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

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

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INTRODUCTION

The central question in this appeal is whether *Fairholme*'s holding—that the Government's expropriation of the entire net worth of Fannie and Freddie was not a taking—still controls. *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022). The Supreme Court's intervening decision in *Tyler v. Hennepin County*, 143 S. Ct. 1369 (2023), directly calls that decision into question. *Tyler* held, contrary to *Fairholme*, that governments cannot "purport[] to extinguish [a] property interest by enacting a law" that selectively disavows traditional property law principles to avoid paying just compensation. *Id.* at 1376-79.

The Government insists that this Court is precluded by *res judicata* from even considering the import of *Tyler* because *Fairholme* addressed the same issue with respect to the Enterprises. That argument is wrong for two reasons. First, the preclusive effect of the *Fairholme* panel's decision is negated by the serious conflicts of interest the *Fairholme* plaintiffs held while litigating a derivative takings claim—which resulted in the *Fairholme* plaintiffs' complete failure to defend the merits of that claim. Second, the Court need not give preclusive effect to a prior decision that has been displaced by binding authority from the U.S. Supreme Court.

The Government argues that even if *Fairholme* should not be afforded preclusive effect, it was correct. It ignores, however, that *Fairholme* is

fundamentally incompatible with *Tyler's* core holding that a statute cannot abrogate traditional property interests to allow it to evade liability under the Takings Clause. *Tyler*'s holding is particularly apt where, as here, a single statute (HERA) purports to be the law that ***both*** abrogates a private corporation's property interests ***and*** allows the Government to appropriate that very same property.

This Court should follow *Tyler* and hold that Appellants state a derivative claim on behalf of the Enterprises for the expropriation of their entire net worth in violation of the Fifth Amendment's Takings Clause.

ARGUMENT

I. The Derivative Plaintiffs Are Not Barred by Claim Preclusion from Pursuing Their Takings Claim.

The Government contends that the Derivative Plaintiffs are barred by claim preclusion from pursuing their takings claim. Gov. Br. 16-22.[1] That is incorrect for two reasons. First, the *Fairholme* plaintiffs failed to adequately represent the Enterprises' interests, as required to satisfy the first element for claim preclusion (an identity of the parties or their privies). Second, the Supreme Court's intervening decision in *Tyler* undermines *Fairholme*'s preclusive effect. Appellants address each argument in turn.

[1] "Gov. Br." refers to the Brief for Appellee.

A. *The Fairholme Plaintiffs' Representation Was Inadequate.*

Preclusion applies to a subsequent derivative lawsuit only where "the shareholder [in the first action] fairly and adequately represented the corporation." *In re Sonus Networks, v. S'holder Derivative Litig.*, 499 F.3d 47, 74 (1st Cir. 2007).[2] Where, as here, a party serves in a representative capacity, "judgment for or against [them] is res judicata in a suit on the same claim by" the party in interest only if "no conflict of interest made the [representative's] representation inadequate." *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1017 (7th Cir. 1988). Here, Mr. Barrett's abdication of his derivative takings claim in *Fairholme*, particularly on appeal, demonstrates that he was an inadequate representative of the Enterprises. It prevents *Fairholme* from having a preclusive effect.

The *Fairholme* plaintiffs filed their complaint on July 9, 2013, asserting exclusively direct claims. Appx00013, Appx00038-00039. The Plaintiffs in this appeal filed their action on behalf of Fannie Mae the next month. Appx00043. Nearly five years after asserting their direct claims, on March 8, 2018, following jurisdictional discovery and multiple appellate decisions in other cases that claims concerning the Net Worth Sweep were indeed derivative, *Fairholme* filed an

[2] *See also* 18 Moore's Federal Practice - Civil § 131.40 (2023). ("A person who represents another in litigation must be properly constituted as such, limit his or her participation to the matters within his representative authority …, and must faithfully discharge that responsibility.").

amended complaint. In addition to their longstanding direct claims, they added a new plaintiff, Andrew T. Barrett, who asserted derivative takings claims for the first time. Appx00133, Appx00201-00223.

The other twelve *Fairholme* plaintiffs continued to exclusively assert direct claims. *Id.* Those twelve plaintiffs are investment funds and insurance companies with substantial holdings in Fannie Mae and Freddie Mac. Appx00142-00143. Those large-investor plaintiffs would have benefited more from a direct recovery (which would provide them with individual damages or settlement payments) than a derivative recovery (which would be paid to the Enterprises and benefit shareholders only indirectly and equally).

