Nos. 24-1167, 24-1168

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.

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

APPELLANTS BRYNDON FISHER, BRUCE REID, AND ERICK SHIPMON'S PETITION FOR INITIAL HEARING *EN BANC*

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2024-1167

Short Case Caption Fisher v. US

Filing Party/Entity Plaintiffs Bryndon Fisher, Bruce Reid, & Erick Shipmon

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
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5. Counsel must file an amended Certificate of Interest within seven days after any information on this form changes. Fed. Cir. R. 47.4(c).

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

Date: 12/4/23

Signature: s/ Amber L. Schubert

Name: Amber L. Schubert

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

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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Edward F. Haber		

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

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If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

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☑ None/Not Applicable ☐ Additional pages attached

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Statutes & Rules

STATEMENT OF COUNSEL

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance.

In 2012, the United States expropriated the net worth of two private companies, Fannie Mae and Freddie Mac, by taking for itself their 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 uncompensated appropriation of a private company's entire net worth states a claim under the Takings Clause of the Fifth Amendment to the U.S. Constitution.

/s/ *Amber L. Schubert*
Counsel for Petitioners-Appellants

INTRODUCTION

This case concerns the Government's taking of two private companies' entire net worth for public use without just compensation.

In an earlier decision, a panel of this Court held that private companies have no property interest in their own net worth. *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1286 (Fed. Cir. 2022) . That decision was wrong at the time and should be overruled. It failed to grapple with the established background principles of corporate property law—and whether Congress could, through statute, abrogate those long-settled property rights under the U.S. Constitution. Courts have long held that state and federal governments cannot simply avoid their obligations under the Takings Clause by enacting laws that abrogate property interests.

If there were any doubt, the U.S. Supreme Court's subsequent decision in *Tyler v. Hennepin Cty. Minn.*, 143 S. Ct. 1369 (2023), made clear that *Fairholme* is no longer good law. Under *Tyler*, 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 government 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). Because *Fairholme* did not conduct that analysis, it now conflicts with a binding decision of the U.S. Supreme Court. For those reasons, the full Court should overrule it.

The question presented is also of exceptional importance. This case concerns the Government's taking of the entire Net Worth of two of the nation's leading providers of home-mortgage financing, the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (together, "the Enterprises"). At the moment these two mortgage giants exited a period of financial uncertainty and were on the cusp of recognizing extraordinary profits, the Government intervened and seized all of the Enterprises' assets. That transaction, known as the Net Worth Sweep, resulted in a windfall of $133.35 billion to the U.S. Treasury. Appx00510, Appx00543.

Accordingly, to ensure the uniformity of this Court's decisions, this Court should grant this petition for initial hearing *en banc* and overrule *Fairholme*.

BACKGROUND

I. The Taking of Fannie Mae and Freddie Mac's Entire Net Worth.

Congress created Fannie and Freddie to help boost the housing market. The Enterprises purchase and guarantee mortgages originated by private banks. They were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. Appx00505, Appx00538. Before the financial crisis of the late 2000s, Fannie and Freddie were reliably profitable. They "were not in financial distress." Appx00505, Appx00538.

During the financial crisis, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), 122 Stat. 2654. HERA authorized the Federal Housing Finance Agency ("FHFA") under certain conditions to appoint FHFA as conservator for each Enterprise. On September 6, 2008, the Enterprises entered conservatorships. Appx00507, Appx00540.

Following the conservatorships, FHFA caused the Enterprises to enter into a Preferred Stock Purchase Agreement ("PSPA"), through which the U.S. Treasury agreed to provide up to $100 billion to each Enterprise to ensure their future solvency. Appx00507, Appx00540. In return, among other things, Treasury was issued shares of the Enterprises' preferred stock with a liquidation preference. *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 PSPAs. *Id.* Although the Enterprises had not yet publicly announced reversals of their paper losses, they were projected to be highly profitable (and solvent) indefinitely into the future.

With this knowledge, Treasury sought to amend the PSPAs. Appx00509, Appx00542. The "key component of the amended PSPAs" was the 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

PSPAs. *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 obvious: "every dollar of earnings that [the Enterprises] generate will be used to benefit taxpayers." Appx00509-00510, Appx00542-00543.

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." Appx00510, Appx00543. 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.* In other words, the FHFA elevated the interests of taxpayers above those of the Enterprises.

As a result of the Net Worth Sweep, "Treasury reaped a **windfall** of [$133.35 billion] in comparison to what it would have received absent changes to the PSPAs." *Id.* (emphasis added). Petitioners allege that this "windfall" was a taking in violation of the Fifth Amendment to the U.S. Constitution.

II. The Proceedings Below.

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.

Petitioners here asserted derivative claims 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, although private shareholders assert those claims, the Enterprises themselves are the parties that stand to benefit from any recovery.

On December 13, 2019, the Claims Court granted in part and denied in part Defendants' motion to dismiss in *Fairholme v. United States*, 147 Fed. Cl. 1 (2019). That decision allowed only the derivative claims to proceed. *Id.* The Claims Court subsequently denied the Government's motion to dismiss the two cases at issue here. Appx00445, Appx00472. It certified its decision in *Fairholme* and the related cases for interlocutory review, which this Court granted.

