Nos. 2024-1167, 2024-1168

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.

On Appeal from the United States Court of Federal Claims in case no. 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.

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

BRIEF FOR APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

US Constitution:

Statutes:

Rules:

Other Authorities:

STATEMENT OF RELATED CASES

No other appeal in or from the present civil action has previously been before this or any other appellate court. *Wazee Street Opportunities Fund IV LP v. United States*, No. 24-1378, is a related case under Rule 47.5 pending in this Court.

STATEMENT OF JURISDICTION

Plaintiffs in this pair of related cases invoked the jurisdiction of the U.S. Court of Federal Claims under 28 U.S.C. § 1491(a)(1). The Court of Federal Claims dismissed all claims in both cases on September 1, 2023. Appx1-2. Notices of appeal were timely filed in each case on October 31, 2023. Fed. R. App. P. 4(a)(1)(B)(i). This Court has jurisdiction over these appeals under 28 U.S.C.§ 1295(a)(3).

STATEMENT OF THE ISSUES

To avert the catastrophic impact on the housing market that would result from the collapse of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the enterprises), Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), which created the Federal Housing Finance Agency (FHFA) and empowered it to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a). Congress recognized that federal financial assistance of vast proportions could be required to prevent the enterprises' collapse and authorized the Treasury Department (Treasury) to "purchase any obligations and other securities issued by" the enterprises. *Id.* §§ 1455(*l*)(1)(A), 1719(g)(1)(A).

After the Director of FHFA placed the enterprises into conservatorship in September 2008, Treasury immediately purchased senior preferred stock in each entity and committed to provide up to $100 billion in taxpayer funds to each enterprise to avoid insolvency. Between 2008 and 2012, the preferred stock purchase agreements

(Purchase Agreements) were amended three times. The first two amendments substantially increased Treasury's capital commitment to the enterprises. The Third Amendment replaced a fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth exceeds a capital buffer.

Plaintiffs in these lawsuits are shareholders in the enterprises. They challenge the Third Amendment as an uncompensated taking of the enterprises' property, in violation of the Fifth Amendment Takings Clause. They assert their takings claims as derivative claims on behalf of the enterprises.

In *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022), this Court held that the Third Amendment did not constitute an uncompensated taking of the enterprises' property. *Id.* at 1302-03. Accordingly, it dismissed a shareholder-derivative takings claim that is identical to the takings claims brought by plaintiff-shareholders in this suit. Recognizing that *Fairholme* directly controls plaintiffs' takings claims, the Court of Federal Claims dismissed those claims.

The questions presented are:

1. Whether claim preclusion bars plaintiffs from bringing derivative Fifth Amendment takings claims on behalf of the enterprises where this Court rejected that claim on the merits in a prior derivative suit brought by an enterprise shareholder.

2. Whether, in any event, the Court of Federal Claims correctly dismissed plaintiffs' derivative takings claims on the ground that *Fairholme* directly controls those claims as a matter of precedent and requires dismissal.

STATEMENT OF THE CASE

I. Factual Background

A. Fannie Mae and Freddie Mac

Congress created Fannie Mae and Freddie Mac to, among other things, provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. *See Collins v. Yellen*, 141 S. Ct. 1761, 1770-71 (2021). The enterprises finance these purchases by borrowing money in the credit markets and by packaging many of the loans they buy into mortgage-backed securities, which they sell to investors. *Id.*

B. The 2008 Housing Crisis and HERA

With the 2008 collapse of the housing market, the enterprises experienced overwhelming losses due to a dramatic increase in default rates on residential mortgages. *See Collins*, 141 S. Ct. at 1771; *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1282 (Fed. Cir. 2022). At the time, the enterprises owned or guaranteed over $5 trillion of residential mortgage assets, representing nearly half the United States mortgage market. *Collins*, 141 S. Ct. at 1771. Their failure would have had a catastrophic impact on the national housing market and economy.

The enterprises lost more in 2008 ($108 billion) than they had earned in the previous 37 years combined ($95 billion). *See Collins*, 141 S. Ct. at 1771 (citing Office of Inspector Gen., FHFA, WPR-2013-002, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 5 (2013)). As a result, the enterprises faced capital

shortfalls, and private investors were unwilling to provide Fannie Mae and Freddie Mac with the capital they needed to weather their losses and avoid receivership and liquidation. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 601 (D.C. Cir. 2017).

In July 2008, Congress enacted HERA, Pub. L. No. 110-289, 122 Stat. 2654 (2008). *See Fairholme Funds*, 26 F.4th at 1282. The legislation created FHFA to supervise and regulate the enterprises and granted FHFA the authority to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a).

HERA provides that FHFA, as conservator or receiver, "immediately succeed[s] to—(i) all rights, titles, powers, and privileges of the [enterprises] and of any stockholder, officer, or director of such [enterprises] with respect to the [enterprises]." 12 U.S.C. § 4617(b)(2)(A)(i). The legislation authorizes FHFA, as conservator, to "take such action as may be—(i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]." *Id.* § 4617(b)(2)(D). HERA also permits a conservator to take actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the enterprises. *Id.* § 4617(a)(2). HERA further states that FHFA, when acting as conservator, may

exercise its statutory authority in a manner "which the Agency determines is in the best interests of the [enterprises] or the Agency." *Id.* § 4617(b)(2)(J)(ii).[1]

Recognizing that an enormous commitment of taxpayer funds could be required, Congress also amended the enterprises' charters to authorize Treasury to "purchase any obligations and other securities issued by" the enterprises upon "'Treasury's specific determination that the terms of the purchase would 'protect the taxpayer,'" *Perry Capital*, 864 F.3d at 600, and to "exercise any rights received in connection with such purchases." 12 U.S.C. §§ 1455(*l*)(1)(A), (2)(A), 1719(g)(1)(A), (B).

C. Conservatorship and the Preferred Stock Purchase Agreements

1. With the consent of the enterprises' boards of directors, FHFA's Director placed the enterprises in conservatorship in September 2008. *Fairholme Funds*, 26 F.4th at 1282. One day later, Treasury purchased senior preferred stock in each entity. *Id.* Under the Purchase Agreements, Treasury committed to provide up to $100 billion in taxpayer funds to each enterprise to maintain their solvency by ensuring that their assets were at least equal to their liabilities. *Collins*, 141 S. Ct. at 1772-73.

