No. 16-1356

In the Supreme Court of the United States

ANTHONY PISZEL,
Petitioner,
v.

UNITED STATES,
Respondent.

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

BRIEF OF THE CATO INSTITUTE AND THE SOUTHEASTERN LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When the United States orders a private party to terminate a private contract without cause, must the injured party show that the government also eliminated his right to seek relief against the private contracting party before he can assert a claim under the Takings Clause of the Fifth Amendment?

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IDENTITY AND INTEREST OF THE *AMICI*

The Cato Institute ("Cato") is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, and conducts conferences and forums.

Southeastern Legal Foundation ("SLF"), founded in 1976, is a national non-profit, public interest firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and regularly files *amicus curiae* briefs with federal and state courts at all levels.

Amici are interested in this case because it represents an unwarranted expansion of the government's power to interfere with private contracts. This case is of great public importance and deserves further judicial scrutiny.[1]

[1] All parties have consented to the filing of this brief, and the parties were notified of *amici's* intention to file this brief at least 10 days prior to the filing of the brief. *See* S. Ct. R. 37.2(a). This brief was prepared by *amici* and their counsel. Nobody but *amici* and their counsel has authored this brief or contributed money for its preparation. *See* S. Ct. R. 37.6.

SUMMARY OF ARGUMENT

Petitioner Anthony Piszel presents an issue of exceptional importance that warrants this Court's review: the constitutional limits on the government's ability to take private property rights without compensation. Piszel sued the United States to recover damages based on the taking of his benefits that were vested and earned under his private contract with Freddie Mac, but were not paid based on a direct order from the Federal Housing Finance Agency ("FHFA"). The Federal Circuit rejected Piszel's claim as a matter of law, however, holding that the government is not liable for the intentional acts of its officials so long as the aggrieved party might be able to seek recovery for damages from some other private person or entity. The Federal Circuit's holding shifts the compensatory burden for government orders to private entities. This cannot and should not be the law. Never before has regulatory authority included the power to order the taking of private contract rights without cause and without compensation. The Fifth Amendment's requirement to pay "just compensation" for a taking is a burden on government, not private entities.

The decision to reject Piszel's takings claim at the motion to dismiss phase sets a dangerous precedent. The Federal Circuit is the court of appeals with exclusive jurisdiction over claims for damages against the United States based on the regulatory taking of property rights. By holding that Piszel could not proceed with his takings claim

absent a showing that it was impossible for him to seek relief against someone other than the United States, the Federal Circuit has shielded the United States from the consequences of government officials' intentional acts. Moreover, by requiring Piszel to show that it was impossible to seek relief from another entity just to survive a motion to dismiss, the Federal Circuit set a precedent that denies an aggrieved victim from access to the mechanisms of discovery that are necessary to allow for full and fair public scrutiny of the government's acts. In sum, the decision below is an invitation for governmental abuse that this Court should review.

ARGUMENT

I. Government Interference with Private Contractual Rights Has Been an Issue of Significant Concern Since the Founding.

Protecting private contractual rights from unwarranted government intrusion has been an imperative since the Founding. "[L]aws impairing the obligation of contracts are contrary to the first principle of the social compact, and to every principle of sound legislation." The Federalist No. 44, at 278-79 (James Madison) (Clinton Rossiter ed., 1961). Contractual safeguards were needed to "inspire a general prudence and industry, and give a regular course to the business of society." *Id.* In response to those concerns, the Framers of the Constitution provided that "No State shall . . . pass . . . any Law impairing the Obligations of Contracts." U.S. Const. art I, §10, cl. 1. The goal

was to protect "persons and their property from the effects of those sudden and strong passions to which men are exposed." *Fletcher v. Peck*, 10 U.S. (1 Cranch) 87, 137-38 (1810).

The Framers "intended to adopt a great principle, that contracts should be inviolable." *Sturges v. Crowninshield*, 17 U.S. (1 Wheat.) 122, 205-06 (1819). Chief Justice Marshall described the Contract Clause as not only designed to prevent a reprise of the contractual violations that marked the Revolutionary era, but also "to prohibit the use of any means by which the same mischief might be produced." *Id.* "[M]en should not have to act at their peril, fearing always that the State might change its mind and alter the legal consequences of their past acts so as to take away their lives, their liberty or their property." *City of El Paso v. Simmons*, 379 U.S. 497, 522 (1965).[2] And while the Contract Clause applies to the states rather than the federal government, "it is clear that the National Government has some capacity to make agreements binding future Congresses by creating

[2] Despite the absolute wording of the Contract Clause, this Court has recognized the need to balance the protection of private contractual rights against the government's regulatory needs. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445 (1934) (holding a regulation must be addressed to a legitimate end and be reasonable). Thus, for example, contractual rights are subject to the power of eminent domain, but only on payment of reasonable compensation. *Id.* at 435-36.

vested rights." *United States v. Winstar Corp.*, 518 U.S. 839, 875–76 (1996).

