Nos. 22-97, 22-98, 22-99, 22-100

In the Supreme Court of the United States

OWL CREEK ASIA I, L.P., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
SARAH E. HARRINGTON
Deputy Assistant Attorney General
MARK B. STERN
ABBY C. WRIGHT
GERARD SINZDAK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Additional Captions Listed on Inside Cover

JOSEPH CACCIAPALLE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ANDREW T. BARRETT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

FAIRHOLME FUNDS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

QUESTIONS PRESENTED

After the 2008 financial crisis, the Director of the Federal Housing Finance Agency took Fannie Mae and Freddie Mac into conservatorship. The Agency, as conservator, negotiated agreements with the Department of the Treasury under which Treasury committed to investing billions of dollars in the enterprises in return for dividends and other compensation. In 2012, the Agency and Treasury negotiated the Third Amendment to their agreements, which modified the formula for calculating Treasury's dividends. The questions presented are as follows:

1. Whether petitioners have stated a direct claim that the Third Amendment took their property without just compensation.

2. Whether petitioners have stated a derivative claim that the Third Amendment took the enterprises' property without just compensation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 26 F.4th 1274.* The opinions and orders of the Court of Federal Claims are reported at 147 Fed. Cl. 1 (Pet. App. 58a-161a) (*Fairholme Funds*); 148 Fed. Cl. 614 (Pet. App. 162a-227a) (*Owl Creek Asia I*); 148 Fed. Cl. 647 (Pet. App. 424a-488a) (*Akanthos Opportunity Master Fund*); 148 Fed. Cl. 712 (Pet. App. 293a-357a) (*Mason Capital*); 148 Fed. Cl. 745 (Pet. App. 489a-562a) (*Cacciapalle*); and 149 Fed. Cl. 363 (Pet. App. 358a-423a) (*CSS*).

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2022. On May 12, 2022, the Chief Justice extended the time within which to file the petitions for writs of certiorari to and including July 22, 2022, and the petitions were filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Factual Background

1. Congress created the Federal National Mortgage Association (Fannie Mae) in 1938 and the Federal Home Loan Mortgage Corporation (Freddie Mac) in 1970. *Collins* v. *Yellen*, 141 S. Ct. 1761, 1770 (2021). The enterprises operate as for-profit corporations with private shareholders, but they serve public missions. See *ibid.* They buy home loans from private lenders, pool a majority of those loans into mortgage-backed securi-

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* This brief uses "Pet. App." to refer to the appendix in No. 22-97; "Owl Creek Pet." to refer to the petition in No. 22-97; "Cacciapalle Pet." to refer to the petition in No. 22-98; "Barrett Pet." to refer to the petition in No. 22-99; and "Fairholme Pet." to refer to the petition in No. 22-100.

ties, and sell the securities to private investors. See *id.* at 1771. Those activities increase the liquidity of the national home lending market and promote access to mortgage credit. See *ibid.*

In 2008, Fannie Mae and Freddie Mac suffered overwhelming losses because of the collapse of the housing market. See *Collins*, 141 S. Ct. at 1771. The enterprises lost more in 2008 ($108 billion) than they had earned in the prior 37 years combined ($95 billion). See *ibid.* At the time, the enterprises owned or guaranteed more than $5 trillion in residential mortgage assets, or nearly half the national mortgage market. *Ibid.*

Recognizing that the failure of Fannie Mae and Freddie Mac would have had catastrophic effects for the national housing market and the economy, Congress enacted the Housing and Economic Recovery Act of 2008 (Recovery Act or Act), Pub. L. No. 110-289, 122 Stat. 2654. The Act created the Federal Housing Finance Agency (FHFA or Agency) to regulate the enterprises. 12 U.S.C. 4511. The Act also authorized the Agency's Director to appoint the Agency as conservator or receiver of the enterprises. See 12 U.S.C. 4617(a). The Act separately authorized the Department of the Treasury to "purchase any obligations and other securities" issued by the enterprises. 12 U.S.C. 1455(*l*)(1)(A). That authorization "made it possible for Treasury to buy large amounts of Fannie and Freddie stock, and thereby infuse them with massive amounts of capital to ensure their continued liquidity and stability." *Perry Capital LLC* v. *Mnuchin*, 864 F.3d 591, 600 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 978 (2018).

2. In September 2008, the Director of the FHFA appointed the Agency as conservator of Fannie Mae and Freddie Mac. *Collins*, 141 S. Ct. at 1772. The enterprises'

boards of directors had consented to the appointment. Pet. App. 8a. A day later, the Agency, as conservator, made agreements with Treasury under which Treasury committed to provide $100 billion to each enterprise. *Collins*, 141 S. Ct. at 1773. When that commitment later proved inadequate, the Agency and Treasury amended their agreements, first to increase the commitment to $200 billion per enterprise, then to make the commitment unlimited through 2012. *Ibid.*

In return, Treasury received compensation including dividends and an entitlement to periodic fees. See *Collins*, 141 S. Ct. at 1773. The dividends were calculated using a fixed-rate formula, under which they were tied to the size of Treasury's investment and did not vary with the enterprises' profits. See *ibid.* Between 2009 and 2011, the fixed-rate dividends repeatedly exceeded the enterprises' quarterly earnings by billions of dollars. See *ibid.* The enterprises "began the circular practice of drawing funds from Treasury's capital commitment just to hand those funds back as a quarterly dividend." *Ibid.*

In August 2012, the Agency and Treasury amended their agreements a third time. *Collins*, 141 S. Ct. at 1773. The Third Amendment replaced the previous fixed dividend (tied to the size of Treasury's investment) with a variable dividend (tied to the enterprises' net worth). *Id.* at 1773-1774. Under the new formula, Treasury's dividend each month would equal the amount, if any, by which the enterprises' net worth exceeded a specified capital reserve. See *id.* at 1774. The new dividend formula "ensured that Fannie Mae and Freddie Mac would never again draw money from Treasury just to make their quarterly dividend payments, but it also meant that the companies would not

be able to accrue capital in good quarters." *Ibid.* The Amendment also suspended the enterprises' obligation to pay periodic fees. *Ibid.* In *Collins*, this Court upheld the Third Amendment against a claim that it exceeded the Agency's authority under the Recovery Act. See *id.* at 1775-1778.