Even after adding a derivative plaintiff, the *Fairholme* plaintiffs—including Mr. Barrett—steadfastly maintained that their claims were direct, not derivative, in their briefing on the motion to dismiss. Appx00367-00371. They also took the same position at oral argument. Counsel who argued on behalf of the *Fairholme* plaintiffs (including Barrett) and other plaintiffs asserted: "[T]he claims we've pled as direct, are, in fact, direct." *Fairholme* ECF 445 at 180:14:17.[3] Those same plaintiffs (including Mr. Barrett) then argued, at length, why they believed the core claims in all the related cases, including the takings claim, were direct rather than

[3] "Fairholme ECF" refers to the ECF entries in the Court of Federal Claims in *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl.).

derivative. *Id.* at 180:9-189:4; *see also id.* at 189:1-189:4 ("I think it's crystal clear they are direct claims."); *id.* at 314:5-315:6 ("The central property right at issue here … are the rights of both the junior preferred and the common shareholders to receive dividends or distributions.… I want to emphasize that's the centerpiece."). Counsel for Mr. Barrett—the sole *Fairholme* derivative plaintiff —did not defend the derivative claims either in his supplemental brief on the motion to dismiss or at oral argument. *See* Appx00425-00426. Only Appellants here did so.

On appeal, Mr. Barrett maintained his position that the claims were direct. He spent nearly half his opening appellate brief asking this Court to hold that the claims arising from the Net Worth Sweep were direct. *Fairholme* Appeal Doc. 35 at 30-60.[4] The other half was spent defending those direct claims. *Id.* In fact, Mr. Barrett's only substantive argument concerning his takings claim (made in his reply brief) was that the direct plaintiffs had standing to seek compensation for the "takings **of their derivative claims**." In other words, he argued his derivative claims themselves *had already been taken*. *Fairholme* Appeal Doc. 58 at 106-13 (emphasis added). That is not only an entirely different claim, but it directly contradicted the Claims Court's ruling in the very same case that the *Fairholme*

[4] "*Fairholme* Appeal Doc. __" refers to documents filed in the appeal in *Fairholme Funds, Inc. v. United States*, No. 2020-1912 (Fed. Cir.).

plaintiffs had stated a derivative claim. Thus, Mr. Barrett effectively abandoned his derivative takings claim and went all-in on his direct claims.

Given that Mr. Barrett abandoned his derivative claims, when the Federal Circuit resolved those claims, it did so without the benefit of **any** briefing on the merits. Mr. Barrett did not describe any property interest held by the Enterprises that was taken or address the import of HERA to the continued vitality of any such property interest. The inadequacy of Mr. Barrett's representation infected the decision the Government now seeks to invoke for its purported preclusive effect.

The Government points to several places where it contends Mr. Barrett "zealously pursue[d] his derivative takings claims." Gov. Br. 20-21. None of those sources reveal any such zealous pursuit. The Government contends that Mr. Barrett "successfully persuaded the Court of Federal Claims to deny the government's motion to dismiss his derivative takings claim." Not true. The Government's only citation for this contention is the Court of Federal Claims' decision denying the motion to dismiss, which was itself the product of consolidated motion to dismiss proceedings in which only Appellants here participated and advocated for the derivative takings claim.[5] The Government cites no brief or argument transcript where Mr. Barrett advocated for his derivative claims. There is none.

[5] *See*, *e.g.*, Appx00427-00434.

The Government also points to several briefs Mr. Barrett filed in the *Fairholme* appeal, but those briefs again reveal no advocacy (zealous or otherwise) on the merits of a derivative takings claim. Gov. Br. 20. The pages of Mr. Barrett's supplemental opening brief to which the Government points focused entirely on the "standing" issue of whether HERA's succession clause barred derivative claims.[6] It did not discuss *the merits* of the derivative takings claims. Mr. Barrett's reply brief likewise failed to defend the derivative takings claims on the merits.[7]

In short, on appeal, Barrett presented ***no authority*** to this Court on the merits of a derivative takings claim, including on the background principles of property law regarding a corporation's property rights in its net worth. Nor did Mr. Barrett address whether Congress could, by statute, sidestep the Takings Clause by purporting to abrogate historically recognized property interests, thus enabling the Government's compensation-free appropriation of those same interests.[8]

Mr. Barrett was not merely inadequate because he did a poor job of advocating for the merits of the derivative takings claims. Rather, Mr. Barrett's

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[6] *Fairholme* Appeal Doc. 38 at 21-31.

