No. 17-540

In the Supreme Court of the United States

STARR INTERNATIONAL COMPANY, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

PAUL D. CLEMENT
GEORGE W. HICKS, JR.
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street NW
Washington, DC 20005
(202) 879-5000

DAVID BOIES
Counsel of Record
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200
dboies@bsfllp.com

Counsel for Petitioner

(Additional counsel listed on inside cover)

CLIFFORD M. SLOAN
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue NW
Washington, DC 20005
(202) 371-7000

JOHN L. GARDINER
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036
(212) 735-3000

MICHAEL J. GOTTLIEB
AMY J. MAUSER
JAMES A. KRAEHENBUEHL
AARON E. NATHAN
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue NW
Washington, DC 20005
(202) 237-2727

ROBERT J. DWYER
BOIES SCHILLER FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
(212) 446-2300

Counsel for Petitioner

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REPLY BRIEF

This case squarely presents the question this Court left for "another day" in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014): the extent to which the third-party prudential standing doctrine remains viable. *Lexmark* all but answers the question, as it recognized that federal courts may not decline to adjudicate Article III "cases or controversies" "merely because 'prudence' dictates." *Id.* at 1386, 1388. Yet the Federal Circuit did just that here, barring the doors to the only courthouse in which petitioner could pursue its monetary claims against the Government *solely* because of the third-party prudential standing doctrine. That decision is irreconcilable with *Lexmark* and with judgments from other courts of appeals, not to mention that it will give the Government a free pass for "plain violations" of the law resulting in one of the most brazen seizures of private property in history. App. 101a. Certiorari is urgently needed.

The Government attacks a strawman, suggesting this case raises a "classic derivative claim" under settled principles of corporate law. Opp. at 17. This case is about the Government's extraordinary efforts to target private shareholders for punishment and to seize tens of billions of dollars from them pursuant to a statute that provides zero authorization for that action. As the court below found, Petitioner plainly has Article III standing to seek redress for that illegal exaction of its property. App. 19a-20a & n.16.

Citations to Delaware law cannot insulate this case from merits review.

The Government urges the Court to preserve the Federal Circuit's prudential-standing holding despite petitioner's Article III standing, and suggests that holding "does not conflict with *Lexmark*." Opp. at 20. That blinks reality. *Lexmark* is clear that federal courts have an "unflagging" obligation to decide cases satisfying Article III requirements *despite* prudential and equitable concerns. *Lexmark*, 134 S. Ct. at 1386. That especially holds true in this case, which was filed in the Court of Federal Claims ("CFC")—a court that awards no equitable relief, Pet. at 27-31. That an equitable doctrine should bar petitioner from a court without equitable power is an oxymoron, and one the Government wholly ignores.

The Government brushes aside the split the decision below created by observing that other decisions did not "involve[] suits by shareholders." Opp. at 23. But there is no disputing that *every* other court that has addressed prudential standing post-*Lexmark* has agreed that doctrine is on life support or extinct, *regardless* of who filed suit. The Federal Circuit is in a class of one in openly embracing that doctrine—and booting plaintiffs from court at the threshold because of it. Only this Court can resolve that division of authority.

I. There Is No Dispute That Petitioner Has Article III Standing.

The Government starts on the wrong foot by recasting this case as a garden-variety Delaware-law

claim over whether shareholders may recover for an overpayment made by a corporation. Opp. at 17. But that argument goes nowhere, because petitioner's claim is not "premised on the theory that the corporation, by issuing additional stock for inadequate consideration, made the complaining stockholder's investment less valuable." Opp. at 17 (citation omitted). Petitioner's claim is a federal illegal-exaction claim rooted in the Due Process Clause of the Fifth Amendment. App. 2a; *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005). As the Federal Circuit found, App. 19a-20a & n.16, Petitioner plainly has Article III standing to bring that claim, and the Government does not suggest otherwise.

