No. _____

In the Supreme Court of the United States

ANDREW T. BARRETT,

Petitioner,

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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QUESTION PRESENTED

In 2012, the Government expropriated the net worth of private companies, Fannie Mae and Freddie Mac, by arrogating for itself the Companies' earnings in perpetuity. The Federal Circuit held this "Net Worth Sweep" did not effect a compensable taking because the Government had purportedly eliminated the Companies' "cognizable property interest" in their own earnings and net worth through the enactment of the Housing and Economic Recovery Act of 2008.

The question presented is whether the Government's uncompensated appropriation of these private companies' earnings and net worth through the Net Worth Sweep effects a taking under the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioner Andrew T. Barrett was the plaintiff in the Court of Federal Claims and the plaintiff-appellant 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.

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 also plaintiffs in the Court of Federal Claims and plaintiffs-appellants in the Court of Appeals for the Federal Circuit. The Fairholme Petitioners have filed a separate petition for writ of certiorari in *Fairholme Funds, Inc., et al., v. United States*, No. 22-_____ (July 22, 2022).

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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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks 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 Pet. App. 1. The Court of Federal Claims' opinion is reported at 147 Fed. Cl. 1 and is reproduced at 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 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 Pet. App. 172.

JURISDICTION

The Court of Appeals issued its judgment on February 22, 2022. Pet. App. 60–65. Petitioner's 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.

INTRODUCTION

The United States, under the guise of a conservatorship unlike any other, expropriated over a hundred billion dollars from private companies, transferring "enormous amounts of wealth" to the Department of the Treasury "to serve public interests." *Collins v. Yellen*, 141 S. Ct. 1761, 1770, 1776 (2021). This transfer was orchestrated by the United States Treasury and the Federal Housing Finance Agency (FHFA) in a transaction known as the Net Worth Sweep. In *Collins*, this Court held that Congress gave FHFA statutory authority to take this action. *Id*. at 1778.

This Petition raises an issue left unaddressed by *Collins*: whether the Net Worth Sweep effected an uncompensated taking of the private property of Fannie Mae and Freddie Mac (the "Companies") for public use. The Federal Circuit concluded that Petitioner failed to state a takings claim, but in doing so, the court below relied on an analysis that splits from other circuits, contradicts this Court's precedents, and undermines the Constitution's solicitude for private property in a vitally important part of the economy.

The Takings Clause serves to protect "private property" "without any distinction between different types." *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). Thus, the Government owes "just compensation" if it takes "a parcel of real property," bunches of raisins, a lien on a ship, a security interest in a home, the contents of a bank account, or the going concern value of a corporation. *Horne*, 576 U.S. at 358; *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S.

595, 614 (2013); *United States v. Pewee Coal Co.*, 341 U.S. 114, 117 (1951). In other words, "[t]he constitutional provision is addressed to every sort of interest the citizen may possess." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

In its appeal to the Federal Circuit, the Government did not dispute the Companies' property interest in their own earnings and net worth. [1] Nevertheless, the Federal Circuit reached out to protect the Government from takings liability for the Net Worth Sweep by holding that the Companies lacked just that—a "cognizable property interest" in their own earnings. Pet. App. 53–54. Congress enacted the Housing and Economic Recovery Act of 2008 (the "Recovery Act") and authorized a conservatorship over the Companies. Pet. App. 8–9. By the Federal Circuit's lights, through this statutory enactment alone, the Government allegedly eliminated the Companies' "right to exclude" the public from their earnings. Pet. App. 52–53. And thus, when the Net Worth Sweep was imposed in 2012, the Federal Circuit determined that the Companies had no property interest left that could be taken. *Id.* at 53.

The Federal Circuit improperly expanded past the breaking point a principle recognized in *Lucas v.*

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[1] *See* Oral Arg. at 54:33–55:10, *Fairholme Funds, Inc. v. United States*, 20-1912 (Fed. Cir. Aug. 4, 2021) ("We have not briefed this."). The Federal Circuit did not seek supplemental briefing on the issue either. After almost a decade of litigation in a case involving over a hundred billion dollars of expropriated earnings and net worth, the Federal Circuit's judicial freelancing is untenable and makes this Petition all the more deserving of this Court's review. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

South Carolina Coastal Council, 505 U.S. 1003 (1992). In *Lucas*, this Court recognized that certain newly legislated "restrictions"—even those that deprive owners of all economically beneficial use of their property—are not takings if the restrictions were derived from "background principles of [a] State's law of property and nuisance." *Id.* at 1029. The reason is that such limitations on property use are not "part of [the owners'] title to begin with." *Id.* at 1027. Seizing upon and extending this reasoning, the Federal Circuit held the Recovery Act accomplished much the same thing as a background limitation on property rights: the Net Worth Sweep was not a taking because the Recovery Act was pre-existing (by 4 years) and made the "right to exclude" no longer part of the Companies' property interest at the time of the expropriation.

In holding that the Net Worth Sweep did not effect a taking, the Federal Circuit adopted an analysis that conflicts with other circuits. When determining whether a plaintiff lacks a protected property interest in light of a recent statutory change, other courts of appeals assess history, tradition, and longstanding practice to determine if the new statute accords with background principles of property law. For example, the D.C. Circuit assesses whether a federal statute's treatment of property comports with "mutually reinforc[ed] understandings" that were "well grounded" under governing law, history, "uniform custom[,] and practice." *Nixon v. United States*, 978 F.2d 1269, 1275–76 (D.C. Cir. 1992). The en banc First Circuit adopted an analogous approach. Upon review of a State's claimed power to require the disclosure of trade secrets under a recently enacted statute, that

court concluded that the State had "fail[ed] to identify any background principles of state law that successfully obviate [plaintiffs'] property interest in their trade secrets." *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 32 (1st Cir. 2002) (en banc). Likewise, the Fifth Circuit assessed a newly enacted restriction on taxi licenses against the backdrop of "existing rules or understandings." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 271 (5th Cir. 2012). The Second Circuit has similarly looked to "long-standing legislative decision[s]" and "legal tradition" to determine if a recent statutory curtailment of property rights was consistent with "background principles." *1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 257, 266 n.10 (2d Cir. 2014) (quoting *Lucas*, 505 U.S. at 1029). In these cases, the courts did not countenance the evisceration of property interests by the mere say-so of a legislature.