[1] This language is understood to mean that, in its role as conservator, FHFA may act in the interests of the public. *See Fairholme Funds*, 26 F.4th at 1286 (quoting *Collins*, 141 S. Ct. at 1785–86).

The Purchase Agreements provided that Treasury would receive various forms of compensation, including preferred stock with an initial liquidation preference of $1 billion that would increase dollar-for-dollar when an enterprise drew on Treasury's funding commitment, quarterly dividends equal to 10% of Treasury's liquidation preference, warrants to purchase common stock, and periodic commitment fees. *Fairholme Funds*, 26 F.4th at 1282; *Collins*, 141 S. Ct. at 1773.

Treasury's initial funding commitment soon proved to be inadequate. *Collins*, 141 S. Ct. at 1773. To address this problem, in May 2009, FHFA and Treasury agreed to double Treasury's funding commitment to $200 billion per enterprise. *Id.*

In December 2009, in the face of ongoing losses, the conservator and Treasury agreed to a second amendment that eliminated the specific dollar cap on Treasury's funding commitment, allowing the enterprises to draw unlimited amounts from Treasury to cure net-worth deficits until the end of 2012. *Collins*, 141 S. Ct. at 1773. At the end of 2012, however, Treasury's funding commitment would become fixed. *See id.*

2. As of June 30, 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment, making Treasury's liquidation preference $189.5 billion, including the initial $1-billion-per-enterprise senior liquidation preference. *See Collins*, 141 S. Ct. at 1773. Under the terms of the original Purchase Agreements, the enterprises' dividend obligations to Treasury were thus nearly $19 billion per year. Between 2009 and 2011, the enterprises could not pay these substantial dividend

obligations out of their earnings and drew on Treasury's funding commitment to pay them. *See id.*

D. The Third Amendment

In August 2012, Treasury and FHFA agreed to modify the Purchase Agreements for a third time. *Collins*, 141 S. Ct. at 1773. This "Third Amendment" broke the draws-to-pay-dividends cycle by replacing the previous fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth for the quarter exceeded a capital buffer. *Id.* at 1773-74. The Third Amendment thus ensured that the enterprises would not deplete Treasury's vital capital commitment prematurely and that the enterprises would play their central role in the housing market for the foreseeable future. *See id.* at 1777 (stating that the Third Amendment assured "a stable secondary mortgage market").

E. January 14, 2021, Amendment

The Third Amendment was modified by letter agreements in 2017 and 2019.[2] Those agreements increased the capital buffer that the enterprises were permitted to retain before paying Treasury dividends. On January 14, 2021, Treasury and FHFA agreed to a further amendment of the Purchase Agreements. *See Collins*, 141 S. Ct. at

[2] FHFA, *Statement from FHFA Director Melvin L. Watt on Capital Reserve for Fannie Mae and Freddie Mac* (Dec. 21, 2017), https://perma.cc/99NZ-DWVF; Press Release, U.S. Dep't of the Treasury, *Treasury Department and FHFA Modify Terms of Preferred Stock Purchase Agreements for Fannie Mae and Freddie Mac* (Sept. 30, 2019), https://perma.cc/8XZW-DQ2N.

1774. Pursuant to that amendment, Treasury agreed to forgo further cash dividends until the enterprises build sufficient capital to meet regulatory requirements, a build-up that is expected to take several years. *Id.* Once the enterprises begin paying dividends to Treasury again, moreover, they will not be required to pay Treasury dividends from the capital that they have amassed. The agreement also sets forth the conditions under which Treasury will agree that the enterprises may exit conservatorship and allows the enterprises to raise capital through the issuance of common stock when certain conditions are met. *See id.* at 1774-75.

II. Prior Proceedings

1. Fannie Mae and Freddie Mac shareholders have brought numerous suits challenging the Third Amendment, in both the Court of Federal Claims and in district courts around the country. *See Fairholme Funds*, 26 F.4th at 1283. As relevant here, various shareholders brought more than a dozen suits in the Court of Federal Claims asserting Fifth Amendment, breach-of-contract, and breach-of-fiduciary duty claims directed at the Third Amendment and FHFA's and Treasury's actions in agreeing to the amendment. *Id.* Some of these shareholders brought claims directly on their own behalf, while others brought claims derivatively on behalf of the enterprises. *Id.*

Plaintiffs in these two consolidated appeals fall in the latter group. They brought suit in the Court of Federal Claims alleging derivative claims on behalf of the enterprises. Their complaints allege, among other claims, that the Third Amendment

constituted an uncompensated taking of the enterprises' property (specifically, the enterprises' net worth), in violation of the Fifth Amendment.[3]

The government filed an omnibus motion to dismiss the claims in all of the pending cases in the Court of Federal Claims, including plaintiffs'. *Fairholme Funds*, 26 F.4th at 1283.[4] The Court of Federal Claims addressed that motion by first considering whether to dismiss the complaint in one of the cases, *Fairholme Funds, Inc. v. United States*, No. 13-465C, which, among other things, involved both direct and derivative takings claims. *Fairholme Funds*, 26 F.4th at 1283. As relevant here, the Court of Federal Claims dismissed the direct takings claims on standing grounds but allowed the *Fairholme* shareholder's derivative takings claims to proceed. *Id.* The court then certified its decision in *Fairholme* for interlocutory appeal, and this Court granted the parties' cross-petitions to review the decision. *Id.*

[3] Plaintiffs also alleged claims for breach of fiduciary duty and illegal exaction, which the district court dismissed. *See* Appx5, Appx10. Because plaintiffs have not challenged the dismissal of those claims on appeal, any challenge to those rulings is waived. *See Advanced Magnetic Closures, Inc. v. Rome Fastener Corp.*, 607 F.3d 817, 833 (Fed. Cir. 2010).

