No. 22-____

IN THE

Supreme Court of the United States

OWL CREEK ASIA I, L.P., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Fannie Mae and Freddie Mac are "for-profit corporations owned by private shareholders" and "dominate the secondary mortgage market." *Collins v. Yellen*, 141 S. Ct. 1761, 1770, 1785 (2021). In 2008, Congress passed a statute that led to the Federal Housing Finance Agency's becoming the companies' conservator and the U.S. Department of Treasury's becoming a shareholder (sole holder of senior preferred, as well as warrants to purchase nearly 80% of common at a nominal price) and providing substantial investment. In 2012, private shares remained outstanding, carrying dividend rights and liquidation preferences. That year, Treasury and the FHFA decided that, henceforth, the companies each quarter "would transfer nearly all of [their] net worth" to Treasury. *Id.* at 1770. They continued as profitable going concerns with a government "backstop," but this net-worth sweep "left nothing for their private shareholders." *Id.* at 1777, 1779; *see id.* at 1774, 1778. In *Collins*, the Court held the private shareholders' APA challenge barred by statute.

With their rights in their shares wiped out, Petitioners sued for a taking. The Court of Federal Claims held that their claims for compensation for themselves were actually derivative, mere "overpayment" claims that belonged to the government-controlled companies. The Federal Circuit affirmed.

The question presented is: If the United States causes a company to transfer to the United States for the public benefit private shareholders' rights incident to their ownership of shares in the company, do the private shareholders have a direct, personal interest in a cause of action challenging that taking?

PARTIES TO THE PROCEEDING

The following entities are Petitioners and were plaintiffs-appellants in the proceedings below: Owl Creek Asia I, L.P., Owl Creek Asia II, L.P., Owl Creek I, L.P., Owl Creek II, L.P., Owl Creek Asia Master Fund, Ltd., Owl Creek Credit Opportunities Master Fund, L.P., Owl Creek Overseas Master Fund, Ltd., Owl Creek SRI Master Fund, Ltd., Mason Capital L.P., Mason Capital Master Fund L.P., Akanthos Opportunity Fund, L.P., Appaloosa Investment Limited Partnership I, Palomino Master Ltd., Azteca Partners LLC, Palomino Fund Ltd., and CSS, LLC.

The United States is a Respondent and was the defendant-appellee below.

The following entities are Respondents who were also plaintiffs-appellants in the proceedings below: Fairholme Funds, Inc., Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Continental Western Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, Preferred Employers Insurance Company, The Fairholme Fund, Andrew T. Barrett, Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited and Joseph Cacciapalle.

CORPORATE DISCLOSURE STATEMENT

The Petitioners each state that they have no parent corporation and no publicly held company owns 10% or more of any Petitioner's stock.

STATEMENT OF RELATED PROCEEDINGS

Federal Circuit: *Fairholme Funds, Inc. v. United States*, No. 20-1912 (Judgment Entered Feb. 22, 2022); *Owl Creek Asia I, L.P. v. United States*, No. 20-1934 (Judgment Entered Feb. 22, 2022); *Mason Cap. L.P. v. United States*, No. 20-1936 (Judgment Entered Feb. 22, 2022); *Akanthos Opportunity Fund, L.P. v. United States*, No. 20-1938 (Judgment Entered Feb. 22, 2022); *Appaloosa Inv. Ltd. v. United States*, No. 20-1954 (Judgment Entered Feb. 22, 2022); *CSS, LLC v. United States*, No. 20-1955 (Judgment Entered Feb. 22, 2022); *Arrowood Indem. Co. v. United States*, No. 20-2020 (Judgment Entered February 22, 2022); *Cacciapalle v. United States*, No. 20-2037 (Judgment Entered Feb. 22, 2022).

United States Court of Federal Claims: *Fairholme Funds, Inc. v. United States*, No. 13-465 (Judgment Entered Feb. 22, 2020); *Owl Creek Asia I, L.P. v. United States*, No. 18-281 (Judgment Entered June 8, 2020); *Mason Cap. L.P. v. United States*, No. 18-529 (Judgment Entered June 8, 2020); *Akanthos Opportunity Fund, L.P. v. United States*, No. 18-369 (Judgment Entered June 8, 2020); *Appaloosa Inv. Ltd. v. United States*, No. 18-370 (Judgment Entered June 8, 2020); *CSS, LC v. United States*, No. 18-371 (Judgment Entered June 8, 2020); *Arrowood Indem. Co. v. United States*, No. 13-698 (Judgment Entered May 15, 2020); *Cacciapalle v. United States*, No. 13-466 (Judgment Entered June 26, 2020); *Rafter v. United States*, No. 14-740; *Reid v. United States*, No. 14-152; *Fisher v. United States*, No. 13-608.

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INTRODUCTION

These cases arise from the most significant nationalization of private companies in our nation's history. In 2008, amidst the housing crisis and Great Recession, Congress passed a statute, the Housing and Economic Recovery Act ("Recovery Act"), which established the Federal Housing Financing Agency. Shortly thereafter, that Agency imposed conservatorships onto Fannie Mae and Freddie Mac ("Companies"). At the time, Treasury made a significant commitment to invest in the Companies and became in substance the majority shareholder alongside private shareholders. The government promised that the conservatorships would be temporary, terminating once the Companies had been restored "to a safe and solvent condition." The government also assured shareholders that private stock would remain outstanding and "retain all rights." But four years later, despite an improvement in the Companies' economic performance (or perhaps because of the improvement), Treasury and the Agency imposed the "Net Worth Sweep," which transferred private shareholders' rights to Treasury and "left nothing for the[] private shareholders." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021). Treasury made no additional investment (nor was one necessary). This nullified private shareholders' dividend and liquidation rights, causing a "concrete injury [that] flows directly from" the Net Worth Sweep. *Id.*

Petitioners sued for the taking of their shareholder rights. But the courts below ruled that their suits for money damages for themselves, for the loss of their dividend and liquidation rights, were somehow derivative claims of overpayment belonging to the Companies. That is plainly wrong.

The lower courts' decisions conflict with this Court's precedents, including *Collins*, and numerous rulings of other federal appellate courts. *First*, under longstanding federal law, the transfer of shareholder rights results in a direct injury to the shareholder. *Pittsburgh & West Virginia Railway Co. v. United States*, 281 U.S. 479, 487 (1930); *American Power & Light Co. v. SEC*, 325 U.S. 385, 386–87 (1945). *Second*, as a corollary, if a company reallocates its equity, shareholders harmed by that reallocation have a direct claim. *E.g.*, *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 160 (1957). *Third*, this Court's reasoning in *Collins* that private shareholders stated an injury-in-fact directly resulting from the Net Worth Sweep is consistent with, and reinforces these federal rules in this very circumstance. These rules all establish that Petitioners were directly harmed by the Net Worth Sweep.