Indeed, as the trial court found, petitioner's claim is premised on the Government's illegal and unprecedented targeting of shareholders of American International Group, Inc. ("AIG"), whom the Government deliberately sought to penalize as the 2008 financial crisis unfolded. App. 93a-96a, 167a.[1] The Government accomplished that objective with alarming precision: It "carefully orchestrated its takeover of AIG in a way that would avoid any shareholder vote," App. 93a, and then used its

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[1] The Government's counter-narrative inexplicably focuses on a September 15, 2008 private-sector term sheet, ignoring that the Federal Reserve itself understands that the purpose of a loan under § 13(3) of the Federal Reserve Act is not for the Government to reap a profit—unlike private-sector loans. A303713 (explaining that 13(3) loans are to be "made not for profit but for a public purpose").

control over the company to provide itself a 79.9% voting equity interest in AIG—which the Government contemporaneously valued at over $22 billion. The Government *knew* it did not have legal authority to seize that equity. App. 192a. As its counsel contemporaneously explained, the Government "is on thin ice and they know it. *But who's going to challenge them on this ground*?" App. 96a (emphasis added). Even when AIG considered challenging the legality of the Government's action, the Government made "threatening statements" to the company's Board to ensure AIG's subservience. *Starr Int'l Co., Inc. v. United States*, 111 Fed. Cl. 459, 465 & n.2 (2013).

The Government attempts to insulate the legality of its unprecedented conduct from review by invoking state-law prudential standing concepts—namely, whether petitioner's claim is "direct" or "derivative." But "standing in federal court is a question of federal law, not state law," *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013). Under this Court's well-established precedent, Article III standing requires a plaintiff to show that (1) it suffered "an 'actual or imminent' injury-in-fact that is 'concrete and particularized'"; (2) there was "a 'causal connection between the injury and the conduct complained of'"; and (3) the injury is "'likely redress[able] by a favorable decision.'" App. 19a (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1991)). Federal law recognizes, moreover, that shareholders may seek relief for constitutional injuries when they have suffered an individual harm. *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 159-60 (1957); *Maiz v.*

Virani, 253 F.3d 641, 655-56 (11th Cir. 2001) (when defendant's misconduct "was not designed to inflict harm on the corporations, but rather to damage the" individual shareholders, denying shareholder the right to seek relief would "indefensibly elevate form over substance").

Petitioner and the shareholder class readily satisfy these Article III standing requirements. They (1) lost 79.9% of their voting equity interests in AIG, (2) which the Government caused by targeting shareholders and exacting voting equity without authorization, and (3) which can be remedied through the return of the value the Government obtained as a result of its illegal exaction. To permit Delaware direct-versus-derivative "standing" principles to bar petitioner's meritorious claim at the threshold amounts to impermissibly "destroy[ing] [a] federal cause[] of action" with state law. *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 n.** (1990). As the court below recognized, there is no dispute that petitioner "has satisfied the requirements of constitutional standing derived from Article III," App. 19a, and that acknowledgment should have entitled petitioner to merits review.

II. The Federal Circuit's Reliance On "Prudential Standing" Is Wrong.

The Government nevertheless insists that the Federal Circuit "correctly held" that petitioner lacks standing to challenge the Government's actions despite satisfying Article III requirements, suggesting that the holding below "does not conflict

with *Lexmark*." Opp. at 20. The Government is wrong.

This case presents the same "tension" the *Lexmark* Court resolved: whether courts "should decline to adjudicate [a] claim on grounds that are 'prudential,' rather than constitutional." 134 S. Ct. at 1386. The answer is clearly no. As the Court explained in *Lexmark*, "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Id.* That is exactly why the Court took care to sever the "zone of interests" test and the bar against "generalized grievances" from the prudential standing doctrine. *Id.* at 1386-87. Although this Court explained that it would address the concept of third-party prudential standing (the only other prudential standing concept) "another day," *id.* at 1387 n.3, it is impossible to walk away from *Lexmark* and conclude that prudential standing still survives in any form. *See* Pet. at 23.

The Federal Circuit nevertheless barred petitioner at the courthouse doors *solely* because petitioner purportedly failed to satisfy third-party prudential standing. App. 33a-34a. The Government staunchly defends that judgment, noting that this Court did not "expressly" discard the third-party prudential standing doctrine, and suggesting that *Lexmark* was an inconsequential "terminology" and "labeling" exercise. Opp. at 22. But delineating the metes and bounds of the standing inquiry is hardly inconsequential, and *Lexmark* says so. As the Court explained, careless standing analysis may permit a federal court to

"decline to adjudicate [a] claim" for a reason that has no footing in the Constitution. *Lexmark*, 134 S. Ct. at 1386. That is exactly what the Government is asking this Court to allow in seeking affirmance of the decision below.

