No. 22-97

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**

## REPLY BRIEF FOR PETITIONERS


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## CORPORATE DISCLOSURE STATEMENT

The disclosure statement in the petition for writ of certiorari remains accurate.

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## ARGUMENT

Imagine two scenarios. First, the government grabs all the stock certificates of private shareholders of a company. Pet.23. Second, a government-controlled company with both governmental and private shareholders announces that, henceforth, whenever it issues a dividend, it will pay it only to the government shareholder. Pet.18–19. In both situations, it would be clear that the shareholders have a direct claim for just compensation for the taking of their rights. It would *not* be clear whether the company itself, although effectively nationalized, suffered harm and thus had any claim. But the *shareholders* obviously would. And, in any event, "the right claimed by the shareholder" would not be "one the corporation could itself have enforced." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 529, 531 (1984).

Substantively, the Net Worth Sweep is the same—but on an unprecedented scale. And substance is what matters. *See Stop the Beach Ren. v. Fla. Dep't of Env. Prot.*, 560 U.S. 702, 715 (2010) ("If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.") (emphasis omitted). The Net Worth Sweep "transferred the value of [the private shareholders'] property rights in [the Companies] to Treasury," which "left nothing for" them. *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021). That "injury" "flows directly from" the Net Worth Sweep. *Id.* The shareholders thus have a direct claim for just compensation for that transfer of their rights—"to redress the United States' wiping out of [their] shares in" the Companies "by seizing for

itself all earnings of the solvent Companies in perpetuity." *Owl Creek* Compl. ¶1, Pet.App.486; *id.* ¶114 (Count I: "the United States directly appropriated for itself [their] property interests in the Junior Preferred Stock 'to benefit taxpayers.'"), Pet.App.526. Although the Net Worth Sweep materially changed the *nature* of the Companies—from "private firms" to nationalized ones—it left them operational and (wildly) profitable. Pet.5, 25; *Collins*, 141 S. Ct. at 1774, 1777–78. And the *Companies* in any event could not enforce *private shareholders'* ownership rights. Pet.29.

Nonetheless, the Federal Circuit threw out Petitioners' claims *at the outset*, confused about the government action challenged, the nature of Petitioners' claims and their taken property rights, and the content of this Court's decisions. Pet.26–30. Yet the government asks this Court to forgo even considering these errors—largely by mischaracterization and omission. For example, this Court's foundational rule, from *Pittsburgh & West Virginia Railway Co. v. United States*, 281 U.S. 479 (1930), is that in a derivative claim "[t]he injury feared is the indirect harm *which may result to every stockholder* from harm to the corporation." *Id.* at 487 (emphasis added). The government omits the italicized language (BIO.16), never acknowledges Treasury as a "stockholder," and misstates Petitioners' claims as depending on some harm to the Companies. It disregards this Court's subsequent decisions employing that very rule in situations analogous to this case, by noting that the "fact pattern[s]" were not identical. *Compare* BIO.17, *with* Pet.15, 20. It scoffs at *Collins*'s analysis, without quoting or directly addressing it. *Compare* BIO.16, *with*

Pet.9–10, 24–26, 28. And it confirms the path to impunity marked out by the synergy of *Collins* with the decision below—if allowed to stand. *Compare* BIO.29–30, *with* Pet.12, 31–33. Indeed, the government effectively agrees with Petitioners on the importance and implications of this case. If anything, its arguments reinforce the need for this Court's review.

## I. The Government's Jurisdictional Arguments Fail And Do Not Counsel Against Certiorari.

It is telling that the government leads with two far-fetched (and half-hearted) jurisdictional arguments.

1. In arguing Petitioners' claims are not against the United States, the government recycles its argument that the Agency as conservator shed its governmental character, "stepping into the shoes" of the Companies when it joined Treasury to impose the Net Worth Sweep. BIO.10. The government can only bring itself to call the question "debatable," and in any event is wrong. *Id.*

In *Collins*, this Court recognized that the Agency exercises executive power because "even when it acts as conservator or receiver, [its] authority stems from a special statute, not the laws that generally govern conservators and receivers." 141 S. Ct. at 1785. And the task of acting as conservator under that statute "is the very essence of execution of the law." *Id.* The Agency's powers under that "special statute," the Court elaborated, "differ critically from those of most conservators and receivers," as does its exposure to judicial review. *Id.* at 1785–86. Indeed, this Court re-

jected the dissent's express "step into the shoes" argument. *Id.* at 1806 (Sotomayor, J., dissenting); *see id.* at 1786 n.20.

