In the Matter of:

Fairholme Funds, et al. v. USA

November 19, 2019

Condensed Transcript with Word Index

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WASHINGTON FEDERAL, ET AL.,	)	Case No. 13-385C
FAIRHOLME FUNDS, ET AL.,	)	Case No. 13-465C
JOSEPH CACCIAPALLE, ET. AL.,	)	Case No. 13-466C
BRYNDON FISHER, ET AL.,	)	Case No. 13-608C
ARROWOOD INDEMNITY COMPANY, ET AL.,	)	Case No. 13-698C
BRUCE REID, ET AL.,	)	Case No. 14-152C
LOUISE RAFTER, ET AL.,	)	Case No. 14-740C
OWL CREEK ASIA I, L.P., ET AL.,	)	Case No. 18-281C
AKANTHOS OPPORTUNITY MASTER FUND, ET AL.,	)	Case No. 18-369C
APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, ET AL.,	)	Case No. 18-370C
CSS, LLC,	)	Case No. 18-371C
MASON CAPITAL L.P., ET AL.,	)	Case No. 18-529C
Plaintiffs,	)	
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

Courtroom 4
Howard T. Markey National Courts Building
717 Madison Place, N.W.
Washington, D.C.
Tuesday, November 19, 2019
9:00 a.m.

Oral Argument Defendant's Motion to Dismiss

BEFORE: THE HONORABLE MARGARET M. SWEENEY

Transcribed by: Sara J. Vance, CERT

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P R O C E E D I N G S

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(Proceedings called to order, 9:00 a.m.)

LAW CLERK: The United States Court of Federal Claims is now in session. The Honorable Margaret M. Sweeney presiding, in Washington Federal vs. United States, Case Number 13-385; Fairholme Funds, Incorporated vs. United State 13-465; Cacciapalle vs. United States, 13-466; Fisher vs. United States, 13-608; Arrowood Indemnity Company vs. United States; 13-698; Reid vs. United States, 14-152; Rafter vs. United States, 14-740; Owl Creek Asia I, L.P. vs. United States, 18-281; Akanthos Opportunity Master Fund, L.P. vs. United States, 18-369; Appaloosa Investment Limited Partnership I vs. United States, Number 18-370; CSS, LLC vs. United States, 18-371; Mason Capital, L.P. vs, United States, 18-529.

THE COURT: Thank you, Mr. Hansen. Please be seated.

Good morning to all of you.

COUNSEL: Good morning, Your Honor.

THE COURT: Would Plaintiffs start by identifying themselves for the record, Plaintiffs' counsel.

MR. COOPER: Yes. Good morning, Your Honor, again. Charles Cooper with Cooper & Kirk representing

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the Fairholme Plaintiffs. With me today are my colleagues, David Thompson and Pete Patterson.

MR. THOMPSON: Good morning, Your Honor.

MR. PATTERSON: Good morning.

THE COURT: Good morning.

MR. HUME: Good morning, Your Honor. For the Cacciapalle Class Plaintiffs, I am Hamish Hume from Boies Schiller Flexner. With me in the audience today are some other class lawyers, Mr. Lee Rudy, Eric Zagar, and my colleague, Patrick Lafferty.

Thank you.

MR. ROSENBERG: Your Honor, Lawrence Rosenberg on behalf of the Owl Creek, Akanthos, Appaloosa, CSS, and Mason Plaintiffs. With me is my partner, Bruce Bennett.

THE COURT: Very good.

And for the United States? Oh, I'm sorry, I do apologize.

MR. GREEN: Good morning, Your Honor. Kevin Green for Washington Federal Plaintiffs, Hagens Berman Sobol Shapiro, co-lead counsel, and I'm also joined by Robert Roseman in the audience of Spector, Roseman and Kodroff.

MR. VALLELY: Good morning, Your Honor. Patrick from Shapiro Haber & Urmy. I represent the Fisher and Reid Plaintiffs. With me in the audience also

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from Shapiro Haber & Urmy is Ed Haber, as well as next to him, Noah Schubert from the Schubert Firm.

MR. JOSEPH: Your Honor, having run out of chairs, I'm in the audience --

THE COURT: Yes, I'm so sorry.

MR. JOSEPH: -- but I'm Gregory Joseph, Joseph Hage Aaronson for the Rafter Plaintiffs, with my partner, Christopher Stanley.

MR. ZUCKERMAN: Good morning, Your Honor. Richard Zuckerman from Dentons for the Arrowood Plaintiffs.

THE COURT: Very good.

Now for Defendants.

MR. DINTZER: Thank you, Your Honor, and good morning. This is Kenneth Dintzer from the Department of Justice. And with me at counsel table is Rita Bezak, Eric Laufgraben, Elizabeth Hosford, Franklin White, and Mariana Acevedo, all from the Department of Justice.

Also from the Department of Treasury, I have Katie Reilly, and Lisa Aiken is a paralegal from the Department of Justice. And Michael Sitcov from the FHFA.

Thank you, Your Honor.

THE COURT: Thank you. Has everyone been identified?

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MR. DINTZER: And the Director of National Courts Robert Kirschman is sitting right behind me.

THE COURT: It's good to see you this morning.

MR. KIRSCHMAN: Good morning, Your Honor.

THE COURT: Very good.

Now, I believe everyone is accounted for. Very good.

Just one preliminary matter, I would ask -- I know some of you have cell phones. I would ask that there would be no tweeting, no texting, no Angry Bird playing please. You may not record these proceedings. You may not transmit these proceedings. In one of my scheduling orders, I explained how you can obtain an audio copy of today's proceedings. So thank you very much for your attention.

I'm ready to begin.

MR. DINTZER: Thank you, Your Honor.

We come today on the Government's motion to dismiss and I'd like to hand up some slides and a paper if that's okay with Your Honor.

May I approach, Your Honor? May I approach?

THE COURT: Please.

MR. DINTZER: And all of the Plaintiffs' counsel have a copy of what you're handing me?

THE COURT: We emailed Plaintiffs' counsel and

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we're physically handing them out as well.

THE COURT: Very good. Thank you, Mr. Dintzer. I just like that on the record. Thank you.

MR. DINTZER: Oh, absolutely.

(Pause in the proceedings.)

MR. DINTZER: And if we could ask the Court to please turn on the screen. We're going to have a PowerPoint if that would be okay with the Court.

(Pause in the proceedings.)

MR. DINTZER: Thank you, Your Honor, for your patience.

May it please the Court. Given the complexity of the case, the multiple Plaintiffs and the multiple arguments, I'd like to do four things this morning to make sort of the rest of our argument -- we've broken it up into pieces -- to make the rest of it more digestible and comprehensible.

The first thing I'd like to do, Your Honor, is I'd like to go through the background and talk about how we got here. Then I'd like to touch on who the parties are and then note a few points worth remembering as we work our way through the issues today. And, finally, Your Honor, offer a bit of context to place this case sort of in context of what we've been doing. And with that, I'll turn to the background and how we got here

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today.

It started in 2008 when disruptions to the housing market snowballed into the worst crisis since the Depression. No one was protected from the shockwaves of this crisis. And at the time, Fannie and Freddie has existed for decades as government-chartered, privately-owned institutions, which means that federal statutes provided for their existence and described what the responsibilities were, but they were owned by private shareholders and profits from them flowed to the shareholders.

I'm going to refer to them as GSEs, government-sponsored enterprises. Some people may just call them "the enterprises."

The GSEs purchased, insured, and repackaged home mortgages, and beginning in 2008, their combined portfolio was $5 trillion, which was about half of the existing mortgage market at the time. Unfortunately, in 2008, that was the absolute worst time to be in the mortgage business with real estate prices falling and crashing.

Before 2008, the GSEs were regulated -- and this is a mouthful -- by the Office of Federal Housing Enterprise Oversight, or OFHEO. For decades, OFHEO had the authority to routinely examine the GSEs and to, if

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necessary -- if it had become necessary, to place them into conservatorship. Foreseeing potential problems with Fannie Mae or Freddie Mac, then Treasury Secretary Paulson went to Congress and asked them for better tools should either of the GSEs fall into the growing financial problem and crisis that was developing.

In July 2008, Congress gave Secretary Paulson his requested tools primarily in the form of the Housing and Economic Recovery Act called HERA. HERA had many elements, and I'm going to touch on a few right now.

First, it created the Federal Housing Finance Agency, or FHFA, which was a new regulator for the GSEs. And, also, HERA clarified the regulator's role should Fannie and Freddie face insolvency. Under HERA, FHFA's director had the discretion to place either of the GSEs in conservatorship or into receivership if that became necessary.

As conservator, FHFA succeeds to all rights, titles, powers, and privileges of the GSE and its shareholders. So what does this mean? This means that in a conservatorship or a receivership, FHFA can step into the shoes of both the companies and their shareholders and manage all of their affairs.

As conservator, FHFA may operate and conduct all business of the GSEs. And next as a conservator,

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FHFA had the authority to act not just in the GSEs' best interest, but in FHFA's. That's in the statute. So the scope of the power and authority was very broad.

Now, HERA is a long statute. When I print it out, I get 44 pages. It's very detailed on FHFA's very broad powers. And HERA and HERA alone describes the FHFA's duties and authorities and responsibilities when acting as conservator.

Now, the Plaintiffs when they get up, as they did in their briefs, they might discuss the common law of conservatorship. Your Honor, common law has no place in this conservatorship discussion. As the D.C. Circuit colorfully explained, Congress made clear in the Recovery Act that FHFA is not your grandparents' conservator. And what they were saying is it's not tied to the common law notions of a conservatorship. So when the Plaintiffs say "common law," it's shorthand for acknowledging it's not in the HERA statute.

So the question is, why could Congress give FHFA unique authority over the conservatorship or potential receivership of the GSEs? And that's because, Your Honor, the GSEs themselves are unique.

With federal charters, it was universally assumed that the Government backed the GSEs' debt. And that has nothing to do with the shareholders; these were

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people who had lent the GSEs money, debtors. But it was thought that the Government would step in and back and protect the debt if something happened. However, there's no support in that in the statutes or regulations. It was -- that was viewed as an implicit promise and that implicit promise or perceived implicit promise allowed the GSEs to grow immensely, but it also put the Government in a special role as they tumbled toward the financial abyss.

Getting back to HERA and its elements, in passing HERA, Congress wanted FHFA to manage the GSEs' affairs without interference, and that's interference from the shareholders or, for the most part, from the Courts. To do this, Congress created an anti-injunction provision. So in HERA, they limited challenges to the conservatorship to -- just to a 30-day window and only to be brought by the GSEs. So the GSEs themselves could challenge it for 30 days. So federal policy, as written by Congress, was to trust FHFA to run the conservatorships.

Now, the GSEs' debt was held basically worldwide and default on the GSEs' obligations, even just the risk that there might be a default, could have been catastrophically disruptive to financial markets. So to protect the GSEs from default, one of the things that

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Congress did in 2008 was they provided Treasury with the authority to buy GSE stock or invest in GSE debt so that Treasury's investments could keep the GSEs going and keep the funds flowing.

Congress recognized that if Fannie and Freddie hit the skids, only the American taxpayer had the resources and the willingness to step up and invest in Fannie and Freddie and keep them solvent. These investments had the goal -- the only goal -- of protecting the taxpayers.

Now, after July 2008, the financial crisis accelerated. Eventually, Lehman Brothers collapsed into the largest bankruptcy in history and the Government rescued AIG, the world's largest insurance company. As the crisis grew, the Government responded. And in the middle of the chaos, actually before Lehman Brothers actually went bankrupt, but when there were those concerns, concerns started growing about Fannie Mae and Freddie Mac.

On September 6th, 2008, they were placed in conservatorship by FHFA. And on September 7th, the next day, FHFA, acting as the conservator, and Treasury entered into the PSPAs. So the preferred stock purchase agreements, or PSPAs, are contracts. And I have on this next slide, Slide 21, I have the signature blocks from

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the agreement. One was signed by the then Secretary of Treasury Henry Paulson and one was signed by FHFA on behalf of the GSEs by James Lockhart, the director of the FHFA.

So turning to the terms of the PSPAs, first and probably most important to the GSEs, there was $100 billion of capital set aside for each of the GSEs. Not as a lump sum investment, but as basically a pile of money for them to draw on as they needed it. In exchange for that enormous commitment, Treasury received -- the Department of Treasury received warrants for 79.9 percent of the common stock of the GSEs.

Also -- and received $1 billion in senior preferred stock. It was one million shares valued at $1 billion. Until the money would be repaid, Treasury would be receiving dividends on that preferred stock, specifically a 10 percent return for every dollar that it ultimately would invest in the GSEs. Now, the dividends were not a repayment. They didn't reduce the balance. They merely would return -- give the Government a return on its enormous investment; give the taxpayer a return on their enormous investment.

Also, the GSEs agreed in the PSPAs to pay a commitment fee. And these were standard in the industry. Along with paying for money that you actually accessed,

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just to have money on ready, standing by, typically in the industry you pay a commitment fee. In this case, there was a billion-dollar initial commitment fee to make this money available, but also there would be an annual fee that would be set later. Finally, the preferred shares had a liquidation preference of $1 billion. And it would go up one dollar at a time every time draws were made on the money that was made available to the GSEs.

So I'm going to take a moment just to discuss the liquidation preference. Typically, if a company liquidates, the creditors get paid first and the stockholders/shareholders get paid second in varying forms. But in this case with the liquidation preference, what Treasury had was the right to get paid ahead of the stockholders. They had a preference in the liquidity after the creditors. So every time a dollar was provided from Treasury's $100 billion commitment, the liquidation preference went up by one dollar. And that was basically eventually how Treasury would get paid back on the PSPA commitment.

Finally, the PSPAs called for shrinking of the GSE portfolios. The GSEs held tremendous assets in mortgages and the PSPAs called for them to shrink those assets to reduce the risk of the portfolio.

Now, no Plaintiffs have alleged that the PSPAs

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themselves are takings or exactions. They call the terms that Treasury received generous, though. And that was not really true, Your Honor. If one considers the enormous risk of loss, of $200 billion right in the middle of the great recession where nobody knew what the bottom of the recession was and nobody knew if Fannie Mae and Freddie Mac would actually survive financially.

So if it had been a generous return in light of the risk of loss, other investors would have offered to step up in the funding. Plaintiffs have no allegations that other investors stood ready to save Fannie Mae and Freddie Mac and certainly none of the Plaintiffs ever invested to help pump up and rescue Fannie Mae or Freddie Mac.

So how do we know that the capital commitment was risky? Well, by 2009, May 2009, just a few months later, there was a real concern that $100 billion each was not enough. And so in an amendment, the First Amendment to the PSPAs, Treasury and FHFA again signed this amendment, Treasury doubled its commitment to each of the GSEs. Now, it would make $200 billion available to each. And Treasury did that -- it took on the extra commitment and extra risk without any additional benefits flowing to Treasury. So it did not up its demand in any way.

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Later that year in December 2009, the Second Amendment was signed where -- between Treasury and FHFA, again as conservator. And the cap was raised again, this time to $234 billion, again with no extra benefits flowing to the Government.

Plaintiffs posed no challenges to the first two amendments because -- and they recognize this -- without them, the GSEs would risk insolvency. So twice in 2009, the Government assumed additional risk without additional compensation. I'd ask the Court to keep that in mind as the Plaintiffs suggest that the Government was only in this to make a profit.

So fast forward -- I apologize, Your Honor -- in 2009 and 2010, the GSEs were responsible for paying dividends on the money as they drew down the amount, but there wasn't always enough profits in what they were earning. They were still running their businesses, but there wasn't enough profits to pay those dividends. So what was happening was they would draw down even more just to pay the dividends that they had coming due. They would borrow -- they would draw down more on the amount from the government commitment. Of course, more draw-downs now meant down the road even a higher dividend that was required of them to pay for the extra draw-downs.

By June 2012, $187 billion had been infused,

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$116 billion in Fannie and $72 in Freddie. And based on the original terms, the dividend that would be due that year would be $19 billion. That exceeded any expectations of the GSEs' net income, certainly what they had been earning before. So under the PSPAs, Treasury's commitments became fixed at the end of 2012. After that, they couldn't keep raising this cap for forever. So in August of 2012, there was a desire to mitigate the risk of these circular draw-downs.

In 2012, Treasury and the GSEs signed a Third Amendment to the PSPAs like the other documents signed between Treasury and FHFA acting on behalf of the GSEs. What was FHFA's role in the Third Amendment? Well, it negotiated and signed the Third Amendment by acting as conservator and it guided the GSEs in what was a normal function of theirs, which is signing a contract or an amendment to a contract, something that the GSEs would typically do.

The Third Amendment did several things. First, it converted the fixed dividend to a (inaudible) dividend. And what that meant was is that if at the end of a quarter, if the GSEs had a negative net worth at below "sea level," then they could withdraw to get themselves back to a place where they wouldn't be insolvent. But if they had a positive net worth above

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whatever capital cushion they had, then that would be paid as the dividend. So it was a variable dividend.

Also, the Third Amendment suspended that periodic commitment fee I've mentioned to reduce the burden on the GSEs. Finally, the Third Amendment accelerated the wind-down of the GSEs by constantly shrinking the amount of their portfolio. So this -- the terms of the Third Amendment gave the GSEs maximum flexibility to only pay what they had earned. And with these steps, the Third Amendment mitigated the risk of these circular draw-downs.

So that, Your Honor, is what has brought us here today. That's the background. And with that, I've mentioned the parties and I'd like to just take a moment to discuss them.

Starting with FHFA, in most circumstances, FHFA is a government agency, a regulator. But when it steps into the shoes as a conservator or a receiver, which is not relevant here, when it steps into the shoes as a conservator, it no longer acts as the Government. It acts as the entity, the GSE whose shoes it's stepping into. We had a lot of experience with that back in the Winstar days. FDIC did the same thing when it stepped into the shoes of banks. Sometimes what it did was it turned around and it sued the United States. We actually

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have a lot of -- a number of cases against the FDIC acting as the receiver on behalf of the banks. Here, FHFA is being sued as a conservator, not as a regulator.

So that's the FHFA side. Obviously, Treasury is the Department of Treasury. The Plaintiffs' shareholders hold both common and preferred shares according to their pleadings. But there are -- but they can be divided into two groups, Your Honor. Those who purchased before the Third Amendment and those who -- I mean, the conservatorship and those who purchased after the conservatorship. Now, those who purchased before invested in the stock, took -- they understood that they were taking risk investing in Fannie and Freddie just like any of us takes a risk investing in any stock and the same type of risk that AIG shareholders took when they invested in AIG or Lehman Brothers' partners when they invested in the partnership. And during the financial crisis, thousands of companies were either wiped out or had -- were greatly diminished and that happened to their shareholders, too.

Now, these shareholders -- these are people who had it before -- they picked the board members and the management that ultimately drove Fannie and Freddie into the position where they needed government assistance. So those were the shareholders that purchased before the

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crisis.

The second set of shareholders invested after the conservatorship or after the Third Amendment, so which raises the question, who buys stock in a company that's already in conservatorship? And the answer is speculators who hope to turn a risky investment into something -- a large return if they see a path to greater profits.

So we have two sets of Plaintiffs here, early buyers who were rescued with the Government's assistance, and the more recent buyers who hoped to profit from that assistance. Neither shareholder group, of course, played any role in actually saving the GSEs. No Plaintiff contributed a dime to helping the GSEs with their obligations. All of the money from the GSEs came from the American taxpayer. Nevertheless, the Plaintiffs' briefs have a tone, and they may have that here, of entitlement to the benefits from the taxpayers' rescue. But, Your Honor, no such entitlement exists.

So those are the parties. Now, I'd just like to touch on a few points that are worth remembering throughout the rest of our presentation. The first is is that this is not -- this Court is not the first court to address this case, as I know the Court knows. Many courts have reviewed the Plaintiffs' claims. In fact,

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Johnny Cash, the great Johnny Cash, has a great song, I've Been Everywhere, and he could have been talking about the Plaintiffs because they have been litigating in -- the GSE shareholders have challenged the Third Amendment in District Courts and Appellate Courts throughout the country. And I just -- I have some of them listed here. I have given the Court and the Plaintiffs a handout which is just sort of a cheat sheet summary of ones that we believe touch on this litigation because we're going to be -- throughout today, we're going to be referencing some of them.

But in those cases, similar or identical claims were raised throughout the country and most of the Courts held that the Third Amendment served a proper business purpose, that the Third Amendment protected Fannie and Freddie from future downturns. For example, the Jacobs -- in the Jacobs case in the 3rd Circuit, the Court held "the Third Amendment thus threw Fannie and Freddie a $200-billion-plus lifeline to safeguard not just their own interests, but also the Government's and the public's interests."

It continues, "The Third Amendment also serves Fannie's and Freddie's own interests. They did not give away their future net worth for nothing. In consideration, the Treasury gave up its right to an

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unconditional 10 percent dividend, which sometimes cost Fannie and Freddie more than their positive net worth and forced them to borrow even more. The Third Amendment thus insured Fannie and Freddie against downturns and "death spirals," preventing unpayable dividends from ratcheting up their debt loads to unsustainable levels."

So that's the first point is that there are -- there's a backdrop of cases that we're going to be -- we will be referencing.

The second point that I'd like the Court to keep in mind is that Plaintiffs are shareholders, but that's all they are. So Plaintiffs' own shares in the GSEs -- and there's no question that shares of stock are property. There's no denying that. But Plaintiffs' shares are their only property interest. As alleged, each Plaintiff continuously owned the shares from the purchase until now, at least that's what we understand. The Government hasn't taken the shares, we haven't exacted the shares. They own their shares. And they're not just pieces of paper. They represent a financial worth.

In their briefs and likely here today, Plaintiffs characterize their property rights as economic interests or in dividends or liquidation and they characterize it a whole bunch of different ways. But the

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truth is they own shares and everything else that they talk about are sticks in the bundle of rights that come with owning those shares. And it's important, your honor, because a market still exists for those shares. It's existed continuously since before the crisis until today.

On any given day, the Plaintiffs could sell those shares. Now, they -- so when they say we've deprived them of all value and they discuss it as if we took their shares, but we didn't, they have them and they can be sold. So we'd ask the Court to keep that thought in mind as we walk through the day and we talk about what property rights they have and how they might have been affected.

The third point I'd like to make to the Court, Your Honor, is that dates matter, a lot. Plaintiffs often talk about what happened after the Third Amendment was signed. And they will throw around, at least they did in their briefs and I expect today, enormous sums of money. But legally that doesn't matter for a takings case, Your Honor. The Court of Federal Claims and the Court of Appeals for the Federal Circuit have recognized that only one thing matters for a takings case and that is the value of the property on the date of the alleged taking. The date matters both from an economic impact

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point and from a how much compensation could possibly be generated.

What happens after that taking date is irrelevant because if the taking occurred, it's already completed. And the best way I can describe that, Your Honor, is with an example with a lottery ticket. If someone had a lottery ticket they bought for the dollar, it's before the lottery has happened and the Government took that ticket, we know exactly how much that ticket is worth. It's worth a dollar.

Now, what if it's a losing ticket? Well, that ticket is worth a dollar because of the date of the alleged taking, that's what it was worth. What if it's a winning ticket? It's still worth a dollar. And that's of key import. The value of property can go up or down after an alleged taking, but the date to focus on is that date of the alleged taking. That's the only date when compensation can be measured.

So when Plaintiffs throw around these enormous numbers about alleged harm, it's irrelevant. The alleged taking date, as we understand it from reading their -- is August 17th, 2012. That's the date that the Third Amendment was signed.

So what happened on or around that date? So these are -- I have two slides here. One of Freddie

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Mac's common stock and one of Fannie Mae's common stock. And if the Court can see, it just basically runs in August. It fluctuated somewhere between 20 and 30 percent -- 20 cents and 30 cents during that time. There were no huge moves in either direction to suggest something dramatic had happened. And it would be fair to say that the market yawned.

Now, the Plaintiffs, to be fair, will note that the preferred stock did move more, and it did. And some of them have alleged that in their pleadings and some of them have not. But the point is is the actual injury that we're talking about is pennies or perhaps dimes that they've alleged on -- per share, and nothing like the billions of dollars that they're going to discuss.

And the Federal Circuit addressed this point in the Starr case, the point about the shares regarding AIG shareholders who bought similar claims of taking an exaction. Those plaintiffs argued that the Government's conduct caused more shares to be printed and this affected their share price, and the plaintiffs demanded that that be viewed as a physical seizure, as if we took -- everybody (inaudible) as if we -- as if we took their shares. And the Federal Circuit refused to equate an action that affected share price with a physical taking.

What the Court said was, "We decline Starr's

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invitation to view the challenged conduct as it wishes. There is a material difference between a new issuance of equity and a transfer of existing stock from one party to another." In this case, there was no transfer of existing stock from one party to another. There is no physical taking. And any unnecessary hyperbole about that can't support their claims.

Also, the Plaintiffs might argue that without their direct claims against the Government, there might be no other options because -- but, of course, they do have other options, Your Honor. The stock certificates are contracts and the GSEs are the Plaintiffs' counterparty on the stock certificates. The Plaintiffs have sued the GSEs in District Court and, in fact, some of them are in discovery against Fannie and Freddie in the D.C. District Court just a few blocks away. So the Plaintiffs are having their day in court, but it should only be one court and, respectfully, it shouldn't be this one.

Finally, Your Honor, just a bit of context. That's the backdrop of what brought us here today. We're prepared to walk through each of the dismissive points we've raised in our brief. Ms. Hosford and Mr. Laufgraben will help me with the heavy lifting here today.

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But the point on context is this: This is the third major set of takings cases that have been brought against the Government since the financial crisis. We've tried and resolved claims that were brought by AIG's shareholders and we've tried claims brought by Chrysler's dealers and we have a decision on that. In both cases we heard roughly the same thing. If the Government had done more, plaintiffs would have been better off. If the Government had only taken more risk or left more on the table, made different decisions on how it was trying to save these entities, the plaintiffs would have been better off.

Here, most Plaintiffs agree that the Government in some way saved the GSEs. But if nothing else, I think we can all agree that the Government provided a tremendous amount of money to these GSEs which the GSEs drew on. At least most of them don't challenge the initial conservatorship. But still, they all say that they're entitled to more. They want a windfall at the Government's expense. They want money that we do not believe that they've earned and they want money that we do not believe that they are entitled to.

So we'd ask the Court in this third round of takings cases and exaction cases to build on what we've learned in the first two. We'd ask the Court to conclude

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the Plaintiffs failed to state a claim on which relief can be granted.

With that, I thank you, Your Honor, for your attention.

MR. THOMPSON: Maybe we can remove the word "windfall" so that's not subliminally -- good morning, Your Honor --

THE COURT: Good morning.

MR. THOMPSON: -- and may it please the Court, David Thompson for the Plaintiffs.

Your Honor, I'd like to start by making our own presentation, then briefly responding to some of the points that my friend from the Government just made, thank you.

This was the largest and most brazen expropriation of private property in the history -- in the Nation's history. With the stroke of a pen, the entirety of the property rights of the shareholders was eliminated, cutting them out entirely from the capital structure. The net-worth sweep assigned the rights of all of Fannie's and Freddie's equity to Treasury and the rights of the other -- of the shareholders were rendered a nullity. There is no scenario, none whatsoever, where under the current arrangement, the private shareholders will get one penny of value.

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Treasury -- this wolf -- comes as a wolf because Treasury said as much when it put the net-worth sweep into place saying that it ensures that "every dollar of earnings that Fannie and Freddie generate will be used to benefit taxpayers." It follows that if every dollar is being used for the benefit of taxpayers, then there are no dollars left for the private shareholders.

The scope of the taking is staggering. There was $33 billion worth of value of the junior preferred and obviously significant value in the common stock as well. And at the time of the filing of the operative complaint in this case, the net-worth sweep dividends that the Government has generated are $280 billion. That's $124 billion more than they would have received under the Second Amendment before there was a net-worth sweep. So it is a massive windfall that they have generated. And that's why Judge Janice Rogers Brown said, "What might serve in a banana republic will not do in a constitutional one."

It's important to remember that we're here on a motion to dismiss. The Government, from its -- has to take our version of the facts as true. And it just -- it's like a moth to a flame, it can't resist spinning a false counterfactual. We see it in its slides today, and I'm going to go through those slides where they reference

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a death spiral, they quote from the Jacobs. This is a maneuver they've made in several cases where rather than dealing with the complaint before the Court, they quote from other cases involving other complaints and those Courts' reading of those complaints as opposed to dealing with this complaint in this Court, which squarely forecloses the idea that there was a death spiral. And I'll come back to that in a moment.

Indeed, the very first sentence of the introduction in their brief says that "These cases stem from the United States' rescue -- rescue of Fannie Mae." And we heard that today just now from the Department of Justice, that they saved the companies.

But the complaint is crystal clear. Paragraph 45 says the companies were never in danger of insolvency, that they had at all relevant times ample cash to easily pay all of their debts. It simply cannot be squared with the complaints in this case to say that they were saved or rescued. On summary judgment, you know, we welcome that factual contestation on who's right about this. But for purposes of today, it must be accepted that this was an ambush, not a rescue.

The FHFA forced Fannie and Freddie into conservatorship on September 6th, and once they were there, they forced them to make significant noncash

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adjustments that did not reflect the underlying strength of the companies. They generated huge paper losses that required them to take more of a draw and thereby enriching the Government by getting even more of a dividend. This dividend was 10 percent. They said, well, it's not really that generous a deal. It's a 10 percent dividend plus warrants of 79.9 percent of two vibrant financial institutions. Even under the Second Amendment, this would have been one of the best investments in the history of the United States. Maybe the Louisiana Purchase was better, but this was a very good deal for the United States Government.

Now, they have said in the Jacobs -- on their Jacobs slide that there was a death spiral, and I'd like to make four points about this. The first is that Fannie and Freddie was authorized to pay a dividend in kind. You know, they had a slide up there showing the Court the features of the PSPA. They neglected one feature, which is they don't have to pay a 10 percent dividend. They can pay a 12 percent stock dividend. That's really important because that means they never were required to draw down on the line of commitment to pay dividends. They could just add to the liquidation preference of the -- of their own liquidation preference.

Why did the Government neglect that from that

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slide? Because it explodes the idea of a death spiral. Because if you never have to drawn down to pay the dividend, there's no risk whatsoever of a death spiral. That's point one.

Point two is the complaint alleges that the Government knew in August of 2012 that Fannie and Freddie was poised to make massive profits. A mere nine days before the net-worth sweep, the CFO of Fannie went into Treasury and said, you know, we're going to reverse the deferred tax asset next year. And Treasury said, well, how much is that going to be? $50 billion of profit. Just from Fannie. Freddie, you know, has a similar DTA. And nine days later, they do the sweep.

In fact, the complaint alleges, quoting from an email that we got in discovery, that in June of 2012, the acting director of FHFA acknowledged that Fannie and Freddie would be "generating large revenues over the coming years, thereby enabling them to pay the 10 percent annual dividend well into the future." There is no -- as a factual matter, there was no threat of a death spiral. Not only could they always pay in kind if they couldn't generate enough earnings to make the $18.9 billion dividend payment, but they were going to generate massive profits. Everybody knew it, including the Government.

In fact, in 2013 alone, the two companies

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earned $130 billion, enough to pay their dividends for seven years just from the profit of 2013. So there was no threat as a factual matter of a death spiral as the complaint specifies.

In addition, we've been told, well, you know, we wanted to mitigate -- the third point I'd make about this death spiral is we've heard that the Government wanted to mitigate the risk that the line of commitment would be drawn down on. The net-worth sweep exposed the line of commitment to maximum vulnerability. In the absence of the sweep, there would have been $130 billion of extra value on the balance sheets today that when there were, you know, shortfalls in terms of earnings, they could just tap into that. That cushion is gone.

And we saw this in 2017 where there was an accounting adjustment and the companies lost some money and they had to make a draw on the line of commitment. Why? Because of the sweep. In the absence of the sweep, there would have been $130 billion of capital. They could have tapped into that and kept every penny of the line of commitment. So on that metric, the death spiral doesn't work.

If we look at the evidence -- my fourth point would be to look at the evidence that was uncovered in jurisdictional discovery which has been -- which is now

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in the complaint. And we can see from the comments of White House officials, in particular Jim Parrot, that this wasn't about a death spiral. He said, and I quote, "We're not reducing their dividend, but including in it every dime these guys make going forward and ensuring they can't capitalize. We're making sure that each of these entities pay the taxpayers back every dollar of profit they make, not just a 10 percent dividend. The taxpayer will thus ultimately collect more money with the changes." More money.

That means that the companies were expected by the White House to make more than the 10 -- more than the $18.9 billion a year necessary to pay the dividend because the sweep is going to take all the value. And they also announced that they were going to be winding down the companies and not allowing them to retain profits or rebuild capital.

You know, as I referenced, they do try to essentially confuse the record here by quoting from the Jacobs case. And as I've said, that's totally inappropriate. That was a different case with a different complaint. The allegations in the complaint before the Court are obviously binding in a motion to dismiss.

They also say -- quoted Jacobs to say, well, it

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was a lifeline. We threw a lifeline to the companies. It was a concrete life preserver. And you can see this in what DOJ said this morning because the companies are not allowed to pay the money back. This is unique in terms of bailouts. What sort of bailout does the Government say, oh, we're going to give you this morning, but you can never pay it back, we don't want it back. Just keep paying us the 10 percent. Okay? That's a tell, Your Honor, that this was not a lifeline, this was a concrete life preserver.

We were told that they -- that they, you know, didn't give anything up. The Jacobs court says, you know, there's this idea that, well, there's no periodic commitment fee that's being imposed under the net-worth sweep. They're taking everything. I mean, so it's like being absolved of one obligation and the Government saying, well, don't worry about that obligation, we'll just take everything. That's no consideration whatsoever. In sum, the allegations in the complaint drive a stake through the heart of this narrative of a death spiral.

I'd like to now segue to some recent developments, Your Honor, and in particular the fact that the agencies appear to be working toward eventually ending the conservatorships.

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THE COURT: And may I take judicial knowledge of that?

MR. THOMPSON: Yes, Your Honor, I think the Court can, of those documents. They're official government documents. And as the Court noted in September, the Treasury put out a plan calling for the ending of the conservatorships. In October, the FHFA put out a plan calling for the ending of the conservatorships. And they don't -- these documents don't say exactly how that will happen, but they at least avert now to that possibility.

On September 27th, there was a letter agreement entered into which would allow -- between Treasury and the FHFA, which would allow the companies to retain $45 billion of capital. But it's really important to understand that that is not going to redound to the Plaintiffs' benefit at all. The private shareholders are not going to get one penny of that $45 billion because every dollar that's retained, the liquidation preference increases. They're paying it in kind, exactly what they omitted from their slide and what they've been allowed to do all along. And, now, that's what they're doing.

Now, these recent actions have relevance for the proceedings throughout today, but I just want to point to a couple of them up-front if I may. The first

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is that it shows that -- these documents show that there were broader governmental objectives at work. The strategic plan states that it provides a new direction for comprehensive reform of the housing finance system and the enterprises. And the net-worth sweep is a key element for the vision of reform held by the prior leadership, one that called for winding down the sweep.

But the vision then and the vision now, although they might differ, in both instances, the Government is acting to further governmental policies and that is an indicia certainly of a taking.

Second, it's important to this -- this letter agreement highlights the two separate injuries that have been visited by the net-worth sweep. The first one was an injury visited on the companies. They were stripped of all their capital. They're massive financial institutions with no capital whatsoever. That was an injury that was visited by the Government and the sweep on the companies.

The second injury was to strip the private shareholders of all economic value whatsoever from their securities, never receive a penny on their stock. And this most recent agreement to some minor extent addresses the first harm, you know, that companies now are going to have potentially up to $45 billion of capital. But it

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does nothing to address the second harm, the harm on the shareholders because, as I indicated, the liquidation preference is growing all along.

The other development that I'd like to reference is the 5th Circuit en banc decision in Collins. And in that case, there were two independent bases for why the plaintiffs argued that the sweep should be invalidated. First was under the Administrative Procedures Act, saying that they were under an obligation to preserve and conserve assets, not strip out the entirety of the net worth. And number two, that they were to operate the institutions in a sound manner and soundness means capital. And the 5th Circuit en banc agreed.

Now, they filed a cert petition, but there's going to be a day of reckoning very soon for the net-worth sweep, either on remand in the Southern District of Texas, or in the United States Supreme Court as to whether it's valid under the APA.

And the other thing -- and if that happens, by the way, the remedy that the Plaintiffs seek there is to have the liquidation preference reduced to zero, to have the company -- the Government be deemed to have been repaid en toto, and if that happens, then you might well see a restoration of the economic rights associated with

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the stock. Essentially, you know, right now, if you look at the equity capital structure, you've got on top the Government, then the junior preferred, and then the common.

Well, if the Government goes away, you know, then the junior preferred should be money good -- they're at the top now of the structure -- and then the common, there will be residual value for them as well. So that's important for the Court just to understand what's at issue under -- in Collins, under the APA.

Likewise, by a vote of 12 to 4, the 5th Circuit en banc said FHFA is unconstitutionally structure. And this is key. The Department of Justice does not disagree. They agree that the FHFA was unconstitutionally structured. And so at the time of the sweep, we have an illegal governmental agency getting -- undertaking this action.

I would add they passed out a chart of the cases that are pending and they drop a footnote saying we're omitting certain cases. They're omitting two key cases the Court should be aware of. One is in the 8th Circuit. It's called Bhatti. It has the same constitutional claims as in Collins, plus an appointments clause challenge and a nondelegation challenge. And there's a case called Rop, R-O-P, which is pending in the

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Western District of Michigan and has the same claims that are pending in the Bhatti case.

That's important because there's a very real possibility that the net-worth sweep is going to be relegated to the dust bin of history where it belongs and that the liquidation preference will be, you know, wiped out, invalidated by these courts. And for Your Honor's purposes, that could be very significant because today we're dealing with a permanent taking where all of the value has been stripped away, but it might become a temporary taking.

THE COURT: Let me ask you, this -- one of the predicates to a Fifth Amendment taking, as you know, is that the Government's action was legal. If the Government's action is illegal, is it a different type of claim that you need to bring?

MR. THOMPSON: Well, and my colleague, Mr. Patterson, will be addressing the illegal exaction claim. But I think these are essentially two sides of the same coin. If it was authorized, we'd win because it's a taking, they took all the value. If it was unauthorized, then we win because it's an illegal exaction.

THE COURT: I just wanted to clarify that point.

MR. THOMPSON: Yes. No, no, I appreciate that.

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Now, I'd like to just quickly make 21 points about their slide show presentation.

THE COURT: All right. Well, not 22, just 21. All right.

MR. THOMPSON: They said first that 2008 was a bad time to be in the mortgage market, but, of course, the complaint at paragraph 45 says the companies were never in danger of insolvency.

They point to the succession clause, but they don't quote it on their slide and they leave out some key language. There's going to be discussion, but please don't rely on that slide. The language of the statute is, you know, clear. It clearly goes our way, number one.

And, number two, another thing to know about the succession clause is they say, look, we get the rights of the shareholders. They don't actually believe that because if that were true, Treasury, they're a shareholder, they won't have any rights either. And all of those previous dividends that they've been taking, $280 billion of sweep dividends, those would belong to the FHFA. So their reading of the succession clause proves too much.

They cite to 4617(b)(2)(J) for the proposition that they can operate these companies in the best

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interest of the FHFA. That provision says -- and this is -- the 5th Circuit en banc agreed with our reading of this -- says as conservator. So it's an -- and it also says, as otherwise authorized by this section. So it's not a freestanding superpower to do whatever they want that's in their best interest, it's as conservator. That's a common law term that for centuries has had a meaning and Congress didn't just throw that out. It doesn't hide elephants in tailpipes, the Supreme Court has said. And so that was an incidental power and the Court should not agree with their reading, but should look to Collins.

They say that under the Anti-Injunction Act, they said that the only way to challenge these conservatorships in court is by the -- within 30 days. That's not true. Every court on their sheet has agreed that to the extent they have exceeded their conservatorship powers, then they can be hauled into court. They said that, you know, there was chaos going on in 2008. Again, paragraphs 45 to 48 say there may have been chaos at Lehman Brothers, there wasn't at Fannie and Freddie. They insured mortgages and they had ample capital.

I mentioned they have their chart with the terms with the 10 percent dividend. They omit the 12

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percent pick.

They say that there were no other investors, that no -- you know, none of the private Plaintiffs showed up. We welcome discovery on that. They don't get credit, though, the fact that we didn't get into all the alternatives the Government had available. What the complaint says is there was no reason to raise capital at all. So it's hard -- you know, they don't get credit there and we'll certainly get into discovery on that.

They said that $100 billion proved not to be enough. Well, the complaint at paragraph 85 says the reason for that was that there were widely pessimistic and inaccurate projections that the Government made forcing the companies to take huge paper losses.

They've said that when they upped their line of commitment by $100 billion they didn't get any additional consideration. They got 10 percent on the $100 billion. They got $10 billion a year on that extra line of commitment. So I would say that is compensation that they received.

They said that the net-worth sweep "mitigates the risk of a circular draw." That's code for death spiral, and we've already been through that.

They said that the periodic commitment fee was suspended. We talked about how they're taking

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everything.
They referenced the history of the FDIC. The FDIC at least had a firewall internally. Now, it was a waist-high firewall where, you know, the general counsel was the same guy, but at least they had some internal division. Here, there hasn't been any firewall whatsoever. They are all acting in the interest of the Government.
They talked about there being speculators. I would say investors who believe in the rule of law. And, you know, this was the same argument that was made at the founding. When people said there was debt floating around in the states and some people said, well, we should just wipe it out. And Alexander Hamilton said, don't you dare do that. The fact that it's speculators buying this debt is irrelevant. We have to honor our commitments. We're a country of laws and we made a sacred pledge of this debt and we will honor the debt even if there are people speculating in it.
They have pointed to the fact that the shares are trading at $10.75 today. That is because of the proceedings in this Court and the proceedings in Collins and Bhatti and Rop, and in front of Judge Lamberth. All of those -- that value is a testament to the faith in the rule of law. It's not that, oh, we didn't take all your

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property. It's the market saying the courts are going to straighten this out once and for all.
They talk about the value -- they had a slide with what the value of the preferred was and that seems to me really only -- excuse me, the value of the common. It seems to me that's only relevant if we're in damages and I'd love it if they'd stipulate to liability. I don't think that was their intention. The point is that that price of $20 a share had baked into it the expectation that the Government would, one way or the other, take all the value for itself. So, you know, we'll have experts that will talk about that, but don't buy for a moment, Your Honor, that this was only worth $20 a share -- or 20 cents a share.
Finally, Your Honor, you know, they say that we're trying to seek a windfall. And, again, we're just seeking to have the rule of law upheld.
Thank you, Your Honor.
THE COURT: Thank you.
MR. GREEN: Good morning, Your Honor, and may it please the Court. Kevin Green for the Washington Federal Plaintiffs. And this is nonduplicative content, which is why I'm standing here.
I want to just reset for a minute the discussion. The focus so far has been the Third

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Amendment and that's what all the other cases are about. But our case, the Washington Federal case, was the first case filed, lowest case number, and unlike all the other actions, it alleges that the conservatorships themselves, consistent with what my colleague has argued, were invalid from the beginning.
And what do I mean by that? Well, the Recovery Act or HERA imposes prerequisites for FHFA, as a regulator, to impose a conservatorship on the enterprises. And our complaint alleges in copious detail that those circumstances which all relate to the financial condition of the companies simply were not satisfied. The companies were solvent. Their assets exceeded their liabilities and so on.
The Government acted for a different reason. It wasn't a rescue or a bailout of Fannie and Freddie. It was done to rescue the Nation's economy, and in particular, it was done to rescue and stabilize the mortgage markets. And that was done on the backs of Fannie and Freddie shareholders who held at the time in 2008.
And that's what makes this case suitable for a taking, because when the Government does that and there's a plummeting of tens of billions of dollars of stockholder value from that takeover -- and the market

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saw what was going on. There was a hint that the shareholders ought to sell their stock and run for the bills because the Government is going to take over Fannie and Freddie as part of what was going on. It was done to stabilize the mortgage markets.
And that really calls to mind a seminal Fifth Amendment takings case, Armstrong, that the Fifth Amendment bars the Government from forcing some people alone to bear public burdens, which in all fairness and justice should be borne by the public as a whole. And this, again, was done very aggressively. And just to quote one example from our complaint, paragraph 64, it's the Secretary of the Treasury Henry Paulson telling President Bush shortly before the conservatorship that "We're going to move quickly and take them by surprise. The first sound they'll hear is their heads hitting the floor."
Now, this was a very aggressive conservatorship. It was not authorized by the Recovery Act. And what I mean by that just to be clear is akin to the Collins analysis that a regulator, in imposing a conservatorship, must act within its statutory authority. And here it did not do so.
Now, the second point I want to make about our case, it's key, is we represent a different class and

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that is stockholders who held in 2008. And these are retail investors, such as Washington Federal Bank, institutional investors and pension funds, retirement systems, like the City of Austin, and individuals who had held the stock for a long time. These people were not speculators.

And the stock went from here to here as a result of the conservatorship and these people lost tens of billions of dollars and most of them could not afford to keep the stock or hold it on their books, in the case of institutional investors, and had to offload it at a great loss. And, again, when the Government is acting not to rescue, but to stabilize the mortgage markets on the backs of these shareholders, it must provide compensation.

Now, this harm was direct to the shareholders, and I'll get into this more later in the day, in that their rights as stockholders, their right to vote, not just the value of the stock, was essentially completely destroyed. And if they don't have recourse in this Court, based on their claims here, they don't have recourse anywhere.

And I want to take a run at the Court's question that you posed to my colleague regarding the legality. My understanding is from the Federal Circuit's

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decision in Del-Rio that government conduct that is outside the takings clause or a takings claim is conduct that is outside the officials -- official duties and is ultra vires. And those aren't the allegations, but the conduct can nonetheless be unlawful, as in Collins, and it's still within the Fifth Amendment.

THE COURT: Usually the unlawful piece is that the plaintiff has not been paid, which is required by the -- by the Fifth Amendment.

