

No. _____

**In the
Supreme Court of the United States**

FAIRHOLME FUNDS, INC., et al.,
Petitioners,

v.

UNITED STATES,
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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July 22, 2022

QUESTIONS PRESENTED

1. 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?

2. Were the rights to future dividends and other distributions held by petitioners cognizable property rights protected by the Takings Clause?

These questions are raised by petitioners in *Owl Creek Asia I, L.P., et al v. United States*, No. 22-_____ (filed July 22, 2022) and *Cacciapalle, et al., v. United States*, No. 22-_____ (filed July 22, 2022), which both seek review of the same court of appeals decision.

PARTIES TO THE PROCEEDING

Petitioners are 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, and The Fairholme Fund (collectively, “Fairholme Petitioners”), were plaintiffs in the Court of Federal Claims and plaintiffs-appellants in the Court of Appeals for the Federal Circuit.

Respondent is the United States, which was the defendant in the Court of Federal Claims and the defendant-cross-appellant in the Court of Appeals for the Federal Circuit.

Andrew T. Barrett was also a plaintiff in the Court of Federal Claims and a plaintiff-appellant in the Court of Appeals for the Federal Circuit. Barrett has filed a separate petition for writ of certiorari raising a distinct question presented in *Barrett v. United States*, No. 22-_____ (July 22, 2022).

RULE 29.6 DISCLOSURE STATEMENT

Petitioner The Fairholme Fund is a series of Fairholme Funds, Inc. Fairholme Funds, Inc. has no parent corporation.

W.R. Berkley Insurance Corporation is the parent of the following Petitioners: Berkley Insurance Company, Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Continental Western Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, and Preferred Employers Insurance Company.

No publicly held corporation owns 10% or more of any of Petitioners' stock

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Fairholme Funds, Inc. v. United States*, No. 20-1912 (Fed. Cir.) (interlocutory appeal granted June 18, 2020; opinion issued and judgment entered February 22, 2022).
- *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl.) (opinion and order filed under seal on December 6, 2019; reissued for publication December 13, 2019; reissued following the granting of motion to certify interlocutory appeal March 9, 2020).

On appeal, the Federal Circuit also addressed takings challenges to the Net Worth Sweep from the following cases: *Owl Creek Asia I, L.P. v. United States*, No. 18-281C (Fed. Cl.); *Mason Cap. L.P. v. United States*, No. 18-529C (Fed. Cl.); *Akanthos Opportunity Master Fund, L.P. v. United States*, No. 18-369C (Fed. Cl.); *Appaloosa Inv. Ltd. P'ship I v. United States*, No. 18-370C (Fed. Cl.); *CSS, LLC v. United States*, No. 18-371C (Fed. Cl.); *Arrowood Indem. Co. v. United States*, No. 13-698C (Fed. Cl.); and *Cacciapalle v. United States*, No. 13-466C (Fed. Cl.).

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¹ The Fairholme Petitioners will make all references to the Appendix that was attached to the Petition for a Writ of Certiorari filed by Petitioner Andrew T. Barrett in *Barrett v. United States*, No. 22-____ (July 22, 2022). The Barrett Petition arises out of the same proceedings as this Petition, and thus contains all the necessary materials for this Court’s review.

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PETITION FOR A WRIT OF CERTIORARI

Fairholme Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 26 F.4th 1274 and is reproduced at Barrett Pet. App. 1. The Court of Federal Claims' opinion is reported at 147 Fed. Cl. 1 and is reproduced at Barrett Pet. App. 66. The order of the Court of Appeals granting the petition to appeal the interlocutory order of the Court of Federal Claims is reported at 810 F. App'x 907 (Mem.) and is reproduced at Barrett Pet. App. 182. The order of the Court of Federal Claims granting the motion to certify an interlocutory appeal of its decision is reported at 147 Fed. Cl. 126 and reproduced at Barrett Pet. App. 172.

