No. 15-5100

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ANTHONY PISZEL,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES
COURT OF FEDERAL CLAIMS
CASE NO. 1:14-CV-00691
JUDGE LYDIA KAY GRIGGSBY

REPLY BRIEF OF PLAINTIFF-APPELLANT ANTHONY PISZEL

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INTRODUCTION

As Mr. Piszel demonstrated in his opening brief, the lower court erred in holding that the Government had the authority to take his contractual termination benefits under the Safety and Soundness Act of 1992 ("SASA") – the statute in place when Mr. Piszel signed his employment agreement with Freddie Mac. The Government now concedes that point, effectively abandoning the lower court's decision. Instead, the Government now engages in misdirection by attempting to focus the Court on its authority under the Housing Economic Recovery Act of 2008 ("HERA") – a new statute enacted nearly two years after Mr. Piszel obtained his property interest. But the Government's argument is contrary to well-settled law.

To begin, as the Government itself acknowledges, the Court should focus on the regulatory scheme in place at the time the property interest arose, not at the time the property interest was taken. Mr. Piszel demonstrated in his opening brief that, at the time he contracted with Freddie Mac, the regulatory scheme in place (SASA) precluded the Government from re-reviewing his termination benefits after it approved them. The Government does not contest that. It instead argues that "pending" legislation – which never passed – would have authorized the Government to take his benefits. But the Government offers no support. Indeed, there were more than 13,000 bills and resolutions "pending" when Mr.

Piszel signed his employment agreement, but only 4% passed. The Government's rule would require Mr. Piszel – and every other counterparty to a contract with Freddie Mac – to review each pending bill, or risk losing their property without recourse under the Constitution if the Government appropriated it.

Next, the Government argues that Mr. Piszel lacked a property interest because Freddie Mac was "pervasively regulated" when he acquired his termination benefits. But Congressional materials – which the Government ignores – show that Freddie Mac was "left alone" under SASA. Moreover, the Government concedes that the only aspect of Freddie Mac's business that is relevant here – its executives' contractual termination benefits – could not be regulated under SASA after they were approved.

The Government also argues that Mr. Piszel lacked a property interest because HERA merely "buttressed" SASA, or closed existing loopholes. But the Government does not – and cannot – explain how its sweeping authority under HERA to prohibit termination benefits for any reason merely buttressed its non-existent authority under SASA to prohibit termination benefits after it approved them. Nor does the Government mention any loophole that HERA purportedly closed.

The Government further argues that Mr. Piszel cannot allege a *per se* taking of a contractual interest, but it fails to address authority finding *per se*

takings under substantively identical facts. In addition, the Government argues that Mr. Piszel failed to allege a categorical taking because he allegedly did not lose "all economically beneficial" use of his property. But the Government does not dispute that it took all of Mr. Piszel's termination benefits, the only property interest at issue here.

Finally, the Government argues that Mr. Piszel has not alleged an illegal exaction claim because he has not paid money to the Government directly or in effect, which the Government asserts is the only way to plead an exaction claim. But the Government ignores the most recent authority addressing this identical issue, finding an illegal exaction based on a money mandating statute. That is the case here, as HERA is a money mandating statute on which the Government relied in exacting Mr. Piszel's termination benefits.

ARGUMENT

I. THE LOWER COURT ERRED IN DISMISSING MR. PISZEL'S TAKINGS CLAIM

A. Mr. Piszel Has A Property Interest In His Termination Benefits That HERA Cannot Destroy

In his opening brief, Mr. Piszel demonstrated that he had a property interest in his termination benefits because the Government reviewed (and approved) them before he executed his employment agreement, and the law in place at the time, SASA, permitted the Government to review such provisions

once, but not twice. The Government's second review (and disapproval) of the termination benefits two years later, supposedly pursuant to a law, HERA, enacted two years after the employment agreement, was an unconstitutional taking. (Br. at 27-33).[1]

The Government does not dispute that SASA did not authorize that re-review.[2] (Opp. at 11, 15 n.5). In fact, the Government agrees with the lower court that "existing rules and understandings and background principles of law" – here, SASA – define the range of interests that qualify for protection as property. (Opp. at 15 n.4; *compare* A12 (holding that "background principles derived from **legislation enacted prior to**" Mr. Piszel's employment agreement define his property interest)). As such, the Government has all but conceded that, under SASA, Mr. Piszel has a property interest in his termination benefits.

That should conclude the matter. But the Government insists that SASA is beside the point. First, the Government argues that legislation to "expand" the Government's regulatory power over executive compensation was "pending" at the time Mr. Piszel executed his employment agreement and,

[1] "Br." refers to Mr. Piszel's opening appellate brief; "Opp." refers to the Government's response appellate brief; and unless otherwise noted, internal questions marks and citations are omitted, and emphasis is added.

