No. 17-540

In the Supreme Court of the United States

STARR INTERNATIONAL COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner, a shareholder of American International Group (AIG), lacked standing to challenge the terms of the government's rescue loan to AIG after the corporation itself declined to sue.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-82a) is reported at 856 F.3d 953. The opinion of the Court of Federal Claims (Pet. App. 83a-220a) is reported at 121 Fed. Cl. 428.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2017. On July 21, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 6, 2017. On August 25, 2017, the Chief Justice further extended the time within which to file a petition for a writ of certiorari to and including October 6, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. American International Group (AIG) is a publicly traded Delaware corporation with numerous insurance and financial-services subsidiaries. Pet. App. 4a. By the mid-2000s, AIG had become a major participant in various derivatives markets, including credit-default swaps linked to subprime mortgages. *Ibid.*

In 2007, with the "bursting of the housing bubble," AIG began to face serious liquidity problems. Pet. App. 107a; see *id.* at 109a. AIG pursued various funding options in the private market, but its liquidity problems continued. See *id.* at 109a-111a. By mid-September 2008, AIG was on the brink of bankruptcy. See *id.* at 111a-114a. On Friday, September 12, 2008, AIG informed the Federal Reserve Bank of New York (FRBNY) that AIG urgently needed funds "in the range of $13 to $18 billion." *Id.* at 113a.[1] Two days later, AIG increased its estimated shortfall to $45 billion. *Id.* at 5a, 115a. The next day, AIG's estimate grew to $75 billion. *Ibid.*

During the weekend of September 13-14, 2008, the "prognosis * * * was that AIG, without an immediate and massive cash infusion, would face bankruptcy by the following Tuesday, September 16." Pet. App. 84a. On Monday, September 15, after AIG's own financing efforts failed, FRBNY asked several private banks to "try to rescue AIG" by "arrang[ing] a syndicated rescue loan" among "a private consortium of lenders." *Id.* at

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[1] FRBNY is one of 12 Federal Reserve Banks, which are private instrumentalities created by federal statute. See 12 U.S.C. 341 *et seq.* Despite their nongovernmental status, the Banks exercise certain federal functions authorized by statute or delegated by the Board of Governors of the Federal Reserve System, an independent agency of the United States. *Ibid.*; see 12 U.S.C. 241 *et seq.* (Board of Governors).

116a. The private banks then "worked through the night" to develop a proposed loan to AIG "that might be attractive to other banks." *Id.* at 117a. The banks developed terms for a $75 billion syndicated loan that would include not only an interest rate, fees, and a pledge of all of AIG's assets as collateral, but also the provision of a 79.9% equity interest in the company. C.A. App. A201589-A201590. The private banks ultimately determined, however, that lending to AIG was too risky even on those terms. *Id.* at A107075-A107077.

In the meantime, AIG's financial position further deteriorated. After the markets closed on September 15, 2008, the three major credit-rating agencies each downgraded AIG, which triggered AIG's obligation to make immediate cash payments under its credit-default-swap contracts. C.A. App. A106398-A106400, A200495. On the morning of September 16, AIG's stock price opened at $1.85—down more than 60% from the prior day's close—and almost immediately fell further to $1.25. *Id.* at A107466-A107467, A400189. This rapid fall reflected the market's belief that AIG was about to go bankrupt and that AIG stock would become worthless unless the government intervened to rescue the company. *Id.* at A107561-A107562, A108213-A108214, A400189. On September 16, AIG estimated that its total liquidity needs had increased to $93 billion, see *id.* at A106425, A200033, and it projected that it would run out of money the next day, see *id.* at A106969-A106971, A200035.

b. In the days and weeks before September 16, 2008, FRBNY and government officials repeatedly counseled AIG that it should find a private-sector solution for its liquidity problems. C.A. App. A100468-A100471, A101337-A101339, A101721-A101722, A101727, A102193. After

AIG failed to find a private-sector solution, and the private banks convened by FRBNY advised that they had been unable to arrange for a rescue, the government considered whether public assistance to AIG would be necessary and appropriate. Pet. App. 117a-119a. On September 16, after concluding that an AIG bankruptcy would have "catastrophic consequences" for the financial system and overall economy, FRBNY undertook to develop terms for a proposed loan to AIG under Section 13(3) of the Federal Reserve Act, 12 U.S.C. 221 *et seq.* Pet. App. 117a; see *id.* at 5a. At that time, Section 13(3) authorized emergency lending in "unusual and exigent circumstances" to any "individual, partnership, or corporation" that was "unable to secure adequate credit accommodations" elsewhere. 12 U.S.C. 343 (2006).

On the afternoon of September 16, FRBNY presented a "preliminary draft" term sheet to the Federal Reserve Board of Governors, whose authorization was needed before FRBNY could offer a loan. C.A. App. A200013-A200020. The draft term sheet proposed to lend AIG up to $85 billion, and it contained substantially the same terms as had been developed by the private banks, including "79.9% equity in AIG." Pet. App. 6a. The Board of Governors unanimously authorized FRBNY to lend to AIG on terms "such as those described" in the draft term sheet. C.A. App. A200004; see *id.* at A200002-A200003.

