No. ______

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

PETITION FOR WRIT OF CERTIORARI

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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 it can assert a claim under the Takings Clause of the Fifth Amendment?

LIST OF ALL PARTIES

The Parties to the Proceeding are Petitioner Anthony Piszel and Respondent the United States.

CORPORATE DISCLOSURE STATEMENT

There are no parent companies or publicly-held corporations in this case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AT ISSUE 2

INTRODUCTION 2

STATEMENT OF THE CASE 4

A. Freddie Mac and the Government Agree to Provide Mr. Piszel with Contractual Termination Benefits 4

B. The Government Orders Freddie Mac to Terminate Mr. Piszel and to Not Pay His Contractual Termination Benefits 5

C. The Decisions Below 6

1. The Court of Claims Decision 6

2. The Federal Circuit Decision 7

REASONS FOR GRANTING THE PETITION......... 9

I. THE FEDERAL CIRCUIT HAS ADOPTED INCONSISTENT STANDARDS FOR WHEN THE UNITED STATES MAY BE LIABLE FOR A TAKING BASED ON A GOVERNMENT ORDER TO TERMINATE A PRIVATE CONTRACT......... 9

A. Before its *Piszel* Decision, the Federal Circuit Consistently Addressed Takings Claims When the Government Interfered with Private Contracts....................................... 9

B. The Federal Circuit's *Piszel* Decision is Inconsistent with its Precedent and has Created Confusion in Takings Law 12

II. THE FEDERAL CIRCUIT'S *PISZEL* DECISION IS IRRECONCILABLE WITH THIS COURT'S PRECEDENT 17

III. THE FEDERAL CIRCUIT'S DECISION EVISCERATES THE CONSTITUTIONAL PROTECTION AGAINST THE TAKING OF PRIVATE CONTRACTS 21

IV. REVIEW IS WARRANTED BECAUSE THE FEDERAL CIRCUIT'S DECISION OPENS THE DOOR TO GOVERNMENTAL FAVORITISM AND ABUSE 22

CONCLUSION 23

APPENDIX:

Precedential Opinion and Judgment of The United States Court of Appeals For the Federal Circuit entered August 18, 2016 ..... 1a

Memorandum Opinion and Order of The United States Court of Federal Claims entered June 19, 2015 ..... 32a

Order of The United States Court of Appeals For the Federal Circuit Re: Denying Petition for Rehearing and Petition for Rehearing *En Banc* entered February 8, 2017 ..... 60a

TABLE OF AUTHORITIES

Page(s)

CASES

A&D Auto Sales, Inc. v. U.S.,
748 F.3d 1142 (Fed. Cir. 2014) 10, 14

Air Pegasus of D.C., Inc. v. U.S.,
424 F.3d 1206 (Fed. Cir. 2005) 11

Allegre Villa. v. U.S.,
60 Fed. Cl. 11 (2004) 16

Armstrong v. U.S.,
364 U.S. 40 (1960) 19

Blanchette v. Conn. Gen. Ins. Corp.,
419 U.S. 102 (1974) 19

Brooks-Scanlon Corp. v. U.S.,
265 U.S. 106 (1924) 18

Castle v. U.S.,
301 F.3d 1328 (Fed. Cir. 2002), *cert. denied*,
539 U.S. 925 (2003) .... *passim*

Cent. Exploration New Orleans, Inc. v. U.S.,
103 Fed. Cl. 70 (2012) 16

Chancellor Manor v. U.S.,
331 F.3d 891 (Fed. Cir. 2003) 11

Cienega Gardens v. U.S.,
331 F.3d 1319 (Fed. Cir. 2003) 11

Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust,
508 U.S. 602 (1993) 17

Esther Sadowsky Testamentary Trust v. Syron,
No. 08-cv-5221 (S.D.N.Y. Mar. 16, 2011) 6

Franconia Assoc. v. U.S.,
536 U.S. 129 (2002) 16, 17, 20

Hughes Communications Galaxy, Inc. v. U.S.,
271 F.3d 1060 (Fed. Cir. 2001) 14

In re Fed. Home Loan Mortg. Corp. Deriv. Litig.,
No. 08-cv-773 (E.D. Va. Mar. 16, 2011)........... 6

Int'l Paper Co. v. U.S.,
282 U.S. 399 (1931) 18

Klamath Irrigation Dist. v. U.S.,
67 Fed. Cl. 504 (2005) 16

Lynch v. U.S.,
292 U.S. 571 (1934) 18, 19, 20

Norman v. Balt. & Ohio R.R. Co.,
294 U.S. 240 (1935) 18, 19

Omnia Commercial Co. v. U.S.,
261 U.S. 502 (1923) 18

Pa. Coal Co. v. Mahon,
43 S. Ct. 158 (1922) 18

Palmyra Pac. Seafoods, LLC v. U.S.,
561 F.3d 1361 (Fed. Cir. 2009) 11

Perry Capital LLC v. Lew,
70 F. Supp. 3d 208 (D.D.C. 2014),
aff'd in part and remandedin part sub nom.,
848 F.3d 1072 (D.C. Cir. 2017) 12

Phelps v. U.S.,
274 U.S. 341 (1927) 18

Prudential Ins. Co. of Am. v. U.S.,
801 F.2d 1295 (Fed. Cir. 1986), *cert. denied*,
479 U.S. 1086 (1987) 15

Stockton East Water District v. U.S.,
583 F.3d 1344 (Fed. Cir. 2009) 15, 16

U.S. v. Gen'l Motors Corp.,
323 U.S. 373 (1945) 17-18

U.S. v. Petty Motor Co.,
327 U.S. 372 (1946) 17

United Nuclear v. U.S.,
912 F.2d 1432 (Fed. Cir. 1990) 11

CONSTITUTIONAL PROVISION

U.S. CONST. amend. V .... *passim*

STATUTES

12 U.S.C. § 1452(h)(2) 4

12 U.S.C. § 4518(e)(1) 5

18 U.S.C. § 1491 9

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1346 9

OTHER AUTHORITIES

David W. Spohr, *(When) Does a Contract Claim Trump a Takings Claim? Lessons from the Water Wars*, 2 Wash. J. Envtl. L. & Pol'y 125 (2012) 17

Freddie Mac, Annual Report and Information Statement to Stockholders (2006), available at http://www.freddiemac.com/investors/ar/pdf/2006annualrpt.pdf#page=67 23

PETITION FOR WRIT OF CERTIORARI

Anthony Piszel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Federal Circuit's Opinion is reported at 833 F.3d 1366 (2016) and is reproduced in the Appendix at 1a-31a.

The Court of Claims Opinion is reported at 121 Fed. Cl. 793 (2015) and is reproduced in the Appendix at 32a-59a.

The Order of the Federal Circuit denying rehearing en banc is not reported and is reproduced in the Appendix at 60a-61a.

JURISDICTION

The date of the decision sought to be reviewed is August 18, 2016. The Federal Circuit denied further review on February 8, 2017.

Jurisdiction is conferred under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment of the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

INTRODUCTION

The United States Court of Appeals for the Federal Circuit sets the law of the land on Fifth Amendment takings claims – subject only to this Court's review. Many takings claims stem from the United States Government ordering or otherwise causing the termination of private contracts during our nation's financial crises. It is therefore critical that the Federal Circuit's decisions are uniform. Through its decision in this case, however, the Federal Circuit has established inconsistent standards on when liability attaches for the taking of a private contract. As a result, takings law is in a state of confusion, which will confound private litigants, lead to further inconsistent results, and deprive aggrieved citizens of a fundamental constitutional right. This Court's review of the Federal Circuit's decision is therefore both warranted and necessary.

Before the Federal Circuit's decision in this case, it had consistently entertained takings claims and found unconstitutional takings when the Government interfered with private contracts. And it did so notwithstanding that plaintiffs had available breach remedies against their contractual counterparties. But the Federal Circuit has now contradicted its own precedent and added a new element to takings law, holding that private parties may no longer sue the Government for taking a

private contract unless the Government also "substantially take[s] away" their private breach remedies.

To support its unprecedented decision, the Federal Circuit established a novel rule of law that no court has ever applied to limit takings claims based on private contracts. In fact, the Federal Circuit's decision conflicts with nearly a century of this Court's precedent consistently finding takings when the Government interferes with private contracts, despite the availability of private breach remedies. The Federal Circuit admitted as much in its decision: "the Supreme Court has consistently addressed takings claims even though claimants could have pursued breach of contract claims against private parties." It then proceeded to disregard this Court's constitutional jurisprudence on this fundamental issue and issue a conflicting opinion.

The consequences of the Federal Circuit's decision are stark. Applying the Federal Circuit's new takings standard eviscerates citizens' constitutional right to sue the Government for taking private contracts. As a prerequisite to bringing such claims, citizens must now file and fully litigate a breach of contract claim against their contractual counterparty – solely to prove that the Government "substantially t[ook] away" that private breach remedy. Few citizens or small businesses have the time or resources to pursue that protracted course, which also undermines judicial economy by promoting duplicative and unnecessary litigation.

Finally, review of the Federal Circuit's decision is warranted because it encourages

Governmental favoritism and abuse. Indeed, the Government now has free license to meddle in private contractual relationships – for any reason – without fearing any repercussions.

We therefore respectfully submit that this Court should grant this Petition.

STATEMENT OF THE CASE

A. Freddie Mac and the Government Agree to Provide Mr. Piszel with Contractual Termination Benefits

In the fall of 2006, the Federal Home Loan Mortgage Corporation ("Freddie Mac") began actively recruiting the Petitioner, Anthony Piszel, to become its Chief Financial Officer ("CFO"). Beset by an accounting scandal, Freddie Mac was searching for a respected financial executive to restore Freddie Mac's financial reporting credibility. In his then current role as the CFO of a public company, Mr. Piszel had earned and accrued significant deferred compensation. As an inducement to leave behind that guaranteed income to join Freddie Mac, Freddie Mac agreed that Mr. Piszel would receive certain contractual benefits if Freddie Mac terminated him "without cause". The benefits included a lump sum cash payment and the continued vesting after termination of certain restricted stock units.