[2] A failure to respond to an argument in opposition waives any argument to the contrary. *See Twp. of Saddle Brook v. U.S.*, 104 Fed. Cl. 101, 111 (2012) ("Under the law of the circuit, arguments not addressed by a party are deemed waived.").

therefore, Mr. Piszel understood that the Government could change the rules of the game. (*See* Opp. at 13, 15 n.4, 27, 38-40). Second, the Government argues that Freddie Mac was at all times subject to "pervasive" Government regulation and, therefore, no property interest arose. (*See, e.g.*, *id.* at 12, 16). Third, the Government argues that HERA, a statute enacted two years after the Government approved Mr. Piszel's termination benefits, merely "buttressed" existing restrictions on Mr. Piszel's termination benefits or "eliminate[d] loopholes". (*Id.* at 6, 10-12, 18-19). All three arguments lack merit as a matter of law.

1. "Pending" Legislation Does Not Define A Property Interest

The Government's first argument founders on the very rule the Government agrees is controlling – property interests are defined by "existing rules and understandings". (Opp. at 15 n.4). It follows that "pending" legislation that was not enacted "prior to" Mr. Piszel's employment agreement does not and cannot define Mr. Piszel's property interest. The Government cites no case law to the contrary,[3] and never explains why a "pending legislation" rule would make sense.

[3] *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986), on which the Government relies extensively (Opp. at 14, 18-20, 34, 40), involved pre-existing, not pending, legislation, as this Court recognized in *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1352 (Fed. Cir. 2003) ("*Connolly* gave, as the reason plaintiff should have expected the particular amendments to ERISA, the **pre-existing legislation** addressing termination.").

Indeed, determining whether proposed legislation stunts an otherwise indisputable property interest would burden courts and claimants alike. For example, more than 13,000 bills and resolutions were pending in Congress when Mr. Piszel executed his employment agreement in November 2006.[4] The Government would have Mr. Piszel – and anyone else contracting in "the highly regulated banking, insurance, and finance industries" (Opp. at 34) – scour proposed legislation for anything that might affect their property interests; and would task the lower court with weighing whether such proposed legislation was far enough along in the legislative process and of sufficient relevance to the subject matter of the dispute to deprive the private citizen of a property interest that otherwise might have arisen. Moreover, the rule does not differentiate between proposed legislation that eventually becomes law and proposed legislation that does not. Of the 13,000 bills and resolutions pending in Congress when Mr. Piszel executed his employment agreement, only four percent eventually became law.[5] The one the Government relies on here was among the 96 percent that did not.[6]

The Government's "pending legislation" rule looks even more ill-conceived when measured against the stability of the GSE executive compensation

[4] https://www.govtrack.us/congress/bills/statistics. The Government agrees that "[j]udicial notice of proposed legislation is [] proper." (Opp. at 38 n.13).

[5] https://www.govtrack.us/congress/bills/statistics.

[6] https://www.govtrack.us/congress/bills/109/hr1461.

scheme in the years before Mr. Piszel's employment agreement. Congress enacted 12 U.S.C. § 4518[7] and 12 U.S.C. § 1452(h),[8] the two statutes at issue here, in 1992 and 1970, respectively. They remained unchanged – for 14 and 36 years, respectively – through the time Mr. Piszel and Freddie Mac contracted, and for two more years after that until HERA was enacted in 2008. In the face of such regulatory stability, the argument that Mr. Piszel's property interest was on shaky ground or that Mr. Piszel should have known as much when he contracted two years earlier is far-fetched and unsupported by any precedent.

A reference in Freddie Mac's 2005 Information Statement to pending bills concerning "GSE regulatory oversight" (A171) does not change the analysis, despite the Government's argument to the contrary. (*See* Opp. at 38-40). The Information Statement does not indicate whether the pending bills concerned executive compensation, and the "Executive Compensation" section of the Information Statement says nothing about pending bills or regulatory oversight.[9]

[7] SASA provision that permits the Government to prohibit "excessive" compensation only if it was not "reasonable and comparable" with similar compensation in similar businesses, and provides no authority for the Government to re-review the compensation once it was approved (as it was here).

[8] Freddie Mac's Charter Act, which requires the Government to approve contractual termination benefits in advance based on comparability to similar agreements, and similarly providing no authority for the Government to re-review the benefits once they were approved.

[9] *See* Freddie Mac, Information Statement to Stockholders (2005), at 150, available at http://www.freddiemac.com/investors/ar/pdf/2005annualrpt.pdf.

Moreover, the same or similar language appears in every Freddie Mac Information Statement or Annual Report from 2002 through today – a period that predates and postdates HERA.[10] Such vague, place-holding disclosures are too blunt an instrument to warrant appropriating Mr. Piszel's property without recourse, and the Government cites no case saying otherwise.

2. Neither Freddie Mac Nor Mr. Piszel's Termination Benefits Was "Pervasively" Regulated Under SASA

The argument that no property interest arose because Freddie Mac was "pervasively" regulated when Mr. Piszel signed his employment agreement founders on the facts and the law. As Mr. Piszel demonstrated in his opening brief, Congress explicitly stated that Freddie Mac was "left alone" under SASA (Br. at 16) and, therefore, Freddie Mac "grew out of control" and "into a big monster where now we say they are too big to fail" (*id.*; *accord id.* at 15-17 (describing