The inclusion of a 79.9% equity interest as a term of the proposed loan reflected various economic and policy considerations.[2] First, officials concluded that the pro-

[2] The Court of Federal Claims found that FRBNY and Federal Reserve officials had "acknowledged that they could not obtain or hold equity," Pet. 10 (quoting Pet. App. 192a), but that finding was

posed $85 billion loan—the largest ever by a Federal Reserve Bank to any private borrower—presented an unprecedented degree of repayment risk, and they determined that equity participation was necessary to adequately compensate taxpayers for assuming that risk.[3] See C.A. App. A101775-A101776, A101982-A101983, A102230, A201619. Second, FRBNY and the Board of Governors concluded that lending to AIG on terms more favorable than those developed by the private market would create perverse incentives. As noted, the proposed private consortium would have required a 79.9% equity interest in AIG in exchange for a fully secured $75 billion loan, and AIG itself expected any rescuer to demand "some form of equity," *id.* at A200029. Officials concluded that lending to AIG without an equity term would encourage other distressed companies to pursue rescues from the Federal Reserve rather than from the private sector, based on a belief that the best terms would come from the government. See, *e.g.*, *id.* at A101243-A101244, A101771-A101779. Third, FRBNY

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clearly erroneous. See Gov't C.A. Principal & Resp. Br. 52-53. That factual dispute, like other factual disputes not resolved by the court of appeals, cf. Pet. App. 3a n.1, has no bearing on the question presented here.

[3] Because any losses on the loan would reduce the net earnings transferred by FRBNY to the U.S. Treasury, American taxpayers bore the ultimate risk of non-repayment. C.A. App. A101816-A101817; A201596. This risk was not eliminated by AIG's pledge of assets as collateral. The rescue loan was secured primarily by AIG's insurance subsidiaries, which were not publicly traded and which were subject to regulation by state or foreign insurance authorities, who could seize the subsidiaries in an AIG bankruptcy. Pet. App. 99a; C.A. App. A102889-A102891, A102895-A102897. If AIG had defaulted or gone bankrupt, moreover, the value of the insurance subsidiaries likely would have declined. C.A. App. A101757, A101812, A102455, A108191-A108193.

and the Board of Governors concluded that accepting an equity interest in AIG would moderate the extent of the windfall to AIG's shareholders from the rescue, and thus mitigate the perceived unfairness in the government's decision to save AIG but not the thousands of other companies that went bankrupt and whose shareholders thereby suffered substantial financial loss. *Id.* at A102170-A102171, A102227.

Neither FRBNY nor the Board of Governors had any power to require AIG to accept the proposed rescue, and they contemplated that AIG might reject it. As Timothy Geithner (FRBNY's president in 2008) later testified, if AIG had rejected the terms of the proposed rescue, the government would not have offered further assistance, and AIG "presumably * * * would have filed for bankruptcy." C.A. App. A101801-A101802.

c. After obtaining the Board of Governors' approval, FRBNY shared a proposed term sheet with AIG. On the evening of September 16, 2008, AIG's board of directors convened to consider FRBNY's proposed loan. Pet. App. 6a-7a, 122a. The AIG board's advisers gave the directors "comprehensive legal advice on whether they should accept the loan or file for bankruptcy," *id.* at 122a, after which the directors "discussed the pros and cons of accepting the loan, including the equity term," *id.* at 6a. All but one of AIG's 12 directors voted in favor of the proposed loan, "decid[ing] that accepting the loan was a better alternative than bankruptcy." *Id.* at 122a; see *id.* at 6a-7a, 122a-123a. The board accordingly "authorized AIG 'to enter into a transaction with [FRBNY] * * * to provide a revolving credit facility of up to $85 billion on terms consistent with those described at this meeting, including equity participation equivalent to 79.9 percent of the common stock of the

Corporation on a fully-diluted basis.'" *Id.* at 123a (quoting board minutes).

After AIG accepted the September 16 term sheet, FRBNY advanced $14 billion to AIG to meet its immediate liquidity needs. Pet. App. 7a, 126a; C.A. App. A200055. FRBNY then drafted a proposed credit agreement to implement the terms set out in the term sheet.

On September 21, 2008, AIG's board unanimously voted to accept the credit agreement. Pet. App. 7a; see C.A. App. A200062-A200075. The agreement stated that the government, through "a new trust established for the benefit of the United States Treasury," would receive the 79.9% equity interest in the form of newly issued preferred stock that would be convertible into common stock. Pet. App. 7a (quoting credit agreement).[4] The recited consideration for the preferred stock was "$500,000 plus the lending commitment of [FRBNY]." *Ibid.* (citation omitted). AIG issued the convertible preferred stock and placed it in the Trust in 2009. *Id.* at 137a.

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[4] The loan terms previously contemplated by the private banks on September 15-16, 2008, had specified that the 79.9% equity interest would take the form of "[p]enny warrants on common shares." C.A. App. A201590. In seeking authorization to lend to AIG, FRBNY presented to the Board of Governors a preliminary draft term sheet that likewise contemplated equity in the form of warrants. *Id.* at A200016, A200020. But the term sheet ultimately presented to, and approved by, the AIG board instead provided generally for "[e]quity participation equivalent to 79.9% of the common stock of AIG on a fully-diluted basis," with the "[f]orm to be determined" later. *Id.* at A400162; see *id.* at A105943-A105944. After AIG accepted the September 16 term sheet, FRBNY and the government decided that the equity interest should take the form of convertible preferred stock with economic and voting rights equivalent to common stock. *Id.* at A100765-A100767, A101774-A101775, A106078-A106081.

d. The $85 billion credit facility quickly proved insufficient to meet AIG's liquidity needs. In the months following September 2008, FRBNY and the Treasury Department provided AIG with several rounds of additional taxpayer-backed assistance. Pet. App. 139a-143a. The total federal assistance ultimately made available to AIG was approximately $182.3 billion. C.A. App. A304784.

e. In 2011, as part of a restructuring agreement with AIG, the government exchanged its preferred stock for new common stock issued by AIG. Pet. App. 9a. Between May 2011 and December 2012, the government sold this common stock in a series of public offerings. *Ibid.* Including the proceeds from the stock sales, interest, and fees, the government's $182.3 billion of assistance to AIG yielded a net return to taxpayers of $22.7 billion, amounting to a 5.7% annual return on investment. C.A. App. A107539-A107541, A304784, A400193.