Pursuant to Freddie Mac's Charter Act (12 U.S.C. § 1452(h)(2)), James B. Lockhart III, the former Director of the Office of Federal Housing Oversight ("OFHEO"), then Freddie Mac's federal regulator, reviewed and approved Mr. Piszel's contractual termination benefits before Mr. Piszel

took the position. If Mr. Lockhart had not approved these termination benefits, Mr. Piszel would not have left his former employer and relinquished his accrued deferred compensation to join Freddie Mac. Mr. Piszel joined Freddie Mac as CFO in November 2006. The Government was not a party to his private employment agreement with Freddie Mac.

Mr. Piszel's performance as Freddie Mac's CFO was exemplary. He achieved the two primary goals that Freddie Mac set for him by mid-summer 2008. He was considered the best performing executive at Freddie Mac in 2007.

In July 2008, Congress enacted the Housing Economic Recovery Act ("HERA"). HERA replaced OFHEO with the Federal Housing Finance Authority ("FHFA"), and gave FHFA expanded conservatorship authority and new powers to prohibit "golden parachute" payments. 12 U.S.C. § 4518(e)(1) (2008). On September 7, 2008, the Government exercised its new authority and placed Freddie Mac into conservatorship.

B. The Government Orders Freddie Mac to Terminate Mr. Piszel and to Not Pay His Contractual Termination Benefits

Two weeks after placing Freddie Mac into conservatorship, Mr. Lockhart ordered Freddie Mac to immediately terminate Mr. Piszel "without cause", and to not pay him any of his contractual termination payments. In his letter communicating this decision to Freddie Mac's CEO, Mr. Lockhart stated that he was taking this action in his capacity

"as Director" of FHFA (and therefore, in the Government's sovereign capacity) and in reliance upon the HERA's new golden parachute provisions. Freddie Mac complied, notwithstanding that neither FHFA, nor any other regulator or court, found that Mr. Piszel was responsible for Freddie Mac's financial condition or the conservatorship. Indeed, after investigating Freddie Mac, the FHFA acknowledged that it found no evidence that Mr. Piszel engaged in any wrongful conduct. As a result, the FHFA moved to voluntarily dismiss all claims against Mr. Piszel (and other former Freddie Mac executives) in two pending derivative actions, and the courts granted the motions. *See Esther Sadowsky Testamentary Trust v. Syron*, No. 08-cv-5221, Docket Nos. 101, 102, 113 (S.D.N.Y. Mar. 16, 2011); *In re Fed. Home Loan Mortg. Corp. Deriv. Litig.*, No. 08-cv-773, Docket Nos. 137, 138, 142 (E.D. Va. Mar. 16, 2011).

C. The Decisions Below

1. The Court of Claims Decision

On August 1, 2014, Mr. Piszel commenced this action seeking just compensation for the Government's taking of his contractual termination benefits.[1] On June 12, 2015, the Court of Claims issued an order and opinion granting the

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[1] In the alternative, Mr. Piszel sought compensation for the Government's illegal exaction of the same property interests in violation of the Government's constitutional, statutory, and regulatory authority. The Court of Claims dismissed that claim, and the claim is not at issue in this Petition.

Government's motion to dismiss Mr. Piszel's takings claim for failure to state a claim. The Court held, among other things, that Mr. Piszel did not have a property interest in his termination benefits. (Appendix at 48a-54a).

Notwithstanding its dismissal, the Court of Claims specifically rejected the Government's argument that the availability of Mr. Piszel's contract remedies against Freddie Mac barred his takings claim against the Government. (*Id.* at 47a-48a). The Court of Claims held that "[i]t is well-established that this Court has jurisdiction over takings claims brought pursuant to the Constitution", and therefore, Mr. Piszel's "takings claim is not jurisdictionally barred because he could have pursued breach of contract remedies against Freddie Mac." (*Id.* at 48a).

2. The Federal Circuit Decision

The Federal Circuit affirmed the dismissal of Mr. Piszel's Complaint on different grounds. It held that Mr. Piszel had a property interest in his contractual termination benefits. (*Id.* at 12a-16a). It also seemingly rejected the Government's argument that "Mr. Piszel's failure to pursue a contract remedy [against Freddie Mac] is an absolute bar to his bringing a takings claim against the government." (*Id.* at 16a). The Federal Circuit held that "we are aware of no case that mandates that a claimant pursue a remedy against a *private* party before seeking compensation from the government." (*Id.* at 18a). The Federal Circuit concluded that the Government had no basis to argue that "Mr. Piszel had to pursue a breach of contract claim against

Freddie Mac before bringing a takings claim", although "the existence of a remedy for breach of contract is highly relevant to the takings analysis in this case." (*Id.*).

In contradictory fashion, however, the Federal Circuit then held 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." (*Id.* at 19a). The basis for this holding was the adoption of a novel, threshold rule that even the Government had not proposed to the court: "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." (*Id.*). The Federal Circuit affirmed the dismissal of Mr. Piszel's claims with prejudice, without granting leave to amend his complaint to address any purported pleading deficiencies.

On October 3, 2016, Mr. Piszel filed a timely petition for rehearing *en banc*. After inviting the Government to respond to Mr. Piszel's petition, the Federal Circuit denied the petition on February 8, 2017. (*Id.* at 60a-61a).

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT HAS ADOPTED INCONSISTENT STANDARDS FOR WHEN THE UNITED STATES MAY BE LIABLE FOR A TAKING BASED ON A GOVERNMENT ORDER TO TERMINATE A PRIVATE CONTRACT

A. Before its *Piszel* Decision, the Federal Circuit Consistently Addressed Takings Claims When the Government Interfered with Private Contracts

The Tucker Act provides that the United States Court of Federal Claims has exclusive jurisdiction over all takings claims seeking in excess of $10,000. 18 U.S.C. § 1491.[2] The Federal Circuit hears all appeals from the Court of Federal Claims. The Federal Circuit is therefore the leading authority that sets the law of the land on takings claims, subject to this Court's review. Consistency and uniformity from the Federal Circuit are therefore critical to avoiding confusion and uncertainty among litigants (and their counsel) who have been aggrieved by Government action. Yet the Federal Circuit's *Piszel* decision conflicts with its own precedent and, unless reversed, will cause a state of disarray in takings jurisprudence.

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[2] Takings claims seeking less than $10,000 may be brought in either the Court of Federal Claims or in U.S. District Courts pursuant to the "baby" Tucker Act. 28 U.S.C. § 1346.

Before the *Piszel* decision, the Federal Circuit addressed numerous takings claims when the Government interfered with private contracts during the nation's financial crises. And the Federal Circuit consistently addressed those claims on the merits, even though the Government did not "substantially take away" the private breach remedies.

For example, in 2014, the Federal Circuit considered a takings claim stemming from the bankruptcies of General Motors and Chrysler. *See A&D Auto Sales, Inc. v. U.S.*, 748 F.3d 1142 (Fed. Cir. 2014).[3] As a condition to providing financial assistance to those companies, the Government mandated that they terminate certain private franchise agreements. When GM and Chrysler complied, the franchisees sued the Government for taking the contracts. The franchisees could have sued Chrysler and GM for breach of contract (or asserted a claim against the companies' bankruptcy estates). But they sued the Government for a Fifth Amendment taking instead. *Id.* at 1147. In affirming the denial of the Government's motion to dismiss, the Federal Circuit held that "[t]here is no per se rule … precluding … liability when the government instigates action by a third-party", even though the plaintiff may have a private breach remedy against its contractual counterparty. *Id.* at 1153.

Similarly, in connection with the low-income housing crisis, the Federal Circuit addressed takings

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[3] Unless stated otherwise, internal citations and quotations are omitted, and emphasis is added.

claims resulting from legislation that nullified low-income housing owners' contractual right to pre-pay their mortgages. *See*, *e.g.*, *Cienega Gardens v. U.S.*, 331 F.3d 1319 (Fed. Cir. 2003); *Chancellor Manor v. U.S.*, 331 F.3d 891 (Fed. Cir. 2003). In each case, the plaintiffs could have sued their private lenders for breach of contract for failing to allow prepayment. But the plaintiffs sued the Government for a Fifth Amendment taking instead. And the Federal Circuit reversed the dismissal of plaintiffs' takings claim in *Chancellor*, and granted judgment in plaintiffs' favor in *Cienega Gardens*, holding that the Government violated the Fifth Amendment by taking plaintiffs' contractual rights. *Chancellor*, 331 F.3d at 893; *Cienega Gardens*, 331 F.3d at 1353.[4]

A very recent ruling from the D.C. District Court demonstrates the importance of the Federal Circuit's precedent in takings law. Investors filed

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[4] Federal Circuit jurisprudence is replete with additional examples of the court addressing takings claims on the merits even when the Government did not "substantially take away" private breach remedies. *See*, *e.g.*, *United Nuclear v. U.S.*, 912 F.2d 1432, 1433 (Fed. Cir. 1990) (finding a taking where the Government refused to approve the plaintiff's contractual right to mine under its leases with an Indian tribe); *Palmyra Pac. Seafoods, LLC v. U.S.*, 561 F.3d 1361, 1363 (Fed. Cir. 2009) (fishing company lessee alleged that subsequent legislation nullified its license to engage in commercial fishing around an island); *Air Pegasus of D.C., Inc. v. U.S.*, 424 F.3d 1206, 1208-09 (Fed. Cir. 2005) (helicopter operator lessee alleged that subsequent legislation nullified its lease to fly in space above the heliport). The plaintiffs in *Palmyra* and *Air Pegasus* could have sued their lessors for breach of contract, but sued the Government instead for a taking, and the Federal Circuit considered the takings claims on the merits.

putative class actions and individual lawsuits alleging numerous claims against the Department of Treasury and FHFA to recover losses stemming from the Government's imposition of a conservatorship over Freddie Mac and Fannie Mae. *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 233-239 (D.D.C. 2014), *aff'd in part and remanded in part sub nom.*, 848 F.3d 1072 (D.C. Cir. 2017). Relying on Federal Circuit precedent, the court considered plaintiffs' takings claim on the merits even though the plaintiffs *also* sued Freddie Mac for breach of contract. *Id.* at 233-239. Contrary to the Federal Circuit's *Piszel* decision, the court did not hold – and it does not appear the Government argued – that plaintiffs' takings claims were barred because plaintiffs' had available private breach remedies against Freddie Mac and Fannie Mae.

