Funds, Inc. v. United States*, No. 13-465C, U.S. Court of Federal Claims. Judgment entered Feb. 22, 2020.

- *Owl Creek Asia I, L.P. v. United States*, No. 18-281C, U.S. Court of Federal Claims. Judgment entered June 8, 2020.

- *Mason Cap. L.P. v. United States*, No. 18-529C, U.S. Court of Federal Claims. Judgment entered June 8, 2020.

- *Akanthos Opportunity Master Fund, L.P. v. United States*, No. 18-369C, U.S. Court of Federal Claims. Judgment entered June 8, 2020.

- *Appaloosa Inv. Ltd. P'ship I v. United States*, No. 18-370C, U.S. Court of Federal Claims. Judgment entered June 8, 2020.

- *CSS, LLC v. United States*, No. 18-371C, U.S. Court of Federal Claims. Judgment entered June 8, 2020.

- *Arrowood Indem. Co. v. United States*, No. 13-698C, U.S. Court of Federal Claims. Judgment entered May 15, 2020.

- *Rafter v. United States*, No. 14-740C, U.S. Court of Federal Claims.

- *Reid v. United States*, No. 14-152, U.S. Court of Federal Claims.

- *Fisher v. United States*, No. 13-608, U.S. Court of Federal Claims.

- *Washington Fed. v. United States*, No. 13-385C, U.S. Court of Federal Claims.

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INTRODUCTION

This petition rests upon a simple proposition: a person that directly owns a specified property right is entitled to bring a claim under the Takings Clause that such specified property right has been taken by the government. It may be that the reviewing court decides the property right that is identified is not protected by the Takings Clause, or that the government action at issue did not constitute a "taking" of that property. But if a plaintiff plausibly alleges that it owns property and that specified property has been taken by the government, then the plaintiff has the right to bring its own claim under the Takings Clause.

That ought to be an uncontroversial proposition. There is no case from this Court that can be read to hold otherwise. Nevertheless, in this case, the lower courts lost sight of this simple proposition when confronted with a case where the plaintiffs are shareholders in corporations who allege that their shareholder rights – most importantly, their rights to future dividends – have been taken. Instead of analyzing whether plaintiffs had identified a property right that they (and they alone) directly own, and whether they had plausibly alleged that this property right had been taken, the lower courts reflexively looked to Delaware state law governing when certain kinds of shareholder claims brought under state law are "direct" versus when they are "derivative." That state law doctrine deals principally with claims of fiduciary breach, and focuses on the corporate law inquiry as to the persons to whom the defendant owes fiduciary duties – the corporation only, the shareholders only, or both. It also inquires into which plaintiff is most appropriately positioned to bring a state common law claim to ensure all injured parties are made whole.

Those state law inquiries are irrelevant to a case brought under the Takings Clause. Under the Takings Clause, the only inquiry needed to determine whether a person is a proper plaintiff is whether that person has plausibly alleged that they (and they alone) directly owned property that has been taken by the government. If so, that person has a right to bring a claim under the Takings Clause that must be evaluated on the merits.

By holding to the contrary, the Federal Circuit drastically reduced the protections of the Takings Clause for corporate shareholders. Since the Federal Circuit is the exclusive court of appeals for claims seeking just compensation under the Takings Clause, this Court should grant *certiorari* to ensure that this gross distortion of the law does not stand.

OPINIONS BELOW

Mr. Cacciappalle adopts and cites to the appendix filed by the *Owl Creek* petitioners.

The opinion of the Court of Appeals is reported at 26 F.4th 1274 and is reproduced in the appendix filed by the *Owl Creek* petitioners at App.1a–57a. The Court of Federal Claims' opinion is reported at 147 Fed. Cl. 1 and is reproduced in the same appendix at App.489a–562a.

JURISDICTION

The Court of Appeals issued its judgment on February 22, 2022. Petitioner's application for extension of time to file a petition for a writ of certiorari by July 22, 2022 was granted by the Chief Justice on May 12, 2022. *See*

Fairholme Funds, Inc. v. United States, No. 21A711. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

STATEMENT OF THE CASE

Collins v. Yellen, 141 S. Ct. 1761 (2021) addressed claims challenging largely the same conduct that is the subject of the Takings claim here. It lays out the relevant factual background. *Id.* at 1770–75. These facts are reiterated here for good order, and to emphasize certain facts not set forth in *Collins* (*see, e.g.,* Sections A.2, A.4, and A.7 below).

A. Factual Background

1. The Federal National Mortgage Association, commonly known as Fannie Mae, was chartered by the federal government in 1938 to help ensure an affordable supply of mortgage funds throughout the country. In 1968, due to concerns over Fannie Mae's impact on the federal budget, Fannie Mae was converted into a publicly traded company funded by private investors. First Amended Class Comp., Case 1:13-cv-00466, Doc. 67, at ¶19 ("FAC").

In 1970, Congress created the Federal Home Loan Mortgage Corporation, commonly known as Freddie Mac.

Freddie Mac was created as an alternative to Fannie Mae to make the secondary mortgage market more competitive and efficient. It was converted to a private corporation in 1989. *Id.*

Both Companies are sometimes referred to as "Government Sponsored Enterprises" (or "GSEs"), reflecting that they are private corporations created by Congress to increase mortgage market liquidity. *Id.*

2. In the 1990s, Fannie Mae and Freddie Mac began issuing preferred stock to private investors. Between 1996 and 2008, private shareholders invested over $30 billion into Fannie Mae and Freddie Mac in exchange for various series of preferred stock in each company.[1] Over $20 billion of this amount was invested into Fannie Mae and Freddie Mac during 2007 and 2008, when the two GSEs were under considerable financial pressure and needed additional funding.[2] Petitioners are the owners of the preferred stock issued in exchange for the foregoing investments.

3. On July 30, 2008, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), 122 Stat. 2654, 12 U.S.C. § 4501 *et seq.* Among other things, HERA created the Federal Housing Finance Agency (FHFA), which was tasked with regulating the GSEs and, if necessary, stepping in as their conservator or receiver. §§ 4511, 4617.

