IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRYNDON FISHER, BRUCE REID, ERICK SHIPMON, DERIVATIVELY ON BEHALF OF FEDERAL NATIONAL MORTGAGE ASSOCIATION

Plaintiffs-Appellants,
v.

UNITED STATES

Defendant-Appellee.

No. 24-1167

Appeal from the United States Court of Federal Claims in
1:13-cv-00608-MMS, Senior Judge Margaret M. Sweeney

BRUCE REID, BRYNDON FISHER, DERIVATIVELY ON BEHALF OF FEDERAL HOME LOAN MORTGAGE CORPORATION,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

No. 24-1168

Appeal from the United States Court of Federal Claims in
No. 1:14-cv-00152-MMS, Senior Judge Margaret M. Sweeney

BRIEF OF APPELLANTS BRYNDON FISHER, BRUCE REID, AND ERICK SHIPMON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Constitutional Provisions

Other Authorities

Rules

INTRODUCTION

This case concerns the Government's taking of two private companies' entire net worth for public use without just compensation. At the time, the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie") (together, "the Enterprises") had exited a period a financial uncertainty and were on the cusp of recognizing asset valuations that would result in extraordinary one-time profits. The Enterprises had a strong, positive financial outlook. Yet, at that very moment, the Government intervened and claimed for itself ***all*** of Fannie and Freddie's assets.

This transaction, known as the Net Worth Sweep, required the Enterprises to pay quarterly dividends to the Government equal to their entire net worth in perpetuity. In other words, at the very moment that Fannie and Freddie recognized massive profits, the Government instead claimed the windfall for itself. That was a taking in violation of the Fifth Amendment to the U.S. Constitution.

Plaintiffs brought suit on behalf of the Enterprises, seeking to vindicate Fannie and Freddie's rights in their own net worth and return what was wrongfully taken to the companies' coffers. In an earlier appeal involving different parties, this Court held that the Enterprises had no property interest in their own net worth. That decision was wrong at the time. But after the U.S. Supreme Court's

subsequent decision in *Tyler v. Hennepin Cty. Minn.*, 143 S. Ct. 1369 (2023), it is egregiously wrong now. This Court, sitting *en banc*, should say so.

Through this appeal, appellants seek two important legal rulings. First, this Court should reaffirm the longstanding, established property rights of businesses in their own "going concern value"—a principle the Supreme Court affirmed eighty-six years ago in the landmark decision of *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1940). Second, in light of *Tyler*, this Court should make clear that the Government may not circumvent the Fifth Amendment's requirement for just compensation by simply redefining private property as public property.

Considering those bedrock principles of property law, there is no doubt that Plaintiffs' complaints adequately alleged claims for unconstitutional takings. Accordingly, this Court should reverse the dismissal of Plaintiffs' takings claims and remand these cases for trial.

STATEMENT OF RELATED CASES

The following is a "related case" under Rule 47.5, pending in this Court: *Wazee Street Opportunities Fund IV LP v. United States*, No. 24-1378.

STATEMENT OF JURISDICTION

The U.S Court of Federal Claims had jurisdiction over both *Fisher v. United States* and *Reid v. United States* under 28 U.S.C. § 1491(a)(1). The orders dismissing the complaints in *Fisher* and *Reid* (the "Derivative Cases") are final

decisions appealable as of right under 28 U.S.C. § 1295(a)(3). The Claims Court dismissed the complaints in both *Fisher* and *Reid* on September 1, 2023 (Appx0001-02), and notices of appeal were timely filed in each case on October 31, 2023, pursuant to Fed. R. App. Proc. 4(B)(i).

STATEMENT OF THE ISSUE

In 2012, the Government expropriated the net worth of two private companies, Fannie Mae and Freddie Mac, by taking for itself the Enterprises' earnings in perpetuity, an action the Government admits that it took to benefit the "public" rather than the Enterprises. The question presented is whether the Government's alleged, uncompensated appropriation of these private companies' entire net worth stated a claim for a taking under the Fifth Amendment.

STATEMENT OF THE CASE

Plaintiffs' claims arise from the Government's decision to take for public benefit all economic value of two valuable, profitable, privately held companies (Fannie Mae and Freddie Mac) without just compensation.[1]

[1] Before it dismissed the Derivative Cases, the Claims Court previously affirmed the Derivative Plaintiffs' claims, as explained below. Derivative Plaintiffs draw the pertinent factual allegations from the Claims Court's earlier decisions on motions to dismiss, which themselves derive from the factual allegations of the Derivative Plaintiffs' complaints and their reasonable inferences.

I. The Facts Giving Rise to Plaintiffs' Claims.

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. *Fisher* ECF 80 at 2; *Reid* ECF 66 at 2.

Before the financial crisis of the late 2000s, both Enterprises were reliably profitable. Although the Enterprises recorded losses in 2007 and the first two quarters of 2008, the Enterprises continued to generate sufficient cash to pay their debts and retained sufficient capital to operate. Even during the financial crisis, "the [Enterprises] were not in financial distress or otherwise at risk of insolvency." *Fisher* ECF 80 at 2; *Reid* ECF 66 at 2.

During the financial crisis, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), 122 Stat. 2654 (codified in various sections in 12 U.S.C.). Among other things, Congress authorized the Federal Housing Finance Agency ("FHFA") under certain conditions to appoint FHFA as conservator for each Enterprise. The FHFA's authorities as conservator were broad and malleable; "Congress provided the FHFA-C with significant discretion on when or how it uses its powers." *Fisher* ECF 80 at 2-3; *Reid* ECF 66 at 2-3. The Enterprises

"consented" to conservatorships on September 6, 2008. *Fisher* ECF 80 at 4; *Reid* ECF 66 at 4.

After entering conservatorship, FHFA caused the Enterprises to enter into a Preferred Stock Purchase Agreement ("PSPA"), through which the United States Treasury ("Treasury") committed to providing up to $100 billion to each Enterprise to ensure their future solvency; in return for the funding commitment, Treasury was issued shares of the Enterprises' preferred stock with a liquidation preference, among other things. *Fisher* ECF 80 at 4; *Reid* ECF 66 at 4. The PSPA was amended twice in 2009, each time increasing the potential funding commitment. *Fisher* ECF 80 at 4-5; *Reid* ECF 66 at 4-5.