In January 2021, the Agency and Treasury amended their agreements a fourth time. See *Collins*, 141 S. Ct. at 1774. That amendment adopted a new dividend formula and suspended cash dividend payments until the enterprises can build up sufficient capital to meet specified thresholds. See *id.* at 1774-1775.

B. Proceedings Below

1. Petitioners are shareholders of Fannie Mae and Freddie Mac. See Pet. App. 7a. They brought eight suits in the Court of Federal Claims (CFC), alleging that the Third Amendment violated the Just Compensation Clause. See *id.* at 9a-10a. The government filed an omnibus motion to dismiss the shareholders' complaints. See *id.* at 10a. The court addressed the government's arguments in an opinion in one of the eight cases, *Fairholme Funds*, No. 13-465C, and then applied the reasoning in that opinion to the remaining seven suits. See *ibid.*

a. The CFC rejected two jurisdictional arguments raised by the government. First, the government observed that the Tucker Act, 28 U.S.C. 1491, grants the CFC jurisdiction only over claims "against the United States." Pet. App. 13a. The government argued that the FHFA, when acting as conservator, is not the "United States" for purposes of that provision. *Ibid.* The CFC rejected that argument, concluding that the Agency "does not shed its government character when acting as conservator." *Id.* at 108a.

Second, the government argued that 28 U.S.C. 1500 deprived the CFC of jurisdiction over some of the suits, but acknowledged that circuit precedent foreclosed that contention. See Pet. App. 84a. Section 1500 provides that the CFC "shall not have jurisdiction of any claim for or in respect to which the plaintiff * * * has pending in any other court any suit or process against the United States." 28 U.S.C. 1500. The government observed that, soon after filing their just-compensation claims in the CFC, some of the shareholders had filed parallel suits elsewhere—depriving the CFC of jurisdiction under the plain terms of the statute. See Pet. App. 84a. But the government acknowledged that, under binding circuit precedent, Section 1500 applies only "when the suit shall have been commenced in the other court before the claim was filed in [the CFC]." *Ibid.* (quoting *Tecon Eng'rs, Inc.* v. *United States*, 343 F.2d 943, 949 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966)); see *Resource Investments, Inc.* v. *United States*, 785 F.3d 660, 669-670 (Fed. Cir. 2015), cert. denied, 579 U.S. 927 (2016). The government conceded, and the CFC agreed, that under that reading, Section 1500 did not deprive the CFC of jurisdiction over any of the suits here. See Pet. App. 83a-85a.

b. Turning to the merits, the CFC noted that corporate law distinguishes between "direct" claims (*i.e.*, claims brought by shareholders on their own behalf) and "derivative" claims (*i.e.*, claims brought by shareholders on behalf of the corporation). See Pet. App. 130a. Petitioners had described their own suits as raising direct claims that the Third Amendment violated their rights under the Just Compensation Clause. *Id.* at 9a. One petitioner, Andrew Barrett, had also raised a derivative claim that the Third Amendment violated

the enterprises' rights to just compensation. *Id.* at 9a-10a.

Applying Delaware corporate law, the CFC determined that the shareholders lacked valid direct claims for just compensation. Pet. App. 137a-142a. The court emphasized that the "gravamen" of the claims was that the Third Amendment "compelled the Enterprises to overpay Treasury." *Id.* at 141a. The court explained that, under Delaware law, such claims have traditionally been classified as derivative. See *id.* at 140a.

The CFC then held that petitioner Barrett could bring derivative just-compensation claims on behalf of the enterprises. See Pet. App. 143a-152a. The court rejected the government's argument that petitioner's derivative claims were foreclosed by the Recovery Act's succession clause, which transfers "all rights, titles, powers, and privileges" of the enterprises' shareholders to the Agency upon its appointment as conservator. 12 U.S.C. 4617(b)(2)(A)(i). The court recognized that the succession clause transferred to the conservator the shareholders' right to bring derivative suits. Pet. App. 148a-149a. But the court read the clause to include an implied exception that allows shareholders to bring derivative suits when the Agency as conservator faces a conflict of interest in evaluating whether to bring suit. *Id.* at 151a-152a. The court concluded that such a conflict existed here because, in the court's view, the Agency as conservator could challenge the Third Amendment only by suing itself. *Id.* at 152a.

The CFC accordingly granted the government's motion to dismiss in full in seven suits (where the shareholders had sought to raise only direct claims) and in part in the remaining suit (where petitioner Barrett had raised both direct and derivative claims). See Pet. App.