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1. *See* Fannie Mae ("FNMA") Form 10-K (Feb. 26, 2009), at F-96; Freddie Mac ("FMCC") Form 10-K (March 11, 2009), at 230.

2. *See* FNMA Form 10-K (Feb. 27, 2008), at 50, 109; FNMA Form 10-Q (Aug. 8, 2008), at 119–120; FMCC Form 10-K (March 11, 2009), at 184.

HERA provides that the Director of the FHFA may exercise his discretion to appoint FHFA as conservator or receiver of either GSE (or "regulated entity") based on any one of twelve different enumerated grounds for doing so. § 4617(a)(1)–(3).

4. On September 6, 2008, the FHFA placed both Fannie Mae and Freddie Mac into conservatorship. FAC ¶5. The next day, acting on behalf of each GSE, the FHFA entered into a senior preferred stock purchase agreement ("PSPA") with Treasury – one each on behalf of each enterprise, respectively. Under each PSPA, Treasury agreed to allow each GSE to draw up to $100 billion in capital in exchange for: (1) senior preferred non-voting stock having quarterly fixed-rate dividends payable at the rate of 10% per year times the amount of the "liquidation preference" in the senior preferred stock, which had an initial value of $1 billion and was then increased by all amounts borrowed from Treasury; and (2) warrants to purchase up to 79.9% of the common stock of each Enterprise at a nominal price. App.8a–9a; FAC ¶5.

Thus, under the PSPA, if the Treasury wished to receive dividends in excess of the 10% amount on the senior preferred stock (assuming the GSEs were in position to pay such dividends), then Treasury simply needed to exercise its warrants to acquire 79.9% of the common stock. It would then receive 79.9% of all dividends paid to common shareholders. However, such dividends would require the GSEs to first pay a dividend to the private preferred shareholders (petitioners here), whose certificates require them to be paid a dividend in any quarter in which dividends are paid to common shareholders.

The PSPAs' structure confirmed that existing private shareholders retained an interest in the GSEs should they recover and return to profitability – albeit a reduced interest given the sizable interest taken by Treasury in exchange for its funding. That Treasury bargained for the right to acquire 79.9% of the common stock in each GSE showed there was potential value in that common stock, which would necessarily mean there was value in the preferred stock held by petitioners.

FHFA and Treasury statements at the time the PSPAs were executed confirmed that private shareholders held rights that could be valuable if and when the GSEs returned to sustained profitability. FHFA Director James Lockhart told investors on September 7, 2008 that "the common and all preferred stocks will continue to remain outstanding." FAC ¶6. That same day, Treasury Secretary Henry Paulson released a statement saying the "conservatorship does not eliminate the outstanding preferred stock, but does place the preferred shareholders second, after the common shareholders, in absorbing losses." *Id.*

Public statements from September 7, 2008 also made clear that the goal of the conservatorships was to return the GSEs to sound, solvent, and profitable operations, at which point they would exit conservatorship. On that day, FHFA Director Lockhart stated that conservatorship was "designed to stabilize a troubled institution **with the objective of returning the entities to normal business operations**." FAC ¶28 (emphasis added). FHFA published a related series of the following Questions and Answers to explain the GSE conservatorships:

> "Q: What is a conservator?"
>
> "A: A Conservator is the person or entity appointed to oversee the affairs of a Company **for the purpose of bringing the Company back to financial health**."
>
> "Q: What are the goals of this conservatorship?"
>
> "A: The purpose of appointing the conservator is **to preserve and conserve the Company's assets and property and to put the company in a sound and solvent condition**."
>
> "Q: When will the conservatorship period end?"
>
> "A. Upon the Director's determination that the Conservator's plan to restore the [GSEs] to a safe and solvent condition has been completed successfully, **the Director will issue an order terminating the conservatorship**."[3]

On September 11, 2008, Freddie Mac issued an SEC Form 8-K stating: "The holders of Freddie Mac's existing common stock and preferred stock . . . **will retain all their rights** in the financial worth of those instruments, as such worth is determined by the market." FAC ¶34.

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3. FHFA, *Questions and Answers on Conservatorship* (Sept. 7, 2008), https://www.fhfa.gov/Media/PublicAffairs/Pages/Fact-Sheet-Questions-and-Answers-on-Conservatorship.aspx#:~:text=%E2%80%8BA%20conservatorship%20is%20the,transferred%20to%20the%20designated%20Conservator (emphasis added).

In May 2009, the FHFA and Treasury amended the PSPAs to increase the amount of capital available to each GSE from $100 billion each to $200 billion each. FAC ¶45. In December 2009, the FHFA and Treasury agreed to a second amendment to the PSPAs under which Treasury agreed to provide as much funding as the companies needed through 2012, after which a cap would be reinstated (for each GSE, the cap was equal to $200 billion plus the amount borrowed since the Second Amendment). *Id.*

5. By August 2012, the housing market had recovered, and the GSEs were returning to profitability. FAC ¶51. In July 2012, a Fannie Mae senior executive told the FHFA that the next eight years were likely to be "the golden years of GSE earnings." FAC ¶52.

On August 17, 2012, Treasury and the FHFA executed a Third Amendment to the PSPA. Among other things, it changed the dividend on Treasury's senior preferred stock from an amount equal to 10% of the liquidation preference (i.e., the principal amount) in the stock, to an amount equal to 100% of the net worth of each GSE, minus a small reserve that was set to shrink to zero by 2018 (the "Net Worth Sweep"). FAC ¶56.[4]

4. In December 2017, Treasury and FHFA executed letter agreements providing that the capital reserve amount for 2018 and future years would be $3 billion instead of zero, but also providing that Treasury's liquidation preference in its senior preferred stock would simultaneously be increased by $3 billion. *Collins*, 141 S. Ct. at 1774 n.8. This confirmed that, in accordance with the Net Worth Sweep, Treasury was guaranteed 100% of all distributions from the GSEs, whether in dividends, liquidation proceeds, or otherwise.

The Treasury provided nothing of value to the GSEs in exchange for having its senior preferred stock dividend changed from 10% of its liquidation preference to 100% of the net worth of the GSEs. FAC ¶58.