The Federal Circuit's analysis also contradicts this Court's many admonishments that the Government cannot simply enact away property interests. 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 Constitution's protection of private property would lose all "vitality" if the Government could simply erase property interests by legislative enactment. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984). But that is just what the Federal Circuit held the Government accomplished through the Recovery Act.

Once the property interest of the Companies is appropriately analyzed, the takings inquiry is straightforward. The Net Worth Sweep is nothing more than "a forced contribution to general governmental revenues." *Webb's Fabulous Pharmacies*, 449 U.S. at 163. When the Government so appropriates private property, "it is a taking without regard to other factors that a court might ordinarily examine." *Horne*, 576 U.S. at 362.

The Federal Circuit's decision is not only wrong by not finding a taking in this important case—immunizing the Government from liability for one of the largest seizures of private assets in American history—but the Federal Circuit's decision stands to undermine property rights throughout the financial sector and beyond. Moreover, the Federal Circuit's flawed *ipse dixit* approach to takings claims knows few limits. For instance, the Federal Circuit has relied on an analogous approach to hold that the Government can promulgate a new regulation to eliminate property interests and avoid paying just compensation under the Takings Clause, just so long as the regulation was reasonable under *Chevron*. *See generally* Pet. for Cert., *McCutchen v. United States*, No. 22-25 (July 5, 2022). It is clear that something has gone seriously awry in the Federal Circuit's takings jurisprudence. This disregard for property rights is particularly problematic given the Federal Circuit's exclusive jurisdiction over takings claims against the government in cases involving more than $10,000 of property.

In sum, the Government acted in disregard of the best interests of "for-profit corporations owned by private shareholders" when it imposed the Net Worth

Sweep. *Collins*, 141 S. Ct. at 1770. Instead, the Net Worth Sweep was purportedly "beneficial to the [Government] and, by extension, the public it serves." *Id.* at 1776. The Takings Clause does not forbid the Government from making the policy choice to requisition "enormous amounts of wealth" for public use. *Id.* at 1770. But when the Government decides to do so, "the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation." *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935).

The Court should grant this Petition and hold that the complaint in this case adequately alleges an unconstitutional taking.

STATEMENT

Petitioner is a shareholder in Fannie and Freddie who is derivatively challenging the Net Worth Sweep as a taking of these Companies' earnings and net worth.

The Companies. "Congress created the Federal National Mortgage Association (Fannie Mae) in 1938 and the Federal Home Loan Mortgage Corporation (Freddie Mac) in 1970 to support the Nation's home mortgage system." *Collins*, 141 S. Ct. at 1770. Initially, both entities were "part of the Federal government." Pet. App. 68. But then Congress made the decision to charter these Companies as "for-profit companies owned by private shareholders." *Id.*

As private entities, the Companies are corporations that rely on state law to define many aspects of their organizations: Fannie under the laws of Delaware, Freddie under the laws of Virginia. *Id.*

"[C]onsistent with the applicable state laws" and with their private status, the companies raised capital by "issu[ing] their own common and preferred stock." Pet. App. 68. Private shareholders, consistent with general corporate law principles, collectively had a right to the Companies' residual assets. After all, while the Companies remained in corporate form, they held "all the title, legal or equitable, to the corporate property." *Schoon v. Smith*, 953 A.2d 196, 201 n.10 (Del. 2008) (quoting 4 POMEROY'S EQUITY JURISPRUDENCE § 1095, at 276 (5th ed. 1941)).

The Companies were "consistently profitable" prior to 2007. Pet. App. 68. In fact, Fannie had not reported a full-year loss since 1985, and Freddie had not reported a full-year loss since becoming owned by private shareholders. *Id.* Consistent with this track record, the Companies regularly declared and paid dividends on each series of their respective Preferred Stock and Common Stock. As alleged in Petitioner's complaint, the Companies' sustained success left them well-positioned to weather declines in home prices and financial turmoil.

The housing market significantly declined in 2007 and the "bubble burst" in 2008, leading the Companies to incur significant losses. *Collins*, 141 S. Ct. at 1771. Yet "both Companies continued to generate enough cash to easily pay their debts and retained billions of dollars of capital that could be used to cover any future losses." Compl., No. 1:13-cv-00465 MMS, Doc. 422, ¶44 (Fed. Cl. Oct. 2, 2018). The Treasury Secretary informed Congress in the summer of 2008 that the Companies' "regulator ha[d] made clear they [were] adequately capitalized." *Id.* ¶45. In fact, the then-Director of FHFA issued a statement stating

that the Companies' "$95 billion in total capital, their substantial cash and liquidity portfolios, and their experienced management served as strong supports for [their] continued operations." *Id.* "Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency." Pet. App. 69.

Nevertheless, behind the scenes "as early as March 2008, Treasury was internally discussing 'potential costs and benefits of nationalization' of the Companies." Compl. ¶46.