10a-11a. The shareholders in the seven suits appealed, and the court certified its order in the eighth suit for interlocutory appeal, enabling the Federal Circuit to resolve the cases together. See *ibid.*

2. The court of appeals affirmed the dismissal of the direct claims and reversed the CFC as to petitioner Barrett's derivative claims. Pet. App. 1a-57a.

a. The court of appeals rejected the government's argument that the CFC lacked jurisdiction because petitioners' claims were not against the "United States." Pet. App. 13a-18a. The court determined that, because the Agency "'clearly exercises executive power' when acting as a conservator," its "adoption of the [Third Amendment] is attributable to the United States." *Id.* at 16a-17a (citation omitted). And although the United States again invoked Section 1500, see Gov't C.A. Br. 86 n.21, the court did not address it.

b. On the merits, the court of appeals held that petitioners lacked valid direct claims for just compensation. See Pet. App. 18a-28a. The court observed that, under Delaware law, a claim's direct or derivative status turns on two criteria: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Id.* at 21a (citations omitted). The court concluded that petitioners' claims were predicated on harm to the enterprises and that any compensation for that harm would flow to the enterprises, not directly to the shareholders. See *id.* at 21a-28a. The court elaborated that petitioners' claims rested on the allegedly unjustified payment of the enterprises' property (*i.e.*, their net worth) to Treasury, and that the appropriate remedy would involve the return of those payments to

the enterprises. See *id.* at 22a-23a. Petitioners' claims thus mirrored a claim of "corporate overpayment," a classic derivative claim. *Id.* at 23a.

The court of appeals then addressed petitioner Barrett's derivative claims. See Pet. App. 50a-53a. The court found it unnecessary to decide whether the Recovery Act's succession clause barred petitioner from pursuing derivative claims during a conservatorship. See *id.* at 50a. The court instead rejected the claims on the merits, holding that the Third Amendment did not effect a taking of the enterprises' property. See *id.* at 50a-53a. The court observed that the enterprises had consented to the Agency's appointment as conservator, with full knowledge that the conservator had "extremely broad statutory powers." *Id.* at 52a. The court explained that, upon the appointment of the Agency as conservator, the enterprises "lost their right to exclude the government from their property" and "had no investment-backed expectation" that the Agency would "not dilute their equity." *Id.* at 52a-53a. The court accordingly determined that the enterprises lacked "any cognizable interest on which Barrett may base a derivative" just-compensation claim. *Id.* at 52a.

ARGUMENT

Three sets of petitioners challenge (Owl Creek Pet. 14-35; Cacciapalle Pet. 19-35; Fairholme Pet. 3) the court of appeals' rejection of their direct claims for just compensation. One petitioner challenges (Barrett Pet. 16-35) the court's rejection of his derivative just-compensation claim. The court of appeals' decision on each of those issues was correct and does not conflict with any decision of this Court or another court of appeals. The petitions for writs of certiorari should be denied.

A. This Court Would Need To Resolve Threshold Jurisdictional Issues Before It Could Reach The Merits

1. The Tucker Act grants the CFC subject-matter jurisdiction only over claims "against the United States." 28 U.S.C. 1491(a)(1). Before it could reach the questions presented, this Court therefore would need to resolve the question whether claims concerning the FHFA's actions as conservator are claims against the United States. It is debatable whether they are, given the principle that, when a conservator or receiver acts on behalf of its ward, it "shed[s] its government[al] character" and becomes "a private party." *Herron* v. *Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017) (citation omitted); see, *e.g.*, *Coit Independence Joint Venture* v. *Federal Savs. & Loan Ins. Corp.*, 489 U.S. 561, 585 (1989); *Montilla* v. *Fannie Mae*, 999 F.3d 751, 757 (1st Cir. 2021), cert. denied, 142 S. Ct. 1360 (2022); *Meridian Invs., Inc.* v. *Freddie Mac*, 855 F.3d 573, 579 (4th Cir. 2017).

The court of appeals rejected that argument, relying on this Court's statement in *Collins* v. *Yellen*, 141 S. Ct. 1761 (2020), that the Agency "clearly exercises executive power." Pet. App. 16a (quoting *Collins*, 141 S. Ct. at 1786). But the Court reached that conclusion because the Agency is a regulator as well as a conservator. For example, the Agency has power to "put the company into conservatorship" in the first place; to "appoint itself as conservator"; to issue "a 'regulation or order' requiring stockholders, directors, and officers to exercise certain functions"; and to "issue subpoenas." *Collins*, 141 S. Ct. at 1786 (citation omitted). This case, however, concerns the Agency's acts as conservator, not its acts as regulator. *Collins* does not resolve the question whether the FHFA's acts as conservator are at-

tributable to the United States for purposes of the Tucker Act.

2. Before reaching the questions presented, this Court would also need to decide whether 28 U.S.C. 1500 deprived the CFC of subject-matter jurisdiction over the claims brought by petitioners Cacciapalle and Fairholme Funds, Inc. Section 1500 states that the CFC "shall not have jurisdiction of any claim for or in respect to which the plaintiff * * * has pending in any other court any suit or process against the United States." 28 U.S.C. 1500. "Two suits are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts." *United States* v. *Tohono O'Odham Nation*, 563 U.S. 307, 317 (2011). After filing the just-compensation suits at issue here in the CFC, some (though not all) petitioners filed parallel challenges to the Third Amendment in the U.S. District Court for the District of Columbia. See *Cacciapelle* v. *Fannie Mae*, No. 13-cv-1149 (D.D.C. filed July 29, 2013) (filed 19 days after the CFC suit); *Fairholme Funds* v. *FHFA*, No. 13-cv-1053 (D.D.C. filed July 10, 2013) (filed one day after the CFC suit). Because those parallel challenges to the Third Amendment were based on the same operative facts as the just-compensation suits in the CFC, the CFC did "not have jurisdiction" over those petitioners' just-compensation claims. 28 U.S.C. 1500.