The Third Amendment's Net Worth Sweep eliminated private shareholders' ability to ever receive a dividend or any other distribution from the GSEs. It guaranteed that 100% of all future distributions would go to Treasury and ensured that none would go to shareholders no matter how large the profits generated by Fannie Mae and Freddie Mac. FAC ¶56. As Treasury stated on the day of the announcement, the Third Amendment was intended to ensure that "every dollar of earnings that Fannie Mae and Freddie Mac generate" would go solely to Treasury. FAC ¶57. In so doing, the Net Worth Sweep eliminated the contingent right to future dividends held by private shareholders as of the time the conservatorship was imposed and the original PSPAs executed, and provided that all contingent upside in the GSEs was instead held entirely by Treasury.

The Net Worth Sweep also directly contradicted FHFA and Treasury's September 2008 public statements that the goal of the conservatorship was to return the GSEs to sound and solvent operations, and then to exit the conservatorship. Treasury documents make clear that the goal of the Net Worth Sweep was the opposite: "By taking all of their profits going forward, we are making clear that the GSEs will *not* ever be allowed to return to profitable entities at the center of our housing finance system." FAC ¶60.

The impact of the Net Worth Sweep was immediate and dramatic. It took effect as of January 1, 2013. During 2013, the GSEs paid Net Worth Sweep dividends to

Treasury of $130 billion. *Collins*, 141 S. Ct. at 1774. That was more than $110 billion larger than would have been the case under the previous, 10% dividend. FAC ¶64. As of the date of the amended complaint in this case (2018), Treasury had received cash dividends under the Net Worth Sweep that were approximately $125 billion higher than they would have been under the 10% dividend. FAC ¶11. The public record information shows that the excess value transferred to Treasury has continued well beyond that amount, as summarized below.

6. In September 2019, the FHFA and Treasury entered into letter agreements providing that from July 1, 2019 onward, no cash dividends would be paid by the GSEs to Treasury unless and until the GSE's capital reserves had exceeded $25 billion (in the case of Fannie Mae) or $20 billion (in the case of Freddie Mac). *Collins*, 141 S. Ct. 1774 n.8. In place of the cash dividends, these agreements provided that Treasury's liquidation preference in its senior preferred stock would be increased each quarter by the amount by which each GSE's net worth increased over what it was in the prior quarter, up to certain limits reflecting capital targets. *Id.* While these changes allowed the GSEs to build and retain capital, they ensured that Treasury would own 100% of that capital by increasing its liquidation preference by the amount of each quarterly increase in net worth.

In 2021, the FHFA and Treasury entered into new letter agreements implementing the same concept (raising Treasury's liquidation preference as the GSE's capital reserves increase) with respect to newly-released regulatory capital requirements for the GSEs. These agreements provided that no cash dividends would be paid until the GSE's met their regulatory capital levels,

but also provided that Treasury's liquidation preference would be increased by the amount of each quarterly increase in net worth up to the time when the regulatory capital requirements would be met for two consecutive quarters.[5] These 2021 agreements further provided that after the regulatory capital requirements were met, cash dividends to Treasury would resume at an amount equal to the lesser of each quarterly increase in net worth, or 10% of the (massively increased) liquidation preference. *Id.*

7. As of the time of the most recent public financial reports filed by the GSEs with the SEC and available at the time this petition was submitted, the following summaries can be provided regarding Treasury's loans to the GSEs, the GSEs's dividend payments to Treasury, and the impact of the Net Worth Sweep:

Total amount GSEs borrowed from Treasury	$191.4 billion
Total borrowings before Net Worth Sweep[6]:	$187.4 billion
Total borrowings after Net Worth Sweep[7]:	$4.0 billion

5. *See* https://home.treasury.gov/system/files/136/Executed-Letter-Agreement-for-Fannie-Mae.pdf; https://home.treasury.gov/system/files/136/Executed-Letter-Agreement-for-Freddie%20Mac.pdf.

6. FNMA Form 10-K (Feb. 29, 2012), at 9 (Fannie borrowed $116.1 billion); FMCC Form 10-K (Feb. 28, 2013), at 180 (Freddie borrowed $71.3 billion).

7. Fannie Mae's only borrowing from Treasury after 2012 was in the first quarter of 2018, for $3.7 billion. *See* FNMA Form

Total dividends GSEs have paid Treasury plus liquidation preference increases in lieu of dividends:	$379.4 billion
Dividends in cash before Net Worth Sweep[8]:	$55.2 billion
Dividends in cash pursuant to Net Worth Sweep[9]:	$245.9 billion
Increases in the liquidation preference based on net worth increases, in lieu of net worth sweep dividends[10]:	$78.3 billion
Amount by which dividends and net worth increases to liquidation preference exceed borrowings:	$188.0 billion

10-Q (May 3, 2022), at 70. Freddie Mac's only borrowing from Treasury after 2012 was for $300 million in the first quarter of 2018. *See* FMCC Form 10-Q (May 1, 2018), at 61, and FMCC Form 10-Q (April 28, 2022), at 40. Had it not been for the Net Worth Sweep, Fannie and Freddie would have retained the substantial positive net worth of approximately $130 billion they generated during 2013, *Collins*, 141 S. Ct. at 1774, which would have obviated any need for future borrowings from Treasury.

