No. 22-99

# In the Supreme Court of the United States

ANDREW T. BARRETT,

*Petitioner*,

v.

UNITED STATES,

*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Government's opposition brief confirms that the Federal Circuit's takings analysis is indefensible. In large part, the brief engages in misdirection, pointing to threshold issues that this Court either has already resolved or need not resolve before reaching the question presented. The only relevant jurisdictional question, whether FHFA's actions during conservatorship are attributable to the government, is answered in the affirmative by *Collins v. Yellen*, 141 S. Ct. 1761 (2021). The other supposed threshold question, whether Petitioner lost the right to maintain a derivative suit by virtue of the Recovery Act's Succession Clause, was not addressed by the Federal Circuit, is not relevant to its takings analysis, and need not be addressed in reversing that analysis. Nor can the Government's claim that the Succession Clause is a vehicle problem be taken seriously when, just two years ago, the Court granted review of a similar issue *at the Government's urging*.

On the merits, the opposition brief is even more tepid. The Government does not dispute Petitioner's characterization of the generally accepted (and correct) takings inquiry, which allows statutes to eliminate property interests only in accordance with history, tradition, and longstanding practice. Nor does the Government deny that in the decision below the Federal Circuit put a unique spin on that inquiry that in effect allows the Government to take whatever it wants without paying just compensation—so long as Congress first enacts a statute that purports to abolish the owner's interest in the property at issue. At one level, the Government's half-hearted defense of

the Federal Circuit's decision is understandable; in nearly two hundred pages of Federal Circuit briefing, the Government never offered this radical theory as a basis for dismissing Petitioner's derivative takings claim.

The Federal Circuit's analysis creates a loophole through which the Government can evade an important constitutional protection via legislative *ipse dixit*. It is also in serious conflict with this Court's precedents and other circuits' caselaw. The Court should grant the writ to correct the Federal Circuit's egregious and important error.

## I. THIS CASE IS AN APPROPRIATE VEHICLE TO REVIEW AND REVERSE THE FEDERAL CIRCUIT'S TAKINGS ANALYSIS

The Government suggests that the Court would need to resolve two threshold issues before reaching the merits of Petitioner's derivative takings claim.[1] The first is whether FHFA acts as "the United States," and is thus subject to Tucker Act jurisdiction, when acting as conservator under the Recovery Act. 28 U.S.C. § 1491(a)(1). The Court has already resolved this issue, explaining in *Collins* that, "even when [FHFA] acts as conservator," "its authority stems from a special statute [the Recovery Act], not the laws that generally govern conservators." *Collins*, 141 S.

[1] For petitioners in parallel cases who also challenged the Net Worth Sweep in federal district court, the Government says that the Court would need to determine whether 28 U.S.C. § 1500 bars their current claims. But Petitioner Barrett did not bring a separate action in district court, and the Government acknowledges that this purported issue does not apply to him.

Ct. at 1785. Thus, "FHFA clearly exercises executive power" in exercising its "distinctive authority as conservator under the Recovery Act." *Id.* at 1786 & n.20.

This holding refutes the Government's bare assertion that this case "concerns [FHFA's] acts as conservator, not its acts as regulator." BIO 10. Under *Collins*, FHFA acted as both. Although *Collins* did not specifically address the Tucker Act, it did address whether, as conservator, FHFA "takes on the status of a private party and thus does not wield executive power," which only the Government can wield. 141 S. Ct. at 1785. Hence it necessarily follows from *Collins* that FHFA acted as "the United States" for purposes of the Tucker Act here. 28 U.S.C. § 1491(a)(1). And *Collins* supersedes any contrary holdings in the earlier circuit cases the Government cites. *See* BIO 10. After all, the Court has already declined the Government's invitation to follow this same caselaw in *Collins*. *See* Reply & Resp. Br. for Fed. Parties, 37, *Collins*, Nos. 19-422 & 19-563 (Oct. 23, 2020) (quoting *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017)).