Early in the conservatorships, each Enterprise's net worth decreased due to losses, but "[t]he bulk of [those] losses resulted from the FHFA-C writing down the value of deferred tax assets and designating large loan loss reserves." *Fisher* ECF 80 at 25; *Reid* ECF 66 at 5. Notwithstanding these "on-paper losses," the Enterprises' cash receipts consistently exceeded their expenses during the entirety of the conservatorship. *Id.*

As of the summer of 2012, years after the financial crises had receded and the housing market had improved, the Enterprises' "financial outlooks were promising." *Id.* Both began to generate reliable profits. Given the change in outlook, both Enterprises planned to reverse the write-downs of their assets and

reduce loan loss reserves—that is, they planned to reverse the "paper losses" they had experienced at the beginning of the conservatorship. *Fisher* ECF 80 at 5-6; *Reid* ECF 66 at 5-6. This plan would result in one-time windfall paper profits due to the accounting reversals. *Id.* As of August 2012, Treasury understood that the Enterprises would post record earnings and were poised to generate profits far over any amounts the Enterprises would owe to Treasury under the PSPA. *Id.* Although the reversals of the paper losses had not yet been publicly announced, the Enterprises at the time were entirely solvent and projected to be highly profitable (and solvent) indefinitely into the future.

With this knowledge, Treasury pushed for a further amendment to the PSPA. *Fisher* ECF 80 at 6; *Reid* ECF 66 at 6. The "key component of the [third] amended PSPAs" was known as a "Net Worth Sweep," which required that each Enterprise "pay Treasury a quarterly dividend equal to 100% of [each Enterprise's] net worth (except for a small capital reserve amount)," rather than a variable dividend as provided under the then-existing version of the PSPA. *Id.* Treasury specifically sought the Net Worth Sweep "as a representative for taxpayers" to "put the taxpayer 'in a better position.'" *Id.* The practical effect was simple: "every dollar of earnings that [the Enterprises] generate will be used to benefit taxpayers." *Fisher* ECF 80 at 6-7; *Reid* ECF 66 at 6-7.

The FHFA, which had a statutory mandate as conservator of the Enterprises to consider the interests of the public, likewise focused on how decisions it caused the Enterprises to make would "affect the taxpayers." *Fisher* ECF 80 at 7; *Reid* ECF 66 at 7. Taking this mandate to heart, the FHFA's director explained that he did not "lay awake at night worrying what's fair to the shareholders' but rather focuse[d] on what is responsible for the taxpayers." *Id.* Put another way, the FHFA elevated the interests of taxpayers over those of the Enterprises.

The Claims Court credited the Derivative Plaintiffs' factual assertions, based on the fact allegations and discovery it allowed, and found that as a result of the Net Worth Sweep, "Treasury reaped a **windfall** of [$133 billion] in comparison to what it would have received absent changes to the PSPAs." *Id.* (emphasis added); This "windfall" is the focus of the Derivative Plaintiffs' takings claim.

II. The Procedural History of the Derivative Cases and Related Cases in the Court of Federal Claims.

In 2013 and 2014, numerous lawsuits were filed in the Claims Court and other courts arising from the Net Worth Sweep under a broad range of theories, including many direct claims asserted on behalf of shareholders and several derivative claims asserted on behalf of the Enterprises. Plaintiffs describe below the procedural history of their own cases and the other related cases, including *Fairholme* in particular, given the Government's contention that this Court's decision in *Fairholme* requires dismissal of the Derivative Plaintiffs' claims here.

The distinction between direct and derivative claims is important. The "direct" claims were claims asserted on behalf of **shareholders** of the Enterprises under the theory that the Net Worth Sweep harmed the shareholders themselves because it deprived them of their right to dividends from the Enterprises. In contrast, the derivative claims, including those asserted by the Derivative Plaintiffs, were asserted on behalf of the **Enterprises themselves**, seeking compensation for the earnings taken from the Enterprises through the Net Worth Sweep. Under established principles of corporate law, private shareholders assert derivative claims on behalf of the Enterprises, and the Enterprises themselves are the parties that stand to benefit from any recovery on a derivative claim.

Fairholme was the first-filed case in the Claims Court. The *Fairholme* plaintiffs initially asserted only direct claims. *See Fairholme* ECF No. 1.[2] The Derivative Plaintiffs, in contrast, were the first shareholders to bring derivative claims on behalf of the Enterprises in the Claims Court, filing their derivative complaints on August 26, 2013 (on behalf of Fannie Mae) and February 26, 2014 (on behalf of Freddie Mac). *Reid* ECF 1; *Fisher* ECF 1. Other cases were filed later in the Claims Court asserting various direct and derivative claims relating to the Net Worth Sweep.

[2] "*Fairholme* ECF" refers to the ECF docket entries of *Fairholme v. United States,* No. 13-465 (Ct. Cl.).

The Claims Court permitted discovery on both jurisdictional and Rule 12(b)(6) issues. *Fairholme* ECF 32. The Claims Court then ordered a joint schedule for filing amended complaints and briefing the Government's motion to dismiss for the cases (including *Fairholme*, *Fisher*, *Reid*, and several other cases). *Fairholme* ECF 396. Although the related cases were not formally consolidated, the Claims Court functionally consolidated them for motion to dismiss practice.

Per the Claims Court's orders, the Derivative Plaintiffs filed their second amended complaints on March 8, 2018. In their complaints, the Plaintiffs maintained their focus on derivative claims on behalf of the Enterprises, including the derivative takings claim involved in this appeal. *Fisher* ECF 36; *Reid* ECF 22.

On the same date, more than four years after the Fairholme plaintiffs filed their initial complaint, the *Fairholme* plaintiffs amended their complaint to add a new plaintiff, Andrew T. Barrett, who for the first time asserted derivative claims in addition to their direct claims. *Fairholme*, ECF 22. The other twelve *Fairholme* plaintiffs continued to assert direct claims exclusively. *Id.* ¶¶ 19-31, 166-287.