[4] Several additional suits with similar claims were filed after the omnibus briefing schedule had been set and were stayed pending its resolution. *See, e.g., 683 Capital Partners, LP v. United States*, No. 18-711 (Fed. Cl.); *Joseph S. Patt, et al. v. United States*, No. 18-712 (Fed. Cl.); *Wazee Street Opportunities Fund IV LP, et al. v. United States*, No. 18-1124 (Fed. Cl.); *Highfields Capital I LP, et al. v. United States*, No. 18-1150 (Fed. Cl.); *CRS Master Fund, L.P., et al. v. United States*, No. 18-1155 (Fed. Cl.); *Perry Capital LLC v. United States*, No. 18-1226 (Fed. Cl.); *Quinn Opportunities Master Fund LP, et al. v. United States*, No. 18-1240 (Fed. Cl.).

Meanwhile, in reliance on its conclusion that a derivative takings claim could proceed, the Court of Federal Claims denied the government's motion to dismiss the complaints at issue here. *See* Opinion and Order at 25-27, *Fisher v. United States*, No. 13-608C (Fed. Cl. June 11, 2020), Dkt. No. 80. Although the court certified its decision denying the government's motion to dismiss plaintiffs' complaint for interlocutory appeal, this Court denied plaintiffs' request for review, noting that plaintiffs could present their arguments to this Court through the filing of an amicus brief in the *Fairholme* appeal, which involved identical derivative takings claims. *See Fisher v. United States*, No. 2020-138, slip op. at 2 (Fed. Cir. Aug. 21, 2020).

2. This Court subsequently affirmed the Court of Federal Claims' *Fairholme* decision in part and reversed it in part. *See Fairholme Funds*, 26 F.4th at 1305. As relevant, this Court concluded that the shareholders' derivative takings claims failed as a matter of law and should have been dismissed. *Id.* at 1302-03. Citing *California Housing Securities, Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992), and *Golden Pacific Bancorp v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994), this Court concluded that, as financial institutions in conservatorship, the enterprises "lack[ed] the fundamental right to exclude the government from their property," and thus lacked the type of property interest in their net worth that is necessary to state a takings claim. *Fairholme Funds*, 26 F.4th at 1303. This Court emphasized that the enterprises had voluntarily consented to the conservatorship, knowing that HERA granted the conservator broad authority over their assets. *Id.* Accordingly, the

enterprises also had "no investment-backed expectation that the FHFA would protect their interests and not dilute their equity." *Id.*

The relevant shareholder asked the Supreme Court to review this Court's conclusion that the Third Amendment did not constitute a taking of the enterprises' property. *See* Petition for a Writ of Certiorari at i, *Barrett v. United States*, No. 22-99 (U.S. July 22, 2022) (Barrett Cert Petition). The Supreme Court denied the shareholder's petition for a writ of certiorari on January 9, 2023, just four days before the Supreme Court granted the petition for writ of certiorari in *Tyler v. Hennepin County*, 598 U.S. 631 (2023). *See Barrett v. United States*, 143 S. Ct. 562 (2023) (denying certiorari); *Tyler v. Hennepin County*, 143 S. Ct. 644 (2023) (granting certiorari).

3. Following this Court's decision in *Fairholme*, the Court of Federal Claims ordered plaintiffs in these cases to show cause why their derivative takings claims, which are identical to the derivative takings claims this Court dismissed in *Fairholme*, should not also be dismissed. Appx5, Appx10. Plaintiffs argued in response that *Fairholme* was wrongly decided in the first instance and that the decision did not survive the Supreme Court's more recent decision in *Tyler*, 598 U.S. 631. In response, the government argued that claim preclusion barred plaintiffs from relitigating derivative claims on behalf of the enterprises that had been resolved by this Court in *Fairholme*, and that, in any event, *Fairholme* is governing law of the circuit and mandated dismissal.

The Court of Federal Claims rejected plaintiffs' contentions and dismissed their claims. Appx3, Appx8. The court explained that "all . . . counts of plaintiffs' second amended complaint present claims of a type that were unequivocally rejected by the Federal Circuit in *Fairholme*." Appx6, Appx11. Indeed, the court noted that plaintiffs had previously "conceded that 'the Federal Circuit's binding decision in *Fairholme* . . . requires this Court to dismiss' their claims." *Id.* (alteration in original). The court emphasized that it was bound by this Court's precedent unless expressly overruled by statute or by a subsequent Supreme Court decision, neither of which had occurred. Appx7, Appx12 (citing *Strickland v. United States*, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005)). And because the court decided that *Fairholme* controlled and mandated dismissal, it did not reach the government's argument that plaintiffs were precluded from relitigating derivative claims that had been previously resolved in *Fairholme*.

These appeals followed.

SUMMARY OF ARGUMENT

The Court of Federal Claims correctly dismissed plaintiffs' derivative takings claims. Plaintiffs—who are shareholders in the enterprises—brought suit on behalf of the enterprises, alleging that the Third Amendment to the Purchase Agreements constituted an uncompensated taking of the enterprises' property. This Court previously addressed the same derivative takings claim in *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022), and held that that it failed as a matter of law. That holding mandates the dismissal of plaintiffs' claims for either of two reasons.

First, claim preclusion bars plaintiffs from relitigating the same derivative takings claim that this Court rejected in *Fairholme*. It is black-letter law that "the plaintiff in a derivative suit represents the corporation, which is the real party in interest." *In re Sonus Networks, Inc*, 499 F.3d 47, 63 (1st Cir. 2007). Thus, when a judgment is rendered on a claim in a derivative action, that judgment "preclude[s] subsequent litigation [of that claim] by the corporation and its shareholders." *Cottrell v. Duke*, 737 F.3d 1238, 1243 (8th Cir. 2013). The Court of Federal Claims' final judgment dismissing the shareholder's derivative takings claim in *Fairholme* therefore precludes plaintiffs from relitigating that claim here.

Second, even absent claim preclusion, this Court's decision nonetheless mandates the dismissal of those claims. As plaintiffs acknowledge, this Court's conclusion in *Fairholme* that the Third Amendment did not constitute an unconstitutional taking of the enterprises' property squarely controls the identical takings claims they raise here. That is a sufficient, independent reason to affirm the dismissal of those claims.