The lower courts' decisions conflict with this law by mischaracterizing Petitioners' claims as derivatively asserting merely that the Companies overpaid for something. And the question presented is important and recurring as it bears on the fundamental integrity of the Takings Clause and, if left undisturbed, the ruling below would serve as a blueprint for government evisceration of private property rights. This Court should grant review.

OPINIONS BELOW

The opinion of the Federal Circuit is reported at 26 F.4th 1274 and is reproduced at Pet.App.1a–57a. The opinions of the Court of Federal Claims are reported at 147 Fed. Cl. 1 (*Fairholme*), 148 Fed. Cl. 614 (*Owl Creek*), 148 Fed. Cl. 679 (*Appaloosa*), 148 Fed. Cl. 712

(*Mason*), 149 Fed. Cl. 363 (CSS), 148 Fed. Cl. 647 (*Akanthos*), 148 Fed. Cl. 745 (*Cacciapalle*) and are reproduced at Pet.App.58a–489a.

JURISDICTION

The Federal Circuit issued its opinion and judgment on February 22, 2022. Pet.App.1a–5a. On May 12, 2022, the Chief Justice extended the time to file this petition until July 22, 2022. No. 21A711 (U.S.). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The "Tucker Act" provides, in relevant part: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded [ ] upon the Constitution. . . ." 28 U.S.C. § 1491(a)(1). This jurisdiction is exclusive for claims for compensation for takings exceeding $10,000. *See id.* § 1346(a)(2). Appeals are exclusively to the Federal Circuit. *Id.* § 1295.

STATEMENT OF THE CASE

A. Factual Background

Congress chartered the Companies as for-profit, shareholder-owned corporations. *Collins*, 141 S. Ct. at 1770. "Their primary business is purchasing mortgages, pooling them into mortgage-backed securities, and selling them to investors." *Id.* at 1771. The Companies "dominate the secondary mortgage market and

have the power to reshape the housing sector." *Id.* at 1785.

In 2008, Congress sought to improve oversight of the Companies by passing the Recovery Act. Pet.App.8a; 12 U.S.C. § 4501 *et seq*. That Act established the Agency, whose powers include being appointed, by the Director of the Agency, as conservator or receiver for the Companies. *Id.* In the event of a receivership and resulting distribution of Company assets, the Recovery Act expressly protects the claims of shareholders. *Id.* § 4617(b)(2)(K) & (c)(1). The Recovery Act also granted the U.S. Treasury authority, for a limited time, to "purchase any obligations and other securities" of the Companies. Pet.App.167a.

Shortly after the Agency was created, the Director placed the Companies into conservatorship, with the consent of their Boards. Pet.App.8a. The next day, Treasury entered into Senior Preferred Stock Purchase Agreements ("Treasury SPAs") committing to invest up to $100 billion (increased in 2009 to $200 billion) in each Company as needed to maintain its positive net worth. Pet.App.169a. In return, Treasury received a million shares of preferred stock, senior to all other; it also received (a) an initial liquidation preference of $1,000 per share (totaling $1 billion), plus any outstanding amount drawn from the commitment, (b) a dividend of 10% per year of the outstanding amount, and (c) warrants to purchase up to 79.9% of the common stock of each Company for a nominal price. Pet.App.169–70a. Petitioners have not challenged these events or terms.

From the outset, the Agency assured the Boards and markets that it would eventually "return[] the entities to normal business operations"; that the conservatorships would be temporary, terminating once the Companies had been restored "to a safe and solvent condition"; that private stock would remain outstanding and trade; and that stockholders would "retain all rights in the stock's financial worth[,] as such worth is determined by the market." Quoted in *Owl Creek* Compl. ¶¶ 45–46, 48. The Agency reiterated such public assurances throughout 2009, 2010, and 2011, including in testimony and regulations. *Id.* ¶¶ 50, 54–56. In November 2011, for example, the Director told the Senate that, "[b]y law, the conservatorships are intended to rehabilitate the [Companies] *as private firms*." *Id.* ¶ 56 (emphasis added).

By the beginning of 2012, the Companies reported positive net worth and announced they would not be requesting a further draw from Treasury. *Id.* ¶ 8. Renewed profitability suggested that the Companies might soon recognize deferred tax assets in the tens of billions of dollars; and the extent of their draws had been, in part, because of excessive estimates (by tens of billions of dollars) of future credit losses. *Id.* ¶¶ 8, 59. Indeed, in summer 2012, Fannie Mae's CFO predicted "golden years" of earnings, and Treasury anticipated that the next reporting period would show "very strong earnings," "in-excess of the 10% dividend to be paid to Treasury." *Id.* ¶ 57. As of the end of 2012, Fannie Mae still had over $115 billion available on its $200 billion commitment from Treasury, and Freddie Mac had over $140 billion available on its $200 billion commitment. *Id.* ¶ 84. Thus, neither Company had

reached, or come within $15 billion of, even the cap on the original commitment amount, from 2008.

Treasury and the Agency, however, decided to amend the Treasury SPAs and replace the 10% quarterly dividend payable to Treasury with a "net worth sweep": Every quarter—indefinitely—the Companies would transfer to Treasury their entire net worth above a pre-determined capital reserve. Pet.App.9a. Treasury henceforth would receive "*all of the surplus*" of the Companies. *Collins*, 141 S. Ct. at 1774. This "le[ft] no residual value"—"nothing"—"that could be distributed to [private] shareholders." Pet.App.9a; *Collins*, 141 S. Ct. at 1779. It thus "materially changed the nature of the agreements." *Id.* at 1774. (Any remaining trading value was attributable to the possibility of litigation success. *Owl Creek* Compl. ¶ 104.) At the time of the Net Worth Sweep, Treasury did not add any new investment.