[10] *See, e.g.*, Freddie Mac, Annual Report (2002), at 21-22 ("Several Members of Congress introduced bills to change Freddie Mac's … regulatory oversight"), available at http://www.freddiemac.com/investors/ar/pdf/2002annualrpt.pdf#page=30; *see also* Freddie Mac, Annual Report (2003), at 18, available at http://www.freddiemac.com/investors/ar/pdf/2003annualrpt.pdf#page=33; Freddie Mac, Annual Report (2004), at 13; Freddie Mac, Annual Report (2005), at 9; Freddie Mac, Annual Report (2006), at 9; Freddie Mac, Annual Report (2007), at 12; Freddie Mac, Annual Report (2008), at 52; Freddie Mac, Annual Report (2009), at 50-51; Freddie Mac, Annual Report (2010), at 60-61; Freddie Mac, Annual Report (2011), at 74-75; Freddie Mac, Annual Report (2012), at 78-79; Freddie Mac, Annual Report (2013), at 52-53; Freddie Mac, Annual Report (2014), at 46. All of Freddie Mac's Annual Reports after 2003 are available at http://www.freddiemac.com/investors/ar/.

Freddie Mac's regulator under SASA as a "small, hyper-specialized agency – with uncertain funding and overly narrow powers")). Not until HERA was enacted in 2008 did the Government obtain vastly expanded powers comparable to "the powers which we have extended historically to bank regulators". (*Id.* at 17). These statements, made by the legislative body empowered to regulate Freddie Mac, speak volumes. The Government's conclusory and self-serving assertions to the contrary do not.

Even assuming Freddie Mac's operations were pervasively regulated, executive compensation – the only aspect of Freddie Mac's business at issue here – was not. SASA simply provided that the Government could prohibit compensation only if it were "not reasonable and comparable with compensation for employment in other similar businesses … involving similar duties and responsibilities." 12 U.S.C. § 4518(a) (1992). Once OFHEO reviewed and approved the termination benefits, it could not re-review or prohibit them, though that is precisely what it attempted to do here. (*See* Br. at 28-30).

The Government disputes none of this, and the cases it cites on its pervasive regulation point are inapposite. All involve industries that, the courts conclude, are "pervasively" or "highly" regulated.[11] Freddie Mac's executive

[11] *Cal. Housing Secs., Inc. v. U.S.*, 959 F.2d 955 (Fed. Cir.), *cert. denied*, 506 U.S. 916 (1992) (banking industry); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992) (same); *Meriden Trust and Safe*

compensation was not when Mr. Piszel entered his employment agreement in 2006.

3. HERA's "Golden Parachute" Provision Did Not "Buttress" SASA or Close Any Existing Loopholes

The Government attempts to leverage cases in which the courts concluded that the Government's actions were authorized either under a new law, which simply closed a loophole in a preexisting law; or under the preexisting law, which the new law merely buttressed. But those cases, and the rule for which they stand, have no relevance here.

Mr. Piszel showed in his opening brief that HERA completely overhauled Freddie Mac's regulatory regime for business and compensation. (*See* Br. at 38-41). Unable to dispute HERA's sweep, the Government ignores it and

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Deposit Co. v. F. D. I.C., 62 F.3d 449 (2d Cir. 1995) (same); *McAndrews v. Fleet Bank of Massachusetts, N.A.*, 989 F.2d 13 (1st Cir. 1993) (same); *North Arkansas Medical Center v. Barrett*, 962 F.2d 780 (8th Cir. 1992) (same); *Golden Pac. Bancorp. v. U.S.*, 15 F.3d 1066 (Fed. Cir. 1994) (same); *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014) (same), *appeal* docketed, No. 14-5243 (D.C. Cir. 2015); *Branch v. U.S.*, 69 F.3d 1571 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 810 (1996) (same); *Am. Cont'l Corp. v. U.S.*, 22 Cl. Ct. 692, 697-698 (1991) (same); *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S.C.*, 508 U.S. 602 (1993) (private pensions); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986) (same); *Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 154 (1st Cir. 2012) ("highly regulated" insurance industry); *Acceptance Ins. Co. v. U.S.*, 583 F.3d 849 (Fed. Cir. 2009) (same); *Hearts Bluff Game Ranch, Inc. v. U.S.*, 669 F.3d 1326, 1331 (Fed. Cir.), *cert. denied*, 132 S. Ct. 2780 (2012) ("mitigation banking program [] run exclusively by the [Government]"); *Mitchell Arms, Inc. v. U.S.*, 7 F.3d 212, 216-217 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1106 (1994) (importation of assault rifles under the Gun Control Act).

asserts that HERA merely buttressed existing regulation. But a new law that gives the Government entirely new authority that it lacked under preexisting law – as HERA did here – does not buttress the preexisting law, and no case cited by the Government says otherwise.

Indeed, *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S.C.*, 508 U.S. 602 (1993), and *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986), on which the Government relies extensively, involved Government actions authorized under preexisting law. In both cases, employers who withdrew from multi-employer pension plans challenged an amendment to ERISA that imposed additional withdrawal liability on them. *Concrete Pipe*, 508 U.S. at 605; *Connolly*, 475 U.S. at 213, 220-221. In rejecting plaintiffs' challenge, the Supreme Court held that the regulatory regime in place when the plaintiffs acquired their property interest authorized the Government to impose liability on withdrawing employers; the statutory amendments merely "buttressed" that existing scheme. *Concrete Pipe*, 508 U.S. at 646; *Connolly*, 475 U.S. at 227; *see also Cienega Gardens*, 331 F.3d 1319, 1342 (Fed. Cir. 2003) ("the very problem addressed by the initial legislation [in *Connolly*] was the one further addressed by the amendment that the plaintiff

argued constituted a taking.").[12] Here, in contrast, the preexisting law (SASA) did not authorize the Government to re-review Mr. Piszel's termination benefits once approved, a fact the Government acknowledges. (Opp. at 11, 15 n.5). HERA gave the Government that entirely new authority two years after Mr. Piszel entered into his employment contract. Accordingly, HERA could not have "buttressed" authority the Government did not have under SASA.