The Federal Circuit has held that "the § 1500 bar operates '*only* when the suit shall have been commenced in the other court *before* the claim was filed in the [CFC].'" *Resource Investments, Inc.* v. *United States*, 785 F.3d 660, 669 (quoting *Tecon Eng'rs, Inc.* v. *United States*, 343 F.2d 943, 949 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966)), cert. denied, 579 U.S. 927 (2016). But

that limitation has no sound basis in the statutory text. Section 1500 applies by its terms whenever "any suit" "for or in respect to" the same claim that was brought in the CFC is also "pending in any other court"; it says nothing about the order in which the two suits were filed. 28 U.S.C. 1500. And while this Court has not squarely addressed the issue, it has cast serious doubt on the Federal Circuit's order-of-filing rule, noting that the rule "le[aves] the statute without meaningful force." *Tohono O'Odham Nation*, 563 U.S. at 314.

B. The Question Whether Petitioners Have Stated Valid Direct Just-Compensation Claims Does Not Warrant This Court's Review

1. In general, "the proper party to bring a suit on behalf of a corporation is the corporation itself, acting through its directors or a majority of its shareholders." *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 542 (1984). Individual shareholders may bring direct claims on their own behalf, but they ordinarily have no right to sue "to enforce the rights of the corporation." *Franchise Tax Bd.* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990).

Federal law governs the determination whether a particular claim against a federally chartered institution is direct or derivative. See 19 Charles Alan Wright et al., *Federal Practice and Procedure* § 4515 (2016). But in resolving that issue, federal courts should "look to state law" for guidance rather than "'fashion an entire body of federal corporate law out of whole cloth.'" *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98-99 (1991) (citation omitted). Fannie Mae and Freddie Mac have chosen Delaware and Virginia law, respectively, to govern their corporate affairs. See Pet. App. 60a. "The

parties agree that Virginia law * * * mirrors Delaware law" on the points at issue here. *Id.* at 21a n.7.

In Delaware, as elsewhere, the determination whether a claim is direct or derivative turns on two questions: (1) "who suffered the alleged harm" and (2) "who would receive the benefit of any recovery." *Tooley* v. *Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (en banc); see 12B William Meade Fletcher, *Fletcher Cyclopedia on the Law of Corporations* § 5911, at 572 (rev. 2017) (Fletcher). If the corporation suffered the harm and would receive the recovery, the claim is derivative; if the shareholder suffered the harm independently of any injury to the corporation and would receive the recovery, the suit is direct. See *Tooley*, 845 A.2d at 1035-1039.

Applying that test, the court of appeals correctly held that petitioners lack valid direct claims. See Pet. App. 18a-28a. To begin, petitioners' complaints allege harm to the enterprises. Petitioners claim, at bottom, that the Third Amendment transferred to Treasury *the enterprises'* property—specifically, the enterprises' quarterly net worth. See, *e.g.*, C.A. App. 395 (*Fairholme* Compl.) (alleging that "Fannie and Freddie" "have been forced to pay substantially all of [their profits] as 'dividends' to the federal government"); *id.* at 487 (*Owl Creek* Compl.) (alleging that "the United States has expropriated hundreds of billions of dollars in net worth from the Companies"); *id.* at 726 (*Arrowood* Compl.) (alleging that the Third Amendment "forc[ed] these publicly-traded, shareholder-owned Companies to turn over their entire net worth") (emphasis omitted). That is a harm to the enterprises.

Any recovery, moreover, would go to the enterprises, not to the shareholders as individuals. "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). It is also a basic tenet of American corporate law that the "accumulated earnings and profits" of a corporation are "corporate property." *Commissioner* v. *Gordon*, 391 U.S. 83, 88-89 (1968); see 11 Fletcher § 5321, at 538 (2011) ("[T]he assets of a corporation belong to the corporation and not to its shareholders."). Accordingly, any taking the Third Amendment might have effected was a taking of the enterprises' quarterly net worth, not a taking of the shareholders' property. Any just-compensation recovery would therefore flow to the enterprises, not to petitioners.

2. Petitioners' contrary arguments lack merit.

Petitioners argue (Owl Creek Pet. 17-19; Cacciapalle Pet. 19-25) that the Third Amendment harmed them because it depleted the enterprises' assets, thus disabling the enterprises from paying them any dividends. But a suit is direct only if the shareholder claims a harm that is "independent of any alleged injury to the corporation," *Tooley*, 845 A.2d at 1039—for example, the withholding of a "certificate of stock," the abridgment of the "right to vote," or the denial of the ability to inspect "corporate books or records," 12B Fletcher § 5915, at 605-606. A suit is not direct simply because an action that injures the corporation thereby causes downstream harm to the shareholders by depleting corporate assets that could otherwise have been used to pay dividends. See, *e.g.*, *id.* § 5913, at 600 ("[D]iminution in the value of corporate stock resulting from some depreciation 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.").

If such downstream harms were enough to make a claim direct, every claim would be direct, because any action that injures the corporation could be said to injure the shareholders indirectly. Nor is there anything anomalous about the prospect that derivative suits might be filed by shareholders who suffer their own indirect economic losses resulting from direct harm to the corporation. To the contrary, preventing or rectifying such losses is the usual motivation for a shareholder to file a derivative claim on the corporation's behalf.

Petitioners also describe the Third Amendment as a taking of their "right to receive dividends" (Owl Creek Pet. 17) and as an appropriation of "shareholder rights to future dividends and other distributions" (Cacciapalle Pet. 19). That characterization is incorrect. The Third Amendment did not transfer to Treasury any economic, voting, or other rights that petitioners claim belonged to the shareholders. The Amendment instead provided for *the enterprises* to transfer their quarterly net worth to Treasury in return for hundreds of billions of dollars in capital. The transfer of the enterprises' net worth may have had incidental effects on the enterprises' ability to pay out dividends to its shareholders, but as just explained, such incidental effects cannot support a direct claim.