Plaintiffs do not dispute that *Fairholme* dictates dismissal. They argue, instead, that the decision was wrongly decided initially and has since been implicitly overruled by the Supreme Court's more recent decision in *Tyler v. Hennepin County*, 598 U.S. 631 (2023). Those contentions are beside the point. Even if plaintiffs' arguments were not without merit, a panel of this Court is bound by a prior precedential decision

unless and until that precedent is expressly overruled by a decision issued by the en banc Court or the Supreme Court. That has not occurred here.

In any event, plaintiffs' assertions do not withstand scrutiny. This Court in *Fairholme* correctly concluded that, at the time of the Third Amendment, the enterprises did not possess the type of historically rooted property interest in their net worth that could give rise to a Fifth Amendment claim. This Court reasoned that, as financial institutions in federal conservatorship, the enterprises lacked the fundamental right to exclude the government from their property and thus could not have had a historically rooted expectation that they would be compensated for actions taken by the federal conservator with respect to the disposition of that property. That straightforward conclusion followed from this Court's recognition of the broad statutory authority over the enterprises' property that FHFA possesses as the enterprises' conservator. It is also in accord with prior decisions of this Court likewise holding that financial institutions in federal conservatorships and receiverships do not possess an interest in their profits that would support a Fifth Amendment takings claim. *See California Hous. Sec., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992); *Golden Pac. Bancorp. v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994).

This Court's takings analysis in *Fairholme* is entirely consistent with the Supreme Court's subsequent decision in *Tyler v. Hennepin County*. In *Tyler*, the Supreme Court concluded that, where the government sells a property owner's property to satisfy a tax bill, the property owner retains a compensable interest in any surplus funds that

the sale generates. In arriving at that conclusion, the Supreme Court reviewed the "rules [and] understandings" governing the rights of property owners in such circumstances, as reflected in state law, historical practice, and Supreme Court precedent. *Tyler*, 598 U.S. at 638 (quoting *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998)).

This Court engaged in the same mode of analysis in *Fairholme*. In deciding whether the enterprises possessed a cognizable interest in their net worth at the time of the Third Amendment, this Court evaluated the rules and understandings that govern the property rights of financial institutions in a federal conservatorship, as embodied in federal law, historical practice, and this Court's precedent. The differing outcomes in the two cases simply reflect the very different context and property interests at issue in the two cases.

In sum, because this Court has already considered and squarely rejected the very claims plaintiffs assert here, the Court of Federal Claims plainly did not err in dismissing those claims. The court's decision should be affirmed.

ARGUMENT

I. Standard of Review.

This Court reviews dismissal for failure to state a claim de novo. *Indiana Mun. Power Agency v. United States*, 59 F.4th 1382, 1384 (Fed. Cir. 2023).

II. The Court of Federal Claims Correctly Dismissed Plaintiffs' Derivative Takings Claims.

Plaintiffs assert derivative takings claims on behalf of the enterprises, alleging that the Third Amendment deprived the enterprises of their net worth without just compensation. Plaintiffs do not dispute that this Court resolved identical takings claims in *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022), and concluded that the Third Amendment did not constitute a taking of the enterprises' property. *Id.* at 1303.

The Court of Federal Claims correctly recognized that this Court's decision in *Fairholme* mandates dismissal of plaintiffs' claims. That is true for two independent reasons.

First, the doctrine of claim preclusion bars plaintiffs from relitigating a claim on behalf of the enterprises where, as here, that same claim was resolved against the enterprises and their representative shareholders in a final judgment on the merits.

Second, even if plaintiffs were not barred from pursuing their claims on behalf of the enterprises, this Court's decision in *Fairholme* requires the dismissal of those claims as a matter of precedent. Contrary to plaintiffs' suggestion, a panel of this Court is not free to disregard it.

A. Plaintiffs' Derivative Takings Claims Are Barred By Claim Preclusion.

1. The doctrine of claim preclusion "forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the

earlier suit.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)). Claim preclusion applies where: "(1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first." *First Mortg. Corp. v. United States*, 961 F.3d 1331, 1338 (Fed. Cir. 2020) (quoting *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003)).

When shareholders bring derivative suits on behalf of a corporation, "a judgment rendered . . . will preclude subsequent litigation [of a claim] by the corporation and its shareholders." *Cottrell v. Duke*, 737 F.3d 1238, 1243 (8th Cir. 2013); *see also Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981); *United States v. LTV Corp.*, 746 F.2d 51, 53 n.5 (D.C. Cir. 1984). That is so because shareholders bring derivative claims "to enforce a right that the corporation or association may properly assert but has failed to enforce." Fed. R. Civ. P. 23.1(a); *see In re Sonus Networks, Inc*, 499 F.3d 47, 63 (1st Cir. 2007) ("It is a matter of black-letter law that the plaintiff in a derivative suit represents the corporation, which is the real party in interest."). As a result, in shareholder derivative actions, "parties and their privies include the corporation and all nonparty shareholders." *Nathan*, 651 F.2d at 1226; *see also LTV Corp.*, 746 F.2d at 53 n.5. This Court recognized this principle in *Fairholme*, where it held that the doctrine of issue preclusion barred enterprise shareholders pursuing derivative claims from relitigating an issue that had been conclusively

resolved in an earlier shareholder derivative suit brought by other enterprise shareholders. *See Fairholme Funds*, 26 F.4th at 1300-02.

The elements of claim preclusion are plainly satisfied here and bar plaintiffs from relitigating their derivative takings claims. There is no dispute that this Court in *Fairholme* entered a final judgment on the merits rejecting the very same derivative takings claim that plaintiffs assert here—*i.e.*, a claim that the Third Amendment constituted an unlawful taking of the enterprises' property. *See Fairholme Funds*, 26 F.4th at 1301-03. And, as just explained, plaintiffs here are in privity with Andrew Barrett, the shareholder who pursued derivative takings claims in *Fairholme*. As in any derivative suit, plaintiffs assert their claims in a representative capacity on behalf of the real parties-in-interest, the enterprises, just as Barrett did in *Fairholme*.