MR. GREEN: Yes, I understand.

THE COURT: I mean, it's a general rule, it's a general rule. Here, we have a rather different fact pattern.

MR. GREEN: Correct. And I appreciate the Court's time and indulgence just to distinguish our case, which the Government has in its briefing and its argument today essentially leapfrogged over as if the allegations haven't been made.

At the end of the day, I will touch on -- and I think that's when it most logically fits -- standing and jurisdictional issues that are specific to our case, challenging only the conservatorship itself.

Thank you.

THE COURT: Thank you.

MR. DINTZER: If I may, Your Honor, if you'll

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indulge me for just one moment to respond.

THE COURT: Certainly.

MR. DINTZER: You've got a lot to go over so I'm going to be very brief, Your Honor.

My colleague at the bar, he talks about the present actions about what's going on or what has going on as indicia of a taking. Those were his words. If it happened -- if the taking happened in 2012, which is what they do allege in their complaint, then most of these recent actions that we're hearing about have no impact on whether there was a taking or not. Either there was or there wasn't and we will spend the rest of the day discussing those possibilities. But whatever happened in 2012 happened in 2012 and all these (inaudible) that they're talking about that have been paid and current things, those really don't bear upon the question.

He mentioned Collins, Your Honor. All I wanted to do was add that both sides have sought cert in Collins. So it is -- I don't know whether the Supreme Court will take it, of course, but it is not just one side, but both sides are seeking cert there.

And, finally, he mentioned an illegal exaction and we look -- Ms. Hosford will be talking about that a little -- down the road. But I would just point out that the benchmark, which she will discuss for a legal

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exaction, is was the money in your pocket that came out of your pocket, and this is -- we don't have those types of facts alleged anywhere in their complaint.

And with that, Your Honor, we're ready to go ahead and get started walking through the issues if that will please the Court.

THE COURT: That's fine.

MR. DINTZER: Thank you, Your Honor.

Ms. Hosford will be up first.

MS. HOSFORD: Your Honor, may I approach with a copy of my PowerPoint?

THE COURT: Please.

MS. HOSFORD: Thank you.

THE COURT: Thank you. And just to confirm for the record, Plaintiffs' counsel have received these?

MS. HOSFORD: Yes, we emailed all of our PowerPoints.

THE COURT: Thank you very much. And it appears they're being handed out again.

MS. HOSFORD: Yes.

THE COURT: Thank you. It's just good to have for the record.

MS. HOSFORD: Good morning, Your Honor, and may it please the Court. I'm here to talk about the Government's contention that the Court lacks jurisdiction

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over the complaints in this case because FHFA acting as conservator is not the United States for purposes of the Tucker Act.

Now, I don't think there's much dispute here that the Tucker Act places the burden on Plaintiffs to demonstrate that the Defendant is the United States by a preponderance of the evidence. Here, Plaintiffs can't meet their burden for two reasons. First, they can't meet their burden because FHFA, acting as conservator, is not the United States. And, second, Plaintiffs haven't plausibly pled that Treasury controlled FHFA.

The seminal case on the first issue of whether FHFA is acting as conservator is the O'Melveny vs. Myers [sic] case that was issued by the Supreme Court in 1994. In that case, the Court held that FDIC, acting as receiver for banks, is not the United States because it actually stands in the shoes of the private institution in receivership. In that case, it was banks. And the reason it stands in the shoes and is not the United States is because of the succession held in FIRREA, which stated that FDIC would succeed to all rights, titles, powers, and privileges of the insured depository institution and any stockholder member, account holder, depositor, officer, or director.

And pursuant to O'Melveny and that succession

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clause, this Court has held on numerous occasions and has dismissed complaints in takings and breach of contract cases because FDIC, acting as receiver and standing in the shoes of the bank that's in receivership or conservatorship is not the United States for purposes of the Tucker Act.

Now, the question may be, well, how does this relate to FHFA? Well, FHFA's succession clause is nearly identical to the succession clause that FDIC is subject to under FIRREA. And I've placed them side by side in this slide and you can see that FHFA succeeds to all rights, titles, powers, and privileges of the regulated entity -- that would be Fannie Mae and Freddie Mac -- and of any stockholder, officer or director of such regulatory -- regulated entity. So FHFA, like FDIC, stands in the shoes of the entity that's in receivership or conservatorship and is not the United States for purposes of Tucker Act jurisdiction.

And Mr. Dintzer already showed us this, but this is a depiction of the Third Amendment. It actually shows that in the Third Amendment, which is the agreement that's at issue in this case, Treasury, acting as the United States, entered into a contract with Fannie Mae and Freddie Mac acting through their conservator. And you can see in the signature page that Secretary Geithner

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signed on behalf of the Government for Treasury and Acting Director DeMarco signed on behalf of Fannie Mae and Freddie Mac, acting as conservator. They were -- Mr. DeMarco was standing in the shoes of the institutions in signing this agreement.

Now, numerous courts, and I've listed them in this slide, have held that the cause of FHFA succeeds to the rights of the entity in conservatorship. It steps into the shoes of the enterprises and it is not the U.S. And that's as recently as 2017 in the Perry Capital vs. Mnuchin case. But there's other cases as well out of the District of Minnesota in Bhatti, the Herron case out of -- also out of the D.C. Circuit, the Meridian case out of the 4th Circuit, and the Adams case out of the 9th Circuit.

Now, Plaintiffs rely on a Federal Circuit case, Slattery vs. United States to argue the opposite, that the FHFA, acting as conservator, is the United States. But the Slattery case is inapplicable here for several reasons. First, in Slattery, the Court acknowledged the O'Melveny rule that normally a conservator or receiver standing in the shoes of the entity in conservatorship or receivership is not the United States. The Court, however, examined the context of the claim and found that in that case the FDIC receiver effectively stepped out of

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the bank's private shoes when it took action that did not fall within the standard receivership situation in which the receiver is enforcing rights or defending claims and paying the bills of seized bank.

So in that case, the reason for that is the suit was a breach of contract that had been entered into by FDIC acting in its corporate capacity before the bank was placed into receivership. And the Court held that the Plaintiffs had a right to seek damages with respect to the breach of that pre-receivership breach of contract by FDIC corporate. It was a very different situation than we have here where Plaintiffs are suing for a taking and other claims with respect to actions taken by FHFA when the Fannie Mae and Freddie Mac were actually in conservatorship and FHFA was acting as conservator.

And the courts that have examined FHFA's actions with respect to the Third Amendment have, with one exception, consistently found that the FHFA acted within its conservatorship authority. Plaintiffs have claimed in six Courts of Appeals that FHFA's execution of the Third Amendment, like the receivership situation in Slattery, didn't fall within FHFA's conservatorship powers. But the D.C. Circuit, the 3rd Circuit, the 6th Circuit, the 7th Circuit, and the 8th Circuit have all said that the Third Amendment was authorized by HERA,

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FHFA's enabling authority.

In Perry Capital, the Court found that FHFA in renegotiating agreements, managing heavy debt, and ensuring access to capitals are acting at the core of its conservatorship authority. In Robinson, the Court found that the Third Amendment falls squarely within FHFA's statutory conservatorship authority and also that it returned the enterprises to profitability and guarantees the solvency of the enterprises.

I won't go through the other three cases, but I'd note that Mr. Thompson dwelt upon the Jacobs case, but there are several other cases that have held consistently with that case.

The one outlier case is the one that's been mentioned a couple of times already and that is Collins vs. Mnuchin, which the 5th Circuit en banc -- I forgot to note that it was en banc on my slide -- decided in September of this year. In that case, it's important to note that the 5th Circuit acknowledged its prior en banc decision in United States vs. Beszborn. There, the Court held that the Resolution Trust Corporation, acting as receiver, was not the United States when it sued the bank's former directors for breach of duties to the bank.

However, the Collins case hold differently for a couple of reasons. The 5th Circuit in Collins

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misplaces its reliance on Slattery. The Collins Court held that FHGA acted beyond its conservatorship authority because it effectively liquidated the GSEs, a role reserved to the receiver. However, FHFA did not exercise its liquidation authority here because the Fannie Mae and Freddie Mac are still operating. They employ thousands of people and they still package and resell a huge amount of the mortgages that are in circulation in this country. They are fully operating businesses.

The Court also wrongly concluded that FHFA was exercising its powers as an executive agency. But that's not right either. To the extent that FHFA's acting within its conservatorship authority and it is not acting as the United States, it's acting in the private shoes of the entities. If Collins were right about that, then all courts that have held that a conservator or a receiver steps into the shoes of the entity in receivership or conservatorship would be wrong.

So this has already been noted, but both sides have filed a petition for cert in Collins and -- and I think Mr. Thompson mentioned this, if the Collins Court is correct and FHFA did not have statutory authority to enter into the Third Amendment, then their remedy is in District Court. They certainly don't have a takings claim.

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Plaintiffs next argue that the Court can exercise jurisdiction even if FHFA is not acting as the United States because Treasury, as its counterparty, is undisputably the United States. But that's wrong as a matter of law. Treasury alone could not have implemented the Third Amendment without FHFA's, as a private party's, voluntary decision to enter into it. The Federal Circuit's Norman case confirms that a voluntary agreement cannot be the basis of a takings claim. So Treasury's role as a counterparty to the GSEs does not create jurisdiction here.

In order to exercise jurisdiction over a takings claim against a private party that contracts with a U.S. agency, the Plaintiff must show that the agency coerced the private party. That's the holding that came out of the Federal Circuit's A&D decision in 2014. That's the case that was recently tried on remand in this Court where dealerships of Chrysler Corporation sued Treasury for a taking. In that case --

THE COURT: Judge Firestone's case.

MS. HOSFORD: Exactly. In that case, the Federal Circuit, before the remand, held that jurisdiction requires that a federal agency control a private party's action and the influence must be coercive rather than persuasive. So persuasive doesn't get you

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there, it has to be coercive.

Apparently recognizing that, Plaintiffs ultimately contend that even if FHFA, acting conservator is not the United States, jurisdiction lies because FHFA was acting at the behest of Treasury or with control by Treasury. We have responses to several of the subarguments they make on that point.

First, Plaintiffs' allegations confirm that Treasury and FHFA acted independently when they entered into the Third Amendment. Second, contrary to Plaintiffs' contention otherwise, FHFA is not Treasury's agent, nor is FHFA as conservator an agent for FHFA's regulator. And, finally, Treasury's contractual rights in the PSPAs don't demonstrate that it somehow controls the enterprises.

First, with respect to our contention that Plaintiffs' allegations confirm the Treasury and FHFA acted independently, this Court, in 2014, after -- upon considering a motion for jurisdictional discovery filed by the Fairholme Plaintiffs in this case provided Plaintiffs with several years of discovery on the very issue that we're talking about now, whether or not Plaintiffs could obtain relevant adequate proof that Treasury controlled FHFA.

THE COURT: Well, I might just have to stop you

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for one moment. It's not as though I wanted discovery to go on for years and years and years. I contemplated it would be several months and the Government -- I'm not trying to pick at you at all. I know there were lots of areas -- lots of different agencies you're working with -- not you personally, but others, looking for -- searching for document and whatnot, but there were lots of motions for enlargement of time to respond to the Plaintiffs' discovery. And I wanted the entire universe of documents to be produced to both sides so that I would have a complete tapestry.

So it's not as though I encouraged or wanted several years of discovery. It's what the Government said it required in order to respond to Plaintiffs. And it seemed unfair to deny the Government's motion and thereby penalize the Plaintiffs in not getting the documents.

MS. HOSFORD: Your Honor, we completely understand that and we appreciate the Court's indulgence in allowing us the time --

THE COURT: No, I just had to have that on the record --

MS. HOSFORD: Right.

THE COURT: -- because to say that, you know --

MS. HOSFORD: We ended up producing a lot of

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documents.

THE COURT: I just -- I mean, if you could have had it done in two months, I would have been thrilled. I'm sure you would have, too.

MS. HOSFORD: I might not be alive if we had done that.

So Plaintiffs -- the Court held that Plaintiffs needed relevant, adequate proof that Treasury controlled FHFA, and that's an extremely high bar in this case because HERA, FHFA's statutory authority, at Section 4617, states that FHFA shall not be subject to the direction or supervision of any other federal agency or state. So the statute doesn't even allow Treasury to control FHFA. So it's not -- it shouldn't be surprising here that notwithstanding the years of discovery that happened, Plaintiffs can't show that Treasury coerced FHFA into executing the Third Amendment. And we can just look briefly at some of the complaints that have been filed in this case to confirm that Treasury did not control FHFA.

In the re-complaint, Plaintiffs allege that the Third Amendment was the product of months of FHFA Treasury -- and Treasury negotiations. They allege that Treasury and FHFA agreed. They met, they discussed it and negotiated. That's not coercion. Similarly, in

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Rafter, the Rafter Plaintiffs describe FHFA's conduct during negotiations.

Plaintiffs offer only conclusory allegations that FHFA acted under Treasury's directory -- direction and supervision or under Treasury's control. And this Court is not obligated to accept as true Plaintiffs' conclusions of law for purposes of a motion to dismiss. Indeed, the Fairholme complaint basically says -- and I'm quoting from paragraph 139. "FHFA agreed to the net-worth sweep only at the insistence and under the direction of supervision of Treasury." That conclusory statement isn't sufficient to make a plausible claim in this case, and I would note that the Arrowood Plaintiffs also made that claim.

In contrast, both the Owl Creek and Cacciapalle Plaintiffs, again conclusory, but they say FHFA and Treasury agreed between themselves to a Third Amendment or FHFA and Treasury agreed to a so-called Third Amendment to the PSPAs. That does nothing except confirm what the Government is trying to say here, which is that FHFA and Treasury entered into an agreement. There was no coercion and there's no evidence that Treasury forced Acting Director DeMarco to enter into an agreement here.

What you don't see here is any allegation that Secretary Geithner ordered Acting Director DeMarco to

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sign a Third Amendment or that Mr. DeMarco felt an obligation to sign a Third Amendment or that anyone coerced him. The Third Amendment is a business agreement signed by Secretary Geithner on behalf of Treasury and Acting Director DeMarco in the private shoes of the enterprises.

Mr. Thompson said much about the original PSPA and the first two amendments, but Plaintiffs don't challenge the original PSPA, they don't challenge the First Amendment, they don't challenge the Second Amendment. Those were business agreements whereby Treasury stepped in, committed to, and spent almost $200 billion in making infusions into FHFA. And in the Second and Third Amendment, the amount that Treasury was allowed to invest increased so that the protection provided by Treasury to Fannie Mae and Freddie Mac to stay solvent would be sufficient.

At best, Plaintiffs take issue with FHFA's and Treasury's business decisions here, their business judgment in executing the Third Amendment. But they offer no allegation that Acting Director DeMarco was acting at the behest of Treasury. And, in fact, Plaintiffs deposed Mr. DeMarco and provided no evidence that his decision to sign the Third Amendment was anything but voluntary.

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Plaintiffs -- I would just briefly note that Plaintiffs or Mr. Thompson has said much about the fact that Fannie Mae and Freddie Mac, at the time the Third Amendment was being proposed, said that they were on the cusp of making quite a bit of money. Well, that may be what certain people at Fannie Mae and Freddie Mac were saying, but if you go to page 11 of our initial brief, you can see that what Fannie Mae and Freddie Mac were reporting to the Securities and Exchange Commission at the time was very different. They were saying that they -- and this was in the June 30th, 2012 10Qs by Fannie Mae and Freddie Mac that were issued in August, very close to when the Third Amendment was adopted.

They stated that they did not expect to generate net income or comprehensive income in excess of their annual dividend obligation to Treasury over the long term. So the dividend obligation to Treasury will increasingly drive its future draws under the senior stock review. Plaintiffs will likely try to say that my bringing that up creates some sort of dispute of fact and that we need to have a trial to decide which story is true, but that's not right. Regardless of whether the Court accepts as true that certain directors or officers at Fannie Mae and Freddie Mac were saying we're going to make a lot of money in the future. What they were

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reporting to the SEC at the time is equally important for examining whether this was a business decision entered into by FHFA and Treasury at the time based on the information available to them.

At that time, it was not certain that Fannie Mae and Freddie Mac would be making tens or hundreds of billion dollars into the future. It wasn't clear. And because the Treasury was no longer allowed to increase its commitment, the parties decided to go to a variable dividend rather than 10 percent dividend. Under that variable dividend, Fannie Mae and Freddie Mac paid no dividends if they were not profitable, whereas before they had to pay 10 percent regardless of how much money they have.

On this issue of whether FHFA is controlled by Treasury, it's not just us that's arguing this. Several courts have already held that FHFA was not controlled by Treasury. In the DDC decision in Perry Capital, Judge Lamberth concluded that nothing in the pleadings or the administrative record provided by Treasury hints at coercion and also that Plaintiff's allegations that Treasury invented the net-worth sweep concept with no input from FHFA do not come close to a reasonable inference that FHFA considered itself bound to do whatever Treasury ordered.

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In Roberts, the Court found that Plaintiffs alleged insufficient facts to show the Third Amendment was executed under Treasury's direction and supervision. And in Saxton in the 8th Circuit, the Court said even if Treasury was in the driver's seat and had to convince FHFA to come along for the ride, it was insufficient to demonstrate control. In each of these cases, the Court dismissed the complaints based on these findings, notwithstanding the facts in the complaint.

And I'll also make one other point about that. The Court alluded to the years of discovery which the Government asked for many extensions for, but as a result of all that discovery, Plaintiffs in these other cases, Roberts, Saxton, et cetera, were given access to the documents and depositions that were produced in our discovery and they incorporated the allegations from our discovery into their complaints. So the discovery that we generated has already been incorporated into complaints that have resulted in dismissal, notwithstanding the allegations that are -- I mean, Mr. Thompson said this case is very different, but it really isn't. We're talking about the same transaction and the same documents and the same deposition. So there's nothing new here.

Next, with respect to Plaintiffs' claim that

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FHFA is somehow Treasury's agent, well, agency requires control and I've already addressed that pretty comprehensively, but we don't see any directive or order here from Treasury telling FHFA to sign the agreement.

Also, and I mentioned this already, HERA says that FHFA shall not be subject to the supervision or direction of Treasury. And Treasury's authority under here also said that they had to -- that they could only enter into agreements if FHFA agreed. There's nothing about coercion or Treasury could order FHFA to do this or order FHFA to do that. At best, Plaintiffs allege that the two parties had common goals, but common goals exist in any contractual relationship. Parties don't enter into contracts unless they have common goals.

Here, they had the common goal of making sure that the enterprises didn't exhaust their funding commitment. So if common goals were enough to show control, then any private party that was entered into a contract with a U.S. -- with a government agency could be said to have been controlled by it.

Next, Plaintiffs argue that FHFA conservator is not an agent for the FHFA regulator. But HERA outlines the differences between FHFA conservator and FHFA regulator. For instance, FHFA, acting as regulator, has rule-making authority, whereas FHFA, acting as

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conservator -- and I think Mr. Dintzer said there's 44 pages of legislation or enactment -- has very defined powers as to what they can and cannot do as conservator as distinguished from their role as regulator.

I think it's the Plaintiff class that alleges that somehow the distinction between conservator and regulator isn't clear enough here because there's no formal wall between the parties. But the case that they rely on for that argument is the all Winstar cases decision that came out in 1999. In that case, FDIC, as conservator or receiver, was suing FDIC as regulator. So in that case, the Court said, look, if you're going to have FDIC on two sides of the beam, you have to have a formal wall between them so that there's no overlap in their functions.

Finally, Treasury's contractual rights in the PSPAs do not demonstrate that it controls the GSEs. In financial crises, the Government often enters into contracts with private parties to provide funding and other sorts of things. In the Winstar cases, we saw 120 different examples of that. I understand that the Winstar cases raised breach of contract claims, but the fact of the matter is nobody said that the Government was controlling the private parties. They just said that the Government breached the contract with the private

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parties. So you can't just assume that because Treasury contracts with a private party that it's somehow controlling it.

The same situation just recently arose in the autos trial involving Chrysler and Treasury. Ultimately, Judge Firestone held that Treasury did not coerce Chrysler into rejecting dealership agreements in bankruptcy. And, in fact, Plaintiffs don't identify any cases in which a private actor is deemed to be controlled by a public actor simply by virtue of contracting for financial support.

So in conclusion, the Court lacks Tucker Act jurisdiction in this case, first, because FHFA, acting as conservator, is not the United States when it stands in the private shoes of the enterprises, and second, Plaintiffs have not plausibly pled that Treasury coerced FHFA into executing a Third Amendment.

Thank you.

MR. BENNETT: Your Honor, may I approach with some slides for you?

THE COURT: Certainly. Thank you kindly.

And copies of the Plaintiffs' handout is being distributed to the Government.

MR. BENNETT: And they were sent by email this morning.

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THE COURT: Thank you for confirming that for the record.

MR. BENNETT: So for the record, Bruce Bennett of Jones Day on behalf of the Owl Creek Plaintiffs. And, Your Honor, one disadvantage of going second is that my slides will be out of order because I want to respond more or less in the order that the Government -- of the Government's presentation. So I will note the page numbers as I move through.

So starting with the issue of whether the Federal Housing Finance Agency, which I'll call "the Agency" is also the United States, I want to start with an observation that is sometimes made by the Government and sometimes ignored by the Government, which is this entire area of law is intensely statutory. You heard that from the first speaker who described the statutes as very detailed and in particular indicating that the conservatorship described by the Recovery Act is a place where the common law has no place.

In the slides that were just handed to you, I think interesting is Slide 23 by my colleague from the Government, where it says, "HERA out" -- HERA, which is the Recovery Act -- "outlines the differences between FHFA conservator and FHFA regulator." And so I think the first place to start for dealing with the issue of what

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is the Federal Housing Finance Agency is the statute

And if you take a look at page 4 of our materials, we cite the two sections that explicitly deal with the issue. The first is 4511(a), which just says that the agency is part of the United States, and then maybe more significantly 4617(a)(7), which says when acting as conservator or receiver, the agency is not subject to the direction or supervision of "any other agency of the United States." Any other agency of the United States, which I think strongly suggests that when acting as conservator or receiver, the agency is an agency of the United States not subject to any other agency of the United States.

Now, some things are so important, I guess, points w[illegible]remembering, to borrow the Government's phrase, a[illegible]I'm going to say them twice because they kind of belon[illegible]in both places. Apart from these two provisi[illegible]ns, the issue of the agency's status is nowhere discus[illegible]ed in the Recovery Act. So no statute says that the a[illegible]ncy loses its governmental character when it beco[illegible]nes a conservator. It's nowhere there. And if it we[illegible] going to be the rule, you'd expect to find it in the su[illegible]cessorship clause, which has been cited as really d[illegible]fining exactly what it is that the agency is doing when

GOV'T WAS ARGUING FHFA WAS A PRIVATE INSTITUTION...OOPS

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it takes over and starts to operate one of the enterprises.

So I think if the -- if Congress wanted to signify that the agency was taking on a different character by becoming a receiver, it certainly could have found a way to say so. Again, the most logical place would have been in the successor provision itself and it doesn't, not anywhere. So I think, we start with statute, an intensely statutory area which says exactly the opposite of the Government's position and they don't manage to cite either of the statutes which actually cover this point in any of their slides.

So let's turn a little bit to the kind of background a little on this area and then get back to O'Melveny in particular. First of all, this Court's general rule in Slattery II, when federal -- when a federal instrumentality acts with a statutory authority to carry out defendant's purposes, the United States submits itself to liability under the Tucker Act, unless some specific provision to the contrary exists. I just said right now there is no contrary provision. There's -- the only statutory provision states specifically that the agency is acting as a part of the United States.

And if there were any doubt about the way the statute works, again, focusing on the agency itself, not

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this whole stepping in the shoes part, Lebron would eliminate any doubt. And although Lebron deals, of course, with a corporation, which is a further step removed from something that is an agency -- that the statute itself declares is an agency of the United States, in Lebron, there's three tests that would be applicable. So this is the constitutional test as opposed to deferring to Congress' statement.

One is created by a special law. Yes, the Recovery Act is a special law. The second is furthers government goals. Yes, we heard specifically that the -- that the agency is not only authorized to further government goals when it's acting as a regulator; it's also allowed to further government goals when it's acting as a conservator, which I think is also important for the reasons we'll get to. And, finally, complete control by the Government. And in this instance, it usually comes up in the Lebron context of majority control of a board or something and, here, there's a single director and the Government has the power to appoint it. So under Lebron, even the constitutional overlay, even ignoring the statute, the agency would be considered part of the United States.

So the only response to this is basically a snippet out of a case that was dealing with something

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else, which is O'Melveny. And I also -- and so O'Melveny, first of all, the context is extremely important. In O'Melveny, the conservator was trying to enforce the rights that the business would have, that the enterprise -- not the enterprise -- yes, in that case, it's equivalent to the enterprise -- the bank would have had against the bank's counsel in the prefiling environment. So back then, this is just -- you have to focus on what rights that the company had. Calling the FDIC or calling the conserved bank the Government would have had the effect of changing the rights that the bank would have had against its lawyers back in the day when there was no conservatorship.

And the Supreme Court said, we're not going to do that. And along the way says the FDIC doesn't deal with HERA or HERA's explicit language just described, that the FDIC is not the United States Government. Well, for that purpose, it wasn't, okay? For that purpose, it only stepped into the shoes. For that purpose, it was exercising the rights of the preconserved entity. And, in fact, all of the cases that the Government cites that they say follow O'Melveny comes in that category of case.

This case is, of course, completely different. Here, we're dealing with the acts of the agency after the agency took control of the enterprises. And we're not

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dealing with the agency attempting to enforce, for example, one of the enterprises' rights to foreclose on a homeowner under a mortgage it bought before. If that were the case, we would say that the agency, as conservator, acquires no additional rights because it's the Government, because it's just, for that purpose, stepping into the shoes of the relevant entity.

And I think this is the precise way to separate the facts of O'Melveny, the statement in O'Melveny, and the cases that follow O'Melveny from the two other cases -- actually the three other cases that I think explain O'Melveny properly. And those cases the Auction Co. case of the D.C. Circuit, Slattery I of the Federal Circuit, and Sisti vs. -- the agency -- FHFA which comes from the Rhode Island District Court.

I think in all three of those cases, they recognize that the O'Melveny decision makes sense in the context of resisting the creation of additional rights for the conserved entity in respect of its preconservatorship affairs, but also recognizes that there's really nothing in the law, certainly nothing in the statute that transmutes the agency from governmental agency to something else when it steps into -- when it becomes a conservator. Nothing in the statute at all and nothing in O'Melveny that suggests that that's the case

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when the agency acts in a conservatorship and exercises its powers.

I think it's additionally important that the same statute that we're talking about gives to the agency powers that are significantly greater than the powers that the enterprises had. And there isn't actually a dispute about that. The Government has said that in numerous places in its papers and a couple of different places.

So first of all, the government brief at page 4, "FHFA exercising its statutory powers, operates the enterprises and conservatorship and the enterprises remain private companies." I think that's exactly the right way to think about it. The FHFA as the conservator is exercising statutory powers, but the enterprises remain private. That's right.

Government brief -- I'm talking about the reply brief -- page 5, footnote 2, last sentence, "In any event, Congress vested FHFA" -- that's the agency -- "as conservator with substantially broader powers than a common law conservator."

Also, reply at pages 59 to 62, this is the section of the brief where the Government maintains that the agency's conservator power is different from traditional conservatorship as established under

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background, trust and property law. Again, they're saying this is a statute that gives us greater rights. It's the same statute that says it's the Government.

And, finally, the Government numerous times -- and I mentioned this before -- also points the agency's authority to act in the Government's interest. It has nothing to do when it's doing that, when it steps into the shoes of a conservator.

So in other words, it's true, common law conservators may be said to step into the shoes of a conserved entity for certain purposes, and they clearly do. But the FHFA has and exercises broader powers. It doesn't, therefore, shed its governmental character and, again, because it's a really important point to keep in mind, we're dealing with an intensely statutory area. Even the Government keeps saying let's pay attention to the statute and let's not import common law conservatorship principles and other kinds of things that might happen in this not intensive statutory environment.

In this intensive statutory environment, there's a statute that tells us that the FHFA is also the United States and it suggests very strongly in its own terms that nothing about its appointment as a conservator changes that at all. That is why there is crystal clear

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jurisdiction under the Tucker Act.

So turning back -- and I skipped a whole bunch of slides, but after Slide 4, there are a number of slides that cover some of the points that I've said, but I forgot to mention them and I apologize.

So going back to the Treasury, which -- and that's Slide 3, so we're going to go backwards. So the Treasury is obviously part of the United States. And so the argument here is that there's something about U.S. Auto and something about the Norman case that says that the Treasury -- that the Treasury here got help to take property or entered an agreement to take property and so you have to take a look at the Treasury's relationship with the second party.

Well, I think, Your Honor, that -- and we don't make this point in our papers because this really comes up as a matter in the reply and the Government, of course, filed the last papers here. A really crucial fact here, in this case, the Treasury got the property and the Treasury is getting all the money. That the Treasury got help to get it doesn't mean the Treasury isn't appropriate -- isn't the appropriate defendant because it got the money.

So how do we understand A&D Auto? In A&D Auto, the Treasury didn't get the money, so it was incredibly

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important that the Treasury be found to have coerced and controlled General Motors when General Motors rejected agreements with dealers so that General Motors would save money. Treasury didn't get the money. To make the Treasury liable, it had to have controlled the person who got the money.

Your Honor, the Norman case is the same. The Treasury didn't get the money, so it was important to connect the Treasury to some kind of device to the party that did get the money or the property because the Government's right. Back when the sweep amendment happened, it got the property interest and that property interest has since been turned into an enormous amount of money and it will be turned into a still greater amount of money in the future. And all that money, by the way, has been appropriated into the budget of the United States of America.

So the cases that are cited do not stand for the proposition that when the Treasury gets help getting the money, you can't sue the Treasury. Again, Treasury got the money. It doesn't matter that it got help.

Also, when the Treasury gets the money, it doesn't matter if there's a contract involved because, by the way, there was no contract involved with any of the shareholders and the property they got was the property

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of the shareholders. And, again, this will become more important, we'll get to it later in the day when we deal with the merits, but what we have here is you have two sets of shareholders. You have the Treasury which holds the senior preferred and then you have the set of shareholders which included the junior preferred and the common.

The senior preferred and the junior preferred and the common start out with different slices of the capital structure. The end result here is that the senior preferred takes all of the capital structure, eliminating the parts of the capital structure that used to be enjoyed by the junior preferred and the common. So what you have here is the Treasury as a senior shareholder taking everybody else's property and, again, there is no case that says that the fact that the Treasury got help where they got the money means that the Treasury can't be a defendant. And, again, Treasury is obviously part of the United States.

When you understand the cases properly, I think there is no way to dispute that you can get to the United States through Treasury under the Tucker Act or through FHFA under the Tucker Act. But, now, let's spend some time -- I don't think it's terribly important -- to go through why it's also significant that both acted

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together. And, frankly, for this purpose, I'm going to use the slides that were provided by the Government because they're helpful for organizing the numerous points that they wanted to make on this -- in this area.

And I think the slides that talk about this start on page 18 and 19. And the first point is about whether or not there was independent -- whether the two agencies acted independently or whether one agency controlled the other.

So first of all, let's be clear that between the two of them, they controlled the enterprises, period, end of story, which is a fact that I think people just glide over. The Treasury had 79.9 percent of the common stock that was in the form of an option. They could have exercised it at a moment's notice. Everybody knew that. That is a source of significant influence that is pled.

In addition, Treasury owned all of the senior preferred stock, and the senior secured stock was not a naked security in terms of covenants. It had additional covenants attached to it by reason of the stock purchase agreement. That included additional control. It is pled that all of these elements, coupled with the FHFA's position as conservator was complete domination and control of the enterprises. I don't think there's any refutation of those facts, but they are facts that are

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alleged. Secondly -- and out of that control came the Third Amendment.

Secondly, I appreciate all of the references in other complaints to meet, agree, discuss, negotiated. I also appreciate that the Owl Creek talks about common goals. Two points as to that, both of which are trial issues, no one called the negotiations arm's length, and that's ultimately what the problem is here. There may have been negotiations, but if the negotiations were basically for show or about issues that didn't matter or about how to implement a policy that was directed from above, those are not arm's length negotiations.

Same with -- I think in the Owl Creek, they point that the -- that the language used agreed between themselves. That doesn't mean there were arm's length negotiations. What it means is it that -- at most, is that two different officers or two different agencies of the Government who may well have been directed to achieve a particular result discussed how to go about doing it. So what? It's still two agencies of the Government together took property that we now know was worth billions of dollars, that we knew then, frankly, from the documents that have been produced were worth billions of dollars.

The significance of other cases -- this is page

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21 of their presentation. This is all about the interpretation of allegations in other cases that I will point out -- that Owl Creek and others will point out that other Plaintiffs in this case -- none of the Owl Creek Plaintiffs, none of the clients Jones Day represents have been parties to any of these cases. They didn't write any of the pleadings and those complaints having nothing to do with the complaint in this case. We stand on our allegations. Our allegations cover control. Our allegations, when we talk about common purpose, we're talking about no arm's length negotiations.

Skipping to page 24, just to talk about Caroline Hunt, the Winstar cases that the Government talks about, that the Government provided financial support, but they didn't own 79.9 percent of the common shares and 100 percent of the senior preferred shares in Caroline Hunt or Colonial Chevrolet or anything like that. These cases are not -- if you're measuring control, this case is in a different league.

And the result in the General Motors Auto case relating to the dealership, that was a result that happened after a trial, after full fact discovery, and it was a full trial before this Court before there was a decision on the issue of coercion. But, once again, there coercion was a necessary element because the

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Treasury didn't get the money, General Motors got the money. So you needed to have the connection of coercion for there to be relief against the Treasury. This is a very different case.

Finally, there was a long discussion about the allegations concerning the financial condition of the GSEs at all times surrounding the Third Amendment. There are ample allegations in the Owl Creek complaints and in all the other complaints here that before the Third Amendment was executed, it was already obvious to everyone who was possessed of the relevant information, a lot of which was nonpublic, but was nevertheless incredibly material, that the GSEs were in terrific financial condition at that point in time and were poised to be in even better financial condition when they were allowed to start recognizing again the value of deferred tax benefits. That's all factual matter.

The Government appears to want to contest that and say that the evidence produced from inside the organizations was not accurate and that the statements made in the securities filings were more accurate. That's obviously a matter for trial. That's not a matter for a motion to dismiss.

Does Your Honor have any questions?

THE COURT: No, thank you.

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MR. BENNETT: Thank you.

MS. HOSFORD: Thank you, Your Honor. There's a lot to cover here. I'll try to be as quick as I can.

Plaintiffs' slide -- I believe it's -- and I would just point out that we did not receive these slides until we got to Court today. They were not emailed to us in advance. But Plaintiffs point to Slide 5 and they try to rely on 12 USC 4511 to say that somehow FHFA, acting as conservator or receiver, is the United States because it's called "the agency." What the provision says is when acting as conservator or receiver -- that's key and they've even emphasized it -- the agency shall not be subject to the direction or supervision of any other agency of the United States.

Well, regardless of whether the agency is standing in the shoes of the entities and not acting as the United States, it's still called FHFA, Federal Housing Finance Agency. So that is the way the statute refers to them, regardless of whether they're referring to them acting as a regulator or a conservator or a receiver. And I would note that in the parallel FIRREA provisions, the FDIC is often referred to as "the corporation," but that's because FDIC is called the Federal Deposit Insurance Corporation. The fact that this says "agency" should not be read to mean that

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somehow, through HERA, FHFA is to be considered the United States. If that were the case, then all of the cases that have already found that FDIC, acting as conservator or receiver, and FHFA, acting as conservator or receiver, are not the United States have grossly misinterpreted what I think is plain language here that Courts have relied on to say that FHFA or FDIC are not acting as the United States.

Plaintiffs mention Lebron, but I think we're -- I'm going to discuss that in more detail in my next presentation. Plaintiffs claim that O'Melveny doesn't apply because the facts were different in that case. But it is a Supreme Court decision and it did hold that FDIC, acting in the shoes of the receiver, is not the United States. And this Court has, on numerous occasions, with respect to the FDIC, notwithstanding the different facts in O'Melveny held that it doesn't have jurisdiction over breach of contract or takings claims against the United States in reliance on O'Melveny. I mean, Slide 6 lists them -- of my presentation.

Plaintiffs also say that the Auction Company case helps them in their argument that FHFA, acting as conservator, is the United States. But in that case, the Court held that FDIC did not act as a receiver for any particular depository institution in that case. So it

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was acting more as a regulator because it wasn't -- there wasn't an actual institution in receivership. That was why the Court held that there.

And the fact that FHFA exercises broader powers under HERA than would a common law conservator is irrelevant. Numerous cases have found that conservators are often -- conservator powers are often established by statute. My colleagues are going to discuss that in more detail later. But Plaintiffs also misstated that somehow O'Melveny creates common law. O'Melveny is case law and O'Melveny made it clear that when FDIC, under its statutory authority, which is greater than a common law conservator would be, is not a -- is not the United States for purposes of Tucker Act jurisdiction.

Plaintiffs tried to distinguish this case from A&D and said that somehow in A&D or in this case, Treasury got the money and that wasn't the case in A&D. Well, first of all, here, Treasury is getting money from FHFA. Treasury is not getting any money from Plaintiffs. Plaintiffs have not paid a cent to Treasury. But, also, in A&D, the allegations were the same. In A&D, Treasury had a contract with Chrysler and Chrysler rejected plaintiffs' dealership agreements. Plaintiffs alleged that Treasury took their dealership agreements. So to

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the extent that plaintiffs are arguing that Treasury took their money in A&D, the plaintiffs were arguing that Treasury took their dealership agreements. So they're really the same issue.

Plaintiffs' counsel argued that somehow between Treasury and FHFA, they controlled the enterprises. Well, here, with respect to FHFA, the enterprises are in conservatorship. So by statute, they are controlled by FHFA. However, they are not controlled by Treasury. Treasury, as an investor in Fannie Mae and Freddie Mac has certain contractual rights as a senior stockholder. That doesn't mean that they control Fannie Mae and Freddie Mac. They just simply have rights by contract and that doesn't -- that doesn't mean that they're somehow controlled FHFA.

Finally, Plaintiffs contend that somehow this case involves what was not an arm's length transaction. But arm's length is when both parties are acting in good faith and have a choice. What Plaintiffs seem to be implying -- and it's not implying because Owl Creek, which is the -- the gentleman from Jones Day represents Owl Creek -- they argue in their briefs that FHFA and Treasury were colluding. So that's what they're saying. The arm's length transaction -- the lack of an arm's length transaction resulted in collusion. But that's a

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tort. That's not the basis for a taking claim. So Plaintiffs -- the Court doesn't even have jurisdiction over a collusion claim, which is what they are basically saying. And my colleague, Mr. Dintzer, will discuss that in more detail later.

And, finally, I won't repeat it, but the fact that what Plaintiffs were telling SEC at the time of the Third Amendment is somewhat different than what the individuals in the corporation were saying does not create a dispute of fact. It just shows that there was a lot of information out there and that Treasury and FHFA made a business decision.

Thank you.

MR. DINTZER: Your Honor, may this be a good time for a break?

THE COURT: Certainly. How much time would you like?

MR. DINTZER: Maybe ten minutes.

THE COURT: Ten minutes is fine.

MR. DINTZER: Thank you so much.

THE COURT: We're off the record.

(Court in recess.)

(11:14 a.m.)

MS. HOSFORD: May I approach with our next set of --

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THE COURT: Please, thank you. Thank you kindly.

Your Honor, our next argument is that FHFA and the enterprises are not government instrumentalities. The Lebron decision out of the Supreme Court established a conjunctive test for determining whether a court may treat a private entity as the Government for constitutional purposes. You have to show that the private entity was created -- created -- was by a special law; that it was in furtherance of a government objective; and that the Government retains for itself permanent authority to appoint a majority of the corporation's directors.

Using that test, the Supreme Court held that Amtrak is a government instrumentality because the Government has permanent structural control. The President appoints the directors and legislative action is needed to end government control over Amtrak.

This is a very different case. I would first note, though, however, that we do not dispute that Fannie -- that either -- that Fannie Mae and Freddie Mac were created by special law or that they were created in furtherance of a government objective. However, the Government does not retain permanent authority to appoint a majority to directors.

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I would note that the D.C. Circuit, the 4th and 6th Circuits, and 11 separate District Courts have already held that the enterprises are not government instrumentalities because the Government doesn't exercise permanent structural control. And we actually listed those in an appendix to our reply brief. But the 4th Circuit case is the Meridian case, which is also cited in our brief.

And the reason why they're not government instrumentalities is because the -- first, prior to conservatorship, Fannie and Freddie appointed their own directors. It's only in conservatorship that FHFA has the authority to appoint their directors. In addition, under a conservatorship, Fannie Mae and Freddie Mac are only subject to indefinite temporary control. At some point, the conservator -- HERA does not contemplate that a conservatorship is permanent and no one has ever -- FHFA has never said that the conservatorships are going to be permanent in this case and the statute is also clear on that.

And in Herron II, the -- I believe it's the -- I think it's the D.C. Circuit, held that FHFA -- that, sorry, Fannie and Freddie are not government instrumentalities for that very reason. The conservatorships are indefinite temporary control and

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FHFA doesn't always appoint all their directors.
The 4th Circuit has also noted that temporary control, as when the Federal Government steps in as a conservator, is not sufficient to establish government instrumentality status, and that's in the Kerpen vs. Metro Washington Airports Authority case that I've cited.
Finally, as I already said, no legislative action is necessary to end the conservatorships. The one case that has found that Fannie Mae and Freddie Mac are government instrumentalities is the Sisti case out of the District of Rhode Island. That one was decided in 2018, but they are far and away an outlier, and the Court in that decision even admitted that it was acting contrary to numerous other courts that have held differently. But the Court in that case was wrong because, first, it cited no authority granting FHFA permanent control and, second, it wrongly assumed that the conservatorships were permanent.
Moving now to the question about whether FHFA is a government instrumentality under the Lebron test, no court has held that FHFA or any other agency, acting as a conservator, is a government instrumentality. In fact, in the Meridian case, which I mentioned before, the 4th Circuit applied the Lebron analysis to hold that FHFA is

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not a government instrumentality and inherent to, which was the D.C. Circuit, the Court reached the same conclusion.
So the enterprises are -- it just goes without saying that if the enterprises are not government instrumentalities, then FHFA, standing in their shoes, cannot also be -- also can't be a government instrumentality.
So I now move to the Court's questions with respect to the government instrumentality issue. I have reproduced question one in full here, but I've then broken it down into three separate questions.
The first question is whether FHFA's director, expressing his commitment to ending the conservatorship, the President directing the Secretary of the Treasury to develop a plan to do so, and Treasury releasing such a plan affect the analysis of whether Fannie Mae and Freddie Mac are under permanent government control for purposes of the government instrumentality test. We have a two-part answer. Technically, that doesn't make a difference because the control is neither structural nor permanent. The statute doesn't allow permanent control and because FHFA doesn't always appoint all of Fannie Mae's and Freddie Mac's directors, it just isn't a government instrumentality here. However, these

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developments highlight the lack of permanence that the statute calls for. So we think that those developments help our argument.
Second, the Court relatedly what effect, if any, does the FHFA and Treasury agreeing to increase the enterprises' capital reserves have on the control analysis. And our answer to that is the same as with respect to part one. Technically, none, because the control is not permanent. But we would note that it does allow the enterprises to take steps towards building more capital as a buffer against any downturns.
Finally, and I don't need to spend much time on this, the Court asked whether the parties should address whether it's appropriate for the Court to take judicial notice of the noted testimony and documents. It seems that we're in agreement with the Plaintiffs on that because Mr. Thompson already acknowledged that the Court may take judicial notice of those documents.
So in conclusion, neither the enterprises nor FHFA are governmental instrumentalities because Congress did not provide FHFA permanent structural control over the GSEs and if the enterprises are not governmental instrumentalities than FHFA can't be either if it's standing in their shows. That's all I have on that.
THE COURT: Thank you.

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MR. JOSEPH: May it please the Court, Gregory Joseph, Joseph Hage Aaronson for the Plaintiffs.
Your Honor, all of the cases cited by the Government for the proposition that the enterprises are not governmental instrumentalities have one thing in common. None of them considers the impact of the net-worth sweep. The net-worth sweep is a permanent structural change to the capital structure of these companies which permanently deprives them of the ability to achieve financial soundness and solvency. Therefore, they cannot leave conservatorship.
All of the cases they cite stand for the proposition that the 2008 conservatorship is inherently temporary because there's an objective benchmark. That benchmark is now incapable of being reached. And Perry is a prime example, Herron is a great example. They all are. Take the Meridian case, which is the one counsel just mentioned, the 4th Circuit case. This conduct occurred -- a breach of contract in 2009 or 2010, before the net-worth sweep. Counsel cited Herron II. Conduct in 2010 doesn't consider the net-worth sweep. Every single appellate case they cite, Meridian, Mik, Rubin, Bernard, Heibel, Williams, none of them considers the impact for the net-worth sweep.
THE COURT: I agree with you. That is one of

sweeney agrees with plaintiffs

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my primary concerns in this case. The money is constantly being funneled out of the enterprises to the Government. It's as though the way this -- the net-worth sweep operates and the way it was configured by Treasur is that it's an impossible task for the conservatorships ever to become solvent because all their profits are being taken away.

MR. JOSEPH: Exactly, Your Honor. And that's why when you look at the Lebron test, the Government doesn't dispute the first two elements. But there can't really be a dispute about permanent control.

Now, it's true -- and Your Honor has asked about judicial notice, and just to be precise, I mean, the rules that permit you to do it, the documents are self-authenticating under Rule 9025 and they're not hearsay under 8038, but they're statements of intent. And they're very tentative statements of intent.

If you look at what page 3 of the Government's plan says, "Treasury and FHFA should consider adjusting the variable dividend, also known as the net-worth sweep," that is not a commitment to end this net-worth sweep.