[7] The Government also argues that Barrett's petition for a writ of certiorari to the Supreme Court reflects his "zealous advocacy" defending the merits of the derivative takings claims. Gov. Br. 20-21. But that is beside the point. Whatever Barrett did *after* the *Fairholme* panel's decision to try to salvage some viable claim does not speak to whether this Court's decision in *Fairholme* was the product of zealous advocacy or conflicted, inadequate representation. Nor could it.

[8] *See id.* at 26-31.

conduct reflects ***a near-complete abdication*** of his derivative claims. It is difficult to imagine a less adequate representative for the Enterprises than one who fails to present **any** argument on the merits of those claims.

B. *Changes in Controlling Law Prevent Preclusion.*

Even where the requirements for preclusion are satisfied, "a change in law justifies an exception to preclusion." *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019); *Bobby v. Bies*, 556 U.S. 825, 836 (2009) (holding "an exception [to preclusion is] warranted [in the event of an] intervening decision" that changes the law"); Restat. 2d of Judgments § 28(2) ("relitigation of the issue in a subsequent action … is not precluded [when] a new determination is warranted in order to take account of an intervening change in the applicable legal context"). An intervening Supreme Court decision that contradicts the legal rule applied in the prior proceeding negates any preclusive effects. *Bobby*, 556 U.S. at 836.

That is exactly what occurred here. The Supreme Court's decision in *Tyler* undermines the core premise of the *Fairholme* panel's merits decision on the Enterprises' derivative takings claim. *Tyler* rejected approaches like that of the *Fairholme* panel that permit governments to nullify property interests by statute to enable the appropriation of those same interests. At a minimum, litigation of the takings principles at issue in this case "is not precluded [because] a new

determination is warranted to take account of an intervening change in the applicable legal context." Restat. 2d of Judgments § 28(2).

The Government argues that "[t]here is no 'change in law'… exception" to *res judicata* principles." Gov. Br. 18-19. (citing *Roche Palo Alto LLC v. Apotex, Inc.*, 531 F.3d 1372, 1380 (Fed. Cir. 2008)). Yet, as the Government concedes (and *Roche Palo Alto* observes), a change in law precludes the application of a prior decision if it involves "moment[o]us changes in important, fundamental constitutional rights." *Roche Palo Alto*, 531 F.3d at 1380; Gov. Br. 19 n.5. The Government summarily contends that standard is not satisfied here. The reality, however, is that *Tyler* was a landmark decision that established a legal standard governing an important constitutional right. *See generally E. Enters. v. Apfel*, 524 U.S. 498, 537 (1998) (describing Takings Clause as embodying "fundamental principles of fairness"). Appellants respectfully submit that the exception, even as articulated by *Roche Palo Alto*, is satisfied here.

In any event, the year after this Court decided *Roche Palo Alto*, the U.S. Supreme Court made clear that "an exception" to preclusion principles "[is] warranted [in the event of an] intervening decision that changes the law." *Bobby*, 556 U.S. at 836. Following *Bobby* (and after *Roche Palo Alto*), this Court itself confirmed that an "intervening change in the law" resulting from a decision of the U.S. Supreme Court "provides an exception" to preclusion principles. *Dow Chem.*

Co. v. Nova Chems. Corp., 803 F.3d 620, 623-24, 627-31 (Fed. Cir. 2015). *Dow Chemical* held there are three requirements for the change-in-law exception to apply: (i) "the governing law must have been altered"; (ii) "the decision sought to be reopened must have applied the old law"; and (iii) "the change in law must compel a different result under the facts of the particular case." *Id.* at 629-30.