This Court's skepticism of prudential and equitable standing principles is particularly well-taken in cases (like this one) filed in the CFC, an Article I court that *lacks* equitable powers and was specifically created by Congress to hear money-damages claims against the United States (like the claim here). 28 U.S.C. § 1491(a)(1) (the CFC "*shall have jurisdiction* to render judgment upon *any claim* against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department" (emphases added)). It is strange to suggest that an equitable doctrine should preclude petitioner from even entering the courthouse when that very court lacks general equitable powers. *See* Pet. at 27-31. Remarkably, the Government does not even address this glaring problem. It is easy to claim that "further review is not warranted" when ignoring issues that warrant review. Opp. at 13.

The Government next argues that even if the direct-derivative distinction is not relevant to Article III standing, it remains a substantive doctrine applicable to any suit brought by a shareholder under federal law—and correction of the error identified here will not change the ultimate outcome of the case. Opp. at 22-23. But that is just another way of saying that shareholders must satisfy

standing requirements above and beyond what Article III requires, and as already explained, *Lexmark* does not support that position.

Nor do other decisions from this Court and other courts of appeals lend credence to applying state law on direct-derivative claims to cases like this one. Other circuits have held that shareholders who have suffered an individual harm have standing and a cause of action to bring suits alleging a constitutional injury. *See, e.g., Korte v. Sebelius*, 735 F.3d 654, 668-69 (7th Cir. 2013); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1057 (9th Cir. 2002); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1156 (10th Cir. 2013) (*en banc*) (Gorsuch, J., concurring), *aff'd*, 134 S. Ct. 2751 (2014). The Government dismisses these decisions as inapposite because, in its view, the harm in this case was suffered by all shareholders equally and thus petitioner did not suffer "individual harm." Opp. at 27. That is wrong twice over. First, it disregards the Federal Circuit's acknowledgment—which the Government does not dispute—that petitioner has Article III standing. App. 19a-20a & n.16. "Art. III requires the party who invokes the court's authority to show that he *personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (emphasis added).

Second, the Government's suggestion that the harm was suffered by the shareholders "on a ratable

basis, share for share," Opp. at 27, is entirely misplaced. As the court below recognized, determining whether shareholders may bring a claim solely by reference to "whether all shareholders were affected" has been "renounced." App. at 33a n.19 (citation omitted). And for good reason: Shareholders should not be precluded from holding the Government accountable just because the Government targets all of them for punishment, rather than just a few. Petitioner's case is illustrative of the very real "individual harm" that AIG's shareholders suffered. Petitioner lost the value in the shares it owned, and it was stripped of its opportunity to vote on the sale of voting equity in AIG to the Government. Those injuries are entirely distinct from any harm suffered by AIG. AIG suffered *neither* of these injuries because (a) it promised to replace any part of the consideration for the loan found illegal with an economic equivalent, A200137, and (b) it had no right to vote on the transaction.[2]

This individualized harm should remove all doubt that petitioner has standing. As this Court explained in *Alleghany Corp. v. Breswick & Co.*, "dilution of the equity of the common stockholders

[2] If *AIG* were to receive monetary relief today for the harm suffered by its shareholders in September 2008, as opposed to Petitioner and the shareholder classes, then the harm would not be remedied because the Government sold its equity interest in AIG on the open market and consequently most of today's shareholders never lost 79.9% of their voting equity interest in AIG.

provide[s] sufficient financial interest to give them standing." 353 U.S. 151, 160 (1957). Respondent argues *Allegheny* is inapposite because it involved a transaction favoring controlling shareholders over minority shareholders, such that the latter had standing only because their harm was distinct from other shareholders. Opp. at 26-27. But the Government cannot dispute that *Alleghany* (a) was decided without reference to state law or third-party standing, *compare* 353 U.S. at 159-60, *with* App. at 32a-34a; and (b) involved an overpayment by the corporation of stock worth $48 million for stock worth $33 million to a party that controlled the corporation, Opp. at 26. That is precisely what took place here when the Government-controlled AIG agreed to the Government's demand to issue convertible voting preferred stock amounting to a 79.9% voting equity interest (for which it paid $500,000) rather than warrants that would cost the Government $30 billion to exercise, App. 130a-131a ("When the Government began lending money to AIG on September 16, 2008, it promptly took control of the company."); App. 127a-128a (recounting the September 21, 2008 conversion).