3. Contrary to petitioners' assertions (Owl Creek Pet. 13-15, 23-26; Cacciapalle Pet. 28-32), the decision below does not conflict with this Court's decisions in *Collins*, *supra*; *Pittsburgh & West Virginia Railway Co.* v. *United States*, 281 U.S. 479 (1930); *American Power & Light Co.* v. *SEC*, 325 U.S. 385 (1945); *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151 (1957); and *Alcan Aluminium, Ltd.*, *supra*.

In *Collins*, this Court resolved a challenge to the Third Amendment without reaching the question whether that challenge was direct or derivative. See 141 S. Ct. at 1781 n.16. *Collins* therefore has no bearing on the proper classification of petitioners' claims here. Petitioners emphasize (Owl Creek Pet. 13) that, in *Collins*, this Court found that shareholders had Article III standing to challenge the Third Amendment. See 141 S. Ct. at 1779. But the question whether a shareholder has Article III standing differs from the question whether he has a valid direct claim. See, *e.g.*, *Alcan Aluminium*, 493 U.S. at 336. To establish Article III standing, the plaintiff must show (among other things) that he has suffered an injury in fact because of the challenged action. See, *e.g.*, *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2200 (2021). To establish that a claim is direct rather than derivative, the plaintiff must additionally show that the harm suffered was "independent of any alleged injury to the corporation." *Tooley*, 845 A.2d at 1039. Petitioners have not made the latter showing here.

In *Pittsburgh*, this Court held that a shareholder *lacked* the right to challenge an agency order that allegedly harmed a corporation's finances. See 281 U.S. at 487. The shareholder alleged that, by impairing the corporation's "financial stability," the order also harmed the shareholder's own "financial interest." *Ibid.* This Court rejected that argument, explaining that a shareholder may not sue based on an "indirect harm" that results "from harm to the corporation." *Ibid.* That holding supports rather than undercuts the court of appeals' decision here: Any harm to petitioners was "indirect," flowing from the Third Amendment's transfer to Treasury of the enterprises' quarterly net worth. *Ibid.*

In *American Power & Light*, this Court held that a shareholder could challenge an agency order that barred a corporation from using assets "to pay dividends," but that did not diminish the assets themselves. 325 U.S. at 386-387. This Court emphasized that the challenged order had a "direct adverse effect" on the shareholder but "d[id] not deprive the corporation of any asset." *Id.* at 389. In this case, in contrast, the Third Amendment *did* transfer the corporations' assets (their quarterly net worth) in return for Treasury's infusion of capital. *American Power & Light* does not address that distinct fact pattern.

In *Alleghany*, this Court held that minority shareholders could challenge a corporate reorganization that would have diluted their interest in the corporation. See 353 U.S. at 159-160. That holding is irrelevant here, because the Third Amendment is not a reorganization. The Amendment changed the formula for calculating Treasury's dividend, but it did not change the enterprises' capital structure—much less in a way that diluted anyone's interest or voting power.

Petitioners claim (Owl Creek Pet. 23) that the Third Amendment has the same economic effect as a reorganization: shifting economic value from the shareholders at large to a favored investor (Treasury). But if a claim rests (as petitioners' claims do) on an alleged diminution of corporate assets, the fact that the challenged action happens to benefit a favored investor at the expense of other shareholders does not make the claim direct. See, *e.g.*, *Frank* v. *Hadesman & Frank, Inc.*, 83 F.3d 158, 159-160 (7th Cir. 1996) (Easterbrook, J.) (concluding that a claim by one shareholder against another for "hollow[ing] out" a corporation and "making off with [its] business" was derivative, even though the transac-

tion transferred value from one shareholder to another); *Cowin* v. *Bresler*, 741 F.2d 410, 412, 416 (D.C. Cir. 1984) (Bork, J.) (holding that a claim that a controlling shareholder had diverted corporate assets belonged "to the corporation," even though the diversion came "at the expense of the minority shareholders"); *El Paso Pipeline GP Co.* v. *Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016) (rejecting the view that "the extraction of solely economic value from the minority by a controlling stockholder constitutes direct injury").

Finally, in *Alcan Aluminium*, this Court declined to decide whether the claim at issue was direct or derivative. See 493 U.S. at 338. Petitioners rely (Cacciapalle Pet. 31) on the Court's dictum that "a shareholder with a direct, personal interest in a cause of action [may] bring suit even if the corporation's rights are also implicated." *Alcan Aluminium*, 493 U.S. at 336. But that principle applies only if the plaintiffs "have suffered * * * injuries independent of their status as shareholders." *Id.* at 336-337; see, *e.g.*, 12B Fletcher § 5915 (noting that a shareholder who is a party to a contract may sue on the contract, even if the breach also harmed the corporation, because the harm to the shareholder is independent of his shareholder status). Petitioners' interest here is not independent of their status as shareholders; their claims depend entirely on the alleged taking of the enterprises' net worth.

4. The Federal Circuit's decision does not conflict with any decision of another court of appeals. Like the court below, the Seventh and D.C. Circuits have held that challenges to the Third Amendment raised derivative rather than direct claims. See *Roberts* v. *FHFA*, 889 F.3d 397, 408-410 (7th Cir. 2018); *Perry Capital LLC* v. *Mnuchin*, 864 F.3d 591, 623-628 (D.C. Cir. 2017),

cert. denied, 138 S. Ct. 978 (2018). To be sure, those cases involved claims that the adoption of the Third Amendment violated the Recovery Act or the Agency's fiduciary duties, rather than the Just Compensation Clause. But nothing in the courts' reasoning—which focused on "(1) who suffered the alleged harm and (2) who would receive the benefit of the recovery"—turned on that point. *Perry Capital*, 864 F.3d at 626 (brackets, citation, and internal quotation marks omitted); see *Roberts*, 889 F.3d at 409.