Appellants satisfy each of these requirements. First, *Tyler* certainly altered the law compared to *Fairholme*. *Tyler* significantly curtailed the weight given to recently enacted statutes in defining the contours of what "traditional property law principles" are protected by the Fifth Amendment, thus preventing the Government from "sidestep[ping]" the Takings Clause by redefining property interests. *Tyler*, 143 S. Ct. at 1375-76. *Tyler* itself reached this conclusion in part based upon prior Supreme Court decisions, but that is unremarkable. The Supreme Court rarely writes on a blank slate; its decisions are based on its precedents. As this Court explained in *Dow Chemical*, an intervening Supreme Court precedent satisfies the first element if it applies a different test than the Federal Circuit applied. *Id.* at 630. *Tyler* plainly applied a different legal test than this Court did in *Fairholme*.

As to the second and third elements, the *Fairholme* panel's decision applied law inconsistent with *Tyler* for all the same reasons Appellants explained in their opening brief and below. Accordingly, *Tyler* compels a different result than the panel reached in *Fairholme*. In short, this Court should not reflexively follow its

prior decision because doing so would require it to ignore intervening and controlling Supreme Court precedent that dictates a different outcome.

II. *Fairholme* Is Incompatible with Controlling Precedent, Including the Supreme Court's Intervening Decision in *Tyler*.

A. *Appellants Plead a Cognizable Property Interest.*

The Government does not dispute that, as a general matter, the Court must consider "traditional property law principles" in defining property interests deserving of Fifth Amendment protection.[9] But it has little to say about the longstanding law that recognizes a corporation's interest in its own going concern value. The Government does not engage at all with the state-law authorities confirming corporations' interests in their own net worth. It merely attempts to distinguish two Supreme Court authorities that Appellants cited.[10] Those Supreme Court authorities are on point.

The Government argues that *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), "did not present the question whether the private owners of [a] laundry business had a cognizable property interest in their business and its assets." Gov. Br. 30. But Appellants do not contend the Government took the Enterprises' "owners" property. Rather, Appellants assert claims derivatively on behalf of the

[9] Appellants' Br. 21-24.

[10] Appellants' Br. 22-24.

Enterprises themselves. The Supreme Court observed in *Kimball* that **both** "intangible" assets, such as a business's "going concern value," and tangible assets, such as "physical property," can be taken, triggering the requirement for just compensation. *Kimball Laundry*, 338 U.S. at 10-11. Thus, *Kimball* expressly confirms the scope of a company's property interest in its own net worth.

Similarly, the Government tries to distinguish *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), by arguing that the Net Worth Sweep was a "negotiated agreement between Treasury and the Enterprises," not a "unilateral appropriation" like in *Webb's*.[11] At the time of the Net Worth Sweep, however, the FHFA—acting in a governmental capacity with a statutory mandate to benefit the "public"—controlled the Enterprises. To characterize the Net Worth Sweep as an arm's-length "negotiated agreement" ignores reality. Appellants alleged (and the Claims Court credited) that "Treasury did **not** negotiate [the Net Worth Sweep] with the FHFA-C." Appx00450-00451 (emphasis added). Rather, at the time of the Third Amendment, "FHFA-C was operating under the belief that Treasury would benefit from the PSPA amendment" and "endorsed the objective of maximizing the benefits of the [Net Worth Sweep] for taxpayers." *Id.* Because the Government was on both sides of the transaction, with Treasury and FHFA operating with the

[11] Gov. Br. 30-31 (emphasis added).

unified purpose of benefiting taxpayers at the Enterprises' expense, the Net Worth Sweep was a unilateral appropriation of the Enterprises' assets for public use.

With little to say to about established historical principles of corporate law, the Government falls back on several arguments to distract from those principles. It argues that (1) the Enterprises' status as regulated entities negates traditional property law principles; (2) HERA provides the exclusive source for identifying the Enterprises' property interests; and (3) the Enterprises' agreement to enter conservatorship abrogated their property interests. Each argument lacks merit.

1. No Regulatory Regime Could Have Negated All of the Enterprises' Investment-Backed Expectations.

The Government argues for a simple, categorical rule: regulated businesses, particularly those that enter regulatory regimes voluntarily, cannot complain when the Government appropriates their property for public use.[12] This is not the law.

This Court addressed the same argument in *Cinega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003). There, regulation restricted the ability of developers to prepay on mortgages obtained through a federal low-rent housing program, which they voluntarily entered and understood to involve greater regulation than the broader rental housing market. *Id.* at 1323. Like here, the Government contended that the businesses voluntarily entered agreements they

[12] Gov. Br. 28.

knew were subject to regulation. *Id.* at 1330. This Court, however, rejected the argument that voluntary entry into such a regulatory regime eliminates all protections for established property interests:

> To understand what is wrong with this argument it is necessary to understand the true scope of the effect implied by this viewpoint. The government, essentially, asks us to hold that *nothing* in the Owners' private mortgage agreements has any force and effect. The government, thus, advocates a legal regime that eviscerates century-old understanding of the stable and enduring nature of the contract and real property rights….