Conservatorship. Around the same time that federal regulators were publicly affirming the financial strength of the Companies, Congress enacted the Housing and Economic Recovery Act of 2008 (the "Recovery Act"). The Recovery Act "authorized Treasury to purchase Fannie Mae's and Freddie Mac's stock if it determined that infusing the companies with capital would protect taxpayers and be beneficial to the financial and mortgage markets." *Collins*, 141 S. Ct. at 1771 (citing 12 U.S.C. §§ 1455(*l*)(1), 1719(g)(1)). Further, "the Recovery Act created the FHFA to regulate the companies and, in certain specified circumstances, step in as their conservator or receiver." *Id.* (citing 12 U.S.C. §§ 4502(20), 4511(b), 4617).

The Recovery Act provides that when acting as conservator FHFA has "the authority to take control of the companies' assets and operations, conduct business on their behalf, and transfer or sell any of their assets or liabilities." *Id.* at 1772 (citing 12 U.S.C. §§ 4617(b)(2)(B)–(C), (G)). But in exercising these powers, the Recovery Act tacitly recognized that the Companies had assets and property that were to be

conserved. Thus, when FHFA acts as conservator, its actions "must be 'necessary to put the regulated entity in a sound and solvent condition' and must be 'appropriate to carry on the business of the regulated entity and preserve and conserve [*its*] *assets and property*.'" *Id.* at 1776 (quoting 12 U.S.C. § 4617(b)(2)(D)) (emphasis added).

This Court held in *Collins* that the "FHFA conservatorship . . . differs from a typical conservatorship." *Collins*, 141 S. Ct. at 1776. FHFA did not have to "always act in the best interests of the" Companies, but instead could act in what FHFA determined was in the best interests of "*the* [*a*]*gency*." *Id.* (emphasis added). Thus, while acting as conservator, FHFA could decide to act in a way "beneficial" to it "and, by extension, the public it serves." *Id.* at 1776.

After the enactment of the Recovery Act, "Treasury 'urg[ed]' the FHFA to place [the Companies] into conservatorship." Pet. App. 72. FHFA and Treasury told the Companies' boards that the Companies would simply be "seize[d] . . . if [they] did not consent to the conservatorship." Pet. App. 73. The Companies relented under this pressure, "with an understanding" that FHFA would "preserve and conserve [the Companies'] assets," attempt to restore them to "sound and solvent condition, and terminat[e] the conservatorships when those goals were achieved." *Id.*

On September 6, 2008, FHFA's director appointed FHFA as conservator of the Companies. On September 7, 2008, FHFA entered into agreements with Treasury, in which Treasury "exercised its

temporary authority to buy" the Companies' stock. *Collins*, 141 S. Ct. 1772. In exchange for providing each company up to $100 billion in capital, Treasury received "1 million shares of specially created senior preferred stock in each company." *Id.* at 1773. With these shares, Treasury received four key entitlements:

> First, Treasury received a senior liquidation preference equal to $1 billion in each company, with a dollar-for-dollar increase every time the company drew on the capital commitment. In other words, in the event the FHFA liquidated Fannie Mae or Freddie Mac, Treasury would have the right to be paid back $1 billion, as well as whatever amount the company had already drawn from the capital commitment, before any other investors or shareholders could seek repayment. Second, Treasury was given warrants, or long-term options, to purchase up to 79.9% of the companies' common stock at a nominal price. Third, Treasury became entitled to a quarterly periodic commitment fee, which the companies would pay to compensate Treasury for the support provided by the ongoing access to capital. And finally, the companies became obligated to pay Treasury quarterly cash dividends at an annualized rate equal to 10% of Treasury's outstanding liquidation preference.

Id. FHFA and Treasury later amended this deal twice in 2009 to provide more capital support for the Companies. As then-FHFA Director Lockhart told Congress, FHFA's "most important goal [was] to

preserve the assets of Fannie Mae and Freddie Mac over the conservatorship period." *The Present Condition and Future Status of Fannie Mae and Freddie Mac: Hearing Before the Subcomm. of Capital Markets, Ins. & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 111th Cong. 136 (2009) (statement of James B. Lockhart III, Dir., FHFA).

In the early stages of the conservatorship, FHFA made the Companies report "on-paper losses" by writing down the value of the Companies' deferred tax assets and by designating large loan loss reserves. This caused a temporary decrease in the Companies' net worth and significant draws on Treasury's capital commitment. But the Companies' "cash receipts consistently exceeded their expenses; they maintained net operating revenue in excess of their net operating expenses from the onset of the conservatorship." Pet. App. 76.

Net Worth Sweep. By 2012, the financial outlook of the Companies was "promising." Pet. App. 76. The improving housing market, the settling of lawsuits, and anticipated revisions to the deferred tax asset and loan loss valuations, signaled that the Companies were about to experience massive profits amounting to over $100 billion. "Treasury noted that the [Companies] would post [r]ecord earnings." *Id*. An internal Fannie document projected that between 2012 and 2020, the Companies were likely to experience "golden years of . . . earnings." Pet. App. 77. Given the Companies' "return to profitability, there was no imminent risk" that they would struggle to repay Treasury. Compl. ¶142.

Treasury and FHFA entered into the Net Worth

Sweep to take maximum advantage of the private Companies' "golden years." Under the Net Worth Sweep, FHFA agreed that the Companies would no longer pay a 10% quarterly dividend to Treasury, as the Companies had been doing since Treasury acquired its senior preferred shares. Instead, the Net Worth Sweep required the Companies "to pay a dividend equal to the amount, if any, by which their net worth exceeded a pre-determined capital reserve." *Collins*, 141 S. Ct. at 1774. In other words, each quarter the Companies would pay *all of their surplus earnings* to Treasury.

As Treasury publicly admitted, the Net Worth Sweep meant that "every dollar of earnings that [the Companies] generate will be used to benefit taxpayers." Pet. App. 79. A Treasury official further commented that "[b]y taking all of their profits going forward, we are making clear that [the Companies] will not ever be allowed to return to profitable entities." Pet. App. 80.