The Government's FIRREA cases show that *Concrete Pipe* and *Connolly* are distinguishable on another basis – they are limited to new statutes that merely extend liability. (*See* Opp. at 35-36 (citing *Branch v. U.S.*, 69 F.3d 1571 (Fed. Cir. 1995); *Meriden Trust & Safe Dep. Co. v. FDIC*, 62 F.3d 449 (2d Cir. 1995))). In those cases, the Government relied on cross-collateral provisions in a new statute (FIRREA) to seize assets of healthy banks after their sister banks failed. *See Branch*, 69 F.3d at 1573-74; *Meriden Trust*, 62 F.3d at 451. In finding no taking, the courts stated that the FIRREA provision – like the ERISA amendments in *Concrete Pipe* and *Connolly* – merely extended existing liability to the plaintiffs, and "a legislature is free to make statutory changes in the common

[12] *Am. Cont'l Corp. v. U.S.*, 22 Cl. Ct. 692, 697-698 (1991) (Opp. at 37), is to the same effect. The court found no taking occurred because "the federal government buttressed the then-existing regulatory scheme by authorizing appointment of a conservator or receiver." Moreover, the Government's reliance on *Fleming v. Rhodes*, 331 U.S. 100 (1947), *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467 (1911), and *Federal Housing Admin.v. Darlington, Inc.*, 358 U.S. 84 (1958), is misplaced, as none of those cases involved a Fifth Amendment taking.

law rules of liability without running afoul of the Fifth … Amendment protections of property." *Branch*, 69 F.3d at 1577, 1579. The court described *Concrete Pipe* and *Connolly* as upholding "statutory changes in pension law that resulted in the imposition of liability", and held that "[t]o treat every statutory change in the rules of liability as a taking would cripple the ability of federal and state legislature to adjust the benefits and burdens of economic life." *Id.* at 1578.

Unlike *Concrete Pipe*, *Connolly*, *Branch*, and *Meriden Trust*, this case does not concern "a statutory change in the rules of liability", or a new statute that imposed additional liability on Mr. Piszel. Indeed, neither the SASA nor HERA provisions at issue concerns liability. Instead, the Government relied on HERA to specifically target and take Mr. Piszel's contractual termination benefits.[13] Accordingly, *Connolly*, *Concrete Pipe*, *Branch*, and *Meriden Trust* lend no support to the Government's argument.[14]

[13] The Government calls the "circumstances" of Mr. Piszel's claim "troubling" because Mr. Piszel was terminated when Freddie Mac was placed into conservatorship, and because taxpayers contributed "billions of dollars simply to keep his former company afloat." (Opp. at 14 n.3). But this appeal to emotions is as inaccurate as it is transparent. After thoroughly investigating the events leading to Freddie Mac's conservatorship, the Government itself concluded that Mr. Piszel did not engage in any wrongdoing or receive any improper personal benefit. (A37-A38, ¶¶ 62-64).

[14] The other FIRREA cases the Government cites are inapposite because they did not involve a Fifth Amendment taking. *See 1st Home v. Liquidating Trust v. U.S.*, 581 F.3d 1350 (Fed. Cir. 2009); *Dougherty v. Carver Fed. Sav. Bank*, 112 F.3d 613 (1997); *Far West Federal Bank, S.B. v. Office of Thrift Supervision –*

In *California Housing* and *Golden Pacific* (*see* Opp. at 21-25), the Government did do not rely on new law that buttressed preexisting law to justify its actions. It relied on the preexisting law itself (*see* Br. at 37-38), a point highlighted in another case the Government cites: "On account of the **existing** regulatory structure permitting the appointment of a conservator or receiver, the financial institutions lacked the fundamental right to exclude the government from its property at those times when the government could legally impose a conservatorship or receivership." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 241 (D.D.C. 2014).[15] Thus, *California Housing* and *Golden Pacific* are even further removed from the facts of this case than *Connolly* and *Concrete Pipe*.

Director, 119 F.3d 1358 (9th Cir. 1997); and *Burke v. Bd. of Governors of Fed. Reserve Sys.*, 940 F.2d 1360 (10th Cir. 1991).