We do have an election coming up next year and it's true that Treasury and FHFA want Congressional action. We have a divided Congress. Maybe it will,

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maybe it won't end. But it's in the nature of permanent control that it ends at the decision of the controller. The controller decides whether, when, and if it ever ends. Facebook controls Instagram. It could decide to spin it off next week. It can announce that it's going to do it. Until it does it, Instagram has no way out and every decision that's made at Instagram is done under Facebook control. That's what we're dealing with now.

And if in the future the Government should privatize -- and we hope it does privatize these entities -- it will not retroactively change anything that's happened since August 17, 2012. So the Lebron test is satisfied by application of the permanency of the structural change to the capital structure. And that's what makes this case unique. It's really a tabula rasa for you to be deciding because nobody else has considered it.

The Sisti case we agree with and counsel calls it an outlier. That's, of course, why we agree with it. But it does apply to Lebron because Lebron has a few tests. It says, is the control going to automatically terminate? Well, it's not going to automatically terminate. There's nothing that provides that it automatically terminates. Is there an objective benchmark that is going to permit it to be hit? That's

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[illegible] now. So those tests make it impossible.

Is it managed for shareholders' benefit? The one thing we know is that FHFA now is not managing these enterprises for shareholder benefit. It's managing it so that all money goes to the public fisc, which is a very noble purpose, but it is not a private enterprise; it's a governmental instrumentality at this point.

You know, Congress has said that, you know, there's no statute making it permanent. You don't need a statute making it permanent when you can achieve it through this capital structure, but I'd also point out in the Department of Transportation vs. American Association of Railroads, they had a statute that said this is a private company, and the Supreme Court said, that's not what you look at, you look at the facts. What is the practical reality?

If an affirmative statute saying there is no government control doesn't decide the issue, then the absence of a statute saying there is government control doesn't decide the issue. And the facts here are clear. There are going to be increases in capital reserves. You know, one of my predecessors up here already mentioned that the Government's liquidation preference is going to rise dollar for dollar with those increases. But whatever happens in the future, it doesn't change the present.

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And all that that is currently going to do is increase the Government's liquidation preference by the same $39 billion that the capital reserves are going to increase.

So, Your Honor, I don't want to take more time than is appropriate. I think I've covered the major points. Whatever happens in the future has no impact on the present or the past. We wish that it happens, but we do have government instrumentalities at present.

Thank you, Your Honor.

THE COURT: Thank you.

MR. VALLELY: Your Honor, if I just may make a point briefly.

THE COURT: Certainly.

MR. VALLELY: First, by way of introduction, my name is Patrick Vallely. I'm one of the attorneys for both the Plaintiffs in the Fisher and Reid cases. And just to provide some very brief context for a couple of arguments I'm going to be making today, my clients are unique in that they are the only Plaintiffs among the various cases that have been filed in this Court that have consistently from the start asserted derivative claims on behalf of the entities as opposed to direct claims.

There are a number of Plaintiffs that have amended their complaints over time to assert derivative

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claims in the alternative, but our -- my clients are a little differently situated in that they've asserted only direct claims from the start and that's what they still assert today.

I just wanted to point out to clarify for the record -- and this is clear in the briefing, too -- that the -- on this issue about whether the entities are governmental instrumentalities, the Fisher and Reid Plaintiffs actually did not join with the other Plaintiffs on that part of the omnibus brief. And on this specific issue, this is one issue where we actually agree with the Government that the entities are not government instrumentalities. I won't repeat the arguments that they've made, but in substance we agree on this specific point. That the entities are not government instrumentalities because there is no permanent control and indefinite control is different than permanent control.

But just one parenthetical note that I'll argue in a little bit more detail later when we go to other issues, it's not important for Plaintiffs' claims that there be permanent control either. The Supreme Court has repeatedly recognized, for example, in the takings context that even when the Government seizes temporary control of the company, that that temporary, although

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indefinite control, can be a taking.

The leading case here is a case way back from World War II, the Kimball Laundry case that the parties discuss in their brief. It was similar in a sense that the Government seized control of this company, a laundry company, during World War II to basically use the company for the Government's own use. And at the time of that seizure, there was no indication of how long the war would be, how long the seizure would be. It was indefinite in a sense. Yet, the Supreme Court still found that there was a compensable taking.

And, again, you know, the point is here is that it's not important that the Government be a -- excuse me, that the entities be government instrumentalities for there to be a taking or for the Plaintiffs to assert any of their other claims. And we agree with the Government on that limited point, that these entities were not government instrumentalities. Again, just on behalf of the Fisher and Reid Plaintiffs.

Thank you.

MS. HOSFORD: Thank you, Your Honor.

In response to the remarks of my colleagues on the other side of the case, a government instrumentality analysis depends on whether control is permanent. And, here, Mr. Thompson has already stated he interprets

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recent developments to mean that Fannie Mae and Freddie Mac will be released for conservatorship. So even under Plaintiffs' theory, there's no permanent control here if they will be released from conservatorship. And the net-worth sweep document itself, in Section 2.5, does have a set of circumstances under which the net-worth sweep would terminate. That hasn't occurred yet, but that doesn't mean that Fannie Mae and Freddie Mac are government instrumentalities.

In the Conrail case that preceded Lebron -- it's 419 U.S. 102, 152, the Court found that Conrail was not a government instrumentality even though the Government was controlling it at that time because at some point in the future, if the Government's support of Conrail ended, then they would no longer be under permanent control. In that case, nobody knew at that point when that support would end, but that didn't make any difference for purposes of a government instrumentality analysis.

So under those, you know, 11 District Courts and several Courts of Appeals who have found that Fannie Mae and Freddie Mac and FHFA are not government instrumentalities are exactly right. And Mr. Thompson's remarks just reinforce that.

I would also take issue with -- I would also

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note that takings analysis is not analogous to the government instrumentality analysis. When you're talking about a taking, you're talking about the Government taking a private party. Here, Plaintiffs are saying that somehow the private party is also the Government, so any test that applies in a takings analysis has more applicability in the government instrumentality analysis.

And you do, contrary to Plaintiffs' counsel's statement, need a statute making the control permanent. And, here, HERA does not make control of Fannie Mae and Freddie Mac permanent.

And I would just finally -- that's my response. Thank you very much.

THE COURT: You're sure? Okay.

MR. DINTZER: May I approach, you honor, with the next set of slides?

THE COURT: Oh, certainly. Thank you, Mr. Dintzer.

MR. DINTZER: Thank you. We're getting this ballet down.

Next, Your Honor, we turn to issues that arise because Plaintiffs' claims sound in tort. My argument on these issues will be broken down into two parts. First, I'll address the Plaintiffs' claims of breach of fiduciary duty and how the -- why the Court should submit

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those because they assert a tort claim and Plaintiffs cannot point to a waiver of sovereign immunity for those claims, and next turn to the Plaintiffs' takings and illegal exaction claims, which the Plaintiffs have chosen to plead as torts, and as torts, they should be dismissed.

So we'll start with the alleged breach of fiduciary duty. The Court should dismiss it because lies beyond this Court's jurisdiction. Plaintiffs contend that FHFA, as conservator, interfered with the GSA's performance of their stock agreements with the Plaintiffs, interfered with their stock contracts. And Plaintiffs allege a variety of misconduct. They allege collusion, coercion, self-dealing, irresponsible accounting. There's a variety of different ways that they've framed it, but they've framed it as an interference with those agreements. They contend that is how the Plaintiffs were injured.

Now, the Tucker Act does not provide, as the Court knows, provide jurisdiction for tort claims. In fact, I think -- I'm going to say two things that I hope everybody can agree with. The Tucker Act does not generally provide jurisdiction for tort claims and the breach of fiduciary duty is generally classified as a tort. So generally there would not be jurisdiction for

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those types of claims. So if the Plaintiffs hope to pursue breach of fiduciary claims here in this Court, they must overcome presumption of no jurisdiction and they have to show us what the basis is. So to do so, they must show an express waiver of sovereign immunity for these types of claims. And without this showing, of course, the Court must dismiss those claims.

Now, they allege a range of sources for the waiver of sovereign immunity and what I'd like to do now is simply walk through what they've asserted as the different possible places to find it and talk about it. The first is a money-mandating statute. The Plaintiffs argue that they have a money-mandating statute and that that provides the necessary fiduciary duty. Specifically, they argue that HERA fits that bill.

But, Your Honor, HERA provides no help. HERA does not authorize a breach of fiduciary duty claim. Indeed, it precludes such claims. First, HERA is clearly not money-mandating. Nothing in HERA suggests Congress was thinking, when it was setting it up, ah, how can we make a cause of action for the shareholders so that they can get money from the Government for any of this. There's simply no language in there that can be read anywhere like that. Indeed, just the opposite, Your Honor.

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Congress sought to limit challenges of FHFA's oversight for the conservatorship. The feeling was was that once FHFA was in charge of the conservatorship, the possibility that there would be suits constantly challenging every single decision that it made would make it impossible for FHFA to do its job. And so what Congress came up with was there's only a 30-day window from the start of a conservatorship for there to be a challenge. And the party making that challenge is -- only the GSEs are empowered to do that. HERA took -- given that very small window of ability to challenge, HERA can't be read as providing a monetary remedy for the Plaintiffs.

Second, HERA sets objectives in conservatorship that are not consistent with a breach of fiduciary duty. The statute provides no instruction for FHFA to protect the GSEs' shareholders. That's simply not part of the structure of the conservatorship. Instead, HERE is focused on protecting two parties, taxpayers and the GSEs. Indeed, FHFA has the option of placing the GSEs in receivership if it felt that was necessary and potential wiping out all shareholder remedy entirely. So there's no statute that creates a fiduciary responsibility for FHFA to take charge of or to be owing to the shareholders.

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Now, Plaintiffs, in their briefing, they rely on a case called Golden Pacific. And they argue that HERA -- they argue that this is the thing that shows that HERA money-mandating, but the reliance is misplaced. What happened in Golden Pacific was it addressed the FIRREA provision that is noticeably similar to the HERA provision. So it's noticeably similar. And what the Court -- the case in that -- in that case, the Court noted that it was undisputed in that case that the FDIC had fiduciary duty. It was undisputed when the bank -- when FDIC placed a bank in receivership.

But Golden Pacific doesn't support the Plaintiffs' breach of fiduciary duty claim for three reasons. First, the fiduciary issue was undisputed. There's no legal analysis. There's no conclusion. And so it can't be held as binding law on anybody for that proposition. Second, Golden Pacific never suggested that fiduciary duty ran to shareholders. In that case, the bank -- the FDIC had a fiduciary duty to the bank and to its creditors. That's all that it conceded. There were no shareholder claims in the case, so that didn't come up.

Finally, the Golden Pacific Court was considering a statutory receivership. And basically there it had to think in a priority scheme where the FDIC

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was passing out money in a receivership as it was liquidating a bank. Did the FDIC have a fiduciary duty passing out the money?

None of those issues are here in a conservatorship. It's a completely different situation. So there's no analog. So the Golden Pacific case is simply not relevant in the analysis here. And HERA by -- and I would challenge them to point to the language in HERA that creates fiduciary duty. It is simply not money-mandating, which brings us to the second place that they looked for a responsibility, which is a contract.

The Plaintiffs argue that a contract provides sovereign immunity. And the Court should conclude that there simply isn't for two reasons. First, the Plaintiffs don't have a contract with the Government. If there's one thing that I think we have heard and agreed on is that the GSEs have stock, which is a contract, with the shareholders. That is a contract. But the Plaintiffs have no contract with FHFA or with the Department of Treasury. There is no contract between the entities. The PSPAs are a contract, but they only exist between Treasury and the GSEs. And, in fact, the PSPAs expressly say there is no third party beneficiary possible with the PSPAs. So they can't provide a contractual or a breach of fiduciary duty of any kind of

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claim.

So that takes us to the Plaintiffs' third place. We're past the money-mandating and contract, now they want to turn to Indian law in search for the jurisdiction, which we think is not a simple fit here. The Plaintiffs cite the United States vs. Mitchell, where the Supreme Court interpreted -- there was a set of federal statutes and regulations where -- that granted the United States comprehensive responsibilities over managing timber assets for a tribe of Native Americans. The Supreme Court found that the U.S. was acting in a fiduciary duty to benefit those Native Americans.

Now, that case, of course, Your Honor, is deeply rooted in the historical relationship between the tribes and the United States. And the Court based its analysis on the general trust relationship that has existed between the Government and the Native Americans. So the Court should reject the Plaintiffs' effort to co-op those principles that are founded in Indian law.

The Supreme Court -- and I've got a quote here on Slide 16 -- the Supreme Court said, "A fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians." And what the Plaintiffs have done is they've tried to read out the "belonging to Indians"

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portion of that. The Plaintiffs argue that the investors, the speculators, the hedge funds that are here have a similar relationship to the United States as the Native Americans. And this simply is an illegal basis for a conclusion such as that.

Moreover, unlike in the Mitchell case where there was a trust relationship, where the Government was taking care of assets that were -- the Indians' assets, there's no such relationship here. FHFA isn't holding the GSEs' assets for the benefit of private shareholders. That's simply not the way the conservatorship was set up by Congress. In HERE, Congress excluded benefits of the shareholders as a goal of the conservatorship. So the basis premise of Mitchell is simply not present.

Finally -- or next up is common law and we've already heard some about common law and I'd like to get a little deeper into that. The Plaintiffs look to common law to find a waiver of sovereign immunity. Specifically, the Plaintiffs want to import the rules of common law conservatorship. But the rules quite simply, Your Honor, have no applicability here. HERA, as I think everybody has now said, is immensely detailed. Congress left no room for the common law to squeeze its way in and expand the Government's responsibilities and liabilities. HERA frees FHFA from common law requirements.

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And that's not just us saying it. The Circuit Courts have said that, too. For example, the 3rd Circuit in Jacobs explained when the agency acts as conservator, it need not act solely in Fannie's and Freddie's interests as a traditional conservator would. It may also act to protect its own interests and those of the public. At common law, a conservator could not act for the benefit of himself or a third party. So there's a real difference between the type of conservatorship that was being set up in HERA and the common law conservatorship that the Plaintiffs are trying to now staple on to that statute.

THE COURT: Mr. Dintzer, you know, I understand your argument and I understand that because taxpayer money was being infused into the enterprises that taxpayer money needed to be protected. But how do you justify -- how does the Government justify never allowing Freddie and Fannie to pay off money it received and eventually being able to stand on its own feet, which it could have done, and then let its board decide whether or not to pay a dividend to the shareholders.

It seems from the beginning when you have FHFA coming -- and Treasury coming to the board of directors of the enterprises and saying you either agree to the conservatorship or you're out, it seems as though there

Sweeney arguing against defendants

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as a death grip placed on the enterprises by Treasury and FHFA and they -- and when I say they, Treasury and FHFA, never allowed Freddie and Fannie to be restored to happier days when the financial crises passed and they could have not needed any infusion of capital and they could have paid their dividends.

MR. DINTZER: So --

THE COURT: I mean, it just -- it seems --

MR. DINTZER: There's a lot there for me to unpack, Your Honor. But I'd like to --

THE COURT: Yes, sorry, sorry.

MR. DINTZER: No, no, no, I'd like to address the Court's concern. So let's back up and think about July of 2008. The concern is is that Fannie and Freddie may end up without the ability to pay their bills and go effectively bankrupt and not have the ability to find their way out of the wilderness. Now, there had already been a conservatorship provision, but it was -- it was clarified in HERA, and what Congress did was Congress said, look, these are two immensely complicated and potentially -- potentially immensely troubled companies that could require more money -- the Government put more money in Fannie and Freddie than they did anywhere else. If that money had been redirected to other parts of -- I mean, we're talking about an immense amount that wasn't

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available anywhere that ultimately was drawn on by those -- by Fannie and Freddie to help them maintain and pay off their debts and maintain a positive net worth.

THE COURT: You're right. They did draw on it, but it wasn't every dime that was put at their disposal and they were never allowed to repay -- the enterprises were never able to repay that which they borrowed. And so they were never allowed to stand on their own two feet again as much as an entity can stand on two feet.

MR. DINTZER: Mm-hmm.

THE COURT: But I think you understand my point.

MR. DINTZER: I do. When Congress gave those powers to FHFA, it was with the understanding that they would be in the best place and have the best judgement to figure out how to structure what the conservatorship should look like, what -- how to manage the company, how to pay Treasury for its investment, and -- because that money is still -- taxpayer money is still being invested, and to figure out either to allow them or allow a political conclusion at some point or a congressional conclusion at some point, but the bottom line is that Congress trusted FHFA to figure out how to do it.

And so they --

THE COURT: But how to do it wasn't necessarily

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for the benefit of Freddie and Fannie ultimately because they were never allowed to repay that which they borrowed. There was this siphoning of every dollar of profit.

MR. DINTZER: But --

THE COURT: And again -- and the other point, I'm very concerned that Treasury approaches the board of directors of the enterprises and says, you either agree to the conservatorship or you're out. That's -- that sounds like undue influence, if not a death grip.

MR. DINTZER: So, Your Honor, the Plaintiffs have alleged that and they've cited Secretary Paulson's book, I believe.

THE COURT: Yes.

MR. DINTZER: And the -- what I would say to that is this. One thing that HERA did give both of the GSEs is if they felt that they were being put into conservatorship unfairly, they had a 30-day -- I mean, if they said, look -- I mean, let's take Mr. Thompson at his word. Look, we don't need you. It's such smooth sailing here, we got this.

And the thing that they should have done is they should have said, okay, let's get some lawyers, okay? And we can take them and we could go to the D.C. District Court and we can say, it's 30 days, so this is

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the window, and we're GSE, so we're the people who can challenge the conservatorship, and you know what, let's go after them and say, let's stop it. And the GSEs didn't do that. That was -- that was how HERA was designed. If they really thought that they could stand on their own, then that was their opportunity to do that and they --

THE COURT: That's -- isn't that part of the litigation that's ongoing now with -- to decide whether or not that provision of HERA is constitutional? I mean, wasn't the 30-day window problematic? If someone puts a death grip on you, yes, I'm sure you open the phone book or you know someone -- some lawyers in Washington or elsewhere, but it doesn't give you a whole lot of time to get into court.

MR. DINTZER: That was -- my understanding is, and I can't swear to know every line of every one of those cases, although I've looked at them all, that the 30-day window itself is not being challenged, that they're saying, as I understand it, and they will nod at me if I'm getting this wrong, is that they're saying if something -- if FHFA was acting outside of its authority, then that 30-day window might not apply, right? I'm getting some blank stares.

But the -- as I understand it, the challenge on

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the 30-day window has not been brought. And the fact is is if they wanted to bring that, they could bring it -- the GSEs could have brought that, too. But the point is is they had an opportunity to say exactly what Mr. Thompson said, which is we've got this, we don't need them. And they chose, in the way that Congress set it up, not to do it.

The Court's concern about what's going on now, I -- the only thing I can do, Your Honor, is I can really emphasize this fact -- this point. If we did -- and there's a lot of reasons we're going to go over today on why we didn't take anything from these Plaintiffs, why did -- but if hypothetically, if we did on August whatever, okay, would have been done the next day. Nothing that's happening now -- let's say hypothetically something happened down the road, it really wouldn't affect the alleged taking.

The alleged taking -- so we're back to the lottery ticket. If they really did have a lottery ticket on August -- in August 2012, if they really did, then we would pay them whatever the value of the lottery ticket is then. These billions of dollars and what's going on since -- now, if they want to go District Court -- and many of them have -- and say, look, this is unconstitutional, we want to challenge the Third

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Amendment, we want to challenge FHFA's structure and all these other things, and they've all been doing and with less success than some, but they -- you know, there is the Collins case, but other Circuits -- most of the Circuits have held against them -- they can do that, okay? And they've done that.

But, here, respectfully, Your Honor, the question here isn't what's going on today, the question is is back then, at that time, whether there was a taking of their rights, whether there was an exaction of their rights, we believe that there wasn't, and we think that the evidence -- I mean, if we ever get there, we don't think they have jurisdiction to bring those claims. But even if they did, the real question, Your Honor, would be what's going on -- what happened back then. What's going on today is something that if they want to fight about -- in the District Courts about the legitimacy under APA and all these other things, they can do that there. But that's really not the questions that are here.

They talk about illegal exaction, the illegal exaction requires -- requires this. It really requires taking it and putting -- it never -- the money was never in their pocket. So the questions about what's going on today -- and I understand Your Honor --

THE COURT: And I'm really not so much

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concerned -- I'm really not concerned about what's going on today, I'm just saying at that time. At the critical time period, you have directors of the enterprises or the board of directors of the enterprises being told you either play ball with Treasury or you're out.

MR. DINTZER: Well, and respectfully --

THE COURT: And that is a Hobson's choice. I can't speak for those directors, but one could imagine that they -- they cared about the institution that they served and they would rather stay on board to see that they could help direct it and protect it from these outsiders that were going to come in, even though those outsiders are Treasury and FHFA, and they're concerned that their organization is going to be raided. And that's -- financially. And it seems to me that that's what happened.

I appreciate your lottery ticket analogy, but the Plaintiffs owned stock, which is far more certain than a lottery ticket. A lottery ticket, you may have one in a billion or 100 billion chance of winning. Stock is something that -- it's a certificate of ownership, you're invested in that company and, God willing, you get a return. For preferred stock, they certainly were enjoying a return year after year after year. I think there was always a dividend paid except for maybe one of

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the enterprises in 1985, something like that. So there was a fairly consistent return which is much better than a lottery ticket, at least any of the lotteries that I know of.

And if you can tell me where I'm going to get 10 percent back, let me know because, I mean, we're going to adjourn and I'm going to go out and buy a ticket right now.

MR. DINTZER: Respectfully, Your Honor, all of that happened before the conservatorship. It --

THE COURT: Oh, of course it did. But that's why I'm saying that the conservatorship was not great favor to the enterprises. It just seemed as though --

MR. DINTZER: If they could have had the money, Your Honor, respectfully, if they could have had the money without the conservatorship, I'm sure they would have been happy to take it. But once the Government -- the American taxpayer is going to pony up $200 billion, I mean, once we're going to --

THE COURT: Which they didn't receive all $200 billion.

MR. DINTZER: No, but they --

THE COURT: I mean, it was put at their disposal.

MR. DINTZER: It was put at their disposal,

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yes.
THE COURT: But they were -- but Freddie and Fannie were not sitting back with $200 billion saying, come one, come all. They could draw on that when they needed it.
MR. DINTZER: Yes, absolutely.
THE COURT: And -- but -- I'm sorry, forgive me, forgive me.
MR. DINTZER: No, no, no, no, excuse me, I apologize.
THE COURT: No, no, not at all. It happens in the give-and-take in a courtroom.
But what concerns me is that the borrower or borrowers, Freddie and Fannie, were never able to repay that which they borrowed. And so it always kept them several steps behind in the financial page. The enterprises were never able to repay the debt to the United States taxpayer, which I'm sure many of the shareholders are, probably the vast majority, and so the -- Freddie -- the enterprises were never able to right their financial ships of state and then make their profits while not borrowing anything from the U.S. taxpayer and then pay what dividend they can to their shareholders. And that doesn't seem cricket. That doesn't seem cricket to the way our government operates.

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MR. DINTZER: Okay. And then --
THE COURT: It's as though it was somebody -- they were used as like a piggy bank that they could -- or it was this funding stream. And I'm a taxpayer so, I mean, it's great that the Government can generate tax revenues, that's fine. But it should be fair and equitable if taxes are --
MR. DINTZER: So let me -- there's a number of things that I'd like to hit here, Your Honor. The first is is that when you reach -- when you're an entity and you reach the point where you financially need the Government's assistance, okay, you can't go out and find some banks and Goldman Sachs, when you reach that point that you need the Government's assistance, that puts you in a position where the Government is entitled to something back.
So just to use a couple of examples, and I'll get to your answer. So Lehman Brothers got no government assistance. It went bankrupt. Its partners got nothing. They ended up with zero. AIG got some government assistance, ultimately $85 billion -- more than that, I think, at the fine tune. The Government ended up owning 90 percent of the company and the shareholders there were not happy about the fact that their ownership went from 100 to 10 percent. They didn't think that was fair.

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And that's what the whole -- and I know the Court is familiar with this, but the point is is that once you reach a point where you're not able to -- and I know that somebody on the other side is going to say, well, we could have, and that will be -- we don't need that point here, but just to answer Your Honor's question. They need -- as far as the record shows they needed the money, they used the money, and if they hadn't, the place for them to go would have been into District Court right away to fight it.
But once they get that money and they -- the Government is the entity that -- the Treasury is the entity that provided money for an investment that allowed them to stay solvent, they had an obligation to pay this dividend to Treasury. And so the -- I understand what Your Honor is saying is why didn't this come to an end, why didn't this wrap up, where is the end point. And, Your Honor, the end point isn't something I can describe here today because that -- those are decisions to be made by other people. Those are decisions to be made especially by the conservator.
But the structure that Congress set up was this is a phenomenal amount of money and we have to make sure that the people who are managing the money are -- know what they're doing because the people who were -- the

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stock -- the board member that you're talking about who was there before, they're the people who put Fannie and Freddie in such a position that they almost blew up the world. Fannie and Freddie was in a financial position that -- and I don't think anybody would disagree with this. If Fannie and Freddie had gone insolvent, if they had, okay, then I don't think anybody would disagree that that would have been -- that would have deepened the financial crisis significantly.
And so these are companies that had been put in a position where they -- the board members, the ones that you're talking about, had run Fannie or Freddie into a position where that may have happened. And so at that point, the FHFA, along with the entities, decided that FHFA would become the conservator, and if the entities wanted to challenge it, that was their time. I'm not here to say one way or the other, it's a factual question. It didn't -- it's not something we need to try in this case to resolve their claims.
So it's not an open -- but however it happened, it happened in 2008 and that was the time for the GSEs to (inaudible) or if these Plaintiffs really thought in 2008 -- now some of them didn't even own stock, but if the ones who did really said, whoa, this is outrageous, then that would have been the time, if they were going to try

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to do anything -- I don't believe that they would have had standing -- but to do it then. To sit back -- so let's just talk about what has happened instead. To sit back, it could have all gone very badly. Really, really badly. And the Government could have been paying out an enormous amount.

But to sit back and to wait and say, whoa, whoa, now it's going well, well now we'll buy stock, now we'll challenge, now we've got something to say, now we'd like the money to flow to us, that's not as fair either. Because there's no -- there's one thing we know for sure that is beyond question and that is that the Plaintiffs, none of them, were the ones to pony up that money and put the money at risk. The American taxpayer did that. And so if -- to think about it, what FHFA is doing as conservatorship is making sure that the Government's money that has been put in, Treasury's money that's been put in is handled and managed in a way that, you know, that is responsible because the people who were doing it before weren't.

And so, respectfully, Your Honor, that's -- now, as far as why has it taken so long, what's the endpoint, how -- I don't know. I couldn't give you -- and if I knew, I couldn't give you an answer anyway.

THE COURT: And I'm not looking for that answer

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anyway.

MR. DINTZER: But I do think that these are people acting in good faith to manage -- I mean, to manage and -- as conservator, GSEs in a healthy way. And looking for what the next form looks like is something that people -- responsible people in different parts of the Government are thinking about. And I don't have the answer, but I'd like to think that those people will find a responsible outcome for this. But whatever it is, it has not been unfair to the shareholders, the shareholders who own stock.

I mean, look at people who own -- the parties in Lehman Brothers. They didn't get the help, zip, nothing. The AIG shareholders, 90 percent of their equity was liquidated. And then 109,000 businesses went bankrupt in the crises without government assistance, not a penny. That's just off the cliff. They would have loved for some government oversight and money to help them out.

So when we talk about what happened, we have to remember how bad things were and that this was an effort to try to help conserve and save Fannie and Freddie. This was not a diabolical act that -- I mean, the last thing anybody had time for in September 2008 was some sort of diabolical act. They were looking -- I mean, I'm

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sure Your Honor remembers this. Every day you turned on the TV, it was like, oh, wow, that's bad news. And so this -- that's what was going on then. That's what -- what Treasury and FHFA were viewing and then -- like I said, I don't think it will become a factual issue in this case, but if it did, the issue would ultimately be, you know, whether these entities could have stood alone on their own. And presumably, they didn't think they could have or they would have challenged the conservatorship.

So that's -- I know it's a long answer, but that's -- that's a long answer to the Court's question, but that I hope that gives you some confidence that this was -- I mean, this was not a -- I mean, if somebody wanted to make a lot of money in 2008, taking over Fannie and Freddie was not the way to do it. So nobody could think that, ah, this is our chance to make -- it was this is our chance to put in $200 billion, but that wasn't what anybody was thinking at the time.

THE COURT: No, I understand that. It was just the decision not to allow Freddie and Fannie to repay loans and to be profitable again concerned me.

[redacted]

And the Plaintiffs have been challenging that in the Circuit Courts because in the Circuit Courts, they're

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saying this thing is unfair or illegal or however they want to frame it now. And mostly the Circuit Courts have disagreed with them and said, no, it's not.

Now, we do have the Collins decision. I have no idea if the Supreme Court will grant cert. We may find out. But mostly the Circuit Courts have said, no, this has not been unfair to you. And the issues here about what happened in 2008 with respect to the Washington Fed Plaintiffs and what happened in 2012 with respect to the rest of the Plaintiffs, those things -- if you have a magnifying glass, without looking at, boy, they earned a lot of money, but looking through -- Your Honor said -- you know, we talked about lottery tickets. The shares of -- the common shares of Fannie and Freddie, if somebody wanted to own them, were less than a lottery ticket. They sold for 25 cents apiece in August of 2012.

And so they -- I mean, the -- before the Third Amendment, there was nobody who was thinking this was going to be a gold mine even before the Third Amendment. If they had, they wouldn't have been 25 cents apiece. So anyway, that's -- structurally, that's sort of where we're at. I hope I've answered the Court's question.

THE COURT: I understand your answer, thank you.

MR. DINTZER: Okay, thank you so much, Your

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Honor.

If I might, I'm going to trudge along just to get us through the rest of this. We're talking about looking for the source of sovereign immunity and the next one that the Plaintiffs have asserted is that Treasury is a stockholder. And basically with that they said, look, Treasury is a stockholder in the GSEs, the fiduciary duty comes from Treasury. So I'd like just to remind the Court, Treasury owned two things. They had warrants, which they had not exercised so there's no voting ability there. And then they had this senior preferred stock which is paying the dividends, which does not have voting rights.

So Treasury, even if state law supported the breach of fiduciary duty claim, state law would require a showing of control, and Treasury never had that control. They don't have -- they can't pick board members, they can't pick officers, they -- they're a shareholder. They're like the Plaintiffs. They are a preferred shareholder and they have warrants in the GSEs. So there's no fiduciary duty arising from that.

Moreover, Treasury's investment pursuant to HERA preempts the alleged duty. I mean, the reason that Treasury was able to do this was because of HERA and HERA would preempt any possible claim. Under HERA, there were

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three purposes for Treasury's investment, to stabilize the financial markets, to prevent disruptions in the availability of mortgage finance, and to protect the taxpayer. Those are the reasons why Treasury is pushing money onto the table. None of those purposes are to protect the shareholders because that would really be fair because Treasury is not pushing money on the table of any of those 109,000 other entities that were going bankrupt that failed.

So the reason Treasury was pushing money onto the table was to protect these interests. None of these purposes to protect shareholders created a fiduciary duty. Therefore, HERA precludes the fiduciary duty term.

That takes us -- so I've addressed the breach of fiduciary duty and I've explained why we believe that there's no jurisdiction. Next, I'd like to explain why that holding should carry over to the Plaintiffs' taking and exaction claims, specifically why the Court should dismiss those claims because they've chosen to plead them. There's no question that they could have pled them as -- they could have tried, as constitutional claims, but they've chosen to plead them as torts.

And returning to a slide that I showed earlier, the Plaintiffs' complaints allege various misconduct by FHFA beyond the breach of fiduciary duty. The Plaintiffs

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have intertwined their allegations in their taking and exaction claims. They argue that the misconduct led to the Third Amendment and then the Third Amendment caused all of the things that they complaint about. Therefore, we ask the Court to dismiss all claims that include assertions of government misconduct.

And I'd just give the Court an example from Owl Creek. This is what Owl Creek alleges. "By acting beyond the bounds of any previously conservatorship, including conservatorship's under FIRREA's longstanding language that is materially identical to the Recovery Act and for the direct benefit of the Treasury, the United States contravened settled principles protecting private property held in trust. It thereby took for public use the property of the shareholders other than itself."

So you can see they've taken an allegation of misconduct and they've twisted it into a taking form and it just can't hold that form. Put simply, if the Government engages in tortious misconduct, as the Plaintiffs have alleged, it can't be a taking and exaction.

And Golden Pacific supports our position here. And just to be clear, there's two sets of Golden Pacific cases. The Plaintiffs cite one in the 2nd Circuit. This one is actually from a predecessor court here. And it

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says that the misconduct claims need to be dismissed, they're completely separate from takings claims. What they said is, "The discretion of the Comptroller cannot be challenged in this forum. Such an allegation would sound in tort and be outside this Court's Tucker Act jurisdiction."

So put simply, under the Tucker Act, you can challenge the Government's actions, but if you want to challenge the propriety of the Government's actions -- I'm sorry, you could challenge the result. But if you want to challenge the propriety of those actions, that's a tort and there's no -- there's no standing here. The same way if you wanted to challenge the Government's decision-making process and whether it's sound or not, there's no jurisdiction for that here as well.

Instead -- moreover, the Court should look at the Franklin Savings case, which is directly from this Court, where there was a challenge regarding the judgment of federal regulators and whether it sounded in tort. And what the Court said was, in addition, to the extent that Franklin alleges the appointment of the conservator was made in bad faith, those claims were ones sounding in tort, over which this Court has no jurisdiction.

So again, if they want to allege bad faith or bad conduct or cross-dealing or anything else, those are

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tortious and the Court should have no jurisdiction and they should go and they should not be part of a takings claim. And as noted, that's exactly what the Plaintiffs have done.

So in conclusion, Your Honor, the Court should hold that given the allegations of misconduct and other tortious actions, all of Plaintiffs' claims that sound in tort, both the takings and exaction claims and the breach of fiduciary duty claims should be dismissed.

I thank you for your patience, Your Honor.

THE COURT: Thank you.

MR. HUME: Thank you, Judge Sweeney. This is Hamish Hume for the Cacciapalle Plaintiffs. We are going to respond to the arguments on tortious -- sounding in tort and fiduciary duty. We do have some slides. My colleague is setting them up to make sure they show on the screens. We did email them to the Government, the Defendants, this morning at around 8:20.

My colleague, Mr. Thompson, for Fairholme would like two minutes I believe to respond to some of the colloquy between you and Mr. Dintzer, if that's okay.

THE COURT: That's fine.

MR. THOMPSON: Thank you, Your Honor.

Just very quickly, Mr. Dintzer said, "The record shows that the companies needed the money." There

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is no record; there's a complaint. And paragraphs 44 to 48 show the companies did not need the money. The Court pointed out that Fannie and Freddie were never allowed to repay the money and Mr. Dintzer pointed to Citibank and AIG and others. All of them were allowed to repay the money. That's what typically happens in a bailout. The Government provides money and they want to get the money back. And that did not happen here.

We were told that, well, gee, the shareholders could have, in 2008, filed a challenge to the conservatorship. Mr. Dintzer said we wouldn't have had standing. He just said that, number one. And, number two, there was no sweep in 2008. We're here, with the exception of the Washington Federal Plaintiffs, talking about the sweep. That obviously happened in 2012, way outside the 30-day window.

He said that no shareholders ponied up the money to save the companies. None of the shareholders were offered 10 percent perpetual return and 79.9 percent of the equity. That's a deal I'm sure they would have taken. Then we were told, well, other jurisdictions, other Circuits said that this was fair and equitable. Your Honor, those other Circuits have said they had no jurisdiction. They were not providing fairness opinions as to the inability to repay the money. You won't find a

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word of that in any of those Circuits.

Thank you.

THE COURT: Thank you.

MR. HUME: Your Honor, would you like (inaudible). I mean, we're having a slight technical difficulty to get the slides on the screen. Is there something that can be adjusted --

MR. DINTZER: Your Honor, I was going to -- I totally don't mean to interrupt, but --

THE COURT: Would you like to respond to Mr. Thompson?

MR. DINTZER: Oh, I absolutely would, Your Honor. I was just going to say that maybe we should take a lunch break now, but I don't want to --

MR. HUME: I can probably complete my argument in about 20 minutes.

THE COURT: Well, that would be acceptable to me.

MR. DINTZER: That is fine, Your Honor.

THE COURT: Okay.

MR. HUME: Twenty minutes minus whatever my colleague (inaudible).

MR. GREEN: Your Honor, Kevin Green for the Washington Federal Plaintiffs. I have just one point very quickly. And that is as to the Slide 4 of the

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Government's presentation identifies one paragraph of the Washington Federal complaint, paragraph 200, and described it as misrepresentation. Certainly, under the most generous reading, the Plaintiffs, on a motion to dismiss, it doesn't remotely allege that or even read neutrally. And I want to echo what my colleague said, that this really sounded a whole lot more like a summary judgment hearing on a record we don't have.

THE COURT: Understood. Thank you.

MR. GREEN: Thank you.

MR. HUME: Thank you, Chief Judge Sweeney. Again, Hamish Hume for the Cacciapalle Class Plaintiffs.

I'm going to address Mr. Dintzer's arguments in reverse order. First, his argument that our takings and illegal exaction claims sound in tort and should be dismissed, and then after that, fiduciary duty.

On the first point, that our claims sound in tort, Mr. Dintzer said -- I think he said, we probably could have pled a takings case, but we messed up and pled a tort case instead. And then he showed some examples of pleadings about collusion, about bad accounting write-downs and other things. Those other allegations are in there, but he knows full well that those are allegations surrounding the central allegation which is of a taking of our shareholder property rights.

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Now, the cases he relies on, I think there's a very simple and clear legal distinction to be made here. In Franklin and Golden Pacific, the Federal Circuit's Golden Pacific, as well as in the Taylor case from Judge Wheeler, which they cited in reply. It was decided between our opposition and reply so we never had the chance to address it. It's so obviously distinguishable. It deals with a person who has a contract to build a wind farm and the FAA says we're not going to give approval and then he says it's a taking, they interfered with my contract. Well, he didn't have a takings claim. And in Golden Pacific and Franklin, they didn't have a takings claim under binding precedent about takeovers of distressed financial institutions. Not the issue here.

So what those cases stand for is this, very simple. If you cannot plead the facts necessary to state a claim for a taking, you are not going to survive by adding in a lot of torts. That's not going to work. That's what those cases say. That's explicitly what Golden Pacific and Franklin say. Because the plaintiffs there had to deal with binding Federal Circuit precedents that say, if you're an undercapitalized thrift, the FSLIC or FDIC gets to take you over, that's not a taking. So they said, well, in our case, we weren't -- it was tortious whether we were undercapitalized. Maybe that

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issue comes up for the Washington Federal Plaintiffs, I don't know, but it's certainly not relevant to the claim against the Third Amendment. What those plaintiffs tried to do was resurrect their takings claim with tortious allegations. That doesn't work. Fine. That's not what we're doing.

What we're doing is alleging a taking and then also there are some atmospheric allegations, maybe more than atmospheric for ill will and tortious conduct. There is no case that says that if you do plead a taking, you're not allowed to have additional allegations about tortious conduct. To the contrary, the Del-Rio case from the Federal Circuit explicitly says that's fine. The fact that there's other kinds of wrongful conduct does not take it out of the takings clause.

And the Del-Rio case also addresses, Your Honor -- I want to revisit something that counsel said earlier -- the fact that there's an APA case, even if it's a correct -- if it's a successful APA case, doesn't take the case out of this Court's jurisdiction. Because Del-Rio in the Federal Circuit said, unauthorized for purposes of the takings clause means you have to be way -- miles outside of your authority. If you're acting anywhere within the scope of what you thought was your authority, it can be a taking even if another court later

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on finds, decides, you know what, you were outside your authority, that was unlawful. It can still be a taking. That's Del-Rio from the Federal Circuit.

Now, back to whether or not we messed up or whether or not we actually managed to plead a taking in this case. I'd like to go to Slide 25, if I could. This is what we pled. And this goes to Mr. Thompson's point, Your Honor, about the difference between 2008 and 2012. We're focused on the Third Amendment, as are most of the Plaintiffs. And this chart, Your Honor, shows the property rights that existed in Treasury's hand and in Plaintiffs' hand before the Third Amendment. Before the Third Amendment, Treasury held a right to 10 percent of its investment on the senior preferred dividends and the right to get more than that by exercising warrants for 79.9 percent of the common.

Everything you've heard from Mr. Dintzer about the Government rescuing these enterprises, which is contested by many of us on the Plaintiffs' side, but if you believe everything he said, even though it's a motion to dismiss where you're supposed to believe everything we say, even if you believe it, it doesn't matter, we still win because this is what they got for their heroic rescue. And this is a lot. This is a lot. 79.9 percent of common stocks of entities worth hundreds and hundreds

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of billions of dollars. And I actually calculated it. Everyone always says a nominal value, a nominal value. I tried to -- it's about $10,000 to exercise those warrants. Okay? That's in the money, let's say. Okay? So that's what they had before the Third Amendment.

But it's important that if they wanted more than 10 percent, they had to do it by exercising the warrants for the common stock. And if they did that, look what happens over here. The Plaintiffs -- you're absolutely right, Judge, it is not a lottery ticket. But by the way, even if it was a lottery ticket, it's a taking if they take the right to win on the lottery ticket. It might not be worth very much, but it's still a taking. I'll come back to that. But it wasn't a lottery ticket. It was a share of actual stock in two major companies.

And here's what we held before the taking. If Treasury -- we had the right to distributions, either dividends or liquidation distributions under certain circumstances. That's a property right. It may be contingent on certain things happening, but it's a property right. And if Treasury wanted to exercise the 79.9 percent, the junior preferred had to be paid their coupon. Before anyone can be paid common, if common is going to get a dividend, the junior preferred get a

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dividend. So if Treasury wanted money on the 79.9, the junior preferred would get paid. And the privately-owned common would also have to be paid pro rata. So that's the state of play before the Third Amendment, before August 17th, 2012.

After the Third Amendment, Treasury, they get everything, 100 percent, no matter how much money these enterprises make. Infinity and beyond, they get it. Private shareholders, zippo, zero. They had something before, that was property, it's gone. That's what we've pled. That's the heart of every complaint before you, with the possible exception of Washington Federal. That's the heart of the complaint. We managed to plead that. All this other stuff about accounting, collusion, tortious conduct, that's there and it deserves to survive, but that's not the heart of the complaint.

And if you'll forgive me or indulge me, Your Honor, I'd like to show a picture of what I just said. Here you have what we've called the capital structure. You have FHFA controlling the enterprise. This is what it looked like before the Third Amendment. The senior preferred gets 10 percent. The junior preferred owns a property right because they have to be paid if the common is paid, whether it's a liquidation or a distribution of a dividend. The private common shareholders, they held a

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property right because they had to be paid pro rata if the government common stock got a dividend. And that government common stock was obviously contemplated as something that would happen. That's why it was put in there.

So what happened with the Third Amendment? The Third Amendment takes those property rights, and guess where it's going, right back into the senior preferred. You know there were some people that didn't want me to show you this slide.

THE COURT: It gives a whole new meaning to like a John Madden presentation.

MR. HUME: That's right, that's right.

So, Your Honor, that's what we pled. We don't think the fact that there are tortious allegations surrounding that has anything to do with this Court's jurisdiction. The Court clearly has jurisdiction over our takings claim. And the same -- the illegal exaction is essentially the same. It's simply saying that's what just happened was illegal. And Mr. Patterson will address that. Those claims can be pled in the alternative. They may also both be valid.

Now, I'll address briefly, Your Honor, the fiduciary duty claim. Now, Mr. Dintzer had characterized us as making four or five different arguments. It's

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really not four or five complicated different arguments. It's one argument for our fiduciary duty claim, based on the United States Supreme Court's interpretation of the Tucker Act. What he somewhat dismissively described as Indian law is not Indian law, it's federal law. It's the United States Supreme Court's interpretation of the Tucker Act.

If we can go to Slide 7, Slide 7 is actually a citation -- a quote from this Court, I think it was Judge Bruggink in the Grady case, but citing to the Supreme Court in the Mitchell case and the Jicarilla Apache Nation case, Plaintiff correctly asserts that this Court has Tucker Act jurisdiction over claims founded on a fiduciary duty the Government owes an individual or a group of citizens.

Now, where does that fiduciary duty come from? And, Your Honor, let me say I've practiced in this Court for many years, including as a former partner of Chuck Cooper's who practices in this Court a lot. I am aware of the fact that you don't see fiduciary duty claims all that often in this Court, and I understand that there may be an instinct to think that it's an unusual claim to bring in this Court. So that's why I'm pointing to these -- this is Supreme Court precedent. You can sue the United States Government for breach of fiduciary duty.

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And this is the standard. If it is plain from the relevant statutes or regulations that the Government has accepted such a responsibility. That was the Grady case. It had nothing to do with Indians. It did dismiss the claim, I will be candid and tell you. That claim was on behalf of all -- of investors in the stock market claiming that SEC's regulation of the stock market -- they had a fiduciary duty to all investors in the stock market. That was a, I think, much more adventurous claim that we're advancing here.

The standard for the statute is, again, it is true that it has come up in the context of Native American tribes, but it has never been limited to that context. The concept is that the statute established, by a trust, because it mandates that certain property -- in these cases, it was timber sales or timber forests -- be based on the best needs -- best interests of a certain population of people and that the property essentially be placed virtually under -- every stage of it, be under federal control.

THE COURT: But in all fairness --

MR. HUME: Yes.

THE COURT: -- a certain population of people --

MR. HUME: Yes.

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THE COURT: -- having come out of more than two decades of the Justice Department, a decade and a half in the Environment Division handling Fifth Amendment takings, I was the apostate of the section, and handling a lot of breach of fiduciary duty cases involving tribes, those cases with the fiduciary duty universally when they have been upheld by the Court of Federal Claims have been Native American claims, whether it's individual Native Americans or tribes, based upon longstanding treaties or statutes, the Bad Man Act, the treaties that we -- the United States Government executed with individual tribes.