8. FNMA Form 10-K (April 2, 2013), at 4; FMCC Form 10-K (Feb. 28, 2013), at 180.

9. FNMA Form 10-Q (Oct. 31, 2019), at 3; FMCC Form 10-Q (Oct. 30, 2019), at 46. *Compare* Note 8, *supra*.

10. *Compare* FNMA Form 10-Q (Oct. 31, 2019), at 3 (Treasury liquidation preference in Fannie of $123.8 billion as of June 30, 2019) *with* FNMA Form 10-Q (May 3, 2022), at 55 (liquidation preference in Fannie of $173.3 billion as of June 30, 2022); *compare* FMCC Form 10-Q (July 31, 2019), at 3 (Treasury liquidation preference in Freddie of $75.6 billion as of June 30,

This chart shows that the total value of all cash dividends paid to Treasury under the Net Worth Sweep ($245.9 billion) plus the net worth increases to Treasury's liquidation preference made in lieu of cash dividends ($78.3 billion) is equal to **$324.2 billion**. That is the current total, using data available through the first quarter of 2022, of the value transferred to Treasury under the Net Worth Sweep regime – thus far. Had there been no Net Worth Sweep, and had the GSEs instead paid the 10% dividend at the 2012 level of $18.9 billion per year over the last nine years and a quarter (FAC ¶64), their total payments to Treasury would have been **$174.8 billion** (9.25 × $18.9 billion). Accordingly, one approximation of the excess value transferred thus far to Treasury as a result of the Net Worth Sweep is **$149.4 billion** ($324.2 billion received under the Sweep minus $174.8 billion of 10% dividends payable absent the Sweep).

But this $149.4 billion estimate actually understates what Treasury has taken through the Net Worth Sweep, for two reasons. First, the Net Worth Sweep remains in effect, such that each quarter's increase in net worth at GSE results in an increase in the Treasury's liquidation preference in its senior preferred stock. Second, had it not been for the Net Worth Sweep, the GSEs would have been able to fully repay the amounts borrowed from Treasury, with interest, eliminating the need to pay any ongoing senior preferred dividend.

B. Proceedings In The Court Of Federal Claims And Related Cases

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2019) *with* FMCC Form 10-Q (April 28, 2022), at 55 (liquidation preference in Freddie of $104.4 billion as of June 30, 2022).

On July 10, 2013, petitioners filed their complaint in the Court of Federal Claims on behalf of the class of all preferred shareholders in Fannie Mae and Freddie Mac. The complaint claimed that the Net Worth Sweep was a Taking of the preferred shareholders' rights to dividends and liquidation proceeds, and that just compensation was owed. The court granted jurisdictional discovery in a closely related case filed by Fairholme Funds, Inc. App.86a. That jurisdictional discovery lasted for several years, after which the parties filed amended complaints in March 2018. App.78a.

In the interim, petitioner and other class representatives, along with other plaintiffs, filed complaints in the United States District Court for the District of Columbia, advancing numerous claims appropriate for that court, including the claim that the Net Worth Sweep was a breach of contract (i.e., a breach of the shareholder certificates held by preferred shareholders). *Perry Capital LLC v. Lew*, 70 F.Supp.3d 208, 233 (2014). The district court dismissed all claims, and shareholders appealed. The D.C. Circuit affirmed the dismissal of all claims except the shareholders' claims for breach of contract, which it reversed and remanded. *Perry Capital v. Mnuchin*, 864 F.3d 591, 598–99 (2017) ("*Perry II*").[11] This Court denied shareholders' various petitions for certiorari to review the decision in *Perry II*. *E.g.*, *Cacciapalle v. FHFA*, 138 S. Ct. 978 (2018). At the time of this petition, a class action of preferred shareholders

11. The D.C. Circuit's decision in *Perry* is referenced as "*Perry II*" to conform to the nomenclature in the Federal Circuit's decision and other briefing below, where "*Perry I*" referred to the District Court's dismissal of shareholder claims in *Perry Capital LLC v. Lew*, 70 F.Supp.3d 208 (D.D.C. 2014).

in Fannie and Freddie and common shareholders in Freddie is scheduled for trial on their breach of implied covenant claim in the U.S. District Court for the District of Columbia. Case 1:13-mc-01288, Doc. 160 (Order filed June 13, 2022).

After motion to dismiss briefing and oral argument, the Court of Federal Claims dismissed the petitioners' complaint through an order issued on June 26, 2020. App.561a. The court first held that the plaintiffs had properly alleged conduct by the FHFA acting as the United States sufficient to trigger Tucker Act jurisdiction. App.534a–36a. It then held that petitioners had no standing to bring a Takings claim, as the only Takings claim that could be brought was a derivative Takings claim on behalf of the GSEs. App.550a–55a. The court reached this decision without analyzing whether petitioners and other shareholder-plaintiffs had properly alleged the existence of a property right that they owned and that had been taken by the government. *Id.*[12] The court denied the government's motion to dismiss derivative Takings claims brought on behalf of the GSEs by other shareholder-plaintiffs. App.154a.

C. Federal Circuit Decision

Petitioner and other direct action shareholder plaintiffs litigating outside of the class appealed the Court of Federal Claims' decision to the Federal Circuit. In addition, the Court of Federal Claims certified its decision denying the motion to dismiss the derivative Takings claim for review by the Federal Circuit. App.11a.

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12. The court also dismissed petitioners' other claims. App.561a.

While the appeal and cross-appeal were pending, this Court issued its decision in *Collins*, 141 S. Ct. 1761, holding that FHFA's decision to agree to the Net Worth Sweep fell within the broad statutory authority provided by HERA, and therefore HERA's anti-injunction provision applied to block the APA claims brought in that case. *Collins* further held that the structure of FHFA as an "independent agency" with a single Director who could not be removed by the President other than "for cause" was unconstitutional, but declined to rule that the remedy for this violation was the invalidation of the Net Worth Sweep. *Id.* at 1787–89 & n.26.

On February 22, 2022, the Federal Circuit issued its decision. In relevant part, it affirmed the decision by the Court of Federal Claims that petitioners and other shareholders did not have a direct claim under the Takings Clause, as any such claim could only be "derivative" in nature. App.21a–28a. The Federal Circuit held that while the Court of Federal Claims dismissed the direct Takings claim for lack of standing under FRCP 12(b)(1), it was affirming this decision by holding that petitioners and other shareholder-plaintiffs failed to state a claim upon which relief may be granted under FRCP 12(b)(6). App.12a, App.28a. The Federal Circuit never explained what it meant by this different holding, but its decision makes clear that its reasoning was that shareholders had no right to bring a direct Takings claim as any such claim was "substantively derivative" in nature. App.27a. Like the Court of Federal Claims, the Federal Circuit reached this decision without analyzing whether petitioners and other shareholder-plaintiffs had alleged the existence of a property right that they owned and that had been taken in its entirety by the government. App.21a–28a.