Treasury conceded that, with the Net Worth Sweep, it intended to benefit itself as shareholder, and thus taxpayers, at the expense of private shareholders. In a Treasury document, an official noted that the amended Treasury SPAs would put the Treasury "in a better position" because, rather than having "Treasury's upside . . . capped at the 10% dividend, now the taxpayer will be the beneficiary of any future earnings produced by the [Companies]." Fed. Cir. Jt. Br. 18. Treasury also emphasized that "every dollar of earnings" would go to "taxpayers," so the Companies would not "rebuild[ ] capital and return to the market in their prior form." *Id.*

After the Net Worth Sweep, the Companies' financial condition continued to improve as expected. As a

result, they "ended up transferring immense amounts of wealth to Treasury." *Collins*, 141 S. Ct. at 1774. Specifically, in 2013, Treasury received $130 billion in dividends; in 2014, over $40 billion; in 2015, almost $16 billion; and in 2016, almost $15 billion. *Id.* And in 2013, Fannie Mae did announce that it would release the valuation allowance on its deferred tax assets, resulting in a tax benefit of $50.6 billion and contributing substantially to the especially large dividends to Treasury in that first year. *Owl Creek* Compl. ¶ 90. Over those four years, Treasury received approximately $200 billion—"at least $124 billion more than the [C]ompanies would have had to pay … under the fixed-rate dividend formula that previously applied." *Collins*, 141 S. Ct. at 1774. If Treasury had instead exercised its warrants (to purchase nearly 80% of common stock at a nominal price), it would have had to share dividends with private shareholders: Holders of junior preferred would have been entitled to dividends after Treasury received payments on its senior preferred (under the pre-Sweep terms), and holders of common would have received dividends along with any paid to Treasury on its common.

As the Court of Federal Claims observed, there were three significant effects of the Net Worth Sweep. First, private shareholders *lost* their economic interests in the Companies because they could never receive dividends or liquidation distributions. Pet.App.73a. Second, Treasury *received* those economic interests. *Id.* And third, the Companies would perpetually operate on the brink of insolvency. *Id.* Because of the government backstop, they could continue to operate as going concerns notwithstanding their

lack of surplus capital—but not as "*private* firms." *Supra* 3 (emphasis added); *see Collins*, 141 S. Ct. at 1778; *id.* at 1777 ("they would never be able to build up their own capital buffers, pay back Treasury's investment, and exit conservatorship"). They were still operational corporations but, in substance, no longer "for-profit corporations owned by private shareholders." *Id.* at 1770.

B. Procedural History

Petitioners and other shareholders sued in the Court of Federal Claims alleging that the Net Worth Sweep unconstitutionally took their shares without compensation. One group of plaintiffs (Fairholme) included a derivative takings claim. The government moved to dismiss all claims.

1. The Court of Federal Claims granted in-part and denied in-part the government's motion. Pet.App.163a. *First*, the court concluded that the private shareholders' claims were against the United States, and therefore it had subject-matter jurisdiction. Pet.App.201a.

Second, the court concluded that, under background federal law (informed by Delaware law), Petitioners' claims pleaded as direct were actually derivative, belonging to the Companies. Pet.App.222a. That Petitioners alleged the government exacted economic value from other shareholders by rearranging the corporate capital structure, transferring to itself Petitioners' rights, did not matter. Pet.App.219a. Rather, their claims were supposedly premised on allegations of overpayment, harming the Companies: that "[t]he government, via the PSPA Amendments, compelled the [Companies] to overpay Treasury." Pet.App.221a.

Finally, the court found that the derivative takings claim could proceed. Pet.App.152a, 159a. Although the D.C. District Court had found in a related case that shareholders' rights to assert derivative claims were transferred to the conservator by the Recovery Act's "Succession Clause," 12 U.S.C. § 4617(b)(2)(A)(i), the court held that shareholders were not collaterally estopped from re-litigating that issue. Pet.App.146a. The court then reasoned that shareholders could assert derivative claims despite the Succession Clause, under *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999), because the Agency faced a conflict-of-interest in deciding whether to sue the federal government. Pet.App.146a.

Petitioners appealed to the Federal Circuit, and the United States cross-appealed.

2. While that appeal was pending, this Court decided *Collins*. It rejected an APA challenge to the Net Worth Sweep, as barred by an anti-injunction provision of the Recovery Act, and granted a constitutional challenge to the Recovery Act's removal restriction on the Director. 141 S. Ct. at 1770.

Before oral argument in this case, the Federal Circuit received supplemental briefing on the effect of *Collins*. Petitioners explained, among other things, that *Collins* confirmed in three ways that Petitioners have direct claims. *First*, the Court's analysis of the injury-in-fact of the private shareholders there (as well as traceability) acknowledged the simple, direct nature of the harm the Net Worth Sweep imposed: "[T]he shareholders claim that the FHFA transferred the value of their property rights in [the Companies] to Treasury, and that sort of pocketbook injury is a

prototypical form of injury in fact." *Id.* at 1779. They alleged a "concrete injury" that "flows directly from" the Net Worth Sweep. *Id.*

Second, *Collins* recognized that the private shareholders' injury did not depend on whether the Net Worth Sweep also harmed the Companies. They continued to "operat[e] at full steam in the marketplace," which was how they were able to transfer such "immense amounts of wealth" to Treasury—all of which were profits, in excess of the capital reserve—even while purchasing millions of mortgages and issuing over $1 trillion in mortgage-backed securities. *Id.* at 1774, 1778.

Third, *Collins* reinforced Petitioners' more specific argument for standing: They suffered a direct harm because the Net Worth Sweep reallocated equity among existing shareholders, from them to Treasury-as-shareholder. *Id.* at 1779; *e.g.*, *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 160 (1957) (concluding that reallocation of equity was *not* an "indirect harm which may result to every stockholder from harm to the corporation") (citation omitted). This "*materially* changed the *nature* of the agreements" setting up the conservatorship. *Collins*, 141 S. Ct. at 1774 (emphasis added); *see id.* at 1779 (new dividend formula "left nothing for their *private* shareholders") (emphasis added).

3. The Federal Circuit affirmed that the shareholders' claims are against the United States, relying on *Collins*. Pet.App.18a. In agreeing with Treasury to amend the Treasury SPAs and implement the Net Worth Sweep, the panel explained, the Agency "exer-

cised one of its powers under [the Recovery Act]—subordinating the best interests of the [Companies] and its shareholders to its own best interests and those of the public." Pet.App.17a.