And I just don't think that can be overlooked, that those duties -- I mean, when the average American is dealing with the Mineral Management Service, there's not a fiduciary duty that the Mineral Management Service and the BIA has towards the sale of those minerals or the acquisition of those minerals. And it's because of that sacred trust that we have, the -- you know, again, based on both statute and treaties.

MR. HUME: Your Honor, I understand that, but --

THE COURT: Sorry to be the wet blanket, but I just --

MR. HUME: I understand that context. I would

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simply urge the Court to look at the Mitchell case and the Jicarilla Apache case because they don't -- they do reference that special relationship, but they don't limit the concept to that. And the question --

THE COURT: I agree with you. And I have to say in terms of looking at the Mitchell case, I used to bleed the Mitchell case for, you know, two decades. I would dream about the Mitchell case.

MR. HUME: Okay. I don't think I need to urge you to read it then.

THE COURT: There wasn't a day that went by that in one of my pleadings I wasn't citing the Mitchell case. So...

MR. HUME: Fair enough, Your Honor. But the question for the Court, which is an open question under the precedents, is whether the conservatorship created by HERA is analogous to a situation where a statute says an agency of the Government is going to take control -- full control over Native American forest on a reservation and manage it completely for conservation purposes and then if it sells things, it has to give the profits, and if it mismanages, it can be sued for fiduciary duty.

Here, we don't have the long history of the special relationship or the treaty, I'll grant you, but it is analogous. Whether it's analogous enough is up to

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the Court. But I think it is analogous enough because you have a conservator who is given total federal control over a corpus of property and it's given that in a context where being a conservator, according to the 5th Circuit -- and I think whether the -- how the question is answered may depend on whether the Court decides to follow the 5th Circuit en banc view of HERA or the D.C. Circuit Panel's view, subject to Judge Janice Rogers Brown's dissent. She goes over with the 5th Circuit.

According to Judge Brown in the 5th Circuit en banc, HERA created a conservatorship with the traditional concepts of conservatorship imported in subject to the provisions of HERA. And so a conservator traditionally has a fiduciary duty. That word means fiduciary duty. That word means you are going to return to a safe and sound solvent condition, just like your questions to Mr. Dintzer, the unstated premise was that what a conservator is supposed to do. And if that's what a conservator is supposed to do, then it owes a duty to those who have an interest -- a residual interest in the potential equity there that has a fiduciary duty to them, not to do anything inconsistent with HERA, and anything they do that HERA authorizes, I think we would have to concede if HERA authorizes it, can't breach a fiduciary duty that HERA creates.

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But if what they're doing is inconsistent with HERA, as the 5th Circuit and Judge Brown said, then I think it is a fairly short road to take to say it's also a breach of the fiduciary duty that they, as conservator, have to the people with the residual interest in that corpus or property. That's the argument.

I mean, there is also an argument that Treasury, too, has a fiduciary duty because HERA says -- and just very quickly Slide 18 if we could. Sorry, 17. HERA says that when they invest in securities, they should be planning for the orderly resumption of private market funding and they should have in mind the need to maintain the company's status of a private shareholder-owner company.

So on Treasury, too, it's saying be mindful of the fact that these are private shareholder-owned companies and they entered into a contract in which they became 79.9 percent majority stockholders, which at least one court, Judge McConnell in Rhode Island, said suffices to make them a dominant shareholder with a fiduciary duty. So we're not so far out in the wilderness we don't have one federal judge agreeing with us on Treasury. And on HERA, I think the 5th Circuit, if it had been presented to them, would see the analogy to Mitchell and say, yeah, they have a fiduciary duty. It's not the same

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as a Native American tribe. It doesn't have that sense of history, of course. But it is analogous.

Thank you, Your Honor.

THE COURT: Thank you.

MR. DINTZER: Thank you, Your Honor.

If I could ask your clerk to please turn on the ELMO. Would that be possible?

LAW CLERK: (Inaudible).

MR. DINTZER: The document camera.

So let's see, Your Honor, just a few points here. My colleague, Mr. Hume, was suggesting that this is a takings case with some tortious allegations sprinkled through it, sort of like a cocoa on top of a coffee or something, but really the tortious allegations are part of -- they wouldn't have done it if not for a reason, Your Honor -- they're part of their allegations of a taking because the entire theory is tortious interference with rights under contracts. That is the claim that they're bringing. And so this is not the case where -- I never suggested that they mistakenly did this. I think that they intentionally put those terms in for a reason, and that is because they don't -- they can't really describe a takings claim.

If FHFA -- if nobody was doing anything wrong, let's say hypothetically we could agree that everybody

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did -- they acted within their lines, nobody drew outside the lines, everybody acted completely, okay, which we think they did, but they don't, but let's say they did, then we don't believe there could be a taking because FHFA then is responsible. It steps in the shoes. It signs these agreements. Their case relies on these tortious allegations, which is why they put them in there.

So we say -- we would ask the Court to dismiss their takings and exaction claims because they have those in there. And to the extent that anybody has pled -- I don't believe anybody has -- any of the Plaintiffs have pled takings or exaction claims without those tortious allegations, we could look at those, but to the extent that they have those in there, they've relied upon them and they should be dismissed. And so we're not responsible for the way that they've chosen to plead.

Mitchell -- and Your Honor -- I'm going to tell you something Your Honor probably already knows, which is that Mitchell was under not the Tucker Act, as I think I heard my colleague say, but under the Indian Tucker Act. So it is actually a different statute.

And Treasury has -- in response to Mr. Thompson, Treasury has a massive continuing commitment to pay the GSEs to maintain their net worth. So talking

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about them taking -- you know, paying back the Government, it ignores the fact that the Government is still on the hook and so -- just to make that clear.

The -- I would like to take a look at a couple of Mr. Hume's slides on the ELMO. One of them he just showed, which is HERA provided six considerations for Treasury's authority to purchase securities. I think this is great and I'm glad he cited this because what it shows is it shows to protect the taxpayers, okay? And that's -- I mean, it's written into the statute. It's not to protect the shareholders. The taxpayers are the -- because they're the people who are ponying up the money. The shareholders are the people who had it and who needed government assistance or it would have gone bankrupt or it would have -- but, again, we don't need to go there.

Second, let's see, this is Slide 24 that Mr. Hume put up. So what we see here is Treasury's property and Plaintiffs' property, and I'm going to get into this more, Your Honor, but since we have the slide, it seemed a shame to waste it. They say they had a right to distributions. And they simply don't. What they have is they have stock, like I said before. And that stock -- if the GSEs or any entity, you own stock in whatever company, you own stock in General Motors, General

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Electric, you don't have a right to dividends, you don't have a right to anything. You have a share of stock. And if the company chooses to provide dividends, then it may, but there is no property right -- protectable property right under the Fifth Amendment to dividends. Because if you did, you could knock on the door and say, you know, GM, I want my dividends. They don't have that right. Nobody has that right. The entities have the right to decide whether to provide those. So there is no rights to distributions. And so I wanted to address that as that is not one of the property interests they have.

And, finally -- and I like the fist and the hand as much as anybody, Your Honor. Unfortunately, they're combined on mine, so I can't break them out, but there was no fist, there was no hand. This is what the hands look like, okay, as the Government pushed $200 billion onto the table and said we're in. And so the Plaintiffs still have their stock. There was no "give us your stock." And so that was the motion, I didn't see those hands on there.

So with that, Your Honor, I'd like to renew my motion perhaps for lunch.

THE COURT: All right. Thank you for -- is this a good time to take a break?

MR. DINTZER: It would. It would be, Your

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Honor.
THE COURT: Okay.
MR. DINTZER: Thank you so much.
(Court in recess for lunch, 12:39 p.m.)

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AFTERNOON SESSION
(1:35 p.m.)
THE COURT: Good afternoon, everyone. Please be seated. I hope everyone had an enjoyable lunch and we're ready to resume.
MR. DINTZER: I'm sorry, Your Honor. So very, very briefly, we have flagged the 1500 issue. We're not going to make any presentation. We understand that the Circuit has said something that -- we read 1500 a little differently than the Circuit, but we understand that's controlling. We just wanted to put it in our brief as a marker, but we don't have any argument on that.
THE COURT: Understood. Thank you.
MR. DINTZER: So with that, unless the Plaintiffs wish to address it, we're ready to move on to the next issue.
MR. ZUCKERMAN: Just briefly. One minute, Your Honor. Richard Zuckerman for the Arrowood Plaintiffs.
We appreciate the Government's recognition that Tecon is controlling precedent in this Circuit. We'd simply note --
THE COURT: Excuse me. I'm so sorry.
MR. ZUCKERMAN: We'd simply note that this Court, as recently as two weeks ago, in a decision by Judge Hodges in Ute Indian Tribe, followed Tecon as

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controlling precedent in the Circuit. We've sent copies of that to counsel for all parties, and I'll hand it up to the Court if you'd like, Your Honor.
THE COURT: I mean, I will just let you all know, I mean, I have a solid draft that I'm working on, but I had no intention of departing from Circuit precedent.
MR. ZUCKERMAN: Then I'll know when to sit down, Your Honor. Thank you.
THE COURT: Thank you. I mean, you're welcome to -- you won't talk me out of it, but you're welcome to make any kind of record you wish.
MR. ZUCKERMAN: We think the record is fine, Your Honor.
THE COURT: Thank you.
MR. LAUFGRABEN: Good afternoon, Your Honor. May I approach?
THE COURT: Please. Thank you. I think I have more than one. Thank you. I didn't check to be honest. You're just handing up one -- the same thing? Very good.
And have you handed out copies to your opposing counsel?
MR. LAUFGRABEN: I have, Your Honor.
THE COURT: Thank you.
MR. LAUFGRABEN: Your Honor, next we'd like to

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address why Plaintiffs don't have standing to bring these shareholder-derivative suits in the first place.
We have a technical issue. One moment.
(Pause in the proceedings.)
THE COURT: Let's go off the record just for a moment.
(Pause in the proceedings.)
MR. LAUFGRABEN: Your Honor, Plaintiffs lack standing under HERA to bring these shareholder-derivative suits. As we demonstrate in our motion to dismiss, even if the Court determines that it possesses jurisdiction over FHFA as conservator, under HERA's succession clause, Plaintiffs have no standing to bring these complaints in the first place. This is an important argument because if Plaintiffs lack standing, that ruling would dispose of the complaints in their entirety.
Here's the argument in a nutshell. Plaintiffs' complaints in substance are derivative suits, or shareholder-derivative suits. Congress transferred shareholder-derivative suit rights to FHFA as conservator under the succession clause. HERA contains no conflict of interest exception or any other exception to this rule. And, finally, shareholders have already litigated and lost their derivative standing in Perry Capital in the D.C. Circuit, Roberts in the 7th Circuit, and in

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Saxton in the Northern District of Iowa, and they are bound by those rulings. Thus, collateral estoppel precludes the Plaintiffs -- the Shareholder Plaintiffs from relitigating those precise issues here.

Now, with those four key points in mind, I just want to take a minute and emphasize a distinction between direct suits and derivative suits and why it's relevant and important here. Now, the corporation and the shareholder are distinct legal entities with separate legal rights. A shareholder owns equity in a corporation, but it has no control over the day-to-day management and operation of the corporation's business. The corporation's officers and directors handle that.

And because the corporation is a distinct legal entity, as a general rule, only the corporation may sue to redress the injury that it suffered. Now, this is the case even if the injury to the corporation results in some sort of injury to the shareholder like a reduction in stock price, but to that end, to the extent a shareholder suffers an injury that's unique to herself, she may sue in her own name to redress that injury.

Now, a shareholder-derivative suit is a common-law-derived equitable exception to the general rule that only a corporation -- that a corporation must sue in its own name to redress its own injury. Now, in a derivative

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suit, the shareholder sues on behalf of a corporation but only when necessary to protect the corporation's interests from, for instance, the misconduct of faithless directors and managers.

Now, a class of example would be, you know, a case in which the company's directors caused the corporation to purchase, let's say, a parcel of land at an inflated value owned by those directors personally. Although the injury is the overpayment for this asset, and that injury harms the corporation directly, but given the nature of the transaction, the subdealing between the corporation and its directors. You know, the directors aren't going to initiate litigation on a corporation's behalf against themselves, so in such circumstances, the shareholders may have derivative standing to pursue a claim against the directors for, say, a breach of fiduciary duty on behalf of the corporation.

Now, various legal requirements exist to ensure that the corporation in the first instance has the opportunity to consider the claim. Ultimately, these requirements are designed to prevent shareholders from usurping corporate control, interfering with corporation management and abusing this limited right.

Now, as I mentioned before, HERA transferred shareholder-derivative suit rights to FHFA upon its

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appointment as conservator. Now, as Mr. Dintzer noted, Fannie and Freddie are publicly traded private corporations, and before conservatorship, shareholders could and did attempt to bring derivative suits on behalf of Fannie Mae and Freddie Mac, typically against their directors; however, in HERA, Congress provided that should FHFA be appointed as conservator, you know, Congress wanted to ensure that the conservator maintains control over not just the business but also, you know, the business' litigation with as little interference as possible. And given that, you know, the nature of a derivative suit is to interfere with a corporation's right to operate its own business and make litigation decisions, Congress ensured that in conservatorship all such rights would be transferred to FHFA as conservator.

Now, you've seen this before, but here's the relevant language. FHFA shall -- so this is mandatory -- as conservator in this specific instance, by operation of law, so this is automatic, succeed to all rights, titles, powers, and privileges of the regulated entity and of any stockholder. Now, the rationale behind this rule is to simplify things. It places all control over the enterprise's business decisions in a single entity, and by doing so, it eliminates the complications arising from shareholders potentially interfering with FHFA's

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authority as conservator.

Now, Congress included no exceptions and found for any type of claim for any type of shareholder or anything else. This transfer of shareholder rights, and specifically shareholder-derivative rights, is categorical. Now, Your Honor, all Circuit Courts who have addressed this question have agreed that HERA transferred shareholder-derivative suit rights to FHFA as conservator and, therefore, that shareholders have no standing to bring these suits -- these derivative suits -- while the enterprises are in a conservatorship. The D.C. Circuit reached this conclusion in Kellmer vs. Raines, and in the Third Amendment context in Perry Capital, in Roberts and in Saxton, and even in Collins, which Plaintiffs allude to, the Court there noted that these positions have textual support.

Now, we note that placing such limits on derivative suit rights is nothing new. Congress included a similar provision in FIRREA. Congress in a sense has also incorporated restrictions on derivative suits by, say, you know, requiring heightened pleading requirements in the federal rules. In addition, state law, which typically governs corporate governance, you know, shareholder relationships with corporations, also includes various requirements and limitations on

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shareholder-derivative suit rights such as pleading, you know, demand futility or in some cases posting security.

Now, this is very important with respect to the succession clause. Now, Congress' transfer of shareholder-derivative suit rights to FHFA as conservator only impacts shareholder standing to bring derivative suits on a corporation's behalf. Now, although Plaintiffs mischaracterize the succession clause as some sort of wholesale bar on judicial review, it merely restricts shareholder standing to bring a derivative suit. But whatever direct rights, whatever direct injuries that the shareholder claims to have suffered that is unique to the shareholder and independent from the injury to the corporation or to the enterprises, the D.C. Circuit in Perry Capital has already determined that the shareholders retain those direct rights to pursue such claims.

And many shareholders, many of whom are in this Court, are, in fact, pursuing direct claims -- direct contract claims -- against the enterprises and FHFA as conservator in District Court. So the succession clause only impacts the Shareholder Plaintiffs' standing to bring a shareholder-derivative suit.

So given this legal backdrop, to the extent that the Plaintiffs here allege a derivative claim, those

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claims must be dismissed for lack of standing. Now, the Fisher and the Reid Plaintiffs acknowledge that their claims are, in fact, derivative, and the Fairholme and Rafter Plaintiffs have pled some of their claims as derivative and some as direct. Other Plaintiffs don't necessarily specify or just say they're direct, but the substance of the claim controls, not the labels and conclusions that Plaintiffs apply.

And when we look at the substance of the claims, they are direct. And how do we know? Well, Your Honor, we look to two questions: Who suffered the alleged harm, and who would receive the benefit of any recovery. Now, this is the case whether the underlying cause of action is constitutional, statutory, or contractual. These are the two questions and the only two questions that control whether a claim or suit is direct or derivative. And the answers to these questions show that all of Plaintiffs' alleged injuries are derivative.

So who suffered the alleged harm? Well, let's see what the Plaintiffs say. Now, the Fisher and the Reid Plaintiffs acknowledge that these are derivative claims, and they say that the substance of their claim here is that the Government seized the company's net worth for its own purposes without providing just

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compensation. The Owl Creek Plaintiffs allege that they brought direct damages actions, but the harm is the United States seizing for itself all of the earnings of the companies in perpetuity.

Similarly, in the omnibus brief, the Plaintiffs allege that the Third Amendment harmed the companies by depriving the companies of their entire net worth in perpetuity. So that's the first question.

And who would receive the benefit of any recovery? Well, the Fisher Plaintiffs say that the recovery would flow to the companies as they were the companies to -- as they were the companies required to pay the net-worth sweep to the Government, but also the Fairholme Plaintiffs asked that the Court, you know, in their -- as part of their prayer for relief that the Court award Fannie and Freddie just compensation under the 5th Amendment, and the Rafter Plaintiffs also asked the Court to award Fannie Mae just compensation.

Now, the remaining Plaintiffs either don't address the point or just say that the recovery should go to them, but because any money that was paid to the Government came from the enterprises, the question of who should any recovery go to would be necessarily the enterprises. And taking the allegations in the complaint further demonstrates that the complaints are shareholder-

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derivative suits.

Okay, now, however they characterize the Third Amendment, as a depletion of corporate capital, a waste of corporate assets, self-dealing, overpayment of dividends, lack of good faith business judgment, or loss of shareholder value, including the Washington Federal Plaintiffs who make that claim in connection with the placement of the enterprises in conservatorship. These are all injuries to Fannie Mae and Freddy Mac.

Now, the Plaintiffs do not and cannot allege any injury that is unique to them that is separate from an injury to the enterprises. So, I mean, we can tell if a claim is direct or derivative because, you know, would we be here without the Third Amendment? No. I mean, the Plaintiffs wouldn't have any alleged -- there'd be no damages to the Plaintiffs, other -- you know, I mean, we are here because of the Third Amendment or from the placement of the GSEs into conservatorship. And the Third Amendment was an agreement between the enterprises and Treasury, and the enterprises pay money to Treasury, and even the placement of the enterprises in conservatorship -- whereas the placement of the enterprises in conservatorship.

And, I mean, the Fisher and Reid Plaintiffs got it right when they argue that the shareholders asserting

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claims relating to the Third Amendment largely assert the same theory that the Government effectively nationalized the company by taking for the Government's use all of the company's net worth in perpetuity. And even in Plaintiffs' opening remarks, Counsel said that the recent letter agreement actually shows two harms. The retention of the capital, you know, still reflects the injury to the companies and that the shareholders still lose their economic value because of the liquidation preference increase.

But they are two sides of the same coin. The retention -- you know, the retention of the capital still increases the liquidation preference, which is -- would necessarily be the direct injury to the corporation and a derivative harm to the Plaintiffs.

Now, the Court also asked whether the analysis of whether Plaintiffs' claims are direct or derivative would change if they could not assert derivative claims because those claims would involve the United States suing itself to the extent the Court were to deem the enterprises government instrumentalities. Now, as an initial matter as Ms. Hosford explained, or as she demonstrated, Fannie and Freddie are not government instrumentalities. But even if they were, the analysis would be the same. The outcome would be a little

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different.

Theoretically, Plaintiffs would have direct contract claims against Fannie and Freddie as government instrumentalities. I mean, there wouldn't be constitutional claims or rights with respect to the government instrumentalities would be governed by contract. So we would argue that they would have direct claims against them as government actors.

And putting aside the general proposition that a litigant cannot sue himself, even if they are enterprises, as government instrumentalities, you know, had a separate contractual relationship with Treasury, Plaintiffs would then -- would be -- would still be derivative and they wouldn't be able to sue on those claims because they would have been transferred to FHFA as those instrumentalities conservator. So the analysis would be the same.

And in responding to this question, the Court asked us to address the Supreme Court's decision in Kamen vs. Kemper Financial Services. In Kamen, the Supreme Court held that federal courts should presumptively apply state law principles unless doing so would conflict with a separate federal policy. That presumption is especially strong in matters such as corporate governance, which are typically governed by state law.

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And, indeed, in Kamen, the Supreme Court applied state law principles to consider whether Plaintiffs had derivative standing, which is essentially the same issue that we're dealing with right here.

Now, here's why applying that, you know, state law test, you know, who suffered the alleged injury and who would receive the benefit of any recovery would frustrate no federal policy. Accordingly, it places no obstacle on Plaintiffs' ability to pursue any claim for their own direct injuries. Now, if Plaintiffs are directly injured parties and the recovery would go to them, then the state law test shows that those claims are direct and they may pursue them on their own. And that's the case whether they're statutory, constitutional, or otherwise. As we demonstrate in our motion, it's the substance of the -- of the injury that controls, not the label that Plaintiffs apply to their claim.

The problem for the Plaintiffs here, though, is that the enterprises suffered the alleged harm, and the recovery should go to the enterprises. So the state law test doesn't frustrate any policy; it just shows that Plaintiffs' claims are derivative.

Second, in Kamen vs. Kemper Financial Services, the Supreme Court explained that state law is presumptively incorporated into federal law, again,

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typically in -- especially in matters typically governed by state law such as corporate governance. Fannie has long chosen Delaware, and Freddie Virginia, to govern their internal governance, and those states' direct and derivative tests are essentially the same. So it's certainly consistent with shareholder expectations that the two-part test -- state law test would govern whether their shareholder claims are direct or derivative.

And, finally, Your Honor, we have some guidance from the Fed Circuit. In Starr, AIG shareholders brought constitutional claims against the United States on their own behalf and on behalf of AIG. And the Fed Circuit explained that under Kamen vs. Kemper Financial Services that courts should apply state law to -- you know, the courts should apply state law to determine whether Plaintiffs' claims are direct or derivative. So thus whether Fannie Mae and Freddie Mac are government instrumentalities or private companies, the Court would apply the same test to determine whether Plaintiffs' claims are direct or derivative, and that test shows that the claims are derivative.

And just one more point about Kamen. Applying the state law principles would be consistent with Congress' decision to transfer shareholder-derivative suit rights to FHFA as conservator. So the omnibus

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Plaintiffs ask the Court to accept a scenario in which all claims are deemed direct, precisely to circumvent the application of the succession clause. And, indeed, Your Honor, accepting such a scenario would frustrate an actual federal policy, namely the policy in HERA that all shareholder-derivative suit rights would transfer to FHFA by operation of law upon its appointment as conservator.

Next, we wish to address whether HERA contains a conflict of interest exception, and it does not. Now, putting -- you know, having shown that their claims are derivative, Plaintiffs nonetheless say it doesn't matter because if so -- even if they're derivative, they can pursue them anyway because the Federal Circuit recognized in FIRREA some sort of conflict of interest exception in a similar succession clause. Now, in making this argument, they rely exclusively on First Hartford Pension Fund and Trust vs. United States, but this case looks nothing like First Hartford, and it has no application to the facts alleged here.

Now, in First Hartford, the Government, through FDIC Corporate, which is the Government, contracted with a bank. The contract permitted the bank to treat regular -- to treat goodwill as an asset, which would allow the bank to meet regulatory capital requirements with less capital than necessary. About five years later, Congress

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passed the FDIC Improvement Act, which prohibited the bank from exercising its contractual right to treat goodwill as an asset and the FDIC implemented rules codifying the statutory prohibition. So in other words, FDIC's rule caused the Government to breach the contract.

So as a result, the bank failed. And FDIC was appointed as the bank's receiver. So one of the bank's assets in receivership or before the receivership was its breach of contract claim against FDIC Corporate. So the claim already existed once the bank was placed into receivership. The question is whether the FDIC as receiver would face a conflict of interest in pursuing such a claim against FDIC corporate. And in those little limited circumstances, the Federal Circuit read an implied conflict of interest exception into FIRREA.

But that's the big difference. Here, the Third Amendment claims arise from the operations of the conservatorship itself and conservator decisions. The alleged misconduct was by FHFA as conservator. There's no potential interagency conflict between, say, FHFA as regulator and FHFA as the conservator. The only real conflict here is a conflict between the shareholders and FHFA as conservator about the correct business decisions on behalf of Fannie Mae and Freddie Mac. And if Plaintiffs are correct that a conflict of interest

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exists, any time that they disagree with the conservator decision, then they could render the succession clause meaningless simply by invoking a conflict of interest exception. So First Hartford is inapplicable.

Indeed, in First Hartford, the Fed Circuit said that such standing under this conflict of interest exception could only occur in a very narrow range of circumstances. It neither inferred nor expressed an opinion on the standing of derivative Plaintiffs in other circumstances. And the D.C. and 7th Circuits, along with the Northern District of Iowa, which were asked to consider this precise question and consider the reasoning of First Hartford, refused to adopt First Hartford's and related shareholder suits challenging the Third Amendment. Those courts determined that as an initial matter no conflict of interest actually existed, and even if it did, Congress left no room in the succession clause to carve out an implied conflict of interest exception, and the reasoning of those courts is sound and persuasive.

Next, although we've addressed why the succession clause bars all the complaints and contains no conflict of interest exception, after the Court properly determines that all of Plaintiffs' complaints are shareholder-derivative suits, the Court need not even

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resolve the impact of the succession clause because all enterprise shareholders are bound by higher rulings under principles of issue preclusion. Remember, we're not starting with a blank slate. Now, having litigated and lost their statutory standing to bring derivative suits in multiple litigations, and also the issue is whether or not HERA contains a conflict of interest exception, the shareholders cannot relitigate those precise issues here.

Now, all elements for issue preclusion are satisfied, the shareholders are fully represented; the issues were identical; they were actually litigated; and they are necessary to the decisions. And none appears to dispute that collateral estoppel applies to shareholders in derivative actions because the corporation is the real party in interest, and the actual four-part test for issue preclusion demonstrates that the shareholders are precluded from relitigating this precise issue.

Now, the only point that some Plaintiffs seem to quibble with is whether the issues are identical. And let us show you why they are. HERA -- and, here, the shareholders argue that HERA does not explicitly bar derivative suits and, for instance, in Perry Capital, the D.C. Circuit stated that the succession clause transfers to the FHFA, without exception, the right to bring derivative suits.

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On the conflict of interest point, the Plaintiffs argue that HERA's succession clause does not preclude a derivative suit where a manifest conflict of interest exists. Shareholders who advanced the same theory in Perry Capital as to why they had standing were denied their standing on that same point because the D.C. Circuit held that the succession clause does not permit shareholders to bring derivative suits, even if a conflict of interest exception existed.

Now, although, Your Honor, those Plaintiffs allege that state law rules that distinguish direct and derivative claims would -- you know, should be eschewed because there's some sort of frustration of federal policy, they also align some state law principles to inject some other sorts of exceptions into the succession clause. So putting the conflict aside, none of the other theories that Plaintiffs argue support their right to pursue derivative claims or to pursue them directly.

So, first, they argue that they have a dual nature claim. Now, under Delaware Supreme Court law, a dual nature claim only exists in two circumstances or -- sorry, in one circumstance with two requirements. The corporation has to issue excessive shares of its stock in exchange for the assets of a controlling shareholder that have lesser value, and the issuance of those excessive

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shares dilutes the voting power of the minority shareholders. So it's a very specific, narrow scenario, and Plaintiffs lose on both points.

So putting aside that Treasury is not a controlling shareholder, the Third Amendment involved no issuance of new shares, and minority shareholder voting power was the same as it was before and after the Third Amendment. So the dual nature theory has no application here.

The Plaintiffs also allege a targeting theory, that they have standing because somehow the Third Amendment targeted them. And the same theory was litigated and rejected in Starr by the AIG shareholders. There's no basis to believe the outcome will be different here. The point, Your Honor, is that standing turns on the Plaintiffs' injury, not the Defendant's motive.

Plaintiffs also allege that they might have third-party -- or they do have third-party standing under this theory that they have a close relationship with Fannie Mae and Freddie Mac. Now, the Supreme Court has recognized the possibility of third-party standing in some very narrow circumstances like maybe an attorney-client relationship, but investors in common or a junior preferred stock don't have a close relationship with a publicly traded corporation.

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Also, the idea that a shareholder is -- that shareholders have a close relationship with Fannie and Freddie is inconsistent with Congress' intent that FHFA will assert all of Fannie Mae and Freddie Mac's rights. So Plaintiffs cannot invoke a third-party standing to bring their derivative claims as direct.

So to sum up, we just want to reiterate the four points we made before. All of the complaints are, in substance, shareholder-derivative suits. Congress transferred shareholder-derivative suit rights to FHFA on its appointment as conservator. HERA contains no conflict of interest exception or any other exception. And these issues are nothing new. Shareholders have already litigated and lost them.

And properly treating Plaintiffs' claims as derivative and barred by the succession clause would dispose of all the complaints. The Court need not address any of the other issues. You know, so long as Plaintiffs do not have standing to bring these suits, that would resolve these cases in their entirety.

If the Court has any questions, thank you.

THE COURT: Thank you very much.

MR. HUME: Your Honor, Chief Judge Sweeney, this is Hamish Hume again for Cacciapalle class Plaintiffs. I will be addressing part of what Mr.

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Laufgraben argued and Mr. Vallely and maybe others will be addressing part. I'm going to be addressing whether the claims that are pled as direct are, in fact and in substance, direct. And Mr. Vallely will be addressing whether the derivative claims can proceed despite the succession clause and whether there's conflict of interest exception under First Hartford and issues related to that.

Now, to be -- I want to make sure one thing Mr. Laufgraben said that we all agree on is that the succession clause does not -- no one is arguing that the succession clause in HERA bars direct shareholder claims. So we're agreed that if we have direct claims, they're not barred. And we do have direct claims. And I'll come back later to our derivative claims as well, but right now I want to focus on the claims that we've pled as direct, are, in fact, direct. And we also agree the Court should look to the actual substance of what's going on. That's what DOJ says in their brief and that they said today. Look to the actual substance of what's going on. And if you do, I think you'll see that we have direct claims.

Mr. Laufgraben said, would we even be here without the Third Amendment, which he meant rhetorically to show that our claims are derivative. I think actually

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we would -- most of us would not be here if it were not for the Third Amendment. But that doesn't show at all that our claims are derivative.

I do like his idea, however, of asking a hypothetical question because I think, Your Honor, a simple hypothetical will clarify this direct/derivative question absolutely for you. Imagine a Third Amendment that is the same as the actual one in one respect and different in another. It is the same as the actual Third Amendment in that it says 100 percent of any distributions that are ever made from these enterprises in any form -- liquidation, distribution, redemption, whatever -- must only go forever and always to the Treasury. That's what it actually says, in my hypothetical, it still says that. So no matter what, the shareholders get nothing. Okay?

The thing that's different in the hypothetical, imagine that the Third Amendment, however, does not require that that 100 percent get swept out every quarter, but instead allows the enterprises to build capital, to build their businesses, to get back on their feet, to flourish and thieve. But whenever they want to get rid of -- distribute any money, 100 percent has to go to Treasury.

So the enterprises arguably are not harmed by

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this hypothetical Third Amendment. They're allowed to flourish. They are allowed to build capital. But the first part of the Third Amendment is the same as the current one. No matter what, the private shareholders get nothing. All profits that are ever distributed -- if there is ever to be a distribution -- must go to Treasury. That hypothetical Third Amendment, Your Honor, there can be no question that the shareholders would have claims, and they would have to be direct because there's no injury to the enterprises.

And that should clarify the whole issue for you because it cannot logically be the case that when you go from the hypothetical Third Amendment to something that's even worse because it hurts the enterprises that that robs us of our direct claim. It doesn't. It's just as bad for the shareholders as the hypothetical. In fact, it's worse for the shareholders.

So our direct claim still exists, just like it would with the hypothetical. The only difference is now the enterprises also have derivative claims. So we have both. There is no question that we are directly injured. If we could just go to Slide -- back to -- well, first to Slide 24, which shows what I just said. Do we have -- we just need help turning on our slides.

So Slide 24, Your Honor, shows what I just

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said. Hypothetical Third Amendment, the same in that all distributions must only go to Treasury; different in that it allows the enterprises to build capital, return to safe and sound operations, and thrive. This would injure the shareholders but would not injure the enterprises, so it would clearly give rise to direct claims only. So our proposition is that logically it cannot be the case that we lose our direct claims because the actual Third Amendment is worse than the hypothetical.

And that's really it. And it conforms with state law because state law says that when the capital structure of a company is rearranged to help some shareholders but harm other shareholders, that gives rise to direct claims by the injured shareholders. And I would cite the Court to the Deephaven case, particularly the text -- and Footnote 41 and the text accompanying Footnote 41 that's cited on page 23 of our omnibus opposition. That's an example, but there are others in the state law cases that confirm that when you injure one group of shareholders in favor of another group of shareholders that gives rise to a direct claim.

Now, I would like to address the Government's argument that the D.C. -- sorry, the Federal Circuit's decision in the Starr case is somehow inconsistent with our position here. And I was involved in that case to

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some degree. Our firm litigated it. And there's a couple of very, very big differences between that case and this case. And if I may, I'd like to go back to this slide that I showed where we showed the property rights taken in this case.

In this first -- and remember I said this box. This shows what the Treasury got under the original 2008 deal: 10 percent dividends and 79.9 percent of the common stock. We are not challenging this. We -- the class -- the Cacciapalle class, none of the Plaintiffs before you except for the Washington Federal Plaintiffs are challenging this. The AIG case was challenging the equivalent of this deal. It was not a 10 percent deal; it was a -- it was a high-interest-rate loan and 80 percent of the stock -- 79.9 percent of the stock. They were challenging that. And that was held to be derivative because it was held to be a corporate dilution through the issuance of stock.

And it's precisely on page 967 of the Federal Circuit's decision that the Federal Circuit rejects the argument of the AIG shareholders that they had a direct claim by saying -- and there's even a quote of this in the Government's slides from this morning, Slide 49. They rejected the argument that there was a direct claim because there's a material difference between a new

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issuance of equity -- the 79.9 percent -- and a transfer of stock between shareholders. They were saying that an equity issuance, even a very diluted one of 79.9 percent, is different. That's not necessarily a direct claim. But that's not what we're challenging in this case.

And, more importantly, the United States Treasury has repeatedly said throughout the six years of this litigation, in responding to the APA lawsuits, that the net-worth sweep the Third Amendment was not a new security. And so if they want to rely on this Slide 49, Your Honor, I challenge them to stand up here and tell you that the Third Amendment was the issuance of a new security because that's what Slide 49 is saying. If they want to rely on Starr for saying this is a derivative claim, they need to stipulate today that the Third Amendment was the issuance of a new security, and they will lose the APA claim. They can't have it both ways.

So we are different from Starr because we are not challenging that. What we are challenging is the fact that despite that healthy deal they got in 2008, we still had something. We had property. Before lunch, Mr. Dintzer responded to this slide by underlying the first -- three things: right to distributions. He circled it, and he said to you, that's not true, they don't have a right. Shareholders don't have a right to distributions.

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And he ignored the fact that I wrote "under certain circumstances." And I said to you when I first showed this to you, it is a contingent right. Certain things have to happen. But if certain things happen, we have a right to distributions.

And one of those things is if they wanted more than their 10 percent return on the senior preferred stock, they had to get it under the original structure, under the rescue package, what they call a rescue package. They had to exercise their warrants for the 79.9 percent. They could get all that common stock dividends, a huge amount, 80 percent, but if they didn't, the junior preferred would have to get paid and the common would have to get paid, pro rata. Junior preferred would get its coupon any time the common gets a dividend, and the junior -- and the common would get paid pro rata. We owned those rights ourselves, and they were taken, they're gone, and the Treasury has them. That's a direct injury to us. That's a direct taking. That's a direct claim.

Why don't we -- I hesitate to indulge your patience with one more picture, but if we could go to Slide 27, another way of thinking about this that is sometimes argued is was there a duty owed to us, a legal duty. There was. I chose to emphasize the one under the

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Fifth Amendment of the Constitution, do not take our property without just compensation, but you could substitute in there, do not breach your fiduciary duty to us, I argued this morning, if you accept that. Do not take our property illegally -- the illegal exaction claim. They -- those two government agencies had that legal duty to our clients, and our clients owned property.

Again, I'm sorry to be a broken record, but there were property rights held by the common shareholders -- a right to be paid pro rata with the Government if it got paid on its common stock. And the junior preferred shareholders have the right to be paid their coupon if the Government got paid on its common stock, meaning if it got paid anything more than the 10 percent.

So there was a legal duty not to take those property rights without compensation, and please forgive me, but here we go ahead, that was breached, and there they go, into the Treasury. Into the Treasury.

So, Your Honor, I think if you just look at it in terms of what we had and what was taken from us, it's clear we had a direct claim. I think there is no Delaware case quite like this because nothing like this could ever possibly happen under Delaware law. If you

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even just try to imagine that, imagine a company in distress, a huge hedge fund comes in, cuts a deal for 10 percent preferred stock and 79.9 percent warrant. It leaves the junior preferred and rest of the common there, and then four years later changes the deal. It could never, ever happen.

I hesitate to say that they would call the police before they even bothered suing in court. It just wouldn't happen. So some of the Delaware cases will bog you down in different fact patterns, but there's no fact pattern like this that says it's not direct. Any time you reallocate rights among shareholders, you give rise to a direct claim because you take the rights of the shareholders. Even if it were not for that, we would have standing if somehow our claims were deemed to be direct and there were no other way for us to vindicate our rights.

Under the Kamen precedent, it would be frustrating the federal policy of honoring our constitutional rights, to not allow us to vindicate our rights in court, and under the third-party standing rules recognized in the Kowalski decision, there is a special relationship between these shareholders and their company, and there would be a hindrance if it's held that there's no other way for us to vindicate our rights. But

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I really don't think you need to get to those exceptions because I think it's crystal clear they are direct claims and the easiest way to see it is to consider that hypothetical.

Thank you, Your Honor.

THE COURT: Thank you.

MR. VALLELY: If we could just switch to the ELMO. I may not use it, but fortunately I'm pleased to tell you I have no presentations to add to your pile, so I'll -- which hopefully I'll be able to keep this simple enough.

First, just to reintroduce myself again, my name is Patrick Vallely. I represent the Plaintiffs in the Fisher and Reid actions. And as I explained -- previewed a bit earlier, we're in a unique position among the various Plaintiffs here in that we've always and exclusively asserted derivative claims on behalf of Fannie and Freddie. So on some issues, our position varies a little bit from the other Plaintiffs, and so I'll try to be careful explaining when I'm speaking for Fisher and Reid and when I'm speaking for all the Plaintiffs with derivative claims.

I'm going to deal with the issues in a little bit different order than the Government. I'm going to deal first with the issue with which the other

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Plaintiffs' attorney just addressed on the question of whether the claims asserted in this Court are direct or derivative. And, again, this is one point on which only as to the Fisher and Reid Plaintiffs we agree with the Government that the claims for takings, illegal exactions, and breach of fiduciary duty are derivative claims.

And in thinking about this issue, and I don't want to kind of repeat and pile on because I think the Government adequately addressed a lot of the relevant criteria and what the relevant case law in terms of determining whether claims are derivative or direct, but I did want to make a couple of observations.

First, I mentioned a case earlier that I think is instructive, and I think all the parties have agreed that in determining whether a particular claim is direct or derivative, you have to look at the nature of the claim. And it often arises where a particular wrongful act may give rise to both direct and derivative claims. Imagine kind of a garden variety accounting fraud within a company. There may be direct shareholder claims that arise from that wrongful conduct in the form of a securities fraud action that plainly belongs to the shareholder. There may be derivative actions for breach of fiduciary duty that arise from that same conduct. But

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-- so whether a claim is direct or derivative is a claim-specific question.

And on the -- particularly on the Fifth Amendment takings claim, I think the Supreme Court's decision in the Kimball Laundry case is instructive. That case -- we discuss it in the brief a bit for the merits on the takings claim, and it doesn't explicitly discuss the direct versus derivative issue, but the case does include important characterizations of what exactly is taken when a government essentially takes control of a corporation for the government's own use. And the facts of that case were a little bit different.

The case involved an action by the Government during World War II where it essentially took control of a laundry company in order to assist the Army with the war efforts. And in describing what exactly was the injury in that case, the Supreme Court used a number of terms that I think are instructive. The Supreme Court used the phrase "net income" to describe what was taken -- the net income from the time when the Government controlled the company. The Supreme Court also discussed the company's earnings from business operations. And it also used the word "profits."

And I think what these -- what the Supreme Court's recognizing here is a core piece of our

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derivative claim, and that is companies have a property interest in their income and in their earnings and in their profits. And when the Government takes some action, such as taking control of the corporation for its own benefit, and denies the company access to that net income, to those earnings, to those profits, that the company can state a takings claim on behalf of the company for that property interest taken from the company.

And, of course, the mechanics here are a little different. The Government wasn't taking over the company to use its services. It was taking over the companies to use their money. But the outcome is the same. Essentially what was taken was the net income of the company during -- in perpetuity from the time of the Third Amendment onward.

The Government made a number of arguments based on the Starr decision and applicable corporate law. I'm not going to kind of repeat all their arguments here, and I anticipate they may have some response to the other Plaintiffs' arguments, perhaps a brief rebuttal argument, so I'm not going to kind of be redundant here, but let's see, so I guess at this point we'll turn to the issue of the succession clause, which is really the core of the Government's argument.

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The issue the Court's addressing here, and the issue, frankly, as it was framed by -- in the first federal case when the Federal Circuit construed substantively identical terms under FIRREA, the question is does the succession clause abrogate background principles of corporate law on when shareholders can step into the shoes of the corporation when whoever is managing the corporation is unwilling to do so because of a conflict of interest.

And the Government, a number of times in its briefs and again in argument, articulated the point that HERA expressly precludes these types of remedies. And the fact is, looking at the text of the statute, it simply doesn't refer to derivative suits or anything of the kind. And moreover, so then the question is looking at the text of the succession clause, there has to be an interpretation made: Is this clause intended to preclude or abrogate these background principles in corporate law, or is it not?

And on that issue, this Court is not writing on a blank slate. There's been some discussion of -- plenty of discussion in the briefs about the First Hartford case. And, of course, HERA copied the succession clause directly from FIRREA. In their briefs and again in argument, the Government has tried to downplay the

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similarity between these two statutes as simply calling them similar, although strangely enough, earlier in the day when they were arguing about the import of the succession clause with respect to whether the entities are the United States, they called the succession clause as between the two statutes identical then, but then when they get to the preclusive effect, they try to downgrade it and say, well, they're merely similar.

And they made this argument in their brief that the text of the two statutes are similar but different, and the problem is when you look at the text of the statute, sure, there are some specific textual differences. FIRREA refers to the FDIC as conservator and receiver. HERA refers to FHFA. FDIC refers to the -- a defined term, "insured depository institutions," referring to banks that are in conservatorship or receivership, while HERA refers to regulated entities, Fannie and Freddie.

But setting aside those textual changes to merely describe the different actors to which each regulatory scheme applies, the operative language in both statutes is word for word identical, and I'll just point to -- let me see if I put this in the right direction. This is a slide the Government used early this morning to make the point that the statutes are identical. And,

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again, here, this precisely makes my point. Sure, the parties and the relevant actors in each statute are chased out and one refers to the FDIC and the other refers to FHFA. But if you look at the operative terms upon which the Government relies for its arguments, the statute is identical, word for word, to FIRREA.

And that's important because it really does transform First Hartford into binding precedent that dictates the outcome of this Court's decision. There have been a number of decisions that the Government cites that have construed HERA differently than First Hartford, but if you read those decisions, none of those decisions point to any difference in statutory text or any difference in congressional intent in distinguishing them. Essentially, the fairest reading of those cases, I'd submit, is that they simply disagreed with First Hartford. But, respectfully, this Court lacks that discretion because the Federal Circuit is binding upon this Court.

There are a couple other points the Government tries to make to avoid the import of First Hartford. One is the Government points to language in First Hartford that says the decision is limited to the circumstances of that case. And on that language, I think it's important to -- when you read First Hartford, there are really two

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holdings that First Hartford contains. The first holding is a pure question of law and the second holding is a question of fact or perhaps a mixed question of law and fact.

The initial threshold legal issue that First Hartford dealt with was whether FIRREA's succession provision, which, again, operative terms identical to HERA, whether FIRREA's succession provision abrogated background principles of corporate law that permit shareholders to bring derivative suits in the case of a manifest conflict of interest. On that question, that legal ruling was not dependent on any particular facts of the case in First Hartford. It was based essentially on observations about the statute, its purpose, and the lack of any indication of congressional intent to abrogate corporate law.

First Hartford, of course, then goes on to take that principle, the manifest conflict of interest principle, and apply it to the facts of that case. And then at the end of the case the Court makes what's frankly an unremarkable observation that its holding -- that factual holding was limited to the circumstances of that case. That doesn't mean that the conflict of interest exception only exists under the particular facts of that case. That pure legal ruling that that exception

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exists was not constrained to the facts.

The Government also attempts to avoid the import of First Hartford by describing it as an outlier. That's an argument they make really for the first time on their reply, and they point to a trio of cases -- the Lemon, Pareto, and Viera cases. And the implication seemingly in their reply brief is that if you go to read these cases you'll find that they disagree with First Hartford, but the fact is that they don't.

In each of these three cases the Government points to call First Hartford an outlier, none of those cases are direct -- none of those cases under FIRREA address whether shareholders may maintain a suit in the presence of a manifest conflict of interest. None of the plaintiffs in those cases even alleged a conflict of interest or raise that issue, so those courts didn't even reach that issue.