Per the Court of Federal Claims' order, the Government filed an omnibus motion to dismiss, and the parties in the related cases submitted an omnibus opposition plus supplemental oppositions filed by some plaintiffs. *Fairholme* ECF 421, 428, 429; *Fisher* ECF 47; *Reid* ECF 33. Even after adding a derivative plaintiff, the *Fairholme* plaintiffs continued to maintain that their claims were

direct, not derivative, contending that "[b]ecause the Net Worth Sweep targeted private shareholders, Plaintiffs are entitled to sue directly." *Fairholme* ECF 428 at 21-25. In contrast, they made no affirmative arguments that any derivative claims exist, arguing instead that, to the degree such claims exist, HERA does not preclude them from being asserted. *Id.* at 25-31.

On December 13, 2019, the Claims Court granted in part and denied in part Defendants' motion to dismiss in *Fairholme. Fairholme v. United States*, 147 Fed. Cl. 1 (2019). Although the parties among the related cases submitted omnibus briefing and argument, the Court initially decided the motion to dismiss only in *Fairholme,* deferring resolution of the motions to dismiss in the other related cases (including the Derivative Cases).

However, the Claims Court made several rulings in *Fairholme* that applied equally to *Fisher* and *Reid*. The Claims Court held that:

(i) Plaintiffs' claims were against the United States, as required for Claims Court jurisdiction, because the FHFA, when acting as the Enterprises' conservator, "retain[ed] its government character." *Id.* at 33-34.

(ii) Claims arising from the Net Worth Sweep were derivative claims held by the Enterprises, not direct claims held by the Enterprises'

shareholders. Accordingly, the Claims Court dismissed all direct claims arising from the Net Worth Sweep. *Id.* at 45-47.

(iii) Plaintiff in *Fairholme* was not barred by res judicata from asserting derivative claims (the Government had contended that the D.C. Circuit's decision in *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017), precluded Mr. Barrett's claims). *Id.* at 47-48.

(iv) HERA's "Succession Clause"—a statutory provision that purports to provide that, upon the commencement of a conservatorship, FHFA "immediately succeed[s] to" every shareholder's "rights, titles, and powers and privileges … with respect to the [Enterprise] and the assets of the [Enterprise]"—did not preclude shareholders from pursuing derivative claims, given the Federal Circuit precedent of *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed Cir. 1999). That case construed the substantively identical language in another statute to include an exception permitting derivative claims when a party controlling a company faces a manifest conflict of interest in deciding whether to pursue claims on behalf of the company. FHFA faced such a manifest conflict of interest concerning its actions as conservator of the Enterprises. *Fairholme*, 147 Fed. Cl. at 49-51.

(v) Plaintiffs stated a derivative claim for a violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution arising from the Net Worth Sweep. *Id.* at 51.[3]

(vi) Plaintiffs stated a derivative claim for illegal exaction in violation of the Fifth Amendment. *Id.*

After its decision in *Fairholme*, the Claims Court denied the Government's motion to dismiss the Derivative Cases through decisions that closely mirrored its rulings in *Fairholme*. *Fisher* ECF 74; *Reid* ECF 60. The Claims Court certified its decisions in the Derivative Cases for interlocutory review *Fisher* ECF 79; *Reid* ECF 65. This Court, however, denied the Derivative Plaintiffs' petition for interlocutory appeal, instead permitting the Derivative Plaintiffs to participate in *Fairholme* only as *amici*. *Fisher v. United States*, Case No. 20-138 (Fed. Cir.), ECF 19. Although the Derivative Plaintiffs submitted an *amicus* brief in *Fairholme*, the focus of the appeal was driven by the *Fairholme* plaintiffs' decision to advance arguments only for their direct claims, failing entirely to argue the substantive merits of Mr. Barrett's derivative takings claim.[4]

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[3] The Claims Court's discussion of the merits of a derivative takings claim was fairly brief, as the Government presented no argument on the substantive merits of that claim as part of its motion to dismiss.

[4] The *Fairholme* plaintiffs' only substantive arguments on appeal for their takings claim (made in their reply brief) was that the direct plaintiffs had standing to seek compensation for the "takings of their derivative claims" under the theory that the

This Court decided the *Fairholme* appeal on February 22, 2022. The Court made several rulings relevant to the Derivative Plaintiffs' claims:

(i) The Court affirmed the ruling that the *Fairholme* plaintiffs asserted claims against the United States, albeit for different reasons than the Claims Court. This Court relied upon the Supreme Court's intervening decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), which held for different claims arising from the Net Worth Sweep, the FHFA's actions as conservator were within its discretion under HERA. Applying *Collins*, this Court held that "the FHFA exercised one of its powers under HERA—subordinating the best interests of the Enterprises and its shareholders to … those of the public," which reflected conduct on behalf of the United States. *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1286 (Fed. Cir. 2022).

(ii) This Court upheld the Claims Court's ruling that claims arising from the Net Worth Sweep were derivative, not direct. *Id.* at 1287-92.

(iii) This Court partially reversed the Claims Court's holding on collateral estoppel concerning Mr. Barrett's derivative claims. This Court

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"appropriation of their right to bring derivative claims" was **itself** a taking. By arguing that any derivative claims they once held had already been taken—despite the Claims Court's ruling that the *Fairholme* plaintiffs *had stated* a derivative takings claim—the *Fairholme* plaintiffs abandoned their derivative theory. *Fairholme*, No. 2020-1912 (Fed. Cir.), Doc. 58 at 106-13.

concluded that Mr. Barrett was collaterally estopped from asserting *non-constitutional* derivative claims, given the D.C. Circuit's decision in *Perry*, but Mr. Barrett was not collaterally estopped from asserting *constitutional* derivative claims, as the D.C. Circuit had not considered any such claims in *Perry*. *Id.* at 1299-1301.

(iv) This Court did not reach the Claims Court's ruling that HERA's Succession Clause posed no barrier to shareholders pursuing constitutional derivative claims. Instead, it assumed the Claims Court was correct and resolved *the merits* of the constitutional derivative claims (the takings claim and the illegal exaction claim). *Id.* at 1302.

(v) This Court reversed the Claims Court on the merits of the derivative takings claim, reasoning that given HERA's broad grant of discretion to FHFA as conservator for the Enterprises, the Enterprises "lack[ed] the fundamental right to exclude the government from their property … after the passage of HERA." *Id.* at 1302-03. As to this claim in particular, it is notable that the *Fairholme* plaintiffs failed to argue on appeal the merits of the derivative takings claim (even though the Claims Court had upheld that claim) *See infra*, § I.C. Accordingly, this Court decided the merits of that claim without the benefit of adequate briefing and argument.