Next, the court accepted the Court of Federal Claims' recharacterization of the private shareholders' direct claims as derivative. Pet.App.22a. The Federal Circuit agreed that the shareholders' claims were actually for overpayment, supposedly essentially asserting that "in exchange for [the Agency's] conservatorship, both the [Companies] and shareholders were forced to pay Treasury at a loss." *Id.* (This statement, although seemingly central for the court, appeared to conflate the events of 2008, in which the conservatorship began, with the Net Worth Sweep, imposed in 2012. Petitioners here challenged only the latter.) The court dismissed the shareholders' arguments based on *Collins* simply by distinguishing Article III standing considerations as irrelevant to the existence of a direct claim. Pet.App.27a–28a. The Federal Circuit similarly rejected Petitioners' reliance on such authority as *Alleghany*, 353 U.S. 151, without much discussion. Pet.App.26a–27a.

On the merits of the derivative takings claim brought by one of the Fairholme parties, the Federal Circuit disagreed with the Court of Federal Claims. The panel explained that the Companies could not state a derivative takings claim, because "the right to exclude is an essential element of property ownership" and "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." Pet.App.51a. In 2008, when the Recovery Act was passed, the Companies

"lost the right to complain if and when the [Agency] chose to elevate its interests, and the interests of the public, above the interests of the [Companies]." Pet.App.52a. Therefore, the court reasoned, the Companies had no protectable property interest in their earnings. *Id.*

The Federal Circuit thus dismissed all of Petitioners' claims, as well as related claims of other private shareholders. Under *Collins*, the government is shielded from any challenge to its authority to *impose* the Net Worth Sweep. And under the Federal Circuit's decision, the government is shielded from having to *compensate* the private property owners at whose expense it imposed the Net Worth Sweep in the purported public interest.

REASONS FOR GRANTING THE PETITION

I. The Federal Circuit's Decision Conflicts With *Collins* On The Same Government Action At Issue Here, As Well As With Other Decisions Of This Court And The Courts Of Appeals.

The Federal Circuit's decision conflicts with decisions of this Court and other courts of appeals. Longstanding federal law establishes that injury to a shareholder's rights, which exists whether or not the company was harmed, is a direct injury. Courts, including this one, have long focused on whether the alleged injury to shareholders is based upon rights incidental to stock ownership (a direct claim), or instead is based on an injury to the corporation, which will indirectly affect *every* shareholder (a derivative claim). In addition, as a specific instance of this black letter rule, when equity rights are reallocated among shareholders—which might not harm the company, and might *benefit* it—a claim by the harmed shareholders is direct. Because the Net Worth Sweep harmed the Private Shareholders' rights that were incidental to stock-ownership, regardless of whether it also harmed the Companies, the private shareholders' takings claims are direct. That the government harmed private shareholders by reallocating their property to itself-*as-shareholder* confirms this conclusion.

If there were any doubt, this Court laid it to rest in *Collins*. There, this Court analyzed the very action at issue in this case: the Net Worth Sweep. And *Collins* concluded that private shareholders suffered an injury-in-fact from the transfer of their rights to Treasury. 141 S. Ct. at 1779; *see* also Dec. 9, 2021 Hr'g Tr.

71:8–72:14 (Justice Breyer suggesting during *Collins* argument that the injury "seems like a takings claim"). The transfer "left nothing" for them and was thus a "concrete injury" that "flows directly from" the Net Worth Sweep. 141 S. Ct. at 1779. The Court correspondingly recognized that the Net Worth Sweep did not necessarily harm the Companies. *Id.* It follows that Petitioners' takings claims are direct claims.

But the Federal Circuit ignored this Court's analysis as well as longstanding background federal law, and mischaracterized the Net Worth Sweep as a merely an injury to the Companies. It was thus quite wrong.

A. A Claim For Compensation Of Shareholders For The Transfer Of Their Rights To The Government Is Direct Under Longstanding Federal Law.

1. In *Pittsburgh*, this Court articulated the foundational rule for distinguishing between direct and derivative claims: A claim brought by a shareholder is derivative if "[t]he injury feared is the indirect harm which may result to *every* stockholder *from harm to the corporation*." 281 U.S. at 487 (emphasis added). There, the plaintiff shareholder asserted that an order from the Interstate Commerce Commission threatened the company's financial stability "and consequently[,] [the plaintiff's] financial interest." *Id.* The Court found that this was "not sufficient to show a threat of the legal injury necessary to entitle [the plaintiff] to bring a suit" because the "financial interest does not differ from that of every investor in [the company's] securities or from an investor's interest in any business transaction or lawsuit of his corporation."

Id. Other claims, however, would involve direct harm, such as those arising from "cases of reorganization, and in some cases of acquisition of control," that "deal with the interests of investors." *Id.*

Applying this rule in *American Power*, the Court allowed a shareholder to challenge an order requiring a company "to make certain accounting entries[,] which will result in taking out of surplus moneys which would otherwise be available to pay dividends to" the shareholder. 325 U.S. at 386–87. The challenge was *not* "in the nature of a *derivative* action . . . to redress a wrong to his corporation," but rather to redress an order that "*directly* and adversely affected" the shareholder. *Id.* at 389 (emphases added). The Court explained that, while the order "does not deprive the corporation of any asset or adversely affect the conduct of its business in the manner it affects the petitioner," it did have "a *direct* adverse effect" on the petitioner "as a stockholder entitled to dividends." *Id.* (emphasis added); *see also id.* at 395 (Murphy, J., dissenting) (pointing out that effect of the order was "presumably to strengthen the financial structure of" the company). The case was therefore "differen[t]" from *Pittsburgh* because it involved an adverse effect on the interest of the investor, whereas the shareholder in *Pittsburgh* "was merely seeking in a derivative capacity, to vindicate the rights of the corporation." *Id.* at 389.

2. Lower federal courts have followed such reasoning and found that when a shareholder's personal interest is affected without depending on whether the company was harmed, the shareholder is directly injured. *See, e.g.*, *Shidler v. All Am. Life & Fin. Corp.*, 775 F.2d 917, 925 (8th Cir. 1985) (depriving "minority

shareholders of their basic property right to a meaningful voice in the conduct of corporate affairs" amounts to a conversion claim by the shareholder); *Knapp v. Bankers Sec. Corp.*, 230 F.2d 717, 721 (3d Cir. 1956) ("[t]he right to dividends is an incident of the ownership of stock" and wrongfully withholding of that impacts shareholder rights); *see also Maiz v. Virani*, 253 F.3d 641, 655 (11th Cir. 2001) (finding shareholders had standing to pursue RICO claims because the harm was targeted at them and not "solely" at the corporations); *First Hartford*, 194 F.3d at 1296 (holding shareholder "possesse[d] a direct and cognizable property interest in a potential liquidation surplus and consequently ha[d] standing to sue for its taking").