[15] *Perry*, and a number of the Government's other cases, are inapposite for the same reason: the Government relied on statutory authority that pre-dated the plaintiffs' property interests to take the plaintiffs' property. (*See* Br. at 38 n.9); *see also Hearts Bluff Game Ranch, Inc. v. U.S.*, 669 F.3d 1326, 1331 (Fed. Cir.), *cert. denied*, 132 S. Ct. 2780 (2012) (holding that the Government's precluding plaintiff from building a mitigation bank on his property was not a taking because the Government's authority preexisted plaintiff's property right); *Mitchell Arms, Inc. v. U.S.*, 7 F.3d 212, 217 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1106 (1994) (holding that the plaintiff's "ability to import the rifles and sell them in the United States was at all times entirely subject to the exercise of ATF's regulatory power"); *Norman v. Baltimore & O.R. Co.*, 55 S. Ct. 407, 418 (1935) (holding that "gold clauses" in plaintiffs' contracts during the Great Depression mandating payment in gold "obstruct[ed] the power of the Congress to regulate the value of the money of the United States", which power predated the plaintiffs' contracts); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 618 (D.C. Cir. 1992). ("At the time of the deal, it is undisputed, the banking regulators had the discretion

As for loopholes, the Government identifies none in SASA that HERA supposedly closed, and *Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 156 (1st Cir. 2012) (Opp. at 34-35), supports Mr. Piszel, not the Government. In *Cioppa*, an employee benefits trust challenged a new statute that required health insurers to disclose basic loss information to the employees. *Id.* at 148. The court rejected the challenge because the preexisting law entitled policyholders to obtain the same loss information. *Id.* at 149. Although the employees were not technically policyholders (their policies were held by the trust on their behalf), the court held that the new statute "simply continues what the [prior] regulations started by addressing a unique scenario which, in all likelihood, was not contemplated by the original legislation." *Id.* at 156. Here, the Government cannot show that its limited authority to review and approve termination benefits only once was a "unique scenario" that was not contemplated under SASA. Indeed, the Government itself interpreted SASA that way (Br. at 15-16), and nothing in the legislative history of SASA or HERA says otherwise.

4. The Government Fails To Distinguish Mr. Piszel's Cases Showing That Mr. Piszel Had A Property Interest

As Mr. Piszel showed in his opening brief (Br. at 34-36), the facts here are on all fours with this Court's decision in *Cienega Gardens*. *See Cienega*

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to allow or disallow the inclusion of goodwill in capital", the property interest the plaintiffs alleged was taken).

Gardens, 331 F.3d 1319 ("*Cienega Gardens VIII*"). As in this case, the plaintiffs in *Cienega Gardens VIII* relied on contractual provisions that the Government reviewed and approved, and the Government later relied on a new statute to take the plaintiffs' contractual rights. *Id.* at 1325-27. In finding a taking, this Court held that "the abrogation by legislation of clear, unqualified contract rights requires a remedy"; if not, "Congress could have changed the mortgage contracts in any way to affect any of the rights established by the contracts … and the Owners would be without remedy. **Again, this is not and cannot be the law.**" *Id*. at 1334. Applied here, if the Government's actions do not constitute a taking, the Government could at any time, for any reason, rely on new statutory authority to take all of Freddie Mac's contracts and Freddie Mac's counterparties would have no Constitutional remedy. "[T]his is not and cannot be the law." *Id*.

Recognizing that *Cienega Gardens VIII* is fatal to its claim, the Government tries to distinguish it. (Opp. at 26-27, 40-41). The Government argues that the housing programs at issue were not "highly regulated" (*id.* at 26), even though "a companion case about the same regulatory restriction decided on the same day" (*id.*) refers to the "highly regulated nature of the subsidized housing industry". *Chancellor Manor v. U.S.*, 331 F.3d 891, 906 (Fed. Cir. 2003). Next, the Government argues that *Cienega Gardens VIII* was "limited" with "no precedential value even as to other plaintiffs in the very same case." (Opp. at 26).

But the later *Cienega Gardens* decision held that "*Cienega Gardens VIII* decided several issues that are equally applicable to all parties in these cases." *Cienega Gardens v. U.S.*, 503 F.3d 1266, 1275 (Fed. Cir. 2007).[16] Finally, the Government argues that *Cienega Gardens VIII* is limited to real property rights. (Opp. at 26-27). But while the underlying rights involved real property, this Court concluded that the plaintiffs' property interest was "the **contractual right** to prepay and exit the housing programs." *Cienega Gardens VIII*, 331 F.3d at 1330.[17] In any event, the Supreme Court recently held that the Fifth Amendment "protects 'private property' without any distinction between different types", and that "[n]othing in [] history suggests that personal property was any less protected against physical appropriation than real property." *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419, 2426-27 (2015).[18]

[16] For other plaintiffs not subject to the court's decision in *Cienega VIII* who raised "different arguments" on a "different record", the court held that *Cienega VIII* did not necessarily preclude a different result. *Cienega Gardens*, 503 F.3d at 1276.

[17] Contrary to the Government's argument (Opp. at 41), *Palmyra Pacific* did not state that *Cienega Gardens VIII* "does not control" if a plaintiff does not allege its contract rights were altered "in a way that affects their underlying [real] property rights". *Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1369 (Fed. Cir. 2009), (brackets in Opp. at 41), *cert. denied*, 559 U.S. 1106 (2010). Moreover, *Palmyra* is distinguishable from the facts here. (*See* page 20 n.19, below).

[18] The Government's argument that *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) does not apply because it concerned the taking of real property fails for the same reason.