III. The Panel's Decision in *Fairholme*.

On February 22, 2022, a panel of this Court decided *Fairholme*, 26 F.4th 1274. Before it reached the merits of the constitutional claims, the panel (i) affirmed the ruling that plaintiffs asserted claims against the United States; (ii) upheld the Claims Court's ruling that claims arising from the Net Worth Sweep were derivative, not direct; and (iii) held that plaintiffs were not collaterally estopped from asserting constitutional derivative claims. *Id.*

On the merits of the derivative takings claim, the *Fairholme* panel held 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.[1]

Following *Fairholme*, the Claims Court dismissed the *Fisher* and *Reid* actions, holding that it was bound by *Fairholme*. Appx0003. Plaintiffs appealed.

LEGAL STANDARD

Under Federal Rule of Appellate Procedure 35, initial hearing *en banc* "is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a).

This Court's Internal Operating Procedures make clear that among the reasons for initial hearing *en banc* are:

> (a) Necessity of securing or maintaining uniformity of decisions;
> (b) Involvement of a question of exceptional importance;
> (c) Necessity of overruling a prior holding of this or a predecessor court expressed in an opinion having precedential status; or
> (d) The initiation, continuation, or resolution of a conflict with another circuit.

Fed. Cir. IOP #13.

ARGUMENT

Initial hearing *en banc* is warranted to address a question of exceptional importance: whether the Government's uncompensated appropriation of a private

[1] It assumed without deciding that the Claims Court was correct that HERA's Succession Clause did not bar constitutional derivative claims. *Id.* at 1302.

company's entire net worth states a claim under the Takings Clause of the Fifth Amendment to the U.S. Constitution.

That question not only affects this case—which itself concerns a $133.35 windfall to the U.S. Treasury—but scores of future cases where a state or federal government may seize the assets of a private company without just compensation.

While this Court's grant of initial hearing *en banc* would be extraordinary, the Court has done it before. *See*, *e.g.*, *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 957 F.3d 1382 (Fed. Cir. 2020) (granting initial hearing *en banc* to consider whether one of the Court's precedents should be overruled); *Martinez v. United States*, 272 F.3d 1335, 1335 (Fed. Cir. 2001) (*sua sponte* ordering initial *en banc* hearing of whether a precedent should be overruled); *Raney v. Fed. Bureau of Prisons*, 222 F.3d 927, 929 (Fed. Cir. 2000) (hearing case *en banc* where "the outcome of this appeal … turns on our precedent").

While that standard is high, this case meets it. In deciding whether Congress could abrogate private property rights through the enactment of a statute, the Claims Court relied on this Court's decision in *Fairholme*. That decision was wrong when it was decided. *See Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 155-59 (1980) (limiting the ability of governments to avoid the Takings Clause by enacting laws that abrogate traditional, established property interests).

If there were any uncertainty in the law at the time, the Supreme Court's subsequent decision in *Tyler* effectively overruled *Fairholme*. *Tyler* held 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 government is attempting to "sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate." *Tyler*, 143 S. Ct. 1375 (cleaned up). Because *Fairholme* did not consider whether Congress could abrogate the established principles of corporate property law in light of history and precedent, it no longer reflects current law.

Nonetheless, because *Tyler* did not expressly overrule *Fairholme*, only this Court, sitting *en banc*, can correct the error. *See Strickland v. United States*, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005) (holding that unless a circuit's precedent is "expressly overruled … by a subsequent Supreme Court decision," it "controls until the circuit court overrules it en banc"). This Court should do so now.

I. *Fairholme*'s Merits Holding Was Wrongly Decided.

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). A threshold issue for

any takings claim is whether the plaintiff has identified "a property interest protected by the Fifth Amendment." *Id*. That was the prerequisite upon which a panel of this Court based its decision in *Fairholme*.

On the merits of the derivative takings claim, *Fairholme* held that "the Enterprises lacked the right to exclude the government from their net worth after the passage of HERA…." *Fairholme*, 26 F.4th at 1303. In other words, the panel held that the passage of HERA and the imposition of the conservatorships stripped the Enterprises of their property interests in their own net worth. That holding does not comport with history or precedent.

In resolving the scope of property interests, a court considering a takings claim must 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); *Baker v. McKinney*, 84 F.4th 378, 383 (5th Cir. 2023) (finding 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.). This Court must "make [its] own determination, without deference to state judges, whether [a] challenged decision deprives the claimant of an established property right." *Id.* at 726 n.9. 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 (D.C. Cir. 1992) (holding 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 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.").

The *Fairholme* panel, however, did not consider the historical property rights afforded to companies in their own net worth. Specifically, it did not

consider the 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 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). Corporations law establishes that a corporation has the power to sell or otherwise dispose of its assets and, *a fortiori,* owns and controls those assets. Del. Code tit. 8, § 271.