2. a. In 2011, petitioner Starr International Co., a shareholder of AIG, brought this lawsuit in the Court of Federal Claims (CFC). Pet. App. 10a. Petitioner contended that the equity term of the government's 2008 rescue loan to AIG constituted a taking, an illegal exaction, or an unconstitutional condition in violation of the Fifth Amendment. See *id.* at 12a-13a. Petitioner sought to bring these claims not only "derivatively" on behalf of AIG, but also "directly" on behalf of itself and an opt-in class of shareholders. *Id.* at 10a-11a.[5]

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[5] On the same date, petitioner sued FRBNY in the Southern District of New York, asserting similar common-law and constitutional claims. The district court dismissed petitioner's suit against FRBNY for failure to state a claim. *Starr Int'l Co.* v. *FRBNY*, 906 F. Supp. 2d 202 (S.D.N.Y. 2012). The Second Circuit affirmed, see 742 F.3d 37 (2014), and this Court denied certiorari, see 134 S. Ct. 2884 (2014).

The government moved to dismiss petitioner's suit. The government argued that petitioner's challenges to the terms of the September 2008 rescue loan were claims belonging to AIG itself (and thus not subject to direct suit by stockholders on their own behalf); that nothing had been taken or exacted from petitioner or other shareholders; that the rescue, as a voluntary transaction, was not a taking or exaction from AIG; and that the actions of the Board of Governors and FRBNY were authorized by the Federal Reserve Act. See generally 106 Fed. Cl. 50. The CFC granted the government's motion to dismiss as to petitioner's "unconstitutional conditions" claim, but otherwise denied the motion. See *ibid.* With respect to petitioner's purportedly direct claims, the court later certified a class of AIG shareholders. Pet. App. 11a, 174a.

In late 2012, petitioner sought permission from AIG's board of directors to bring claims derivatively on behalf of the corporation. See 111 Fed. Cl. 459, 464-465. In January 2013, the AIG board unanimously refused petitioner's demand, concluding that bringing suit was not in the interest of AIG or its shareholders. *Id.* at 467-468; see Pet. App. 11a.[6]

b. After the AIG board decided not to sue, petitioner filed a second amended complaint, again seeking to assert the same claims both directly and derivatively. The CFC dismissed petitioner's claims to the extent they were asserted derivatively, holding that the AIG board's rejection of petitioner's claims was reasonable and entitled to deference. Pet. App. 174a; 111 Fed. Cl. at 469-480. But the court allowed petitioner's claims to

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[6] As of that date, the government was no longer a shareholder of AIG.

proceed to the extent they were asserted directly, notwithstanding the government's argument that any claims challenging the terms of the 2008 rescue loan belonged solely to AIG and should be dismissed given AIG's decision not to sue. Pet. App. 14a. The CFC subsequently refused to certify for interlocutory appeal the question whether petitioner lacked standing to pursue its claims. *Ibid.*

c. After a 37-day bench trial, the CFC determined that petitioner was entitled to no relief. Pet. App. 83a-220a. The court concluded that FRBNY lacked the authority to acquire equity as consideration for a loan made under Section 13(3) of the Federal Reserve Act, see *id.* at 94a-95a, and it declared that petitioner "shall prevail on liability" as to its illegal-exaction claim, *id.* at 206a; see C.A. App. A100169 (judgment). The court found, however, that petitioner had suffered no economic loss, Pet. App. 98a-101a, because the government's actions had "significantly enhanced the value of the AIG shareholders' stock," *id.* at 204a. The court explained that, if the government had not rescued the company, the "inescapable conclusion" was that "AIG would have filed for bankruptcy," and "[i]n that event, the value of the shareholders['] common stock would have been zero." *Id.* at 203a-204a.[7]

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[7] Petitioner had also asserted, as an additional "direct" claim, that a reverse stock split undertaken by AIG in June 2009 constituted a taking or illegal exaction by the United States. After trial, the CFC rejected this claim, finding "no evidence" to support petitioner's contention that the reverse stock split "was designed to allow the Government's preferred stock to be exchanged for common stock." Pet. App. 98a. The court concluded that "the primary motivation for the split was to ensure AIG was not delisted from the New York Stock Exchange." *Ibid.* The court of appeals affirmed the judgment

d. Petitioner appealed the CFC's decision not to award damages. The government cross-appealed the CFC's judgment that petitioner "prevail[ed] on liability." The government argued that petitioner lacked standing because its claims were derivative and belonged to AIG rather than to AIG's shareholders individually, and that the government's acquisition of equity in AIG was not an illegal exaction.