Instead of "golden years" for the Companies, the Companies became the Government's "golden geese." The Government's seizure of the Companies' wealth led to "*enormous*" profits for the Government. *Collins*, 141 S. Ct. at 1770 (emphasis added). The windfall between 2012 and when the operative complaint in this case was filed in 2018 was at least $124 billion over the amount the Government would have received without the Net Worth Sweep.

In *Collins*, this Court upheld the Net Worth Sweep as authorized by the Recovery Act. 141 S. Ct. at 1778. In doing so, the Court explained, however, that its holding was grounded in the fact that *this*

conservatorship is *not* "like any other." *Id.* at 1776. Unlike a traditional conservator, FHFA is authorized by statute to act for the public's benefit even to the detriment of the financial institutions under its care. And "the facts alleged in the complaint demonstrate that the FHFA chose a path of rehabilitation that was designed to serve *public interests* by ensuring Fannie Mae's and Freddie Mac's continued support of the secondary mortgage market." *Id.* (emphasis added).

This Court did not address whether such a public-serving seizure of property would qualify as a taking under the Fifth Amendment.

Proceedings Below. Petitioner is Andrew T. Barrett, a shareholder of the Companies who has continually owned shares of both since September 2008. Petitioner, along with other shareholders, filed this action in the Court of Federal Claims. As relevant here, Petitioner brought "this action derivatively on behalf of and for the benefit of" the Companies, alleging that the Companies had both property interests and reasonable, investment-backed expectations in their net worth. Thus, Petitioner alleges that "[t]he Government, by operation of the Net Worth Sweep, has expropriated" the Companies' property interests and "has destroyed" their reasonable, investment-backed expectations.

The Court of Federal Claims had jurisdiction over Petitioner's claims under 28 U.S.C. § 1491(a)(1). That court held that Petitioner's takings claim survived the Government's motion to dismiss. Pet. App. 169. At the parties' mutual request, the Court of Federal Claims certified this ruling for an interlocutory appeal under 28 U.S.C. § 1292(d)(2), Pet. App. 170–81, and the

Federal Circuit agreed to hear the Government's appeal. Pet. App. 182–85.

As relevant here, the Federal Circuit reversed and held that Petitioner's derivative takings claims must be dismissed. *See* Pet. App. 58–59. In doing so, the Federal Circuit based its decision on a ground not advanced by the Government. The Federal Circuit explained that Petitioner "fails to state a claim upon which relief may be granted" because the Companies "lack any cognizable property interest on which [Petitioner] may base a derivative Fifth Amendment takings claim." Pet. App. 53.

The Federal Circuit concluded that the Companies lacked a cognizable property interest because, after the enactment of the Recovery Act, the Companies "lost their right to exclude the government from their property, including their net worth." Pet. App. 53. This was fatal because the "right to exclude is an essential element of property ownership," yet it is a right that "regulated financial entities lack . . . when the government could place the entities into conservatorship or receivership." Pet. App. 52–53. Accordingly, "[a]s of at least 2008," when the Recovery Act authorized FHFA to act as a conservator with "very broad authority," the Companies had no cognizable rights under the Takings Clause. Pet. App. 53. The court added that its conclusion was "bolstered" because the Companies "consented to the conservatorship." Pet. App. 53–54.

Thus, according to the decision below, "[b]ecause the [Companies] lacked the right to exclude the government from their net worth after the passage of [the Recovery Act], and especially after the imposition

of the conservatorship, they had no investment-backed expectation that the FHFA would protect their interests and not dilute their equity." Pet. App. 54.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH HOW OTHER CIRCUITS DECIDE WHETHER A RECENTLY ENACTED STATUTE ELIMINATES A PROPERTY INTEREST FOR PURPOSES OF THE TAKINGS CLAUSE

The first question in any takings claim is whether the plaintiff has identified "a property interest protected by the Fifth Amendment[.]" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000 (1984); *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1951 (2017) (Roberts, C.J., dissenting) (identifying this inquiry as "[s]tep one"). But the Constitution does not itself define private property. So, this Court "[t]raditional[ly] resort[s] to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property'" under the Takings Clause. *Lucas*, 505 U.S. at 1030 (quoting *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972)).

The Federal Circuit ruled that the Companies lack a protected property interest in their own earnings and net worth because the Recovery Act simply eliminated it. Thus, no property was taken by the Net Worth Sweep a few years later. The Federal Circuit's "step one" analysis was not only wrong (*see infra* Part II), but its approach also conflicts with that

of several other circuits. These other circuits consider purported statutory changes in property interests against the backdrop of history, tradition, and practice rather than giving the government *carte blanche* to eliminate property interests by legislative fiat. The Court should grant certiorari to resolve this important division of authority.

A. The Federal Circuit assessed the purported statutory elimination of the Companies' property interest in their own earnings and net worth by looking exclusively at whether Congress authorized the Net Worth Sweep.

The Federal Circuit has embraced a simplistic equation: if a statute purports to eliminate a property interest prior to the owner's acquisition of title (*contra Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001)) or the time of the taking, then there is no interest left to be taken. For example, in this case, the Federal Circuit breezily dismissed any property interest retained by the Companies in their earnings and net worth. Instead of a rigorous review of the nature of property interests under conservatorships or rights retained by corporate entities in their earnings (and without the benefit of briefing on the issue), the court relied on the following propositions: (A) the Companies complained of a taking of their earnings; (B) by the enactment of the Recovery Act, the Companies lost their "right to exclude" FHFA from their earnings; and (C) "[w]ithout this right to exclude, the [Companies] lack[ed] any cognizable property interest on which" to base a "Fifth Amendment takings claim." Pet. App. 53. A single

2008 statutory enactment destroyed the Companies' interest in their own earnings and net worth, thus defeating any subsequent takings claims.