For example, in *Knapp*, the Third Circuit concluded that a suit to compel a declaration of a dividend was a suit "to vindicate a primary and personal right of the shareholders and not to enforce a secondary right derived from the corporation"— the suit was direct, not derivative. 230 F.2d at 721. The court noted that ordinarily a claim for dividends cannot be enforced until after a dividend is declared; however, shareholders have a "fundamental right to share in the net profits of the corporation," and a claim to enforce that right is based on the shareholders' injury. *Id.* And "[i]t is . . . clear that the successful outcome of [such] a suit . . . will benefit only the shareholder[]." *Id.* at 722. The court (applying Pennsylvania law while drawing on decisions of several other States and this Court) was "compelled" to find the claim direct when it considered "*who is the injured party*, the shareholder or the corporation, and *who will be benefitted* if the action is brought to a successful conclusion." *Id.* at 721 (emphases added).

This law aligns with and is reinforced by the *Tooley* test under Delaware law, from which circuit courts have drawn in determining federal law. *See e.g.*, *Starr Int'l Co. v. United States*, 856 F.3d 953, 966 (Fed. Cir. 2017). The *Tooley* test analyzes two issues to determine whether a claim is direct: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004); *see Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251 (Del. 2021) (reaffirming *Tooley*). Other federal courts are in accord. *Meland v. WEBER*, 2 F.4th 838, 848 (9th Cir. 2021) (applying *Tooley* test and concluding that shareholder's Fourteenth Amendment claim asserting that California law requiring companies to have a minimum number of females on their boards was direct); *Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 261 (D. Conn. 2012) (explaining that the *Tooley* test "is substantially similar" to federal law as both depend on whether shareholder suffered an injury distinct from that of corporation).

3. Here, Petitioners were injured (regardless of whether the Companies were), and they would receive the benefit of any recovery. Their claims are therefore direct.

First, before the Net Worth Sweep, Petitioners had the right to receive dividends and a liquidation preference from the Companies. This was a personal property right that Petitioners enjoyed by virtue of their stock ownership. A stock certificate is "a unit of interest in the corporation based on a contribution to the

corporate capital." 2 *Cox & Hazen on Corporations* 718 (2d ed. 2003). "[S]hares of stock" are "property," *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1073 (Fed. Cir. 1994), and even "a shareholder's direct interest in a potential liquidation surplus is a cognizable property interest," *First Hartford*, 194 F.3d at 1283. Granted, Treasury's distribution rights were senior to all other shareholders; however, Petitioners still had stockholder rights and there was the potential that they could receive distributions, whether upon the anticipated end of the conservatorship or at least in the form of a liquidation preference if the Companies' assets managed to pay Treasury in full first.

After the Net Worth Sweep, it is impossible for any private shareholder to ever receive any distribution—either in the form of a dividend or liquidation preference. Shareholders invested in the Companies with the expectation that if circumstances allowed, they had a right to distributions through dividends or a liquidation preference, and the government in the years before the Net Worth Sweep reinforced those expectations. But through the Net Worth Sweep the government made this impossible. Indeed, the government did this with the intent to benefit taxpayers at the expense of private shareholders. *Supra* 6. That is a classic direct claim. *See Pittsburgh*, 281 U.S. at 487; *American Power*, 325 U.S. at 386–87.

While the Companies may have suffered their own injuries, the taking of shareholders' rights is a distinct injury to Petitioners and in no way depends on any harm to the Companies. Suppose the Net Worth Sweep had allowed the Companies to decide whether to pay each quarter's dividend to Treasury, while still

providing that 100% of all dividends and other distributions that the Companies did pay must be paid only to Treasury. The Companies would have been allowed to rebuild capital and would not have been injured. But Petitioners would have suffered *the same injury*, and would clearly have had a direct claim.

Second, if Petitioners succeed, any recovery would go to them. That is what they have pleaded, and it makes particular sense here: If any recovery were given to the Companies, then under the Net Worth Sweep the money would be kept by the Companies, until they hit their capital reserve, and the rest would be swept to Treasury. None of the recovery would benefit Petitioners.

It is of course of no moment that the government allowed Petitioners to retain their stock certificates. The analysis in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), confirms that. *Lucas* established that the government can commit a per se taking of property by regulating the property in such a way as to deprive it of all value. *Id.* at 1017–18. Although the property owner still has the papers representing their title, "total deprivation of beneficial use is . . . the equivalent of a physical appropriation." *Id.* at 1017. Although Petitioners may still hold their stock certificates, a deprivation of their rights incidental to the certificates is equivalent to a physical appropriation—in either case they have no beneficial use of their property. That loss produces a direct claim, one they should be able to litigate on the merits.

B. A Claim Based On Harm To A Subset Of Shareholders Due To Reallocation Of Equity Is Direct Under Longstanding Federal Law.

A specific corollary of the general and longstanding rule discussed above is that, if a company reallocates its equity among shareholders, the shareholders harmed by that reallocation have a direct claim.

1. In *Alleghany*, the Court identified this corollary in expressly applying the rule of *Pittsburgh* and finding the case similar to *American Power*. 353 U.S. at 160. Common stockholders of a company challenged an order authorizing it to exchange existing preferred stock for a new class of preferred stock. *Id.* at 158–60. It was "not," the Court explained (with no dissent on this point), a case in which "the 'injury feared is the indirect harm which may result to *every* stockholder from *harm to the corporation*.'" *Id.* at 159–60 (emphasis added) (quoting *Pittsburgh*, 281 U.S. at 487). Rather, because the preferred stock was convertible into common, "the threatened 'dilution' of the equity of the common stockholders provided sufficient financial interest to give [common stockholders] standing" to challenge the order. *Id.* at 160 (citing *Am. Power*, 325 U.S. at 388–89); *see also S. Pac. Co. v. Bogert*, 250 U.S. 483, 487 (1919) (explaining that shareholders are injured directly when denied "the right to a pro rata share of the common property").