3. The court of appeals vacated the CFC's judgment and remanded with instructions to dismiss petitioner's suit. Pet. App. 1a-44a; see *id.* at 45a-82a (Wallach, J., concurring in part and concurring in the result).

a. The court of appeals held that petitioner's challenges to the rescue loan were barred because petitioner "lack[ed] standing" to pursue them. Pet. App. 3a. The court explained that "a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Id.* at 21a (quoting *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004)). The court stated that this limitation "generally prohibits shareholders from initiating actions to enforce the rights of [a] corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." *Id.* at 23a (quoting *Franchise Tax Bd.* v. *Alcan Aluminium Ltd.*, 493 U.S. 331 (1990)) (brackets in original). "Only 'shareholder[s] with a direct, personal interest in a cause of action,' rather than 'injuries [that] are entirely derivative of their ownership interests' in a corporation, can bring actions directly." *Ibid.* (quoting *Franchise Tax Bd.*, 493 U.S. at 336-337)

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in favor of the government on the reverse-stock-split claim, see *id.* at 43a, and petitioner does not seek this Court's review as to that claim (cf. Pet. 13 n.1).

(brackets in original). The court noted that this distinction between "direct" and "derivative" shareholder claims was well-recognized in "both federal law and Delaware law," *ibid.*, and observed that "[petitioner] d[id] not argue that the distinction should be relaxed" in this case, *id.* at 21a n.17.

Applying those principles, the court of appeals concluded that the claims asserted by petitioner "belong[ed] exclusively to AIG." Pet. App. 3a. The court explained that a shareholder's claim that a corporation has overpaid a third party in a corporate transaction is generally derivative, because "any dilution in value of the corporation's stock" suffered by the shareholder "is merely the unavoidable result * * * of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction." *Id.* at 25a (citation omitted). Here, petitioner acknowledged that the alleged harm to shareholders from the government's rescue of AIG occurred "on a ratable basis, share for share," *id.* at 34a (quoting C.A. App. A501694, A502227), so that "[t]he alleged injuries to [petitioner] are merely incidental to injuries to AIG" as a whole, *id.* at 41a. The court further observed that AIG, in the "exercise[] [of] its business judgment," had already "declined to prosecute this lawsuit" on behalf of the corporation and its shareholders. *Ibid.*; see also *id.* at 22a.

b. Judge Wallach concurred in part and concurred in the result. He concluded that petitioner's illegal-exaction claim failed at the threshold because the Federal Reserve Act was not "money mandating" so as to establish subject-matter jurisdiction in the CFC under the Tucker Act, 28 U.S.C. 1491(a). See Pet. App. 47a-70a. With respect to petitioner's takings claim, Judge Wal-

lach concluded that petitioner lacked Article III standing because the claim properly belonged to AIG rather than to shareholders individually. See *id.* at 70a-82a.

ARGUMENT

Petitioner contends (Pet. 16-38) that it is entitled to assert, in its own right, claims that the government's bilateral transaction with AIG constituted a taking or illegal exaction. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of another court of appeals. Petitioner principally argues that the distinction between direct and derivative shareholder suits is not a matter of "prudential standing," and instead should be given some other doctrinal grounding. But that argument was not raised below; it lacks foundation in this Court's precedent; and acceptance of petitioner's approach would not change the outcome of this case. Further review is not warranted.

1. The court of appeals correctly held that the asserted claims challenging the terms of the government's rescue of AIG belong to AIG as a whole, not to shareholders individually.

a. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003). The "basic purpose" of incorporation "is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001). Legal wrongs committed against a corporation thus give rise to claims belonging to the corporation itself. *First Annapolis Bancorp, Inc.*

v. *United States*, 644 F.3d 1367, 1373 (Fed. Cir. 2011), cert. denied, 566 U.S. 982 (2012).

It is likewise a "basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the [corporation's] board of directors." *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 530 (1984). "Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders." *United Copper Sec. Co.* v. *Amalgamated Copper Co.*, 244 U.S. 261, 263 (1917).

An exception to that general principle is that, when a corporate board *unjustifiably* declines to sue, a shareholder may bring a "derivative" suit on the corporation's behalf. A derivative suit is one "founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff." *Hawes* v. *Oakland*, 104 U.S. 450, 460 (1882). In such a suit, the shareholder "step[s] into the corporation's shoes" and "seek[s] in its right the restitution [that the shareholder] could not demand in his own." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949); see *Ross* v. *Bernhard*, 396 U.S. 531, 534 (1970); *Koster* v. *(American) Lumbermen's Mut. Cas. Co.*, 330 U.S. 518, 522 (1947).

Derivative lawsuits are subject to various procedural and substantive limitations. To "prevent shareholders from suing in place of the corporation in circumstances where the action would disserve the legitimate interests of the company or its shareholders," the rules governing derivative actions impose a "demand requirement," under which a shareholder must first "seek action by the corporation itself." *Daily Income Fund*, 464 U.S. at

532-533 & n.7; see Fed. R. Civ. P. 23.1; RCFC 23.1. If the corporation's board, exercising good-faith business judgment, concludes that the suit is not in the best interest of the corporation and its shareholders, it may decline the shareholder's demand, and substantive corporate law then generally precludes the shareholder from bringing the derivative suit. See, *e.g.*, *Rales* v. *Blasband*, 634 A.2d 927, 932-933 (Del. 1993). But if the corporation's board refuses to pursue the action "for reasons other than good-faith business judgment," the shareholder derivative suit may be allowed to proceed even over the board's objection. *Franchise Tax Bd.* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990).