Regardless, the Government misreads *Allegheny*. That decision acknowledges that shareholders have standing to challenge government action that has an impact on "the interest of investors," including dilution of their shares. 353 U.S. at 159-60. The indirect-harm language the Government relies on, Opp. at 26, simply stands for the proposition that there is no standing for generalized harms like that

relied on in *Pittsburgh & West Va. Railway Co. v. United States*, 281 U.S. 479 (1930), where the plaintiff premised its standing on a threat to the company's "financial stability," *id.* at 487. That is not this case.

In short, there can be no serious dispute that barring petitioner from court based on prudential standing principles is fundamentally inconsistent with *Lexmark*, and the Government's insistence that shareholder cases are somehow immune from this Court's move away from prudential standing does not change the calculus.

III. The Case Is an Excellent Vehicle To Resolve A Split Among The Circuits.

The Government has no real answer for the split that the Federal Circuit's decision has created. Indeed, the Government observes only that none of those cases "involved suits by shareholders," Opp. at 23, but nothing in *Lexmark* suggests that the viability of prudential standing depends on the plaintiff's identity. Thus, as matters currently stand, the Federal Circuit is alone among the courts of appeals in continuing to openly embrace prudential standing. The Government hardly suggests otherwise, for it acknowledges that every other court that has addressed the issue post-*Lexmark* has concluded that "doctrines previously described as 'prudential' might instead be better understood as embodying either an Article III requirement or a merits inquiry." Opp. at 23-24 & n.9; *see also* Pet. at 3-4 (collecting cases from the Fourth, Fifth, Sixth, Ninth, and Eleventh circuits); *see also Thole v. U.S.*

Bank, Nat'l Ass'n, 873 F.3d 617, 628 (8th Cir. 2017) (the Supreme Court "has suggested that the use of that term in conjunction with anything other than the 'irreducible constitutional minimum of standing' provided by Article III should be disfavored"). Nor does the Government dispute that the Federal Circuit decided this case on third-party prudential standing grounds alone. That makes this an excellent case to resolve a split of authority over a question this Court already vowed to address "another day." *Lexmark*, 134 S. Ct. at 1387 n.3.

The Government nevertheless insists this case is not a good vehicle because petitioner purportedly waived the question presented. Opp. at 19-20. The question could not have been waived in the CFC, which agreed that petitioner had standing. And the Government never raised a prudential-standing defense in the Federal Circuit for petitioner to object to. *See* United States' Principal & Resp. Br. at 29-39; United States' Reply Br. at 4-11. Prudential standing was raised by the Federal Circuit, and it turned into an outcome-determinative error. Petitioner can hardly be faulted for the Federal Circuit's mistake.

The Government further asserts that "petitioner did not question the need for the courts to determine whether its claims were direct or derivative," Opp. at 19, but that is plainly wrong. Petitioner and the similarly-situated shareholders it represented argued that they had standing separate and apart from Delaware direct-derivative law on three independent grounds: (1) as "targets of challenged

misconduct" of the Government, Pet. Resp. & Reply Br. at 31-33; (2) as persons that "were directly injured by the Government's actions," *id.* at 33-34; and (3) "to remedy a violation of their Fifth Amendment rights," *id.* at 34-35.

Petitioner has thus always argued that it has standing under federal law without reference to the prudential concepts that formed the basis of the Federal Circuit's decision. It is now time for this Court to decide whether those prudential concepts may bar petitioner from pursuing its claims in the only court where it may do so—and whether one of the largest seizures of private property in history will escape review.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted.

PAUL D. CLEMENT
GEORGE W. HICKS, JR.
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street NW
Washington, DC 20005
(202) 879-5000

CLIFFORD M. SLOAN
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue NW
Washington, DC 20005
(202) 371-7000

JOHN L. GARDINER
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036
(212) 735-3000

DAVID BOIES
Counsel of Record
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
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MICHAEL J. GOTTLIEB
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AARON E. NATHAN
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue NW
Washington, DC 20005
(202) 237-2727

ROBERT J. DWYER
BOIES SCHILLER FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
(212) 446-2300

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