B. The Federal Circuit's *Piszel* Decision is Inconsistent with its Precedent and has Created Confusion in Takings Law

The Federal Circuit has now departed from its precedent and turned takings law on its head. In each of the Federal Circuit cases cited above, the plaintiffs could have sued private parties for breach of contract. Thus, the Government had *not* "substantially take[n] away" the plaintiffs' private breach remedies. Yet in each case, the plaintiffs sued the Government for taking their private contract rights. And in each case, the Federal Circuit either found a taking, or considered the takings claims on the merits.

The Federal Circuit's *Piszel* decision is squarely at odds with that precedent, notwithstanding that the Federal Circuit did not explicitly overturn it. The court affirmed the dismissal of Mr. Piszel's takings claim *solely* because "Mr. Piszel was left with the right to enforce his contract against Freddie Mac in a breach of contract action." (Appendix at 19a). To support its decision, the court announced the following rule, contradicting its own precedent and adding a new element to takings law: "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." (*Id.*). The Federal Circuit's *Piszel* decision therefore creates diverging precedent on how courts should treat identical cases.

The Federal Circuit's holding in *Piszel* represents a profound and unwarranted change in the law that is likely to confuse private litigants and result in conflicting decisions in takings law. In barring Mr. Piszel's takings claim, the Court relied on a single inapposite case – *Castle v. U.S.*, 301 F.3d 1328, 1342 (Fed. Cir. 2002), *cert. denied*, 539 U.S. 925 (2003). (Appendix at 19a-20a). But unlike the contract between the parties here, *Castle* involved a contract to which the *Government* was a party. And until the *Piszel* decision, it was well-settled that a different rule applied to takings claims concerning Government contracts. In those cases, courts at times dismissed takings claims because "plaintiffs retained the full range of remedies associated with any contractual property right they possessed" against the Government. *Castle*, 301 F.3d at 1342.

Before the Federal Circuit's *Piszel* decision, no court had ever extended *Castle* to limit a takings claim based on a *private* contract.

Compelling reasons exist for not extending *Castle* to private contract cases. As the Federal Circuit itself acknowledged, "[t]akings claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity and therefore the remedies arise from the contracts themselves". (Appendix at 17a). Thus, applying *Castle* in Government contract cases avoids turning "nearly all Government contract breaches" into constitutional cases. *Hughes Communications Galaxy, Inc. v. U.S.*, 271 F.3d 1060, 1070 (Fed. Cir. 2001); *see also A&D*, 748 F.3d at 1156 ("In [Government contract] cases, the government is usually subject to contractual remedies that make takings liability redundant.").

Conversely, in private contract cases, "the government did not bargain or contract with the plaintiffs, and the plaintiffs have no ordinary commercial remedy against the government." *A&D*, 748 F.3d at 1156. Thus, the risk of turning all Government contract breaches into constitutional cases is absent. Acknowledging this distinction, the Federal Circuit observed "we are aware of no case that mandates that a claimant pursue a remedy against a *private* party before seeking compensation from the government." (Appendix at 18a). Yet the Federal Circuit's decision did just that – mandating that claimants (such as Mr. Piszel) pursue breach of contract claims against private parties instead of

suing the Government for a taking, unless the Government "substantially take[s] away" the private breach remedy.

Broadly extending *Castle* to private contract cases is particularly unsound because the Federal Circuit has limited *Castle's* application even in Government contract cases. For example, in *Stockton East Water District v. U.S.*, 583 F.3d 1344 (Fed. Cir. 2009), the court held that a plaintiff's right to damages for breach of contract does *not* preclude a takings claim. The court vacated the dismissal of a takings claim based on a Government contract, even though the plaintiff had also sued the Government for breach of contract. The court stated that the general rule limiting takings actions when (among other things) "remedies are provided by the contract ... is nothing more than a passing comment about government contract law", and "cannot be understood as precluding a party from alleging" both a breach of contract claim and a takings claim against the Government. *Id.* at 1368.[5] Stated another way, even though the Government did not "substantially take away" plaintiff's right to

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[5] *See also Prudential Ins. Co. of Am. v. U.S.*, 801 F.2d 1295, 1300 n.13 (Fed. Cir. 1986) (holding that a plaintiff suing the Government for breach of contract "may have an alternate avenue of relief under the Takings Clause of the Fifth Amendment"), *cert. denied*, 479 U.S. 1086 (1987).

damages for breach of contract, the Federal Circuit permitted a takings claim to proceed.[6]

Notably, it does not appear that this Court has adopted the *Castle* rule to limit takings claims in either Government contract or private contract cases. And before the Federal Circuit's *Piszel* decision, no court had adopted it to limit takings claims in private contract cases, such as Mr. Piszel's. Further, while not explicitly rejecting the *Castle* rule, this Court reversed the dismissal of a takings claim in a Government contracts case and allowed *both* a breach claim and a takings claim to move forward. *Franconia Assoc. v. U.S.*, 536 U.S. 129, 149 (2002). Thus, this Court apparently has acknowledged that, even in Government contract cases, the availability of breach of contract remedies does *not* preclude takings claims.

We respectfully submit that the Court should grant this Petition to address the narrower question of whether the *Castle* rule extends to preclude takings claims based on *private* contracts when the

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[6] *See also Cent. Exploration New Orleans, Inc. v. U.S.*, 103 Fed. Cl. 70, 81 (2012) (denying motion to dismiss a takings claim and rejecting the Federal Circuit's "threshold test" as "inconsistent with the Federal Circuit's binding decision in *Stockton East*"). The Court of Federal Claims has also held that *Castle* does *not* limit takings actions that are based on *private* contracts, such as Mr. Piszel's. *See, e.g.*, *Klamath Irrigation Dist. v. U.S.*, 67 Fed. Cl. 504, 532 (2005) (holding that the rule precluding takings actions when plaintiffs have a right to damages for breach of contract "applies to the [plaintiffs] *only to the extent that they actually have contract claims against the United States*."); *Allegre Villa. v. U.S.*, 60 Fed. Cl. 11, 19 (2004) (same).

Government has not "substantially taken away" private breach remedies. As set forth above, and as held by every court except the *Piszel* court, that is not – and cannot be – the law.[7]

II. THE FEDERAL CIRCUIT'S *PISZEL* DECISION IS IRRECONCILABLE WITH THIS COURT'S PRECEDENT

For nearly a century, this Court has considered takings claims on the merits – and found takings – when the Government took plaintiffs' contractual rights. *See, e.g.*, *Franconia Assoc.*, 536 U.S at 149 (reversing the dismissal of a takings claim when the Government took plaintiffs' contractual right to prepay their mortgages); *Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 605, 641-646 (1993) (addressing a takings claim where the Government enacted new legislation that affected plaintiff's contractual liability limitations); *U.S. v. Petty Motor Co.*, 327 U.S. 372, 373-375 (1946) (finding a taking when the Government took tenants' contractual right to the lease of a building); *U.S. v. Gen'l Motors Corp.*, 323 U.S. 373, 374-375, 383-384

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[7] Legal scholars, including a former "trial attorney on the 'Takings Team' within the U.S. Department of Justice", agree that the *Castle* rule does not apply in private contract cases. *See, e.g.,* David W. Spohr, *(When) Does a Contract Claim Trump a Takings Claim? Lessons from the Water Wars*, 2 Wash. J. Envtl. L. & Pol'y 125, 163 (2012) ("the 'limited application' [of] the Takings Clause discussed above *is only for parties in contract (or in privity of contract with) the government*"; "if a claimant is not in privity of contract, he or she can (indeed, can only) proceed under a takings theory.").

(1945) (finding a taking when the Government took a portion of tenants' contractual right to the lease of a building); *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240, 292-294, 305, 316 (1935) (addressing a takings claim when the Government enacted new legislation that affected plaintiffs' contractual "gold clauses"); *Lynch v. U.S.*, 292 U.S. 571, 572, 589 (1934) (reversing and finding a taking when the Government enacted new legislation that precluded plaintiffs from receiving contractual insurance benefits).[8]

The Federal Circuit's decision – barring takings claims unless the Government *also* "substantially take[s] away the [plaintiffs'] right to damages in the event of a breach" (Appendix at 19a) – cannot be reconciled with this Court's long-standing application of the Fifth Amendment's Takings Clause. In each case, as here, the Government had *not* substantially taken away the plaintiffs' right to seek damages in the event of a breach. And in each case, unlike here, this Court entertained the takings claims on the merits, and

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[8] *See also Int'l Paper Co. v. U.S.*, 282 U.S. 399, 405, 407-408 (1931) (reversing and finding a taking when the Government took plaintiff's contractual right to certain water rights); *Phelps v. U.S.*, 274 U.S. 341, 343 (1927) (reversing and finding a taking when the Government took plaintiff's contractual right to a pier); *Brooks-Scanlon Corp. v. U.S.*, 265 U.S. 106, 121 (1924) (reversing and finding a taking when the Government took plaintiff's contractual right to a ship); *Omnia Commercial Co. v. U.S.,* 261 U.S. 502 (1923) (addressing a takings claim when the Government took plaintiff's contractual right to steel); *Pa. Coal Co. v. Mahon*, 43 S.Ct. 158 (1922) (finding a taking when a new statute destroyed plaintiff's contract right to mine under property).

found unconstitutional takings in numerous instances.

The Federal Circuit acknowledged as much here, noting that "the Supreme Court has consistently addressed takings claims *even though claimants could have pursued breach of contract claims against the private parties*". (*Id.* at 18a (citing *Armstrong v. U.S.*, 364 U.S. 40 (1960); *Norman*, 294 U.S. 240). Yet directly contradicting the very precedent it acknowledged, the Federal Circuit's sole basis for dismissing Mr. Piszel's takings claim was that he suffered no taking because he "was left with the right to enforce his contract against Freddie Mac in a breach of contract action." (Appendix at 19a). To put a fine point on it, whereas this Court consistently addresses takings claims notwithstanding the availability of private breach remedies, the Federal Circuit's *Piszel* decision *precludes* takings claims when – and solely because – there are available private breach remedies. (*Id.*).