Not all shareholder claims are derivative. For example, the violation of a shareholder's rights *within* the corporation—such as the shareholder's right to inspect the corporate books or to vote at the annual meeting—constitutes a legal wrong done to the shareholder, not to the corporation. Claims arising from such violations are "direct" claims belonging to the shareholder, and are not subject to the rules that apply to derivative actions. See generally James D. Cox & Thomas Lee Hazen, *Treatise on the Law of Corporations* § 15.3 (3d ed. 2016); American Law Institute, *Principles of Corporate Governance* § 7.01 (1994). When a shareholder possesses such a "direct, personal interest in a cause of action," the shareholder "'assert[s] his own legal rights and interests,'" rather than "'rest[ing] his claim to relief on the legal rights or interests of [the] third part[y]'" corporation. *Franchise Tax Bd.*, 493 U.S. at 336 (citation omitted).

The determination whether a federal claim is direct or derivative is governed by federal law. Pet. App. 22a-23a. This Court has recognized, however, that "state law

should be incorporated into federal common law" in areas—such as corporate law—in which "private parties have entered into legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991). In particular, when a determination turns on "the allocation of governing power within the corporation," courts should look to state law "unless 'its application would be inconsistent with the federal policy underlying the cause of action.'" *Id.* at 99 (brackets and citation omitted). Thus, federal courts have applied state corporate-law principles in determining whether a federal claim is direct or derivative. See, *e.g.*, *Strougo* v. *Bassini*, 282 F.3d 162, 167-169 (2d Cir. 2002); *Lapidus* v. *Hecht*, 232 F.3d 679, 682 (9th Cir. 2000); *Boland* v. *Engle*, 113 F.3d 706, 715 (7th Cir. 1997).

The proper classification of shareholder claims as direct or derivative is essential to preserving corporations' ability to manage their own affairs, including decisions about when and whether to initiate litigation. See *Daily Income Fund*, 464 U.S. at 530; *Burks* v. *Lasker*, 441 U.S. 471, 485 (1979) (acknowledging "situations in which the independent directors could reasonably believe that the best interests of the shareholders call for a decision not to sue"); cf. *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 479 (2006) ("[W]hen 'the holders of those rights . . . do not wish to assert them,' third parties are not normally entitled to step into their shoes.") (quoting *Singleton* v. *Wulff*, 428 U.S. 106, 113-114 (1976) (plurality opinion)). The distinction between direct and derivative claims also affects the interests of other corporate stakeholders. In a derivative suit, any recovery flows to the corporate treasury; in a direct suit, it bypasses the corporation and flows directly to

individual shareholders. When funds rightfully belonging to the corporation are diverted to particular shareholders, the corporation has fewer assets available to finance its business or to satisfy creditors' claims. See, *e.g.*, *Labovitz* v. *Washington Times Corp.*, 172 F.3d 897, 904 (D.C. Cir. 1999).

b. The court of appeals correctly applied these principles in concluding that petitioner's claims are derivative and belong exclusively to AIG. Pet. App. 18a-41a.

The gravamen of petitioner's takings and illegal-exaction claims is that the government, in contracting with AIG to provide the company with an $85 billion loan, received a 79.9% equity interest "without just compensation" or "valid legal authority." C.A. App. A502257. In other words, petitioner alleges that AIG was "caused to overpay" for the loan. Pet. App. 25a (citation omitted). Petitioner asserts that the government thereby injured all existing AIG shareholders "on a ratable basis, share for share," by diluting the value of their investments in the company. *Id.* at 34a (quoting C.A. App. A501694, A502227).

Those allegations present a classic derivative claim. Petitioner's claim "is premised on the theory that the corporation, by issuing additional stock for inadequate consideration, made the complaining stockholder's investment less valuable." *Feldman* v. *Cutaia*, 951 A.2d 727, 732 (Del. 2008). Such a claim is derivative because the "*pro rata*" harm to the shareholder is simply the by-product of the alleged injury to the corporation as a whole. *Id.* at 733. "[A]ny dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in the value of the entire corporate entity, of which each share of eq-

uity represents an equal fraction." Pet. App. 25a (quoting *Gentile* v. *Rossette*, 906 A.2d 91, 99 (Del. 2006)); accord, *e.g.*, *Gaff* v. *FDIC*, 814 F.2d 311, 315 (6th Cir.) ("[A] diminution in the value of corporate stock resulting from some depletion of or injury to corporate assets is a direct injury only to the corporation; it is merely an indirect or incidental injury to an individual shareholder."), modified, 828 F.2d 1145 (6th Cir. 1987); *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 818 (Del. Ch. 2005) ("[I]f a board of directors authorizes the issuance of stock for no or grossly inadequate consideration, the corporation is directly injured and shareholders are injured derivatively.") (citation omitted), aff'd, 906 A.2d 766 (Del. 2006). The proper remedy for any such harm is to restore "to the corporation" the "improperly reduced value," not to award damages to individual shareholders. Pet. App. 25a (citation omitted).

Petitioner's assertion (Pet. 24) that the equity term was "illegal" does not affect the analysis. "When an ultra vires, unauthorized or illegal transaction has been consummated and a wrong has been done to the corporation, the shareholder's right to sue the * * * wrongdoers is derivative and not primary [*i.e.*, direct]." 12B *Fletcher Cyclopedia on the Law of Corporations* § 5928 (2017). Thus, in *Pittsburgh & West Virginia Railway Co.* v. *United States*, 281 U.S. 479 (1930), this Court ordered that a suit brought by a minority stockholder to challenge the lawfulness of a federal agency's order affecting the corporation "should have been dismissed without inquiry into the merits," because the injury underlying the stockholder's claimed standing was simply "the indirect harm which may result to every stockholder from harm to the corporation." *Id.* at 487-488.