Second, the Government argues that Petitioner's derivative takings claim is barred by the Recovery Act's Succession Clause, which provides that, "as conservator," FHFA "immediately succeed[s] to … all rights … of any stockholder." 12 U.S.C. § 4617(b)(2)(A). The Government fails to note that this Court has encountered this clause before. In *Collins*, the *Government* insisted that the Court review whether this clause precluded the constitutional claims raised there, *see* Pet. for Writ of Cert. at I,

*Collins*, No. 19-563 (Oct. 25, 2019); the Court granted review of that question over the other parties' objection; and this clause supplied the *lead argument* in the Government's merits briefing, *see* Br. for Fed. Parties 18–32, *Collins*, No. 19-563 (Aug. 17, 2020).

An issue that, according to the Government, required this Court's review just two years ago cannot be a vehicle problem now. If the Court needed to address this issue, it would be only another reason to take this case. Indeed, there is effectively a circuit split on this issue, with the D.C. and Seventh Circuits holding that the Succession Clause transfers without exception the right to bring derivative claims to FHFA, *see Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 623–25 (D.C. Cir. 2017); *Roberts v. FHFA*, 889 F.3d 397, 408–10 (7th Cir. 2018), and the Federal and Ninth Circuits holding that shareholders maintain that right despite FIRREA's materially identical succession clause where FDIC, as conservator, has a "manifest conflict of interest," *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999); *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021–24 (9th Cir. 2001); *see* 12 U.S.C. § 1821(d)(2)(A).

But if it does not wish to do so, the Court would not need to resolve the parties' dispute over the Succession Clause if it granted certiorari. The Federal Circuit dismissed Petitioner's derivative takings claim on the merits, declining to consider the Succession Clause's effect on that claim. *See* Pet. App. 51. And the Government correctly does not argue that the clause is jurisdictional. The clause limits shareholders' ability to bring derivative claims, not

courts' power to hear such claims. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Thus, this Court could simply reverse the Federal Circuit's flawed takings analysis and remand for that court to address the ancillary Succession Clause question, as this Court commonly does. *E.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 851–52 (2018). The Court *could* address this other, purely legal question, which was ventilated in the above cases and briefed below. But no part of the takings question presented in this petition requires analyzing the Succession Clause.

In any event, the Succession Clause does not bar Petitioner's claim. The clause does not mention judicial review, much less contain the "clear" statement required "to preclude judicial review of constitutional claims." *Webster v. Doe*, 486 U.S. 592, 603 (1988). Under the Government's reading, however, the clause would preclude judicial review of constitutional claims like Petitioner's: Only FHFA could assert the claim, yet FHFA, as one of the agencies that violated the Takings Clause through the Net Worth Sweep, has a manifest conflict of interest as to that claim. The Government argues that no conflict exists because FHFA "as conservator could file a suit for compensation in the enterprises' name"—in other words, sue itself. BIO 22. This argument was never made to the Court of Federal Claims and is therefore forfeited. Regardless, it defies both common sense and basic standing principles. *See United States v. ICC*, 337 U.S. 426, 430 (1949) ("[N]o person may sue himself."); *SEC v. Fed. Lab. Rel. Auth.*, 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring). Tellingly, the Government's only support for the

proposition that FDIC "has pursued many such suits," BIO 22, is the case where the Federal Circuit *recognized* a conflict-of-interest exception to FIRREA's succession clause. *See First Hartford*, 194 F.3d at 1295.

The Recovery Act's Succession Clause can and should be read to include this exception. Nothing in the clause's text reflects an intent to eliminate any shareholder rights. Yet transferring to FHFA a right that it would never exercise, such as the right to file a derivative claim against its own unconstitutional acts, would eliminate that right. "[T]o avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim," the clause must be read not to transfer a right that, due to a manifest conflict of interest, would not survive transfer. *Webster*, 486 U.S. at 603 (internal quotation marks omitted). In arguing otherwise, the Government points to a separate provision, 12 U.S.C. § 4617(a)(5)(A), which allows regulated entities to seek "an order requiring [FHFA] to remove itself as conservator" soon after appointment. But a provision for a different sort of action does not indicate that shareholders need permission to bring any sort of claim—especially not a constitutional claim, which need not be expressly permitted but must be expressly barred.