(vi) This Court also reversed the Claims Court on the merits of the derivative illegal exaction claim based on the Supreme Court's intervening decision in *Collins*, which held that FHFA was within its statutory authority under HERA to cause the Enterprises to agree to the Net Worth Sweep. *Id.* at 1303-04.

After this Court's decision in *Fairholme*, the *Fairholme* plaintiffs chose not to seek *en banc* review and instead filed a petition for certiorari with the Supreme Court. The Supreme Court denied the petition, bringing the *Fairholme* case to an end. *Fairholme Funds, Inc. v. United States*, 143 S. Ct. 563 (2023).

Following this Court's decision in *Fairholme*, the Supreme Court issued a landmark Takings Clause decision in *Tyler*, 143 S. Ct. at 1369. *Tyler* clarified important aspects of Takings Clause jurisprudence in a manner that undermined the legal premises of this Court's decision in *Fairholme*. In light of *Tyler*, Plaintiffs informed the Claims Court that they no longer believed that *Fairholme* required dismissal of their takings claim. *Fisher* ECF 100; *Reid* ECF 86.[5] The Claims Court nonetheless dismissed the Derivative Cases, holding that it was bound by *Fairholme* to dismiss the takings claims. Appx0003. Plaintiffs timely appealed.

[5] The Derivative Plaintiffs also contested the application of collateral estoppel due to the inadequacy of the *Fairholme* plaintiffs' representation of the Enterprises' interests in prosecuting their case and the existence of intervening authority (*Tyler*) that dictated a different outcome. *Fisher* ECF 100 at 6-10; *Reid* ECF 86 at 6-10.

SUMMARY OF ARGUMENT

This case requires the consideration of significant new Supreme Court precedent in resolving whether Congress, through the enactment of HERA, can regulate away the Enterprises' historically rooted property interests. That action enabled the Government to later appropriate Fannie and Freddie's entire net worth for public use, exempting itself from Fifth Amendment scrutiny. The Enterprises' property rights were firmly established by background principles of corporate law in their own net worth. Nevertheless, the Government took that net worth for public use without paying just compensation. That violated the Takings Clause.

In deciding that Congress could do so, the Claims Court relied on this Court's panel decision in *Fairholme*. The Derivative Plaintiffs respectfully submit that decision was wrong when it was decided—given the then-controlling precedent limiting the ability of any government (state or federal) to avoid Takings Clause liability by enacting laws that purport to abrogate traditional, established property interests before taking them for public use. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 155-59 (1980). That the *Fairholme* plaintiffs failed to even make this argument further emphasizes why *Fairholme* should be overruled. The decision failed to grapple with the established background principles of corporate property law—and whether Congress could, by statute, abrogate those long-settled property rights.

Yet even were there any uncertainty in the law when *Fairholme* was decided, the Supreme Court in *Tyler* resolved that uncertainty. *Tyler* made clear that a court evaluating a takings claim must consider "[h]istory and precedent" in determining whether a property right exists, particularly where it appears that a state is attempting to "sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate." *Tyler*, 143 S. Ct. 1375 (quotations omitted). Yet, that is precisely what the Government did here. It purported to eliminate the Enterprises' interests in their own net worth by enacting HERA—and then taking that net worth for taxpayers. Whatever *Fairholme*'s reasoning or conclusion, *Tyler* now requires this Court to grapple with whether the Government can regulate away the Enterprises' property interests.

Moreover, *Tyler* clarified that a private party's debts owed to the government do not justify the Government's taking for public use of more than what is due to it. As the Supreme Court explained, under the Fifth Amendment, "[t]he taxpayer must render unto Caesar what is Caesar's, but no more." *Tyler*, 143 S. Ct. at 1380. Here, however, the Government used conservatorship and debt owed as an excuse to extract for public use a $133 billion windfall for itself. Its confiscation of Fannie and Freddie's entire net worth for public use is a taking that requires just compensation under the Fifth Amendment.

ARGUMENT

The Claims Court held that the Derivative Plaintiffs failed to state a takings claim based on this Court's decision in *Fairholme*. The *Fairholme* panel's holding on the merits of the derivative takings claim—without ***any*** briefing or argument on the issue—was in error. Indeed, by simply comparing the analysis in the Supreme Court's decision in *Tyler* and the panel's decision in *Fairholme*, it is clear that this Court failed to apply the proper legal standard or adequately consider the property interests at stake. The panel decision's perfunctory conclusion—that HERA's grant of authority to FHFA acting as conservator negated the existence of any property rights the Enterprises had in their net worth—was simply wrong.

Because the Derivative Plaintiffs recognize that a panel of this Court would ordinarily be bound by its own prior decisions, the Derivative Plaintiffs are filing a petition with this brief under Federal Circuit Rule 35 for initial hearing *en banc* because the panel's decision in *Fairholme* (i) "conflicts with a decision of the United States Supreme Court" and (ii) the issues presented are of "exceptional importance." *See* Fed. Cir. Rule 35(b)(1)(A, B).

After a proper analysis of the relevant legal principles under *Tyler*, this Court should reconsider and overrule *Fairholme*, reverse the dismissal of the derivative takings claims and remand these cases for trial.

I. The Derivative Plaintiffs Plead a Cognizable Property Interest.

The Takings Clause of the Fifth Amendment directs that "private property" shall not "be taken for public use, without just compensation." U.S. Const. 5th Am. To plead a compensable taking, a plaintiff must (1) identify a property interest and (2) allege sufficient interference with that property interest to amount to a taking. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000 (1984). Therefore, a threshold issue for any takings claim is whether the plaintiff has identified "a property interest protected by the Fifth Amendment," *id*., which was the requirement upon which this Court based its decision in *Fairholme*.

A. *The Takings Clause Protects Property Interests Established by Traditional and Historical Property Rights Conferred by States.*

When determining whether a private party possesses a protected property interest, courts assess history, tradition, and longstanding practice to determine if the statute accords with background principles of property law. This Court in *Fairholme* erred by failing to consider such background principles and assuming instead that HERA was the proper source to resolve the scope of the Enterprises' property rights.