This Court's decision in *Lynch* is illustrative. The plaintiffs alleged that new legislation resulted in the taking of their contractual right to receive term insurance issued during World War I. 292 U.S. at 575. "This Court unanimously reversed the dismissals" of plaintiffs' takings claims, and held that the legislation "effect[ed] an unconstitutional taking of vested property rights." *Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 135 (1974) (summarizing *Lynch*). Importantly, the *Lynch* Court found a taking even though it expressly held that the legislation did *not* take away the plaintiffs' right to damages in the event of breach. *Lynch*, 292 U.S. at

583 ("Obviously, Congress did not intend to repeal generally the section providing for suits" stemming from the Government's breach of plaintiffs' contracts). That holding remains vital 80 years later, and the Federal Circuit's *Piszel* decision directly conflicts with it.

This Court's decision in *Franconia Associates* further demonstrates the Federal Circuit's divergence from this Court's precedent. 536 U.S. 129. There, the plaintiffs asserted a breach of contract claim and an alternative takings claim against the Government based on the taking of plaintiffs' contractual right to pre-pay their mortgages. *Id.* at 138. This Court reversed the dismissal of both claims. *Id.* at 149. By permitting the breach of contract claim to proceed, this Court acknowledged that the Government had *not* "substantially take[n] away the right to damages in the event of breach." (Appendix at 19a). Yet this Court still allowed plaintiffs' alternative takings claim to proceed. The Federal Circuit held the opposite in *Piszel*.

These cases demonstrate this Court's consistent position in addressing takings claims on the merits despite the availability of private breach remedies. If the *Piszel* decision stands, however, the Government will now argue that takings claims stemming from private contracts are barred as a matter of law – notwithstanding this Court's precedent – unless this Court expressly holds otherwise. Accordingly, this is a ripe issue of significant importance for this Court to consider now.

III. THE FEDERAL CIRCUIT'S DECISION EVISCERATES THE CONSTITUTIONAL PROTECTION AGAINST THE TAKING OF PRIVATE CONTRACTS

Before the Federal Circuit's decision, a plaintiff's only threshold burden was to show that it had a cognizable property interest in the contract that was taken. Now, however, the Federal Circuit has added another element, requiring that same plaintiff to *also* show that the Government "substantially t[ook] away the right to damages in the event of a breach." And it must make that showing *before* it can even bring its takings claim.

Few aggrieved citizens or small businesses will have the resources to make this new required threshold showing. Indeed, unless the Government takes some action to expressly limit a plaintiff's private breach remedy – an unlikely scenario after the Federal Circuit's decision – the plaintiff must now file and fully litigate a separate breach claim before it can pursue a takings claim. And the purpose of litigating the breach claim would be solely to obtain a judicial determination that the Government's action did, in fact, substantially take away the plaintiff's private breach remedy. Stated another way, the Federal Circuit's decision encourages citizens and small businesses to spend money to litigate and lose, just so they can spend more money to litigate again against the Government. The likelihood of citizens and small businesses enduring this lengthy and expensive litigation trajectory is remote. And even if pursued,

it would undermine judicial economy by promoting duplicative litigation in different fora.

IV. REVIEW IS WARRANTED BECAUSE THE FEDERAL CIRCUIT'S DECISION OPENS THE DOOR TO GOVERNMENTAL FAVORITISM AND ABUSE

The Federal Circuit's decision encourages Governmental favoritism and abuse by shielding the Government from any repercussions when it intentionally interferes with private contracts. The Government may now pick and choose which regulated entities' contracts it does not like, and order those contracts terminated without fear of reprisal. And the Government may do so for any reason, or no reason at all. Perhaps a regulator prefers that a regulated entity use a different vendor. Or perhaps a regulator wants to limit executives' salaries so they are more in line with their government counterparts. The Government may now meddle in those provide contracts with impunity.

That unwarranted extension of governmental power is likely to have broad public policy implications that may adversely affect the United States economy. For example, it discourages anyone from contracting with regulated entities – including utilities, financial institutions, and insurance companies – for fear that their contract could be taken without recourse against the Government. In 2006 alone, the year Mr. Piszel signed his employment agreement, Freddie Mac's contractual

obligations totaled almost *one trillion* dollars.[9] If the Federal Circuit's decision stands, the Government could appropriate all of those contracts, and not a single Freddie Mac counterparty would have recourse against the Government.

This concern is even more pronounced for regulated entities that are struggling financially in adverse economic conditions. These entities often require new leadership or outside expertise to help right the ship and bolster the economy. But highly qualified individuals and entities who would otherwise be inclined to contract with such a company may now be unwilling to do so, given that their ability to receive their contractual compensation is now uncertain.

CONCLUSION

For the foregoing reasons, Mr. Piszel respectfully requests that this Court grant his Petition for a writ of certiorari.

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[9] *See* Freddie Mac, Annual Report and Information Statement to Stockholders (2006), at 55, Table 33 (reflecting $952,352,000,000 in total specified contractual obligations as of December 31, 2006), available at http://www.freddiemac.com/investors/ar/pdf/2006annualrpt.pdf#page=67.

Dated: May 9, 2017
Washington, D.C.

Respectfully Submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

Page

Precedential Opinion and Judgment of
The United States Court of Appeals
For the Federal Circuit
entered August 18, 2016 .... 1a

Memorandum Opinion and Order of
The United States Court of Federal Claims
entered June 19, 2015 .... 32a

Order of
The United States Court of Appeals
For the Federal Circuit
Re: Denying Petition for Rehearing and
Petition for Rehearing *En Banc*
entered February 8, 2017 .... 60a

[ENTERED: August 18, 2016]

United States Court of Appeals for the Federal Circuit

ANTHONY PISZEL,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2015-5100

Appeal from the United States Court of Federal Claims in No. 1:14-cv-00691-LKG, Judge Lydia Kay Griggsby.

Decided: August 18, 2016

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Before DYK, SCHALL, and HUGHES*, *Circuit Judges*.

DYK, *Circuit Judge*.

Mr. Anthony Piszel appeals from a judgment of the United States Court of Federal Claims ("the Claims Court") dismissing his complaint against the United States for failure to state a claim. That complaint alleged a taking and illegal exaction resulting from a statute and regulations barring the payment of so-called "golden parachute" compensation upon his termination as an employee of the Federal Home Loan Mortgage Corporation ("Freddie Mac"). Because we agree that Mr. Piszel's complaint fails to state a claim on which relief can be granted, we affirm.

BACKGROUND

I

The question here is whether a government prohibition on making golden parachute payments to terminated employees of Freddie Mac constitutes a taking or an illegal exaction.

Mr. Piszel is a former employee of Freddie Mac. According to his complaint, Mr. Piszel began

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* Judge Hughes concurs in the judgment and joins all but Part I.A. of the Discussion section.

working as the chief financial officer ("CFO") of Freddie Mac in November of 2006. As part of his compensation package, Mr. Piszel was to receive a signing bonus of $5 million in Freddie Mac restricted stock units that would vest over four years, an annual salary of $650,000, and performance-based incentive compensation of roughly $3 million a year in restricted stock. In addition, Mr. Piszel's employment agreement provided that in the event of his termination without cause, Mr. Piszel would receive a lump-sum cash payment of double his annual salary and that certain restricted stock units would continue to vest. These types of termination payments are often referred to as "golden parachute payments." The payments at issue here are alleged to have a value in excess of $7 million.

Freddie Mac is a government sponsored enterprise, meaning that it is a privately owned but publicly chartered financial services corporation created by the United States. *See* 12 U.S.C. § 1452. Pursuant to its charter, Freddie Mac was created to "provide stability in the secondary market for residential mortgages" and "to promote access to mortgage credit throughout the Nation" by "increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." *See* 12 U.S.C. § 1716. As such, Freddie Mac was authorized to purchase and sell residential mortgages from various banks, including "any . . . financial institution the deposits or accounts of which are insured by an agency of the United States." *Id.* § 305(b), 84 Stat. at 454 (codified as amended at 12 U.S.C. § 1454(b)).

At the time that Mr. Piszel accepted his position, Freddie Mac was regulated by the Office of Federal Housing Enterprise Oversight ("OFHEO") pursuant to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992. *See* Pub. L. No. 102-550, § 1311, 106 Stat. 3672, 3944 (1992). Mr. Piszel alleged in his complaint that his employment contract was reviewed and approved by OFHEO. Mr. Piszel alleged that he performed his job as CFO as a "strong leader" with "excellent performance." J.A. 30–31.

On July 30, 2008, facing great turmoil in the national housing market and the potential collapse of Freddie Mac, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"). Pub. L. No. 110-289, 122 Stat. 2654 (2010) (codified at 12 U.S.C. § 4511 *et seq.*). At the time, Freddie Mac, along with its sister bank the Federal National Mortgage Association ("Fannie Mae"), owned or guaranteed about half of the nation's $12 trillion mortgage market. The act significantly restructured the regulatory framework for Freddie Mac, establishing the Federal Housing Finance Agency ("FHFA") to replace OFHEO as the primary regulator of Freddie Mac. *See* 12 U.S.C. § 4511. In addition, the act significantly clarified and expanded the powers of the FHFA to act as a conservator or receiver for Freddie Mac should the mortgage giant get into serious financial trouble. *See id.* § 4617. As a conservator, the FHFA would "immediately succeed to all rights, titles, powers, and privileges of the regulated entity" and could "take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity." *Id.* § 4617(b)(2).

The FHFA as conservator was given the explicit power to "disaffirm or repudiate any contract," after which damages for the breach would be limited to "actual direct compensatory damages." *Id.* § 4617(d)(1).

Additionally, and apart from the powers vested in the conservator to disaffirm contracts, the act contained a limit on "golden parachutes": it authorized the Director of the FHFA to "prohibit or limit, by regulation or order, any golden parachute payment." *Id.* § 4518(e)(1). The statute defined a "golden parachute payment" as "any payment . . . that is contingent on the termination of [a] party's affiliation with [Freddie Mac]" and that is received on or after Freddie Mac is declared insolvent, placed in conservatorship or receivership, or is in financial trouble. *Id.* § 4518(e)(4)(A). The section also provided that "any payment made pursuant to a bona fide deferred compensation plan or arrangement which the Director determines, by regulation or order, to be permissible" is not a "golden parachute payment." *Id.* § 4518(e)(4)(C)(ii).