Petitioners cite (Owl Creek Pet. 15-17) several court of appeals decisions holding that various claims were direct. But as petitioners acknowledge (Owl Creek Pet. 17), the standard that the court of appeals applied here aligns with the standard used in those cases. The courts in those cases reached different results simply because the claims there, unlike the claims here, did not depend on the diversion of corporate assets or on any other harm to the corporation. See *Meland* v. *WEBER*, 2 F.4th 838, 847-848 (9th Cir. 2021) (claim that the challenged law required the shareholder personally to discriminate against other persons); *Maiz* v. *Virani*, 253 F.3d 641, 655 (11th Cir. 2011) (claim based on wrongdoing that occurred "well in advance of the chartering of the corporations"); *Shidler* v. *All Am. Life & Fin. Corp.*, 775 F.2d 917, 925 (8th Cir. 1985) (claim that shareholders had been denied the right to vote on a corporate merger); *Knapp* v. *Bankers Sec. Corp.*, 230 F.2d 717, 721 (3d Cir. 1956) (claim that a corporation had withheld dividends owed to a shareholder).

5. The question presented does not warrant this Court's review. Resolution of that question turns, at least in part, on Delaware corporate law. See Pet. App. 27a (concluding that petitioner's claims are "derivative

under Delaware law"); *id.* at 140a (applying "Delaware law"); Owl Creek Pet. 22 (invoking "Delaware law"). But the Court typically grants certiorari only to answer "an important question of *federal* law." Sup. Ct. R. 10(c) (emphasis added). The Court "do[es] not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944) (per curiam). That is particularly so when, as here, the "construction of state law [was] agreed upon by the two lower federal courts." *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 395 (1988).

Petitioners, moreover, do not challenge the legal test that the court of appeals applied in determining that their claims are derivative rather than direct. See Pet. 17 (accepting "the *Tooley* test under Delaware law"). They instead challenge the court's application of that test to the facts of this case. See Pet. 17-19. But a "petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10; see *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

C. The Question Whether Petitioner Barrett May Bring A Derivative Just-Compensation Claim Does Not Warrant This Court's Review

One petitioner challenges (Barrett Pet. 16-35) the court of appeals' rejection of his derivative just-compensation claims, brought on behalf of Fannie Mae and Freddie Mac. The Recovery Act's succession clause precludes those derivative claims. In any event, those claims lack merit, and this aspect of the court of appeals' decision does not warrant review.

1. The succession clause provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to * * * all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. 4617(b)(2)(A). The right to bring derivative suits on behalf of the corporation in appropriate circumstances is a well-established right of corporate shareholders. See *Koster* v. *(American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947). The succession clause thus "plainly transfers" to the Agency "shareholders' ability to bring derivative suits" on behalf of the enterprises. *Perry Capital*, 864 F.3d at 623 (citation omitted); see, *e.g.*, *Roberts*, 889 F.3d at 408 (holding that the succession clause transfers to the Agency "the sole right to bring derivative actions on behalf of" the enterprises.).

Petitioner argued below that the succession clause contains an implied exception that allows shareholders to bring derivative suits when the Agency, as conservator, would face a conflict of interest in deciding whether the enterprises should pursue a legal claim. See Pet. App. 147a. But as the government explained, principles of issue preclusion bar petitioner from advancing that argument. See *id.* at 46a. In *Perry Capital LLC* v. *Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014), aff'd in part and remanded in part on other grounds, 864 F.3d 591 (D.C. Cir. 2017), "class plaintiffs * * * who adequately represented Barrett's interests" litigated the question whether the succession clause contains an implied conflict-of-interest exception—and they lost. Pet. App. 48a; see *Perry Capital*, 70 F. Supp. 3d at 229-230. Petitioner may not relitigate that issue here. See *Taylor* v.

Sturgell, 553 U.S. 880, 892 (2008). The court of appeals found the doctrine of issue preclusion inapplicable on the ground that the earlier suit involved statutory claims, while this case involves constitutional just-compensation claims. See Pet. App. 49a. But petitioner cannot invoke that difference as a ground for relitigating the conflict-of-interest question, since issue preclusion applies "even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892.

Petitioner's argument that the succession clause contains an implied conflict-of-interest exception lacks merit in any event. The clause states categorically that the Agency, as conservator, "immediately succeed[s]" to "*all* rights, titles, powers, and privileges * * * of *any* stockholder * * * with respect to the [enterprises]." 12 U.S.C. 4617(b)(2)(A)(i) (emphases added). That broad and unqualified language leaves no room for an implied conflict-of-interest exception. See *United States* v. *Gonzales*, 520 U.S. 1, 5, 10 (1997). The succession clause, moreover, includes an express exception under which the enterprises may challenge the Agency's appointment as conservator. See 12 U.S.C. 4617(a)(5)(A). The inclusion of an "express exception" generally precludes the recognition of additional "implicit" exceptions. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 844 (2018).

Even if the succession clause could be read to include an implied conflict-of-interest exception, moreover, no conflict of interest exists here. If the Agency wished to pursue a just-compensation claim on behalf of the enterprises, the Agency as conservator could file a suit for compensation in the enterprises' name. The Federal Deposit Insurance Corporation, as receiver, has pursued many such suits on behalf of failed banks in receivership. See, *e.g.*, *First Hartford Corp. Pension Plan &*

Trust v. *United States*, 42 Fed. Cl. 599, 616 (1998) (noting that "[t]he FDIC has intervened in more than 40 * * * cases, as receiver," against the United States, "and has originated similar claims against the Government on behalf of failed depository institutions in receivership."), aff'd in part and rev'd in part and remanded, 194 F.3d 1279 (Fed. Cir. 1999).