The Government also fails to effectively distinguish *A&D Auto Sales*, a recent decision in which this Court found a taking where the Government relied on a new restriction that "was enacted after the plaintiff's [contractual] property interest was acquired." (Br. at 33-34 (citing *A&D Auto Sales, Inc. v. U.S.*, 748 F.3d 1142, 1152-53 (Fed. Cir. 2014))). The Government argues that *A&D* is distinguishable because it did not involve a "pervasively regulated industry". (Opp. at 25-26, 31). But the Government does not point to any language in *A&D*, or any other case, that so limits *A&D*, and indeed, there is none. The Government also fails to address *Tulare Lake Basin Water Storage Dist. v. U.S.*, 49 Fed. Cl. 313, 324 (2001), which found a taking and held that "subsequent amendments to [the regulatory scheme] cannot, for contract purposes, be made retroactive".

B. *Omnia* Does Not Apply Because Mr. Piszel's Property Interest Was Not Merely "Frustrated" By Government Action

In the lower court, and again before this Court, the Government argued that its actions "merely frustrated [Mr. Piszel's] employment agreement", and did not amount to an unconstitutional taking. (Opp. at 28-29 (citing *Omnia Commercial Co. v. U.S.*, 261 U.S. 502 (1923))). But *Omnia* does not apply and, in any event, as the lower court held, the Government's actions went well beyond frustrating Mr. Piszel's agreement. (*See* A17-18 n.9-10 (holding that Mr. Piszel's rights "were not merely frustrated by the government's actions"; instead, his

"rights were directly and intentionally terminated" by the Government's actions)). This Court should follow suit.

In *Omnia*, the Court rejected a takings claim by a party indirectly impacted by the Government's action. Specifically, Omnia contracted to buy steel from Allegheny Steel Corporation. When the Government requisitioned one year's worth of Allegheny Steel Company's steel production, Allegheny was unable to fulfill its contract with Omnia. *Omnia*, 261 U.S. at 507. No taking occurred, the Court held, because "the government dealt only with the [Allegheny] company", not with plaintiff, and the plaintiff's loss was merely a consequence of lawful "governmental action" for which "the law affords no remedy". *Id.* at 510-511.

The Government's actions here were hardly indirect. Specifically targeting Mr. Piszel, the Government directed Freddie Mac to terminate Mr. Piszel and not pay him his contractual benefits. (A35-A36 ¶¶ 52-55). Mr. Piszel's resulting loss was no more a mere "consequence" of the Government's actions than the car dealerships' loss of their franchises in *A&D* after the Government required the dealerships to close. *See A&D*, 748 F.3d at 1154 ("in the cases relied on by the government [including *Omnia*], the effect of the government action upon the plaintiff was merely collateral or unintended or the action affected a general class"); *see also Love Terminal Partners v. U.S.*, 97 Fed.Cl. 355, 398 (2011) ("plaintiffs have removed themselves from the circumstances presented in *Omnia*

Commercial Co. and its progeny because they allege that the government specifically targeted and took their contractual rights").[19]

C. Mr. Piszel Has Alleged A Reasonable Investment-Backed Expectation To Receive His Contractual Termination Benefits

In holding that Mr. Piszel did not have a reasonable investment-backed expectation in his termination benefits, the lower court gave the same reasons, and cited the same authority, that it gave for holding that Mr. Piszel did not have a property interest in those benefits. (*See* Br. at 42). The Government follows suit (*compare* Opp. at 16-27 *with id.* at 33-44), and therefore, its arguments are unavailing for the reasons set forth in Point I.A, above; *see also* Br. at 42-43; *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1177 (Fed. Cir. 1994) (finding a taking because plaintiffs – like Mr. Piszel here – "demonstrate[d] that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.").[20]

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[19] *See also Love Terminal Partners v. U.S.*, 97 Fed. Cl. 355, 398 (2011) ("The element absent from *Omnia Commercial Co.*, *Huntleigh USA Corp.*, *Air Pegasus of D.C., Inc.*, and *767 Third Avenue Associates* is that the plaintiffs never alleged that the government regulations at issue targeted their property rights or took their contracts."). *Palmyra Pacific Seafoods, LLC v. U.S.*, 561 F.3d 1361 (Fed. Cir. 2009), *cert. denied*, 559 U.S. 1106 (2010) (Opp. at 27, 29-30) is also distinguishable because the plaintiff did not have a property interest in engaging in commercial fishing in a wildlife refuge (*id.* at 1370), whereas Mr. Piszel has a property interest in his termination benefits.

[20] *Appolo Fuels, Inc. v. U.S.*, 381 F.3d 1338, 1350 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1188 (2005), is distinguishable because the statute on which the

Moreover, the Government's narrow conception of the scope of Mr. Piszel's "reasonable expectations" is divorced from how real people contract. At the time the parties contracted, the Government told Mr. Piszel he would receive his termination benefits, and the law precluded the Government from changing its mind. Relying on those assurances, Mr. Piszel forfeited $8.1 million in earned and accrued compensation to join Freddie Mac. (A30 ¶ 27). No reasonable person would expect the Government to invoke entirely new statutory authority, enacted two years later, to renege. If that were the law, then on the first day of Mr. Piszel's employment with Freddie Mac, the Government could have ordered Freddie Mac to terminate Mr. Piszel without paying him any termination benefits, and Mr. Piszel would have no recourse. Mr. Piszel made that point in his opening brief (Br. at 42-43); the Government offered no response.