Congress did not outright prohibit all golden parachute payments,[1] but rather left it to the Director of the FHFA to develop regulations determining which payments should, and should not, be made. Congress provided a number of "factors to be considered by the Director in taking any action" pursuant to his new authority. *Id.* § 4518(e)(2).

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[1] Congress did prohibit some severance payments, specifically the prepayment of salary if made "in contemplation of the insolvency of such regulated entity" or "with a view to, or having the result of preventing" the proper distribution of assets to creditors. 12 U.S.C. § 4518(e)(3).

Specifically, Congress stated that the Director should consider:

> **(A)** whether there is a reasonable basis to believe that the affiliated party has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the regulated entity that has had a material effect on the financial condition of the regulated entity;
>
> **(B)** whether there is a reasonable basis to believe that the affiliated party is substantially responsible for the insolvency of the regulated entity, the appointment of a conservator or receiver for the regulated entity, or the troubled condition of the regulated entity (as defined in regulations prescribed by the Director);
>
> **(C)** whether there is a reasonable basis to believe that the affiliated party has materially violated any applicable provision of Federal or State law or regulation that has had a material effect on the financial condition of the regulated entity;
>
> **(D)** whether the affiliated party was in a position of managerial or fiduciary responsibility; and
>
> **(E)** the length of time that the party was affiliated with the regulated entity, and the degree to which—

> **(i)** the payment reasonably reflects compensation earned over the period of employment; and
>
> **(ii)** the compensation involved represents a reasonable payment for services rendered.

Id.

The Director issued regulations implementing the statute on September 16, 2008. *See* 73 Fed. Reg. 53356-01 (2008) (codified at 12 C.F.R. § 1231). These regulations generally prohibited all payments within the statutory definition of "golden parachute payments," but listed several scenarios in which such a payment could be made, for example, when a regulated entity requests to make a payment and can demonstrate that the person involved did not commit any wrongdoing. *See* 12 C.F.R. § 1231.3(b) (2014).

The government placed Freddie Mac into conservatorship on September 7, 2008, because, according to FHFA's website, there was "substantial deterioration in the housing markets that severely damaged Fannie Mae and Freddie Mac's financial condition and left them unable to fulfill their mission without government intervention." J.A. 34. Mr. Piszel alleges the following in his complaint: about two weeks later, on September 22, 2008, the Director of the FHFA, acting in his capacity and under his authority as Freddie Mac's regulator, sent a letter to Freddie Mac's CEO stating that he had "determined that [Mr. Piszel] should be terminated effective close of business today 'without cause.'" *Id.* 35. The letter

further provided that Freddie Mac should not pay Mr. Piszel a severance payment nor "any salary beyond the date of the cessation of Mr. Piszel's employment, any annual bonus for 2008 [or] any further vesting of stock grants." *Id.* As alleged, the letter stated that the basis for this decision was the newly-enacted golden parachute section of HERA and the implementing regulations. As a result of the letter, Freddie Mac terminated Mr. Piszel and, according to Mr. Piszel, "refused to provide him with any of the benefits to which he was contractually entitled under his employment agreement, including his $1.3 million termination payment and the remainder of the restricted stock units that were granted to him as a signing bonus and were required to continue vesting after his termination." *Id.* 36.[2]

II

Mr. Piszel filed suit against the United States on August 1, 2014, nearly six years after he was fired from his job as CFO of Freddie Mac. At the time of the filing of his suit, Mr. Piszel had not filed suit against Freddie Mac for breach of contract nor, apparently, could he have, as the statute of limitations on such an action had already run.[3]

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[2] Mr. Piszel alleges that at the time of his termination, he had only received 19,735 of the 78,940 restricted stock units granted under his employment agreement.

[3] Both parties agree that Freddie Mac, as a private institution, would be the appropriate counterparty in a breach of contract suit. *See O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 85 (1994). According to both parties, the suit would have been brought in Virginia state court under Virginia law, which has a five-year statute of limitations for contract claims. *See* Va. Code Ann. § 8.01-246(2) (1977).

In his complaint, Mr. Piszel alleged a taking and an illegal exaction by the United States. Mr. Piszel asserted that:

> The FHFA's actions . . . in directing Freddie Mac to terminate Mr. Piszel without cause without paying him his contractually-required benefits (or any other just compensation), constitute[d] a taking in violation of the Fifth Amendment that completely deprived Mr. Piszel of his rights in his private property interests and rendered those interests worthless. Indeed, the Government's actions permanently excluded Mr. Piszel from any interest in his contractual benefits and destroyed Mr. Piszel's right to those interests . . . .
>
> Alternatively, the Government's actions constitute an unlawful exaction in violation of HERA and the Due Process Clause of the Fifth Amendment, specifically because the government exceeded its authority under HERA in prohibiting payments that were not "golden parachute payments."

J.A. 39.

The government moved to dismiss under Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC").[4] This rule is identical to

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[4] The government also moved to dismiss under Rule 12(b)(1) of the RCFC for identical reasons because the Claims Court would not have jurisdiction if Mr. Piszel could not plausibly state a claim against the United States. *See* 28 U.S.C. § 1491.

its counterpart rule in the Federal Rules of Civil Procedure. The government argued that Mr. Piszel had failed to plead facts sufficient to support the various takings and illegal exaction claims. Mr. Piszel did not move to amend his complaint under RCFC 15 in response to the motion to dismiss, but rather defended the complaint as originally filed.

The Claims Court granted the government's motion to dismiss the categorical and physical takings claims because it concluded that Mr. Piszel "fail[ed] to allege a plausible categorical or physical takings in his complaint." *Piszel v. United States*, 121 Fed. Cl. 793, 805 (2015). The Claims Court also dismissed Mr. Piszel's regulatory takings claim because it concluded that Mr. Piszel did not have a cognizable Fifth Amendment property interest in his employment agreement and that Mr. Piszel did not have an investment-backed expectation in his employment agreement. *Id.* at 803, 805–06. Additionally, the Claims Court dismissed Mr. Piszel's exaction claim because Mr. Piszel "concedes that he has not paid any money to the government" and therefore "there is no way to read the allegations in the complaint to state a plausible illegal exaction claim." *Id.* at 807.

Mr. Piszel appealed. Following oral argument, we ordered supplemental briefing regarding the regulatory takings claim. Specifically, we asked the parties to address three questions:

> (1) Does the fact that the golden parachute provision, 12 U.S.C. § 4518(e), did not eliminate breach of contract claims preclude a takings action against the government?

> (2) Would recovery for such a breach of contract claim be limited by the doctrine of impossibility or the sovereign acts doctrine and would the limitations on damages for breach of contract claims in HERA, 12 U.S.C. § 4617(d)(3)(A), preclude or limit recovery of breach of contract damages? *Compare Office & Prof'l Employees Int'l Union, Local 2 v. FDIC*, 27 F.3d 598 (D.C. Cir. 1994), *with Howell v. FDIC*, 986 F.2d 569 (1st Cir. 1993).
>
> (3) If these doctrines or statutory provisions would limit recovery, what impact would that have on the existence of a takings claim?

Order for Supplemental Briefing, *Piszel v. United States*, No. 15-5100 (Fed. Cir. Apr. 7, 2016). Supplemental briefs were received from both parties. We have jurisdiction under 28 U.S.C. § 1295(a)(3) from a final decision of the Claims Court. We review the Claims Court's grant of a motion to dismiss *de novo*, assuming the factual allegations of the complaint to be true. *See Kam-Almaz v. United States*, 682 F.3d 1364, 1367–68 (Fed. Cir. 2012).

DISCUSSION

I

We first consider Mr. Piszel's regulatory takings claim. The Supreme Court has explained "that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be

compensable under the Fifth Amendment." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). A regulatory takings analysis eschews any set formula, but rather involves an "ad hoc, factual inquir[y]" which involves "several factors that have particular significance." *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978). "Primary among [the] factors" for analyzing a regulatory taking is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Lingle*, 544 U.S. at 538–39 (internal quotation marks and citations omitted).

Here, Mr. Piszel alleges that the government effected a taking of his contractual right to payment of severance benefits when, pursuant to the statute and regulations prohibiting payment of golden parachutes, 12 U.S.C. § 4518(e) and 12 C.F.R. § 1231.3, the Director of the FHFA instructed the CEO of Freddie Mac to terminate Mr. Piszel's employment and not to pay him any severance. The government argues that the government's actions did not amount to a taking for several distinct reasons.

A

The government argues, and the Claims Court found, that Mr. Piszel lacked a cognizable Fifth Amendment property interest. We disagree.

In evaluating whether governmental action constitutes a taking for Fifth Amendment purposes, the court must determine "whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking." *Acceptance Ins. Cos., Inc. v. United States*,

583 F.3d 849, 854 (Fed. Cir. 2009). When a claimant lacks such a property interest, nothing has been taken, and thus the claimant cannot maintain a takings claim. *See Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

In general, "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States." *Lynch v. United States,* 292 U.S. 571, 579 (1934); *see U.S. Tr. Co. of N.Y. v. New Jersey,* 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014); *see also United States v. Petty Motor Co.*, 327 U.S. 372, 380–81 (1946) (holding that plaintiff was entitled to compensation for government's taking of option to renew a lease). Mr. Piszel's employment contract with Freddie Mac is no exception.

Nonetheless, the government asserts that Mr. Piszel did not have a vested property interest in his contractual rights to severance because Freddie Mac operated in an environment of pervasive federal regulation. The government's theory is that because Mr. Piszel voluntarily contracted with an entity that was subject to pervasive regulation, he assumed the risk of future regulation and thus cannot claim a vested interest in property that was likely to be subject to additional regulation. Because Mr. Piszel voluntarily entered into a highly regulated area, he lacked a right to exclude the government from his property.