The Federal Circuit also affirmed the Court of Federal Claims's dismissal of petitioners' other claims. App.57a.

The Federal Circuit further held that the Court of Federal Claims should have dismissed the shareholder derivative claim under the Takings Clause brought by another plaintiff, Andrew T. Barrett ("Barrett"). The Federal Circuit chose not to address whether HERA's Succession Clause transferred the right to bring such a constitutional shareholder derivative claim to FHFA, finding that it could avoid that question by rejecting the constitutional claim on the merits. App.49a–53a. According to the Federal Circuit, "regulated financial entities" such as the GSEs "lack the fundamental right to exclude the government from their property when the government could place the entities into conservatorship or receivership." App.51a. Based on this proposition, the Federal Circuit held that after HERA was enacted in July 2008, "the Enterprises lost their right to exclude the government from their property, including their net worth." App.52a.

In footnote 14 of its opinion, the Federal Circuit stated in passing (without expressly holding) that its reasoning in rejecting the derivative Takings claim would also have applied to require dismissal of the shareholders direct Takings claim, had one been permitted and not barred as "substantively derivative." App.53a n.14.

REASONS FOR GRANTING THE PETITION

This Court's Rule 10(c) identifies grounds for certiorari where a court of appeals "has decided an important question of federal law that has not been, but should be,

settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The questions presented in this petition qualify under this provision.

I. REASONS FOR GRANTING CERTIORARI ON QUESTION ONE

The Federal Circuit is the exclusive court of appeals for all federal Takings claims against the United States seeking just compensation. 28 U.S.C. §§ 1295, 1346. Because Takings claims against the United States present unique issues arising out of Congress' exercise of its Article I powers and the actions of federal agencies exercising power that Congress delegates, it is especially important for this Court to review the Federal Circuit's most significant Takings Clause decisions without waiting for a circuit split that may never materialize.

It also is important to review this case because it presents an important question that has now arisen in multiple cases – *i.e.*, the use of the state law direct-derivative framework to bar at the threshold any consideration of the underlying merits of constitutional claims by shareholders challenging or seeking just compensation for the taking of their property. As discussed herein, the only relevant question in evaluating a shareholder's Takings claim should be whether the shareholder's property has been taken. By imposing an inapposite direct-derivative framework, the Federal Circuit decision severely restricts the application of the Takings Clause. Further, it does so as to a Taking that is as extreme as a taking of shareholder property can get – one that deprived shareholders of 100% of their interest

in a corporation.

A. This Court, Not The Federal Circuit, Should Decide Whether Shareholders May Bring A Takings Claim When The Government Has Taken The Entirety Of Their Property For Its Own Benefit.

The Federal Circuit and the Court of Federal Claims, the principal courts charged with adjudicating federal Takings claims, both dismissed petitioners' Takings claim as a "derivative" shareholder claim without analyzing whether petitioners had identified a property interest that they (and they alone) directly owned and that was taken in its entirety by the government. In so doing, they seriously distorted the analysis that should dictate whether a plaintiff may pursue a Takings claim. This Court should grant *certiorari* to make clear that standing to bring a Takings claim is based on direct ownership of property that was allegedly taken, nothing else.

Petitioners in this case alleged that the Net Worth Sweep appropriated their shareholder rights to future dividends and other distributions, and transferred those rights to the United States Treasury. Before the Net Worth Sweep, petitioners owned the following property:

- The right to receive dividends in any quarter in which a common shareholder received a dividend;

- The right to receive a dividend in any quarter in which the Treasury received a dividend above the 10% dividend payable on its senior preferred stock (since the only way Treasury could receive a dividend above that 10% amount was by exercising

its warrants to acquire common stock and receiving dividends on such stock);

- The right to priority over common shareholders, including Treasury, in the distribution of any liquidation proceeds, after Treasury received the amount of its funding plus $1 billion (per GSE).

After the Net Worth Sweep, the private shareholders no longer owned any of these rights. Instead, all of these rights were owned by the Treasury. The necessary effect of the Net Worth Sweep was to transfer rights from the petitioners to the Treasury. The following chart summarizes this appropriation of private property by the Treasury.

Property Rights Taken By Treasury

	Treasury's Property	Private Preferred Shareholders' Property
Before Net Worth Sweep	Right to **10%** dividend on Senior Preferred if paid in cash Right to **79.9%** of common stock for nominal price Right to liquidation preference equal to actual funding amount plus $1 billion	Right to dividend in any quarter when dividend is paid on common stock Right to dividend whenever Treasury receives dividend above its 10% senior preferred dividend Right to priority liquidation proceeds over all common shareholders (including Treasury) after Treasury recovers both actual funding amount and $1 billion on its senior preferred stock

	Treasury's Property	Private Preferred Shareholders' Property
After Net Worth Sweep	**100% of all dividends**, no matter how much they may exceed the original 10% dividend amount **100% of all liquidation proceeds**, no matter how much they may exceed Treasury's investment plus $1 billion	**ZERO** in dividends **ZERO** in liquidation proceeds

Thus, petitioners identified property that they owned, and that the Treasury acquired through the Net Worth Sweep. That establishes petitioners' standing to bring a claim under the Takings Clause. Yet the Federal Circuit and the Court of Federal Claims held petitioners had no right to bring a direct claim because their only possible claim was a derivative claim on behalf of the companies; both courts reached this conclusion without spending any time analyzing whether petitioners had identified a property right that they owned and that was taken. App.550a–55a; App.21a–28a.

The only place where the Federal Circuit obliquely recognized that petitioners owned a property right was in distinguishing the D.C. Circuit's holding in *Perry II* that shareholders have an "obviously direct" claim for the

breach of their shareholder contracts. *Perry II*, 864 F.3d at 628. The Federal Circuit rejected petitioners' argument that their ability to vindicate their property rights should be just as "obviously direct" as their ability to vindicate their contractual rights, holding as follows:

> The fact that shareholders possess a property interest in their shares of the Enterprises does not answer the question of whether they are asserting direct or indirect harm to that property right. Shareholders clearly allege a corporate overpayment by the Enterprises which, in turn, indirectly diluted the value of their shares.