In its analysis in this case, the Federal Circuit cited two of its prior decisions on conservatorships. *See* Pet. App. 53. (citing *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994)). But those two cases stand only for the proposition that the Government has certain authority to impose conservatorship on regulated financial institutions without necessarily effecting a compensable taking when acting pursuant to long-standing, well-established principles relating to capital requirements and other rules. They do not hold that financial institutions lose *all protected property interest*s once a conservatorship is established or that the Government can simply gut entities in conservatorship for its own profit without paying just compensation. *See Cal. Hous. Sec.*, 959 F.2d at 958 (explaining that plaintiffs had "less than the full bundle of property rights," not *no* bundle of rights). In this way, the Federal Circuit broke new and extraordinary ground with its *ipse dixit* analysis below. *Cf. 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.").

Although unsupported by its older precedents, the Federal Circuit has utilized the approach here or analogous approaches with alacrity in recent times. *See, e.g., McCutchen v. United States*, 14 F.4th 1355,

1365–68 (Fed. Cir. 2021) (finding that "preexisting limitation on [plaintiffs'] title included subjection to future valid agency interpretations" under *Chevron*, and thus no property interest had been taken)[2]; *Am. Bankers Ass'n v. United States*, 932 F.3d 1375, 1385 (Fed. Cir. 2019) (finding no property interest, in part, because "Congress 'expressly reserved' its 'right to amend, alter, or repeal' any provision of the Federal Reserve Act."); *see also A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014) (finding a property interest but explaining that "[i]f a challenged restriction was enacted before the property interest was acquired, [it] may be said to inhere in the title").

The Federal Circuit's Takings Clause analysis in this and other cases is straightforward: property interests are whatever a statute or regulation says they are. But that means the people of this country own only so much as the Government says they own and nothing more. If that were true, the Takings Clause would lose all "vitality," *Ruckelshaus*, 467 U.S. at 1012, no longer "stand[ing] as a buffer between property owners and governments." *Murr*, 137 S. Ct. at 1951 (Roberts, C.J., dissenting).

B. Other courts of appeals assess the purported statutory elimination of property interests against the backdrop of history, tradition, and practice.

When determining whether a plaintiff lacks a

[2] A petition for a writ of certiorari is pending in *McCutchen*, No. 22-25. If this Court grants *McCutchen*, it should also, at a minimum, hold this Petition pending its resolution of that case.

protected property interest in light of a recent statutory enactment, other courts of appeals assess history, tradition, and longstanding practice to determine if the statute accords with background principles of property law.

In contrast to the Federal Circuit's decision below, the D.C. Circuit looks to "mutually explicit understandings," custom, and usage, to decide whether a statute has eliminated property rights consistent with background principles. In *Nixon v. United States*, 978 F.2d 1269, 1276 (1992), the D.C. Circuit (in an opinion joined by then-Judge Ruth Bader Ginsburg) faced a takings claim brought by former President Nixon based on the property interest he asserted in his presidential papers. The claim arose based on the Presidential Records and Materials Preservation Act of 1974 ("PRMPA"). *Id.* at 1271. Analogous to the Petition here, this Court had previously evaluated the governmental seizure at issue and upheld it as legally permissible. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 484 (1977). But after this Court's decision came the question whether President Nixon had a property interest in the seized materials, and thus whether a taking had occurred. *Id.* at 445 n.8; *Nixon*, 978 F.2d at 1274. It was the takings claim that the D.C. Circuit considered in subsequent litigation.

After assessing "mutually explicit understandings" and the development of custom and usage around presidential papers, the D.C. Circuit held that President Nixon had a constitutionally protected property interest. The Government attempted to point to common law rights over employee work product, but this assertion was

relatively unsupported in light of "the robust tradition of private ownership" by past Presidents of their papers. *Id.* at 1276. The Government also argued that PRMPA was an enactment consistent with a longstanding *joint* interest by "both the American public and the President" in presidential papers. But, upon review, "the clear import of the historical practice [was] completely at odds with the Government's view." *Id.* at 1276–77. From President Washington until President Nixon's administration, "[h]istory, custom and usage . . . indicate[d] unequivocally" that presidential papers were private property. *Id.* at 1284. Thus, the PRMPA, by depriving President Nixon of "possession and control" over his papers, effected a per se taking. *Id.* at 1285–86.

The First Circuit undertook a similar analysis when, sitting en banc, it vacated a panel decision in a case involving a new Massachusetts statute requiring tobacco companies to disclose their trade secrets. *Philip Morris*, 312 F.3d at 32. The panel had not adequately considered the metes and bounds of Massachusetts law and the "long-recognized property interest" in trade secrets. *Philip Morris, Inc. v. Reilly*, 267 F.3d 45, 70 (1st Cir. 2001) (Selya, J., concurring in part, dissenting in part). Upon review of the State's claimed power to require the disclosure of trade secrets, the en banc First Circuit concluded that the State had "fail[ed] to identify any background principles of state law that successfully obviate [plaintiffs'] property interest in their trade secrets." *Philip Morris*, 312 F.3d at 32.

To be sure, the careful historical inquiry into background principles of property law used by other circuits does not always mean a property interest will

be found. For instance, the Fifth Circuit evaluated a newly enacted restriction on the transferability of taxi licenses in New Orleans in *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 268 (5th Cir. 2012). To assess whether the taxi drivers had a property interest, the court evaluated Louisiana's "existing rules or understandings." *Id.* at 270–71. Looking at the history, the scope of past regulation, market dynamics regarding the licenses, and a seventy-year-old state supreme court decision, the court concluded that the taxi drivers "possess, if anything, only a limited bundle of rights" and the newly enacted restrictions "merely codif[ied] pre-existing law." *Id.* at 272–74. Thus, no protected property interest had been taken.