Two months later, Justice Frankfurter (author of *Alleghany*), writing for himself and three other justices, summarized the law more generally: "[I]f a corporation rearranges the relationship of different classes of security holders to the detriment of one class, a

stockholder in the disadvantaged class may proceed against the corporation as a defendant to protect his own legal interest." *Swanson v. Traer*, 354 U.S. 91, 99 (1957) (Frankfurter, J., dissenting). Although this was a dissent, the majority did not disagree.[1]

2. Lower federal courts have followed this rule. In *Strougo v. Bassini*, the Second Circuit held that a plaintiff's claim based on "the reduced value of their equity did not derive from a reduction in the value of [the company] but rather from a reallocation of equity value" among shareholders. 282 F.3d 162, 175 (2d Cir. 2002). A shareholder asserted under the federal Investment Company Act that a coercive rights offering reduced the value of his equity. *Id.* This claim, the court reasoned (drawing on Maryland law to assess the federal claim), was direct because the alleged injuries did "not derive from a reduction in the value of the [company's] assets or any other injury to the [company's] business." *Id.* The rights offering *increased* the company's assets, while reducing the share value for shareholders who did not participate. *Id.*; *see also, e.g.*, *Lochhead v. Alacano*, 697 F. Supp. 406, 413 (D. Utah 1988) (reasoning that shareholder "had the right to maintain his relative status as a stockholder and to protect his proportionate ownership interest" and that the dilution of his shares as a result of a merger was a "direct and distinct" injury from that of the corporation); *Horwitz v. Balaban*, 112 F. Supp. 99, 101

[1] There was no dispute that the claim at issue (charging corporate directors with wrongdoing) was a "derivative suit," "belong[ing] to the corporation." *Smith v. Sperling*, 354 U.S. 91, 92–93 (1957). The disagreement was just over the implications of such a suit for diversity jurisdiction.

(S.D.N.Y. 1949) ("The right of a stockholder to maintain an existing proportion between his stock and the entire capital stock is a property right of which, under ordinary circumstances, he cannot be deprived by an increase of stock."); 12B Fletcher Cyclopedia of the Law of Corps. § 5908 (Sept. 2021 update) (reciting among examples of direct claims shareholder challenges to "recapitalization, redemption, or similar transaction[s] unfairly affect[ing] minority shareholders"); *id.* § 5922 (noting that when controlling shareholders opt to "pay dividends only to themselves," shareholders are injured directly); 13 *id.* § 5939 ("a shareholder may litigate as an individual if the wrong to the corporation inflicts a distinct and disproportionate injury on the shareholder").

And, as much as with the general rule discussed above in Part I.A., this corollary is also consistent with Delaware law. *See Kennedy v. Venrock Assocs.*, 348 F.3d 584, 589 (7th Cir. 2003) (describing *Struogo* as consistent with Delaware law; explaining that a suit by a minority shareholder against a majority shareholder is direct because the "wrong [is] to the minority shareholder rather than to the corporation"); *Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 345 (2009) (citing *Tooley* as well as *Struogo* in discussing direct and derivative claims, and explaining that "a shareholder may bring a direct action . . . when the shareholder suffers the harm directly or a duty is owed directly to the shareholder, though such harm also may be a violation of a duty owing to the corporation"); *see also Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008) (recognizing a direct claim exists if a shareholder "suffered some individualized harm not suffered by all of the stockholders at large").

This rule similarly establishes that Petitioners have a direct claim. They are asserting that *their* distribution rights were taken and given to *other* shareholders, the government. If the government had compelled the Companies to cancel all stock of Petitioners and reissue it to the government, the effect would have been the same—and there would be no serious dispute that Petitioners' claim was direct. *Cf. Lucas*, 505 U.S. 1003. Indeed, the Companies could not assert *these claims* if they wanted to, because the Companies have no interest in *which* shareholders receive distributions. *See Alleghany*, 353 U.S. at 158.

C. This Court's Analysis In *Collins*, Of The Same Shareholder Injury-In-Fact As Here, Is Consistent With And Reinforces Longstanding Federal Law.

In *Collins*, this Court determined that private shareholders of the Companies had standing to pursue a constitutional claim involving the Net Worth Sweep (for violation of the Separation of Powers), reasoning that the injury-in-fact to them from it "concrete[ly]" and "directly" harmed them. 141 S. Ct. at 1779.

Article III standing of course requires the claimant "to 'show that he *personally* has suffered some actual or threatened injury'" from the defendant. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (emphasis added). For Petitioners' claim here, seeking compensation for a taking and not asserting any sort

of third-party standing,[2] the injury-in-fact is *the same*, and so is the logic—logic consistent with and reinforced by the longstanding law discussed above.

First, the Court's analysis of the injury-in-fact of the private shareholders in *Collins* (as well as traceability) acknowledged the simple, direct nature of the harm the Net Worth Sweep imposed—"the shareholders claim that the FHFA *transferred the value of their property rights* in [the Companies] *to Treasury*, and that sort of pocketbook injury is a prototypical form of injury in fact." 141 S. Ct. at 1779 (emphases added). And in holding that this prototypical injury was traceable to the Net Worth Sweep, the Court further explained that it "swept the companies' net worth to Treasury and *left nothing for their private shareholders*." *Id.* (emphasis added). The private shareholders therefore alleged a "concrete injury" that "flows *directly* from" the Net Worth Sweep. *Id.* (emphasis added).

This analysis provides a close analogy for why Petitioners' takings claims are direct. Petitioners allege the Agency "transferred to Treasury 100% of their private-shareholder rights to receive dividends and distributions from the Companies, eviscerating the economic value of their shares . . . ." Fed. Cir. Jt. Br. 30. They have detailed the "transfer to the government of the ownership rights that [they] held," ownership rights in which they have a '"direct personal interest."'

[2] In this, the takings claim seeking compensation for Petitioners differs from the APA claim in *Collins* seeking equitable relief in favor of the Companies. The government characterized the APA claim as derivative and, for that reason, barred by the Recovery Act's Succession Clause. *Cf. Collins*, 141 S. Ct. at 1781 n.16.

Id. at 33–35 (quoting *Starr*, 856 F.3d at 966). And they have shown how the allegations in their complaints provided ample factual bases for that "distinct injury." *Id.* at 36. The allegations are the same, and the logic is the same.

Second, and confirming the first point, *Collins* recognized that the private shareholders' claimed injury did *not* depend on whether the Net Worth Sweep also harmed the Companies. The Court recognized that it did not halt or apparently even weaken the Companies' operations to divert all its surplus capital to Treasury: "Nothing about the amendment precluded the companies from operating at full steam in the marketplace, and all the available evidence suggests that they did so." *Id.* Indeed, the "immense amounts of wealth" transferred to Treasury—as the Companies "amassed over $200 billion in net worth" and Treasury netted "at least $124 billion" compared to the presweep terms—were generated by this very "full steam" operation. *Id.* at 1778; *see also id.* at 1774. What changed was that operational companies ceased to be *private* companies—which is to say, that the private shareholders lost their interests.