To be sure, if a regulation existed at the time of contract formation, the regulation would have

inhered in the title. *See A & D*, 748 F.3d at 1152; *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1331 (Fed. Cir. 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 predated plaintiff's property right); *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 618 (D.C. Cir. 1992) (rejecting a takings claim because pre-existing regulations allowed for agency discretion relating to the act alleged to be a taking). But here there was no specific regulation prohibiting golden parachute payments at the time of contract formation. The regulation, at the time, provided only for government review of Mr. Piszel's compensation to determine whether it was "reasonable and comparable with compensation for employment in other similar businesses . . . involving similar duties and responsibilities." 12 U.S.C. § 4518(a). There is no contention here that Mr. Piszel's golden parachute was unreasonable under that standard. "If a challenged restriction was enacted after the plaintiff's property interest was acquired, it cannot be said to 'inhere' in the plaintiff's title." *A & D*, 748 F.3d at 1152. This is the situation here.

The government is nonetheless correct that the background regulatory environment is relevant to a takings analysis. When the government acts in a highly regulated environment to bolster restrictions or eliminate loop-holes in an existing regulatory regime, the existence of government regulation does not defeat a property interest, but is relevant to whether there were investment-backed expectations under the *Penn Central* test. *See*

Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 645 (1993); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226–27 (1986). Indeed, in *Concrete Pipe* and *Connolly*, relied upon by the government for the proposition that Mr. Piszel lacked a cognizable property interest, the Supreme Court did not conclude that no property interest existed. Rather, the Court concluded that because the property involved in those cases "had long been subject to federal regulation," there was no interference with the plaintiff's reasonable investment-backed expectations because there was no "reasonable basis to expect" that Congress would not alter the regulatory scheme. *Concrete Pipe*, 508 U.S. at 645; *accord Connolly*, 475 U.S. at 226–27. The same approach is also reflected in our decision in *California Housing Securities, Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992), on which the government additionally relies. *See also Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1073–74 (Fed. Cir. 1994).

In short, "there is [] ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment." *Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003). In *Cienega Gardens*, we rejected the government's position that "enforceable rights sufficient to support a taking claim against the United States cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control." *Id.* at 1330 (quoting government brief) (internal quotation marks omitted); *see also A & D*, 748 F.3d at 1152–53 (finding that a property interest in contract rights

existed despite being subject to bankruptcy law). We therefore conclude that Mr. Piszel had a cognizable Fifth Amendment property interest in his contract rights.

B

The government argues that Mr. Piszel should be barred from pursuing a takings claim because he failed to pursue a breach of contract claim against Freddie Mac. Mr. Piszel argues that there is no requirement to pursue a breach of contract claim against a private party before bringing a takings claim. We disagree with the government that Mr. Piszel's failure to pursue a contract remedy is an absolute bar to his bringing a takings claim against the government.

The Supreme Court has held that a claimant must exhaust administrative or judicial remedies against the relevant government entity in order for his regulatory takings claim to be ripe. *See, e.g.*, *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186–87 (1985); *see also, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 618–19 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 735 (1997); *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 348 (1986). The Court has explained that to demonstrate a regulatory taking, a party "must establish that the regulation has in substance 'taken' his property—that is, that the regulation 'goes too far.'" *MacDonald*, 477 U.S. at 348 (citations omitted). But "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Id.* This is because "resolution of [this] question depends, in significant part, upon an

analysis of the effect [of the regulation] on the value of [the] property and investment-backed profit expectation. That effect cannot be measured until a final decision is made as to how the regulations will be applied." *Id.* at 349 (quoting *Williamson*, 473 U.S. at 200). As to the second prong of a takings claim, a failure to provide "just compensation," "a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation the responsible administrative body intends to provide." *MacDonald*, 477 U.S. at 350.

We have applied a similar concept in cases where a party alleges a taking of a contract with the government. We have held that when the government itself breaches a contract, a party must seek compensation from the government in contract rather than under a takings claim. As we have explained, "[t]aking claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than its sovereign capacity" and therefore the "remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights." *Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001); *see also Sun Oil Co. v. United States*, 215 Ct. Cl. 716, 770 (Ct. Cl. 1978) (dismissing takings claim where the government was a party—the plaintiff's remedies for the government's violation of its contractual rights "must be directed [at the government] in its proprietary capacity and not in its sovereign capacity").

However, we are aware of no case that mandates that a claimant pursue a remedy against a *private* party before seeking compensation from the government. Indeed, our recent decision in *A & D* is to the contrary. In *A & D*, car dealerships brought takings claims against the government because the government instructed auto manufacturers to breach certain agreements with those dealerships. *A & D*, 748 F.3d at 1147. We addressed the takings claim against the government even though we noted that the claimants may have remaining claims against the auto manufacturers. *Id.* at 1149 ("To the extent the franchises were terminated by action of the bankruptcy estate, the affected dealers received unsecured claims against the estates."). And the Supreme Court has consistently addressed takings claims even though claimants could have pursued breach of contract claims against the private parties. *See, e.g.*, *Armstrong v. United States*, 364 U.S. 40, 41–42 (1960); *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240, 292–94 (1935); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510–11 (1923). We therefore find no basis for the government's argument that Mr. Piszel had to pursue a breach of contract claim against Freddie Mac before bringing a takings claim, even though, as described below, the existence of a remedy for breach of contract is highly relevant to the takings analysis in this case.

II

A

We next consider whether the complaint sufficiently alleges a taking. As noted, the complaint simply alleges that the government's instruction to

Freddie Mac amounted to a total taking of Mr. Piszel's contractual right:

> The FHFA's actions . . . in directing Freddie Mac to terminate Mr. Piszel without cause without paying him his contractually-required benefits (or any other just compensation), constitute a taking in violation of the Fifth Amendment that completely deprived Mr. Piszel of his rights in his private property interests and rendered those interests worthless. Indeed, the Government's actions permanently excluded Mr. Piszel from any interest in his contractual benefits and destroyed Mr. Piszel's right to those interests.

J.A. 39.

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. As the government correctly points out, "the only duty a contract imposes is to perform or pay damages." *F.T.C. v. Think Achievement Corp.*, 312 F.3d 259, 261 (7th Cir. 2002) (citing Oliver Wendell Holmes, Jr., *The Common Law* 300–02 (1881)). Thus, 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. *See Castle v. United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002) (finding that because "the plaintiffs retained the full range of remedies associated with any contractual property

right they possessed[,]" the government action "did not constitute a taking of the contract").

There can be no doubt that the golden parachute provision of HERA did not take away Mr. Piszel's ability to seek compensation for breach of his employment contract in a traditional breach of contract suit under state contract law. Indeed, at oral argument, Mr. Piszel agreed "that the golden parachute provision didn't eliminate [Mr. Piszel's] breach of contract claim," and the government agreed. Oral Argument at 2:40; *see also id.* at 17:29; Gov't Supp. Br. at 3–4; Piszel Supp. Br. at 1.

Nothing in the statute or regulations removes Mr. Piszel's ability to pursue a breach of contract remedy against his employer. Neither the golden parachute provision nor the regulations make any mention of a breach of contract claim. *See* 12 U.S.C. § 4518; 12 C.F.R. § 1231.3.

Other similar provisions of HERA indicate that when a conservator prohibits performance of a contract, an action for breach of contract remains. Section 1367(b)(2)(H) of HERA states a general policy that the conservator "shall, to the extent of proceeds realized from the performance of contracts or sale of the assets of a regulated entity, pay all valid obligations of the regulated entity that are due and payable at the time of the appointment" of the conservator. 122 Stat. at 2738 (codified at 12 U.S.C. § 4617(b)(2)(H)). Section 1367(b)(19)(d), like the golden parachute provision, allows the conservator to "disaffirm or repudiate" contracts including "any contract for services between any person and any regulated entity" like employment contracts. 122 Stat. at 2747–48, 2750 (codified at 12 U.S.C.

§ 4617(b)(19)(d)). That section plainly preserves a breach of contract claim, providing that the conservator will be liable for the disaffirmance or repudiation of the contract but limits the liability to "actual direct compensatory damages." *Id.*; *see also Howell v. F.D.I.C.*, 986 F.2d 569, 571 (1st Cir. 1993) ("By repudiating the contract the receiver is freed from having to comply with the contract . . . but the repudiation is treated as a breach of contract that gives rise to an ordinary contract claim for damages."). The statute cannot reasonably be read to preserve a breach claim when the conservator disclaims a contract providing for a payment but to eliminate a breach claim when the identical action is taken pursuant to a regulatory directive. Thus, the surrounding provisions indicate that Congress intended to preserve breach of contract claims, as the parties agree.

B

On appeal, Mr. Piszel argues that even if his breach claim is preserved, it is of little value because such a breach claim would be subject to an impossibility defense. The complaint makes no such allegation, and there is no basis for such an assumption.

"The Supreme Court . . . has made clear that in the regulatory takings context the loss in value of the adversely affected property interest cannot be considered in isolation." *Cienega Gardens*, 503 F.3d at 1280. Rather, the "test for regulatory taking requires [a court] to compare the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987); *see also*

Concrete Pipe, 508 U.S. at 644; *Cienega Gardens*, 503 F.3d at 1281. The Supreme Court recognized this in the very case that created the regulatory takings framework, explaining that "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses . . . on the character of the action and *on the nature and extent of the interference with rights in the parcel as a whole*." *Penn Cent.*, 438 U.S. at 130–31 (emphasis added). This is, of course, because "a regulatory taking does not occur unless there are serious financial consequences" that stem from the government action. *Cienega Gardens*, 503 F.3d at 1282.

Mr. Piszel asserts in his briefs, but not in his complaint, that pursuing his breach of contract claim against Freddie Mac would have been futile because "[t]he doctrine of impossibility would preclude Mr. Piszel's recovery for a breach of contract claim against Freddie Mac." Piszel Supp. Br. at 11.[5] In other words, Mr. Piszel argues that because the government's actions created an impossibility defense for the private party he may have sued, the government effected a taking of his property or, at least, caused severe adverse financial consequences. It is unclear whether a government action that creates a state-law impossibility defense amounts to an act that would support a takings claim. *See, e.g.*, *Omnia*, 261 U.S. at 511 (finding no takings claim even though the Supreme Court recognized that "[a]s a result of [the] governmental action the performance of the contract was rendered

[5] Impossibility, or impracticability, is an affirmative defense against a breach of contract claim which excuses non-performance in certain situations. *See, e.g.*, Restatement (Second) of Contracts § 261 (1981).

impossible"). But even assuming without deciding that the indirect creation of an impossibility defense could support a takings claim, Mr. Piszel's breach of contract claim may well have survived an impossibility defense, and his complaint does not allege otherwise.