In resolving the scope of property interests, a court considering a takings claim should consider "traditional property law principles," including historical practice and this Court's precedents. *Phillips v. Wash. Legal Fund.*, 524 U.S. 156, 165-168 (1998); *Tyler*, 143 S. Ct. at 1373 (holding courts must also "look to

'traditional property law principles,' plus historical practice and [Supreme Court] precedents" to determine whether a party has cognizable property interests that may be subject to the just compensation requirement when taken); *Baker v. McKinney*, 84 F.4th 378, 383 (5th Cir. 2023) (analyzing recent Supreme Court precedents, including *Tyler*, to conclude that the Supreme Court "has increasingly intimated that history and tradition, including historical precedents, are of central importance when determining the meaning of the Takings Clause").

This standard requires a reviewing court to independently evaluate the property interest at stake. *Stop the Beach Renourishment, Inc., v. Florida Dep't of Env't Prot.,* 560 U.S. 702, 725–27 (2010) (plurality op.). As Justice Scalia explained, this Court must "make [its] own determination, without deference to state judges, whether [a] challenged [state court] decision deprives the claimant of an established property right." *Id.* at 726 n.9 (emphasis added). In doing so, a court must decide "what state property rights exist" and any "background principles" that inhere in the property title itself. *Id.* at 726 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)).

This Court must apply the same approach when the alleged taking is by the United States. To hold otherwise—to defer to Congress's judgment about what is and is not property—would leave the "constitutional provision that forbids the uncompensated taking of property … quite simply insusceptible of enforcement by

federal courts." *Id.* at 727; *see also Nixon v. United States*, 978 F.2d 1269, 1276-86 (1992) (court must consider "the clear import of … historical practice," including "[h]istory, custom and usage" to determine the scope of private property rights); *Philip Morris, Inc. v. Reilly*, 267 F.3d 45, 70 (1st Cir. 2001) (*en banc* decision reversing panel due to panel's inadequate consideration of companies' "long-recognized property interest" in trade secrets, where panel "fail[ed] to identify any background principles of state law that successfully obviate [plaintiffs'] property interest in their trade secrets."); *1256 Hertel Avenue Associates, LLC, v. Calloway,* 761 F.3d 252 (2d Cir. 2014) (focusing on state law's "longstanding legislative decision" to confer property right of homestead exemption).

The *Fairholme* panel failed to consider the historical property rights afforded to companies in their own net worth, focusing only on recently enacted provisions of HERA that purported to define away the Enterprises' traditionally held property interests.[6] Specifically, the panel failed to consider well-established principles of corporate law, providing that a company's assets, including its economic value, are "property" within the meaning of the Fifth Amendment. It is a longstanding and established principle of corporate law that "the capital or assets

[6] The *Fairholme* plaintiffs failed to argue the merits of a derivative takings claim and failed to present to this Court any analysis of the relevant background principles as to the Enterprises' property interests (focusing instead on the shareholders' direct property interests).

of the corporation are its property…. Thus, earnings and profits still in the possession of a corporation belong to the corporation the same as its property generally." 1 FLETCHER CYC. CORP. § 31; *see also Schoon v. Smith*, 953 A.2d 196, 201 n.10 (Del. 2008) ("[C]orporation[s] hold[] all the title, legal or equitable, to the corporate property.") (quoting 4 POMEROY'S EQUITY JURISPRUDENCE § 1095, at 276 (5th ed. 1941).

Delaware corporations law, for example, has long provided that one of the basic "powers" held by corporations is the power to "receive … or otherwise acquire, own, hold … and use … real or personal property" and to "invest and reinvest its [own] funds." Del. Code tit. 8, § 122(4, 14).[7] Corporations law contemplates the power of a corporation to sell or otherwise dispose of its assets—a power that presupposes a corporation's ownership and control of those assets (including its own net worth). Del. Code tit. 8, § 271.

The existence of these protected property interests may be confirmed by established "precedents." *Tyler*, 143 S. Ct. at 1373. Here, there is a directly on-point precedent. Specifically, the Supreme Court affirmed the basic principle of a company's property interest in the value of the business in *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1940). There, the United States seized control of the

[7] Fannie Mae's and Freddie Mac's property rights are governed by Delaware and Virginia law, respectively, because their corporate charters so designate. *See Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 408–09 (7th Cir. 2018).

operations of a laundry company for use by the United States as part of its efforts in prosecuting World War II. *Id.* at 3. Although the Government's control of the company was temporary, it was a taking. *Id.* at 6.

In determining the value of the property taken when a government temporarily controls a private company for public benefit, the Court affirmed that the Takings Clause requires compensation including not only physical property owned by a company but also the company's "going-concern value"—that is, the "intangible" value of the company itself. The Court held that "where public-utility property has been taken over for continued operation by a government authority…, the taker acquires going concern value, [and] it must pay for it." *Id.* at 12. Put another way, the Court made clear that where the Government's exercise of control over a company "has the inevitable effect of depriving the owner of the going-concern value of his business [it] is a compensable 'taking' of property.'" *Id.* at 13.

Of course, unlike in *Kimball*, where the Government took over a company to procure the use of its services for public benefit, the Government here did not seize the Enterprises to use their services. Instead, when it implemented the Net Worth Sweep, the Government's needs were more basic: it wanted the Enterprises' assets (in the form of anticipated substantial future profits) to help support the general federal budget. The Government's appropriation here was plainer than in *Kimball* by permitting the Enterprises to operate as usual but simply seizing any net worth

they obtained in any quarter to benefit taxpayers. And, of course, the fact that the assets taken are in monetary form does not alter their status as cognizable property. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614-15 (2013) (taking occurs if the Government takes funds "linked to a specific, identifiable property interest such as a bank account").