Moreover, as the Supreme Court has explained, the "res judicata consequences" of a final judgment are not "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). "[T]here is no 'change of law' or fairness exception to prevent application of claim preclusion." *Roche Palo Alto LLC v. Apotex, Inc.*, 531 F.3d 1372, 1380 (Fed. Cir. 2008); *see also id.* (citing cases). Thus, plaintiffs' (erroneous) contentions that *Fairholme* was wrongly decided at the time and subsequently invalidated by the Supreme Court's decision in *Tyler v. Hennepin County*, 598 U.S. 631 (2023), have no bearing on the question whether claim preclusion applies. Even if their contentions had merit (which they do not, *see*

infra pp. 31-34), claim preclusion nonetheless bars them from pursuing their derivative claims.[5]

2. In the Court of Federal Claims, plaintiffs argued that this Court's decision in *Fairholme* did not preclude them from relitigating the same derivative claims this Court dismissed because shareholder Barrett, who asserted the derivative takings claims in *Fairholme*, did not adequately represent the enterprises' interests. Appx572-576; *see also Sonus Networks*, 499 F.3d at 64 (noting that, "to bind the corporation, the shareholder plaintiff [in a prior derivative suit] must have adequately represented the interests of the corporation"). Specifically, plaintiffs asserted that Barrett's counsel was operating under a conflict-of-interest because that counsel also represented other shareholders who had asserted exclusively direct takings claims. Appx573-575. Plaintiffs urged that this alleged conflict resulted in Barrett's counsel devoting more time to defending the direct taking claims and insufficient time defending the derivative takings claims. Appx575.

Plaintiffs' claim that the shareholder who asserted derivative claims in *Fairholme* (Andrew Barrett) did not adequately represent their interests and the enterprises' interests is without foundation. To establish that a prior shareholder was an

[5] This Court has noted that there "may be a rare exception" to the application of claim preclusion principles where a change in law involves "moment[o]us changes in important, fundamental constitutional rights," *Roche Palo Alto*, 531 F.3d at 1380 (quotation marks omitted). Even assuming such an exception exists, no such momentous change occurred here. *See infra* pp. 31-34.

inadequate representative in a derivative suit, a subsequent shareholder must demonstrate more than a "failure of [the] representative to invoke all possible legal theories or to develop all possible resources of proof." *Sonus Networks*, 499 F.3d at 66 (quoting Restatement (Second) of Judgments § 42 cmt. f (Am. Law Inst. 1982)). Rather, the representation must have been "so grossly deficient as to be apparent to the opposing party." *Id.* (quoting Restatement (Second) of Judgments § 42 cmt. f).

Any suggestion that counsel for the relevant shareholder in *Fairholme* did not zealously pursue his derivative takings claim does not withstand the briefest scrutiny. Indeed, Barrett successfully persuaded the Court of Federal Claims to deny the government's motion to dismiss his derivative takings claims. *See Fairholme Funds*, 26 F.4th at 1301-02. Barrett then vigorously defended the Court of Federal Claims' decision as part of the *Fairholme* appeal. *See* Supplemental Opening Brief of Plaintiffs-Appellants Fairholme Funds, Inc. et al. at 21-31, *Fairholme Funds, Inc. v. United States*, Nos. 2020-1912, 2020-1914 (Fed. Cir. Oct. 23, 2020) (defending the Court of Federal Claims' decision allowing shareholder derivative claims to proceed); Joint Reply Brief of the Plaintiff-Appellant Private Shareholders Fairholme Funds, Inc. et al., *Fairholme Funds, Inc. v. United States*, Nos. 2020-1912, 2020-1914, 2021 WL 824966, at *90-105 (Fed. Cir. Feb. 26, 2021) (same).

When this Court subsequently issued its decision in *Fairholme* reversing the Court of Federal Claims and concluding that Barrett's derivative takings claims failed as a matter of law, Barrett filed a petition for a writ of certiorari asking the Supreme

Court to review that determination. *See* Barrett Cert Petition. That petition raises the same objections to this Court's takings analysis that plaintiffs aver in their opening brief. *See id.* at 23-35. Indeed, plaintiffs' opening brief at times reiterates arguments from Barrett's certiorari petition almost verbatim. *Compare, e.g.*, Br. 38 ("'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.'" (alteration in original) (quoting *Horne v. Department of Agric.*, 576 U.S. 350, 362 (2015))), *with* Barrett Cert Petition 33 ("It is scarcely different than if the Government were to reach into a citizen's pocket and grab all the cash. Or if the Government decreed a 'percentage of [a] raisin crop without charge, for the Government's control and use.'" (alteration in original)).

Plaintiffs may disagree with Barrett's decision to seek Supreme Court review of this Court's decision in *Fairholme* without first asking this Court to review that decision en banc, *see* Br. 15, but that disagreement with Barrett's strategic judgment does not come close to establishing that Barrett's defense of his derivative takings claims was deficient, let alone "grossly deficient." *Sonus Networks*, 499 F.3d at 66 (quotation marks omitted).

In short, Barrett's interests in the derivative takings claims at issue in *Fairholme* litigation were clearly "aligned" with plaintiffs' interests in those same claims here. *Fairholme Funds*, 26 F.4th at 1300 (quotation marks omitted). And he zealously

defended those interests, presenting many of the identical arguments plaintiffs advocate in their briefing. Plaintiffs' suggestion that he was an inadequate representative for purposes of claim preclusion is without merit.

B. *Fairholme* Controls Plaintiffs' Derivative Takings Claims And Requires Dismissal Of Those Claims.

Even if claim preclusion did not bar plaintiffs from pursuing their derivative takings claims on behalf of the enterprises, *Fairholme* would nonetheless dictate dismissal of those claims. As plaintiffs recognize (Br. 18), the derivative takings claims that plaintiffs assert here are indistinguishable from the derivative takings claims that this Court considered and rejected in *Fairholme*. As in *Fairholme*, plaintiffs allege that the Third Amendment constituted an uncompensated taking of the enterprises' property, in violation of the Fifth Amendment. *See* Br. 1, 34 n.12; *Fairholme Funds*, 26 F.4th at 1302. This Court concluded in *Fairholme* that that claim failed as a matter of law. *Fairholme Funds*, 26 F.4th at 1302-03. Because that holding squarely controls and forecloses plaintiffs' identical claims, the Court of Federal Claims correctly dismissed those claims. *See* Appx3, Appx8 (concluding that "binding precedent compels the dismissal of plaintiffs' claims").