First, an impossibility defense would have been unlikely to succeed if the statute and regulations did not bar the payments.[6] Mr. Piszel could have sought to prove, and does in fact allege in his complaint, that the termination of his payments was not authorized by the statute. J.A. 39–40 ("[T]he government exceeded and contravened its statutory and regulatory authority under HERA" in withholding payments which were "explicitly excluded from the definition of 'golden parachute payment.'"). Under the statute, the only payments that are prohibited are "golden parachute payments," meaning payments that are "contingent on the termination of [a] party's affiliation with the regulated entity." 12 U.S.C. § 4518(e)(4)(A)(i). Congress explicitly stated that payments "made pursuant to a bona fide deferred compensation plan" are not "golden parachute payments," 12 U.S.C. § 4518(e)(4)(C)(ii), and the regulations include in that definition agreements where a party "voluntarily elects to defer all or a portion of the reasonable compensation, wages, or fees paid for services rendered," 12 C.F.R. § 1231.2.

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[6] While we do not reach the issue here, we have also held that "[a] compensable taking arises only if the government action in question is authorized." *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998).

Mr. Piszel alleges that the payments he was to receive "fit[] squarely into [the] exclusion," Piszel Opening Br. at 54, because "they were payments 'made pursuant to a bona fide deferred compensation plan or arrangement[,]' which are excluded from the definition of 'golden parachute payment.'" J.A. 37. Plaintiffs have brought, and courts have considered, reach claims that particular payments do not qualify as "golden parachute payments" in similar situations. *See, e.g.*, *Solsby v. Plaza Bank*, No. G049272, 2015 WL 668711, at *6 (Cal. Ct. App. Feb. 17, 2015) (addressing the question of "whether . . . severance compensation qualified as a[] . . . 'golden parachute'"); *Cross-McKinley v. F.D.I.C.*, No. CV 211-172, 2013 WL 870309, at *4 (S.D. Ga. Mar. 7, 2013) (same); *Faigin v. Signature Grp. Holdings, Inc.*, 150 Cal. Rptr. 3d 123, 139 (Cal. Ct. App. 2012) (same); *Hill v. Commerce Bancorp, Inc.*, No. 09-3685 RBK/JS, 2012 WL 694639, at *7 (D.N.J. Mar. 1, 2012) (same). Mr. Piszel offers no reason why the courts could not have addressed his breach claim, had he sought to prove it.

Second, an impossibility defense is not available if the breaching party could have secured permission to perform under the agreement. Under the regulations, a regulated entity may make a golden parachute payment if it requests to do so and "demonstrate[s] that it does not possess and is not aware of any information . . . that would indicate that there is a reasonable basis to believe" that the party to whom the payment is made has committed any wrongdoing that would be likely to have a "material adverse effect" on the regulated entity, is "substantially responsible for the . . . troubled condition of the regulated entity," "has materially

violated any applicable Federal or State law or regulation that has had or is likely to have a material effect on the regulated entity," or has violated various sections of federal law relating to fraud and corruption. 12 C.F.R. § 1231.3(b)(1)(iv); *see also, e.g.*, *WMI Liquidating Tr. v. F.D.I.C.*, 110 F. Supp. 3d 44, 54 (D.D.C. 2015) (reviewing and remanding a determination by the Federal Deposit Insurance Corporation ("FDIC") as to a request to pay a golden parachute payment under identical regulations).

In his complaint, Mr. Piszel alleged that "no court, regulator, or government agency has found that Mr. Piszel committed any wrongdoing or violated any law while at Freddie Mac, or that Mr. Piszel was otherwise responsible for Freddie Mac's financial condition or the conservatorship." J.A. 37. The complaint also notes that "the FHFA publicly acknowledged that it investigated but uncovered no evidence sufficient to demonstrate that any of Freddie Mac's current or former officers or directors engaged in" wrongdoing. *Id.* 38 (internal quotation marks omitted). Thus, Mr. Piszel's complaint itself suggests that Freddie Mac could have received the required permission to make the payments. The complaint, however, makes no allegation that Freddie Mac sought, or that the FHFA denied, permission to make the necessary payments.

In *Hill*, under nearly identical FDIC regulations, the district court denied a bank defendant summary judgment based on an impossibility defense when a former executive sued for breach of his employment contract after his former employer failed to pay his severance. *See*

2012 WL 694639, at *10. The employer asserted an impossibility defense based on an analogous FDIC prohibition on golden-parachute payments. *See id.* However, the district court held that the employee could pursue a theory that the employer's failure to request permission, as allowed under the regulations, constituted a breach of the agreement calling for severance payments. *See id.*, at *9 ("[T]he question of whether Defendants are able to make the requisite certification for the [] exception is central to the question of whether or not Defendants can be said to have breached the Agreement by withholding Mr. Hill's severance payment."). Thus, because "there remain[ed] a genuine question of material fact as to whether or not Defendants are able to make the . . . certification[s] [necessary to apply for an exception], Defendants cannot be afforded summary judgment on their contractual impossibility defense." *Id.* If the employer could but did not, it would be liable for breach notwithstanding the regulations prohibiting golden parachutes. Here also there remained the possibility that Freddie Mac could have secured permission to make the payments.[7]

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[7] There is also the possibility that Mr. Piszel himself could have requested permission to receive the payment. The FHFA notice proposing the golden parachute regulations provided little explanation on this point. *See* 73 Fed. Reg. 53356-01 (Sept. 16, 2008); 12 C.F.R. § 1231. However, notably, in a notice announcing nearly identical regulations resulting from a nearly identical provision of title 12 governing the FDIC's regulation of financial institutions, the FDIC stated that under the regulations an "employee who feels that he/she is being unfairly affected by the rule could apply for permission to receive a payment" as well. Regulation of Golden Parachutes and Other Benefits Which May Be Subject to Misuse, 60 Fed. Reg. 16069-01, 16074 (Mar. 29, 1995) (codified

Third, it is not clear as to whether the impossibility defense would apply at all even if the payments were prohibited. An impossibility defense could be defeated by showing that the contracting party assumed the risk of government regulation. The Restatement (Second) of Contracts § 264 states that "[i]f the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made." Restatement (Second) of Contracts § 264. However, the comments note that "[w]ith the trend toward greater governmental regulation, however, parties are increasingly aware of such risks, and a party may undertake a duty that is not discharged by such supervening governmental actions." *Id. cmt. a; see also United States v. Winstar Corp.*, 518 U.S. 839, 868–69 (1996) (reading a contract promise there "as the law of contracts has always treated promises to provide something beyond the promisor's absolute control, that is, as a promise to insure the promisee against loss arising from the promised condition's non-occurrence. . . . Contracts like this are especially appropriate in the world of regulated industries, where the risk that legal change will prevent the bargained-for

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at 12 C.F.R. § 359.4); *see also Hill*, 2012 WL 694639, at *7 (noting that both the bank and the affected party are "equally eligible to apply for the exception to the golden parachute restrictions"). There is no indication in the complaint or the briefs that Mr. Piszel made a request to the FHFA to allow Freddie Mac to pay for any or all of his severance benefits. However, we need not decide this issue, which has not been identified by either party, because (as discussed), Mr. Piszel's complaint fails for other, independent reasons.

performance is always lurking in the shadows."). Certainly Freddie Mac operated in a regulated environment where a court may have concluded that Freddie Mac accepted the risk of regulatory action. In a breach action, the courts might have concluded that Freddie Mac bore the risk of regulatory intervention, thus depriving it of an impossibility defense.[8]

C

Under the circumstances, Mr. Piszel has failed to allege facts that would allow us to conclude that the government's actions substantially affected his contractual property right. He agrees that his breach claim survived. In his complaint, Mr. Piszel does not allege that the government action created an impossibility defense. Indeed, to some extent his complaint alleges to the contrary, stating the FHFA's instruction to Freddie Mac was invalid because his payment was not a "golden parachute" payment but rather deferred compensation exempt from the golden parachute provision (removing an impossibility defense), and that he did not engage in wrongdoing (thereby permitting Freddie Mac to request permission to make his severance payments). In other respects as well it appears

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[8] As noted, we asked the parties to address whether recovery for a breach of contract claim would be limited by the sovereign acts doctrine. Both Mr. Piszel and the government take the position that the sovereign acts doctrine would not limit recovery in this case. Gov't Supp. Br. at 6–7; Piszel Supp. Br. at 12 n.10. We agree. We also agree with the parties that HERA's limitations on damages for breach of contract claims, 12 U.S.C. § 4617(d)(3)(A), would not affect Mr. Piszel's recovery in a breach of contract action against Freddie Mac. *See* Gov't Supp. Br. at 8–9; Piszel Supp. Br. at 12 n.10.

possible that the right to enforce the terms of the contract may have been left substantially intact after the government's actions.[9] We affirm the Claims Court's dismissal of Mr. Piszel's regulatory takings claim.

III

We now address Mr. Piszel's remaining claims, which we conclude are without merit.

Mr. Piszel alleges that the government's actions amount to a per se or a categorical taking. Supreme Court precedent carves out two categories of regulatory action that constitute "per se" takings under the Fifth Amendment. "First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." *Lingle*, 544 U.S. at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking)). Here, none of Mr. Piszel's property suffered permanent physical invasion. "A second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial use' of her property." *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)). Even if the *Lucas* line of cases applies to intangible

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[9] We note that in *A & D*, the plaintiff had a theoretical claim against the bankruptcy estate, but as the government conceded, "there [was] no question that [the plaintiffs] have alleged that their [franchises] have no value" after the government action. *A & D Auto Sales, Inc. v. United States*, Nos. 13-5019, 13-5020, Oral Argument at 3:50–4:00.

property like contract rights,[10] as we have discussed above, the government's actions did not amount to a total taking of Mr. Piszel's property because the government's actions left intact his potential breach of contract claim against Freddie Mac.