Here, the government lost this argument in the Court of Federal Claims ("CFC") even before *Collins*. *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1, 33 (2019). Then the Federal Circuit recognized that *Collins* eliminated any question. It reasoned that the Agency, when it adopted the Net Worth Sweep, "exercised one of its powers under HERA—subordinating the best interests of the Enterprises and its shareholders to its own best interests and those of the public," and therefore Petitioners' claims are "against the United States." Pet.App.17a–18a (citing *Collins*).

2. The government erroneously claims that 28 U.S.C. § 1500 strips jurisdiction, asserting that the CFC lacks jurisdiction if the plaintiff ever has another suit, based on substantially the same facts, against the United States pending in another court. BIO.11. Petitioners have not sued the United States in another court over the Net Worth Sweep. *Id*. Moreover, the government acknowledges that settled Federal Circuit precedent forecloses its argument. *Id*. In *Resource Investments, Inc. v. United States*, the Federal Circuit held that it was bound by longstanding precedent that § 1500 operates only when another suit was filed *before* the CFC suit. 785 F.3d 660, 669 (Fed. Cir. 2015) (citing *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 949 (Ct. Cl. 1965)); *see* 28 U.S.C. § 1500 (barring jurisdiction over claims that plaintiff "has pending in any other court"). The Federal Circuit thus did not need to consider the constitutional problem if § 1500 stripped jurisdiction over the plaintiff's takings claim, because the plaintiff could have obtained

review simply by filing the Claims Court action first. *Id.* While this Court did comment, before *Resource Investments*, that the precedent in *Tecon* left § 1500 "without meaningful force," the Court denied certiorari in both *Tecon* and *Resource Investments* (*see* BIO.11) and has not otherwise seen reason to review the question, despite its being raised often in lower courts. *See United States v. Tohono O'Odham Nation*, 563 U.S. 307, 314, (2011); *Resource Investments*, 785 F.3d at 669 n.7 (noting this Court expressly declined to overrule *Tecon*). Here, the other petitioners filed their D.C. District Court proceedings *after* they filed in the CFC. And if § 1500 applied to Petitioners, it would, as *Resource Investments* warned, deprive them of the opportunity to have their takings claim heard, raising a serious constitutional issue. There is thus no genuine question that § 1500 is inapplicable, and if there were, that would only be an additional reason for review.

## II. The Government Fails To Refute The Conflict That The Federal Circuit's Decision Creates.

The question presented asks whether the United States may take ownership of a private company with impunity, notwithstanding the Takings Clause. Petitioners allege that the Net Worth Sweep stripped away their rights as shareholders and transferred them to Treasury, another shareholder. The Petition showed that, seeking compensation for such a taking is a garden-variety, direct claim under this Court's precedents stretching at least to 1930. The government's various efforts to deny this simple axiom fail.

### A. The Question Presented Is Indisputably Federal.

The government makes a half-hearted suggestion that this case does not warrant the Court's review because its resolution might draw on Delaware corporate law. BIO.8, 12 The government is wrong.

Whether Petitioners' claim is direct does not at all *turn on* Delaware law, as the government must concede. BIO.12; *cf.* Pet.17. The claim is a constitutional one governed by federal law. *See Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2172 (2019). Even before *Knick*, in *Starr International Co., Inc. v. United States*, the Federal Circuit recognized that "federal law dictates" whether a federal claim is direct or derivative. 856 F.3d 953, 965 (Fed. Cir. 2017) (quoting 7C Fed. Prac. & Proc. Civ. § 1821 (3d ed.) ("in suits in which the rights being sued upon stem from federal law, federal law will control the issue whether the action is derivative")). That a federal court might consult state law in working out the contours of a federal question does not change the federal nature of the question.