Plaintiffs spend the bulk of their brief arguing that *Fairholme* was wrongly decided at the time it issued. *See* Br. 19-31. However, as plaintiffs concede (Br. 18), "[a] panel of this court is bound by prior precedential decisions unless and until overturned *en banc*." *Sacco v. Department of Justice*, 317 F.3d 1384, 1386 (Fed. Cir. 2003);

see also Newell Cos. v. Kenney Mfg. Co., 864 F.2d 757, 765 (Fed. Cir. 1988). That rule applies even where a prior decision is alleged to have been "wrongly decided." *Sacco*, 317 F.3d at 1386. Because *Fairholme* "squarely confronts and disposes" of the claim that the Third Amendment amounted to a taking of the enterprises' property, it controls and mandates dismissal of plaintiffs' claims, regardless of the correctness of that decision. *Id.* Thus, even if plaintiffs' arguments were not without merit (for reasons we address below), *Fairholme* would still control the outcome of this case.

1. *Fairholme* was correctly decided.

This Court's conclusion in *Fairholme* that the Third Amendment was not a taking of the enterprises' property was correct and entirely consistent with this Court's and the Supreme Court's precedent. To plead a compensable taking under the Fifth Amendment, 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). In *Fairholme*, a shareholder plaintiff brought derivative takings claims on behalf of the enterprises alleging that the Third Amendment took the enterprises' net worth without compensation, in violation of the Fifth Amendment. *See Fairholme Funds*, 26 F.4th at 1283.

This Court concluded that the plaintiffs' derivative takings claims failed as a matter of law because, at the time of the Third Amendment, the enterprises lacked the requisite property interest in their net worth to support a Fifth Amendment takings claim. *Fairholme Funds*, 26 F.4th at 1302-03. In so concluding, this Court emphasized

that "Supreme Court case law has long held that the right to exclude is an essential element of property ownership." *Id.* at 1303 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982)). The Court then further recognized that, as this Court had previously held, "regulated financial entities lack the fundamental right to exclude the government from their property when the government could place the entities into conservatorship or receivership." *Id.* (first citing *California Hous. Sec., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992); and then citing *Golden Pac. Bancorp. v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994)). And because such financial enterprises lack the ability to exclude the government from their property (including their assets and net worth), they do not possess a reasonable expectation that they will be compensated when a federal conservator takes control of that property and uses it. *Id.* (citing *Golden Pac.*, 15 F.3d at 1074).

This Court found additional support for its conclusion that the enterprises lacked a cognizable property interest in their net worth at the time of the Third Amendment in the "fact that the Enterprises consented to the conservatorship, and consented to one where the conservator had extremely broad statutory powers." *Fairholme Funds*, 26 F.4th at 1303. As a result, the enterprises had "no investment-backed expectation that the FHFA [as conservator] would protect their interests and not dilute their equity." *Id.*

This Court's conclusion that, at the time of the Third Amendment, the enterprises lacked a cognizable property interest on which to base a takings claim was

clearly correct. As the Court recognized, since 2008, the enterprises have been subject to regulation under HERA. *Fairholme Funds*, 26 F.4th at 1303. Moreover, in 2008, four years before the Third Amendment, the enterprises consented to conservatorships pursuant to HERA's dictates. *Id.* That action transferred "all" of the enterprises' "rights, titles, powers, and privileges" to the conservator. 12 U.S.C. § 4617(b)(2)(A)(i). It also allowed the conservator to take any action "necessary to put the [enterprises] in a sound and solvent condition" and "appropriate to carry on the business of the [enterprises]." *Id.* § 4617(b)(2)(D). In particular, the conservator could "take over the assets of and operate the [enterprises]," *id.* § 4617(b)(2)(B)(i), and could "transfer or sell any asset or liability of the [enterprises], and may do so without any approval, assignment, or consent with respect to such transfer or sale," *id.* § 4617(b)(2)(G). And as conservator, FHFA was permitted to exercise those powers in a manner which the Agency determined to be "in the best interests of the regulated entit[ies] or the Agency." *Id.* § 4617(b)(2)(J)(ii).

Those statutory provisions make clear that, once the enterprises entered conservatorship, they no longer possessed the traditional property interests that corporations have in their earnings and assets. Most significantly, they no longer owned the right to exclude others, such as the conservator, from using their property. To the contrary, the enterprises' ownership rights were transferred to the Agency. And the enterprises likewise understood that the conservator had the authority to transfer or sell the enterprises' assets in a manner that served either the enterprises' *or*

FHFA's (*i.e.*, the public's) interests. The conservator's subsequent use of its statutory authority to rehabilitate the enterprises in a manner that "was designed to serve public interests," *Collins v. Yellen*, 141 S. Ct. 1761, 1776 (2021), thus did not involve the taking of a constitutionally protected property interest.

Plaintiffs criticize this Court for purportedly "fail[ing] to consider the historical property rights afforded to companies in their own net worth," Br. 21, and "assuming instead that HERA was the proper source to resolve the scope of the Enterprises' property rights," Br. 19. That criticism is unavailing. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Monsanto*, 467 U.S. at 1001 (quotation marks omitted) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). As this Court correctly recognized, the relevant independent source of law that governs the highly-regulated enterprises is HERA, especially where, as here, the enterprises are in a conservatorship governed by HERA's strictures. And, as this Court recognized in *Fairholme* and has recognized in other cases, when a financial institution enters a federal conservatorship, it forgoes the traditional property rights that private businesses might otherwise possess in their net worth, including the right to exclude the government from using that property. *See supra* pp. 23-24.[6]

[6] At one point in their brief, plaintiffs appear to assert that HERA's enactment itself might qualify as a taking. *See* Br. 27-28 (asserting that HERA should not be "assumed [to be] valid[]" under the Takings Clause and may be "unconstitutional"

Continued on next page.