The court of appeals correctly rejected petitioner's attempt to evade this logic by portraying the government's transaction with AIG as a "physical exaction of stock directly from AIG shareholders." Pet. App. 26a. The government did not acquire stock from AIG shareholders, but instead obtained newly issued stock from the corporation. For purposes of determining whether a particular claim is direct or derivative, "[t]here is a material difference between a new issuance of equity and a transfer of existing stock from one party to another." *Id.* at 27a. Because AIG's shareholders retained all of their stock in AIG, petitioner's claims are premised solely on the allegation that the government diluted the economic value and voting power of petitioner's shares. Such claims are "exclusively derivative in nature." *Id.* at 25a.

2. Petitioner does not identify any error in the court of appeals' determination that the claims at issue belonged to AIG, not to petitioner and other shareholders. Petitioner instead argues that the court of appeals used the wrong doctrinal label to describe its holding. Petitioner asserts (Pet. 2) that, under this Court's decision in *Lexmark Int'l Co.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), "plaintiffs who have Article III standing may not be denied a federal forum based on the judicially crafted third-party prudential standing doctrine." That argument is forfeited, meritless, and irrelevant to the outcome of this case.

a. In the proceedings below, petitioner did not question the need for the courts to determine whether its claims were direct or derivative. Nor did petitioner dispute that dismissal of its suit for lack of standing would be the appropriate disposition if its claims were found

to be derivative.[8] On the contrary, petitioner accepted the distinction between "direct and derivative claims" as a matter of both "federal law" and "Delaware law," Pet. C.A. Resp. & Reply Br. 24, and argued that petitioner had "standing" to pursue its claims because the claims were "direct" in nature, *id.* at 22-23; see *id.* at 22-36. The court of appeals therefore had no occasion to address petitioner's current argument. This Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and it "ordinarily will not decide questions not raised or litigated in the lower courts," *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam).

b. The court of appeals' treatment of the direct-versus-derivative question as a "standing" issue does not conflict with *Lexmark*. In *Lexmark*, this Court considered whether a supplier of components for toner cartridges could sue a printer manufacturer for false advertising under Section 43(a) of the Lanham Act, 15 U.S.C. 1125(a). See 134 S. Ct. at 1383-1384. After the court of appeals reversed the district court's dismissal of the suit for lack of "prudential standing," this Court granted certiorari to decide "the appropriate analytical framework for determining a party's standing" to sue under the Lanham Act. *Id.* at 1385 (citation omitted). The Court explained that the "prudential standing" label was "misleading" and "in some tension with [the Court's] recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Id.* at 1386 (citation omitted). Although the Court applied a "zone-of-interests test" in deciding whether the supplier could

[8] Petitioner did not even cite *Lexmark*, which was decided more than a year before briefing began in the court of appeals.

bring its claim, it explained that this test was best understood not as a "prudential standing" requirement, but instead as a merits inquiry into whether the supplier "f[ell] within the class of plaintiffs whom Congress has authorized to sue under § 1125(a)." *Id.* at 1387.

In a footnote, the Court observed that "[t]he zone-of-interests test is not the only concept that [the Court] ha[s] previously classified as an aspect of 'prudential standing' but for which, upon closer inspection, [the Court] ha[s] found that label inapt." *Lexmark*, 134 S. Ct. at 1387 n.3. Also included in that category was the Court's "reluctance to entertain generalized grievances—*i.e.*, suits claiming only harm to [the plaintiff's] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Ibid.* (citation and internal quotation marks omitted; brackets in original). The Court explained that, although it had sometimes grounded such reluctance "in the 'counsels of prudence,'" it had "since held that such suits do not present constitutional 'cases' or 'controversies.'" *Ibid.*

In the same footnote, the Court added that the "limitations on third-party standing" are "harder to classify." *Lexmark*, 134 S. Ct. at 1387 n.3. The Court explained that it had sometimes "observed that third-party standing is 'closely related to the question whether a person in the litigant's position will have a right of action on the claim,'" but that in other cases it had "framed the inquiry" as one of prudential standing. *Ibid.* (citation omitted). The Court concluded, however, that "consideration of that doctrine's proper place in the standing firmament can await another day." *Ibid.*

Nothing in the *Lexmark* decision contradicts the established understanding that a shareholder lacks "standing" to sue on claims that belong to the corporation. Although the *Lexmark* Court "shed the 'prudential' label" for the zone-of-interests test, it "did not expressly do so for the principle of third-party standing." Pet. App. 22a n.18 (citing *Lexmark*). And the Court has described the "shareholder standing rule" as "[r]elated" to "prudential" third-party standing principles. *Franchise Tax Bd.*, 493 U.S. at 336. The court of appeals thus correctly held that, because the claims at issue belong to AIG rather than to AIG's shareholders individually, petitioner lacked "direct standing" to assert them. Pet. App. 22a.

c. In any event, petitioner's criticism of the court of appeals' terminology has no bearing on the proper disposition of this case. Nothing in *Lexmark* called into question the substantive principle that "a party 'must assert his own legal rights' and 'cannot rest his claim to relief on the legal rights . . . of third parties.'" *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). The *Lexmark* Court did not disapprove of the zone-of-interests test or the longstanding rule that federal courts may not adjudicate generalized grievances. Rather, the Court simply disapproved of a label ("prudential standing") that it had previously attached to those concepts.