The Fifth Amendment extends protections against governmental interference with contractual rights to the federal government. *See* U.S. Const. amend V; *Lynch v. United States*, 292 U.S. 571, 579 (1934). It also compels both federal and state governments to pay just compensation when their regulations strip citizens of their contract rights and those rights rise to the level of a property right. *See Penn-Central Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978).

II. The Federal Circuit's Decision Allowed the Government to Interfere with Private Contractual Rights Without Just Compensation.

The Federal Circuit agreed that Piszel had a property right in his employment contract with Freddie Mac. Pet. App. 12a-16a. He was hired in late 2006 to be Freddie Mac's Chief Financial Officer, at a time when Freddie Mac was already experiencing financial problems. Piszel moved across the country and left behind millions in accrued benefits with his former employer to accept the position. Accordingly, Piszel and Freddie Mac negotiated an executive compensation plan that included a severance package that would apply if Piszel were terminated without cause. This severance package was an essential inducement to get Piszel to join Freddie Mac.

Despite receiving excellent performance reviews, Piszel was terminated "without cause" in

accordance with an order from Freddie Mac's regulator, the FHFA. The FHFA Director ordered Piszel's termination without the compensation due under the terms of his employment contract, relying on the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. §4511, et seq., which was adopted two years *after* Piszel signed his Freddie Mac contract. HERA established the FHFA as Freddie Mac's regulator, 12 U.S.C. §4511, and authorized FHFA's Director to "prohibit or limit, by regulation or order, any golden parachute payments." 12 U.S.C. §4518(e)(1). The Director adopted a regulation prohibiting all golden parachute payments unless they fell within an exception such as the one for persons terminated without committing any wrongdoing. 12 C.F.R. §1231.3(b) (2014). Of course, neither HERA nor the FHFA's regulations required Freddie Mac to terminate Piszel. Instead, Freddie Mac followed the Director's order to terminate Piszel's employment without paying him under the payout provisions of his contract.

Piszel sued the United States, seeking to hold the government liable for the decision ordered by the FHFA Director. The Federal Circuit rejected this claim, however, finding that Piszel could not pursue a takings claim against the government. According to the Federal Circuit, "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." Pet. App. 18a. The Federal Circuit

continued by holding 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." Pet. App. 19a. In other words, because Piszel could have sued his private employer for damages for breach of contract, the government was immunized against any takings claim based on its role as regulator in the termination and in directing Freddie Mac not to pay termination benefits under Piszel's employment contract.[3]

The government's actions in this case are not unique. During the recent financial crisis, the government ordered the termination of many private contracts. For example, the government ordered General Motors and Chrysler to terminate numerous franchise agreements with automobile dealers as a condition for government bailout assistance. *See generally A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2015). The Federal Circuit's treatment of takings claims against the government, however, has been

[3] As the Petition correctly points out, the Federal Circuit made a fundamental error when it extended the "*Castle* rule" to claims alleging a taking of a private contract. *See* Pet. at 13-17 (discussing *Castle v. United States*, 301 F.3d 1328 (Fed. Cir. 2002)); *see also* Pet. App. 19a (applying *Castle*). Tellingly, the United States did not even cite *Castle* in its original briefs on appeal. *Castle* was first addressed in response to questions raised *sua sponte* by the Federal Circuit.

anything but consistent. In stark contrast to the result in the present case, the Federal Circuit allowed the automobile franchisees to pursue takings claims against the government "even though . . . the claimants may have remaining claims against the auto manufacturers." Pet. App. 18a (citing *A&D Auto Sales, Inc.*, 748 F.3d at 1149). The Federal Circuit did not attempt to reconcile its conflicting decisions, and it even denied Piszel's rehearing petition seeking clarification of the applicable Fifth Amendment standards. Guidance from this Court is needed to clarify the law.