JURISDICTION

The Court of Appeals issued its judgment on February 22, 2022. Barrett Pet. App. 60–65. The Fairholme Petitioners' application for extension of time to file a petition for a writ of certiorari up to and including July 22, 2022 was granted by the Chief Justice on May 12, 2022. *See Fairholme Funds, Inc., v. United States*, No. 21A711. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part, “nor shall private property be taken for public use, without just compensation.”

U.S. CONST. amend. V.

STATEMENT

This case concerns the conservatorship of Fannie Mae and Freddie Mac and a transaction orchestrated by the Government, known as the Net Worth Sweep. *See Collins v. Yellen*, 141 S. Ct. 1761, 1770–75 (2021) (describing the companies, the conservatorship, and the Net Worth Sweep). Currently pending before this Court are three petitions for writs of certiorari that arise from the same Federal Circuit opinion. *See Barrett v. United States*, No. 22-____ (filed July 22, 2022); *Owl Creek Asia I, L.P., et al v. United States*, No. 22-____ (filed July 22, 2022); *Cacciapalle, et al., v. United States*, No. 22-____ (filed July 22, 2022). In this Statement, Fairholme Petitioners cite to the petitioner’s appendix attached in *Barrett v. United States*, No. 22-____ (July 22, 2022).

Fairholme Petitioners are, in all relevant respects, identically situated as the Petitioners in two of the pending petitions: *Owl Creek Asia I* and *Cacciapalle*. Like petitioners there, Fairholme Petitioners are shareholders in Fannie Mae and Freddie Mac who are seeking to bring direct claims for the unconstitutional taking of their property interests as a result of the Net Worth Sweep. Barrett Pet. App. 8–10, 84–87.

Fairholme Petitioners filed their complaint in the Court of Federal Claims on July 9, 2013. Barrett Pet. App. 85. The Court of Federal Claims had jurisdiction over Petitioners’ claims under 28 U.S.C. § 1491(a)(1). After the conclusion of discovery, Fairholme Petitioners filed their second amended complaint—the operative complaint here—on August 3, 2018.

Barrett Pet. App. 86. The Government filed an omnibus motion to dismiss Fairholme Petitioners' complaint and the complaints in eleven related cases (including those in the *Owl Creek Asia I* and *Cacciapalle* petitions). Barrett Pet. App. 87–88 & n.11. The Court of Federal Claims dismissed Fairholme Petitioners' direct claims. Barrett Pet. App. 169.

In a single opinion, the Court of Appeals for the Federal Circuit considered Fairholme Petitioners' direct claims, as well as those direct claims in *Owl Creek Asia I* and *Cacciapalle*. Barrett Pet. App. 11 n.2 (noting that “the actual appeals were never consolidated,” but would be addressed in “this single opinion”). As explained in the *Owl Creek Asia I* and *Cacciapalle* petitions, the Federal Circuit affirmed the dismissal of Fairholme Petitioners' direct claims. Barrett Pet. App. 58–59.

REASONS FOR GRANTING THE PETITION

The Federal Circuit held that the Fairholme Petitioners failed to state a direct claim for the unconstitutional taking of their property interests as shareholders in Fannie Mae and Freddie Mac. This was error and raises important issues of federal law. On July 22, 2022, two petitions were filed that present this Court with the opportunity to address these very issues. See *Owl Creek Asia I, L.P., et al v. United States*, No. 22-____ (filed July 22, 2022) and in *Cacciapalle, et al., v. United States*, No. 22-____ (filed July 22, 2022). This Court should grant review for the reasons provided in the *Owl Creek Asia I* and *Cacciapalle* petitions and hold this Petition pending the Court's disposition of those cases.

Further, the Petition filed in *Barrett v. United States*, No. 22-____ (July 22, 2022) raises a distinct takings issue presented by the Federal Circuit's decision below, yet one that is sufficiently related such that this Court should also hold this Petition pending the disposition of *Barrett*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Owl Creek Asia I*, *Cacciapalle*, or *Barrett* and then should be disposed of as appropriate in light of any decision in those cases.

July 22, 2022

Respectfully submitted,

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