If the Court chose to address the Succession Clause, it would confront no serious question of issue preclusion. The Government argues that *Perry Capital*, where the D.C. Circuit applied the Succession Clause to bar certain shareholders' derivative

*common-law* claims (for breach of fiduciary duty), collaterally estops other Fannie and Freddie shareholders from bringing other derivative claims against FHFA. Issue preclusion is discretionary and generally applies only to those who were parties in the first action. *See Taylor v. Sturgell*, 553 U.S. 880, 899 (2008). Petitioner was not a party in *Perry*, and his constitutional interests were not adequately represented there. *See Rop v. FHFA*, 485 F. Supp. 3d 900, 927–28 (W.D. Mich. 2020) (rejecting a similar claim-preclusion argument on representation grounds), *rev'd on other grounds*, 50 F.4th 562 (6th Cir. 2022); *Saxton v. FHFA*, 245 F. Supp. 3d 1063, 1073–75 (N.D. Iowa 2017) (similar). Issue preclusion also applies only if the issues are "identical," and issues "are not identical if the second action involves application of a different legal standard." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 154 (2015). Faced only with derivative common-law claims, the *Perry Capital* court did not consider whether the Succession Clause meets the clear-statement standard for barring judicial review of constitutional claims.

Like the Federal Circuit and the other courts to address similar arguments, therefore, this Court could readily dispatch any issue-preclusion argument from the Government. *See* Pet. App. 49 n.12. But again, the Court need not do so to reach the question presented. Any dispute over issue preclusion relates only to arguments over the Succession Clause and, like those arguments, can be left for remand.

## II. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE GOVERNMENT MAY VALIDLY ELIMINATE A CONSTITUTIONAL PROPERTY INTEREST BY SIMPLY ENACTING A STATUTE

Rather than dispute Petitioner's reading of the opinion below, the Government doubles down on the simplistic takings equation embraced by the Federal Circuit: If a statute purports to eliminate a property interest prior to the time of the taking, then there is *no interest* left to be taken. *See* BIO 24 ("The relevant independent source of law here was the Recovery Act."). In fact, the Government argues that the Federal Circuit "had *no reason* to delve deeper than the Recovery Act" in assessing Petitioner's derivative takings claim. *Id.* at 28 (emphasis added). Under the Government's view, so long as such a statute exists, the Takings Clause leaves the stage.

The Federal Circuit's (and the Government's) endorsement of takings by *ipse dixit* diverges from other circuits' evaluation of property interests against the backdrop of history, tradition, and practice. In addition to decisions of the D.C., First, Second, and Fifth Circuits discussed in the Petition, add the recent decision of the Sixth Circuit in *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022) (Kethledge, J.). In that case, the question presented was whether a Michigan county could, by virtue of a statutory enactment alone, "divest a debtor of real property" to repay a debt to the county, but then "refuse[] to refund any of the difference" between the debt owed and the value of the real property. *Id.* at 187. In other words, whether the

county could simply seize "any surplus proceeds" that otherwise would belong to the property owner. *Id.*

Splitting from the Federal Circuit's approach, the Sixth Circuit explained that "[t]he government may not decline to recognize long-established interests in property as a device to take them." *Id.* at 188. Thus, whether a county had unconstitutionally taken plaintiffs' property is *not* "answered solely by reference to Michigan law." *Id.* at 189. "[T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take." *Id.* at 190. The court accordingly proceeded to assess the "interest that the plaintiffs invoke[d]" against the backdrop of "Anglo-American legal history." *Id.* The court traced the history of equitable interests in real property from the middle ages, through English common law, and the later development and refinement of those interests in American courts. *Id.* at 190–94. With property interests well-ascertained by history, tradition, and longstanding practice, it became abundantly clear that "Michigan law flatly contravened all these long-settled principles." *Id.* at 194. In essence, the county claimed it could take the plaintiffs' property without just compensation because a Michigan statute "said it could." But the Takings Clause cannot be so easily "sidestep[ped]." *Id.*