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013-14 (1984) (Opp. at 33) only proves Mr. Piszel's point. There, a pesticide inventor alleged that the Government's disclosure of its pesticide data constituted a taking. *Id.* at 998-999. In 1978, the relevant statutes governing the Government's use of pesticide data were amended to give plaintiff "explicit assurance that [the government agency] was prohibited from disclosing publicly … any data submitted by an applicant if both the applicant and [government agency] determined the data to constitute trade

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Government relied to take plaintiff's mining leases "was enacted long before [plaintiff's] leases".

secrets." *Id.* at 1011. Accordingly, the Court held that disclosure of plaintiff's data during that period "will constitute a taking", because it "conflicts with the explicit assurance of confidentiality … contained in the statute during that period". *Id.* at 1013-1014.[21]

D. Mr. Piszel Alleges A *Per Se* Taking

Mr. Piszel showed in his opening brief that, contrary to the lower court's holding, the Government itself does not need to take property for a *per se* taking; instead, a *per se* taking may arise when the Government authorizes a third-party to take a plaintiff's intangible property, including a contract. (Br. at 43-47). The Government even concedes that "in certain circumstances, the Government will be chargeable for a physical intrusion that it expressly authorizes." (Opp. at 45-46; *see also* Br. at 44-45). But the Government appears to argue that contractual interests are not susceptible to "physical occupation". Precedent proves otherwise. *See Tulare Lake Basin Water Storage Dist. v. U.S.*, 49 Fed. Cl. 313 (2001); *Starr Int'l Co. v. U.S.*, 106 Fed. Cl. 50 (2012).

In *Tulare*, the Court found a *per se* taking where the Government relied on subsequent legislation to limit a plaintiff's contractual right. *Id.* at 319-320. Mr. Piszel addressed *Tulare* in his opening brief. (Br. at 45-46). The

[21] As set forth in Section I.A.1, the Government's attempt to distinguish *United Nuclear Corp. v. U.S.*, 912 F.2d 1432, 1436 (Fed. Cir. 1990), on the grounds that there was legislation **pending** at the time Mr. Piszel signed his employment agreement (Opp. at 42-43), is unavailing.

Government never responds. The Government attempts to distinguish *Starr* by arguing that "the Government did not physically take Plaintiffs' common shares" in that case. (Opp. at 47 n.16). But *Starr* alleged two takings: one of shares, and the other of "cash collateral posted by AIG." *Starr*, 106 Fed. Cl. at 58. The Government addresses only the former; Mr. Piszel relies on the latter.[22]

E. Mr. Piszel Alleges A Categorical Taking

As Mr. Piszel demonstrated in his opening brief, the lower court erred in dismissing his categorical takings claim because he alleged that the Government took **all** of his termination benefits, including all **unvested** RSUs. (Br. at 47-48). The Government offers two responses. Both fail as a matter of law.

First, citing out-of-Circuit case law, the Government argues that intangible property cannot be the subject of a categorical taking. (*Id.*). But as the lower court correctly assumed, intangible property, such as Mr. Piszel's contractual termination benefits, may be the subject of a categorical taking. (A16). That assumption is supported by, whereas the Government simply ignores, *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419, 2426-2427 (2015) (holding that the

[22] The Government also tries to limit the holding in *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 217-218, 235 (2003), in which the court found a *per se* taking of a plaintiff's monetary interest. The Government argues that *Brown* only applies "in the context of trust accounts or other deposit arrangements". (Opp. at 46). But *Starr* applied the same principle in the context of contracts for cash collateral. *See Starr Int'l Co. v. U.S.*, 106 Fed. Cl. 50, 76 (2012). ("The collateral is thus comparable to the 'deposits in an established account'").

Government cannot appropriate a patent [that is, intangible property] "any more than it can appropriate or use without compensation land which has been patented to a private purchaser").

Second, the Government argues that it "did not take [Mr. Piszel's] entire contract" because "he received more than $1 million in salary and a substantial portion of the restricted [or **vested**] stock Freddie Mac promised him". (Opp. at 48). But this Court has consistently held that the proper categorical takings test to determine whether a plaintiff has lost "all economically beneficial" use of his property is to determine what property is left **after the taking**, not what property was acquired **before** the taking. *See, e.g., Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (finding a categorical taking where the "**remaining value**" of the plaintiff's land **after the taking** was "de minimis"); *Lost Tree Village Corp. v. U.S.*, 787 F.3d 1111 (Fed. Cir. 2015) (same).[23] Indeed, this Court previously rejected the Government's same argument when a plaintiff alleged a categorical taking of its wetlands. *See Loveladies*, 28 F.3d at 1181 (holding that the lower court did not err in concluding that "land developed or sold

[23] The Government's own cases demonstrate the point. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1483-84 (2002) (holding that a temporary moratoria prohibiting any economic use of land for 32 months was not a categorical taking "because the property will recover value as soon as the prohibition is lifted").

before the regulatory environment existed should **not** be included in the denominator" to determine if all of plaintiff's property was taken).