Other courts that did grapple with the same issue in First Hartford agreed with it. We cite the 9th Circuit decision in Delta Savings and a couple of District Court decisions, but it's important to note, First Hartford was a landmark decision. It was a major decision from the Federal Circuit that guided the resolution of dozens of Winstar cases. It just wasn't some kind of unknown decision buried in the F.2d

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somewhere. This was a real -- a substantial decision that Congress was plainly aware of when they passed -- when they enacted HERA. And this is even reflected in the legislative history of HERA, which we cite in Footnote 8 of the omnibus brief.

And it's important because it reflects a -- there's evidence reflecting a congressional intent that the scope of the conservator's power -- powers under HERA would be the same as they were under FIRREA. That involves basic principles of statutory interpretation, that when one statute copies directly from another, especially where it's coupled by a statement of congressional intent so that the same standard is borrowed from one statute to another, that the law is going to be directly applicable from the cite -- from the earlier act to the later act.

Turning to a couple of additional key points, this case really is different than the other cases that the Government cites on the succession clause, where the courts have essentially declined to follow First Hartford in that in those cases upon which the Government relies, the Court did not focus on any constitutional claims. The plaintiffs in those cases did not assert them, and that's important because if the Court adopts the Government's position on the meaning of the succession

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clause, the practical effect of that will be barring judicial remedies for constitutional claims, in particular the takings claims and the legal exaction claims.

And we cited a number of cases in the omnibus brief on this point. One notable one is Webster vs. Doe. That was a case where a statute, fairly read, afforded the director of the CIA essentially unfettered discretion to terminate employees. And the Supreme Court was faced with the issue of, well, if that statute is applied literally to preclude judicial review of those claims, then claims that the plaintiff asserted there for due process and other constitutional violations could not be heard. And the Court essentially indicated -- applied a well-established doctrine that statutes should be construed not to deny parties constitutional claims.

Reich vs. Collins is a similar case. That court involved -- excuse me, that decision involved a case where certain state taxes had been ruled as unconstitutional, and the state agreed to not apply those laws going forward but refused to afford a remedy for the people who had already paid the tax. And the Supreme Court made clear that it's important to have a "clear and certain remedy" for constitutional violations. And although Congress, or a state legislature for that

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matter, can define the procedures pursuant to which a constitutional claim will be heard, what Congress is powerless to do is to simply declare that there will be no judicial remedy for this constitutional violation.

And yet if the Government's position on the succession clause is adopted, that will exactly be the result here. You will have a well-pled takings claim that the company -- excuse me, that the Government has taken from these companies their right to -- their future right to earnings and the perpetuity, but by a mere act of Congress that the company can have no remedy for that constitutional violation. And that's simply a result that the Supreme Court has said is not permissible. You can't overrule the Constitution with a statute.

One other important point to note is that Perry itself recognized this point. Now, there were no constitutional claims asserted in Perry, so the Court didn't have to apply the principle there. And just taking a step back, there were -- Perry, the Appeals Court decisions deal with a broad range of issues. The succession clause is just one of them. There is an additional clause that was argued in that case, and that isn't really at issue in this case, that the parties in these cases are generally referred to as the anti-injunction clause. And without getting into details,

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it's another succession that's -- excuse me, another clause that's in both HERA and FIRREA that the Government has argued precludes judicial review of -- or -- yeah, judicial consideration of certain types of claims.

And there was a debate in Perry within the Court between the majority there and the dissent about whether the majority's interpretation of the anti-injunction clause would preclude remedies for constitutional violations. And the majority in Perry, and this is around -- spans pages 613 to 614 of the F.3d Reporter in the second Perry appeal -- made very clear that as to the anti-injunction clause it would not preclude a constitutional claim. And it was referring to prior decisions of the D.C. Circuit that have reached that result and essentially read that exception into FIRREA.

And that's important because even this Perry decision, which is the decision upon which the Government relies for its issue preclusion argument, which I'll discuss next, even Perry recognized that the outcome might need to be different, the statute would need to be construed differently if constitutional claims were at peril.

Finally, turning to the issue of issue preclusion, it's important to note exactly what the

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Government is arguing here, because really you have at least potentially, and I'll argue perhaps why there's not even a conflict coming up, but you have a conflict potentially between two principles: What are the issue preclusion principles the Government argues; and the other is the concept of precedent that's binding on a court.

The Government hasn't cited a single case in which on a pure question of law the court has invoked issue preclusion to disregard controlling a precedent. They have cited some cases in which -- I think the Bouchard case in particular, which was essentially the resolution of a fact question carried over from one circuit to another when there was a vague argument made by the plaintiffs that maybe the -- although the legal standard was the same, maybe one circuit didn't apply it as vigorously as the other. But there's no authority the Government cites where on a pure question of law a court invokes issue preclusion in a way that would disregard controlling precedent.

And there's substantial authority as to why a court should not apply issue preclusion in this way. There are a couple of basic principles of issue preclusion. For example, issue preclusion does not apply where the controlling law has changed. And that's

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typically applied in the concept in where something -- there's been some subsequent decision that's changed the legal principle, but the underlying policy of that exception to issue preclusion is simply that you shouldn't disregard controlling law.

The underlying policy is essentially the same here. The Court -- although it happens to be a different circuit rather than over a period of time. The Government's essentially arguing that the Court should disregard controlling law, and that's something it should not do.

There's also established authority that issue preclusion should not apply to a pure question of law when there's even the potential that the Circuit Court in which you're in would decide the case differently than the case [sic] that decided it for which preclusion is sought. And, of course, here, our situation goes far beyond that to the mere potential of a different decision. We know that the Federal Circuit has already construed these exact words to not preclude shareholder-derivative suits where there's a manifest conflict of interest.

So, again, although the case law is a little -- a little elusive on the precise question here, certainly the case law on the application of issue preclusion makes

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clear that you don't disregard controlling precedent and that you don't -- I guess that's the short answer. You don't disregard controlling precedent, and you don't even necessarily apply issue preclusion when there is reason to believe that controlling precedent may develop differently on a pure question of law. Both those principles apply equally here.

And, finally, you know, just to reiterate on issue preclusion, the fact that there are constitutional claims here are -- is, again, significant. The only case upon which they rely directly for issue preclusion is Perry. There are other cases that have reached the same holdings, but those cases were dicta, and dicta can't be the basis for issue preclusion.

And as I mentioned a few minutes ago, Perry itself recognizes in discussing a similar clause of HERA that these clauses that purport, if read literally, to preclude review of certain claims cannot be construed to deny and form the constitutional claims. So Perry itself recognized that the issue here was different than the issue in Perry. And Perry itself mentioned that there were no constitutional claims asserted in that case, so it didn't need to address that issue.

And that's also the issue we mentioned in our supplemental briefing on Collins as well where the 5th

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Circuit was faced with a constitutional claim and held that HERA's succession clause could not be read to bar a constitutional claim.

The one final point here, the Government's made an argument in its reply and again today in argument, well, it's okay if we read the succession clause to throw out the Plaintiffs' constitutional claims because they have these other contract claims that they can assert in other courts, and that's good enough. But the fact is there's no reason to believe that those claims would have identical remedies or any -- would provide adequate relief to the harm that's been visited upon the companies.

So the fact that shareholders may have some claims somewhere on some theory does not at all negate the serious problem with construing HERA to deny legitimate constitutional claims to the companies.

And I'm happy to answer any questions if the Court has any. Otherwise, I'll step down for now and -- well, I should mention as well, just -- I should have mentioned this at the outset, just some of the organization of this argument has kind of been shuffled in the last couple of days, and I believe an attorney, Attorney Joseph, will be arguing -- will be responding specifically to the point they made about the Court's

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inquiries about government instrumentalities.

There's a chance I may have a short comment following that, but I anticipate counsel for the other Plaintiffs will handle that issue. But just so you understand where the Plaintiffs are going here, there's different pieces and different parties who are involved, so I apologize if it's been a little bit disjointed.

THE COURT: No, not at all.

MR. VALLELY: Thank you.

THE COURT: Thank you so much.

MR. HUME: Your Honor, this is Mr. Hume. May I have one minute? I'll be reserved in this ability to supplement with less than two minutes.

THE COURT: That's fine.

MR. HUME: One point Mr. Vallely made, and so I apologize, but in addition to First Hartford, which we do think is binding precedent, there were three other courts that interpreted the FIRREA succession provision, the identical provision, as having a conflict of interest exception. They're cited on pages 26 to 27 of our principal opposition, including the 9th Circuit. And in Footnote 8, we make the point that that's especially significant because of the Supreme Court cases that say when Congress enacts a statute that's identical to an earlier statute, it's deemed to understand and adopt the

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judicial interpretations in the interim. And so -- and that's in Footnote 8 of our opposition brief.

There's also -- on the constitutional doubt point, which we brief up on pages 28 to 29 of our brief, I just wanted to emphasize we are going to be arguing later this afternoon that to the extent the succession clause is deemed to prevent derivative claims, that is itself a taking. And so the D.C. Circuit decision, that was a taking of our right to bring that kind of derivative claim and at this Court. So we do think there's a significant issue of constitutional doubt.

It would be unconstitutional to interpret the succession clause as barring these derivative claims, and the Supreme Court in the DeBartolo case, the Catholic Bishops case cited on page 27 of our brief, say that if you have two interpretations, go with the one that's not unconstitutional. Page 29 of our brief.

Thank you very much, Your Honor.

THE COURT: Thank you.

MR. JOSEPH: Your Honor, Gregory Joseph, Joseph Hage Aaronson, Rafter Plaintiffs and all the Plaintiffs in this.

I want to respond briefly to your precise question that if the Court were to determine that the enterprises are government instrumentalities, is a

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derivative suit precluded by the familiar principle that the Government can't sue itself. The answer to that is a firm no, but it's because the answer depends on the facts. The Supreme Court has repeatedly held that when there is a real dispute between real disputants, the fact that the Government is on both sides of the caption is not preclusive.

Here, we have a real dispute between private shareholders that own the shares of Fannie and Freddie and the U.S. Government. We're not saying that the FHFA could sue itself. It clearly has no dispute with anything that it's done. I mean, that would be -- in First Hartford, where the FDIC refused to sue. But in this case -- let me give you some examples.

The United States Supreme Court in U.S. vs. Interstate Commerce Commission ruled that the United States as a shipper could sue the United States Interstate Commerce Commission as regulator because the Government as shipper, even though it had to sue as an additional defendant the United States, had a real dispute and real money would change hands because railroads, if it won its appeal, would have to refund charges to it. The Government as shipper thought it was being overcharged by railroads. The Interstate Commerce Commission ruled no. The defense in the Supreme Court

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was, well, there's no case or controversy; the Government's on both sides; in fact, the same assistant attorney general signed the complaint and the answer.

But the Supreme Court said that's just not the reality here. The reality is that the Government as shipper has a dispute with this adjudicative ruling and wants a court to review it, and there will be a real impact if that happens.

This Court, in the TVA case, allowed TVA to sue the Department of Energy because the ratepayers would benefit from it. In the old Winstar cases, the FDIC on behalf of failed thrifts was allowed to sue the FDIC as the representative of FSLIC because it would be bound to distribute any funds that it received to the shareholders.

So when there is a real dispute between real disputants and real money will change hands, the Government can sue itself. And the cases where they come out the other way, it's because, you know, if the RTC has such a claim that's so large that any amount the FDIC were to win, it would just go back to the Government, you're taking it from the Government to the Government, that's not a dispute. But that isn't what we have here.

Thank you, Your Honor.

MR. LAUFGRABEN: Thank Your Honor. I'd just

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like to respond to a few of the points made by Plaintiffs. As an initial matter, we do not agree that HERA would deny Plaintiffs a remedy for a constitutional violation. Again, to the extent that the injury suffered by the Plaintiffs and the recovery would go to them, HERA's succession clause does not bar them from pursuing a constitutional claim. They just -- it's just Plaintiffs are only barred from pursuing the enterprises' claims, you know, under any cause of action because Congress transferred those claims to FHFA as conservator.

The hypothetical Third Amendment, well, we're not here under a hypothetical Third Amendment. The actual Third Amendment requires the money to be paid from the -- Fannie and Freddie -- to the Government. I mean, that's -- that's the harm. Everything that happens from it, you know, with their rights to liquidation preferences and dividends all stem from the transfer of the dividend payments from Fannie and Freddie to the Government.

And the comment that what the Federal Circuit in Starr -- I believe Counsel said that the issuance of stock rendered the claim derivative, but here, what's the difference? It's the issuance of dividends. So why would the issuance of stock render the claim -- render a suit derivative but the issuance of dividends would

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render it direct?

In addition, no new security was issued. And the comment again about the AIG case, the Starr case, was taken out of context. The actual security here was the PSPA, okay? There are no additional PSPAs. It was the parties just amended the PSPA and changed the structure of the dividend provision.

Now, you heard about First Hartford. As an initial matter, I think it was Mr. Joseph said there's no conflict here because FHFA has no conflict with itself. So the potential conflict that was at issue in First Hartford between FDIC and receiver and FDIC as in its corporate governmental capacity, there's simply no analog in this case.

And sorry if I'm repeating myself, but again, they -- this point that there be -- that interpreting the succession clause to bar shareholder-derivative suits would somehow frustrate all these constitutional policies, first of all, Your Honor asked the Plaintiffs to identify the source of these constitutional policies and I still haven't heard the precise source, but the point is that the actual federal policy that Congress established is in HERA, and that was to transfer the shareholder-derivative suit rights. Okay, again, to the extent that Plaintiffs have a constitutional injury that

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is unique to them that does not derive from any alleged injury to the enterprises, the succession clause does not bar them from pursuing such a right.

Again, finally, with the issue of collateral estoppel, this idea that a pure question of law, collateral estoppel, when applied to a pure question of law, that's inaccurate. Collateral estoppel applies to issues of fact and law. And it doesn't matter whether the controlling precedent is different. The test for collateral estoppel applies, you know, so long as the issues are identical, the parties were sufficiently aligned, but, you know, the rulings were necessary to a final decision, and the issues were actually litigated. I mean, that's the test. And so long as that test is satisfied, then issue preclusion applies.

May I take a moment?

THE COURT: Certainly.

MR. LAUFGRABEN: We have no further comments, Your Honor.

THE COURT: Thank you.

MR. LAUFGRABEN: Thank you.

MR. VALLELY: Your Honor, if I may, before we continue with the next topic just address a couple of points the Government is trying to make.

THE COURT: Certainly.

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MR. VALLELY: I'll be brief. Patrick Vallely again for the Fisher and Reid Plaintiffs. The Government again repeated the argument that it's essentially okay to read the -- excuse me. Can I have a glass of water?

My apologies, Your Honor.

(Pause in the proceedings.)

MR. VALLELY: So the Government argued that, well, it's okay if we read the succession clause in a way that essentially precludes all remedies for the takings in legal exaction claims because -- and then the Government attorney -- I apologize, I forget his name -- used some carefully crafted language here. He said to the extent the shareholder has a direct claim, the succession clause doesn't bar that. But, of course, if you read the first part of his argument, his whole argument was that shareholders do not have a direct claim for takings and legal exactions and all the claims asserted in this Court.

So essentially when you put their two arguments together, it really does amount to a complete deprivation of any remedy for the constitutional claims that the Plaintiffs assert here, which is not constitutionally permissible.

The Government also argued -- kind of pressed the Plaintiffs on what the source was for the policies,

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and again, the Government refers to HERA, but, of course, there's a more important policy here embedded in the Fifth Amendment itself. We cite cases in the omnibus brief making clear that the takings clause in particular is a self-enforcing provision that provides its own remedy. Unlike other certain constitutional provisions for which some remedy may need to be provided by statute, the takings clause itself provides a remedy -- just compensation. And the policies behind that amendment simply cannot be overridden by policies behind statutes.

And the same goes for due process, too. Due process talks about deprivation of property without due process of law. That's the language in the Constitution from the Fifth Amendment upon which legal exaction claims are based. Again, the remedy is provided by the Constitution. The polices underlying the Constitution cannot be negated by a mere statutory policy to not -- to deny constitutional claims.

Thank you.

THE COURT: Thank you.

MR. LAUFGRABEN: We have no further comments.

THE COURT: Very good.

MR. DINTZER: Hello again, Your Honor.

May I approach?

THE COURT: Yes, certainly, of course.

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Thank you.

MR. DINTZER: So, Your Honor, earlier when I talked about breaking the -- when I did the original introduction, I talked about breaking the Plaintiffs shareholders into two groups, those who purchased before and after the conservatorship. Now I'm going to zoom down a little bit more and break those who purchased after into two additional groups, and I'm going to focus on those who purchased shares specifically after the Third Amendment was in place.

The Court should dismiss claims from all Plaintiffs who purchased shares after August 17th, 2012, which is when the Third Amendment was put in place. And, Your Honor, our argument is pretty straightforward. Because they purchased shares subject to the Third Amendment's limits, they can't complain that the Third Amendment affected their property rights. Indeed, if the Third Amendment affected the share value as all the Plaintiffs have alleged, which they say, oh, it made the share value go to zero, if that was the case, then when these speculators bought those shares at the discount, whatever impact from the Third Amendment was there, had already taken place. I mean, it had already been impacted. That's why they got it at a discount.

And so based on their own allegations that the

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Third Amendment has already taken place and already impacted the share value, they couldn't have been harmed. And we haven't had discovery on the Plaintiffs yet, but pleadings show that several purchased after the Third Amendment, for example, the Rafter complaint says that they purchased -- as it's showing on the screen -- in October of 2013, a year after the Third Amendment. So they clearly know what they were getting themselves into.

And the next one is basically the very simple point that you can't buy a blue car and then sue because they gave you a blue car, which is what those Plaintiffs are alleging. Now, the only value the preferred stock -- and, now, the Plaintiffs have alleged that the Third Amendment shares were effectively worthless, and that's citing Cacciapalle. The only value the preferred stock has had since the net-worth sweep is a value that depends on the net-worth sweep being invalidated by the courts or Congress or from a court awarding damages or just compensation for the net-worth sweep. It's the Cacciapalle Plaintiffs.

Taking that allegation at face value, it raises the question, if their shares are worthless with the floating dividend in place, which is what they allege, then why would an investor purchase the shares after the Third Amendment? And the obvious answer is, is they

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hoped that by pursuing litigation they could score a windfall. And the objects are perfectly at odds with the Fourth and Fifth Amendment, where the proper goal is to compensate Plaintiffs whose property was actually taken from them, not reward speculators and encourage litigation. So if these shareholders recover anything, it would be an improper windfall.

Some Plaintiffs have alleged that there's an ongoing taking, that every time the money is moved forward that a taking occurs. Every dividend payment is a separate taking. We don't believe that their allegations properly articulate that type of a taking. We don't believe one can be articulated in this case because everything they say ties back to the Third Amendment but for this point that I'm making right here, it really doesn't matter because even if you have a seriatim version of taking, it all starts at the Third Amendment, and the Third Amendment was in place when these Plaintiffs purchased their shares.

So when these Plaintiffs purchased their shares, they knew that most or all of the profits would be paid to taxpayers for the foreseeable future and they bought their shares anyway. And so they never owned the property that they say was taken. That's the real key. They never owned whatever that property is, however they

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want to describe it, they never owned it. And so it couldn't have been taken from them, and under the Fifth Amendment, that's a disqualifier.

Now, they do cite the Palazzolo vs. Rhode Island case. They cite two cases, but Palazzolo is the primary case. But this doesn't really help them. Now, in that case, the Supreme Court held that there's no blanket rule barring claims from a purchaser with notice about the restriction. And that is true, but two things make the Palazzolo case unique and certainly inapplicable here.

First is that the case dealt with the regulation of real property, and land is treated differently. The second and which is really a unique element, is that Palazzolo -- what you had was you had a corporation that bought the property, and then it was dissolved by the state and the property devolved to its single shareholder. So it wasn't like somebody was buying or selling the property; it simply moved -- changed hands. And what the Court was recognizing is that movement of changing hands was not a blanket bar to the gentleman who ended up with it in his possession to him bringing the takings case.

No case has every proved the use of the -- of the Constitution and the Fifth Amendment the way that the

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Plaintiffs are describing it, where you could go out and you could buy something and then you can sue on a takings case from -- that there could before you bought it.

Next, the Plaintiffs cite the Bailey case, a Court of Federal Claims case, that itself relies on Palazzolo, reaches a similar conclusion. And the most important thing about Bailey is that Judge Wolski expressly said that he's limiting this to real property and, of course, again, Judge Wolski wasn't considering a case like this.

Instead, what the Court should look to is the Maniere case, which is at 31 Fed. Cl. 410, and it's persuasive and we think it really takes care of -- it knocks it out of the park. It expressly addressed a takings claim brought by a stock ownership, somebody who owned stock in a savings and loan and then sued the United States. And what the Court there said was pursuant to a taking claim under the Fifth Amendment, a plaintiff must initially show standing, including proof of personal injury, that is the requisite interest in the property at issue and the deprivation thereby of the United States.

And then it goes on, "Accordingly, to demonstrate the requisite interest in the property at issue, the plaintiff must demonstrate ownership of the

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property at the time of the taking." And the Court dismissed the plaintiffs because they didn't make the showing. And we ask the Court here to do the same because this set of Plaintiffs can't make that showing.

Now, some of the Plaintiffs have asked the Court to punt, and they just say, look, don't address this now, and because the Plaintiffs disagree amongst themselves and they're trying to, I believe, avoid some sort of fratricide. But we ask the Court not to punt because they say that there'll be no harm in punting, but there really will be.

This would affect the takings analysis. Takings analysis is very fact-specific; it's based upon the economic impact, how it affected a Plaintiff, and that the Plaintiffs' expectations when they made the original investment, and these Plaintiffs have a completely different perspective, both on the economic impact, how it affected them, but especially on their expectations because they bought it after the Third Amendment was in place.

And so keeping them in the case would mean additional discovery for the Government if this -- if any of this goes forward. It would mean every brief and every argument, including the takings argument I'm going to make in a little while, has to have its own separate

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section on, well, let's talk about those post-Third-Amendment buyers. And so this would not -- this is not a freebie. This would mean more of the Court's time, more of the Government's time, and even more of the other Plaintiffs' time to resolve whatever else is left if the Court -- now, of course, if the Court dismisses everything, then we don't have to get into this, but on the off chance that we have to go forward with any of this, I would just say that this would raise the stakes for everybody.

So with that, Your Honor, we ask the Court to dismiss the Plaintiffs' case arising from purchases after August 17th, 2012, when the Third Amendment was signed.

Thank you, Your Honor.

THE COURT: Thank you.

MR. ZUCKERMAN: Good afternoon, Your Honor. Richard Zuckerman from Dentons on behalf of the Arrowood Plaintiffs. The Arrowood Plaintiffs, unlike many of the other Plaintiffs here, agree with the Government on this issue, that the takings claims are limited to direct takings claims, they're limited to those shareholders who owned stock as of the net-worth sweep in August 2012.

Let me put that in perspective by describing who the Arrowood Plaintiffs are and what their perspective is on this. The Arrowood Plaintiffs are

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three affiliated insurance companies who over a period of years prior to September 2008 made investments, not lottery tickets, but investments in preferred stock of Fannie and Freddie. They continued to hold that stock through September 2008 when the conservatorship was imposed. They continued to hold that stock through August 2012 when the net-worth sweep took place, and they continued to hold all of that stock when they commenced this action in 2013. They subsequently have sold some of that stock.

Now, the Government does not challenge the standing of the Arrowood Plaintiffs on direct claims because the Arrowood Plaintiffs owned stock as of the date of the net-worth sweep. But the Arrowood Plaintiffs have a clear, direct stake in this issue, and that is because if the after-the-sweep purchasers have standing, then some of the recovery that would otherwise go to shareholders who held stock as of August 2012, as of the date of the net-worth sweep, would not be available to go to them.

If after-the-sweep purchasers do not have standing, which we believe is correct under the law, then those shareholders who held stock as of August 2012, as of the net-worth sweep, can get full compensation for their -- for their losses. The Government is only

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required to pay and is only obliged to pay compensation once. A sale of an interest in property after a taking neither diminishes nor increases the obligation of the Government to pay. The Government's obligation is to pay the owner of the property as of the date of the taking, not somebody who acquired a property interest later on.

The axiomatic principle is stated that only persons with a valid property interest at the time of taking are entitled to compensation. That's quoted from the CRV case, which is discussed in both of the briefs. The most instructive case on this issue, on this specific issue, is, as the Government stated, the Maniere case. In Maniere, the shareholder who brought suit had purchased stock in a federal savings and loan after FIRREA had come into place and after regulations under FIRREA had prohibited the amortization of net worth as a capital investment on the books of the savings and loan.

That was the complaint of the shareholder. The complaint of the shareholder was that I bought this stock and the value of my stock was diminished, there was a taking from me, because before I purchased the stock the solvency of the corporation was affected by this change in accounting standards. The Court held explicitly this shareholder does not have standing. You came on the scenes after the alleged taking took place, you have

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nothing that you complain about.

The cases that are relied upon by the other Plaintiffs, and I will -- should state, Your Honor, that David Thompson of Cooper Kirk will speak after me and will address on behalf of those Plaintiffs who disagree with the Government on this issue, the cases that are relied on by the other Plaintiffs are limited, as the Government said, to the taking of a temporary land use regulation arising in real property cases. There's a fundamental difference between those cases and the case before Your Honor.

One, those cases on their face state that they are limited to applying to taking -- to temporary takings of real property interest. Two, there are two characteristics that those temporary takings of real property interest that are completely different from what is before Your Honor here. First, those takings by their nature either were temporary or could have become temporary. That's the nature of land use regulation. A government may ease the restrictions on land use regulation, may -- may change the restrictions on land use regulation, by its nature, it may be temporary.

Here, the net-worth sweep was permanent. It permanently changed the capital structure of Fannie and Freddie. It took place on a single date, and it had an

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effect on shareholders who owned as of only that date.
The other aspect of the real property cases which makes them completely different from the case before Your Honor and really makes the real property cases sui generis, has to do with when a claim based upon a land use regulation becomes ripe. And that's an issue that's discussed in the cases that are cited in the briefs on which the Government made reference. And a taking claim relating to a land use regulation, relating to a temporary taking of real property only ripens when the regulation at issue has its effect on the real property that is affected. So, for example --
THE COURT: You have to apply for the permit and it has to be turned down.
MR. ZUCKERMAN: Absolutely, Your Honor.
THE COURT: Barlow and Haun. Whitney. There are many.
MR. ZUCKERMAN: Nothing like here. There's no question here that the taking occurred, if it was a taking, and we believe it was, the taking occurred on the date of the net-worth sweep, and there was nothing that any shareholder as of that date had to do to ripen the claim. The claims were -- the taking occurred on Augu
-- in August 2012. The claims were ripe in Augu 2012.
And the claims are those of only shareholde who held

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stock as of that date.
Thank you, Your Honor.
THE COURT: I agree n everything you've said.
MR. ZUCKERMAN: I appreciate it, Your Honor.
THE COURT: Sorry.
Mr. Thompson, you may be able to change my mind, but as I sit here today and since the lawsuits were filed, it's always been my view, and I guess perhaps you'll change it, but that in order to assert a taking claim, the stockholder would have had to own the stock on the date of the taking. If a stockholder invested in the enterprises after the date of taking, they were speculators. Whether they knew it or not, they were speculators, or perhaps someone was trying to buy a lawsuit. I don't know. That's never a good idea. But in any event, that's -- that is my world view.
I'm sorry to -- again, I've been a --
MR. THOMPSON: I remember, Your Honor. We were here many years ago. I think it was under seal actually at the time, and, you know, the Court had indicated that, and so I'll just spend my time talking about the Ferrari.
THE COURT: Okay.
MR. THOMPSON: No, but I actually, with all respect, Your Honor, I am going to change your mind,

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okay?
THE COURT: Okay, here we go.
MR. THOMPSON: And I'm going to change it in two respects, okay? The first one is the threshold question of whether the Court should even address this. And this is a novel -- for reasons when I get to the merits, I'm going to try to show this is a novel and difficult question, number one. And number two, you need not address it now.
The Supreme Court has repeatedly said in the line-item veto case at Footnote 19, that when one plaintiff has standing, the Court need not assess whether another plaintiff has standing. In other words, there's a case or controversy. Even within the Fairholme complaint itself, we have Berkley, who's owned it from 2005 to the present, you know, and we also have Fairholme, who bought it after the sweep. And so there's no doubt, and nobody's suggesting that there aren't Plaintiffs here with standing. Of course, Arrowood itself. So the --
THE COURT: Oh, yes, and I didn't mean to imply or in any way suggest that Arrowood was the only Plaintiff that I believed had standing. Sorry if I gave that --
MR. THOMPSON: No, no, no, not at all.

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THE COURT: -- misimpression.
MR. THOMPSON: No, you didn't. No, Your Honor. But I'm just saying that the Supreme Court's been very clear: Where one Plaintiff has standing, there's an Article III case or controversy in the Court -- in front of the Court, then the Court need not address the standing of other parties. Point one.
Point two is, now, those cases were injunctive relief cases, is what the Government says. But, here, the mere fact that we're asking for damages doesn't change the wisdom of those Supreme Court cases. And the reason is no party before you denies that there will be a different rule of standing if it is a permanent taking versus a temporary taking. In the Court of Claims' binding decision from 1965 in Aorbide (phonetic) vs. United States, there you had a temporary taking, and the entity, the plaintiff that purchased after the taking had started, was allowed to get just compensation. So if you've got a temporary taking, then all the rules that my friends at Arrowood and the DOJ are talking about, they're flipped on their heads.
And, here, there may well be a temporary taking because of the Collins case, which is going to be decided by June of 2020 by the United States Supreme Court in all likelihood, given that the Solicitor General has asked

conversation regarding owning shares before or after "taking"

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for cert to be granted, and we'll know by December 13th about that. Also because of the Bhatti case and the Rock case, all this litigation trying to invalidate and reverse the net-worth sweep.

And, you know, the -- and if those cases prevail, then we'll be dealing with a temporary taking. And Fairholme will be the one with standing. And Arrowood, to the extent they sell their stock, would not have standing anymore. And the Court would be creating thorny due process questions if this litigation continues without the party that ultimately is deemed to have standing.

So if it becomes a temporary taking and the current shareholders have been thrown out and then a year from now the Supreme Court says, actually, the net-worth sweep is invalid, and it becomes a temporary taking, then if it's been litigated without the current shareholders, now we have a big due process problem because we are entitled, and so that's a reason why, Your Honor, respectfully, I would say, the Court just need not get into this yet. At some point obviously --

THE COURT: I agree. I agree with you because I think I had said that I was not going to rule on that issue in this particular --

MR. THOMPSON: Oh.

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THE COURT: -- in this particular briefing.

MR. THOMPSON: Okay.

THE COURT: In this round of briefing.

MR. THOMPSON: Oh, well, that's music to my ears, Your Honor. In addition, I would add --

THE COURT: But I'm telling you right --

MR. THOMPSON: Well, and I'm going to get to that. I'm going to get to that. I'm going to get to that, Your Honor. So, great, let me do that now.

So -- and, yeah, okay. I will just point out that that the thorny issues -- one last point -- on why the issues could be thorny is if the Collins case does not decide and neither does Bhatti or Rock, the Government has said in their Treasury report that what they might do is take the liquidation preference and convert it into common.

And if they do that, that will be massively dilutive to the common, who will continue to have a permanent taking claim, but a complete taking claim, but it might well restore the junior preferreds, and then they would have a temporary taking claim. So it could -- this could play out in a multiplicity of different ways, which will have ramifications for who is entitled to a check at the end of the day in this Court.

Now, in terms of the merits, let me say there

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is no binding precedent that goes their way on this. They talk about the Maniere case. With all respect to Maniere, the issue was not joined. It was assumed by the Plaintiff, so there's not one word of reasoning or explanation in it. And, of course, it's not binding on this Court.

There are cases that talk about broad language, saying that it needs to be someone who owned the property at the time of the taking, but I really think that Judge Wolski did an outstanding job in the Bailey case in terms of synthesizing this entire area and pointing out that there are really two types of takings broadly speaking. One are permanent physical invasions: building a dam, demolishing a home, killing a flock of turkeys, you know, building a road. Those are permanent physical invasions, and as Judge Wolski explained, in those instances, there is not possessory interest to transfer. It's been demolished, and it's appropriate. And we would concede that in those cases, that certainly the rule is, as our friends at Arrowood say, that it's at the time of the taking.

But there's a second type of taking, and those are what Judge Wolski calls "words on paper." Words on paper. And when you have words on paper, they are reversible. And Judge Wolski points out that words --

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takings that flow from words on paper can be reversed and the Government should be given an opportunity to cut its losses. And that's exactly what we're dealing with here. We're dealing with a type of case where it's a word on paper case, we're even seeing it, you know, in the Treasury report itself that they might want to cut their losses, at least with respect to the junior preferreds by taking their liquidation preference, putting it into common, then restoring the junior preferreds to their proper place in the capital structure.

And so to cut -- there's no reason to cut off the Government's ability to do that. They point to CRV, but CRV involved a log boom, and with all respect, I don't believe it was temporary. It was a log boom. It was a physical -- it falls on our side of the line, the line we're asking the Court to draw the line that the Bailey Court draw. It's fully consistent with CRV.

Now, Bailey itself involved land, and we're dealing with stock, but that goes our way for at least four reasons. Number one, Your Honor, stock is supposed to be fungible. I mean, in this country when one goes to buy a share of Coca-Cola, all the shares of Coca-Cola are the same. If one person goes to eTrade and another person goes to Fidelity.com and another one goes to Scott, they all buy the share, it's worth the same thing

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under their rationale, and capital markets require this type of fungibility. That's -- of stock. Stock especially is the point.

The second point is Delaware law and Virginia law, which create this property right, acknowledge the special nature of stock, and they say that, you know, all the rights in the security that the seller had, that they transfer. And that ensures, again, that you have this fungibility in the capital market so people aren't having to worry, well, what share am I buying, or what share -- you know, or is it a different type of share?

The third point, and there's been no answer from Arrowood or the Department of Justice, is the double recovery problem. Judge Lamberth has ruled that the contract claim transfers, and so in his court, where there's a breach of contract claim over this situation, it's the current holders who have standing. And under the rule that they're inviting you and that Arrowood is inviting you to accept, then the current holders will be paid by Judge Lamberth, and the former shareholders will be paid here.

That doesn't make any sense, and nobody's explained to us why it would make sense to have a rule of double recovery. And, again, it shows the special nature of stock. And that's point. You know, they point to all

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these other cases. There's only one case about stock, and that's Maniere, and as I've said, there's not a word of explanation or a contemplation of the difficulty of it.

And, finally, when you -- the rule that they're trying to ask the Court to adopt, not only does it create a risk of double recovery, not only does it destroy the fungibility, which is the hallmark of the capital markets, but it would tie the Government's hands, because if it did want to cut its losses, it wouldn't be able to. Their liability would be fixed, and that creates perverse incentives.

They said that Palazzolo was a real property case. Well, again, that cuts our way because stock is fungible and has these special characteristics. They said that, well, look, when you bought the stock, you knew, you knew that there had been a sweep. And so the impact of the sweep was already reflected in the price, is what they say. The price reflects the market's assessment of the litigation of the takings claim, the breach of contract claim, the Collins claim. So it's simply not true to say that the stock has somehow been divorced from the litigation. That's not right.

In addition --

THE COURT: I don't know. The day after the --

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day after the date of take --

MR. THOMPSON: Yes.

THE COURT: -- when anyone acquired stock, whether they knew or not, they were speculators.

MR. THOMPSON: Well, Your Honor, I would say respectfully -- and this goes back to the Alexander Hamilton point --

THE COURT: And I'm not -- I'm not knocking speculators.

MR. THOMPSON: Well, that's what I'm saying, yeah, but, you know --

THE COURT: A lot of South Florida who own property in South Florida who did very well, and there are other people who lost their shirt.

MR. THOMPSON: One person's speculator is another's investors, but this was exactly the argument that was used at the time of the founding --

THE COURT: Yes.

MR. THOMPSON: -- and it was made with respect to the state debts. And the word "speculator" was used. That was the argument. They're speculators. You know, they knew what they were getting into. And Alexander Hamilton said, there's a more important principle, that's property. We gave our sacred word as a nation that we would honor property rights. And the fact that they

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speculated and they knew that they were going to have to fight the Government to be -- have their property rights honored was not a reason. So I would say, look, the --

THE COURT: I just don't see the situation as analogous.

MR. THOMPSON: Well, they're -- you know, the states had defaulted, and the only way people were going to get the money was you bought this paper where there was a default, and then you were suing, hoping that you would be able to get money from the Government. So I think it's pretty analogous, but the point is, they can't point to a single case where because -- you know, that the speculators, you know, the alleged speculators were not -- were stripped of their Fifth Amendment rights.

Investors, which is the word I would use, investors are entitled to rely on the Fifth Amendment, and they're entitled to come -- and that's why we saw that the stock is trading. They showed, you know, $10 and change. It's because the market has faith. The market has faith that this wrong will be righted.

THE COURT: Or for, you know, whatever they're reading in the newspaper or they think a change in administration, whatever it may be, but after the date of taking, anyone who invested in the stock -- or invested in the enterprise, purchased stock, they did not have the

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same confidence before the PSPAs were -- before the Third Amendment was struck that there would be a return on investment.

MR. THOMPSON: So I would make two points, Your Honor. The first is going back to that temporary taking case, Everhide. The Plaintiff there that was awarded money --

THE COURT: Right.

MR. THOMPSON: -- there, there were bombs being dropped on this farm, and someone -- and for five years. Someone came in and bought the farm, you know, part of the farm, with the bombs falling. He knew, hey, this is a degraded -- you know, there are bombs falling. And the Court nevertheless said you get paid. He knew what he was getting into. You could say he was a speculator. He probably, you know, got that property for a song, but speculator or investor or whatever, he was paid, number one.

Number two is I think it begs the question a little bit, because if you assume that the rule is that it transfers, then you put your mind in what's the mindset of the -- what's the reasonable investment-backed expectation of someone who buys after the sweep. If the claim transfers, then their reasonable-backed expectation is I'm buying a takings claim essentially. You know, I'm

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buying this claim, and the courts will do right by me in the end.

And so I think, you know, it goes back to Judge Lamberth's courtroom, too. I have not heard any answer from my friends at the Department of Justice or my friends at Arrowood as to why it would make any sense to have this decoupling between the breach of contract and the takings and expose double recovery where both sets of people recover. It doesn't -- it's not logical, and certainly -- and they've conceded, by the way, in their briefing that Judge Lamberth was right and that it does -- the contract claim does transfer.

So that's my pitch, Your Honor. And I'll go back to looking at the blue car.

THE COURT: Thank you.

MR. THOMPSON: Thank you.

MR. HUME: Sorry, Your Honor, may I just briefly supplement?

THE COURT: Certainly.

MR. HUME: Again, this is Mr. Hume for the class. One note -- a couple quick notes on the class. First, our class representatives stay in the case either way because they bought before -- even before 2008 and certainly before the net-worth sweep, and they still own today. So they're similarly situated to Arrowood.

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Having said that, unlike Arrowood, we agree with Mr. Thompson. We agree and we argued in the brief that the Plaintiffs with standing are the ones who are the current holders. And I just want to emphasize, I know Mr. Thompson said this, but the central thing about stock being different, it is intangible property, right, for sure; and it's an intangible property right where state law says all the rights associated with it, including the right to enforce claims, travel with it. And that's the way the whole market understands it, and that's the way the market has reacted in this particular situation.

So it is -- it is -- I think the fact that these other cases were real property cuts in our favor. I think it's a closer call with real property. With intangible property, the claim has to go with the stock or else you get into a world that doesn't make any sense. And so I do think the -- just like in a bankruptcy, for example, the instinct of the Court to say they were speculators is in no way inconsistent with what Mr. Thompson and I are arguing. You can say they were speculators; you can say they were buying for what was in the newspaper, political, legal speculation, whatever. It doesn't matter.

Hedge funds and investment companies buy up all

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sorts of financial instruments based on the legal rights associated with those instruments, and that happens in bankruptcy all the time. People will speculate that the credit of a company is going to be worth more than 10 cents on the dollar when they work out the assets in bankruptcy. And they're going to be --

THE COURT: But if they're -- if they're on the losing end of the proposition, it doesn't mean that the Government should reimburse them.

MR. HUME: No. No one -- no one's saying -- the losing end of the proposition, if we lose the case, we lose the case.

THE COURT: Oh, I don't -- okay.

MR. HUME: Okay, that's what I'm saying, is they -- you can buy credit in a bankruptcy and say I have a legal claim that no one's thought of, or I like the legal claim that's being litigated so much that I'll buy it for a premium over what it's selling because I think it's going to go up because I like their legal claims. They're allowed to do that here, too. The fact that the legal claims are constitutional takings claims shouldn't change that. People like the claims we have. They think we're going to win. That's why they bought the stock.

And I don't think it's going to make any sense if the Court says they don't have standing to pursue it

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and that they all bought it on a mistake because normally all those property rights, including the right to sue, including the right to sue a constitutional claim, travel with the intangible property, with the stock.

THE COURT: Thank you.

MR. HUME: Thank you.

MR. BENNETT: Short supplement, also.

THE COURT: Of course.

MR. BENNETT: Bruce Bennett, Jones Day, on behalf of the Owl Creek Plaintiffs. All of our clients are owners before the third sweep. Some of them may have sold some, but they're all -- they were all holders on that date. In my day job, I'm a bankruptcy lawyer. And the rule just stated was actually stated slightly incorrectly, and we'll deal with it more fully when it is the right time, but the reality is is that -- and this is a great rule because it creates lots of litigation. Some claims do travel with a stock certificate, and some claims do not. The easiest example to think about that doesn't move, securities fraud claims don't move the security unless there's a specific separate agreement that deals with it.

So I guess there's a question about whether these claims move with the certificate or don't move with the certificate, but there is no blanket rule that every

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claim moves with the certificate. We look forward to the opportunity to briefing this when Your Honor thinks it's the right time, but as I said before, as far as the Owl Creek Plaintiffs are concerned, the rule you articulated as your understanding is ours as well.

Thank you.

THE COURT: Thank you for your candor. I appreciate it.

MR. DINTZER: So I'm going to go directly to my colleague, Mr. Thompson's, dramatic point about the double recovery because we agree --

THE COURT: I thought it was going to be the Ferrari when you said dramatic.

MR. DINTZER: No, no. We agree with him about double recovery. I think that is a real concern, but that is why there should be no takings cases at all and that the Plaintiffs should pursue, as they are, their claims in the District Court as breach of contract claims. That is where they belong if they belong anywhere and because they have claims, and that's what I started with when I talked about Piszel. They have -- they still have those claims.

THE COURT: But, okay, let's say that I do think there are Fifth Amendment and illegal exaction claims. There's accord and satisfaction that the

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Government can raise. I mean, if there's -- if there's recovery in District Court.

MR. DINTZER: If --

THE COURT: On some other grounds.

MR. DINTZER: The point is is that they have a remedy. The remedy is actually the remedy where they sue the GSE that they had a stock certificate with, a contract with, if they believe that there's been a breach. And I'm not advertising that. I'm not saying that that's -- that they should win, certainly, but my point is is that they have a remedy outside, and his concern, and I appreciate his concern about double recovery, but it is -- it arises because they are pursuing basically parallel claims in parallel courts.

And so the proper way to protect against the double recovery that he is so concerned about is that to terminate the takings cases -- exaction cases in this Court and tell them, let the Plaintiffs continue to pursue their breach of contract cases in the District Court, which is what they are already doing.

THE COURT: And the recovery in Judge Lamberth's case would not come out of the Judgment Fund; it would come out -- I assume that's correct.

MR. DINTZER: If -- my understanding --

THE COURT: Unexpected quiz.

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MR. DINTZER: Yes, I know, pop quiz. A judge and the Judgment Fund, I didn't pick that category. My understanding, which is subject to quick revision by my team, is that it would not, but I don't know --

THE COURT: That it?

MR. DINTZER: That any recovery against the GSEs would not come out of the Judgment Fund.

THE COURT: Would not?

MR. DINTZER: I would have to assume that.

THE COURT: Yes, that was my assuming as well.

MR. DINTZER: I would have to assume that that's the case.

THE COURT: Okay. My assumption as well.

MR. DINTZER: So -- but to the extent that the Court allows both the pre and past owner of a piece of property to parallel sue the United States, that clearly would create a risk of double recovery.

Now, just to walk through some of the points that were made, we had filed a separate motion in 2015, and my understanding was the Court deferred that motion to the motion to dismiss with the understanding that we would get a resolution in the motion to dismiss. So just to -- the Court mentioned the deferral. That's how we understood it.

Standing is the same for temporary taking and

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permanent taking. It's the -- what can be effected, but it shouldn't be. There was some case law about it, but we think that the Court has cleaned this up with statute of limitations, but I believe that that's been cleared up in the Carriage House case. It is the same. Once -- once your piece of property, if the Government comes in and says this is ours, takes it away, then you have a case to bring a taking claim. You have six years to bring it. If you don't bring it in six years, then you've lost your case. If at some point the Government gives you back the property, it doesn't change any of that except for now it truncates it, and so the amount that you would get paid is different.

On the other hand, if the Government decides not to give it back, it's the Government's choice. They could give it back, they could not give it back, but that doesn't affect standing. That would make no sense that all of a sudden we, the Government, could control who has standing by the decision to give it back or not. That wouldn't be fair to the original Plaintiffs. The people who own a property, and I'm just speaking generally of takings, people who own a piece of property, if there is a government taking, they are the plaintiffs at the time who own the property. So this won't -- shouldn't affect who gets to sue.

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What the Plaintiffs are advocating is a permanent market in takings claims. They are saying stocks with an attached takings claim should be traded, the claims should be traded, you know, hedge funds should be able to buy them, you should be able to litigate them on the behalf. That is the furthest thing from the Fifth Amendment, which is trying to look at -- and it would make it impossible to litigate cases where -- where, I mean, under the Penn Central factors, which I will get to, it's very fact-specific.