App.26a.

This mischaracterizes petitioners' claims. First, the Net Worth Sweep did not "indirectly dilute the value" of petitioners' property rights; it nullified them in their entirety, and transferred their value to the Treasury. Before the Net Worth Sweep, petitioners held rights that had value because of the potential for future dividends – in particular, they would have considerable value when and if the Treasury ever sought to receive dividends in excess of their 10% senior preferred dividend. After the Net Worth Sweep, petitioners had no rights – zero. No matter how much money the GSEs might make, 100% of it must go to Treasury. This government action did not "indirectly dilute the value" of petitioners' property; it effected a total deprivation of 100% of the value of petitioners' property, and thus was a categorical taking under this Court's decision in *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992).

Second, petitioners did not allege an "overpayment" by the GSEs. The words "overpayment" and "overpaid" cannot be found in petitioners' complaint. And that is for good reason: when the GSEs were forced by the FHFA to agree to the Net Worth Sweep, they were not "paying" for anything; they were simply being told to give away 100% of their future net worth to the Treasury, so that nothing could ever go to private shareholders such as petitioners, no matter what. That is not an "overpayment." It is a direct taking of 100% of the property held by private shareholders.

In any event, it does not matter whether the government takes private property directly, indirectly, or via a forced "overpayment" by a related party, so long as the property is taken. If A owes a stream of future payments to B, it makes no difference whether the government passes an ordinance requiring A to pay all future amounts to the government, or instead passes an ordinance expressly appropriating B's right to the future stream of payments from A. Either way, the impact is the same: all of the future payments that would have gone to B are instead going to the government. Thus, either way, B has a right to bring a claim under the Takings Clause.

We are not aware of a single decision by this Court that could support the conclusion that a person who owns property that was taken by the government lacks standing to bring a Takings claim, or is somehow otherwise precluded from bringing such a claim. It should make no difference that the property owned is the right to receive future dividends as a shareholder in a company. When that property has been taken in its entirety for the benefit of the government, the shareholder must have a

right to bring a claim under the Takings Clause. Holding otherwise is a drastic abdication of the extent to which the Takings Clause protects the property rights owned by shareholders. Such a significant decision should not be made without review by this Court.

If the Federal Circuit's decision were correct, that would mean that the Government could promulgate a rule requiring 100% of future dividends from any company to be paid directly to the Treasury, and the shareholders of that company would have no right to bring a claim for just compensation under the Takings Clause. That cannot be correct, and should not be allowed to stand.

B. This Court, Not The Federal Circuit, Should Decide Whether State Law Doctrines Governing Shareholder Fiduciary Breach Claims Should Block A Federal Takings Claim.

Rather than analyzing whether petitioners had properly alleged that they owned property rights that had been appropriated by the government, the lower courts analyzed petitioners' right to bring a claim through the prism of state law doctrines governing when shareholders have a "direct" claim and when they have a "derivative" claim on behalf of the companies in which they own stock. App.551a–55a; App.21a–26a. Based on their analysis of Delaware law on this subject, both courts concluded that petitioners had only a derivative claim. *Id.*

This is the second time the Federal Circuit has held that state law doctrines governing when shareholders have "direct" versus "derivative" claims dictates whether shareholders have standing to bring a Takings claim. *See*

Starr Int'l Co. v. United States, 856 F.3d 953, 965–66 (Fed. Cir. 2017). This case, however, presents the *reductio ad absurdum* of *Starr*. In that case, the challenge was to a taking of 79.9% of shareholders' interest in AIG equity, even as shareholders retained a substantial economic stake in the corporation. This case, by contrast, involves a taking of 100% of shareholders' economic interests in perpetuity, no matter how much money the companies make.

The state law cases relied on by the Federal Circuit do not address claims under the Takings Clause. Instead, they typically involve claims of fiduciary breach.[13] This is an important difference. In fiduciary breach claims, part of the analysis of whether the claim is "direct" or "derivative" is based on whether the defendant owed a fiduciary duty only to the company, to both the company and its shareholders, or only to the shareholders.[14] By contrast, in a Takings case, the government always owes a duty to pay just compensation to a person whose property it has taken.

Thus, the question of who has standing to bring a Takings claim should not be based upon the fiduciary duties owed by the defendant or other considerations relating to state common law claims; instead, it should be based upon whether the plaintiff has pled a valid claim

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13. *See e.g.*, *Tooley v. Donaldson, Lufkin & Jenrette*, 845 A.2d 1031, 1033 (Del. 2004); *Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007); *Gentile v. Rossette*, 906 A.2d 91, 93 (Del. 2006) *overruled in part by Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1267 (Del. 2021) (en banc).

14. *See Gentile*, 906 A.2d at 99–100; *Gatz*, 925 A.2d at 1275.

for the Taking of that plaintiff's own property – *i.e.*, whether the plaintiff has identified a property interest that ***it*** owned and that the government has taken. Where a plaintiff has such a claim, then the plaintiff should be able to bring a claim regardless of the application of an inapposite test for determining the proper plaintiff to raise state common law claims.

The extreme nature of the Federal Circuit's decision is demonstrated by its adopting the following characterization of Delaware law: "claims are derivative in nature whenever the shareholders' claims are not ***completely independent*** from the claims of harm to the corporation." App.20a n.6 (emphasis added) (citing *Brookfield*, 261 A.3d at 1267). In this view, shareholders could not assert constitutional claims where there is ***any*** overlap between the shareholder and the corporate claim, even where the shareholders could show (as here) that the property rights they (and they alone) clearly own were taken. Whatever its merits in addressing the proper plaintiff(s) for state law claims, this cannot possibly be the test for addressing a plaintiffs right to consideration on the merits of ***their own*** well-pled Takings claims against the federal government. Even assuming that, in certain instances, a successfully asserted derivative claim by the corporation might reduce or even eliminate the just compensation owed to a shareholder, that is a question of remedy and merits, not a justification for barring any and all consideration of the claim at the threshold.