The court of appeals found it unnecessary to rely on the succession clause, instead rejecting petitioner's claim on the merits. See Pet. App. 50a. But the government, as the prevailing party, is "free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the [lower courts]." *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). The government's threshold argument that the succession clause bars petitioner's suit (and its subsidiary arguments concerning issue preclusion) make this case a poor vehicle for reviewing petitioner's contentions.

2. In any event, as the court of appeals correctly held, petitioner's derivative just-compensation claim fails on the merits.

The Third Amendment did not "take[]" property within the meaning of the Just Compensation Clause. The Amendment did not unilaterally appropriate the enterprises' property, but instead was a negotiated agreement between Treasury and the enterprises (acting through their conservator). Under the Amendment, the enterprises were relieved of their obligations to pay Treasury dividends at fixed rates—obligations that totaled $19 billion per year at the time and that the enterprises had repeatedly been unable to fulfill. See *Collins*, 141 S. Ct. at 1773. The enterprises also were re-

lieved of their obligations to pay periodic commitment fees to which Treasury was entitled. See *id.* at 1774.

In return, the enterprises agreed to pay Treasury their quarterly net worth, less a specified capital reserve, while the Third Amendment remained in effect. See *Collins*, 141 S. Ct. at 1774. That arrangement ensured that the enterprises "would never again have to use capital from Treasury's commitment to pay their dividends," which in turn "ensured that all Treasury's capital was available to backstop the companies' operations during difficult quarters." *Id.* at 1777. The Amendment thus was not a taking, but a negotiated financial transaction in which each side received valuable consideration. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1007 (1984) ("[The] voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.").

At the time of the Third Amendment, the enterprises also lacked a "cognizable property interest on which Barrett may base" a derivative claim for just compensation. Pet. App. 52a. Property interests "are not created by the Constitution"; rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Monsanto*, 467 U.S. at 1001 (citations omitted). The relevant independent source of law here was the Recovery Act.

Four years before the Third Amendment, the Director of the FHFA, with the consent of the enterprises' boards of directors, took the enterprises into conservatorship under the Recovery Act. See *Collins*, 141 S. Ct. at 1772; Pet. App. 8a. That action transferred "all" the enterprises' "rights, titles, powers, and privileges" to

the conservator. 12 U.S.C. 4617(b)(2)(A)(i). It also allowed the conservator to take any action "necessary to put the [enterprises] in a sound and solvent condition" and "appropriate to carry on the business of the [enterprises]." 12 U.S.C. 4617(b)(2)(D). In particular, the conservator could "take over the assets of and operate the [enterprises]," 12 U.S.C. 4617(b)(2)(B)(i), and could "transfer or sell any asset or liability of the [enterprises], * * * without any approval, assignment, or consent with respect to such transfer or sale," 12 U.S.C. 4617(b)(2)(G). And FHFA as conservator was authorized to exercise those powers in a manner that the Agency determined to be "in the best interests of the regulated entity *or the Agency*." 12 U.S.C. 4617(b)(2)(J)(ii) (emphasis added).

Those statutory provisions make clear that, once the enterprises entered conservatorship, they no longer possessed the property interests that corporations traditionally have in their earnings and assets. Most significantly, the enterprises no longer owned the right to exclude others, such as the conservator, from using their property. See Pet. App. 52a. Rather, the enterprises' ownership rights were transferred to the Agency, whose subsequent use of its statutory authority to rehabilitate the enterprises in a manner that "was designed to serve public interests," *Collins*, 141 S. Ct. at 1776, thus did not take any constitutionally protected property interest.

3. Petitioner contends (Barrett Pet. 23-34) that the court of appeals' decision conflicts with this Court's precedents. That argument lacks merit.

Contrary to petitioner's assertion (Barrett Pet. 25-26), the decision below does not conflict with *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155

(1980). In that case, the Court held that a State owed a person just compensation for unilaterally appropriating interest that had accrued on a fund that the person had deposited with the State. *Id.* at 160-164. As discussed above, however, this case does not involve any such unilateral appropriation; rather, it involves a negotiated agreement between Treasury and the enterprises (acting through their conservator).

Petitioner is also wrong in arguing (Barrett Pet. 33) that the decision below conflicts with this Court's precedents on *per se* takings. A *per se* taking occurs when the government simply "takes possession of an interest in property." *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). But as explained above, Treasury did not simply take possession of the enterprises' funds. Rather, it negotiated a change to the terms of its financing arrangement with the enterprises, in which it exchanged the fixed dividends and entitlement to commitment fees for a variable dividend based on the enterprises' net worth. Petitioner cites no case in which this Court or any other has treated a similar financial transaction as a taking at all, let alone a *per se* taking.

4. The decision below does not conflict with any decision of another court of appeals. None of the cases that petitioner cites (Barrett Pet. 16-23) involved a federal conservatorship. Nor did any involve an amendment designed to fix a critical problem in a financing agreement between the government and a federally chartered enterprise. The court of appeals' conclusion that the Third Amendment did not take the enterprises' property therefore is not at odds with any decision of another court.