Contrary to plaintiffs' contention, this Court's conclusion that the enterprises lacked a cognizable property interest broke no new ground, and, in fact, followed from the well-established precedent on which this Court relied. In *Golden Pacific*, 15 F.3d 1066, for example, a shareholder of a bank argued that the Comptroller of Currency's decision to place the bank in receivership constituted an unconstitutional taking of the bank's property (and the value of their shares). *Id.* In rejecting that claim, this Court held that the bank lacked the required property interest to support a Fifth Amendment claim because "[a]t those times when the Comptroller could legally inspect the Bank or place it in receivership, the Bank—which Golden Pacific owned—was unable to exclude the government from its property." *Id.* at 1074. And because "the Bank did not have the right to exclude the Comptroller," neither "the Bank nor Golden Pacific 'could have developed a historically rooted expectation of compensation' for the seizure which resulted from the Comptroller's actions." *Id.*

That ruling accorded with this Court's conclusion two years earlier in *California Housing*, 959 F.2d 955. There, a shareholder of a savings and loan argued that the Resolution Trust Corporation's (RTC) appointment as a conservator of the savings and loan and RTC's subsequent transfer of the saving and loan's assets to a different

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(quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 637 (2001) (Scalia, J., concurring))). But plaintiffs elsewhere make clear that their takings claim is directed solely at the Third Amendment, not at HERA or the imposition of the conservatorship. Br. 34 n.12. Any such claim is accordingly waived and would fail in any event. *See, e.g.*, *Washington Fed. v. United States*, 26 F.4th 1253 (Fed. Cir. 2022) (rejecting the claim that FHFA's appointment as conservator constituted a taking).

entity constituted a Fifth Amendment taking. *Id.* at 957. This Court rejected that claim, reasoning that the savings and loan lacked the requisite property interest because, as "a consequence of the regulated environment in which [the savings and loan] voluntarily operated," it "lacked the fundamental right to exclude the government from its property at those times when the government could legally impose a conservatorship or receivership." *Id.* at 958. Accordingly, neither the savings and loan nor the shareholder "could have developed a historically rooted expectation of compensation for" the RTC's appointment as conservator and subsequent transfer of the savings and loan's assets. *Id.*

This Court's conclusion in *Fairholme* that the enterprises lacked a cognizable property interest in their profits at the time of the Third Amendment follows directly from this Court's decisions in *Golden Pacific* and *California Housing*. As was the case with the financial institutions at issue in those cases, in light of the regulatory scheme under which the enterprises operate, they lack the fundamental right to exclude the government from controlling their assets during a conservatorship. They thus have no expectation of compensation for actions taken by the conservator which are consistent with the conservator's statutory conservatorship authority. Indeed, HERA, the federal law that regulates the enterprises, is modeled after the regulatory schemes that were applicable to the financial institutions in *Golden Pacific* and *California Housing*. *See, e.g.*, *Jacobs v. FHFA*, 908 F.3d 884, 893 (3d Cir. 2018) (noting that HERA "is

closely patterned on an earlier financial-institution-rescue law, the Financial Institutions Reform, Recovery, and Enforcement Act").

Plaintiffs unsuccessfully attempt to distinguish *Golden Pacific and California Housing* on the ground that the two cases allegedly involved the seizure and sale of a financial institution's assets for a purportedly private purpose, whereas the conservator's sale of the enterprises' property served a public interest. Br. 30. Plaintiffs' purported distinction fails on its own terms. As this Court recognized in *Golden Pacific*, a federal regulator's decision to place a financial institution into conservatorship or receivership and to sell or transfer that institution's assets is not designed to serve a private interest but rather "to promote the public interest in a sound banking system." *Golden Pac.*, 15 F.3d at 1074 (quoting *American Cont'l Corp. v. United States*, 22 Cl. Ct. 692, 696 (1991)). Plaintiffs are therefore wrong in suggesting that the actions of the federal regulators in *Golden Pacific* and *California Housing* involved the seizure of property for private use.

And, in any event, this Court did not reject the plaintiffs' takings claims in *Golden Pacific* and *California Housing* based on the use to which the conservator or receiver put the financial institution's property. Rather, this Court concluded that the takings claims in those cases failed because the relevant financial institutions lacked a cognizable property interest in their assets and profits given the regulatory regime to which those institutions were subject. *Golden Pac.*, 15 F.3d at 1073-74; *California Hous.*,

959 F.2d at 957-58. That conclusion did not in any way turn on the reasons why the regulator sold or transferred the institutions' property.

Plaintiffs' assertion (Br. 22-24) that the *Fairholme* decision conflicts with the Supreme Court's decision in *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), likewise misses the mark. In *Kimball*, the Supreme Court addressed whether the calculation of just compensation for a business temporarily requisitioned by the United States during wartime needed to account for the "going-concern value" of that business. *Id.* at 9. The Court concluded that it did, explaining that the "earning capacity of the business" above and beyond the value of such tangibles as the "land, plant, and equipment" would be compensable if taken. *Id.* *Kimball* did not present the question whether the private owners of the laundry business had a cognizable property interest in their business and its assets—the only question was how to value that interest and whether the intangible "going-concern value" could be included. Nor, of course, did *Kimball* confront any questions regarding the property interests of a highly regulated financial institution that has been placed in a federal conservatorship or receivership. The Supreme Court's decision in *Kimball* thus has no bearing on the issue this Court resolved in *Fairholme*, *Golden Pacific*, and *California Housing*.

This Court's decision in *Fairholme* likewise does not conflict with the Supreme Court's decision in *Webb's*, 449 U.S. 155. *See* Br. 28-29. In that case, the Supreme Court required a state to pay just compensation for unilaterally appropriating the

interest that accrued on money deposited with the state court in an "interpleader fund." *Webb's*, 449 U.S. at 160-64. Unlike *Webb's*, the Third Amendment did not involve any such unilateral appropriation. Rather, it involved a negotiated agreement between Treasury and the enterprises (acting through their conservator) to amend the existing Purchase Agreements. *See infra* pp. 10-11. And, in any event, the Supreme Court concluded that the petitioner in *Webb's* had a cognizable property interest in the interest earned on the funds deposited with the court because, "under the narrow circumstances of th[e] case," the Court found no basis for departing from the "usual and general rule . . . that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who" are entitled to the principal. *Webb's*, 449 U.S. at 162, 164. As discussed above, in the unique context of a financial institution that is operating under a federal conservatorship or receivership, the traditional rules governing ownership and the right to control corporate property do not apply. *See surpa* pp. 27-29.