The investment-backed expectations are one of them that are disqualifying if you didn't have an expectation and you invested, something contrary to the Government taking. It's disqualifying. There's no way, and I will get to this, that they could meet that. So the simple -- Hamilton, I have to talk about Hamilton. Great musical. But it doesn't help his case.

So there's -- there's -- that is debt. Debt can sometimes carry -- I mean, if you have the debt and you're the owner of the debt, there's no debt here. There's -- none of the Plaintiffs are talking about debt. This is all stock shares, of stock that they have with certain rights. The rights of the shareholder are the rights to own the shares, and if something happens to your shares then the right to sue about those shares, not

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the interests that they claim are attached to it.

The fact that the Government -- well, the Court understands the Hamilton point, but there's no Fifth Amendment right with respect to -- there wasn't a Fifth Amendment right with respect to the ability to sue on something that had already happened before you bought your property.

He mentioned the Collins case. This is significant, Your Honor. If the Plaintiffs win in Collins, it means no taking at all, okay, because the theory of Collins is that there was -- that there was a misstep by Fannie and Freddie or, I mean, by FHFA or misconduct or however they want to frame it, but there's no taking. And so if -- if the resolution in Collins is, is that they have a District Court action, not an action here.

Finally, I really don't understand why the Plaintiffs want to punt on this when this is ripe for resolution. Keeping a group of plaintiffs in the case, even if they're embedded with other plaintiffs under a case caption means that if any discovery takes place it will be an increased burden to everybody, to the plaintiffs who are not subject to it, to the Government. It would mean more minding for the Court, it would mean more litigation down the road. And the whole point, we

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hope, over the motion to dismiss is if we can't get rid of all of it, which is our real hope, then to at least clarify which issues we can't get rid of and need further -- be further addressed.

And keeping the Plaintiffs in the case encourages, as they have said a market in people thinking that they will get paid by buying these shares and litigating against the Government, and we do not believe that that's the case, and we do not want to encourage that kind of thing.

So with that, Your Honor, I thank you for your time.

THE COURT: Thank you.

MR. THOMPSON: Your Honor, may I take 30 seconds to --

THE COURT: Please.

MR. THOMPSON; Thank you. I would just say two things, Your Honor. Number one, with respect to Collins, you know, if the Court does invalidate the net-worth sweep, there will have been a seven- to eight-year period where there was no property right. So, respectfully, there would be a temporary taking for the loss of the property during that period of time. And it would be the rental value or, you know, the experts would fight over how to calculate that, but it's not as though there'd be

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no taking, would be point one.
Point two is the idea that, you know, we can't have people investing based on what might happen in the litigation. There was a case called AmBase, which Mr. Hume and I litigated in front of Judge Smith in this Court.
THE COURT: Loren or --
MR. THOMPSON: Yes, Loren.
THE COURT: -- Patricia?
MR. THOMPSON: Yes, yes, Loren Smith.
THE COURT: Okay.
MR. THOMPSON: And AmBase had one asset, the lawsuit. And the stock traded up and down with the rulings, you know, all along the way. So the idea that this is some -- we don't want to encourage that. We don't want to allow that. We don't want people to try to figure out what's going to happen in a lawsuit, happens every day.
THE COURT: No, they can do that all the time. I just -- I have a particular world view in takings analysis with respect to standing.
MR. THOMPSON: Yeah.
THE COURT: And what people do after the date of taking is on them, but I won't necessarily find that they have standing in a Fifth Amendment taking lawsuit.

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MR. THOMPSON: And I would just say, Your Honor, I think stock is different. I agree with your world view, but because of the fungibility, because of the way the capital markets work, it's -- and because rights do travel, like the contract claim, that's what I would respectfully ask the Court just to think about is stock different, and we say it is.
Thank you.
THE COURT: And I'll get you one -- I just -- I think in my ruling what I may do is include standing. I'll just have to -- I'm still mulling. I have a solid draft of a decision, but what I may -- I think logical next steps would very well be for -- because clearly one or all parties will be dissatisfied or disagree with my ruling, and certification of questions to the Federal Circuit, I think, would make good sense because perhaps by that time we will have rulings in other cases, and the Federal Circuit can give guidance in this case, and then I'm not guessing.
The Federal Circuit can take a look at what its sister circuits have done in similar cases, and it may say -- the panel may decide we don't care what other circuits have done because this is a Court of Federal Claims Fifth Amendment takings case or an illegal exaction case. You know, I think it was in the Winstar

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cases, every Circuit Court ruled against the Plaintiffs, but in this Court, Judge Loren A. Smith, who was then the Chief Judge, ruled in favor of the plaintiffs, and he was the one who was ultimately affirmed by the Supreme Court.
So, you know, numbers can give a lowly trial judge comfort, but it doesn't tell the story. It depends upon the claims and what the jurisdiction is of the Court. So I think perhaps after I rule, and I promise to give you a lot to chew on and mull over and meditate on, I think next step should be certifications of questions to the Circuit. I just throw that out.
MR. THOMPSON: Thank you, Your Honor.
THE COURT: Yes, Mr. Hume.
MR. HUME: Thank you, Chief Judge Sweeney. Just very quickly, I wanted to offer two thoughts in response to the Court's observation that those who bought the stock after the net-worth sweep, it's on them in terms of --
THE COURT: And I don't mean they're evil or --
MR. HUME: No, I know you don't.
THE COURT: -- I mean this whole --
MR. HUME: No, no, I know you don't mean that.
THE COURT: -- this country has been built on people with moxie and grit who speculate and they have foresight and they can find a way to legitimately find a

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place in the market where they can take an advantage, as you will, and be highly successful. And godspeed to all those people. So I wasn't --
MR. HUME: No, no, no.
THE COURT: -- I wasn't --
MR. HUME: I didn't interpret it that way --
THE COURT: Okay.
MR. HUME: -- at all. I interpreted it through the lens -- through the lens of the takings clause legal standards because what I heard, maybe incorrectly, had nothing to do with hostility to the people, but was if somebody buys -- and this is normally, I think the issue, when somebody buys property that's already subject, say, to a land use regulation. In the context of a regulatory taking, their reasonable investment-backed expectations are going to collide with what they knew when they bought the property.
And what I wanted to suggest for your considerations -- consideration -- and, again, the class is sort of straddling this issue because our Plaintiffs meet -- our class representatives meet the definition both ways and we've pled the class in a way that covers both, but is this -- the taking -- if it's per se taking, which we think it is, then the whole issue of expectations about the property being taken isn't

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relevant. It's simply a per se taking, and that stock, which really has no rights left to it, they keep saying we still have the stock. We have stock with 100 percent zero right under any circumstances to get anything, no matter how much money these enterprises make. So what is it? It is nothing more than the claims -- the legal claims against that net-worth sweep, and those travel with the stock. And if it's a per se taking, I think it's easier to see that.

However, even if it's a -- even if you decide to test this case through the regulatory takings framework, which we don't think is the correct way, but even if you did, in the District Court, and maybe this will be fought out, but I think it's pretty clear that the legal standard there is a breach of the implied covenant, which also looks at reasonable expectations, and it looks at what a reasonable investor would have expected before the net-worth sweep.

And so I think the standard would still be an objective one of what a reasonable investor would have expected, even if you went the rubric of regulatory takings, but my suggestion was it might be helpful to seeing how the claim would run with the stock if you looked at it as a per se taking, and maybe that legal standard impacts this question potentially.

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So I just wanted to offer that suggestion.

THE COURT: Thank you. I appreciate your insights.

MR. HUME: Thank you.

THE COURT: Thank you.

MR. DINTZER: Your Honor, we don't have anything more on this, but what we'd ask, since I'm up next with the takings portion, if we could have a short break now.

THE COURT: Let me just ask counsel if they anticipate going past 6:00 p.m. And it's -- I'm not trying to hurry you along. It's for security reasons. So we need to alert security if you do, and I would say at 10 of 6:00, all the members of the audience, non-attorneys associated with counsel would have to excuse themselves. Just have to tune into the audio to find out what happened at the end, because I will have to make arrangements for people to be escorted out of the building, and it would be difficult to escort all of you. So --

MR. DINTZER: On paper, Your Honor, it looks like we have almost three hours left.

THE COURT: About another three hours?

MR. DINTZER: On paper. We can all make an effort, I'm sure, to streamline it, but my guess is --

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THE COURT: And you mean not just you, but you think --

MR. DINTZER: No, no, no, both sides.

THE COURT: Okay.

MR. THOMPSON: I was just going to suggest, maybe during the break, we can talk and see if we can, you know, cut the time down to two hours, but --

THE COURT: Okay, and I don't -- I don't want to rush things.

MR. THOMPSON: I understand.

THE COURT: I want the parties to have their day -- well, we'll have many days in court, but I mean, for this initial oral argument. Let me just -- we're going to go off the record just for 10 minutes so we can just...

(Court in recess.)

(4:00 p.m.)

THE COURT: We've contacted security, and we'll just wait to hear back from counsel after the next break to have you let us know how the timing is going. And I don't want to rush anyone, so all the time you need is fine with me.

MR. DINTZER: We appreciate that, Your Honor. Thank you. May I approach?

THE COURT: Oh, please.

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Thank you.

MR. DINTZER: So what we have next, Your Honor, is the takings analysis and our motion to dismiss regarding their takings claim. I just want to check my note here.

So the Court should dismiss the takings claims of the Plaintiffs, Your Honor, because they fail to allege the property interest and the government action necessary to sustain such claims. They also fail to allege the elements necessary to establish takings. And we'll walk through those points, but I'd like to first start with the Federal Circuit decision that completely resolves the direct takings claims.

And that's the decision in the Piszel case, which is a 2016 Federal Circuit decision. The Federal Circuit -- it was based on not only -- not only does it control here, Your Honor, but it was based on the same basic set of facts.

THE COURT: Was that Judge Griggsby?

MR. DINTZER: I'm sorry, what?

THE COURT: Was that originally Judge Griggsby? Oh, that's okay.

MR. DINTZER: I'm getting a nod yes.

THE COURT: Okay, thank you.

MR. DINTZER: So -- and I believe it's an

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affirmance of Judge Griggsby. So Mr. Piszel worked for Freddie Mac, and when it was placed in conservatorship and based on a term in HERA and FHFA regulations, Mr. Piszel lost his contractual employment benefits. So he sued the United States and alleged a taking. And the Federal Circuit held there was no cause of action because he continued to have a contract remedy against Freddie Mac. And that was what I was referring to just a few minutes ago.

What they explained was that the Government's instruction to Freddie Mac did not take anything from Mr. Piszel because even after the Government's action, Mr. Piszel was left with the right to enforce his contract against Freddie Mac in a breach of contract action, and then went on to effect a taking of a contractual right when performance has been prevented, the Government must substantially take away the right to damages in the event of a breach. And that's Judge Dyk who wrote that.

And so he's basically saying, if you can still sue for breach, then you don't have any standing here to sue for takings. Accordingly, the Government did not take -- could not take Mr. Piszel's contract. That holding made further analysis unnecessary. And, here, like Mr. Piszel, the Plaintiffs allege that the Government took contract rights, their shares, their

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contracts with the GSEs by FHFA's exercising its authority under HERA.

So like Piszel, Plaintiffs allege that the Government targeted them and frustrated their contracts. But in the same way that Congress preserved Mr. Piszel's ability to pursue damages against Freddie Mac, Congress has preserved the Plaintiffs' ability to seek contract remedies against the GSEs. And --

THE COURT: Isn't there a big difference, though, between a breach of employment and the ownership of stock and the Government's taking stock?

MR. DINTZER: Well --

THE COURT: Would it be different if, you know, the Government seized someone forest or seized their oil, or -- I should go with something intangible, but in any even --

MR. DINTZER: Their patent rights. Well, the truth is, Your Honor, that the Plaintiffs have not alleged that we took their stock because we -- we've confirmed that they all still own their stock. What they're really saying is, one way or another, we interfered with their contractual rights to what they -- the contracts, which they believe they have the rights to get dividends. And so they're alleging -- they're not -- they're alleging an interference. They're not alleging

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that those shares of stock are ours in the same way that Mr. Piszel wasn't saying, you took my contract. He was saying, you interfered with my contract.

THE COURT: And I don't think -- did I hear you mention patent rights?

MR. DINTZER: Well, I was just saying -- you were looking for an intangible right.

THE COURT: Oh, I was going to say because patent can't be the subject of a Fifth Amendment taking.

MR. DINTZER: No, and I was reaching for an intangible.

THE COURT: Oh, sorry, sorry.

MR. DINTZER: No, no, no.

THE COURT: Well, that's fine.

MR. DINTZER: So actually this case reads directly on Piszel, Your Honor. These are people with stock contracts, with -- against the GSEs, and any -- they have -- if they believe that those stock contracts have not been satisfied by the GSEs, then in theory and practice, it is they're pursuing them in District Court. They have a right to pursue them in District Court against the GSEs.

And so if -- in fact, so as I said earlier, if the takings claims exist, that could provide a concern for double recovery, which is exactly what Mr. Thompson

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was suggesting. So I wanted to address the Piszel case up front, but with that, I'm going to move to our -- you know, to walk through the substantive takings issues and start with the nature of the alleged property interest.

So I described in the opening how -- that the shares in the GSE are their property interest, and takings law describes property, whether real or personal, as coming with a bundle of rights. And to maintain a takings claim, you have to show that whatever sticks you argue were taken were ones that were protected by the Fifth Amendment. And so because -- because they still have their shares, at most they're saying that we took some of their sticks out of their bundle of rights, and so we want -- we say, well, let's take a look at what sticks you're saying have been taken.

And they identify three that seem to come up in all of their complaints. First is the right to exclude the conservatorship or to stop the conservatorship. The second is what they say is a right to the payment of dividends or liquidation preference. And the third is what they say is a right to pursue derivative claims. But, Your Honor, the Plaintiffs never had these sticks in the bundle of rights, and so they couldn't be taken. And I'm going to walk through these in order.

First, the right to exclude the

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conservatorship. Statutes and regulations -- but look -- first of all, we'll look at the statutes and regulations because those create the background principles that inure to property rights and that say, okay, these are the rights that you have and these are the rights that you don't have. And the background principles help us identify what are the sticks in the bundle of rights. So dating from 1992, the GSEs were subject to possible conservatorship. Since 1992, the conservator could succeed to "all rights of the enterprises and shareholders." So that was in the Safety and Soundness Act that preceded HERA.

Similarly, HERA empowered FHFA to appoint a conservator, and as conservator, HERA granted FHFA, as we've discussed, the ability to step into the shoes. So HERA and its predecessor limited the GSEs' shareholder rights. They couldn't exclude the conservator from stepping in and running the GSEs. Those were background statutory principles that inured to whatever -- whoever held stock in these GSEs.

Second, the payment of dividends or liquidation preference. And my colleague, Mr. Hume, was saying, well, that there's a right to those. And they say it because they had an expectation that they would receive dividends or some sort of payment on the GSEs'

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liquidation. Your Honor, those expectations are not cognizable property rights under the takings clause. They are not protected under the takings clause. Corporations' profits belong solely to the corporation. Those profits only pass to shareholders, they only become rights, property, if the board declares a dividend.

And so this is Perry Capital from the D.C. Circuit, and what they said was, "According to the class plaintiffs, the stock certificates thereby guarantee them a right to dividends, discretionary though they may be." We agree with the FHFA's response that the class plaintiffs have no enforceable right to dividends because their certificates accord the companies complete discretion to declare or withhold the dividends.

So the shares didn't include their rights to dividends or their rights to liquidation payment, and that can't be the basis of a takings claim. Now, what the Plaintiffs do is they cite a Supreme Court case, Brown vs. Legal Foundation of Washington to support their claim on the dividends. Now, what this was was this was a Supreme Court case, and it involved the State Supreme Court of Washington that required all attorneys, when they had client funds, to put those funds in interest-bearing accounts, but the interest from those accounts could go to Legal Aid, or would go to Legal Aid.

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And the Supreme Court said, hey, that's a taking. You're taking the interest. But Brown has no application here, Your Honor. In Brown, the interest belonged to the clients because the underlying funds belonged to the clients. It was their money. That's a fundamental difference between the interest in that case and here. The dividends that are only available to the Plaintiffs, if and when the GSEs say we'd like to declare a dividend. Here, the Plaintiffs are merely shareholders, and the GSEs' funds never belong to the Plaintiffs.

So the third claim property right that they assert is the right to pursue derivative claims. Not all of them assert this, but some of them do. Cacciapalle Plaintiffs have identified that, and they specifically claim a right to bring derivative claims and seek injunctions. Your Honor, there's no property rights in derivative claims for three reasons.

First, like all corporate property, shareholders don't own the claims; the GSEs do. They're their claims. What -- a derivative claim is just the right to sue on the GSEs' behalf. So the claims don't belong to them.

The second is that although state law allows derivative claims sometimes, it's based on equitable

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principles when it becomes necessary to protect shareholders. And, of course, you can't have a property right in an equitable principle. So they don't have that right. That's not a stick in their bundle.

Finally, the right to sue itself is not a property interest. Courts have repeatedly held that it can't become a property interest until a final judgment. Once you get a final judgment, then it's a property interest, then it's something that if it's taken it's a stick in the bundle. But until then, the ability to sue -- the opportunity or a lawsuit that's in the making, there are no -- there's no property right in that. And the Federal Circuit -- the Plaintiffs can't point to a single Federal Circuit case that found a taking of an unsecured claim.

So because the Plaintiffs fail to allege protective, cognizable property, the Court should dismiss their takings claims.

Second, even if the Plaintiffs could get past the cognizable property issue, the Plaintiffs fail to articulate government action that is necessary. Now, of course, to have a taking claim, the Government has to do something to take your property. And the Plaintiffs have failed to show or failed to allege that kind of government action.

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In this -- on this point, this Court in Parker vs. United States in 2017 indicated, "To prevail on a takings claim under the Tucker Act, Plaintiff must concede the legitimacy of the government action that affected the taking." So the Plaintiffs here have argued that the Third Amendment is unauthorized by HERA. That would destroy their taking claim. Several Plaintiffs have made the identical arguments and through the D.C. Circuit. Those include Fairholme and Arrowood, and those arguments have failed.

And so the Plaintiffs' position has sort of backed themselves into a corner. If the Plaintiffs allege that FHFA violated HERA, that it broke the rules, specifically that FHFA worked with Treasury in collusion, as they've said, or something like that, then there can't be a taking claim because their action would be -- in creating the Third Amendment would be ultra vires.

Conversely, if FHFA properly executed the Third Amendment in its conservator capacity, then FHFA's actions are not those of the United States; they're those -- they've stepped in the shoes of their -- those of the GSEs. And under those circumstances, there's no claim of taking because the actions were the GSEs' actions and they're private actions, they're not the Government's actions. Either way, the Plaintiffs fail to describe the

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government action necessary for a taking claim.

Finally, Your Honor, the Plaintiffs fail to allege the elements of a taking. So even if the Court finds that the necessary property and the necessary government action, then to look at the allegations of the elements of a taking, the Court should conclude that they failed to allege the necessary elements.

Generally speaking, and I know the Court knows this, the Fifth Amendment can be broken down into physical and regulatory takings. Physical takings require actual confiscation. We don't have that allegation. They still have their shares, so we don't have to -- we can put the physical takings aside and we can take a look at the regulatory analysis.

Regulatory takings can be broken down into the Penn Central balancing test, but this Court has also provided the Lucas shortcut or wipeout if the Plaintiffs can meet very, very specific requirements. Now, Plaintiffs have argued that they're entitled to the Lucas analysis. And the Court should conclude that Lucas vs. South Carolina -- that's the case -- that that doesn't apply for two reasons.

First, it's not applicable to intangible property. No court has ever applied Lucas to intangible property such as contracts. The Federal Circuit has been

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asked, and they have punted or refused to on multiple occasions. The Supreme Court has repeatedly said that for complicated allegations of taking, such as -- this is clearly complicated, and you just have to look around the courtroom and you know it's complicated. The Court's shortcut shouldn't apply. A full-on balancing should take place because the Court should look at all of the elements.

So if nothing else, Plaintiffs' claims are complicated enough and detailed -- and there's enough of a variety, no shortcut should be taken here. Even if Lucas applies to intangible rights, it still can't apply here, Your Honor, because the Plaintiffs still own their stock. And Lucas is not available unless there's a complete, 100 percent wipeout of value. We know that there's not because they can sell their stock. And they can argue about why they can sell their stock, why people would buy the stock, but the reality is, is on the alleged day of the taking, on the alleged day after the taking, on every day since, up until today and tomorrow, they could sell their stock for some value, and that means, quite simply, Lucas is not available.

THE COURT: Even under Penn Central, if you have a substantial, significant diminution in value, let's say you bought stock for $300 a share and you can

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sell it for a penny, that's -- that can be evidence of a taking.

MR. DINTZER: Oh, absolutely. All I'm saying -- absolutely, Your Honor. All I'm saying is, is that if it goes from $300 to a penny, you just can't use Lucas, so then you go to the Penn Central analysis.

THE COURT: Oh, yes, okay.

MR. DINTZER: Okay, so all I'm saying is -- I'm not saying that that forecloses everything. I'm just saying the fact that they can sell it forecloses the Lucas analysis. What they have done in their briefs is that they want to say, okay, we have the share, but we'd really like to tell you about these economic rights we think are -- or this -- these rights that are -- and they want to break the share then into pieces and say these have gone to zero.

But the Court is supposed to, under Murr vs. Wisconsin, under a long line of cases, the Court is supposed to look at the property as a whole, what they have as a whole. That's their shares, and if you ask whoever follows me up here, can you still sell your shares, they'll have to say yes, and that means Lucas is not available to them. And so all I'm saying is, is why Lucas -- and why -- if they're -- that the Court should, at a minimum, dismiss the Lucas claims in any of the

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Plaintiffs' complaints. And I'm going to get to the Penn Central, but what I'm saying now is only focused on the Lucas test.

And, in fact, the Court -- the D.C. District Court in Perry stated regardless of whether Lucas only applies to real property, the Plaintiffs cannot find relief under a total wipeout theory. The Plaintiffs maintain economically beneficial use of their shares since the stock very much remains a tradeable equity. Indeed, GSE shares are traded daily on public, over-the-counter (OTC) exchanges. Basically the same, Your Honor, point I just made. So that takes us out of Lucas, and that portion of their complaint should be dismissed.

And so now we look at Penn Central, the Penn Central balancing test. The Plaintiffs have failed to properly allege Penn Central elements, and that means that those portions of their taking should be dismissed as well, but for different reasons, not for the -- not for the reason that I described in Lucas.

There are three parts to the Penn Central analysis, as the Court was reflecting, on the economic impact part, and that's where I'm going to start because some people have referred to that as the most important, although in reality there are cases where any one of these three -- failure to allege any one of these three

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can be enough to have a case dismissed. So the economic impact, the Plaintiffs have failed to allege economic impact under the A&D Auto decision.

So the first thing I'll have to do here is that I'll divide the before and after Plaintiffs, so this is the first example of why keeping them in the case would create -- because they would face different economic impact. There can be no economic impact for those who purchased after the Third Amendment because it had already taken place and it could not affect -- its existence predates their shares, could not have affected the value of their shares.

So for the other Plaintiffs, they fail to describe the effect on stock price and to fully describe the effect on the stock price. Some of the Plaintiffs -- in general, the Plaintiffs describe their economic benefits and their impact on the economic benefits and the like. Some of the Plaintiffs have alleged that their stock price went down because of the Third Amendment. So that is a necessary but not sufficient allegation.

But what none of them have done is this. What A&D Auto says is this. It says you have to tell us what would have happened had the Government not been involved. What would have happened if the Government hadn't been involved in your -- at all? What would the price have

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been then? Is the only reason that the price was what it was because of the Government involvement?

And what we don't have, and in A&D the plaintiffs were -- the complaints were kicked. They were allowed to re- -- to resubmit new complaints, but their original complaints were dismissed because they hadn't alleged what the world would have looked like without the Government's assistance and whether their property would have had value if the Government had never gotten involved at all.

And the Plaintiffs would have to be able -- they would have to allege that as required -- expressly required -- by A&D. And I don't believe that any of the Plaintiffs have made such allegations. So what we need is an actual world and a comparison to the but-for world without government assistance, showing that their property would have had value without the government assistance.

Also, we need it on a certain date, and the date of the taking is -- the date of the alleged taking is important. As the Court said in Cienega Gardens -- this is the 2007 version -- a comparison could be made between the market value of the property with and without the restrictions on the date that the restriction began, the change-in-value approach. That's what they're

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talking about there.

In Anaheim Gardens, this Court, when a real estate parcel has been permanently affected by regulatory taking, the measure of economic injury is the difference between the fair market value of the property without the restriction imposed by the government action and the fair market value of the property with the restriction imposed by the government action, both measured at the time of the taking. So we go to that time, and we do a comparison to measure the economic impact, and under A&D, we compare the actual and the but-for world. So that's the economic impact, and that's what we believe where the Plaintiffs fall short.

Second, they have to allege a reasonable, investment-backed expectation. And that is what the Fed Circuit says is, look, we need to know why you invested, when you invested, what you thought the return was going to be and why, and whether that was reasonable. It's not enough that you thought it had to be reasonable. So this is another place where the speculators that bought after the Third Amendment, they -- I mean, their expectations should have been that the Third Amendment would be there because it was there.

But even the ones who bought before the Third Amendment would have difficulty meeting this prong and

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they have not, we don't believe, can meet that prong because if your property -- if your business is in a highly regulated area where there's a lot of regulation and government participation, especially if there's the possibility of a conservatorship or receivership, the expectations on going in would be affected by those existing regulations and statutes.

THE COURT: But --

MR. DINTZER: Okay.

THE COURT: -- a reasonable plaintiff or investor, knowing that an infusion of capital was required and the Government was going to provide that infusion of capital and that the company -- in this case the enterprises -- would have the opportunity to repay the loan and then regain its footing and then eventually to be able to pay dividend, that's what one would expect.

One would not expect in the United States of America that the Government would step in with an infusion of capital and not then not allow -- and the dividends were going to flow to the taxpayers to repay the taxpayers, one would not expect that all profits would be directly flowing into the U.S. Treasury and that the company would never be able to repay that which it borrowed, get back on its feet, and resume normal

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operations and pay dividends again.

MR. DINTZER: So --

THE COURT: That's an aberration.

MR. DINTZER: Okay, so the -- somebody who invested in this stock, let's say in early 2000 or in 2008 or late 2007, before any of this happened.

THE COURT: Right.

MR. DINTZER: They would know that this was an entity that was subject to regulation, potentially subject to conservatorship. They would understand that if Fannie and Freddie became insolvent, weren't able to pay their bills, that they might lose everything. I mean, when you buy stock, that's one of the risks. People who buy stock in a [illegible]-your-bankrupt-company, then they lost everything. There is no right and no ability to have an expectation of a government rescue. Nobody's entitled to a government rescue.

So, Your Honor, respectfully, what diverges, when you start with, okay, well, if the Government comes in and saves the company, then dot-dot-dot, they're not entitled to expect that. And if -- and if they had read when HERA was put into place -- and nobody's challenging the existence of HERA -- when HERA was put into place made it clear it could be a conservatorship, it was -- it could be a receivership, and they would get -- the

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entities could get -- the shareholders could get wiped [illegible]. They could have a role in managing these companies Government could have a role in managing these companies for a very long time. There's no end date on it.

THE COURT: But there was no wipeout of the companies. There was -- they were continued -- they continued on. Yes, there were infusions of capital, and, again, instead of being able to pay the loans back, every dime was sent to the U.S. Treasury.

MR. DINTZER: Yeah.

THE COURT: So it's -- that's not -- that's not reasonable for an investor in holdings -- you know, who acquired stock before the market became shaky to anticipate, oh, well, there may be a bailout like Chrysler or some other companies, and -- but what the Government will probably ultimately do is continue to take dividends in perpetuity, that they will allow these -- Fannie and Freddie or the enterprises to be -- remain -- to become solvent and make a profit, but the shareholders with ownership in the enterprises will not see a dividend. It will all go to the U.S. Treasury.

MR. DINTZER: And, respectfully, Your Honor, if --

THE COURT: Has this happened often? Has this --

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MR. DINTZER: Well, if you look at -- if you look at AIG, I mean, they said the exact same thing, that they should -- that, you know, Mr. Hume indicated that his firm had a role in AIG, and I as well had a role in AIG. And they made the similar claim that, wait, we never would have expected this to happen, the Government would come in and why would they, you know, demand X amount of -- but the reality is, is that if you hit that point where the Government is the only place that you can turn -- and the truth is it's not just the Government. I mean, if you're on your last leg and you turn to anybody for funds, then they have the right to demand whatever they want to demand.

THE COURT: I hate to say it, I'm not -- this is going to sound so flip, and I don't mean for it to, but this is like the mob. And it's not, of course, but, I mean, you have all the money is being turned over to the Treasury.

MR. DINTZER: Your Honor, the mob doesn't show up with $200 billion to save you. That's what the Government --

THE COURT: But, you know, what kind of -- how are they saving -- it's almost as though the companies or the enterprises have become shells, and they're able -- and they're supposed to continue on in their work, but

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they will never make a profit because everything's being diverted to Treasury.

MR. DINTZER: Well, I won't say never, Your Honor, because I have no ability to foresee how --

THE COURT: Oh, no, I wouldn't --

MR. DINTZER: -- the conservatorships will end, if they will -- I mean, presumably, at some point they will end. I don't know when or how or whether they'll be -- but the reality is, is that when somebody comes in bearing $200 billion of assistance, they are going to demand to be paid. And that money, that assistance, was brought in with the -- and one of the terms of the original PSPAs was that all dividends to the shareholders would stop. So that --

THE COURT: Well, one and two were fine. It was number three that whisked all the money away.

MR. DINTZER: No, but the original PSPAs called for until Treasury signed off on it, that there would be no more payments, no payments of dividends. And the need of paying the Government, making sure that these entities who have the Government's money are steady, making sure that the conservator's work is done, whenever it is done. So I --

THE COURT: But they've really been steady. I mean, they've been making a profit, and it's been going

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to Treasury and the conservators have not allowed the two enterprises to return to what would be business as usual.

MR. DINTZER: The Government is still on the hook, though, Your Honor, for over $150 billion. I mean, they still have the Government's money. And I know that they would like to say, well, we can offset this and you should have paid this back, but those weren't the terms. Every -- after it's successful, after -- you know, after the kid goes to college, everybody wants to take credit for it. But when he's flunking in middle school, everybody's like, oh, it's not my -- and so, I mean, that's sort of what we have here.

We have them saying, oh, yeah, he's our kid because he's graduated from medical school, but you look back, the only -- the only parent who was willing to step in with the money at the time when they weren't looking so good was the American taxpayer, not the Plaintiffs. And so when they say the American taxpayer is demanding too much, the Government is demanding too much, it's like, no, no, this is the only money that saved these companies. They're not -- they don't save without this.

And so they might think that -- like I said before, AIG and Chrysler both had, in both those cases, the exact same allegation, that the Government kept too much for itself when they should have given more to the

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people, not who saved it, but who were standing around waiting for them to be saved. And the truth is, is nobody has a right -- and this is a fundamental thing -- nobody has a right to be saved by a government bailout. They just don't. They don't have a right to have their ownership be made more -- because there are all those other people and all those other companies who were completely wiped out. And so for --

THE COURT: Well, that I agree with you.

MR. DINTZER: -- and so for them to say, whoa, whoa, whoa, ours are only worth pennies or nickels or dollars or whatever, they still came out ahead of 109,000 companies that went bankrupt in 2008 and 2009. 109,000, all with, you know, everything from cleaners and small -- to large businesses, to people -- to home mortgage companies. So that -- any expectation about when you reach the point where you can't go on without government assistance, once you reach that point, your expectations about what's going to come after, they should be expectations that there's not going to be -- because you can't -- you don't have a right, an expectation of government assistance.

THE COURT: Well, no, I -- I completely agree with you, but money -- the loans were not drawn down, and they could have been drawn down, so it seems -- the kid

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that went off to college, I mean, maybe looked at with a jaundiced eye by at least one or both parents or by the aunts and uncles, but --

MR. DINTZER: That's what I was thinking, Your Honor.

THE COURT: -- the kid has repaid --

MR. DINTZER: Hopefully the parents are in for the long haul.

THE COURT: -- yeah, exactly. Well, no, but the money has been -- has been given to the parents one way or the other. You know, maybe the kid -- this is -- I shouldn't continue with the analogy, but maybe they bought -- the parents paid for their home and gave them all the resources they need as opposed to writing a specific tuition check. Nevertheless, the money has returned to the parents.

MR. DINTZER: But just so we're clear, the money hasn't. Under the terms, and I know they don't like these terms, but under the terms, right now, the Government is being -- the Treasury is being paid for the use of the money, but they don't like the terms, I get that, but these are the terms that exist because Fannie and Freddie needed the Government's assistance and the conservator operating for the GSEs entered into agreements with Treasury, who was willing then -- I mean,

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given -- Treasury didn't have to make the money available.

I mean, we have two separate entities. We have the FHFA stepping into the shoes and saying to the GSEs, well, you got to find some money. And then Treasury is saying, well, okay, we happen to have the money, but we're not going to just hand it out. We've got these other 109,000 companies that would really like it, too. We're going to put some terms in, and some of them are no dividends because this is our money. And we want to make sure that this thing is going to be well run, and we want to have some confidence in the people who are running it. And the FHFA said, well, we're going to be running it at least for a while because we're the conservator.

And so this is a negotiation that took place that created the PSPAs and ultimately they took the -- and I understand that they don't like it, and I understand that if -- that they would like to profit from the assistance that the Government provided, but if we're talking about expectations of somebody who buys a share of stock, that doesn't come with any kind of right to an expectation that the Government is going to save your bacon and then on the other end you get to reap some of the benefits.

So I completely understand what the Court is

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saying. I'm just saying based on the regulatory structure of the HERA and the regulations that preceded it, those expectations, if they had them, would not have been reasonable. And everybody else -- those 109,000 other people, other companies, other businesses, didn't -- weren't allowed to have those expectations because they did not get rescued. And so that was the -- those were the reasonable expectations.

I hope I answered the Court's question.

THE COURT: You did.

MR. DINTZER: So, also, the Plaintiffs should have no reasonable expectations that the PSPAs would remain static. They have a contract provision in the PSPAs that anticipated possible changes. And, of course, FHFA and Treasury have amended it twice before we got to the Third Amendment, and they have no complaints about the First and Second Amendment, which I -- which provided more money to the GSEs.

Finally, Your Honor, we get to the character of the government action, and that favors against taking liability. Typically framed, this is have the Plaintiffs been unfairly forced to bear a burden that should be borne by the Government. And that's from Rose Acre. Fannie Mae and Freddie Mac shareholders benefitted from years of the GSEs' unique relationship with the

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Government. Taxpayers, not shareholders, saved the GSEs by risking billions. So when corporation can't pay their bills as they come due, equity holders generally -- and I believe one of counsel said he's a bankruptcy lawyer -- in most cases, if you can't pay your bills, that's what happens. That didn't happen here because there was a conservatorship and the Government put the money in.

All funds that are being sent to the taxpayers in the form of dividend payments are to compensate for investment and risk. So the character of the Government action is compensation for the biggest rescue investment in the history and the risk it entailed and not the character of a taking.

Now, to this point, Your Honor, I've been discussing the direct takings claims, how Plaintiffs have alleged that they were directly affected. Plaintiffs also assert derivative claims on behalf of the GSEs, as I understand their allegations. These should also be dismissed for failure to state a claim for more or less the same reasons.

Fannie and Freddie face the same background principles and expectations as for shareholders, so they shouldn't have had expectations any differently than their shareholders, but also Fannie Mae and Freddie Mac had contracts with Treasury. And when you have a

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contract with an entity, then you've agreed that your relationship is going to be covered by the contract. Money sent to the Treasury, it's not likely Treasury's sent, you know, police people over to go and take the money. It was pursuant to a contract where the GSEs had an agreement and they sent the money back pursuant to the agreement. Plaintiffs can't maintain a takings claim on behalf of Fannie and Freddie because the relationship should be governed by the contract, and a violation of that relationship could be handled as a breach and not as a taking claim.

So in closing, I'd like to note that -- I'd like to note that the Wash Fed -- Washington Federal Plaintiffs allege taking at the implementation of the conservatorship. So every time we talk about everything, we kind of put an asterisk to say, well, let's talk about Wash Fed. We believe that their claim is untimely, and I'm going to address that down the road, but they also fail to state a takings claim for the same structural reasons as those described here: property interest, lack of government action, and the elements of a taking. Thus, the Court should conclude that all Plaintiffs fail to properly allege taking claims and the Court should dismiss their claims from the complaint.

Thank you.

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THE COURT: Thank you.
MR. BENNET: And if it's okay with the Government, I'd like to keep the slides up and go back over a few, if you don't mind.
MR. DINTZER: Sure. We've given you that --
MR. BENNETT: No, I understand. I can go through the hard copy, too, but it might be good for the audience to see the slides. So once again, I've got a little bit of an organizational challenge, but we'll see if we're up to it. I want to start with a few kind of issues that popped up out of order, and then I want to go through the Government's presentation fairly carefully.
One good place to start, and ripples through the entire presentation, which is why I start with it up front and I'm going to have to emphasize it a couple of times, and they said over and over again that no one had a reasonable expectation of dividends, or nobody had a reasonable expectation that value would flow through the stock after the conservatorship was started. And there's two fundamental reasons why that isn't true at all.
The first is because the Recovery Act itself says that even upon the appointment of a receiver, the right of the company shareholders to payment resolution or other satisfaction of their claims is not terminated. That's Section 4617(b)(2)(K). There's another provision

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that provides for the termination of rights of equity. That's only in the context of a receivership. So when this starts, and throughout the pleadings, I think it's redacted in some places so I'm not going to repeat it. We have a slide that you have from the earlier deck, which includes all of this. The Government said over and over again, we are -- we are -- this is a conservatorship. We're trying to make these things better, and stock is retaining their rights, and preferred stock is retaining their rights.
And by the way, in this sense, the college example is completely wrong because the whole idea was that if the venture was successful, if the governor -- if the Government supplied a huge amount of money and it was repaid in accordance with its terms, the shareholders were going to benefit. They're not coming back and saying we're wiped out and we're coming back and saying now pay us because it was successful.
The initial bailout by the Government, the initial loan, one of its terms was the survival of equity. That was the rules of the game from the very beginning. That didn't change. If the rules of the game had started out differently, and in some cases they do, some of those 109,000 cases, which I was involved in, next time I'm going to call them for money to make sure I

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get on line, in those cases, it sometimes did. The initial rescue wiped people out, but this initial rescue didn't wipe people out. And that's a really essential distinction.
THE COURT: That's what I find so problematic in this case.
MR. BENNETT: That is very problematic. Now, there's a second part that's less obvious, and I admit we didn't actually mention it in the papers, but it's in the record. The Government bought junior stock. They bargained for warrants. You can't get anything on account of the warrants unless the junior preferred which stays there gets paid. So I'm a reasonable investor. I'm looking at the whole situation in September of 2008, after the conservatorship starts. What do I see? I read the -- I read HERA; I find that equity interests survive. I understand that the Government has bought senior preferred stock that has all kinds of special rights. I understand that there's a conservator. And then I said, wait a second, the governor just -- the Government, sorry, I keep doing that because I'm involved in Puerto Rico.
The Government -- the Government decides that an important part of their deal is to buy warrants to -- cheap warrants that can be exercised for very little

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money for 79.9 percent of the stock. They didn't get warrants to buy more senior preferred stock. They could have. They got warrants to buy common stock. Why would they do that unless they thought someday they were going to be worth something? And if they were going to be worth something, they were going to have to pay the junior preferred.
So in terms of not only the Government -- so I talk to people all the time about paying attention to what people do and as well as to what they say. What the Government was saying is, yes, we have a conservatorship. We are going to help these companies to recover and shareholders are going to benefit if it's successful. That's what they're saying. What are they doing? As part of their consideration, and they're certainly going to say their consideration was fair, they were entitled to all of this, instead of taking something else, what did they want? They wanted 79.9 percent of junior stock. Okay? So the idea that people were wiped out in '08 and therefore had no expectation in August '12 and are coming back today and saying, whoa, well, we're entitled to something that we weren't entitled to, that's not what this case is about at all.
And during the presentation, there was a little bit of a mixup between things that happened in '08 and

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things that happened in '12. In '08, there was an argument as to whether these things were distressed or not. That's what you learned from Mr. Paulson's book. No one knew on a cash basis. The whole issue was what reserves were being taken and what was going -- were the reserves adequate, inadequate, were they too little, too large. It was what was coming next, nobody really knew.

But a big slug of cash on the preferred stock basis made creditors feel a lot better, and that definitely stabilized them. The allegations of the complaint, and they clearly disagree with them, but that's for trial, are that by August 12th, everybody important knew. It was no longer dire. The Government had already made their investment. The expectation was it going to be -- start to be returned.

So when we get to August 12th, the idea that this was a condition of a government bailout like A&D Auto, that's false. If there was a government bailout, and we think there was a sensible investment that the Government's going to make money on one way or another, that's '08. By '12, it's not. And so the A&D Auto example isn't apt.

Okay, I've talked about the fact that this isn't the college kid, that these rights were supposed to survive. The Government recognized their survived --

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that they were to survive by their words and by their deeds. Okay, now let's turn to what was taken because there's been some ambiguity about this that has rippled through several of the different presentations.

I am, once again, indebted to Mr. Dintzer for clarifying this for us all because he said this morning -- and I think he said it again this afternoon -- is that the taking occurred on August 17th, 2012. And I think that's right. I think the Judge -- oh, sorry, 17th, not 12th. August 17th, 2012. I think that's right, and so now we have to say, okay, what was taken on that date, because on that date, there was no cash coming out of the enterprises.

On that date, there was a transfer of shareholder rights from one group of shareholders -- actually, several groups of shareholders because from both the junior preferred and the common -- to the holders of the senior preferred. That is why, by the way, the chart that was displayed earlier by my side was actually a very good presentation of exactly what happened.

So important observation at this point. These are not assets of the company. These are entitlements of the shareholder level. After the rearrangement, proceeds started to arise, and those proceeds, as a result of the

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rearrangement, have been paid to the Government, specifically to the Treasury, specifically into this country's general fund, which will have implications for the very last point when we get there.

So the taking on the 17th was a rearrangement of rights among shareholders. Their rights were taken from one set of shareholders to another set of shareholders. That's not assets of the company. That's one of the fundamental reasons, by the way, why the claims are properly understood as direct.

And by the way, one other point back to where I started, I wish I had thought about the moving hands. I thought those were really good, but when Mr. Dintzer came up and said, well, he had a different set of moving hands involved, he just said what really happened back -- and now he was, I think, talking about the '08 time frame, was the Government pushing things over? That's not the right image at all. I wouldn't want to have thought of that one because what the Government did is they made an exchange. They made an exchange for cash for a big bundle or rights. And they decided then that that was a reasonable deal for the shareholders.

And it's that bundle of rights and those enforced -- that's what they had and were looking at a change for what they had. And, remember, what's in that

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bundle of rights, preferred stock, additional rights under the preferred stock agreement, the warrants, and all of the entitlements that are attached to all those things. So there was no -- once again, the imagery of a bailout -- of dumping whole money in for nothing, of ungrateful equity holders trying to glom on afterwards, even the imagery falls down. It's just not accurate.

Okay, now I want to turn to the charts, to the Government's presentation. And why don't we start with Piszel vs. the United States -- Piszel vs. the United States. There are, of course, here in particular differences between the contract claims in Piszel and the contract claims -- the contract claims in this case. But before we get there, let's remember what else Piszel has to say. Piszel has to say a lot about the fact that the conservatorship doesn't actually change everybody's expectations and turn them into zeros.

The first part of the Piszel case is finding that there were reasonable expectations in Mr. Piszel, even though there was a kind of regulation of employee contracts before the Recovery Act was passed, and the Recovery Act made it more stringent. Even after the conservator -- he started working in '06, you know, so even after the conservatorship, he continues to have expectations. That's another part of Piszel that is

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actually worth reading. It wasn't -- didn't figure prominently in the presentation just ended.

But the reason that he couldn't recover is the Court actually thoroughly evaluated his contract claim, found, first of all, that there was at least as great a chance he was going to win -- the Court clearly thought he was going to win -- and that it was going to be paid. Why? Because it was a creditor-level pay -- claim, and all of the creditor claims are being paid by the GSEs.

Here, there's a much different question going on. There's a whole issue. We don't know the answer yet necessarily, but the idea that the contract claim being asserted is going to -- is to one -- is going to win, there hasn't been proof of that in this Court. There was that Piszel was going to win. There was proof of that in the Piszel court, or that it will be paid and the Government will take the position that there's equity around to pay it because it would be an -- it might be -- they might try to subordinate it and say there's no money to pay it.

There are all kinds of hurdles that the Government would have to prove to get a result like Piszel to say that there is a contract remedy that should have been pursued. And why did it come up in Piszel? Well, because Piszel let the statute of limitations

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expire, so he didn't have a claim left. And that's why his failure to pursue the contract claim that they decided was good and decided would have been money-good, then he can't recover under his -- under his takings claim.

There was a lot of water under the bridge. That same water hasn't gone under the bridge here, and there's been no showing that any of the things that were the basis for the Piszel resolution happened here.

Okay, cognizable property. We talked about the -- I'm now moving to Chart Number -- I guess it is 9, okay? No, we do not claim that there was a right to avoid a conservatorship, but we also point out that the conservatorship was not supposed to have affected shareholder interests to be paid. Some interests were affected, others were not. That was for a receivership. And so the idea that shareholders didn't oppose the conservatorship is probably suggested by another claim in this case, which is the implicit contract claim, which is that the Government certainly told the GSEs exactly what they told the public, which is we're trying to fix these things; the equity is going to come out at the other side; and, oh, by the way, we want warrants, and we think warrants are valuable. That was the message for the shareholder world.

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So the Government understood, too; the investors understood at the beginning that the Government was there; the investors understood at the beginning that cash was going in and specific rights were going out; but the investors also understood that the regulators were saying that the shares were going to be fine and they were going to ride through; and they also understood that the Government was saying that we're here to help; and they also understood that the Government was actually doing something to indicate that they thought it was going to work because they were taking warrants at a very junior level in the capital structure.