There is nothing in the text, history, or structure of the Fifth Amendment that supports the Federal Circuit's decision in this case to preclude government liability for a taking of private contractual rights simply because a private entity may be available to cover the damages. The government should be required to answer for the consequences and liabilities created as a direct result of its officials' intentional acts.

III. It is Critically Important for this Court to Correct the Federal Circuit's Takings Decision.

A. The Federal Circuit has Exclusive Appellate Jurisdiction Over Takings Claims Based on the United States' Interference with Private Contractual Rights.

The Federal Circuit plays a key role in takings cases against the United States because it has exclusive appellate jurisdiction over such cases

then plaintiffs seek damages. It is thus critically important to ensure that the Federal Circuit is employing the correct standard under the Fifth Amendment.

First, the Federal Circuit has exclusive appellate jurisdiction over all appeals from the Court of Federal Claims. 28 U.S.C. §1295(a)(3). "Under the Tucker Act, 28 U.S.C. § 1491(a)(1), the Court of Federal Claims has *exclusive jurisdiction* to render judgment upon any claim against the United States for money damages exceeding $10,000 that is 'founded [ ] upon the Constitution …'." *Eastern Enter. v. Apfel*, 524 U.S. 498, 520 (1998) (emphasis added). "Accordingly, a claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Id.; see also Horne v. Dept. of Agriculture*, 133 S. Ct. 2053, 2062 (2013) (same). There is no statutory provision that withdraws the Tucker Act's grant of exclusive jurisdiction to the Court of Federal Claims, and thus exclusive appellate jurisdiction to the Federal Circuit, for Fifth Amendment takings claims seeking damages against the government.

Second, the Little Tucker Act provides the only exception to this exclusive jurisdictional scheme: federal district courts are given concurrent jurisdiction with the Court of Federal Claims for claims against the United States for amounts of $10,000 or less. 28 U.S.C. §1346(a)(2); *see also*

Preseault v. I.C.C., 494 U.S. 1, 12 (1990). Nevertheless, the Federal Circuit is still the exclusive appellate court to hear appeals from these takings claims. 28 U.S.C. §1295(a)(2).

The fact that Congress has granted district courts jurisdiction to hear condemnation claims filed *by the United States* does not undermine the paramount importance of the Federal Circuit for cases like this one. 28 U.S.C. §1358. Section 1358 only applies when the United States affirmatively files suit seeking to exercise its rights of eminent domain to take physical property belonging to a private party. *See, e.g., Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984); *United States ex rel. and for Use of Tennessee Valley Auth. v. Powelson*, 319 U.S. 266 (1943). When the United States takes property without first instituting a condemnation proceeding, the aggrieved landowner's remedy is to seek damages under the Tucker Act. *See United States v. Dow*, 317 U.S. 17, 21 (1958). Where, as here, the government acts through its official's unilateral orders, and not through a condemnation complaint, the Federal Circuit will have exclusive appellate jurisdiction to determine whether the United States is liable for damages flowing from its actions.

As a result of this jurisdictional scheme, a case like the present challenging the intentional acts of the United States to terminate a private contract will only reach this Court from the Federal Circuit. Accordingly, this Court's supervisory jurisdiction over such cases is similar to that

applicable to patent cases. Where, as here, the Federal Circuit has adopted a standard that is contrary to law and sets a dangerous precedent, this Court should grant review to correct that erroneous standard. Without correction, the Federal Circuit's standard in this case will be the binding authority governing all future cases involving intentional government actions to terminate private contracts.

B. The Federal Circuit's Decision Sets a Dangerous Precedent.

The Federal Circuit set a dangerous precedent for solvent regulated entities and people who, like Piszel, choose to do business with regulated entities. The Federal Circuit places the regulated entity in the untenable position of having to choose between defying its regulator's orders to terminate the contract or accepting financial responsibility for the governmental decision by complying and facing breach of contract liability. Under no circumstances should the government be allowed to exert such an abuse of its authority—especially where, as here, the government asserted no cause for its contract termination order.

This case involves the termination of an employment contract. But its application is much broader. For example, there is no limiting principle to stop a regulator from using its coercive powers to force private entities to terminate contracts with vendors or suppliers, solely because the regulator would prefer for them to use someone else (perhaps the regulator's friends). What would stop a

regulator from using authority to pressure regulated employers to reduce the salaries of existing employees in order to ensure that those employees are not paid more than public employees? Under the Federal Circuit's decision, the affected parties—the vendors, private employees, etc.—would have no recourse against the governmental actor that caused the harm. This cannot possibly be the law. If allowed to stand, it would represent an extension of governmental power beyond constitutional warrant.