Although the Government framed the Net Worth Sweep in accounting terms, speaking, *e.g.*, of the Enterprises' "net worth," the reality is that the Government simply took the Companies' entire value. The Net Worth Sweep literally swept up any assets the Enterprises had on hand at the end of each quarter that exceeded their liabilities. This makes the Net Worth Sweep a "direct government appropriation," requiring the payment of "just compensation." *See Brown v. Legal Found*., 538 U.S. 216, 240, 123 S. Ct. 1406, 1421 (2003) (requirement that interest earned on client funds be transferred to a different owner for a legitimate public use would not be a "regulatory taking" but instead "could be a *per se* taking requiring the payment of 'just compensation' to the client."); *Webb's Fabulous Pharms*, 449 U.S. at 164 (in holding that the county's taking of interest earned on interpleader funds violated the Fifth Amendment, the Supreme Court reasoned the county's "appropriation of the beneficial use of the fund is analogous to the appropriation of the use of private property in [*Causby*]."). The naked taking of a company's entire net worth on an ongoing basis is substantively no different than

the taking of a company's "going-concern value"; it requires compensation under *Kimball*.[8]

Unlike most garden-variety conservatorships and receiverships, the special status into which the Government placed the Enterprises here was unique. It exhibits all the red flags of an unconstitutional redefinition of rights designed to usurp the private property of private companies. As this Court itself recognized, and as the Supreme Court has also recognized, HERA permitted FHFA to "***subordinat[e] the best interests of the Enterprises [to] those of the public.***" *Fairholme*, 26 F.4th at 1286 (emphasis added). The Supreme Court explained in *Collins* how HERA created a novel form of conservatorship:

> An FHFA conservatorship … differs from a typical conservatorship in a key respect. Instead of mandating that the FHFA always act in the best interests of the regulated entity, [HERA] authorizes the Agency to act in what it determines is "in the best interests of the regulated entity **or the Agency**." §4617(b)(2)(J)(ii) (emphasis added). Thus, when the FHFA acts as a conservator, it may aim to rehabilitate the regulated entity in a way that, **while not in the best interests of the regulated entity, is beneficial to the Agency and, by extension, the public it serves**.

[8] This does not mean conservatorships and receiverships necessarily or even typically raise significant takings concerns. Had the Government taken the Enterprises' net worth at a time when the Enterprises had no value or negative value (which is usually the case when companies enter or remain in conservatorship or receivership), any "taking" would be of little significance. Even if such an action could be considered a taking at all, there would be no "just compensation" due to an entity with zero or negative going concern value.

Collins, 141 S. Ct. at 1776 (first emphasis in original; second added).[9] This is a quintessential public use.[10]

B. *Congress's Enactment of HERA Did Not Eliminate the Enterprises' Property Interests in Their Own Net Worth.*

The core principle grounding this Court's decision in *Fairholme* was that HERA eliminated any property interests the Enterprises may have held in their net worth. Thus, no property was available to be "taken" when the FHFA, acting as the Enterprises' conservator, caused the Enterprises to agree to the Net Worth Sweep.

Fairholme creates a two-step process for any government wishing to take private property for public use without just (or any) compensation: simply redefine (by statute or otherwise) the property interest the Government wishes to take and then seize the no-longer-protected property interest for public use. Put another way, under *Fairholme*'s logic, an end that a government could not accomplish directly (taking a company's going concern value for public use), a government may freely do, so long as it first enacts a statute that changes the background rule.

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[9] The Supreme Court concluded that the Net Worth Sweep was within the FHFA's statutory authority because of HERA's unique provisions permitting the FHFA to operate the Enterprises *in the interests of the public*. *Id.* at 1176-77.

[10] The Government could have exercised its authority under HERA in a manner that did not effect a taking of the Enterprises private property. For example, FHFA could have considered the interests of the public in structuring the Enterprises' affairs to minimize the risk to the Government and the broader economy, without simply taking the Enterprises' entire net worth. But as applied to the Enterprises, the Government's actions under HERA violated the Takings Clause.

In other words, *Fairholme* permits the Government to simply regulate away a private company's constitutional right in its own property. That cannot be the law.

"Under the Constitution, property rights cannot be so easily manipulated." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021). Put another way, when it regulates commerce, Congress cannot "override the provision that just compensation must be made when private property is taken for public use." *Scranton v. Wheeler*, 179 U.S. 141, 153 (1900). "[T]he government does not have unlimited power to redefine property rights." *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 439 (1982).

Importantly, a court's mandate to conduct an *independent evaluation* of the relevant property interests endures even when a statutory enactment purporting to curtail property rights predates the alleged taking. After all, "[a] law does not become a background principle … by enactment itself." *Palazzolo v. Rhode Island*, 533 U.S. 606 630 (2001). The mere fact that "a restriction existed at the time the purchaser took title … should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking" unless the "restriction form[s] part of the 'background principles of the State's law of property and nuisance.'" *Id.* at 637 (Scalia, J., concurring) (quoting *Lucas*, 505 U.S. at 1029). That a law is on the books does not bless it with "assumed validity" under the Takings Clause, especially when it "in fact deprives property of so much of its

value as to be unconstitutional." *Id.*; *see also Cienega Gardens v. United States*, 331 F.3d 1319, 1334 (Fed. Cir. 2003) (rejecting argument that broad contract term permitted Congress to "change[] … the … contracts in *any* way to affect *any* of the rights established by the contracts," as the Government's retention of such an unfettered right to abrogate a property interest "is not and cannot be the law").

For example, in *Webb's Fabulous Pharmacies*, the Supreme Court considered statutes some states had construed to permit the Government to retain interest on amounts deposited by private parties in court registries (for example, in interpleader cases). *Webb's Fabulous Pharmacies*, 449 U.S. at 155-59. Florida's Supreme Court had ruled, based on a Florida statute, that the funds deposited into the court accounts were "considered public money," and therefore, there could be "no unconstitutional taking because interest earned [in the] account is not private property." *Id.* at 158-59. The Florida Supreme Court's reasoning mirrored this Court's reasoning in *Fairholme* that the Enterprises' net worth was no longer private property due to HERA.

The Supreme Court reversed. The Court began by recognizing "[t]he usual and general rule … that any interest on [a] deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Id.* at 162. The Supreme Court rejected the idea that a statute could recharacterize private property as public to allow it to seize the money for public use. It reasoned:

> Neither the Florida Legislature by statute nor the Florida courts by judicial decree may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the Court ….
>
> Put another way: **a State, by *ipse dixit*, may not transform private property into public property without compensation**, even for [a] limited duration…. This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent.

Id. at 164 (emphasis added).

The same holds here. Congress may not by statute simply recharacterize the Enterprises' entire net worth as "public assets" simply because the Government, through the FHFA, temporarily controls the Enterprises. Nor may it, by *ipse dixit*, transform that private property into public property without just compensation.