Claimed property rights, Perry Capital. The problem with the Perry Capital decision is that it got the complete -- this is Number 11, page 11. If you want to flip to it, that'd be great. The word "complete discretion" to declare or withhold dividends is the -- is the premise of the ruling. I don't know why it is that that court reached that conclusion on a motion to dismiss, but it's just an incorrect conclusion. We know that the junior preferred stock was entitled to dividends before anything could go to the common. We know that every issue of junior preferred stock was entitled to dividends pro rata with each and every other share of junior preferred stock.

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And as I said before -- again, I'm repeating myself with something to keep in mind -- and the Government had a boatload of common stock, and if they wanted their common stock to be valuable, they had to pay the junior preferred stock. So there was not only an entitlement to dividends, if you looked at the way the parties were arranged, you had to have an expectation, a reasonable expectation, that dividends were going to be paid.

By the way, in that sense, this is exactly analysis [sic] to the bank account cases where there's an owner of the bank account but something's going on inside the bank account, and the issue is can that taking be a taking of the person who owns the bank account, and I think, frankly, the most important case, I think it was the Watts -- the pharmacy case, where the purchase was -- the buyer was concerned he was buying into a bulk sale problem and put all the consideration into a bank account. And the local authorities had a great idea. They'd take their expenses, which was like $9,000, and then they'd take a fee, which is $100,000, and they just took it out of the bank account. And they basically said, well, the court -- it was accused to be a taking because all the expenses were paid out of the $900,000 and the $100,000 was deemed to be a taking.

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And the really interesting thing about that case is, is that the bank account was not in the name of the people who owned the money. The people who would get the money were the creditors. The bulk sale laws basically say that you take the entire purchase price, you hold it aside for creditors, and then you use it to pay creditors. If it turns out anything is left over, it goes to the equity. But at the moment in time when the account was created, and not until the end of the case, one has no idea who those creditors are and what their relevant proportions are. And the Supreme Court said not a problem. We understand that. That's an interesting situation, but some group of those people own this account, effectively beneficiary, and they are entitled to this money, and it has been taken from them.

So you have a very indirect -- you have an entitlement through some lines, which is the situation you have here. We have shares, which are evidenced by sometimes pieces of paper, but that was kind of misleading when they included the stock certificate because they almost don't exist anymore. Nowadays, they exist as book entries. And they are -- what is that piece of paper? What is that book entry? Well, those things themselves are meaningless. They're a reflection of rights, they're rights to distributions.

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When you own a bank account, what you have is a right to distributions. You have a right to what's in that bank account, and the Supreme Court was not put off by, number one, the fact that that bank account was not only in the wrong name because the person that was named didn't have a real interest in it, but -- and you couldn't even figure out who owned an interest in it, but the recognition was the rights of those creditors ripples into this account, and their $100,000 was taken. It's a lot more attenuated even than this situation where we're talking about stock certificates.

Moving on. The next suggestion was -- was on page 14, was that there was no right to pursue derivative claims. That's actually not -- we're not asserting any. The Owl Creek Plaintiffs are, so I'm going to skip that, but I suspect someone else will want to talk about Government page 14.

Government page 15, Plaintiffs failed to describe the cognizable property. The complaints very clearly explain the existence of the shares, the rights represented by the shares. In fact, the provision of the conservatorship law, 4617(b)(2)(K) is reproduced in part actually in the pleading. I just don't understand that. It has been completely described.

And then we're said -- then it is said that

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Plaintiffs failed to articulate government action. The government action was the Third Amendment, two arms of the Government on both sides, one helping the other, the end result being all of the proceeds, all of the rights are now in the hands of the Treasury and all of the proceeds go to the Treasury, into the general fund, paying the costs of Government that all of us are supposed to pay. That is the facts of this case.

Parker vs. United States. I think page -- the best way to go at this is to skip this and to go to Slide 17 from the Government. This case, at least in the case of our pleadings, is a classic pleading in the alternative. Their first line, If 3A misconduct, they say no takings, I guess I have to agree with that technically but that's the illegal exaction claim. And then if it's the case that the action was proper and not misconduct, we say it was a taking. And so there are two alternative pleadings that are absolutely permitted under rules of this Court and rules in every other federal court. I don't understand this slide at all.

Okay, now we turn to the very conclusory part of this pleading where we -- Plaintiffs fail to allege the elements of this taking, and they say right away that we haven't -- I have to find the right place in the notes. We haven't said that this was a direct

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appropriation. We haven't said that it was an invasion. And the fact is, is we said it was both those things. Let's do a little bit of analysis.

And, now, by the way, I can pick up on my slides if you have them. The summary with respect to this section is Slide 11. We talk about the fact the slides -- excuse me, that the shares are not eliminated by the initiation of the conservatorship in Slide 12. And we get to the sweep amendment being a direct approach creation at Slide 15. The transfer of every single right represented by the junior preferred shares -- by the book entries, by the certificate, however you want to look at them -- the rights represented by those book entries or by those certificates were taken in their entirety absolutely and assigned to the Treasury of the United States.

If that is not a direct appropriation, I don't know what is. They took it all. They get all the proceeds. Whenever there's anything to be distributed from this company, it doesn't go to us, not a penny of it goes to us. Every single nickel goes to the Treasury.

You know, they say that it wasn't all taken because the shares still have value. That's what they say, but the reality of the situation is under the Third Amendment, there is nothing left. There's an easy way to

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ignore the shares, and that's basically to look at the Lost Tree case at page 1117. The Lost Tree case involves a Florida development. It was almost fully developed. They had this one extra parcel, and they were kind of using it to -- they had some mounds on it and they had something that had something to do with mosquito abatement, which I confess I don't understand for a minute why that -- why one piece of property could do mosquito abatement for the rest of the development, but apparently that's what it was for.

And all of a sudden the developer had the idea that he was going to go develop it. And he apparently had plans for a really good house because the proof was is that the house, when completed, was going to generate net value of somewhere between $5 and $6 million. It was going to be some really nice house or maybe a condo building. And the Army Corps of Engineers, after he gets the permits and he has to fill part of the -- after he gets the permits, the Army Corps of Engineers says, no, not really, this piece of property is really important for wetlands, you can't build on this at all.

And the Court found that it was a taking, and one of the defenses was, well, it's not really a complete taking because you can still sell the land, and the evidence was, is that if you could sell the land for like

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$10,000 or some, you know, really little number, and the Court in Lost Tree said in the circumstance like that, which, frankly, I think we are in the same circumstance, that is not a beneficial use. All beneficial use has been taken from you. A sale is not a beneficial use.

And I think, frankly, that is the best way for the Court to deal with the fact that no matter how badly pounded the stock of the preferreds was, and it was -- they didn't show you a chart of the preferred stock value, they showed you the common bopping around at 20 cents, but the preferred did get hit. To the extent there's a residual value, I think you deal with it exactly as you do in Lost Tree. It no longer had its original purpose to represent all of the distributions from this company to be the possibility of dividends before the Government got to realize on its 79.9 percent.

It was completely taken away. And the residual value doesn't make a difference. So we take the position that there was, in fact, a complete appropriation, that there's no need to get to any of the other kinds of takings, but let's do it anyway and let's -- and let's focus on the slides again where we are supposedly taken through the Lucas and Penn Central analysis.

Wipeout, Lucas. Again, when looking at exactly

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what happened here and what was taken -- I'm on Chart 20 -- it's perfectly clear from the language of the Third Amendment that what was taken from the junior preferred stockholders, what was taken from the common stockholders was absolutely every opportunity for economic return, no exceptions, period, end of story. Again, they say, well, it's not absolute because there was residual value in the stock. I make the same response, the Lost Tree case deals with it. So do we have a Lucas wipeout? Absolutely. We have a Lucas wipeout in this case. There's no question.

And, again, the Lost Tree case specifically goes the other way with respect to economically beneficial use, including a sale value after the wipeout. Failure -- then we talk about Penn Central, or at least the Government talks about Penn Central. We're on pages 26 and 27, and they say that there's a failure to allege economic impact. Again, I just can't believe it.

So our complaint covers this every conceivable way. It alleges the provisions of the Third Amendment, the fact that it takes absolutely every single opportunity for economic gain away. The opportunities which existed after the conservatorship, after the loans -- excuse me, loans -- the senior preferred stock purchase in '08, after the First Amendment, after the

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Second Amendment. It is only the Third Amendment that these things are not just modified; they are decimated.

If that is a failure to allege economic impact, I think we're entitled to an opportunity to amend. I'll figure out how to say it differently, but I think we said it pretty well the first time.

In the alternative, we have also talked about the issue of stock price drops and the significant stock price drops that at least with respect to the preferred stock was attendant to the taking at the time of the Third Amendment. This, of course, is a damages issue. I absolutely understand that there is going to be a fight over damages in this case. This Court should hear evidence about them before making any decisions, but there's clearly been a statement -- excuse me, statements made in the complaint to cover completely economic impact from the perspective of people who held on the 16th of August of 2012, the day before the sweep.

Okay. Yeah, and this is -- I think I said it at the front, but I want to just say it again. When we talk about the 12th -- excuse me, when we talk about '12, August 17th, 2012, and they try to say, well, what we did then was -- was -- that's the price of government involvement, okay, that's confusing your dates because by August 17th, 2012, the Government is completely involved.

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The involvement happened in '08. It's four years later. Things have recovered.

It has been alleged that there's no longer jeopardy, that the Government's investment at this point in time is a money-good investment, that they are going to be repaid, that there's no longer a legitimate price for the Government's continued involvement, yet one was assessed. And it was a huge price. This was a total -- the total taking of everything that the junior preferred stock and the common shares had.

I'll incorporate here that our allegations, okay, all of the allegations were made on this point as well.

Okay, we talked about the economic impact. I don't want to talk about it again, but this deals with the Cienega Gardens cite and with the Anaheim Gardens cite, which are very, very different circumstances where there really was something left. This is like Lost Tree. This is not like these cases, not at all.

And, finally, to two other things. So reasonable, investment-backed expectations, I don't want to repeat myself. We think those were clearly there. They were clearly there at the time of the conservatorships in '08. I listed all the reasons -- because the conservatorship said that equity was going to

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survive, because everybody knew what the terms of the Government preferred stock purchase was going to be, and the Government -- the Government said that they were there to help and that the purpose was to make -- was to get the GSEs better, and they took 79.9 percent of the stock in the form of warrants against both of them. That package confirms that expectations that the equity would have value or reasonably could have value were absolutely reasonable.

And then, lastly, the character of the governmental action. You know, I actually -- I've got to get something else in a minute. I actually disagree with the way the Government describes this particular prong. When they talk about the character of the government action in these cases, they are comparing this case to, for example -- and I'm not remembering the name, the -- like the case where the Government decides to create a no-fishing zone or a conservation zone around an island. Okay, that's a regulation. The Government isn't taking that money. They're preserving fish. And if the Government prescribes a health and safety regulation that someone says has a taking impact or there's a Supreme Court case, Ruckelshaus, about use of data in connection with drug testing, or excuse me, pesticide testing.

They're -- the Government isn't putting money

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into its own pocket; it's creating regulations that are having an ancillary effect on other people. Well, I said it several times because I don't want anyone to forget it. What is the character of the governmental action in this case? The governmental action in this case was to redirect money, redirect rights from a group of shareholders to another group of shareholders.

That group of shareholders -- the group of shareholders who got the rights was the United States Treasury, and then they started collecting proceeds. And what do they do with the proceeds? They put them in the budget. It actually became a significant line item, which is one of the reasons why I think they haven't reversed it so quickly.

They put all this money into the budget. That's nothing like deciding you're going to create an exclusion zone to make fish healthier. It's nothing like reforming regulations of pesticides for the public good that has ancillary impacts. This is taking money ultimately, by taking rights, ultimately taking money, and putting it in the budget.

Now, their test. Is this the kind of thing that should be paid for by the junior preferred shareholders and common shareholders in the government-sponsored enterprises? Are they ones that are supposed

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to be filling the general fund budget of the United States of America, to the exclusion of everybody else on this theory? I don't think so. I think this makes the character of the government action right in the center of those things that the Fifth Amendment is supposed to ameliorate.

I skipped a page. We are told that we're supposed to interpret the First and Second Amendment. There's a suggestion that more changes to the governmental deal was possible. Maybe, but it wasn't noticed that one of the consequences of a governmental deal was going to be effectively to reverse HERA's command that during a conservatorship the rights of equity were going to survive, and they were only going to terminate in a receivership, which has never happened.

Any questions?

THE COURT: None. Thank you.

MR. BENNETT: Okay, thank you.

MR. VALLELY: Your Honor, if no other Plaintiffs have comments, I do have a couple of brief supplemental comments on behalf of the derivative Plaintiffs, just the Fisher and Reid Plaintiffs.

THE COURT: Yes.

MR. VALLELY: Your Honor, Patrick Vallely

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THE COURT: Can you just wait until you get to the podium, please?
MR. VALLELY: I apologize. Yes, yes.
THE COURT: No, no, quite all right.
MR. VALLELY: Your Honor, Patrick Bougherly again on behalf of the Plaintiffs in the Fisher and Reid cases. If we could put back up Slide 38 from the Government's presentation, that would be helpful, or I can put it on the ELMO, either way.
THE COURT: I think that's your obligation. As you want to use somebody else's slide, I think you need to put it on the ELMO.
MR. VALLELY: Okay.
THE COURT: Do we have -- thank you.
MR. VALLELY: Your Honor, the four words you see here on Slide 38 of the Government's presentation represent the entirety of their written argument challenging the merits of the derivative takings claim. In the motion to dismiss briefing, the Government made no merits-based argument for dismissal of the derivative takings claim. The entirety of the argument throughout the briefing on motion to dismiss focused exclusively on the direct takings claim. So it appears that they may have realized that oversight in preparing for this

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argument and, therefore, spent about 30 seconds or so during this argument articulating why the derivative takings claims should also be dismissed.
The Government's attorney made a broad statement that just simply incorporating all the arguments they made about the direct Plaintiffs. One argument in particular is important. The Government distinguished the Brown case. This was a Supreme Court case involving the property interest and the interest earned on funds held in client accounts. And the Government says that the reason why the direct Plaintiffs cannot invoke Brown to assert a takings claim is because those funds didn't belong to the shareholders; they belonged to the companies. But that observation demonstrates exactly why Brown supports a derivative takings claim here.
Here, the companies had -- as confirmed also by the Kimball Laundry decision we discussed earlier, the companies have a property interest in their income earned on their business and their profits going forward. And the taking here directly appropriated that property interest, and frankly, Brown and the decision that precedes it, Phillips, another Supreme Court case concerning IOLTA accounts as well as Kimball Laundry, all three Supreme Court decisions that directly support the

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merits of the companies' derivative takings claim.
So just to make clear, those arguments that simply -- the same arguments apply both to the direct and the derivative Plaintiffs. Setting aside the fact that it's a new argument offered off the cuff here at the first time at argument, it's simply incompatible with multiple Supreme Court cases that are obviously controlling here.
Thank you.
MR. HUME: Chief Judge Sweeney, this Hamish Hume for the class. The schedule had us addressing the part of the argument that relates to the taking of our derivative claim. I don't think given the hour that it's necessary to take the Court's time with an oral response to that. I'll make one or two quick points and rest on our papers.
THE COURT: And that's fine. Perhaps I should have started at 8:00 or perhaps even at 7:00. No, no, no, and I'm quite serious about that. Would -- and I'm sure there will be just groans that will not be audible, but would counsel like to regroup at another date, you know, either this week or whatever to flesh out any additional argument? I mean, that may be -- I'm sure that what you all were looking forward to was finishing up tonight, going home, have a great dinner, play with

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the dog, you know, call it a day, but -- and I'm also willing to stay as late as you like.
MR. HUME: Well, speaking for myself, I literally was going to speak for less than a minute and be done, but there are other items on the agenda. I'm content on the issue, to rest on the papers. I just want to make one or two quick clarifying points substantively, but shall I do that first and then we can canvass the team for --
THE COURT: Could I just canvas both the Plaintiffs and the Defendant?
MR. THOMPSON: We're prepared to carry on, Your Honor, and just see it through this evening.
THE COURT: Okay.
MR. THOMPSON: But, you know --
THE COURT: That's fine. If anyone needs to leave, I understand, and that's fine, that's no problem.
Is the Government able to --
MR. DINTZER: We're available at your disposal. So we're here as long as the Court is.
THE COURT: Well, is that going to -- because I know people have certain firm schedules. Can we stay through and finish this this evening? Or if you -- if there's a problem, no hard feelings, please let me know. I mean that most sincerely. No adverse --

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MR. DINTZER: We're good, Your Honor.
THE COURT: You're good?
MR. DINTZER: We're here to the end.
THE COURT: Everybody? Okay. So if you have to head out --
MR. HUME: Oh, in that case, I'll take...
THE COURT: And I --
UNIDENTIFIED MALE: We don't want to encourage more time than --
THE COURT: And I believe there may be movement with --
MR. JOSEPH: Your Honor, I would just like to have a chance to talk with the colleagues on the Plaintiffs' side because maybe we'll do some reordering for those of us that are not in town. We still have to get back to New York or elsewhere tonight.
THE COURT: Oh, certainly.
MR. JOSEPH: And maybe we can do something about the order of what (inaudible).
(Pause in the proceedings.)
THE COURT: Okay, we're back on. Thank you.
MR. HUME: Thank you, Your Honor. This is Hamish Hume for the Cacciapalle Class Plaintiffs. Your Honor, we will largely rest on the papers on the proposition that there is a taking of our derivative

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claim. It is, I want to emphasize, the tail on the dog here. It's an important claim, but the Government tried to "moosh" a bunch of things together. The property rights, it was unclear what they are.
The central property right at issue here, in case you didn't get it from Mr. Bennett's excellent presentation, are the rights of both the junior preferred and the common shareholders to receive dividends or distributions under certain circumstances. And if that's not a property right, we're in big trouble, because the only one point I would make to supplement Mr. Bennett is on the issue of -- there's a cognizably property interest. This doesn't answer everything, this hypothetical, this analogy, but if our prospective right to receive dividends as both junior preferred and common shareholders is not a property right, that means the Government could decide that Big Tech's making too much money and all Apple shareholders have no dividend rights ever and any dividend Apple ever pays goes to the United States Treasury, and it's going to use it to pay down the debt and do wonderful good for property -- you know, things for poor people. That would be a taking, and they're trying to tell you that that's not a taking.
That's what it boils down to. They're saying that a -- if you hold stock with a contingent right to a

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dividend under certain circumstances, that's not property. And that needs to be very squarely understood that they mean -- that Congress could pass a law like the one I just described and it wouldn't be a taking, and that's crazy.
So I want to emphasize that's the centerpiece. I also want to emphasize Mr. Bennett's calling attention to how important it is. If there's one thing that's most important from the whole day, because it got confused a lot, is the difference between what happened in 2008 and what happened in August 2012. And it's so important I am going to repeat it, which is in 2008, they got 10 percent senior preferred dividends and warrants for 79.9 percent of common. That's what they got for the $200 billion or whatever they offered to fund. That's what they got.
And that did send the message and reinforced the message that everyone would have thought because of the statute, because of what's in HERA, how conservatorship normally works and basic common sense that, of course, there was potential value in the privately held junior preferred and common stock. So Mr. Bennett was 100 percent right on that, and Chart 25 of our demonstratives lays that out, and I exhort to the Court, you can even plug through the progression in the native format version I emailed you.

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So I will rest on that. On the derivative claim, the one point I'll make is they said that it has to be a final judgment. I'll give you a hypothetical on that. What if Congress passes a law saying all current pending securities lawsuits are now owned by the United States Government. We're tired of all these plaintiffs' lawyers making money, and it's now owned by the United States Government. We'll litigate the case and we'll take the judgment for that case and we'll use it to do wonderful, good things. That will be taking, and there's no final judgment in those cases.
And the Court of Federal Claims Slide 36 of our demonstratives quotes this Court directly rejecting the Government's argument that they made to you today, that a cause of action is only a property right when it's reduced to final judgment. That's dead wrong. And in the slides leading up to that, we give all the quotes from the Supreme Court on down that a cause of action is a property right.
Thank you, Your Honor.
THE COURT: Thank you.
MR. GREEN: Your Honor, briefly. Kevin Green for the Washington Federal Plaintiffs. Given that the Government didn't make a separate oral argument concerning our takings claim, I have nothing to respond

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to and will simply submit on our opposition to the motion to dismiss. And assuming the same follows for the illegal exaction claim do the same thing, and also in the interest of time.

THE COURT: Thank you.

MR. DINTZER: So, Your Honor, so I'd like to start -- first, I hope every time I said a taking claim August 2012, I said alleged, but if I hadn't, for the record, I mean, we don't think there is any taking, but my understanding of reading all of the complaints was that that is the allegation regarding the Third Amendment. They want to talk about September 7th, 2008, so let's be clear. The original PSPAs signed on September 7th, 2008, did not allow the GSEs to pay back Treasury. Repayment was not contemplated by provisions of the original PSPAs, by the First Amendment or by the Second Amendment.

So the fact that they are embracing the original PSPAs that they are happy, that they say those were the ones that we want to be governed by, those are the ones that have no provision for them to be paid back. Their expectations based on those PSPAs -- if they bought before, it doesn't matter anyway, but if they bought afterwards, if they had read the PSPAs, to make sure, wow, there's no provision to be paid back, and then that

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should have stopped them. And instead, what I hear is that they discerned from the existence of a 79.9 percent warrant that money was going to flow because why would the Government want that.

Your Honor, the existence of the Government's accepting 79.9 percent warrants cannot form the basis of anybody's expectations of anything. All that showed was the Government was getting some warrants to participate if it decided to exercise those at some point in the future. They still have not been exercised. The facts that the Plaintiffs instead of relying on the actual documents, the PSPAs, the terms in them, that they were relying on reading tea leaves about what the Government was thinking by asking for the -- by the warrants I think is -- they should have read the documents. That would have fulfilled their -- or filled out their expectations.

The point about -- and this is an important one, Your Honor, because this is one from you, and I want to make sure that we're clear about the Government getting all this money. It's very clear -- it's very important that the Court understand, the Government traded something. The Government traded a reliable 10 percent dividend, and if things had gone in the other direction -- it's easy to say now -- to sit now and say, wow, things went well and say we should -- let's go back

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and look at how things were.

But as the perception at the time, there was a risk -- and, of course, there's still that risk, but there was a risk back then that it wouldn't go so well, that the market would go down, that the payments would not be made. If that had happened, we wouldn't be here.

THE COURT: In 2012?

MR. DINTZER: After 2012. If there had been -- the point of the Third Amendment, if it turned out that by taking the variable dividend the Government did worse because the market -- we all know, nobody knows what the market is going to do five years out and six years out. If the market had gone this way instead of this way and the Government had gotten less than its 10 percent, we wouldn't be here. They wouldn't be so offended by the Third Amendment. They're offended because the market -- because of what happened afterwards, not because of what happened then.

There was a risk that -- of -- and the Government took this risk that they wouldn't get any dividends for months, for years. So there shouldn't be the assumption, the ex ante analysis at the time. And then they say, well, people thought things were going to go well. They're talking about a few months. I'm talking about -- I mean, it would take years, years, but

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nobody knew what the future was going to bring.

And the Treasury and FHFA in agreeing on the Third Amendment accepted the idea for -- Treasury accepted the idea that instead of fixed dividends, they would take variable. And just if I offered you the choice of you can have 10 percent every year if you get a long term, if you go to the bank and get a CD for 30 years, or you can take a variable amount, but you realize, it could go up and down, it could go -- be really bad. You understand that there's a tradeoff. Treasury understood that there was a tradeoff. The only reason we're here is because, one, it paid off in one way and not the other, and they're looking at it backwards through rose-colored glasses. At the time, there was a tradeoff, and that's how it should be viewed. The Government has provided $187 billion. They have actually drawn $187 billion. They have that money.

The Piszel case, Your Honor. Mr. Piszel was ultimately time-barred from bringing the contract claim. There was a statute of limitations. I believe counsel alluded to that. So the fact that he had a claim, the fact that he didn't pursue was on him, but he had a claim. The Government -- if you have a contract and something -- the Government does something and your contract becomes a breach action, what Piszel says is

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that whatever the Government did couldn't be a taking because the only think you're entitled to when you have a contract is potential breach action if the other side breaches. And so there's no -- the Government hasn't removed anything from you.

And, here, we know that the Plaintiffs have a breach action because they're bringing the breach action. And so, in fact, they're in District Court, and they're alleging that Fannie and Freddie abused discretion to pay dividends. That's the claim that the shareholders are litigating in District Court. So that -- I mean, it duplicates here, but it exactly reads on Piszel.

Your Honor, they compare this to a bank account. This is not a bank account. In a bank account, you own your funds. It's your money. Even in the Brown case, it was these clients' money, even if they didn't know the name of the account or anything about it, it was -- there was no question it was their money. And the interest, ultimately the Supreme Court said that's their money, too, because it's their money.

Dividends are not like that. This isn't -- they were never their money. It's never been their money, and they haven't been declared, so to compare this case to a bank account is inappropriate. And that takes me to Mr. Hume's hypothetical of the Government reaching

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out and taking the Apple dividends. There's no -- there's no stick in the bundle of stock rights to demand a dividend, and he would agree with that. You can't go to Apple and say, I want my dividend. I mean, they would say, who are you? So you can't.

What happens is, is if you get a dividend and it's in your bank account and the Government then says, aah, we're going to take that, well, that would be problematic. But that's not what happened here. There has never been a declaration of a dividend to these shareholders which they lost. They keep describing it like that, but they don't have that. The GSEs have never done that. It's not their money. It's never been their money, and they may be annoyed about that and disappointed about that, but if they read the PSPAs from the beginning, they wouldn't be surprised to realize that there's not a way to pay it back.

Let's see. So we heard about the 100 percent of the taking. It's been 100 percent. They said it over and over. What they didn't do is address the fact that they -- I mean, he said, well, you shouldn't -- don't look behind the curtain, okay? Yeah, we can sell it; yeah, we can make money. In fact, I mean, he didn't say this, but I would guess that if some of his people bought around the time of the conservatorship, when the shares

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were about $1, $1.20, that means they're worth a lot more now.

We're not talking about a penny, you know, some -- some negligible amount. My guess is they're worth more now, but even if they weren't, right now, you can sell them, I think, the preferred for something like $10 a share or something like that. That is nowhere near zero that the Lucas case requires for you to -- for them to access Lucas. There simply has not been a wipeout of these Plaintiffs of these shares. And so the Lucas rule is -- and this is Tahoe-Sierra -- it has to be permanently deprived, the whole property, of all of its value.

It's very clear. The whole property is the shares, not permanently deprived of all value because not only can they sell it, but, I mean, they -- we heard from Mr. Thompson how there's hopes that maybe, you know, that there might be in the works undoing and stuff. I have nothing to say to that, but the possibility that that might happen could be something else that provides these value. I have no idea what provides these value, but I do know that you can open up the newspaper and see the value, so it can't be zero.

Economic impact. So I mentioned the but-for world. My esteemed colleague on the other side did not.

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So you have to allege the but-for world. They didn't. A&D Auto says you have to. They didn't tell us what happens -- what would have -- what the world would have looked like for them without -- without the Government assistance.

Character of the government action, I'll skip that, but I will go to derivative. I was trying to be brief by not repeating myself for the derivative claims for the -- after the direct, but the arguments about what their expectations should have been, the nature of the property, they do read the same, so I don't want to repeat myself.

And that is quickly as possible, Your Honor, on our responses. Thank you, Your Honor.

THE COURT: Very good. What I'm going to do now is in theory -- in theory, the -- not in theory, it's the Government's motion, the Government gets the last word, but I'm going to have a lightning round to hear from Plaintiffs and then hear back from the Government, and then we will conclude.

MR. BENNETT: On this topic?

THE COURT: I beg pardon?

MR. BENNETT : On this topic?

THE COURT: Oh, yes.

MR. BENNETT: Okay.

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THE COURT: What we're going to do -- I thought that's what you all were going to do now.
MALE: Right, okay, okay.
MR. DINTZER: Just so I'm clear, after this, then we'll move on to the next topic?
THE COURT: Oh, no. I thought we would finish out. Estoppel is next and final, isn't it?
MR. DINTZER: So we have contract -- we have two contract issues?
THE COURT: Oh, right, right, right. I'm sorry.
MR. DINTZER: We have illegal exaction.
THE COURT: I'm just thinking -- yes, yes, yes. I've got it. I'm sorry.
MR. DINTZER: No, no, no.
THE COURT: I was --
MR. DINTZER: I just wanted to make sure we're all on the same page.
THE COURT: -- no, no, no. We absolutely are. I do -- I apologize. What I was going to say is after we hit all the issues that we've identified in the agenda, we will have a lightning round where if Plaintiffs have any final -- either epiphany or if they've said something that they want to correct the record, I will let them do that after you've had your response to what they've had

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to --
MR. DINTZER: We understand, Your Honor.
THE COURT: Good, okay.
MR. DINTZER: No, so now do you want us to proceed to the next issue?
THE COURT: Yes.
MR. THOMPSON: Yes, although I have a few points. I have one point I want to make.
THE COURT: Okay.
MR. THOMPSON: Yes, thank you. Thank you, Your Honor.
THE COURT: That's okay. That's fine.
MR. THOMPSON: Yes. And it relates to 2012. And we heard for the first time today that in 2012 there was a trade, and the Government went from a fixed guaranteed 10 percent to a variable rate. Your Honor, there is no scenario even where the Government makes less money on the net-worth sweep. They take it all. And now they say, oh, but, you know, take a world in which they make $5 billion in a year, the companies do, and they say, well, under the old system, we got 18.9; we're only getting 5. But on a net basis, under the old system, they only got 5. That's all there was, and they could either -- the companies could either draw down on the line of commitment, or pay in cash, pick -- pay in kind

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with stock, increasing the liquidation preference, but in a year in which the companies make less than 18.9, then that's all there was available under the old regime.
And so there was no risk, what -- the Government didn't assume any risk. They took it all, and it's really important that the record be correct on that, number one.
Number two, the complaints allege they knew that the companies were going to be massively profitable going forward, so not only was it theoretically impossible that they would make less money, they, in fact, knew they were going to make a boatload more money, which they did, $130 billion of profits in 2013 alone. They knew it was coming. That's why they did this.
THE COURT: Thank you.
UNIDENTIFIED MALE: In the interest of time --
MR. DINTZER: We'll let it go there, Your Honor.
UNIDENTIFIED MALE: Thank you.
MR. DINTZER: In the interest of dinner.
THE COURT: Have we heard back from security? Oh, can we go off the record for a moment? Pardon me, I just need to...
(Pause in the proceedings.)
THE COURT: I note that it's about 20 minutes

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of 6:00. I suggest that all the attorneys who are not involved in the case exit. I don't know whether this would be a good time for people to exit. Do you have -- are there clients here as well?
UNIDENTIFIED MALE: Yes, Your Honor.
THE COURT: May I have a hand raised with regard to clients? Okay, that's great. Are the remaining members here members of the public or just curious about the case?
UNIDENTIFIED FEMALE: We're here for Fannie Mae, Your Honor.
THE COURT: I'm sorry. You are?
UNIDENTIFIED FEMALE: We're here for Fannie Mae.
THE COURT: Oh, well, very good.
UNIDENTIFIED MALE: And we're here for Freddie Mac, Your Honor.
THE COURT: Okay. Everyone else is -- you're just curious about the case?
UNIDENTIFIED MALE: Your Honor, I represent plaintiffs in two cases that are currently stayed (inaudible).
UNIDENTIFIED MALE: As do I.
THE COURT: Okay. Is there -- and not that I'm minimizing this at all because this is the people's

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court, but are there just general members of the public here?

UNIDENTIFIED MALE: I'm a consultant on this topic. I'm happy to leave or stay.

THE COURT: Okay. Well, what I would ask -- I wonder -- well, this is what I will tell you. I won't ask anyone to -- everyone seems to have more than just a passing interest in being here, just know that if you don't leave the courtroom in the next five minutes, you will have to be escorted out of our building through the garage. Does everyone have the constitutional patience to know that it may take you about 20 minutes or longer to get out of our Court? It could take a half-hour. If you don't think you can afford the time, then I suggest you exit now and go down to the first floor. And, otherwise, we'll just have to take our security. You look very confused or upset. Are you -- yes.

UNIDENTIFIED MALE: Me?

THE COURT: Are you all right?

UNIDENTIFIED MALE: I'm sorry, me?

THE COURT: Yes.

UNIDENTIFIED MALE: Oh, no, I'm fine.

THE COURT: Oh, good, good. You looked very perplexed, and I thought --

UNIDENTIFIED MALE: No --

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THE COURT: -- we aren't going to hold you hostage. We're really going to let you leave, but I just wanted to let everyone else know that unless you want to have maybe a half-hour by the time we let you all exit, we've had some significant security concerns at the Court with generally I'll describe them as mischief-makers being here at the Court, having to be escorted out. They then went down to the DDC and attacked policemen. And so I have -- we have very strict protocols now, so walk now or please bear with us.

Okay. Well, I think we're ready to go.

MR. DINTZER: Thank you, Your Honor. We've been asked by the Plaintiffs to change the order a little bit so that -- to accommodate one of them, so I believe next up will be Mr. Laufgraben with some -- with the contract issues.

THE COURT: That's fine.

MR. LAUFGRABEN: May I approach, Your Honor?

THE COURT: Certainly.

Thank you kindly.

MR. LAUFGRABEN: Good afternoon, Your Honor. We'd like to address why I believe it's the Rafter Plaintiffs and the Cacciapalle Plaintiffs who allege breach of contract claims, breach of express contract claims don't have those claims. The basic problem is

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that the Plaintiffs fail to identify any contract between them and the United States. And because they haven't identified a contract, they can't identify a breach.

Now, Plaintiffs' express contract claims are -- well, the Rafter Plaintiffs allege the existence of essentially two contractual relationships. The first is the charter. It's a congressional charter in which Congress chartered -- I believe it's Fannie Mae is their claim, but a congressional charter isn't a contract between shareholders and the Government. And absent any language in the charter evincing an intent to contract, there's no presumption of a contractual relationship.

And this is very important. It takes two to contract, a meeting of the minds. And treating a statute like a contract would limit Congress' power to make decisions about housing finance reform and about moving forward with the enterprises and, you know, in making decisions based on -- about their future if the congressional charter is, in fact, a contract.

Although certain courts have construed charters as reflecting contractual relationships, there are two sets of relationships under, you know, some traditional common law principles of corporate law. The first contractual relationship would be between the shareholder and the corporation. And the second would be between the

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corporation and typically the state. The Rafter Plaintiffs have cited no authority for the proposition that a corporate charter creates a third set of contractual relationships between the shareholder and the chartering government.

And if that were the case, then every -- you know, if it were the case that the shareholder has some sort of contractual relationship with the -- with either -- with the government that chartered the corporation, then every shareholder would have a contract with every state in which they -- you know in which their corporations that they invest in are incorporated.

The Rafter Plaintiffs also allege different -- oh, sorry -- a different contract theory under this so-called Fannie Mae contract, that it's not just the charter but a collection of corporate bylaws, stock certificates and Delaware law that somehow established a contractual relationship with the United States. That's not so. The Fannie Mae contract is just another name for the overall contract relationship between Plaintiffs as investors in the GSEs' -- I guess in this case in Fannie Mae and Fannie Mae. The alleged Fannie Mae contract that the Rafter Plaintiffs allege is the precise contract that Judge Lamberth is entertaining claims about in the District Court. It's not a contract with the United

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States.
Finally, the Cacciapalli Plaintiffs simply state that the stock certificates are contracts between it and the United States, but that really makes no sense because stock certificates reflect ownership of equity in Fannie Mae and Freddie Mac, not ownership of equity in the United States. Indeed, the Cacciapalli Plaintiffs state that the certificates for the Fannie Mae and Freddie Mac preferred stock constitute contracts between Plaintiffs on one hand and Fannie Mae and Freddie Mac on the other.
And, again, they're pursuing -- the Cacciapalli Plaintiffs, the class of shareholders, are pursuing such contract claims against Fannie Mae and Freddie Mac in District Court. You know, just because FHFA stood in the shoes of the enterprises does not somehow transform their contract rights against Fannie Mae and Freddie Mac into contracts rights against the United States.
Now, the Rafter Plaintiffs also bring a derivative claim on behalf of the GSEs to reform the PSPAs to eliminate the variable dividend provision. Now, putting aside that Plaintiffs lack -- that the Rafter Plaintiffs lack standing to bring this derivative claim, the claim is essentially for equitable relief, not money damages, and, therefore, it's beyond this Court's

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jurisdiction.
Now, what the Rafter Plaintiffs seek is to -- they ask the Court to excise the Third Amendment and they ask for restitution of funds paid to the United States under the Third Amendment. Now, this is the type of equitable relief that shareholders have sought in District Court when they've asked to -- when they've asked district courts to enjoin the Third Amendment. And here are just some examples of what the plaintiffs in the District Court cases have requested: rescission, vacating and setting aside the net-worth sweep, the same thing in the Wassen and Body cases. This is the precise relief that the Rafter Plaintiffs are seeking here.
Simply put, just to sum up, no party is -- no Plaintiff is a party to an express contract with the United States. Their only contracts are with the enterprises, and they're pursuing those claims in District Court. And there's no basis to duplicate those claims here. And, accordingly, we request that the Court dismiss Plaintiffs' breach of express contract claims.
Thank you.
THE COURT: Thank you.
MR. JOSEPH: May it please the Court. Gregory Joseph for the Rafter Plaintiffs and on this argument the Cacciapalle Plaintiffs also. I want to begin with

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Counsel's last slide, saying that some Plaintiffs have litigated and lost these claims. The cases he put up are 4617(f) cases. They're Anti-Injunction Act cases -- or the anti-injunctive provision. And every circuit that's considered it has ruled that the anti-injunction provision doesn't apply if FHFA exceeded its jurisdiction, which is, of course, the issue that's before this Court.
I'd say there are three other reasons why those contract claims are not affected by those cases. The second is that all but one court has ruled that 4617(f) has no impact on a damages claim, and the court that said that it does have an impact, which is the Jacobs Court in the 3rd Circuit, said but there could be an appropriate damages claim, like for breach of contract. There was no breach of contract claim.
It also said it could be appropriate if there were a takings claim. There was no takings claim. It could be appropriate if it were an ultra vires claim. And there was not and there are here. Third reason why those cases are not relevant is they don't apply to any of the direct claims, and both Cacciapalle Plaintiffs and we assert direct claims. And, fourth, they're not relevant as to derivative claims because none of the Plaintiffs there was found to even have standing to bring

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a derivative action, so it can't be binding.
Your Honor, in order to try and expedite and facilitate this, I put together a grid, and we gave one to the Government hours ago. Do you have one, Counsel? You do, okay.
May I approach, Your Honor?
THE COURT: Please. Thank you.
MR. JOSEPH: Thank you. And, hopefully, this will just facilitate the argument and make it easier for Your Honor (inaudible).
Here are some extras if anybody here wants it. And I'm just -- if we start on page 2 of that with the Rafter contract claims, and I'm just going to walk through these quickly because I want to address their claims, and I think everything is addressed in this. So Count 4 for Rafter is a derivative claim that's brought on behalf of Fannie to vindicate its rights under the PSPA. So there is jurisdiction. It's a claim between Fannie and the Government.
There is privity because Fannie is a party to that contract, the PSPAs. And the relief, reformation, there's no question this Court has the power to issue that. It's exactly the same relief that in the Council for Indian Employment Rights case was given, and that was simply striking a void amendment because the ultimate

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issue is was -- did FHFA exceed its jurisdiction in entering into it, which is an ultimate issue Your Honor will be addressing. But if that's the case, then it was not authorized, and that's appropriate. That's not an equitable reformation claim; that is a contractual claim, which this Court -- whatever you call it -- this Court has many times issued that kind of relief when, in fact, it was a statutorily unauthorized act.

I want to skip down to the sixth and seventh counts because they go together and I can go through those quickly. And those are -- the sixth count and the seventh count both identify who the Government is, so there's some preliminary questions Your Honor will have to address. You know, are the GSEs governmental instrumentalities, because that's a theory for those counts, Treasury, of course, and FHFA has stepped into Fannie and Freddie's shoes.

Now, this is the one that is an implied covenant claim based on the charter. Now, Counsel says that the charter isn't a contract, which is interesting because the Office of Legal Counsel of the Department of Justice in 1977 issued an opinion stating expressly that Fannie's charter is a contract between Fannie, its shareholders, and the Government. Right? That's one opinion, Office of Legal Counsel, 126. That's our

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respected adversary in 1977.

The Supreme Court has on five occasions ruled that a corporate charter is a contract between the Government and the shareholders. And Dartmouth College is the first one, but they've done it also in the Sinking Fund cases and three others. We have all five on pages 7 to 9 of our supplement brief. So the contract exists. DOJ has recognized the contract.

If we take a look then at Count 5, which is the second count -- second line on this, which is a direct claim, and, again, you'll see how the Government is defined. And this is the contract that Counsel was referring to at the end, and this is a contract which Delaware, we've cited a case called Boilermakers, which says that the bylaws, together with the certificate of incorporation and the broader Delaware general corporation law form part of a flexible contract between the corporation and its stockholders, and that includes the officers and directors. And that is the contract.

Now, the Government says they're not a party to it, but we have the HERA succession clause. We have FHFA also stepping into the shoes of Fannie and Freddie. So in either of those ways, and, again, I've identified them on the grid so Your Honor can decide, but I've tried to make it at least clear as to what our position is because

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there's so many issues in this case. Clarity, I think, has some value.

I will point out -- Counsel didn't -- but the 3rd Circuit in Jacobs said there is no such contract claim because there's no precedent in Delaware holding there is such a contract. There is no precedent in Delaware because this would never be allowed to happen in Delaware. There is no question. Delaware has abundant case law on self-dealing. They would never allow a controlling party to abscond with all of the value of a corporation at a time when the other shareholders are about to realize value. But I do want to call that case to your attention so that you're aware that that case is out there.

Now, on the subsequent purchasers, on a contract claim, for all these contract claims, Delaware law is that a contract claim passes with shares. And we've cited a lot of authorities for that. I don't think that's even controversial as a Delaware contractual matter. So the contract claims do pass with the shares.

I'd like to turn to the last page, which are the Cacciapalle Plaintiffs' contract claims. And Mr. Hume, who represents them, will correct me if I misstate anything on these, but I've again -- we've cleared the grid to make sure that's accurate, and so you can see

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again these are direct claims, and I will say that many of the Plaintiffs, the Cacciapalle named Plaintiffs, just like Ms. Rafter and the Rattiens among our Plaintiffs, were not subsequent purchasers. You know, they've been purchasers throughout. So there will be standing for these direct claims no matter what.

Also under Delaware law, the claims do pass with that, but the Cacciapalle claims are both under the certificates. Now, Counsel says, well, the certificates may be a contract, but it's not a contract with the Government. Well, once again, right now, the question is are the GSEs the Government, and we say they are; and, alternatively, Fannie and -- excuse me, FHFA has stepped into their shoes, so they are a contractual party for these purposes.

Since all the claims are against the Government for one or the other of those reasons, all of these claims are within the jurisdiction of the Court. All of the named Plaintiffs in Cacciapalle were prior purchasers. While the class includes some subsequent ones, they've cited many cases as we have showing that these claims pass with the shares.

And on the 12(b)(6) motion, to the extent one is made on Cacciapalle, it's a straightforward claim, and that is just a breach of contract which are the preferred

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stock certificates. These are preferred shares. And there is or there isn't a breach, but it's a clearly stated contract claim. And the Government hasn't argued that there hasn't been a breach of any of these contracts. It just says it's not a party, and we respectfully suggest that they are.

Thank you very much, Your Honor.

THE COURT: Thank you.

MR. LAUFGRABEN: Just briefly, Your Honor. With respect to the slide showing the out -- the request for relief in the District Court cases, it wasn't to suggest that Plaintiffs are somehow precluded from pursuing such relief under issue preclusion. Our only point was that the relief that they're seeking in this Court, the excision of the Third Amendment, is precisely the nature of the equitable relief that other shareholders have sought in District Court. Our only point was that the relief is equitable in nature and not, you know, a claim for money damages under a contract.

As you can see from the chart that Counsel prepared, you know, the only -- well, it's true that the Third Amendment was a contract between Fannie Mae and Treasury. Plaintiffs as shareholders do not have standing to bring that under the succession clause. The other contracts are supposedly between the Government as

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the grantor of Fannie's charter and Fannie's shareholders. Again, under general principles of corporate law, there's no contract between shareholders and the Government that incorporates the corporation.

Finally, just this notion that under the succession clause whether, you know, these contracts between the shareholders and Fannie Mae and Freddie Mac and whether they are somehow contracts with the United States, when FHFA as conservator stands in the enterprises' shoes, it takes on the enterprises' private character. FHFA as conservator standing in the shoes of the entities does not somehow transform those entities into the Government. I mean, that turns the basic principle set forth in O'Melveny on its head.

And with that, we ask the Court to dismiss these contract claims.

THE COURT: Thank you.

MR. LAUFGRABEN: We'll also do the implied contract claims if that's convenient for the Court.

THE COURT: Can we go off the record just for a moment?

(Court in recess.)

(6:11 p.m.)

THE COURT: Oh, very good, okay.

MR. DINTZER: And Mr. Laufgraben is up again

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with another (inaudible).

MR. LAUFGRABEN: May I approach, Your Honor?

THE COURT: Certainly. Thank you.

MR. LAUFGRABEN: Hopefully, we can keep this point relatively brief, but a handful of Plaintiffs, certainly the Owl Creek Plaintiffs, have alleged a breach of a purported implied-in-fact contract. A little earlier, Your Honor had, you know, engaged in a discussion with Mr. Dintzer about the possibility of FHFA strong-arming the boards into consenting to this conservatorship, but the theory is actually that the boards -- or that the Government was really scared that the boards would somehow initiate litigation, so to stop the conservatorships.