The Second Circuit likewise approached property interests against the backdrop of history, tradition, and longstanding practice in *1256 Hertel Avenue Associates, LLC, v. Calloway*, 761 F.3d 252 (2d Cir. 2014). There, a creditor claimed in bankruptcy proceedings that his judgment lien had been taken by the application of a recent amendment to New York's homestead exemption. A prior version of the statute, in effect at the time the lien was perfected, allowed the debtor to exempt $10,000. The amended version allowed the debtor to exempt $50,000, thus reducing the value of the creditor's lien.

To evaluate the creditor's property interest, the Second Circuit reviewed New York's "long-standing legislative decision" to provide a homestead exemption. 761 F.3d at 257; *see also* 1850 N.Y. Laws ch. 260. The court walked through how the state had "amended the homestead exemption from time to time to ensure that its protections keep pace with

homeowners' changing needs." *Id.* In light of this history, the Court concluded that the recent amendment of "New York's homestead exemption qualifies as part of those common, shared understandings of permissible limitations derived from a State's legal tradition." *Id.* at 267 n.10 (quoting *Palazzolo*, 533 U.S. at 630). Thus, it served to "define the scope of a judgment lienholder's property interest"; it was an "implied limitation" that "ha[d] been there all along." *Id.* at 266–67.[3]

* * *

There is a division of authority. When faced with new statutory enactments, the D.C., First, Second, and Fifth Circuits have assessed those enactments in light of the backdrop of history, tradition, and longstanding practice to determine whether the new enactment is consistent with background principles of property law. In contrast, the Federal Circuit in this case looked exclusively at the statutory enactment itself and the broad authority it granted, thus adopting a takings analysis that is no more substantive than a rubber stamp—leaving property interests to the whim of whatever Congress says they are.

II. THE NET WORTH SWEEP EFFECTED A COMPENSABLE TAKING

The Federal Circuit's approach effectively

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[3] State courts have undertaken similarly fulsome analyses. *See Matter of City of New York*, 58 Misc. 3d 1210(A), 95 N.Y.S.3d 124 (N.Y. Sup. Ct. 2018), *aff'd sub nom. Matter of New Creek Bluebelt, Phase 4*, 205 A.D.3d 808 (N.Y. App. Div. 2022); *cf. Avenal v. State*, 886 So. 2d 1085, 1108 n.28 (La. 2004).

nullifies the Takings Clause in an important set of circumstances, namely when a newly enacted statute purports to eliminate a claimed property interest. Although this Court has found "no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle" that limits property interests, *Palazzolo*, 533 U.S. at 629, the Court's precedents require an approach completely contrary to what the Federal Circuit did here. And under those precedents, Petitioner has adequately alleged a compensable taking of the Companies' property interest in their earnings and net worth.

A. The Federal Circuit's approach to deciding whether the Companies have a property interest in their own earnings and net worth is inconsistent with this Court's precedents.

The Federal Circuit's analysis contradicts this Court's precedents, which have sent a simple but clear message to governments: "Under the Constitution, property rights cannot be so easily manipulated." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021). That is why "in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use." *Scranton v. Wheeler*, 179 U.S. 141, 153 (1900); *see also Gen. Motors*, 323 U.S. at 377 ("[The Takings Clause] conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs."). And governments "may not sidestep the Takings Clause by disavowing traditional

property interests long recognized under state law." *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998). Because, at bottom, "the government does not have unlimited power to redefine property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982). Thus, certain "severe" limitations on property "cannot be newly legislated or decreed (without compensation)" unless they accord with "background principles" of property law. *Lucas*, 505 U.S. at 1029.

This Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), is instructive. In that case, a Florida statute provided that interpleader funds were to be deposited with the county clerk. 449 U.S. at 155. The clerk charged a fee, and pursuant to a state statute, deposited the funds "in an assignable interest-bearing account at the highest interest." *Id.* at 157. After the principal interpleader funds were paid out, the clerk retained the interest earned on those funds during the time they were in public custody. The Florida Supreme Court held that the clerk's retention of this interest was not a taking because the "interest [was] not private property." *Id.* at 163.

This Court reversed, finding a taking. The Court explained that "[t]he usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Id.* at 162. Interest, as well as other "earnings of a fund," "are incidents of ownership of the fund itself and are property just as the fund itself is property." *Id.* at 164. This was a "long established general rule." *Id*. at 163. Since the interpleader funds were private,

the interest earned on them was traditionally private too. But "the state statute ha[d] the practical effect of appropriating for the county the value of the use of the fund for the period in which it" was held by the clerk, contrary to this established rule. *Id.* This the State could not do:

> a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

id. at 164. Thus, the "forced contribution" of the interest "to general governmental revenues" was unconstitutional without just compensation. *Id.* at 163.

The Federal Circuit's approach flies in the face of these precedents. Contrary to *Webb's Fabulous Pharmacies*, the Federal Circuit did not consider the longstanding property interest of private companies in their own earnings and net worth. It merely said the Recovery Act granted FHFA authority over the Companies' right to exclude because of the conservatorship, therefore the Companies "lost" any property interest that could be taken. That is all but an endorsement of the destruction of property rights by the "ipse dixit" of a statute.