Similarly, in *Phillips*, the Supreme Court considered state statutes requiring lawyers to hand over interest earned on accounts holding client funds for public use. *Phillips,* 524 U.S. at 159-63. The Supreme Court began its analysis by recognizing that "[t]he rule that 'interest follows the principle' has been established under English common law since at least the mid-1700s." *Id.* at 165. The Court then rejected the notion that the enactment of a statute requiring such interest to be paid for a fund for low-income persons negated such "established" property interests, holding "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Id.* Put another way, the Government cannot take private assets for public use simply by announcing first that a business no longer has a property interest in its own assets.

The two decisions of this Court that the *Fairholme* panel relied upon in holding otherwise—*California Housing Securities, Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992), and *Golden Pacific Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994), do not support the panel's decision. Both cases involve takings claims related to receivership, but neither case held that the mere entry of receivership (or conservatorship) eliminates property interests held by a company.

In *California Housing*, this Court held a company "could [not] have expected to be compensated for a regulatory possession … of its property if that possession were to occur following a determination that [the company's] financial situation mandated federal conservatorship or receivership." *California Housing*, 959 F.2d at 959. It did not hold that the company's property rights were eliminated entirely by receivership but instead that it "held less than a full bundle of property rights" upon receivership. *Id.* at 958.

Similarly, *Golden Pacific* held that a bank "held less than the full bundle of property rights" when the Government "became satisfied that the Bank was insolvent." *Golden Pacific,* 15 F.3d at 1074. Most importantly, neither case addressed whether the Government may exercise its authority as conservator to seize the net worth of a company **for public use**, which is what the Government did here. *Fairholme*, 26 F.4th at 1286 (noting that "the FHFA exercised one of its powers under HERA—subordinating the best interests of the Enterprises and its

shareholders to … those of the public"). In short, the differences in statutory conservatorship regimes and how those statutory powers were used to benefit the public minimize any relevance of *California Housing* or *Golden Pacific* on the facts here. Nor did this Court consider whether those cases were still good law in light of *Tyler*.

At most, *California Housing* and *Golden Pacific* stand for the proposition that it may be constitutionally acceptable to seize certain assets in certain limited situations where a company is (1) in significant financial distress and (2) those assets are taken for *private use* to rehabilitate the same company. They do not hold that the Government can take the entire net worth a financially viable private company for public taxpayer use.

C. *The Fairholme Panel's Decision Cannot Be Reconciled with Tyler.*

On May 25, 2023, after the *Fairholme* panel decision, the U.S. Supreme Court decided *Tyler v. Hennepin County*. *Tyler* resolved whether the Government can extinguish a property right through the passage of a statute—the same question the *Fairholme* panel answered in the affirmative with minimal discussion (after the *Fairholme* plaintiffs forfeited the argument). The *Tyler* Court held that the Government cannot "sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate." *Tyler*, 143 S. Ct. at 1375. The same is true here. *Id.*

Tyler clarified important aspects of regulatory takings law, contradicting the *Fairholme* panel's holding on the merits of the Derivative Plaintiffs' takings claim. To repeat, this Court in *Fairhome* ruled that the *Fairholme* plaintiffs failed to state a derivative takings claim because HERA "gave the FHFA the unrestricted authority to place the Enterprises into conservatorship." *Fairholme*, 26 F.4th at 1303. When the FHFA exercised that authority, the panel held that "the Enterprises lost their right to exclude the government from their property, including their net worth." *Fairholme*, 26 F.4th at 1303. Thus, it concluded that because the "Enterprises lacked the right to exclude the government from their net worth," they "had no investment-backed expectation that FHFA would protect their interests and not dilute their equity." *Id*.

Tyler concerned a state statute that permitted the Government to obtain a judgment against real property for unpaid real estate taxes. *Tyler*, 143 S. Ct. at 1373-74. If the taxpayer did not pay outstanding tax debts within a specified period, the Government could sell the property and retain all proceeds, even if the proceeds far exceeded the tax debt and costs of sale. *Id.* The district court had dismissed the plaintiff's takings claim for failure to state a claim, and the Eighth Circuit affirmed, ruling, in terms similar to the *Fairholme* panel, that because state law recognized no property interest in the surplus proceeds from the sale, there can be no unconstitutional taking. *Id.* at 1374.

The Supreme Court reversed. In so doing, the Court clarified that the Fifth Amendment constrains the Government's ability to redefine property interests to permit it to take private property that it otherwise could not without providing just compensation. The Court held that the Government cannot "**sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate**." *Id.* at 1375 (quotations omitted) (emphasis added). In other words, the Government cannot regulate away takings by redefining property interests to exclude a private property owner's longstanding property expectation.

As the Supreme Court explained, because the Takings Clause does not define property, courts draw on existing rules and understandings about property rights. *Id.* Although a government statute is one important source, it "cannot be the only source." *Id.* Indeed, the Takings Clause "would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take." *Id.* (quoting *Phillips*, 524 U. S. at 165-68).[11] Instead, courts must also "look to 'traditional property law principles,' plus historical practice and [Supreme Court] precedents." *Id.*

[11] Although *Tyler* concerned a state statute and this case concerns a Congressional statute, the Fifth Amendment's Takings Clause applies all the same. *See Stop the Beach*, 660 U.S. at 715 ("[T]he Takings Clause bars the [government] from taking private property without paying for it, no matter which branch is the instrument of the taking…. The particular state action is irrelevant.").

The *Fairholme* panel, however, failed to conduct any such analysis. Its discussion of the relevant property interest under the Takings Clause focused entirely on the effect of HERA on plaintiffs' property rights and failed to consider traditional property law principles. Considering the framework the Supreme Court prescribed in *Tyler,* the *Fairholme* panel's analysis of what constitutes a cognizable property interest is incomplete and inadequate.[12]

Moreover, although *Tyler* and this case concern very different statutes, the property rights analysis is remarkably similar. In nationalizing the Enterprises to avoid the Takings Clause requirement of just compensation, the FHFA disavowed the Enterprises' interests in their net worth. As the Derivative Plaintiffs have consistently maintained, whatever authority HERA granted the FHFA, that authority must be construed consistent with the Takings Clause. The FHFA's statutory authority conferred by HERA thus must be limited by the Government's constitutional obligation for just compensation.[13]

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[12] The *Fairholme* plaintiffs also failed to brief traditional property law principles and their application to the definition of the relevant property interests.