So in order to get the boards' consent, the FHFA somehow agreed that if it appointed a conservator, the conservator would relinquish its full range of statutory rights and operate the enterprises essentially as if it were a common law conservator. That's the gist of the theory.

THE COURT: Oh, am I mistaken that members of the board were not told that you either agree to the conservatorship or you'll be fired? Am I mistaken?

MR. LAUFGRABEN: I would have to go back and look at what the complaints allege, but what's important

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to note is that the statute in HERA, there is a provision that if the directors consent to the conservatorship that they will be protected from personal liability. So the statute itself contains an incentive.

THE COURT: Thank you.

MR. LAUFGRABEN: Sure. But putting aside the merits of this rather implausible claim, no Plaintiff really has standing to bring it. So even if the Plaintiffs could show the existence of any preconservatorship contract to build capital while in conservatorship and operate as a common law conservator, the contract intended to benefit a group of shareholders directly, you know, to benefit the group, to, you know, shareholders of the class, that's insufficient to confer third-party beneficiary standing to enforce this alleged contract between the boards and FHFA as the regulator that Plaintiffs were not part of.

Now, this is a law. To enforce a contract as a third-party beneficiary, the contract must express the intent of the promisor to benefit the shareholder personally, independently of his or her status as a shareholder. Okay, so that -- this is what the Fed Circuit provides, and it guts Plaintiffs' theory that they are somehow third-party beneficiaries of an implied contract between the enterprises and FHFA as a regulator.

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You know, the Owl Creek Plaintiffs point to some minutes from a Fannie meeting that talks about discussing the shareholders, you know, generally in connection with the decision to enter into the conservatorships, but there's no mention about benefitting any particular shareholder. And the theory is particularly incredible with respect to the Owl Creek Plaintiffs because they sued on the purchase of stock after the enterprises entered into the conservatorships.

So they weren't even shareholders at the time this third-party -- this contract was formed that they claim they have third-party beneficiary standing to enforce. In addition, just the allegations themselves are implausible. It's a theory that was developed as part of litigation, and there's no mention of some implied contract and any SEC filing or public statement.

You know, the contract duties alleged are statutory powers, and as I mentioned before, Congress, not FHFA, provided the boards' members with statutory incentives to consent in the form of the protections from personal liability. And also to the extent that Plaintiffs seek to enforce this contract between the boards and FHFA as regulator derivatively, Plaintiffs do not have standing to bring such a claim under the succession clause. And because Plaintiffs have no

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standing and in our briefs we explain why the merits of the claims fail anyway, the implied contract claims should be dismissed.

MR. ROSENBERG: Your Honor, Lawrence Rosenberg, Jones Day, for the Owl Creek Plaintiffs. If you want to turn to our book of slides that we handed out earlier today, the argument here starts at Slide 28 of the cover and then the substance on Slide 29.

And I just want to start out with a couple of big-picture points. So Slide 29 is the first substantive one, but number one, the arguments that you've heard here and the observation you made about pressure on the GSE about to accept the conservatorship is not inconsistent with this theory. I think there was concern that the GSE might not agree to the conservatorship, and I think there was pressure put on them to agree to it.

But, also, as part of trying to get them to agree, they were constantly being told and the board minutes show that the GSEs were concerned about what would happen to the shareholders. And when we get to intended beneficiary status, we've included in the slides and we've included in our briefs several statements, both public statements as you've seen generally that the shareholders were going to be protected in the conservatorship, and then specific statements by the

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board to that effect. And so I think all of that is consistent.

Another big-picture point is that there are a number of cases out there that suggest that rights like contract rights can still exist, even in a conservatorship or receivership situation, cases like Slattery I and FDIC vs. Hartford show that in general there can be these kinds of rights that exist, even in those regulated conservator-type circumstances. And so there's no automatic disqualification of this.

So then we turn -- if you look at the slides -- if you look at Slide 30, we talk about the elements of what an implied-in-fact contract claim would be. Right, so it's four elements: unambiguous offer and acceptance; mutuality of intent to contract; consideration; and actual authority. And each of those elements is met at least at the motion to dismiss stage, and we were talking about something without discovery, without facts. It may be that after discovery the Government has different arguments to make on a summary judgment motion or at trial, but at this point, there is enough alleged to show that all four elements have been satisfied.

First of all, as we note on Slide 31, in -- and I'm not going to read this specifically because it's protected, but there are statements in the board minutes

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and the board resolutions confirming that there was an offer by Treasury and acceptance by the boards of directors to appoint the agency as a conservator. So there was an offer; there was an acceptance. Those are the first two elements.

Then if you take a look at Slide 32, we also see that there was a bargain for exchange, at least to some extent here. And it's important to realize that the Government had not made any finding. There was nothing specifically that authorized it to impose conservatorships without consent of the -- of the instrumentalities and the GSEs. And so part of what was going on in trying to ensure that the GSEs would accept the conservatorship was this guarantee that they would look out for the interests of the shareholders, among other interests. And so we also talk about board minutes here, where we talk about the idea of preserving and conserving, keeping it into sound economic functions and, of course, looking out for the shareholders.

And then we look at, I think, the crux of the argument here, which is intended beneficiary status. So my colleague cited the Castle case and quoted this and has this quote that talks about an intent to benefit the shareholder personally. The Castle case doesn't mean by that that you've got to identify them as an individual.

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What that case is talking about is you can't just simply say that any action that befalls the company creates some kind of intended beneficiary status for the shareholders.

What it's saying is there has to be something more, and if you take a look at Slide 33, the State of Montana vs. United States case explains pretty clearly what that "something more" needs to be. That case says the intended beneficiary need not be specifically or individually identified in the contract but must fall within a class clearly intended to be benefitted thereby. One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him.

So it's the class. It can't be just anything happens to the company and so therefore you're an intended beneficiary, but if there's something that's being done specifically for the benefit of the shareholders, that's different from what they're talking about in Castle. That can confer intended beneficiary status.

And as the last two slides on this show -- Slide 34 again -- we cite a number of statements that are protected from the board minutes showing that the boards were specifically concerned -- considering, concerned with evaluating their rights, their fiduciary duties to

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the shareholders and how they would be preserved.

And then if you look at Slide 35, these are public statements where the -- where various folks had specifically said that preferred stocks will continue to remain outstanding, that conservatorship does not eliminate the outstanding preferred stock, and that stockholders will continue to retain all rights in the stock's financial worth.

At the motion to dismiss stage, Your Honor, this is enough to preserve, to show the statement of a claim for an intended beneficiary status and for an implied-in-fact contract. There simply is enough here. There's enough in these statements. This claim should go on and should be permitted to go through discovery at this point.

Thank you, Your Honor.

THE COURT: Thank you.

MR. LAUFGRABEN: Briefly, Your Honor. You know, just general propositions about contracts and what the board said at certain points is one thing, but before the Court even considers those matters, you know, the Plaintiffs have to show they had some sort of standing. And third-party beneficiary status is an extraordinary status. And it's not just the case where if, you know, shareholders are somehow discussed or even intended to

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benefit all the shareholders of the class, that a shareholder somehow now has the right to invoke the corporation's contractual rights with a third party. I mean, that's what the Fed Circuit said, that's not enough.

And, again, the claim is especially implausible here when the Owl Creek Plaintiffs allege that they did not even own Fannie Mae or Freddie Mac stock until after this alleged implied-in-fact contract was even formed. So with that, Your Honor, we ask that the Court dismiss the implied-in-fact contract.

MR. ROSENBERG: One point, Your Honor.

THE COURT: Certainly.

MR. ROSENBERG: On this point about whether the Owl Creek Plaintiffs owned the stock at the time, right, under the State of Montana case, the whole point is that it's only the class that needs to be specifically benefitted. So even if they didn't own the stock at the time the contract was originally made, if they became the class here before the Third Amendment then they would still be able to benefit from the implied-in-fact contract.

So they don't have to be named individually. They don't have to be part of that class at the time the contract was entered into, and there's no case that the

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Government cites that says that.

Thank you, Your Honor.

MR. LAUFGRABEN: We have no further comments.

THE COURT: Very good.

MS. HOSFORD: Your Honor, I'd like to approach the bench to hand up our slides on the illegal exaction issue, please.

THE COURT: Thank you.

MS. HOSFORD: Thank you.

THE COURT: Thank you.

MS. HOSFORD: Your Honor, tonight I'm going to address the Government's argument that Plaintiffs have failed to state a plausible legal exaction claim. To assert a plausible legal exaction claim, a plaintiff must establish three things. First, they must establish that the United States improperly collected or withheld plaintiff's money. That's under the Norman vs. United States case. Second, they have to show that the withholding of money was in contravention of a money-mandating statute, regulation. And, third, plaintiffs have to show that they received a financial benefit in one of two ways, either directly or indirectly. Directly is through the plaintiff's payment to the Government; and indirectly is by requiring a plaintiff to incur a cost that the Government would otherwise have had to pay.

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But in either case, the Government must have the claimant's money in its pocket. There is no exception for a claimant that has not actually paid any money. I'm going to quickly go to the -- skip this and go to the next slide and just briefly explain why a money-mandating statute is required.

Now, normally, the Tucker Act does not grant jurisdiction over due process claims because the due process clause is not money-mandating, and the Federal Circuit has held that. Illegal exaction claims are due process claims that are premised on a payment of money that's contrary to a statute or regulation or a constitutional provision that's money-mandating. So, for instance, the Fifth Amendment itself provides for just compensation, so it's considered to be money-mandating, and that's why the Court has jurisdiction over those types of constitutional claims.

Stepping back to my last slide briefly, so what Plaintiffs are claiming here is that they have lost a claim on the company's equity that could be paid out in the form of dividends or liquidation. So let's now go and look at the requirement for -- sorry. Oh, and go back and see how the requirements for an illegal exaction claim have not been fulfilled in this case.

First, the Government doesn't have any of the

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shareholders' money in its pocket. Plaintiffs admit that they paid no money to the Government themselves. Most Plaintiffs incorrectly argue that they paid money in effect to the Government, but they did not pay money in effect because the shareholders' money was never paid to the Government. It was -- it was the GSEs or the enterprises money -- Fannie and Freddie -- that actually paid dividends to the Government.

Plaintiffs improperly rely on the Aerolineas Argentinas case and Fireman vs. United States cases to say that they don't have to have that money actually go out of their pocket. But in both of those cases, the claimant actually had money out of its pocket, but the route to the Government's pocket was circuitous. They were paid first to somebody else, and then that person or entity paid it to the Government. But there's no exception to the rule. Plaintiffs have money -- must have money out of their pocket, and the shareholders have not paid any money in this case.

The Washington Federal Plaintiffs concede that they paid no money directly or in effect, and they misread the Eastport and United States vs. Testan cases to not require them to, but those cases are clear that when you bring an illegal exaction claim, you must pay money.

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Second, FHFA did not act contrary to a statute or regulation in executing the Third Amendment. I talked about this comprehensively early in the day. I'm not going to go through it again, but five circuits have found -- every circuit except the 5th Circuit in Collins has found that FHFA definitely acted within its conservatorship authority. So, therefore, Plaintiffs can't identify an action contrary to statutory regulation, or constitutional provision.

Plaintiff nonetheless make several arguments to advance their theory that some violation has taken place. They first claim that FHFA violated HERA's best-interest provision because FHFA and/or Treasury didn't act in the interest of shareholders. But the best-interest provision doesn't run to the shareholders. It says that the agency may take action in the best interest of FHFA or the company's. It doesn't go to the shareholders. And in any event, it's -- the provision is "may." It's a permissive statutory provision, and it's not required in the first instance.

Second, Plaintiffs claim that there was a violation of an FHFA regulation that precludes capital distributions in conservatorship. But they -- and that's 12 CFR 1237.12, but they ignore subsection (b), which allows dividends and contributes to the long-term

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financial safety and soundness of the enterprises in the interest of the enterprises or otherwise in the public interest. And when FHFA went through rulemaking in promulgating this regulation, it expressly recognized that paying dividends to Treasury would be in the best interest because Treasury -- on behalf of the taxpayers is putting vast amounts of money into the GSEs. Vast amounts of money into the GSEs.

Third, Plaintiffs claim that the Third Amendment is an illegal purchase of new securities, but the Third Amendment merely modified the dividend structure that was already in place when Treasury bought securities back in 2008 and then increased its investment in -- its investment limit in the GSEs in the Second -- the First and Second Amendments to the PSPAs. The Third Amendment did not result in Treasury acquiring any new shares, and Treasury did not raise the cap on capital infusions. So, therefore, several courts, and even the Collins court -- the 5th Circuit Court -- has held that there was no purchase of new securities here.

Second, Plaintiffs cannot show under the second requirement for an illegal exaction claim that HERA is a money-mandating statute. HERA mandates no compensation, much less monetary compensation to enterprise shareholders, and Plaintiffs can point to no provision of

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HERA that actually mandates monetary compensation. Washington Federal and Owl Creek instead rely on the White Apache Mountain case, and we heard a lot about the difference between shareholders in a corporation and Indian rights earlier today, but in any event, the White Apache Mountain case is not an illegal exaction case. It has to do with a breach of a fiduciary duty, and it really goes to breach-of-contract damages, and so it's completely irrelevant to an illegal exaction claim.

So just to sum up, an illegal exaction claim fails if Plaintiffs fail to plausibly plead any of the three elements that they must show. Here, Plaintiffs have plausibly -- failed to plausibly plead all three elements. The Government has none of the Plaintiffs' money in its pocket. Plaintiffs cannot show that there was any violation of a statute, regulation, or constitutional provision. And Plaintiffs have not identified a money-mandating statute.

So I will sit down and let the other side get...

MR. PATTERSON: May I approach with some slides?

THE COURT: Thank you.

MR. PATTERSON: And this is going to be your last set of today.

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THE COURT: Thank you very much.

MR. PATTERSON: And I've handed out some for the Government, and these were emailed earlier today as well.

Good afternoon, Your Honor, and I'll try to go quickly, as I believe I'm the last person standing between everyone and being done here, but --

THE COURT: Could you identify yourself for the record.

MR. PATTERSON: Yes. Pete Patterson.

THE COURT: Thank you.

MR. PATTERSON: I represent the Fairholme Plaintiffs.

THE COURT: Thank you very much.

MR. PATTERSON: And I'll be addressing the illegal exaction claims. The Government's motion to dismiss these claims should be denied, and I will begin with the money-mandating issue, which the Government claims is required to state an illegal exaction claim, but it's been established that the Tucker Act provides jurisdiction to HERA illegal exaction claims for at least 65 years, starting with the Clapp case in the Court of Claims and in the United States Supreme Court case in Testan in 1976, made very clear that a money-mandating statute is required when the Government does not have the

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plaintiff's money in its pocket. So an illegal exaction claim and a money-mandating claim are distinct claims, and only money-mandating claims require a money-mandating statute.

And there are a couple -- we list a number of precedents here, but I would like to point Your Honor to a couple in particular. One is the Eastport case from 1967, and what that involved was the Federal Government was illegally requiring shippers to pay a fee for permission to sell their ships to a foreign buyer. So in the Eastport case, the plaintiff brought a claim saying I want that fee back, and I also want the damages that were visited upon me by the Government requiring this because I held out for a while and made me lose the sale, and I lost money, so I want damages for that.

And what the Court of Claims held in that was that you can get your money back because that's an illegal exaction, but you can't get your damages because if it's not an illegal exaction, you need a money-mandating statute, and you don't have one here, so you don't get your damages. So that case very clearly stands for the proposition that for an illegal exaction claim, you do not get -- you do not need a money-mandating statute.

The same is true in Aerolineas, where the Court

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held for the plaintiff and said there's been an illegal exaction here. In Footnote 3 in that case, the Court said, and, therefore, we do not need to reach the alternative theories of recovery, including money-mandating statute because that is a distinct issue, and a money-mandating statute is not required for an illegal exaction claim.

And the Government itself recognized this just two years ago in the Eastern District of Wisconsin in the Kentera case where the Government asserted that either an illegal exaction or a money-mandating statute is required for Claims Court jurisdiction but not both. And that's our position here, and it's consistent with binding precedent.

The Government relies on the Norman case, but that does not preclude jurisdiction here for three reasons. First, although Norman has language appearing to conflate the money-mandating and illegal exaction issue, the holding in that case was that there was no exaction to begin with. So its language was not necessary to the decision, and, therefore, it was dicta.

Second, to the extent there is a conflict between Norman and the earlier decisions, such as Aerolineas and Eastport, under well-established precedent, and as Your Honor recognized in the decision

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in Bonewell vs. United States, if there's a conflict in Federal Circuit authority, the earlier decision controls as the binding precedent on this Court. So the earlier decisions of Aerolineas, Eastport, Clapp, those other decisions that make very clear it is key to holding that a money-mandating statute was not required for an illegal exaction claim, those cases bind Your Honor in this case.

And, finally, our submission is that even if Norman -- Norman's test applied, which is either expressly or by necessary implication, the statute provides for a monetary remedy, we submit that it is satisfied here under the United States vs. Mitchell case. You know, you and Mr. Hume had a lengthy exchange about that earlier. I won't repeat that. I think Mr. Hume stated our position well as to why damages are required under that case for HERA. So for those reasons, this Court's jurisdiction is secure.

Moving on to the next issue, which is whether the Government has exacted the Plaintiffs' property, the Government ignores our derivative claims, and it's very clear the Government has hundreds of billions of dollars of Fannie and Freddie's money in its pocket through the form of dividends, so it's clear that that claim should proceed on this element. And the same is true with our direct claims because the Government has taken -- again,

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we've got the hands -- taking our contract rights -- or not our contract rights, our stock rights, our equity, in the companies, and this has resulted in our money being in the Government's pockets. And an illustration what happened in the second quarter of 2013, which based on the company's earnings that quarter, they paid Treasury $66 billion in dividends on the senior preferred stock.

Under the prior arrangement, how it would have worked was that the first approximately $4.7 billion could have gone to Treasury for its 10 percent dividend. The rest of the 60-billion-plus, a first cut, around $2 billion, I believe, would have had to go to the junior preferred, and then the remainder, assuming Treasury exercised its warrants -- it hasn't done that yet -- but had it done that, would have gone 80 to Treasury, 20 percent to the other common shareholders. So in a very real way, every time that net-worth sweep payment exceeds Treasury's 10 percent dividend, the Government is taking our money and putting it in its pocket, because under the lawful security documents, that's what would have had to happen.

And it's -- you know, the Government tries to limit the situation. You know either we have to pay the money directly to the Government, or the Government directs us to bear a burden that the Government itself

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otherwise would have had to bear, but that's not the test, and as the Court recognized in Fireman, you know, what constituted an exaction has not been strictly construed. Eastport was clear in saying that the Government can exact money or property, and we're saying here that it's done both.

And in the case of Bowman vs. the United States, which is 35 Fed. Cl. 397 from 1996, was a forfeiture case, and the allegation there was that the Government had illegally obtained property through forfeiture and then sold the property. And the Court said, well, that's sufficient to say you have the money in the pocket because you've acquired an asset and you've reduced that to money. That's similar to what has happened here.

In addition, the Fireman case and the Virgin Islands Port Authority cases are other cases in which the Government stood in between a third party and the plaintiff and took the money that the plaintiff said should have gone to it. In the Fireman case, it was a situation where a campaign -- the donor alleged the money should have come back to the donor; instead, the campaign gave it to the Government and the Government wouldn't return it.

In the Virgin Islands Port Authority case, it

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was the Government collected port fees in the Virgin Islands that the Virgin Islands said should have come to it directly. The Virgin Islands didn't pay anything, but the Government just took the money and kept it for itself. And, again, that is similar to what we have here. And so for those reasons, the Government has our money in its pocket.

Moving on to the fact that the exactions are illegal in this case, they're illegal for at least four independent reasons: one that Treasury -- or the FHFA is an unconstitutional agency; two, FHFA exceeded its statutory authority in the net-worth sweep; three, FHFA violated its own regulations; and, four, Treasury exceeded its statutory authority.

Now, on the FHFA being an unconstitutional agency, which is what the en banc 5th Circuit decided by a 12-to-4 vote in the Collins case and which DOJ notably has agreed that FHFA's director's for-cause removal protection is unconstitutional, they haven't briefed that issue here, they haven't argued it, so at a minimum, this claim on the merits, you know, assuming Your Honor finds for us on other predicates that we've discussed, must go forward.

The next issue is that FHFA has violated its authority under HERA. And HERA strictly charges FHFA as

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conservator with preserving and conserving Fannie's and Freddie's assets while rehabilitating them to a sound and solvent condition. This is based on the plain text of HERA, as well as the statutory and common law background that should inform the Court's interpretation of that text. And the net-worth sweep clearly violated those responsibilities.

As the 5th Circuit said in Collins, it abandoned rehabilitation, it actively undermined the pursuit of sound and solvent condition, and did not preserve and conserve assets. And you don't have to take our word for it. In our second amended complaint, Paragraphs 134, 135, and 138, Treasury, FHFA, and White House officials all acknowledged that the net-worth sweep, by its very design, prohibits Fannie and Freddie from rehabilitating and returning to a sound and solvent condition.

And that's what's key. You know, a lot has been discussed today about the timing and whether Fannie or Freddie could pay back the Treasury money, those sorts of things, but it's telling that at the very moment when Fannie and Freddie were demonstrating that they had the capacity to pay the Government back, that's when the Government came in and said, no, we're going to make it so you can't do that because we don't want you to exit

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conservatorship, we don't want you to build up your capital, we don't want the other shareholders to get any money, we want everything. And that is flatly contrary to FHFA's authorities under HERA. Indeed it is -- as the 5th Circuit said, turns conservators -- inverts what it means to be a conservator, turns it on its head.

Courts that have upheld the net-worth sweep and the Government argued primarily based on two provisions that they point to that they say make the net-worth sweep legal. One, they say that HERA uses "may" instead of "shall" when it says that FHFA as conservator is to preserve and conserve assets and return to a sound and solvent condition, but that is language of authorization. Without that authorization, FHFA, as the Supreme Court has said in other contexts, literally would have no power to act.

And so by saying FHFA may do this, Congress was not saying, "and you may also do the precise opposite of this." It would be like a doctor claiming you may resuscitate the patient, saying, well, I take that for authorization to kill the patient and harvest his organs and give them to my friend, which is, by analogy, what FHFA did here. They're putting Fannie and Freddie in a zombie-like state and sucking out the capital every quarter.

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And outside of litigation as our complaint makes clear, Paragraph 59, FHFA has repeatedly said that these are statutory mandates. It's only in court that FHFA says, no, these are optional, we don't have to pursue them. And a contrary interpretation actually would not help the Government because as, again, the 5th Circuit recognized, that would leave FHFA with no intelligible principle to guide its exercise of its conservatorship authorities, which would be a violation of the nondelegation doctrine. So either way would make the net-worth sweep illegal.

The other provision that the Government and some other courts have looked to is -- and that the Government adverted to here today, was HERA's best-interest provision, where it says that FHFA as conservator when authorized by this -- may take actions authorized by this statute that it determines in the best interest of the enterprises or the agency. The plain language of this demonstrates that it cannot do what the Government argues that it does, which basically says we can do anything we want if we think it's in our interest.

It actually conditions authority given elsewhere. It says as conservator, you may exercise authorities under this section if you make these

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determinations, so it conditions the Government's exercise of those authorities on a best-interest determination. It does not expand the Government's authority.

And a contrary interpretation would violate core principles of interpretation by essentially making HERA's detailed specification of the FHFA's conservatorship authorities superfluous if the Government can just do whatever it wants, and also by hiding elephants in mouse holes by fundamentally changing what it means to be a conservator in an ancillary provision, and the Supreme Court has said that Congress does not write statutes in that way.

What this provision does do, the best-interest provision does do by saying FHFA may act in the interest of the agency is in one respect modestly relaxing FHFA's fiduciary duties as Collins held by allowing them to enter into interested-party transactions. Absent this provision, for example, it's not clear that FHFA could enter into a contract with Treasury at all. So given that there was some anticipation under HERA that Treasury may be investing in the companies, some provision had to be made for that. But it does not upend what FHFA's obligations are as a conservator to preserve and conserve and restore to a sound and solvent condition. Those

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things remain, and FHFA must abide by them.

And, finally, to make clear that this doesn't do what the Government claims it does, is FIRREA, under which HERA was patterned. It gives FDIC the same authority to consider its own best interest, and they -- in a provision that is essentially the same as this. And no one to my knowledge has ever suggested that that would authorize FDIC to say to a banking conservator, okay, we're taking your deposits and giving them to Treasury because we think that is in our best interests, and that is the implication of what they are arguing here.

And they point to, you know, one distinction that FIRREA mentions depositors, but again there it is a disjunctive here, and the reason why depositors aren't mentioned in HERA is that Fannie and Freddie don't have depositors. So both have shareholders. Neither mentions shareholders, yet no one would interpret the FIRREA provision the way that they are interpreting it here.

Next, the net-worth sweep is illegal under Treasury's own regulations, which generally prohibit the payment of dividends while Fannie and Freddie are in conservatorship. The Government cites to an exception for things that promote the long-term safety and soundness of the enterprises, but given that the net-worth sweep was designed to thwart that, that exception

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can't possibly justify the takings or justify the action here in an exception to that.

Finally, Treasury's net-worth sweep exactions are illegal because Treasury's authority to acquire Fannie and Freddie stock expired on December 31st, 2009, and has been discussed repeatedly here today. The economic substance, the reality of what happened on August 17th, 2012, well after that, is that Treasury acquired for itself the rest of the stock that it had not acquired in 2008. And Treasury was not authorized to do that at that late date. The fact that they did that pursuant to an amendment rather than to issuance of new shares, the Court should not let that formality override the reality of what took place.

Unless you have any questions, that's all, Your Honor.

THE COURT: Thank you very much.

MR. PATTERSON: Thank you.

MR. VALLELY: Brief supplement if Your Honor will indulge it on behalf of the Derivative Plaintiffs, the Fisher and Reid Plaintiffs.

Again, Your Honor, Patrick Vallely on behalf of the Fisher and Reid Plaintiffs. Attorney Patterson made a brief mention, but it's worth bearing emphasis to the point that a core premise of the Government's argument on

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the illegal exaction claim is that the Government simply doesn't have the shareholders' money in its pocket. Of course, the Government does not and cannot dispute that it does have Fannie and Freddie's money in its pocket, so that entire premise of their argument simply does not apply to the derivative illegal exaction claims.

Moreover, I think Attorney Patterson made an important observation here about the factual allegations in this case that it was precisely when the Government knew that the companies have the capacity to repay the Government that it then seized on that opportunity through the Third Amendment, and I think that observation is important because it brings us full circle back to a metaphor the parties were passing around early this morning, the metaphor of the lottery ticket.

And I think this is important that the allegations in the original complaints, which were bolstered substantially by the discovery that the Court permitted in between the original complaints and the amended complaints, makes very clear that the Government knew full well that it had a winning lottery ticket when it rolled out the Third Amendment -- when it implemented the Third Amendment.

That was the precise purpose of the Third Amendment. It realized it had this winning lottery

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ticket, and rather than let the companies cash that in, it went straight to the lottery office and cashed it in for the Government, cashed it in for itself, and that windfall to the Government is exactly what's precluded by the Fifth Amendment. Whether it's deemed a taking or an illegal exaction, that's a windfall the Government cannot take for itself. Thank you.

THE COURT: Thank you.

MS. HOSFORD: Oh, somebody else, sorry.

UNIDENTIFIED MALE: This is still illegal exaction.

MS. HOSFORD: Yes.

THE COURT: Okay.

MS. HOSFORD: Sorry. I'm going to try to keep this as brief as possible. First, I'll touch on Mr. Vallely's comments. To the extent that there are any derivative claims here, we have to remember that if he's talking about money being taken from Fannie Mae and Freddie Mac themselves, Fannie Mae and Freddie Mac had a contract with Treasury. When you have a contract between two parties, then you cannot have an illegal exaction claim. They cannot show any violation of regulation, statute, or constitutional provision.

In addition, to the extent that the shareholders claim that it was their equity that was paid

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to Treasury, they're mistaken. What we're talking about is -- they don't have the equity in the company; the company has the equity in the company. So to claim that if equity is paid from the company to Treasury that that somehow is a direct payment from Plaintiffs, that's just incorrect.

I would also take issue with Plaintiffs' interpret -- or construction of the Fireman case where they said that the claimants in that case made no payment, but the plaintiffs did make a payment in that case. They made the legal campaign contributions that campaigns were required to refund by regulation but instead were transmitted to the Government, so there was a payment made there.

With respect to the whole issue of whether an illegal exaction claim requires a money-mandating statute, regulation, or constitutional provision, I won't spend a lot of time on this, but this Court has on numerous occasions relied on the Norman decision to establish that a money-mandating provision is required. And -- but the Court doesn't have to rely solely on the Norman decision. The Norman decision cited to a prior decision in Cyprus Amax Coal vs. U.S. That's a Federal Circuit case as well from 2000, 205 F.3d 1369, and there the Federal Circuit held that to invoke Tucker Act

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jurisdiction, a plaintiff must demonstrate a source of federal law such as the Constitution, federal statutes or regulations that create a substantive right that must be fairly interpreted as mandating compensation by the Federal Government for the damages sustained.

I would also note that to the extent Plaintiffs allege that Norman is somehow overruling Eastport and Testan, Norman actually cited to Eastport, so obviously the Federal Circuit's interpretation of Eastport was not consistent with Plaintiffs' interpretation. And like I said, this Court has on frequent occasions relied on Norman for the money-mandating requirement, and just to name a few cases, the Northern Virginia Power case, the Boeing case that was decided in 2018, the Christy case, and the Kalos case.

I would also mention that in the Starr case on appeal, Judge Wallach in his concurring opinion reaffirmed that in order to bring an illegal exaction claim you must demonstrate that there's a money-mandating statute, regulation, or constitutional provision.

This -- the points I'm about to make are mostly covered in our briefs, but I just want to reiterate on the conserve and preserve issue that Mr. Patterson raised, the conserve and preserve issue -- sorry, provision, is permissive, and the courts in Saxton,

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Robinson, and Perry Capital have all interpreted that -- interpreted it that way, so I'll just leave it at that.

With respect to the best-interest provision, I covered that before, but the best -- like I said, the best-interest provision is itself permissive and does not apply to shareholders.

And in addition, to the extent that FIRREA has its own best-interest provision, that only helps us here because no one has challenged to our knowledge -- they have not cited anybody's challenge to FDIC's right to act in its own best interests when it's in conservator or receivership.

With respect to the unconstitutional structure issue that they raised, they've only got half of the Government's position here, and I would caution the Court that the -- we have already agreed that we will defer that issue until after this motion to dismiss is resolved. All the parties and the Court had agreed to that, but Plaintiffs claim that the Government agrees that FHFA's structure is unconstitutional, that -- to a certain extent, that position's been taken, but the position's always been that the remedy going forward -- the remedy's only going forward; it's not going backward to when the Third Amendment was executed. So it's really -- that issue is irrelevant.

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And, finally, Plaintiffs attempt to make an analogy to the FDIC funneling bank deposits to Treasury. That analogy is misplaced because FDIC actually guarantees deposits, and they act in depositors' best interests. As Counsel said, neither HERA nor FIRREA contemplates a scenario in which the conservator acts in the shareholders' best interests. So there's really -- that's not an analogous situation.

I believe that's all I have. Thank you.

THE COURT: Thank you very much.

MR. DINTZER: Okay, so, Your Honor, the next thing we have on our list, the last one, is our motion to dismiss on the Washington Federal Plaintiffs conservatorship-based claims, and so I was going to go first, but pleased to present -- thank you.

May I approach, Your Honor?

THE COURT: Please. Thank you.

MR. DINTZER: So this one is thin enough that I probably could have skipped it altogether, but we wanted to make sure you had a complete set.

THE COURT: Thank you very much.

MR. DINTZER: Thank you.

So the Washington Federal Plaintiffs. Their claim arises out of the conservatorship's appointment -- the conservator's appointment. They're the only

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Plaintiff asserting claims based on that. Specifically, they allege that the imposition of the conservatorship took or exacted the shareholders' rights. And here's -- I won't read it, but here's the claim, the portion in their complaint, Paragraph 16. So what do we have here? The Court should dismiss Washington Federal's claim that the appointment of a conservator was a taking or exaction because their claim is untimely and it's misdirected.

So, first, as we've discussed today, HERA has an express 30-day window after the conservator's appointment to challenge FHFA as conservator. This window closed in October 2008, years before Washington Federal filed its complaint. The purpose of closing the window, as we discussed earlier, was so that FHFA could operate the conservator without constant disruptive challenges. And such challenges could disrupt from the purpose of the conservatorship, and the fact that the Plaintiffs have framed -- or the Washington Federal Plaintiffs have framed their constitutional -- their claim as a constitutional challenge can't extend that 30-day window. And that's really what they're trying to do. This is a way of trying to challenge the conservator.

I mean, because basically if they make FHFA pay money for what it's done as the conservator, that's simply another way of trying to challenge it.

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Second, under HERA, the District Court had exclusive jurisdiction for this type of challenge under 12 USC 4617. So for Wash Fed, it was a matter of the wrong place and the wrong time. They argue that FHFA improperly exercised conservatorship authority. Those challenges were subject to the 30-day limit and should have been -- and, regardless, they should be in District Court.

So the Court should dismiss Washington Federal's claim about the conservatorship. We've discussed Wash Fed as we worked our way through all the other issues, so I don't have any unique arguments for Wash Fed that we haven't already raised, so for the rest of those claims, we stand on what we said here and what we said in our brief.

THE COURT: Thank you.

MR. DINTZER: Thank you, Your Honor.

MR. GREEN: Kevin Green for the Washington Federal Plaintiffs. The Government said something earlier this afternoon that we agree with and was very important, and that is that the date of the taking is important. And, again, to reset to 2008, because our case is about that, and it's not about the Third Amendment, Washington Federal agrees that the critical time to assess the Government's conduct was in August of

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2008 when the directors of the enterprises were confronted with, as the Court put it, a Hobson's choice -- agree or you're out. And the Court had used the terms undue influence, death threat, or death grip. And our complaint alleges in great detail allegations showing coercion, and I'm not going to repeat those because they're under seal, but they are detailed and I think quite compelling.

Now, do they rise to the level of a quid pro quo? That's sort of a delicate question these days, but putting that aside, it's very compelling that that element of HERA, that the Board's consented, simply was not satisfied. Now, again, what kind of case do we have or what sort of class do we represent as distinct from the Third Amendment claimants? These are mom-and-pop investors who held stock in Washington Federal, quite often for a long time.

And it's been touched on earlier today that should they have foreseen -- I mean, what were their reasonable, investment-backed expectations? And I think the Cienega Gardens case discusses the touchstone on that, and it's whether the Government's action was foreseeable. And given the financial state of Fannie and Freddie, and this is all detailed in the complaint and also under seal, detailed allegations as to its solvency,

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they had no reason to foresee that the Government was going to do this and impose the conservatorships.

Now, one theme, I think, a thread that runs through a lot of what we've talked about today and links to the Third Amendment, even though the two claims are factually and legally distinct, is that when the conservatorships were imposed, Fannie and Freddie were never the same. It was a conservatorship without end, or at least without an exit to profitability. And that's been argued and I think has shown overwhelmingly and at least on a motion to dismiss as alleged.

So the question the Court faces as to the Washington Federal Plaintiffs is what recourse do the stockholders have. And I want to cover three issues that are specific to the Washington Federal Plaintiffs, including what the Government just mentioned. First, just very briefly, the Government contested very tersely in its motion whether this Court has subject matter jurisdiction over our takings and the illegal exaction claims.

And this Court said in its order granting jurisdiction on discovery, ECF Document Number 32, in the main case, 465, if FHFA was an agent and arm of the Treasury, then this Court possesses jurisdiction over Plaintiffs' claim. And that pretty much repeats the

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legal touchstone from the Slattery decision, the en banc decision from the Federal Circuit. And the Government hasn't disputed that, so I don't have more to say about that, that in other words, the suit is against the United States for purposes of the Tucker Act.

Now, moving on to the statute of limitations, as the Court, I'm sure, is fully aware, the statute of limitations is six years under 28 USC 2501. Now, every claim over which this Court has jurisdiction is governed by a six-year statute. Now, the Government's position is that we are taken out of that by the conservator removal provision, and this is in 12 USC 4617(a)(5)(A). And the Government didn't address the text of this provision, but it just doesn't apply here.

It says the regulated entity -- and we're talking about, again, the rights of the shareholders or not, whatever they may have. The regulated entity may, within 30 days, seek an order requiring the agency to remove itself as conservator. And our case doesn't seek that. It doesn't seek equitable relief. It doesn't seek removal of the conservator, and this statute just quite simply doesn't apply. And if it's going to bar constitutional claims, I mean, the law is well-established that Congress has to say so explicitly, and it certainly didn't do so here.

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And this also takes me to Perry Capital, which the Government has relied on heavily here and, of course, must take the good with the bad that comes from that case. The Perry Capital decision from the D.C. Circuit at page 614 says that Recovery Act does not prevent constitutional claims while discussing that same conservator removal provision in the next paragraph. Now, you would think if there was some timing provision with that, they might have said something about it.

So moving on to my last point, and that is direct derivative, and it's whether -- what makes our claims direct in this case. And the Government said earlier, and we agree with this, that this case is unique. I'm going to use the familiar lawyer's term, it's sui generis. The usual labels don't fit here in boxes, fit here very easily. But the Tooley test that is commonly applied, doesn't apply in every situation. And for the reasons that we've already explained, and in the interest of time, I won't go into it, in our brief, we believe the claim is direct under Tooley.

But it also needs to be looked at for substance and I think with a little bit of common sense. Because if the claim is derivative and practically speaking it's not going to be brought, then the shareholders have no recourse. And if you were -- that promotes an absurdity.

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If you were to take that to a logical conclusion, they would probably violate due process.

And, in fact, the Court said in Perry Capital, that Tooley has no application when the plaintiff asserts a claim based on its own rights, and among those rights asserted here -- a bundle of rights were the rights to vote, in addition to what happened to the stock.

And last, again, this involves a novel area. The 5th Circuit held in the Collins decision that analytically similar claims under the APA were direct, and that's Collins at page 574 and -- granted that it involved the APA, but alleged FHA violated the grant of conservator powers. And that's exactly the core allegation here.

So unless the Court has any sort of questions, then I --

THE COURT: Thank you so much.

MR. GREEN: And I thank the Court for its indulgence on time today. Thank you.

THE COURT: Of course.

MR. DINTZER: So, Your Honor, the problem is is that Wash Fed, they rely on allegations that the conservatorship was improper. That's sort of the gravamen of their complaint. Without those allegations, their claims would fail. And the point of the 30-day

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limit was to say, if you've got problems with the implementation of the conservatorship, with the adoption of FHFA as the conservator, you've got a 30-day window.

So what they're basically asking is they're looking for a way to challenge the propriety of the conservatorship and they're looking for a way to do it outside the 30-day window by coming here. Wash Fed's claims are effectively derivative, which means that they are really trying to do exactly what the GSEs had only 30 days to do, which is go into District Court and challenge the conservatorship if they wanted to. Wash Fed could have done that. They could have tried to do it derivatively in the District Court. They didn't choose to do it. And now what they're seeking to do is to do that collaterally here years and years later, and the window has closed.

If they don't have those claims, those assertions that the conservatorship was improperly implemented or broke some law, then they don't have their exaction claims and they don't have at least the framework of their takings claims. And so the challenge, the direct challenge to the conservatorship should have been done within that 30-day window and not here.

And so with that, Your Honor, we wrap up what is the last issue in our list.

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THE COURT: Thank you very much.
MR. DINTZER: Thank you, Your Honor.
THE COURT: While you're standing there, because the Government will always get the last word, I'm going to have what I refer to as the lightning round. If you have had an epiphany -- this is not the time to bring up any new arguments, but if there's any argument -- excuse me, if you forgot to respond to something one of your opposing counsel said or if there's a point you wanted to make, a short point you wanted to make, I'm going to let you go through and give me any information that you think I need that you haven't already said.
I'll let Plaintiffs have the same opportunity to speak. Once they have had their opportunity, I will let you have the final word.
MR. DINTZER: Thank you, Your Honor. I have one thing. I just want to put a case on the record. At one point, Plaintiffs were saying that the Government -- if a claim is not a property right, then the Government could just cancel claims willy-nilly. Well, actually, the Government -- I won't say willy-nilly, but actually the case law is that canceling a claim is not a taking. If the Court looks at the Abrahim–Youri case and the series of cases brought where claims such as those against Iran, Iraq, those have been canceled. They have

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been taken to the Federal Circuit. The Federal Circuit says, you know what, that's not a taking because the Government can actually cancel your claims. So that is not a taking and I -- I took some -- I couldn't remember the name of the case off the top of my head. Alimanestianu I believe is a more recent one. But they cite the Abrahim-Youri case, but I wanted to put those on the record.
THE COURT: And there were some ones years ago that I remember Judge Smith had when he was chief and it went up to the Supreme Court and he was affirmed.
MR. DINTZER: I believe with the -- under the -- with the idea that until you got a final judgment, you don't have a property interest in it and that's why -- and that's what the thinking is on the ability to cancel those claims. I believe that that is correct.
Okay, let me check --
THE COURT: Do any of your other colleagues have anything they wish to add?
MR. DINTZER: I think we're all --
THE COURT: I'll let Plaintiffs go forward and then you may have -- something may inspire you.
MR. DINTZER: Thank you, Your Honor.
MR. THOMPSON: Your Honor, Mr. Patterson has a point he'd like to make about illegal exaction.

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THE COURT: Very good. Thank you.
MR. PATTERSON: Just one quick point, Your Honor. On the Norman case, opposing counsel mentioned that it relied on the Cyprus Amax case, but Cyprus Amax was a money-mandating case and not an illegal exaction case. That actually was the source of Norman's confusion. The Federal Circuit's decision in Ontario Power Generation, which was decided one year before Norman, expressly explained that Cyprus Amax was a money-mandating case and not an illegal exaction case and distinguished between the two.
And the reason why in Cyprus Amax they had to bring a money-mandating case is in a footnote in that opinion. I believe it's footnote 1. It says that as part of the statute. It said you had -- before bringing a claim for taxes illegally assessed -- it was a tax case -- you had to go through some administrative procedures first, and the plaintiffs had not done that. So the plaintiffs could not bring an illegal exaction case. It was foreclosed by statute. It was a money-mandating case.
Thank you.
THE COURT: Thank you.
MR. HUME: Your Honor, very quickly, I would like to say two quick things on illegal exaction, one of

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which is following up on what Mr. Patterson said, which is simply I think Mr. Patterson has brilliantly argued it and the law in Norman -- the difference between a money-mandating claim and illegal exaction. I would simply say this, what the Government's argument boils down to, their reading of Norman, is that the Government -- that you can have the first two elements and not have a claim, according to them.
So it's possible for the Government to have your money in their pocket and to have it illegally and that's -- and you got nothing -- you can't do anything unless you have a money-mandating statute. That can't be right. Mr. Patterson knows the law, but all I know is those two things can't be right. It can't be that they can have your money in their pocket, that it can be illegal that they have your money in their pocket and you have no claim.
And on the "money in the pocket" point, I want to highlight Mr. Patterson's example of the $60 billion. He gave an example of one-quarter. I want to give -- I think the main -- part of what they have in their pocket, they have our entire property rights, which we think is enough for the illegal exaction. They have our rights to any distributions in the past and in the future.
But I want to make sure this fact is clear. We

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allege it, so it has to be accepted as true, but I think it's also undisputed. Somewhere on the order of $125 billion is the number. What's that number? Compare the dividends they would have gotten under the 10 percent senior preferred stock from the date of the net-worth sweep to the present with the dividends they've actually received under the sweep. The difference is about $120 to $130 billion. Call it roughly $125 billion. That's what they've gotten in excess of what they would have gotten under the 10 percent.

So do they have our money in their pocket? Yes. Because if they had played by the rules, before they enacted the unlawful -- we allege unlawful Third Amendment, that $125 billion gets paid to the junior preferred in any quarter where there's a dividend to common. The only way they get that money is by exercising their common stock warrants and then paying dividends on it, which means they have to pay the coupon on the junior preferreds in any of those quarters and they have to pay the 20 percent private owners of the common pro rata. So some amount of that $125 -- most of it they still would get, but a big chunk would have gone to junior preferreds and commons. And that's just part of what they've taken. That's just part of the illegal exaction, but that shows that they have our money in

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their pocket.

THE COURT: Thank you.

Any of the other Plaintiffs? All right.

MS. HOSFORD: I'd just like to follow up on Mr. Hume's comments briefly.

In order to have a takings claim, you have to show that you've had a property interest taken, and we don't agree that Plaintiffs had a property interest taken in this case. But that's different from an illegal exaction claim. In an illegal exaction claim, you have to show that your actual money is taken out of your pocket and no money has been taken out of the shareholders' pockets.

In addition, to the extent that Plaintiffs claim that they have no remedy for a return of monies that were wrongly taken if they can't bring an illegal exaction claim in the absence of a money-mandating provision, Plaintiffs have neglected to mention that if they actually do have such a claim, they could go into District Court under the APA and get equitable relief.

And that's all I have. Thank you, Your Honor.

THE COURT: Very good. Mr. Dintzer, last call for you --

MR. DINTZER: With that, Your Honor, we're ready to wrap up. We wanted to thank you for your time

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and attention today.

THE COURT: Oh, well, thank you.

COUNSEL: Thank you, Your Honor.

THE COURT: Oh, thank you. I want to compliment all counsel on just the superb quality of your written submissions. Your briefs were just excellent. This case presents an intellectual feast that has required -- and what a pleasure to -- there's a lot of reading, there's a lot of history to absorb, a lot of thorny legal issues, but it's an absolute pleasure. Your oral presentations today have been superb.

I congratulate all of you because both the Government and the private sector is very ably represented by extraordinary counsel who served their clients very well and therefore served justice.

So thank you very much, and we're adjourned.

(Whereupon, at 7:19 p.m., the hearing was adjourned.)

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