Id. at 1330-31 (emphasis added). The mere fact that a business falls under a regulatory regime does not end the takings analysis.

Although the regulatory regime under which a business operates informs the contours of its investment-backed expectations, such regimes must be considered in light of the property interests at issue and the degree of interference with those interests. The Supreme Court's decision in *Phillips v. Washington Legal Foundation* is instructive on this point. 524 U.S. 156 (1998). There, the Court distinguished "confiscatory regulations" with those "those regulating the **use** of property." *Id.* at 167 (emphasis added). Although a regulatory regime might reasonably limit how a business may *use* its property, a government may not *confiscate* that property without paying just compensation. Nor as here could it possibly abrogate a company property's interest in its entire net worth.

2. HERA Did Not Eliminate the Enterprises' Property Interests.

In their opening brief, Appellants focused on *Tyler*'s core holding that property rights traditionally recognized at law cannot simply be defined away by statute.[13] In response, the Government doubles down on its position that HERA abrogated traditional property law principles, arguing that HERA displaced all background principles governing the Enterprises property interests. Gov. Br. 26.

The Government's argument ignores the Supreme Court's clear command that the law purportedly authorizing the taking "cannot be the only source" for defining property rights. "Otherwise a State could sidestep the Takings Clause by disavowing property interests in assets it wishes to appropriate." *Tyler*, 143 S. Ct. at 1372. Rather, *Tyler* directs that the Court must consider historical practice and precedents rather than blindly deferring to a statute's redefinition of property. *Id.* at 1373. This is especially true where, as here, the statute conferring the Government discretion to take property is the *same statute* that is the proposed "independent source" of traditional property law principles.

In short, HERA is not (and cannot be) the sole source of historical practice and precedents that define the scope of the Enterprises' property interests. That

[13] Appellants' Br. 26-31.

error infected both the Government's arguments and the Court's decision in *Fairholme*.[14]

3. The Enterprises' Agreement to the Conservatorship Did Not Eliminate Their Property Interests.

The Government also argues that the mere fact that the Enterprises consented to the conservatorship ended all their investment-backed expectations in their own net worth. That is not the law.

At the time the Enterprises entered conservatorship, HERA permitted FHFA to exercise its powers in a manner that was "in the best interests of the [Enterprises] **or the Agency**," 12 U.S.C. § 4617(b)(2)(J)(ii) (emphasis added). They did not, however, consent to being stripped of their bedrock property rights under the Fifth Amendment's Taking Clause. Nor could they have contemplated that FHFA would use that authority to sweep their entire net worth in violation of the Constitution.[15] Indeed, Congress passed HERA to *shore up* the Enterprises'

[14] Although Appellants recognize that FHFA had authority under HERA to implement the Net Worth Sweep, that does not mean that HERA itself effected a taking. HERA's plenary authority permitted FHFA to engage in a range of actions, but the *mere potential* for it to operate in a way that usurped the Enterprises property rights did not create the taking. The FHFA's subsequent actions did.

[15] Nor did HERA itself authorize such actions. The Government incorrectly assets that HERA "transferred" the "rights" of the Enterprises to FHFA. Gov. Br. 25. Rather, as conservator, FHFA merely succeeds to "all rights, titles, powers, and privileges of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). Separate provisions regulate what the Government *can do* with those assets. *See* 28 U.S.C.

financial positions to stabilize the nation's mortgage industry, not to expropriate their assets for taxpayer use.

Nor do conservatorships generally limit private businesses' "right to exclude" the Government. The Government relies on *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). But neither case stands for the proposition that a conservatorship eliminates a business's property rights. Rather, in *California Housing*, this Court held that a business's property rights may be curtailed but ***not eliminated***. *Cal. Housing*, 959 F.3d at 958; *see also Golden Pac.* 15 F.3d at 1074 (same). Similarly, in *Golden Pacific*, this Court observed that the Government "did not actually take Golden Pacific's property" but instead merely "reduced [its] value" through its actions as a conservator. *Golden Pacific*, 15 F.3d at 1073. These cases came nowhere close to authorizing the wholesale sweep of a business's entire net worth.