The Government argues that there is no split because the Federal Circuit stated that it, like other circuits, refers to "background principles" in its decisions. BIO 27. Yet that is question begging. The question presented is what those background principles *are*. The Federal Circuit has allowed the

Government carte blanche to take property, so long as a pre-existing statute says it can. Other circuits conduct an independent evaluation of property interests. *See* Pet. 19–23. Outside the Federal Circuit, a recent statutory enactment may prove relevant, but it does not (and cannot) wholly displace what the Takings Clause requires. In this, the Federal Circuit's approach could hardly be more out of step with other circuits.

The Government argues that the Federal Circuit did not *really* need to conduct an independent analysis of the Companies' property interest in this case because "statutes governing conservatorships and receiverships have a long pedigree; the Recovery Act was modeled on such longstanding statutes." BIO 28. The Government's response demonstrates a misunderstanding of the relevant takings inquiry. "[T]he act of taking is the event which gives rise to the claim for compensation." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019) (cleaned up). In this case, the relevant act is the Net Worth Sweep. The Federal Circuit upheld this seizure of property because of the prior enactment of the Recovery Act, which purportedly eliminated any property interest the Companies had in their own net worth. Because the taking occurred with the Net Worth Sweep, the proper analysis is not whether there exists a "long pedigree" of conservatorships and receiverships; Petitioner readily concedes there is. Instead, the inquiry is whether, in light of that historical pedigree, there is *any* background principle that permits the government to operate the financial institutions under its care for public profit without compensating

the institutions' owners. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). An evaluation of history, tradition, and longstanding practice of conservators will demonstrate no such principle exists. After all, as *Collins* teaches, FHFA's powers "differ critically" from ordinary conservatorships. 141 S. Ct. at 1785.

Trying a different tack against this Court's review, the Government presents the Net Worth Sweep as "a negotiated financial transaction in which each side received valuable consideration." BIO 24. But here the Government negotiated against itself. *See* Pet. 12–14. Alarm bells for a taking should go off when the Government engages in "self-dealing," especially when its actions are "an aberration" in light of history, tradition, and longstanding practice. *Hall*, 51 F.4th at 188. Moreover, the Net Worth Sweep involved the forced seizure of billions of dollars of corporate assets over and above what the Companies owed to the Government. *See* Pet. 13. To put it another way, the Government "forcibly took property worth vastly more than the debts these [Companies] owed, and failed to refund any of the difference. In some legal precincts that sort of behavior is called theft." *Hall*, 51 F.4th at 196 (internal quotation marks omitted).

* * *

This Court has repeatedly established that the Takings Clause "is addressed to every sort of interest the citizen may possess." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). The Companies' net worth is one such interest. The Court has further instructed that governments may burden those

property interests in a manner consistent with "background principles." *Lucas*, 505 U.S. at 1029. But what this Court has had "no occasion" to determine, *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001), is under what circumstances statutory enactments can so inhere in a property owner's title as to deprive him of any interest that could be taken.

The circuits are divided. On one side are the many circuits that conduct a careful evaluation of history, tradition, and longstanding practice to ascertain the contours of a property interest in light of background principles. On the other side is the Federal Circuit, which instead allows constitutional property interests to be redefined or abolished by the mere *ipse dixit* of statutory enactments. Petitioner respectfully submits that now is the occasion to ensure that the Court with exclusive appellate jurisdiction over the Court of Federal Claims—and thus the lion's share of takings claims against the federal government—does not continue to disregard the Constitution's protection of private property.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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