The Federal Circuit did not even bother to analyze whether petitioners had identified a property right that they owned, that is protected by the Takings Clause, and that the government has taken. That should be the

dispositive analysis for determining whether plaintiffs have the right to bring their own Takings claim, yet the lower courts ignored it, just as they ignored it in *Starr*. The Federal Circuit has thereby created a test for determining when corporate shareholders have the right to bring a Takings claim that has no support in this Court's jurisprudence, that has nothing to do with the Takings Clause, and that is at odds with common sense. This Court should not allow such precedent to go un-reviewed.

C. This Court Should Grant Certiorari Because The Federal Circuit's Decision Conflicts With This Court's Reasoning In *Franchise Tax Board* On Which The Federal Circuit Relied.

In assessing whether petitioners could bring a direct Takings claim, the Federal Circuit cited this Court's decision in *Franchise Tax Bd. v. Alcan Aluminium, Ltd.*, 493 U.S. 331 (1990) for the proposition that only "shareholders with a direct, personal interest in a cause of action" have standing to bring a direct claim, whereas those whose injuries are "entirely derivative of their ownership interests" in a corporation do not. App.20a (quoting *id.* at 336–37 (alteration omitted)).

In *Franchise Tax Board*, this Court held that shareholders had Article III standing to bring claims challenging the state tax laws imposed upon their subsidiaries, since they were indisputably injured by those laws and had claims that would redress that injury. 493 U.S. at 336. After finding that the shareholders had Article III standing, this Court expressed doubt as to whether the shareholders could "meet the prudential requirements of the standing doctrine," including the

requirement that the plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). In particular, the Court alluded to the "so-called shareholder standing rule," which it summarized as follows:

> [T]he rule is a longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment. There is, however, an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated.

Id. (citation omitted).

In *Franchise Tax Board*, this Court did not apply this "so-called shareholder standing rule" because it held that the Tax Injunction Act, 28 U.S.C. § 1341, prohibited the plaintiffs' claims in that case. 493 U.S. at 338. This Court has not revisited the "so-called shareholder standing rule" since *Franchise Tax Board*.

The Court should grant *certiorari* to address whether the shareholder standing rule it described in *Franchise Tax Board* was correctly applied in this case. It was not.

First, as shown above, petitioners assert their "own legal rights and interests," and do not rest their claims "on

the legal rights or interests of third parties." Petitioners claim that the property rights they (and they alone) own have been taken. Whether they are right or wrong is the relevant question, not whether the claim is "direct" or "derivative." Petitioners rely on their own, direct ownership of the right to receive future dividends on their preferred stock under certain contingent circumstances, and allege that this right was taken from them and given to Treasury. Petitioners do not rely upon the property rights of the GSEs, but upon their own property rights as owners of preferred stock in the GSEs. For that reason, petitioners have a "direct, personal interest" in their cause of action, and readily satisfy the standard for bringing direct claims as described in *Franchise Tax Board*.

Second, given the nature of the Taking, it is not the case that petitioners' injuries are "entirely derivative of their ownership interests" in the GSEs. By giving Treasury 100% of all right to all future dividends, the Net Worth Sweep took away any and all economic interests that the shareholders had in perpetuity. At that point, the shareholders' interest was not just diluted, but destroyed. Petitioners would have had exactly the same direct Takings claim if the Net Worth Sweep had provided that (a) the GSEs would keep their earnings and rebuild capital, but (b) when and if they paid dividends, they would pay 100% to Treasury. This would have caused zero injury to the GSEs, but the same injury to private shareholders.

The 2019 and 2021 amendments to the Sweep illustrate this. They allow the GSEs to retain their profits, but simultaneously ensure that Treasury's liquidation preference is increased by the increase in the GSEs' net worth. This regime does not harm the GSEs, but it

directly harms the private shareholders by ensuring they can never recover anything. It therefore highlights the fact that shareholders suffered an independent injury that was not dependent on harm to the GSEs.

Third, this Court's description of the shareholder standing rule in *Franchise Tax Board* recognized "an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit ***even if the corporation's rights are also implicated***." 422 U.S. at 336 (emphasis added). By contrast, the Federal Circuit effectively adopted a 2021 Delaware Supreme Court ruling in a fiduciary breach case that "abolished" this "dual nature" concept, proclaiming the absolute rule that "claims are derivative in nature whenever the shareholders' claims are not completely independent from the claims of harm to the corporation." App.19a n.6 (citing *Brookfield*, 261 A.3d at 1267). The Federal Circuit thus used a Delaware Supreme Court case to overrule this Court's description of the shareholder standing rule in *Franchise Tax Board*. Under the Federal Circuit's absolute rule, "if the corporation's rights are also implicated," then the claim must be derivative. That directly contradicts the exception identified by this Court in *Franchise Tax Board*.

Fourth, this Court's discussion of the issue in *Franchise Tax Board* was made in the context of a case involving a Foreign Commerce Clause challenge to a state tax regime. It did not involve a claim by U.S. citizens raising claims that a fundamental right had been infringed. Here, petitioners claim that their right not to have their private property taken without just compensation has been violated. That invokes a fundamental individual

right protected by the Fifth Amendment. It deserves greater scrutiny than was given by the Federal Circuit, and warrants revisitation of the shareholder standing discussion in *Franchise Tax Board*.

D. The Federal Circuit's Decision Fails To Properly Apply The Takings Clause To An Historically Egregious Taking Of Private Property.

The Court should also grant certiorari on the question of direct shareholder claims to ensure a full consideration of all issues relating to this historic decision that dramatically shrinks the application of the Takings Clause to shareholders in regulated financial institutions.

The Federal Circuit's ruling would place severe restrictions on the ability of shareholders to challenge government abuses that appropriate shareholder rights. By preventing shareholders from challenging the taking of their property without examination of the merits of their claim, the Federal Circuit effectively opens the door to all manner of government abuses.