IV. Allowing Cases Like This One to Proceed on the Merits Promotes Government Accountability and Discourages Public Corruption.

Allowing claims like Piszel's to proceed to discovery furthers the public interest by promoting government accountability. "The takings clause has emerged as an important vehicle for evaluating government actions during the [2008] financial crisis and its aftermath." Julia D. Mahoney, *Takings, Legitimacy, and Emergency Actions: Lessons from the Financial Crisis of 2008*, 23 Geo. Mason L. Rev. 299, 300 (2016). Cases like this one have "served an important purpose by uncovering information about how and why the United States Department of the Treasury ("Treasury"), the Federal Reserve, and other key actors chose to do what they did." *Id.* This is a necessary step to "better the odds of avoiding serious errors" in the next crisis. *Id.* Moreover, "the availability of relief for takings claims can bolster the legitimacy of

public action that stems from financial crisis." *Id.* Providing relief means that the unfortunate, disadvantaged, or politically disconnected are not left paying the price for recovery. Finally, in a "political economy," allowing judicial and public scrutiny of government decisions prevents "the use of crisis to subvert government for private ends."[4] *Id.* at 301.

Here, Piszel alleges that he was the victim of the FHFA Director's decision to terminate his employment contract without cause. He consistently received exemplary performance reviews and has been cleared by FHFA of any wrongdoing in the 2008 financial crisis. Nevertheless, the government took his valuable

[4] Many scholars recognize the important values that are served by subjecting post-crisis government decision-making to public scrutiny. *See, e.g.,* Anthony J. Casey & Eric A. Posner*, A Framework for Bailout Regulation*, 91 Notre Dame L. Rev. 479, 512 (2015); David Zaring*, Litigating the Financial Crisis*, 100 Va. L. Rev. 1405, 1424-32 (2014). Professors Casey and Posner favorably cited the Federal Circuit's decision in *A&D Auto Sales*, which allowed the takings case to proceed, as setting a standard that "might block the worst forms of government abuse." 91 Notre Dame L. Rev. at 521. They warned, however, that the protection may not go far enough to protect against more subtle forms of abuse by government officials using their influence to obtain benefits for some favored stakeholders at the expense of others. *Id.* Professor Zaring has also commented on the need for scrutiny of the government's decisions during crisis, citing the Takings Clause as "the only way the government's actions during the crisis will be evaluated by the courts." 100 Va. L. Rev. at 1425.

contractual rights, including those used to induce him to leave a lucrative job and join Freddie Mac. This is precisely the type of case that deserves full and public scrutiny to establish what happened and why.[5]

By relegating the right to relief to a claim against a private entity, however, the Federal Circuit eliminated the opportunity to scrutinize the legitimacy of the government action. In private litigation, the parties would have significantly less access to discovery from the government. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-70 (1951). The private litigation likely would focus on whether there was a breach of contract and the extent of the damage caused by that breach. It is dubious whether a court could even reach questions regarding the legitimacy of the government's actions and the extent of its culpability in litigation to which the government is not a party. This not only leaves a private entity holding the bill for state action, but insulates the government from scrutiny, thereby increasing the likelihood that constitutional violations will recur. This is a recipe for abuse.

[5] By focusing on whether Piszel has an alternative remedy against Freddie Mac, the Federal Circuit implicitly recognized that similar government action could rise to the level of a constitutional violation if no other remedy exists—such as where the claimant could show in his pleadings that his ability to pursue recovery against a private entity is barred by the doctrine of impossibility.

V. The Present Case is a Good Vehicle to Decide the Issue Presented.

Petitioner's case is an excellent vehicle for this Court to decide when the government must pay compensation for its interference with private contractual rights. Piszel's claims were decided as a matter of law and on a motion to dismiss standard, so there are no facts in dispute. Accordingly, this case presents a clear record to decide whether the Federal Circuit erred as a matter of law when it accepted the government's legal theory, which allowed the government to shift liability for its actions to a private entity, thereby escaping liability under the Takings Clause.

CONCLUSION

Amici request that the Court grant a writ of certiorari and reverse the Federal Circuit's judgment.

Respectfully Submitted,

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