Petitioners' claims are therefore independent of, and distinct from, whatever claims the Companies may have based on the Net Worth Sweep. That distinction is a key part of the standard analysis, as far back as *Pittsburgh*, as well as *American Power* and *Tooley*, for whether a claim is direct or derivative, and confirms the claims' directness here. *See supra* I.A.

Third, *Collins* reinforced the private shareholders' more specific argument for standing based on their direct harm from the "reallocation of equity value"

among existing shareholders, from them to Treasury-as-shareholder. *Strougo*, 282 F.3d at 175; *see Alleghany*, 353 U.S. 151. The Net Worth Sweep, as this Court recognized, "materially changed the nature of the [prior] agreements" setting up the conservatorship. *Collins*, 141 S. Ct. at 1774; *see id.* at 1779. By changing the quarterly dividend payable to Treasury from a fixed amount to a variable dividend equal to almost the Companies' entire net worth, the Sweep Amendment "left nothing for the[] private shareholders." *Id.* at 1779. This reallocating of equity rights from private shareholders to the government-shareholder, by the government, directly injured Petitioners. This did not necessarily injure the Companies as the agreement merely changed to whom the Companies pay dividends. But it directly injured a subset of the Companies' shareholders.

D. The Federal Circuit's Decision Is Wrong.

In light of the law and precedent of this Court above, the Federal Circuit's decision is wrong.

1. The Federal Circuit erred when it found that Petitioners' claims are derivative.

First, the Federal Circuit did not grapple with the property interest that was taken—rights to dividends and liquidation distributions, which belong to the private shareholders and *only* to the private shareholders—and which were reduced to "nothing." *Collins*, 141 S. Ct. at 1779. Instead, the court recharacterized Petitioners' allegations and asserted that the shareholders were resting their claims on the assertion that the Companies were overpaying Treasury. (Whether this supposed overpayment claim involved govern-

ment action in 2008, which Petitioners did not challenge, or in 2012, which they do challenge, was not clear. *Supra* 10–11.) That is not what Petitioners allege. *E.g.*, *Owl Creek* Compl. ¶¶ 96, 103–04. The government took their rights for itself—rights in which Petitioners have a "direct, personal interest." *See Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990). And the Government, "by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The Net Worth Sweep transformed Petitioners' private property into Treasury's public property. Whatever the merits of a claim by Petitioners challenging that, it is at least a direct claim, one they should be allowed to press on the merits.

Moreover, the Federal Circuit's "overpayment" recharacterization makes no sense as to the Net Worth Sweep. Unlike at the time of the original entry into conservatorship, at the time of the Net Worth Sweep, Treasury added no new investment. Nor could it have: Its authority to do so had expired in 2009. *See Collins*, 141 S. Ct. at 1771. Instead, the Net Worth Sweep simply expropriated Petitioners' equity rights. This results in direct claims for taking those rights.

Second, and even more simply, the Federal Circuit failed utterly to grapple with the rule that claims of shareholders harmed by reallocations of equity *among* shareholders are direct. The Federal Circuit disregarded *Alleghany* on the ground that it was not really addressing the question of direct v. derivative claims.

But the Court expressly drew on both the rule of *Pittsburgh* for distinguishing direct and derivative claims (which it quoted) and *American Power* (which expressly framed its analysis, based on *Pittsburgh*, in terms of direct and derivative claims). The Federal Circuit similarly dismissed, in a footnote, the undisputed restatement of the rule in *Swanson*. The rule is longstanding, is on point, and compels finding a direct claim here.

Third, the Federal Circuit similarly failed to grapple with *Collins* on this question. Its only justification for that disregard was that *Collins* involved a question of private shareholders' Article III standing. That refuses to see the direct applicability of this Court's reasoning, answering an analogous question of law, in the same terms, on the same government action.

2. There can be no question that Petitioners' stock constitutes a property interest supporting a takings claim here. *Supra* I.A.2. Indeed, the Fifth Circuit panel in *Collins* found, and the en banc court agreed, that "the transfer of the Shareholders' economic rights to Treasury" "[d]ivest[ed] the Shareholders' property rights [and] caused a direct injury." 896 F.3d 640, 654–55 (5th Cir. 2018) (per curiam); *see* 938 F.3d 553, 574–75 (5th Cir. 2019) (en banc). And, here, the government had not raised any such merits issue on appeal.

Nevertheless, the Federal Circuit in a two-sentence footnote suggested (without holding) that Petitioners do not have a cognizable property interest in their stock because it had held that the Companies once in conservatorship had no cognizable property interest in their net worth. Pet.App.53a n.14.

This off-hand, unbriefed suggestion, going to the merits rather than the directness of the claim, is frivolous and would not present any genuine question. *First*, even if the Federal Circuit were correct as to the Companies (which it is not, *see, generally Andrew T. Barrett v. United States*, Petition for A Writ of Certiorari, No. 22-__ (July 22, 2022)), the suggestion would not follow. If, for example, the Companies were liquidated, no one would claim they retained any interest in their property, yet private shareholders would retain their property rights in the liquidation proceeds. Indeed, the Recovery Act expressly recognizes this truism. *Supra* Statement A. Supposing the government may with impunity seize the Companies' assets, it is a separate question whether it may do the same to Petitioners.

Second, the mere *possibility* of something like the Net Worth Sweep, under the Recovery Act's general authorization of a conservatorship, does not vaporize property rights during the conservatorship. That is so even under the Federal Circuit's (overly generous) view of the malleability of background property rights in the face of new legislation. The most that inheres "in the title," so as to "defeat a property interest," is "specific regulation," not potential regulation. *Piszel v. United States*, 833 F.3d 1366, 1374–75 (Fed. Cir. 2016); *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014) (same). The whole point of the Takings Clause is that the government must compensate property owners for *authorized* action. *E.g.*, *Preseault v. I.C.C.*, 494 U.S. 1, 17 (1990).

Third, the two cases on which the Federal Circuit relied are irrelevant on this issue, which is why no party cited either of them on it in the Federal Circuit.