The facts of this case are stark enough. As shown in the Factual Background section above, to date, the Treasury has received over $379 billion of value from the GSEs – over $300 billion in cash dividends, and over $78.3 billion in increases to its liquidation preference based on increases in the GSEs' net worth since the third quarter of 2019 (essentially, dividends paid in kind rather than in cash). *See* Section A.4, above. And these amounts continue to grow each quarter. The property Treasury has taken far exceeds what Treasury loaned to the GSEs (about

$190 billion), and what it bargained for when it agreed to provide financial support to the GSEs.

Of the $379 billion Treasury has received, it received approximately $324.2 billion since the Net Worth Sweep. This amount is roughly $150 billion larger than the maximum amount Treasury would have received under the original 10% senior preferred dividend (and even that number assumes the GSEs would not have been permitted to repay Treasury rather than paying the incredibly expensive 10% dividend *ad infinitum*). Under the original terms of the PSPA, if Treasury had wanted to take the maximum value it could from the GSEs, it could have received close to 80% of that $150 billion: but it would have had to pay some of that amount to the private preferred and common shareholders. Treasury was unwilling to do so; it wanted 100%, and it took 100%.

Taking property on such a scale should not be permitted without review by this Court. Moreover, as discussed in Section II, below, the drastic nature of the Federal Circuit's decision is compounded by its holding that the derivative Takings claim also had to be dismissed. According to the Federal Circuit, once the Government has regulatory authority to put an enterprise into conservatorship, it has the power to take 100% of its net worth for the financial benefit of the Government without triggering the Takings Clause. App.52a–53a. No prior case supports that holding, and this Court should not allow it to stand.

If both of the Federal Circuit's holdings are considered together and taken as true, it means the Takings Clause would have no application to any of the following events:

- Congress passes a law requiring all shareholders in regulated financial institutions to transfer their stock to the U.S. Treasury.

- Congress passes a law requiring all shareholders in regulated financial institutions to transfer any dividends they receive to the U.S. Treasury.

- Congress passes a law requiring all regulated financial institutions to pay 100% of all future dividends to the U.S. Treasury.

- Congress passes a law appropriating some or all of the assets held by some or all of the regulated financial institutions in the country.

- Congress passes a law expressly nationalizing some or all of the regulated financial institutions in the country.

These examples undoubtedly seem extreme. But the Federal Circuit decision holds that the Takings Clause would have no application to any one of them.

And while perhaps marginally less extreme, the facts here are similar in kind: this Court itself recognized during oral argument in *Collins* that the Net Worth Sweep was effectively a "nationalization" of the GSEs. Transcript of Oral Argument at 13–14, *Collins*, 141 S. Ct. 1761 (No. 19-422). And the Net Worth Sweep has caused Treasury to receive hundreds of billions of dollars in dividends that would otherwise have been shared with private shareholders, who themselves invested over $30 billion into the GSEs, including $20 billion in the distressed years of 2007 and 2008.

In *Collins*, this Court held it was lawful for the government to take this action. Now it should decide if just compensation should be paid for the private property that was taken.

II. REASONS FOR GRANTING CERTIORARI ON QUESTION TWO

After dismissing the direct Takings claims of shareholders as "substantively derivative," the Federal Circuit addressed plaintiff Andrew Barrett's derivative Takings claim. It by-passed the question of whether HERA's Succession Clause, while generally transferring derivative claims to the FHFA, must have a conflict-of-interest exception in circumstances where FHFA would be called upon to sue itself. Instead, it reached out to decide an issue not briefed before it: it held the GSEs' lacked any cognizable property interest in their net worth, and therefore the derivative Takings claim had to be dismissed on the merits. App.50a–53a.

The Federal Circuit relied on two prior Federal Circuit decisions that had rejected arguments by regulated financial institutions and their shareholders that placing the institutions into conservatorship or receivership was itself a Taking. App.51a–52a. (citing *Golden Pac. Bancorp. v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994) and *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992)).

At the end of that discussion, in footnote 14 of its opinion, the Federal Circuit noted in passing:

> Because the plaintiffs in *Golden Pacific* included the bank's shareholders (as well as

> the regulated entity), our reasoning here would apply to the shareholders' direct takings claims—including those asserted by Fairholme and Cacciapalle. Because we affirm dismissal of those claims on independent grounds, we need not rely on their lack of a cognizable property interest to do so.

App.53a n.14.

Barrett is petitioning for review of the dismissal of the derivative Takings claim, and the class petitioners agree that issue should be considered in conjunction with Question 1 here. But whatever the Court decides on the Barrett petition, and in an abundance of caution, we ask the Court to grant certiorari as to Question 2 – either to decide it, or (as may be the more typical course) to vacate and remand the issue for consideration in light of any decision on Question 1 of this petition, any decision on Barrett, and in light of full briefing and consideration by the Federal Circuit going beyond its cursory reasoning on the merits of the derivative Takings claim and its perfunctory footnote 14.

The defendant should not be permitted to defend the dismissal of petitioners' multi-billion dollar Takings claim based upon a partially reasoned footnote attached to text that dramatically shrinks the protections of the Takings Clause. It is one thing to hold, as *Golden Pacific* and *California Housing Securities* both did, that it is not a taking under the Fifth Amendment to place a financial institution into conservatorship or receivership that is justified based on facts and circumstances that actually exist and that are set forth in a statute reasonably designed

to protect the public from failing financial institutions. It is quite another to hold, as the Federal Circuit did, that because the former is not a taking, ***nothing*** that the government does with respect to a regulated financial institution can ***ever be a taking***. The former proposition is necessary to allow reasonable regulation and oversight of financial institutions. The latter is a "Get out Jail Free" card to the government that allows it to ***take anything it wants*** from regulated financial institutions and their shareholders without paying just compensation.

For example: government regulators have the power to put Bank of America, Wells Fargo, and Citibank into conservatorship or receivership. According to the Federal Circuit, that means that, no matter what the facts and circumstances are, those regulators have the power to take 100% of all dividends those regulated banks may pay in the future – no matter what.

This cannot be squared with the Takings Clause. This Court must therefore grant certiorari to ensure that the Takings Clause still exists for shareholders in regulated financial institutions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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