Nor did the panel consider established Supreme Court precedents concerning a company's property interests. In *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1940), the Supreme Court affirmed the basic principle that a company has a property interest in the value of the business. There, the United States seized control of the operations of a laundry company for use 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 nonetheless 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 held that the Takings Clause requires compensation for not only physical property owned by a company but also the company's "going-concern value"—the "intangible" value of the company itself. 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. Yet the *Fairholme* panel did not consider this precedent.

Rather, *Fairholme* assumes that the mere passage of a statute and the imposition of a conservatorship is enough to redefine longstanding property rights. *Fairholme*, 26 F.4th at 1303. But *Fairholme*'s holding would allow governments to avoid the Takings Clause by legislating away any background property interests. "Under the Constitution, property rights cannot be so easily manipulated." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021). 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) (finding that Government's retention of such an unfettered right to abrogate a property interest "is not and cannot be the law").

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. *Webb's Fabulous Pharmacies*, 449 U.S. at 155-59. Florida's Supreme Court had ruled that there was no taking because, under Florida law, the deposited funds were "considered public money." *Id.* at 158-59. The Supreme Court reversed. It held that a statute could not

recharacterize private property as public to allow it to seize the money for public use. *Id.* at 164. In short, "a State, by *ipse dixit*, may not transform private property into public property without compensation…." *Id.* "This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent." *Id.* Put another way, the Government cannot take private assets for public use simply by first announcing that a business no longer has a property interest in its own assets. Yet, that is precisely what *Fairholme* allowed.

II. *Fairholme* Conflicts with Supreme Court Precedent.

After the *Fairholme* panel decision, the U.S. Supreme Court decided *Tyler v. Hennepin County*. If there were any doubt, *Tyler* resolved whether the Government can extinguish a property right merely through the passage of a statute. It cannot. The Supreme Court held that a government cannot "sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate." *Tyler*, 143 S. Ct. at 1375.

Tyler clarified important aspects of regulatory takings law, contradicting the *Fairholme* panel's holding on the merits of the derivative takings claim. *Tyler* concerned a state statute that permitted the Government to obtain a judgment against a property for unpaid real estate taxes. *Tyler*, 143 S. Ct. at 1373-74. If the taxpayer did not pay 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, 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 could 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. *Id.* at 1375. 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).[2] Instead, courts must also "look to 'traditional property law principles,' plus historical practice and [Supreme Court] precedents." *Id.*

The *Fairholme* panel, however, did not conduct any such analysis. Its discussion of the relevant property interest under the Takings Clause focused entirely on the effect of HERA (a federal statute) on plaintiffs' property rights and

[2] Although *Tyler* concerned a state statute, the Fifth Amendment's Takings Clause applies equally to federal laws. *See Stop the Beach*, 660 U.S. at 715.

did not discuss traditional property law principles, historical principles of corporate property law, or many of the Supreme Court's precedents. After *Tyler*, *Fairholme*'s holding—allowing the abrogation of property rights merely through the passage of a statute—is no longer operative.[3] This Court should say so.

III. The Question Presented Is of Exceptional Importance.

Finally, there can be doubt that the question at issue in this appeal—whether the Government can seize the entire net worth of two of the nation's leading mortgage financers—is extraordinarily important.

The United States, under the guise of a conservatorship unlike any other, expropriated an estimated $133.35 billion from two private companies. That transaction, known as the Net Worth Sweep, transferred "enormous amounts of wealth" to the U.S. Treasury "to serve public interests." *Collins*, 141 S. Ct. at 1770, 1776. The "enormous potential" sums at issue in this case (and the potential effects on the federal budget) is a strong factor favoring hearing *en banc*. *Cf. Fid. Fed. Bank & Tr. v. Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., concurring).

The decision is also exceptionally important to takings jurisprudence. The panel's decision in *Fairholme*, if let stand, could insulate the federal government

[3] To be clear, Derivative Plaintiffs allege that the taking occurred at the time of the Net Worth Sweep, when the Government seized the Enterprises' assets. Because HERA authorized the Government's actions, *see Collins v. Yellen*, 141 S. Ct. 1761, 1303-04 (2021), to the extent HERA conflicts with the Takings Clause, it is unconstitutional as applied to the Net Worth Sweep.

from any takings liability for its operation of conservatorships and receiverships throughout the financial system. And it could allow Congress to sidestep the Takings Clause in other cases by merely passing a statute that disavows traditional property interests in the assets it wishes to seize. *See Tyler*, 143 S. Ct. at 1375.

To be clear, petitioners fully acknowledge that initial hearing *en banc* is reserved for exceptional cases. But in light of the extraordinarily important and recurring constitutional questions at issue in this appeal—coupled with the enormous stakes—this is the rare case that deserves the full Court's consideration.

CONCLUSION

For these reasons, this Court should grant initial hearing *en banc* and overrule *Fairholme*'s holding that a government may abrogate a private company's property rights merely through the enactment of a statute.

Dated: April 1, 2024

Respectfully submitted

/s/ Amber L. Schubert

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FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 24-1167, 24-1168

Short Case Caption: Fisher v. U.S.

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