Here, Mr. Piszel alleges a categorical taking of **all** of his contractual termination benefits, including a termination payment and **unvested** RSUs that were required to continue vesting **after** he was terminated. (*See, e.g.*, A35 ¶ 53, A36, ¶¶ 55-57, 39 ¶ 69). Compensation that he received **before** he was terminated – including "salary" and **vested** RSUs, as the Government argues – are not **termination benefits**, and are therefore not part of the denominator for the categorical takings analysis.

II. THE LOWER COURT ERRED IN DISMISSING MR. PISZEL'S ILLEGAL EXACTION CLAIM

As Mr. Piszel demonstrated in his opening brief, the lower court erred in dismissing his exaction claim because it failed to address Mr. Piszel's argument that that he is entitled to payment from the Government for damages pursuant to a money mandating statute, which is an alternative basis for an exaction claim. (Br. at 49-53). In response, the Government argues that the **only** way to plead an exaction claim is by alleging that the plaintiff "paid over money to the Government directly or in effect." (Opp. at 50). And while the Government recognizes that some other claim exists for damages based on a money mandating statute, it argues that Mr. Piszel "did not plead" it. (*Id.* at 54). The Government is wrong.

The Government avoids the most recent decision addressing the exact issue of whether an exaction may be alleged based upon a money mandating statute – *Starr Int'l Co. v. U.S.*, 121 Fed. Cl. 428 (2015). In *Starr*, the lower court denied the Government's motion to dismiss an exaction claim that plaintiff based on a money mandating statute, and held that the "Federal Circuit has indicated that an illegal exaction claim requires a showing that the statute causing the exaction is **either expressly or implicitly money-mandating**." *Starr*, 106 Fed. Cl. at 84. After a bench trial on the merits, the court adopted plaintiff's money mandating argument and held that the Government illegally exacted plaintiff's property interests, notwithstanding that plaintiff did not allege it paid anything to the Government directly or in effect. *Starr*, 121 Fed. Cl. at 464-466. In so holding, the court expressly rejected the Government's argument that illegal exaction claims **only** apply when money is paid to the Government directly or in effect. *Starr*, 121 Fed. Cl. at 464 ("illegal exaction claims arise in many other contexts as well, such as [plaintiff's] lawsuit here.").[24]

[24] *Ontario Power Generation, Inc. v. U.S.*, 369 F.3d 1298 (Fed. Cir. 2004) did not limit exaction claims to allegations that a plaintiff paid money to the Government directly or in effect. In fact, the court recognized that an exaction claim lies "where the government's actions on the intermediate third party have a 'direct and substantial impact on the plaintiff asserting the illegal exaction claim.'" *Id.* at 1303. Here, the Government's actions directing third-party Freddie Mac not to pay Mr. Piszel his termination benefits had a "substantial impact" on him.

Even if the Government were correct that claims against the Government pursuant to money mandating statutes give rise to some other claim, but not an exaction claim, Mr. Piszel has sufficiently pleaded such a claim. Indeed, Mr. Piszel expressly pleads the money mandating statute in his Complaint. (A33 ¶ 43 (citing 12 U.S.C. § 4617(d)(3)(A))). And pleading the relevant facts in a Complaint is all that is required to state a claim, even if the name of the claim is not included. *See Figueroa v. U.S.*, 57 Fed. Cl. 488, 495 (2003) (holding that plaintiff pled an illegal exaction claim where plaintiff alleged the relevant facts in its complaint, even though "plaintiff did not expressly use the term 'illegal exaction'"), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006).

The Government also argues that HERA is not money mandating because it merely "establishes a limitation on the potential liability" instead of providing a damages claim against the Government. (Opp. at 55). But the relevant section of the statute is styled "Claims for damages for repudiation". 12 U.S.C. § 4617(d)(3). The Government also argues that HERA is not money mandating because the section purportedly limiting liability only applies when the Government is acting as a conservator, whereas here, the Government was acting as a regulator. (Opp. at 54). But a different section of HERA is substantively identical to another statute that the Supreme Court held was money mandating. (*See* Br. at 50-51 (citing *U.S. v. White Mt. Apache Tribe*, 537 U.S. 465, 474

(2003))). In short, Mr. Piszel has shown that HERA can "fairly be interpreted" as money mandating, which is all that is required. (Br. at 50).[25]

CONCLUSION

For the foregoing reasons, Mr. Piszel respectfully requests that the Court reverse the lower court's Order and reinstate Mr. Piszel's takings and exaction claims.

[25] The Government also argues that its exaction of Mr. Piszel's benefits did not contravene HERA. (Opp. at 52-53). But it does not dispute that **all** of the relevant factors for the Director to consider before prohibiting "Golden Parachute" payments heavily favor permitting Mr. Piszel's benefits. (*Id.* at 53 n.17; Br. at 53).

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2015, I electronically filed with the Clerk's Office of the U.S. Court of Appeals for the Federal Circuit this reply brief of Anthony Piszel, and further certify that the parties' counsel will be notified of, and receive, this filing through the Notice of Docket Activity generated by this electronic filing.

Dated: December 23, 2015

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 6,991 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Rule 32(b) of the Federal Circuit Rules. This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2010 in 14 font using Times New Roman.

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