### B. The Government Mischaracterizes Petitioners' Claims.

The government asserts that Petitioners do not have a direct claim because they supposedly allege a harm derivative of harm to the Companies. BIO.13. But, like the Federal Circuit, they tellingly fail to specify what this supposedly alleged harm really was.

This is not a case where company assets were transferred and all shareholder interests were uniformly diluted. Pet.20–23. The government took over private companies, made itself one of the shareholders, and

then, years later, took all profit and liquidation distribution rights for itself. Even the lone sentence of Petitioners' Complaint that the government excerpts (from ¶2) shows this: What the United States expropriated was the Companies' "net worth"—profits—"to benefit the government at the expense of the Companies' other shareholders." *See also supra* 1–2. Petitioners were directly injured as a result, and this injury is independent of any harm that the Companies may have suffered.

The government ignores Petitioners' arguments that the Net Worth Sweep destroyed Petitioners' property interest in their stock and left them with worthless paper. Pet.26–27. The government similarly ignores *both* how *Collins* confirmed the nature of this harm to the private shareholders *and* how it recognized the lack of any clear harm to the Companies. Pet.24–25. The Companies' operational assets were not depleted; rather, their net worth was transferred to Treasury, the government shareholder, at the direct expense of Petitioners, whose equity was extinguished. And to remedy this injury, any recovery must go to shareholders.

The government also incorrectly claims that the Net Worth Sweep "provided for the [Companies] to transfer their quarterly net worth to Treasury in return for hundreds of billions of dollars in capital." BIO.15. This conflates what happened in 2008 with what happened in 2012 (as the Federal Circuit did, Pet.11). In 2012, when the government imposed the Net Worth Sweep, it did not provide the Companies with any new capital or investment. Rather, the government changed shareholders' dividend and liquidation rights, taking all for itself. Pet.5–6.

### C. The Decision Below Conflicts With Federal Law.

The Petition explained that, under longstanding federal law, (1) a claim is derivative only if the injury affects every shareholder indirectly as a result of harm to the corporation and, as a corollary, (2) shareholders harmed by a reallocation of equity have a direct claim. Pet.13–23. Relying on its mischaracterization of Petitioners' claim, the government argues that the decision below does not conflict with *Collins*, *Pittsburgh*, *American Power & Light Co. v. SEC*, 325 U.S. 385 (1945), *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151 (1957), or *Franchise Tax Bd. v. Alcan Aluminium, Ltd.*, 493 U.S. 331 (1990). BIO.15–18. The government is wrong across the board.

1. *Collins* explained that the Net Worth Sweep "transferred the value of [the private shareholders'] property rights in [the Companies] to Treasury," which "left nothing for" them, an "injury" that "flows directly from the Net Worth Sweep." 141 S. Ct. at 1779. *Collins* further explained: "[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. The government avoids quoting this language and, like the Federal Circuit, casually dismisses it as about Article III standing. But this fails to grapple with the content of the Court's reasoning—Article III injury-in-fact need not be "direct," but this Court has recognized that the shareholder injury here was. Confirming this, the Court emphasized the continuing profitability of the Companies after the Net Worth Sweep. *See also Kennedy v. Venrock Assocs.*, 348 F.3d 584, 589 (7th Cir. 2003) (Posner, J.) (to "redistribute

wealth from" one shareholder to another "does not reduce the value of the corporation").

2. In arguing that *Pittsburgh* does not apply, the government overlooks that *Pittsburgh* is *the source of the rule*, which it avoids fully quoting (BIO.16), and that Petitioners' case *contrasts* with *Pittsburgh*. That is evident because the action challenged in *Pittsburgh*, if it harmed any shareholders, harmed all of them. Pet.14–15.

The parallel is *American Power* which, as the government and Federal Circuit overlooked, was directly applying *Pittsburgh*'s rule. The government argues that *American Power* did not address the "distinct fact pattern" here. But the facts here are *more* extreme. In *American Power*, the Court focused on how the shareholder was "directly and adversely affect[ed]," "irrespective of any effect" of the challenged order "on the corporation." 325 U.S. at 388–89. Here, Petitioners are challenging the direct and adverse effect they suffered from the Net Worth Sweep—which goes *farther* than the facts in *American Power* by involving a transfer rather than mere retention of profits. Pet.18–19 (hypothetical).