Nor does the traditional conservatorship framework fit the facts here. The "distinctive feature of an FHFA conservatorship" is that, unlike traditional conservatorship, HERA granted FHFA the power to act in the interests of the public. *Collins v. Yellen*, 141 S. Ct. 1761, 1776 (2021). The Government argues

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§ 4617(b)(2)(D) (enabling FHFA 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]").

this "distinctive feature" isn't distinctive at all because *Golden Pacific* and *California Housing* also "served a public interest." Gov-Br-29. But there is a big difference between government actions that merely "serve a public interest" (as almost all government actions do) and those that "take property for public use." Whatever public interest might be served by traditional conservatorship laws, they do not involve the appropriation of a company's assets to fill the Government's general fund.[16]

B. *The Net Worth Sweep Was an Unconstitutional Taking.*

Finally, the Government asserts that even if the Enterprises had property interests in their own net worth, the appropriation of that net worth was not a taking. It says no taking can arise from a "negotiated financial transaction" for which the Enterprises received "valuable consideration." Gov. Br. 34-35. But this characterization distorts reality.

The Government's assertion that the Net Worth Sweep was a "negotiated financial transaction" simply disregards Appellants' well-pled factual allegations. The Claims Court properly credited Appellants' allegations that "Treasury did **not**

[16] For this reason, the Government's argument that conservatorships "have never been found to constitute a taking" is beside the point. Gov. Br. 33. HERA is fundamentally different than other conservatorships. The absence of cases concerning similar facts simply reflects that the Net Worth sweep was unprecedented.

negotiate with the FHFA-C" in agreeing to the Net Worth Sweep.[17] The Government offers no reason for this Court to disregard those allegations.

Moreover, Appellants' allegations are confirmed by both the Supreme Court's holding in *Collins* and this Court's discussion in *Fairholme*. The Supreme Court held in *Collins* that FHFA caused the Enterprises to agree to the Net Worth Sweep pursuant to its authority under HERA to advance the interests of "the public" over that the Enterprises. *Collins*, 141 S.Ct. at 1776. And this Court held in *Fairholme* that, through the Net Work Sweep, "the FHFA exercised one of its powers under HERA—subordinating the best interest of the Enterprises and its shareholders to its own best interests and those of the public." *Fairholme*, 26 F.4th at 1287. Because both branches of the Government (Treasury and FHFA) were advancing the interests of the "public," no one negotiated for the interests of the Enterprises. In short, the Net Worth Sweep was not negotiated at arm's length.

Similarly, the Enterprises did not receive "valuable consideration" through the imposition of the Net Worth Sweep. Rather, the Claims Court properly credited Appellants' allegations that the Government (i) "benefited from the [Net Worth Sweep] at *the expense* of [the Enterprises]" and (ii) "reaped a windfall of perhaps

[17] Appx00509 (emphasis added).

$81 billion in comparison to what it would have received absent" it.[18] This Government windfall was *the purpose* of the Net Worth Sweep.

Appellants' factual allegations amply support that the Government's imposition of the Net Worth Sweep was a taking without just compensation in violation of the Fifth Amendment. This Court should not disturb that finding.

III. This Court Should Recommend *En Banc* Review.

Appellants recognize that, absent *en banc* review, the panel hearing this appeal would ordinarily be bound by the *Fairholme* panel's decision. Appellants also recognize that this Court denied their petition for initial hearing *en banc*. Under Federal Circuit Rule 35(a)(1), however, the panel considering this appeal may "decide whether to ask the judges in regular active service to consider hearing the case en banc." Fed. Cir. Rule 35(a)(1). Appellants respectfully request that, given the arguments raised in this appeal—in particular the serious questions regarding the process that led to the panel decision in *Fairholme* and the incompatibility of *Fairholme* with the Supreme Court's intervening decision in *Tyler*—the panel should recommend that the full Court hear this case *en banc*.

CONCLUSION

This Court should reverse the dismissal of Appellants' takings claims and remand these consolidated cases for trial.

[18] Appx00509-00511 (emphasis added); Appx00542-00543.

Dated: May 22, 2024

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FOR THE FEDERAL CIRCUIT

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