In contrast to the decision below, the proper approach requires the reviewing court to make an independent evaluation of the property interest at stake. *Stop the Beach Renourishment, Inc., v. Florida*

Dep't of Env't Prot., 560 U.S. 702, 725–27 (plurality op.). That is what this Court requires when reviewing alleged takings by States. As Justice Scalia explained, this Court must "make [its] *own determination*, without deference to state judges, whether [a] challenged [state court] decision deprives the claimant of an established property right." *Id.* at 726 n.9 (emphasis added). In doing so, the Court will decide "what state property rights exist" and any "background principles" that inhere in the property title itself. *Id.* at 726 (quoting *Lucas*, 505 U.S. at 1029). This Court must apply the same approach when the alleged taking is by the United States. To provide otherwise—which is to say to defer to Congress's judgment about what *is* property—would leave the "constitutional provision that forbids the uncompensated taking of property . . . quite simply insusceptible of enforcement by federal courts." *Id.* at 727.

A court's mandate to conduct an independent evaluation endures even when the statutory enactment curtailing property rights predates the alleged taking. After all, "[a] law does not become a background principle . . . by enactment itself." *Palazzolo*, 533 U.S. at 630. Moreover, "the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking" *unless* the "restriction form[s] part of the 'background principles of the State's law of property and nuisance.'" *Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring) (quoting *Lucas*, 505 U.S. at 1029). That is because the mere fact that a law is on the books does not give it an "assumed validity" under

the Takings Clause, especially when it "in fact deprives property of so much of its value as to be unconstitutional." *Id.*[4]

The Federal Circuit's analysis is also wrong for another reason: it implicates what property scholars have called the "positivist trap." *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 922–23 (2000). As Professor Merrill has explained, if "property interests" are completely dependent on what nonconstitutional sources of law (e.g., statutes) say are the property interests, then the Takings Clause will end up protecting only as much property as the Government wants.

When caught in the "trap," a reviewing court ends up "ced[ing] the domain of constitutional property to governmental actors over which the Court, in its capacity as constitutional interpreter ha[s] no control . . . requir[ing] the Court to go along with any and all contractions or expansions on the domain of property." *Id.* at 923. This leaves the Takings Clause a dead letter. *See* Thomas W. Merrill, *The Eagle Theory,* 9 BRIGHAM-KANNER PROPERTY RTS. J. 17, 35 (2020) ("The trap is created by the possibility that state law defines all property as being qualified by the police

[4] The fact that laws do not have an assumed validity under the Takings Clause is reflected in how this Court treats as separate inquiries (1) whether the government had the authority to take an action and (2) whether the government's otherwise authorized action effects a taking. *See, e.g.*, *Preseault v. I.C.C.*, 494 U.S. 1, 17 (1990); *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 305 (1987) ("The [Takings] Clause is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.").

power, and the police power is so broadly defined that any conceivable regulation is automatically upheld as a legitimate qualification of property.").

B. The Companies' property interests in their own earnings and net worth were taken without just compensation.

To plead a compensable taking, a plaintiff must (1) identify a property interest and (2) sufficient interference with that property interest to amount to a taking. *Ruckelshaus*, 467 U.S. at 1000. The allegations in Petitioner's complaint more than suffice to show the Net Worth Sweep effected a taking. First, the Companies have property interests in their own earnings and net worth. In fact, the Government did not argue to the contrary in its briefing before the Federal Circuit. Second, Petitioner has alleged that the Net Worth Sweep effected a taking of those interests in a "paradigmatic" manner, namely that the Government by "direct appropriation" transferred the Companies' earnings to itself. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

It is hornbook law that "the capital or assets of the corporation are its property. . . . Thus, earnings and profits still in the possession of a corporation belong to the corporation the same as its property generally." 1 FLETCHER CYC. CORP. § 31; *see also Schoon v. Smith*, 953 A.2d 196, 201 n.10 (Del. 2008) ("[C]orporation[s] hold[ ] all the title, legal or equitable, to the corporate property." (quoting 4 POMEROY'S EQUITY JURISPRUDENCE § 1095, at 276 (5th ed. 1941))). This is a basic tenet of the law of corporations that this Court has implicitly recognized in the takings context. *See*

Kimball Laundry Co. v. United States, 338 U.S. 1, 11 (1949) ("'In determining the value of a business as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property. Where the public acquires the business, compensation must be made for these, at least under some circumstances.'" (quoting *Galveston Electric Co. v. Galveston*, 258 U.S. 388, 396 (1922)).

Moreover, corporate earnings retain the traditional hallmarks of constitutionally protected property interests. Namely, corporate earnings are a "readily identifiable discrete resource" over which the corporation traditionally exercises the "right to exclude." *Merrill*, *Landscape, supra*, 86 VA. L. REV. at 975–76; *see also Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) ("[T]he interest earned in the IOLTA accounts is the 'private property' of the owner of the principal."); *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 164 (explaining that "earnings of a fund" "are incidents of ownership of the fund itself and are property just as the fund itself is property.").

There are no "background principles" which "inhere" in the Companies' right to their corporate earnings or net worth that could excuse the Net Worth Sweep. *Lucas,* 505 U.S. at 1029. Even if the possible imposition of a *traditional* conservatorship, which acted as a fiduciary of the financial institution, could be said to be a background principle, *cf. California Housing Securities*, 959 F.2d at 958, it is an altogether different proposition to hold that history, tradition, and longstanding practice countenance a conservatorship in which government officials

expropriate all of the institution's assets and run it for public profit. To date, the Government has never identified anything close to a background principle of conservatorship, reflecting "common, shared understandings of permissible limitations derived from . . . legal tradition" that would permit the Net Worth Sweep. *Palazzolo*, 533 U.S. at 630. As this Court is well aware, FHFA's conservatorship has operated unlike any other. *Collins*, 141 S. Ct. at 1776. There have been thousands of federal conservatorships and receiverships over more than a century of federal financial regulation, but none of them involved anything like the Net Worth Sweep.