2. Nothing in *Tyler v. Hennepin County* casts doubt on the soundness of this Court's analysis in *Fairholme*.

Plaintiffs additionally assert (Br. 31-36) that this Court's decision in *Fairholme* should be overruled because it is purportedly irreconcilable with the Supreme Court's later decision in *Tyler*, 598 U.S. 631. That assertion is without merit.

The circumstances giving rise to the takings claim at issue in *Tyler* bear no resemblance to those present here. The petitioner in *Tyler* owed Hennepin County a

$15,000 tax debt. *Tyler*, 598 U.S. at 635. Acting in accordance with Minnesota's forfeiture laws, Hennepin County seized the petitioner's condominium and subsequently sold it for $40,000. *Id.* As Minnesota law allowed, the County did not return to the petitioner the amount of the proceeds that exceeded her tax debt but instead kept the surplus $25,000 for itself. *Id.* The petitioner challenged the County's retention of the excess, claiming that the County's actions violated the Takings Clause.

The Supreme Court agreed that a taking had occurred. *Tyler*, 598 U.S. at 647-48. In deciding whether the petitioner possessed a cognizable property interest in the surplus value of her home, the Court examined the "existing rules [and] understandings" about the property rights of homeowners under such circumstances. *Id.* at 638 (quoting *Phillips v. Washing Legal Found.*, 524 U.S. 156, 164 (1998)). That examination included consideration of state law, traditional property law principles, historical practice, and the Court's precedents. *Id.* The Court then found that these sources established that property owners possess a historically-rooted interest in the surplus value of their homes and are entitled to that surplus following a tax sale. *See id.* at 638-45.

This Court's analysis in *Fairholme* did not differ in any material way from the Supreme Court's analysis in *Tyler*. Like the Supreme Court, this Court examined the "rules and understandings" governing the property rights of an entity subject to a federal conservatorship. In so doing, the Court reviewed the federal law that governs the enterprises' conservatorship (HERA), the historical treatment of financial

institutions operating under federal conservatorships and receiverships, and this Court's and the Supreme Court's precedent. Plaintiffs are thus wrong when they assert (Br. 34) that this Court failed to consider relevant history and precedent. That this Court in *Fairholme* reached a different conclusion regarding the existence of a cognizable property interest than did the Supreme Court in *Tyler* simply reflects the very different factual contexts in which the alleged taking occurred and the differing property interests, rules, and expectations that apply in those contexts.

Plaintiffs insist that HERA "regulate[d] away" the enterprises' property interests, purportedly in contradiction to the Supreme Court's observation in *Tyler* that the government cannot "sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate." Br. 33 (emphasis omitted) (quoting *Tyler*, 598 U.S. at 1375). HERA did no such thing. As relevant here, the relevant portions of HERA merely set forth the rules and regulations that govern the operation of the enterprises when they are placed in federal conservatorships. Statutes governing conservatorships and receiverships of financial institutions have a long pedigree, and those provisions of HERA were modeled on such longstanding statutes. *See supra* pp. 28-29. Such statutes have never been found to constitute a taking of the financial institutions' property.

In any event, plaintiffs' objections to HERA have no bearing on their takings claim. Plaintiffs make clear that they are not alleging that HERA or FHFA's decision to place the enterprises into conservatorship constituted a taking (nor could they, *see*

supra p. 26 n.6). Br. 34 n.12. Accordingly, plaintiffs concede that, at the time of the Third Amendment, FHFA as conservator possessed broad authority over the enterprises' property, including the authority to "transfer or sell any asset" of the enterprises, 12 U.S.C. § 4617(b)(2)(G), if FHFA determined that doing so was "in the best interests of the regulated entity or the Agency," *id.* § 4617(b)(2)(J)(ii). Plaintiffs' claim that, at the time of the Third Amendment, the enterprises retained the traditional interest in their net worth and control over that net worth that private businesses generally possess cannot be squared with the extensive control over their assets that the enterprises ceded to FHFA upon its appointment as conservator.

3. The Third Amendment was not a taking.

In the concluding section of their opening brief, plaintiffs argue (Br. 37-39) that if, contrary to this Court's holding in *Fairholme*, the enterprises possessed an interest in their net worth cognizable under the Fifth Amendment at the time of the Third Amendment, then the Third Amendment effected a taking of that property interest. Because *Fairholme* is controlling, and because its validity is unaffected by *Tyler*, there is no occasion for the Court to reach this assertion which, in any event, is quite wrong.

The Third Amendment did not "take[]" property within the meaning of the Takings Clause. U.S. Const. amend. V. The Amendment did not unilaterally appropriate the enterprises' net worth but instead was a negotiated agreement between Treasury and the enterprises (acting through their conservator). Under the Amendment, the enterprises were relieved of their obligations to pay Treasury

dividends at fixed rates—obligations that totaled $19 billion per year at the time and that the enterprises had repeatedly been unable to fulfill. *See Collins*, 141 S. Ct. at 1773. The enterprises also were relieved of their obligations to pay periodic commitment fees to which Treasury was entitled. *See id.* at 1774.

In return, the enterprises agreed to pay Treasury their quarterly net worth, less a specified capital reserve, while the Third Amendment remained in effect. *See Collins*, 141 S. Ct. at 1774. That arrangement ensured that the enterprises "would never again have to use capital from Treasury's commitment to pay their dividends," which in turn "ensured that all of Treasury's capital was available to backstop the companies' operations during difficult quarters." *Id.* at 1777. The Amendment thus was not a taking but a negotiated financial transaction in which each side received valuable consideration. *See, e.g.*, *Monsanto*, 467 U.S. at 1007 (The "voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.").

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

/s/ Anna M. Stapleton
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,693 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

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