In particular, the Court in *Lexmark* did not discuss, let alone call into question, the principles that the "cause of action" that a shareholder asserts in a derivative suit "is not his own but the corporation's," *Koster*, 330 U.S. at 522, and that a shareholder may bring such a suit only in the event of "an unjustified failure of the corporation to act," *Daily Income Fund*, 464 U.S. at

530. Petitioner describes the court below as exercising "a free-floating judicial power that allows judges to decline their obligation to hear cases on almost any conceivable ground." Pet. 27 (citation and internal quotation marks omitted). But the court did not engage in unstructured equitable balancing; it relied instead on longstanding principles of corporate governance that this Court has repeatedly endorsed and applied. See pp. 13-16, *supra*.

The government has asserted at each stage of this litigation that the claims at issue belonged to AIG and that petitioner could not pursue them over AIG's objection. As discussed (pp. 17-19, *supra*), the court of appeals correctly held that the decision whether to sue on the claims at issue rested within the "good-faith business judgment" of AIG's board. Pet. App. 23a (citation omitted). Thus, whether the conceptual distinction between direct and derivative shareholder claims is best understood to be a matter of Article III standing; a matter of prudential standing; a "merits inquiry"; or "something else" (Pet. 22, 23), the court of appeals correctly applied that distinction in determining that petitioner's claims must be dismissed. The court's use of the "prudential standing" label provides no reason for this Court's review. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'") (citation omitted).

d. Contrary to petitioner's assertions, nothing in the decision below "opens a divide" with other courts of appeals. Pet. 32 (capitalization omitted). None of the decisions cited by petitioner involved suits by shareholders at all, let alone suggested that a shareholder could properly bring suit in its own name to challenge a corporation's transaction with a third party. The decisions

cited by petitioner simply observed in general terms that, after *Lexmark*, certain doctrines previously described as "prudential" might instead be better understood as embodying either an Article III requirement or a merits inquiry.[9]

3. The question presented in the petition does not directly embrace the issue whether the claims that petitioner seeks to litigate belong to AIG or its shareholders. See Pet. i (asking whether the court of appeals properly applied "the equitable doctrine of 'third-party prudential standing'"). To the extent the petition is understood to embrace that question, however, none of petitioner's arguments warrants review.

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[9] See *United States* v. *Under Seal*, 853 F.3d 706, 722 & n.5 (4th Cir. 2017) (allowing appeal by a nonparty who sought to "vindicate his own legal right to have information pertaining to him kept confidential," and observing that the case "implicated" "none" of the standing doctrines that pre-*Lexmark* courts had described as "prudential") (citation omitted); *Miller* v. *City of Wickliffe*, 852 F.3d 497, 503 n.2 (6th Cir. 2017) (dismissing business owners' preenforcement challenge to local ordinance for lack of Article III injury, and declining concurrence's recommendation to "dispos[e] of this case on prudential-ripeness grounds"); *City of Oakland* v. *Lynch*, 798 F.3d 1159, 1163 n.1 (9th Cir. 2015) (holding that government had forfeited its argument that plaintiff lacked "prudential standing," while noting in dicta that *Lexmark* had "call[ed] into question the viability of the prudential standing doctrine"), cert. denied, 136 S. Ct. 1486 (2016); *Duty Free Ams., Inc.* v. *Estée Lauder Cos.*, 797 F.3d 1248, 1272-1273 (11th Cir. 2015) (holding that plaintiff lacked Article III standing, and stating in dicta that the doctrine of "antitrust standing" might be better understood as a merits rather than prudential inquiry); *Excel Willowbrook, LLC* v. *JP Morgan Chase Bank, N.A.*, 758 F.3d 592, 596-599 & n.34 (5th Cir. 2014) (holding that landowners could sue to enforce leases conveyed by the lessee to another party because the landowners were in "privity of estate" with the new party, and noting in passing that "the continued vitality of prudential 'standing' is now uncertain").

a. Petitioner asserts (Pet. 25) that "state-law standing principles do not control the Article III standing analysis," and that the court of appeals therefore should not have applied Delaware law in determining whether petitioner's claims were derivative or direct. In the court below, however, petitioner argued that "Delaware law is used to define the scope of Plaintiffs' property interests," and it relied on Delaware law in contending that it had standing to pursue its claims. Pet. C.A. Resp. & Reply Br. 25; see *id.* at 8, 22-31.

In any event, petitioner's argument misconstrues the court of appeals' decision. The court recognized that, "[b]ecause [petitioner] presses the Equity Claims under federal law, federal law dictates whether [petitioner] has direct standing." Pet. App. 22a. But "[t]he fact that the scope of [a] federal right is * * * a federal question does not * * * make state law irrelevant." *Burks*, 441 U.S. at 477 (citation and internal quotation marks omitted). As explained above (pp. 15-16, *supra*), this Court generally presumes that "state law should be incorporated into federal common law" where "private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98. That approach is warranted here, since AIG is "a wholly artificial creation whose internal relations between management and stockholders are dependent upon state law," *Cohen*, 337 U.S. at 549, and the determination whether a claim is direct or derivative implicates "the allocation of governing power within the corporation," *Kamen*, 500 U.S. at 98. Thus, the court of appeals properly concluded that "the law of Delaware, where AIG is incorporated, also plays a role" in the analysis,

"as the parties recognize[d]" in their respective briefs. Pet. App. 23a.

b. Petitioner's reliance (Pet. 26) on this Court's decision in *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151 (1957), is likewise misplaced. See Pet. App. 32a-34a. In *Alleghany*, two controlling shareholders caused their corporation to exchange existing preferred stock (worth $33 million) for new preferred stock (worth $48 million), a transaction that benefited the controlling shareholders while diluting the investments of common shareholders. See Br. for Appellees at 16-17, 92-93, *Alleghany*, *supra* (No. 36). After regulators approved the transaction, minority shareholders brought suit, arguing that the transaction violated shareholder-rights provisions of the Investment Company Act. *Id.* at 32-35; see *Alleghany*, 353 U.S. at 158-159.