They merely involved challenges to being *placed* into conservatorship or receivership (and consistent with longstanding background law)—which is not at issue here—not to action such as here in the course of a conservatorship or receivership (and unlike any taken before). *See Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1069, 1073–74 (Fed. Cir. 1994); *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 958–59 (Fed. Cir. 1992). That is why the same court had no trouble later recognizing a shareholder's property interest in even a contingent surplus from a receivership. *First Hartford*, 194 F.3d at 1296; *see Cal. Hous*, 959 F.2d at 957 n.2 (similar); *see also Waterview Mgmt. Co. v. F.D.I.C.*, 105 F.3d 696, 701 (D.C. Cir. 1997) ("To read the statute . . . to permit a federal agency acting as conservator or receiver to sell assets in disregard of all pre-receivership rights, raises significant constitutional questions under the takings clause.").

Fourth, even if one were merely applying a *Penn Central* balancing analysis of a regulatory-taking claim in the context of a regulated industry, the result would be the same. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003) (explaining that a party can have reasonable investment backed expectations even where a business operates in "a heavily-regulated industry," because not all regulatory changes are reasonably foreseeable); *cf. Collins*, 141 S. Ct. at 1776.

II. Review Of The Federal Circuit's Decision Is Important, For Its Own Sake (Particularly In Light Of *Collins*) And Because Of Its Implications, And This Case Is An Ideal Vehicle.

These cases are exceptionally important for three reasons.

First, these cases are important in themselves. They involve enormous sums of money and ask whether private investors in two critical, congressionally chartered corporations are entitled to some remedy for the taking of their property for the public benefit. It is thus unsurprising that the government's action in this case has already received this Court's attention.

The Fifth Amendment's Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The combination of this Court's decision in *Collins* (holding the Net Worth Sweep authorized) and the Federal Circuit's decision here (holding that the government may make just "some people alone," Petitioners, bear the cost of that arguably public good) is a paradigmatic instance of that principle.

The government lawfully imposed the Net Worth Sweep on the Companies for the benefit of taxpayers and received a windfall of over $120 billion while eviscerating the shares of Petitioners. *See Collins*, 141 S. Ct. at 1774, 1777; *see id.* at 1776 ("The facts alleged in the complaint demonstrate that the FHFA chose a path of rehabilitation that was designed to serve pub-

lic interests."). Because it was within the government's power to impose the Net Worth Sweep taking shareholders' rights, private shareholders cannot maintain an APA claim. *Id.* at 1778. But shareholders pursued takings claims asserting that if the government is entitled to take their property, they must at least be paid just compensation. However, the lower courts rejected these claims finding that shareholders lack standing. Without this Court's intervention, these cases establish a pernicious precedent that the government may take private property for the public benefit, and the owners of the property lack any remedy for the taking. Accordingly, this case is a perfect vehicle for the Court to address the question presented, which is dispositive, and involves likely the most extreme nationalization of private companies in our nation's history.

Second, the case has significant broader implications, because what the government did here provides a simple map for corporate takeovers and shareholder wipeouts by the government. All Congress needs to do is pass a statute similar to the Recovery Act that makes it easy for the government to put a company into "conservatorship" or receivership. Then, the government can with impunity do what it wants with the company for the benefit of the public: Shareholders will be unable to assert APA claims to challenge the government's authority to act (because there is a statute authorizing the action under the reasoning of *Collins*); shareholders will have no direct claims to be compensated for that authorized action (under the Federal Circuit's reasoning here); the companies under government control will of course bring no claims against the government; and the shareholders will

(assuming Congress drafts its statute with minimal care to avoid the rule of *First Hartford*, *supra* Bkgd. B.1) have no ability to bring a derivative claim on the companies' behalf.

Third, opportunities or pretexts for following this road map into other areas are sure to arise, and the time to prevent that is now. This nation has known its share of economic crises and recessions and, as current events suggest, it will know more. In response to past recessions the government has created businesses and privatized government functions. J.W. Verret, *Treasury Inc.: How the Bailout Reshapes Corporate Theory and Practice*, 27 Yale J. on Reg. 283, 294 (2010). But the government's taking of a controlling interest in the Companies and other private entities in 2008 was new. *Id.* In response to the 2008 recession, the United States "purchased controlling interests in hundreds of the nation's largest banks" and other companies. *Id.*

And the government has used that control to its benefit, without the need to impose regulations through the ordinary course. For example, one bank is alleged to have begun "to cave to political pressure to engage in corporate policy decisions that, though unprofitable for the bank, are politically useful to its government regulators." *Id.* at 305. Specifically, it has been claimed that the bank "expressed support for a congressional plan to allow judges to modify mortgages, legislation it opposed prior to receiving preferential treatment from the Treasury, and which the rest of the banking industry opposed." *Id.* Similarly, "[a]fter taking control of [a different bank], the FDIC also adopted a policy of modifying mortgages with the aim of 'keeping mortgage holders in their homes,'

which suggests a diminished concern for corporate profitability." *Id.*

This Court has granted writs of certiorari to the Federal Circuit before to ensure that the government does not use its power with inappropriate financial impunity. *See, e.g.*, *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308 (2020) (No. 18-1023) (granting petition for certiorari arguing that companies must be able to rely on words of statutes in financial arrangements with the government and not worry that the government will impliedly repeal the statute); *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012) (No. 11-597) (granting petition for certiorari arguing that lower court's rule will give the government unrestricted authority to take property by manipulating flooding regimes to benefit anyone it chooses without paying just compensation).

It should do so again here. While the government benefits from its control of private companies, it is not subject to the same rules that govern private controlling shareholders (or indeed the rules that govern any of the private shareholders that are investors alongside the government). Unlike private shareholders, the government is entitled to sovereign immunity limiting instances in which it can be sued, and it is not subject to the same securities laws as a private shareholder. Whereas a private controlling shareholder owes fiduciary duties to minority shareholders and cannot engage in insider trading, the government as a controlling shareholder has not been subject to those same rules. Verret, *supra*, at 287, 329. (The private shareholders here also pleaded claims for breach of fiduciary duty, but the Court of Federal Claims dismissed those too, and the Federal Circuit affirmed.) In

other words, the government has the power to take control of a private company and force it to take actions that injure private shareholders but are beneficial for the government, and it gets to do that without having to comply with the same general corporate laws that govern private controlling shareholders. Allowing the decisions of the lower courts to stand permits the government to do this without even the remedy (and counter-incentive) of having to pay for the private harm from what it does in the public interest. In other words, without this Court's intervention, the Takings Clause will be meaningless to shareholders because the lower courts have removed the mandate that the government pay "just compensation" for taking private property in the public interest.

CONCLUSION

The Court should grant the petition.

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Respectfully submitted,

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