The government also argues that *Alleghany* does not apply because the Net Worth Sweep was not a reorganization. BIO.17. This ignores what the Net Worth Sweep did. It reallocated the net worth of the Companies to one shareholder: the United States Treasury—wiping out Petitioners' equity, destroying their interests in the Companies, and leaving them with scraps of paper. The Net Worth Sweep eliminated private shareholders in all but name, and made Treasury the only shareholder of the Companies.

The Federal Circuit could ignore this precedent only by misconstruing it, Pet.27, and the government's framing is no better.

3. The government also argues that *Alcan* does not apply. But *Alcan* declared the rule that "a shareholder with a direct, personal interest in a cause of action [may] bring suit *even if the corporation's rights are also implicated*." 493 U.S. at 336 (emphasis added). The government tries to contrast the italicized with the next sentence (BIO.18), but the Court was simply quoting the respondent's argument. Petitioners satisfy the rule of *Alcan*, and, as discussed, their claim does not depend on whether the Companies have suffered any injuries.

The government makes a conclusory statement that *Meland v. WEBER*, 2 F.4th 838 (9th Cir. 2021), *Maiz v. Virani*, 253 F.3d 641 (11th Cir. 2011), *Shidler v. All Am. Life & Fin. Corp.*, 775 F.2d 917 (8th Cir. 1985), and *Knapp v. Bankers Sec. Corp.*, 230 F.2d 717 (3d Cir. 1956), do not apply, claiming those cases reached a different result "because the claims there . . . did not depend on the diversion of corporate assets or any other harm to the corporation." BIO.19. But again, Petitioners' claims are independent of any harm to the Companies.

4. The government's cases are inapposite. *Frank v. Hadesman & Frank, Inc.*, involved a sale of assets from one corporation to another, which affected all shareholders of the selling corporation *pro rata*, and thus made the plaintiff's claims classically derivative. It did not involve transferring minority shareholder interests to a majority shareholder. 83 F.3d 158, 160 (7th Cir. 1996). And *Cowin v. Bresler*, involved typical

derivative claims of corporate mismanagement that applied *pro rata* to all shareholders; if anything, the court's reasoning supports finding directness here. 741 F.2d 410, 412, 415 (D.C. Cir. 1984); *see also El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1261 (Del. 2016) (only alleging loss to partnership). Correspondingly, the government ignores *Struogo v. Bassini*, 282 F.3d 162 (2d Cir. 2002), as well as its treatment in *Kennedy*, which post-dated and cited *Frank*.

The government's reliance on *Roberts v. FHFA*, 889 F.3d 397 (7th Cir. 2018) and *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017), is similarly misplaced. In *Roberts*, shareholders asserted Administrative Procedure Act claims (*cf.* Pet.24 n.2) and in *Perry*, plainly derivative claims for the Companies. Those claims do not depend on personal shareholder rights. But here, Petitioners assert a claim for the taking of their property interests.

5. The government also incorrectly claims that Petitioners do not challenge a legal test. BIO.20. But the Federal Circuit has eviscerated the longstanding legal test, twisting it out of recognition in a scenario where it has exclusive appellate jurisdiction and the distortion has had and will have severe consequences for property and constitutional rights. Pet.27–28.

## III. The Government Agrees With Petitioners On The Importance And Implications Of This Case.

The government does not dispute the importance of this case or that this Court has repeatedly granted certiorari in analogous circumstances. Pet.31–34.

And the government effectively agrees with Petitioners on the implications of this case. The government argues that there is no need to worry about the precedent set by this case because there are checks on a government conservator or receiver from misusing its authority. But the concern is not that there is no remedy for when a conservator acts *unlawfully*—it is that depriving Petitioners of their direct Takings claim will allow a government conservator to lawfully (under *Collins*) take property costlessly—without any protection for the private property holders, requisitioned into bearing all the public burden. Pet.31. As explained in the Petition, all the government needs to do is pass legislation allowing the government to put a company into "conservatorship." The government can then do whatever it wants with shareholders' interests. Pet.32–33. That is untenable.

## CONCLUSION

The Court should grant the petition.

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Respectfully submitted,

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