In holding that the suit could go forward, the Court explained that the dilutive transaction did not involve simply "the indirect harm which may result to every stockholder from harm to the corporation." 353 U.S. at 160 (quoting *Pittsburgh & W. Va. Ry. Co.*, 281 U.S. at 487).[10] Rather, the action of the controlling shareholders imposed distinct harms on the "minority common stockholders," *id.* at 158, and "there is no indication that the corporation itself was harmed by the challenged conduct," Pet. App. 33a. Here, by contrast, petitioner's "financial interest does not differ from that of every investor in [AIG] securities," or indeed from its "interest in any * * * lawsuit" brought by AIG itself. *Pittsburgh*

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[10] Petitioner describes (Pet. 26) *Alleghany* as holding that the shareholders had standing to sue "without regard to state law rules." But the *Alleghany* Court did not address what law should govern the determination whether particular claims are direct or derivative.

& W. Va. Ry. Co., 281 U.S. at 487. The court of appeals therefore correctly held that *Alleghany* did not "grant[] [petitioner] direct standing to pursue" its claims. Pet. App. 34a.

Petitioner also relies (Pet. 26) on court of appeals decisions assertedly holding that "shareholders have standing to bring suit in federal court where they allege a constitutional injury and have suffered an individual harm." But decisions resting on "individual harm" to particular shareholders are inapposite here, where the alleged injury was done to the corporation and affected all AIG shareholders "on a ratable basis, share for share." Pet. App. 34a; see *Korte* v. *Sebelius*, 735 F.3d 654, 668-669 (7th Cir. 2013) (concluding that owners of closely held corporations who "set all company policy and manage[d] the day-to-day operations of their businesses" had "a direct and personal interest in vindicating their individual religious-liberty rights," inasmuch as they would personally participate in "purchas[ing] the required contraception coverage"), cert. denied, 134 S. Ct. 2903 (2014); *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1156 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring) (same), aff'd, 134 S. Ct. 2751 (2014); *RK Ventures, Inc.* v. *City of Seattle*, 307 F.3d 1045, 1057 (9th Cir. 2002) (concluding that shareholders had "standing to assert a civil rights claim" when they alleged violations of the First and Fourteenth Amendments and sought damages, "as individuals, for intentional infliction of emotional distress and for defamation").

c. Petitioner's policy arguments are also unpersuasive. Petitioner asserts (Pet. 17) that, under the court of appeals' analysis, shareholders could become "victims of takings or illegal exactions" without "receiv[ing]

the compensation to which they are constitutionally entitled." As explained, however, the illegal-exaction and takings claims that petitioner asserts belong to AIG, which could have sued the government if its board had determined that the suit had sufficient merit and was in the best interests of the corporation and its shareholders. The terms of the government's rescue loan will "escape judicial review," Pet. 36, only because AIG chose not to sue. The CFC found that the AIG board had made that decision "in an informed, transparent, rational, and exemplary fashion," and it therefore held that the board's refusal was "entitled to the presumption of the business judgment rule." 111 Fed. Cl. at 480. Petitioner's speculation (Pet. 36-37) that the government unfairly interfered with AIG's decisionmaking process is both meritless and irrelevant.[11] Petitioner chose not to appeal the dismissal of its derivative claims, see Pet. 13 n.2; Pet. App. 12a, and it cannot now complain about the consequences of that choice.

At bottom, petitioner's argument appears to be that the distinction between direct and derivative shareholder actions is "anomal[ous]" and should be eliminated. Pet. 18; see Pet. 19 (arguing that courts "should not erect additional standing requirements beyond those imposed by Article III") (capitalization omitted). Acceptance of that position would have extraordinary consequences. Under that approach, any shareholder

[11] Petitioner contends (Pet. 36-37) that the government "took steps to block AIG from seeking legal recourse" by requiring that AIG "indemnify the Federal Reserve if there were any challenges to the Credit Agreement." If there was anything improper in such an indemnification provision, petitioner could have demanded that AIG sue to invalidate it. If AIG refused, petitioner then could have litigated the reasonableness of that refusal. Petitioner took neither of those steps.

who is dissatisfied with the terms of a corporation's contract or other transaction with the government could always sue the government, even over the corporation's clear objection, and no matter how "pedestrian" (Pet. 38) the alleged misconduct. Cf. *First Annapolis Bancorp, Inc.*, 644 F.3d at 1373 (denying attempt by shareholder to bring direct suit against government for breach of contract with corporation); *Robo Wash, Inc.* v. *United States*, 223 Ct. Cl. 693, 695-698 (1980) (same). Such a rule would be irreconcilable with the "basic tenet" that the "corporation and its shareholders are distinct entities," *Dole Food Co.*, 538 U.S. at 474, and with the "basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the [corporation's] board of directors," *Daily Income Fund*, 464 U.S. at 530. Nothing in *Lexmark* or in other precedents of this Court suggests that such a result would be proper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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