[13] To be clear, Derivative Plaintiffs allege that the taking occurred at the time of the Net Worth Sweep, not the time of conservatorship. Although HERA gave the FHFA discretion to prioritize the interests of the public in exercising its authority as conservator, nothing compelled it to do so by confiscating the Enterprises' value for the public, nor was there any suggestion in HERA or the circumstances of its passage that Congress had in mind that FHFA would exercise its discretion under the statute in a manner that violated the Constitution.

The *Tyler* Court reached a similar conclusion. There, although the case concerned real property, the Supreme Court held that the Government could not simply rely on a statute to abrogate a homeowner's interest in the surplus value following the sale of her home and the satisfaction of her debts. *Id*. Property rights "cannot be so easily manipulated." *Id.* at 1379 (quoting *Cedar Point Nursery*, 141 S. Ct. at 276). The Government "may not extinguish a property interest … to avoid paying just compensation when it is the one doing the taking." *Id.*[14]

Nor could the Government "use the toehold of the tax debt to confiscate more property than was due." *Id.* at 1376. That is, the fact that a private party owes the Government money does not grant unlimited license to the Government to take

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[14] As one commentator explained, discussing the import of *Tyler* for governments' ability to redefine property law to avoid a taking:

> [T]hroughout the Court's case law, a theme persists: a fear of gamesmanship and the possibility that affirming the importance of state law incentivizes states to insulate themselves from takings liability. The worry is that, left to its own devices, [the government] might transform private property into public property via legislative enactment….
>
> Pre-*Tyler*, this concern appeared overstated …. But at the same time, Minnesota's contradictory statutory regime [at issue in *Tyler*] represents a [government] appearing to extinguish traditionally recognized property rights in bad faith. *Tyler* therefore lends credence to the Court's concern of legislative chicanery. The Court's response has been to acknowledge state law's role, but over time, diminish that role and supplement it with an analysis of history and tradition.

Fifth Amendment Takings Clause, Tyler v. Hennepin County, 137 Harv. L. Rev. 310, 314-16 (Nov. 2023)

whatever it wants for public use. The Government may not obtain a windfall from a private party merely because the party owes a debt to the Government.

Similarly, the FHFA could not, consistent with the Takings Clause, use the toehold of conservatorship to nationalize the Enterprises for public use merely because the Enterprises owed the Government money. It could not use conservatorship as an excuse to extract money from the Enterprises that far exceeded what the Enterprises owed to the Government, resulting in a windfall to the Government. Yet, that is precisely what happened here. As the Claims Court explained, Plaintiffs alleged that "Treasury reaped a **windfall**" of [$133] billion "in comparison to what it would have received absent changes to the PSPAs." *Fisher* ECF 80 at 7; *Reid* ECF 66 at 7. Because the Fifth Amendment does not permit such windfalls, Plaintiffs adequately alleged the Government's conduct was unconstitutional.

In summary, even assuming that the FHFA had the statutory authority under HERA to seize the Enterprises' net worth to fill a hole in the federal budget, it had the constitutional obligation to pay just compensation consistent with the Takings Clause. Because it failed to do so, Derivative Plaintiffs state a takings claim under *Tyler*. To the extent the *Fairholme* panel found no such claim exists, its decision is inconsistent with *Tyler* and must be overruled.

II. Plaintiffs Adequately Alleged That the Net Worth Sweep Took the Enterprises' Property Without Just Compensation.

As explained above, a compensable taking requires a plaintiff to (1) identify a property interest and (2) allege sufficient interference with that property interest to amount to a taking. *Ruckelshaus*, 467 U.S. at 1000. The *Fairholme* panel's rejection of Mr. Barrett's derivative takings claim addressed only the first element—the existence of a cognizable property interest. Given that holding, the *Fairholme* panel did not resolve whether, assuming the company retained an interest in its net worth, the Government's action taking that interest without just compensation constituted a taking. In any event, it is uncontroversial.

Plaintiffs alleged that the Government's interference with the Companies' property interest in their net worth was total, amounting to a per se taking. *Brown*, 538 U.S. at 235. "A … categorical rule applies to [Government actions] that completely deprive an owner of 'all economically beneficial us[e]' of her property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting *Lucas*, 505 U.S. at 1019); *see also Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan*. Agency, 535 U.S. 302, 322 (2002) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.").

Plaintiffs' complaint contained extensive allegations that the Government completely deprived the Enterprises of all economically beneficial use of their net worth. As Treasury boasted in a press release, all that the Companies earned over a comparatively small capital reserve—"every dollar"—has been turned over "to benefit taxpayers." *Fisher* ECF 80 at 6-7; *Reid* ECF 80 at 6-7. The Government's actions here were no different than if the Government were to reach into a citizen's pocket and grab all the cash or decree a "percentage of [a] raisin crop without charge, for the Government's control and use." *Horne v. Dep't of Agric.*, 576 U.S. 351, 362 (2015). As in those instances, the interference with the Enterprises' property interest here is of "such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.* at 362. The Net Worth Sweep was indistinguishable from "a forced contribution to general governmental revenues." *Webb's Fabulous Pharmacies*, 449 U.S. at 163; *see also Koontz*, 570 U.S. at 614 (taking occurs if the Government takes funds "linked to a specific, identifiable property interest such as a bank account").

As the *Fairholme* panel observed (based on the Supreme Court's decision in *Collins*), the FHFA, in causing the Enterprises to agree to the Net Worth Sweep, "subordinat[ed] the best interests of the Enterprises and its shareholders to … those of the public." *Fairholme*, 26 F.4th at 1286. This further bolsters Plaintiffs' allegations that the FHFA took the Companies' net worth "for public use" without

just (or any) compensation. *See* U.S. Const. 5th Am. Because Plaintiffs allege that the FHFA implemented the Net Worth Sweep to benefit taxpayers at the Enterprises' expense, its action was a taking requiring just compensation.

In short, if the Derivative Plaintiffs are correct that the Enterprises retained an interest in their positive present and future Net Worth, their allegations are more than sufficient to state a claim that the Net Worth Sweep effected a taking.

CONCLUSION

For these reasons, the Court should reverse the dismissal of Plaintiffs' takings claims and remand these cases for trial.

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