Petitioner contends (Barrett Pet. 18) that the court of appeals' "approach" to identifying a compensable property interest differs from the approach employed by the First, Second, Fifth, and D.C. Circuits. That is incorrect. In accordance with this Court's precedents, the Federal Circuit considers "existing rules or understandings" and "background principles of law" when determining whether a property interest protected by the Just Compensation Clause exists. *McCutchen* v. *United States*, 14 F.4th 1355, 1365 (Fed. Cir. 2021) (citations and internal quotation marks omitted); see *American Bankers Ass'n* v. *United States*, 932 F.3d 1375, 1385 (Fed. Cir. 2019) ("Property interests arise from existing rules and understandings and background principles derived from an independent source, such as state, federal, or common law.") (citation and internal quotation marks omitted); *A & D Auto Sales, Inc.* v. *United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014) (noting that "background principles of law" define the scope of a property interest) (citation and internal quotation marks omitted). That is precisely the inquiry that the other courts of appeals undertook in the cases that petitioner cites. See *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 32 (1st Cir. 2002) (en banc) (explaining that the existence of a property interest turns on "background principles of state law"); *1256 Hertel Ave. Assocs., LLC,* v. *Calloway*, 761 F.3d 252, 262 (2d Cir. 2014) ("[W]e look first to state law to define the contours of the purported property interest."); *Dennis Melancon, Inc.* v. *City of New Orleans*, 703 F.3d 262, 272 (5th Cir. 2012) (explaining that courts must "resort 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 Fifth and Four-

teenth Amendments.") (citations omitted), cert. denied, 569 U.S. 994 (2013); *Nixon* v. *United States*, 978 F.2d 1269, 1275-1276 (D.C. Cir. 1992) ("[P]roperty is an expectation based on rules and understandings.").

Similarly here, the court of appeals evaluated the enterprises' interest in their net worth at the time of the Third Amendment by reference to the applicable background rules and legal principles. Those rules were established by the Recovery Act, which governs the interests and operations of the enterprises during a conservatorship. Petitioner criticizes (Barrett Pet. 20) the court of appeals for failing to assess "history, tradition, and longstanding practice to determine if the [relevant] statute accords with background principles of property law." But petitioner does not claim that either the Recovery Act itself or the imposition of the conservatorship constituted a taking of property. He claims only that the Third Amendment was a taking. And at the time of the Third Amendment, the enterprises already were in a conservatorship subject to the Recovery Act's rules. In any event, statutes governing conservatorships and receiverships have a long pedigree; the Recovery Act was modeled on such longstanding statutes, *Perry Capital*, 864 F.3d at 606; and petitioner cites no aspect of the Recovery Act that differs from the rules and principles that have long governed federal conservatorships and receiverships of troubled financial institutions. The court of appeals therefore had no reason to delve deeper than the Recovery Act in identifying the rules that governed the enterprises' property at the time of the Third Amendment.

D. The Consequences Of The Court Of Appeals' Decision Do Not Justify Granting Review

Petitioners assert that the court of appeals' decision "provides a simple map for corporate takeovers and shareholder wipeouts by the government" (Owl Creek Pet. 32); that it "opens the door to all manner of government abuses" (Cacciapalle Pet. 32); and that it will have "troubling consequences throughout the financial sector" (Barrett Pet. 34). Those concerns are unfounded.

Since 2008, Treasury's commitment of hundreds of billions of dollars in taxpayer funds has enabled the enterprises to remain in operation. See *Collins*, 141 S. Ct. at 1777. And the Agency and Treasury agreed to the Third Amendment only because "the companies had repeatedly been unable to make their fixed quarterly dividend payments without drawing on Treasury's capital commitment," creating a "realistic possibility that the companies would have consumed some or all of [Treasury's] remaining capital" if the enterprises' dividend obligations had not been amended. *Ibid.* Those singular circumstances are unlikely to arise in the ordinary course, and they readily distinguish this case from "common" conservatorship and receivership scenarios (Barrett Pet. 34).

The decision below likewise does not allow the government to deploy a conservatorship or receivership as a means of taking property with "impunity" (Owl Creek Pet. 32). Many checks exist to prevent a government conservator or receiver from misusing its authority. If a financial institution believes that a conservatorship or receivership is unwarranted, it can challenge the appointment of the conservator or receiver. See, *e.g.*, 12 U.S.C. 4617(a)(5); 12 U.S.C. 1821(c)(7). And if a conservator takes action that "exceeds [its] powers or func-

tions," that action can be enjoined. *Collins*, 141 S. Ct. at 1776.

In *Collins*, this Court concluded that the Agency had not exceeded its statutory authority in agreeing to the Third Amendment because the Amendment reduced the enterprises' fixed financial obligations, preserved Treasury's capital commitment, and ensured "Fannie Mae's and Freddie Mac's continued support of the secondary mortgage market." 141 S. Ct. at 1776. The Amendment thus could reasonably be viewed as an exercise of the conservator's statutory authority to rehabilitate the enterprises. See *ibid.* In contrast, a decision to give away property of a corporation or its shareholders without justification or compensation is unlikely to fit within a conservator's statutory powers or functions. And if the government did take the enterprises' property, the conservator or receiver could pursue a just-compensation claim on behalf of the institution that is in conservatorship or receivership. As noted above, the FDIC has done so many times when acting as a receiver for a failed financial institution. See pp. 22-23, *supra*.

In short, petitioners' contentions that the court of appeals' decision will render the Just Compensation Clause "meaningless" (Owl Creek Pet. 35) disregard the unique facts of this case and the legal constraints under which federal conservators and receivers have long operated. Their fears that the decision will lead to widespread government abuses are misplaced. Further review is not warranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
SARAH E. HARRINGTON
Deputy Assistant Attorney General
MARK B. STERN
ABBY C. WRIGHT
GERARD SINZDAK
Attorneys

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