Moreover, conservatorship is but one species of financial remediation where the Government enjoys dominion over otherwise private property. Even in these situations, the Government cannot simply walk away with funds not owing to it or transfer property rights to itself without just compensation. For instance, in bankruptcy, the Government cannot eliminate preexisting security interests by fiat. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 75 (1982). If it does so, it is a taking. *Id.* In forced sales to recover funds for tax liens, the Government cannot transfer or take for itself any surplus from the sale unless the owner forfeits the right to the surplus. That too would be a taking. *See United States v. Lawton*, 110 U.S. 146, 150 (1884); *accord Nelson v. City of New York*, 352 U.S. 103, 110 (1956).

Longstanding principles of receivership—another approach taken by the Government to distressed financial institutions—reaffirm that there is no conservatorship exception to the Takings Clause.

Receivers have long had a general duty to return any surplus generated by the liquidation of assets. *See Pierce v. Carleton*, 12 Ill. 358, 364 (1851) ("[I]f there is any surplus it is the duty of the officer to pay it over to the defendant."). Specifically, "in the case of a corporation the purpose and object of their appointment is not only to adjust and pay the claims of creditors but also to distribute the surplus, if any, to stockholders." CLARK ON RECEIVERS, § 22 (3d ed. 1959). This is a right that the Recovery Act codified. *See* 12 U.S.C. § 4617(b)(2)(K)(i) (providing stockholders retain "their right to payment, resolution, or other satisfaction of their claims"); *id.* § 4617(c)(1)(D) (establishing priority scheme for unsecured claims included those to "shareholders or members"). And one that can give rise to a taking. *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1296 (Fed. Cir. 1999) (finding plaintiff "possesses a direct and cognizable property interest in a potential liquidation surplus and consequently has standing to sue for its taking"). Applying these principles here, even to the extent an imposed conservatorship could temporarily transfer control of the Companies' assets to the Government, that would not eliminate altogether the Companies' property right in those assets. It would be odd indeed if the Companies' property rights endured through receivership but not conservatorship, as the outcome of receivership would be to shut the Companies down, while the goal of conservatorship is to rehabilitate them.

With an established property interest and no background principle supporting an action "so severe" as the Net Worth Sweep, *Lucas*, 505 U.S. at 1029, the

second part of the takings inquiry is straightforward. The interference with the Companies' property interest in their earnings and net worth was total, amounting to a *per se* taking. *Brown*, 538 U.S. at 235. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002) (citing *Pewee Coal*, 341 U.S. at 115). Here, as Treasury boasted in a press release, all that the Companies earned over a comparatively small capital reserve—"every dollar"—has been turned over "to benefit taxpayers." Pet. App. 79. It is scarcely different than if the Government were to reach into a citizen's pocket and grab all the cash. Or if the Government decreed a "percentage of [a] raisin crop without charge, for the Government's control and use." *Horne*, 576 U.S. at 362. Here, as in those instances, the interference with the Companies' property interest is of "such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.* at 362.

"The facts alleged in the complaint demonstrate that the FHFA chose a path of rehabilitation that was designed to serve *public interests* by ensuring Fannie Mae's and Freddie Mac's continued support of the secondary mortgage market." *Collins*, 141 S. Ct. at 1776. (emphasis added). To accomplish this support, the Government engineered the Net Worth Sweep, which is indistinguishable from "a forced contribution to general governmental revenues." *Webb's Fabulous Pharmacies*, 449 U.S. at 163. No matter how "great the Nation's need . . . private property shall not be thus taken even for a wholly public use without just

compensation." *See Louisville Joint Stock Land Bank*, 295 U.S. at 602.

III. THIS CASE PRESENTS A GOOD VEHICLE TO ADDRESS IMPORTANT AND RECURRING ISSUES

The Takings Clause is a "constitutional provision . . . addressed to every sort of interest the citizen may possess." *Gen. Motors Corp.*, 323 U.S. at 378. And in every sort of case the nature of the property interest must be ascertained by the reviewing court—whether the alleged taking is a per se taking or so-called regulatory taking. Thus, the Federal Circuit has split with other circuits on a recurring issue that is critical to takings jurisprudence.

This Court's review is made the more necessary by the fact that this Court itself has left open the question whether statutory enactments can so inhere in a property owner's title so as to deprive them of a property interest that can be taken. Previously, this Court found "no occasion" to articulate a standard. *Palazzolo*, 533 U.S. at 629. Petitioner respectfully submits that this is the occasion to do so, especially given the enormity of the alleged taking here.

Further, if the Federal Circuit's decision is left undisturbed, it will have troubling consequences throughout the financial sector. Conservatorship and receivership are common tools in federal financial regulators' arsenal. *See* 12 U.S.C. § 1821(d) (granting FDIC conservatorship and receivership powers materially identical to those of FHFA). The Federal Circuit's reasoning could thus apply to all the assets under the jurisdiction of the FDIC, which is a commonly appointed conservator or receiver. As of

March 2022, the FDIC served as primary or secondary federal regulator of over $23 trillion in assets. And it is the federal agency "typically appoint[ed]" as receiver. *See 2017 Annual Report*, FDIC (last updated Mar. 1, 2018), https://bit.ly/3Ppstg8. Conservatorship can also be imposed over federal credit unions by the National Credit Union Administration, *see* 12 U.S.C. § 1787(b)(2)(D)–(E), and in the agricultural sector by the Farm Credit Administration, *see* 12 U.S.C. § 2183(b). Moreover, the Federal Circuit has exclusive jurisdiction over appeals from the Court of Federal Claims.

That the Federal Circuit's decision may insulate the Government from any takings liability for its operation of conservatorships and receiverships throughout the financial system is itself a compelling reason for this Court to grant certiorari. That this particular case involves "enormous potential" sums "is [another] strong factor in deciding whether to grant certiorari." *Fid. Fed. Bank & Tr. v. Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., concurring in the denial of certiorari).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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