Mr. Piszel also alleges that the government's actions amounted to an illegal exaction. "[A]n illegal exaction claim may be maintained when the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum that was improperly paid, exacted, or taken from [him] in contravention of the Constitution, a statute, or a regulation." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572–73 (Fed. Cir. 1996) (internal quotation marks and citations omitted). Mr. Piszel does not allege that he paid any money to the government. Rather, his theory is that because the government (as conservator) caused Freddie Mac not to pay him his severance payments, his not receiving severance was in essence a payment sufficient to amount to an illegal exaction.[11] Even assuming that an illegal exaction claim can involve payments to non-governmental entities, there was no exaction here because there was no payment. *See Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135, 153 (2002) (no illegal exaction where money is "prevented from coming into [a] plaintiff's account"). Illegal exaction concerns the "recovery of monies

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[10] As we noted in *A & D*, "[w]e have not had occasion to address whether the categorical takings test applies to takings of intangible property such as contract rights," 748 F.3d at 1151–52, and we need not do so here.

[11] On appeal, Mr. Piszel also argues that HERA is money mandating. Mr. Piszel failed to plead such a claim. *See* J.A. 38–40. In any case, there is no basis for such an assertion.

that the government has required to be paid contrary to law." *Aerolineas*, 77 F.3d at 1572. No facts as alleged in the complaint concern the payment of money by Mr. Piszel; thus, Mr. Piszel's illegal exaction claim must also fail.

We affirm the dismissal of Mr. Piszel's claims.

AFFIRMED

COSTS

Costs to the government.

[ENTERED: June 19, 2015]

In the United States Court of Federal Claims

No. 14-691C

(Filed: June 12, 2015)

ANTHONY PISZEL,	)	
	)	
Plaintiff,	)	Rule 12(b)(1); Subject-Matter Jurisdiction; Rule 12(b)(6); Failure to State a Claim; Fifth Amendment Takings; Illegal Exaction.
	)	
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	
	)	

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David A. Harrington, Senior Trial Counsel, Franklin E. White, Jr., Assistant Director, Robert E. Kirschman, Jr., Director, Christopher C. Mizer, Acting Assistant Attorney General, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., Attorneys for Defendant, and Michael Sitcov, Federal Housing Finance Agency, of Counsel, Washington, D.C.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Plaintiff, Anthony Piszel, brought this action alleging an illegal exaction and contract-based

takings of his severance compensation under an employment agreement with the Federal Home Loan Mortgage Corporation, in violation of the Fifth Amendment of the United States Constitution. The government has moved to dismiss plaintiff's claims for lack of subject-matter jurisdiction and for failure to state a claim, pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"). For the reasons set forth below, the government's motion to dismiss is **GRANTED**.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. Factual Background

Plaintiff, Anthony Piszel, is the former Chief Financial Officer of the Federal Home Loan Mortgage Corporation ("Freddie Mac"). Compl. at ¶ 1. Prior to joining Freddie Mac in 2006, plaintiff accrued $8.1 million in unpaid compensation from his former employer. *Id.* at ¶¶ 2, 16. As an incentive to join Freddie Mac and to forego this compensation, Freddie Mac offered to provide plaintiff with certain employment benefits if he were to be terminated from his job without cause during the first four years of his employment. *Id.* at ¶ 4, 22-25. Specifically, plaintiff's employment agreement provided that,

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[1] The facts recounted in this Memorandum Opinion and Order are taken from the plaintiff's complaint cited in this Memorandum Opinion and Order as ("Compl. at ___"), the defendant's motion to dismiss ("Def. Mot. at ___"), plaintiff's opposition to the motion to dismiss ("Pl. Opp. at ___"), and defendant's reply ("Def. Rep. at ___"). For the purpose of this Memorandum Opinion and Order, the Court accepts all undisputed facts in the plaintiff's complaint as true.

should he be terminated without cause, plaintiff would receive a lump sum cash payment and certain restricted stock units awarded to plaintiff would be allowed to continue to vest. *Id.*

Freddie Mac is a government-sponsored enterprise ("GSE"). *See* 12 U.S.C. §§ 1451-1459 (2008). In 1992, Congress established the Office of Federal Housing Enterprise Oversight ("OFHEO") to regulate Freddie Mac, pursuant to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 ("Safety and Soundness Act"). Compl. at ¶ 11. Since that time, Freddie Mac has been subject to regulatory oversight and the potential for conservatorship. *See* Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102–550, §§ 1301–95, 106 Stat. 3672, 3941–4012; 12 U.S.C. § 4617(b) (1992) (establishing OFHEO). OFHEO, acting in its capacity as the regulatory agency for Freddie Mac, reviewed and approved plaintiff's employment agreement in 2006. Compl. at ¶¶ 5, 21.

In response to great economic turmoil within the national housing market, Congress enacted the Housing and Economic Recovery Act ("HERA") on July 30, 2008, to provide for greater regulatory authority over the housing sector. *See* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654; 42 U.S.C. § 4501 *et seq*. HERA, among other things, replaced OFHEO with the newly created Federal Housing Finance Agency ("FHFA"). Compl. at ¶ 36. HERA also gave the Director of FHFA expanded authority to prohibit or limit any golden parachute or indemnification payment to senior executives who were employed by

Freddie Mac and expanded the government's authority to place Freddie Mac into conservatorship. Compl. at ¶¶ 38-39; *see also* 12 U.S.C. § 4518(e)(l).

With these new authorities in hand, the FHFA placed Freddie Mac into conservatorship on September 7, 2008. Compl. at ¶ 7. The following week, the Director of FHFA promulgated regulations setting forth the factors to be taken into account when seeking to limit or prohibit golden parachute payments under employment agreements with Freddie Mac. Compl. at ¶¶ 41, 44; *see also* 12 C.F.R. § 1231.5.

On September 28, 2008, the Director of FHFA instructed Freddie Mac to terminate plaintiff without cause and to withhold plaintiff's severance compensation. Compl. at ¶¶ 52-54. Freddie Mac complied with this directive. *Id.* at ¶ 55. At the time of his termination, plaintiff received 19,735 of the 78,940 restricted stocks units granted under his employment agreement. *Id.* at ¶ 56. Plaintiff has not received the remainder of severance compensation called for under his employment agreement. *Id.* at ¶¶ 8, 55-57.

B. Procedural Background

On August 1, 2014, plaintiff commenced this action alleging an unconstitutional takings without just compensation of his property rights under his employment agreement with Freddie Mac, in violation of the Fifth Amendment. *Id.* at ¶ 69. Alternatively, plaintiff alleges that the government illegally exacted his property rights in violation of HERA and the Due Process Clause of the Fifth Amendment. *Id.* at ¶ 71.

On November 25, 2014, the government moved to dismiss plaintiff's complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted, pursuant to RCFC 12(b)(1) and 12(b)(6). *See generally* Def. Mot. On January 30, 2015, plaintiff filed his opposition to defendant's motion to dismiss. *See generally* Pl. Opp. The government filed its reply brief on March 10, 2015. *See generally* Def. Rep. The Court held oral argument on the government's motion on June 2, 2015.[2]

III. LEGAL STANDARDS

A. Jurisdiction and RCFC 12(b)(1)

The United States Court of Federal Claims is a court of limited jurisdiction and the Court "possess[es] only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Under the Tucker Act, the Court has limited jurisdiction to adjudicate "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2011). The Tucker Act, however, is "a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages . . . the Act merely confers jurisdiction upon [the United States Court of Federal Claims] whenever the substantive right

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[2] References to the transcript from the oral argument held on June 2, 2015 are cited as ("Tr. at ___").

exists." *United States v. Testan*, 424 U.S. 392, 398 (1976). To pursue a substantive right under the Tucker Act, a plaintiff must identify and plead a claim founded upon an independent contractual relationship, Constitutional provision, federal statute, and/or executive agency regulation that provides a substantive right to money damages. *See Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004) ("[J]urisdiction under the Tucker Act requires the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act itself."); *see also Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc) ("The Tucker Act . . . does not create a substantive cause of action; . . . a plaintiff must identify a separate source of substantive law that creates the right to money damages. . . ."). Specifically, a plaintiff must demonstrate that the source of substantive law upon which he relies "can fairly be interpreted as mandating compensation by the Federal Government . . . ." *Testan*, 424 U.S. at 400 (internal citation omitted).

When deciding a motion to dismiss based upon a lack of subject-matter jurisdiction pursuant to RCFC 12(b)(1), this Court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But, plaintiff bears the burden of establishing subject-matter jurisdiction, *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998), and he must do so by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) (citations omitted). Should the Court

determine that "it lacks jurisdiction over the subject matter, it must dismiss the claim." *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006).

B. Rule 12(b)(6)

When deciding a motion to dismiss based upon a failure to state a claim pursuant to RCFC 12(b)(6), this Court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor. *See Erickson*, 551 U.S. at 94. And so, to survive a motion to dismiss under RCFC 12(b)(6), a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In *ABB Turbo Systems AG v. TurboUSA, Inc.*, the Federal Circuit explained the interplay between RCFC 8(a)(2) and RCFC 12(b)(6), which "together establish a notice-pleading standard that is applied, in a context-specific manner, with the recognition that the imposition of litigation costs must be justified at the threshold by the presence of factual allegations making relief under the governing law plausible, not merely speculative." 774 F.3d 979, 984 (Fed. Cir. 2014). RCFC 8(a)(2) requires that a plaintiff provide a "short and plain statement of the claim showing that the pleader is entitled to relief," so that the complaint provides fair notice of the nature of claim and the grounds upon which it rests. RCFC 8(a)(2); *see also Twombly*, 550 U.S. at 555. Where the complaint fails to "'state a claim to relief that is plausible on its face,'" the Court must dismiss the complaint. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). On the other hand, "[w]hen there are well-pleaded factual

allegations, a court should assume their veracity," and determine whether it is plausible, based on these facts, to find against the defendant. *Iqbal*, 556 U.S. at 664, 678-79 ("A claim has facial plausibility when the . . . plead[ed] factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

C. Illegal Exaction and Fifth Amendment Takings

1. Illegal Exaction

This Court has recognized that an illegal exaction occurs when a "'plaintiff has paid money over to the [g]overnment, directly or in effect, and seeks return of all or part of that sum' that 'was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.'" *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)). And so, to assert a valid illegal exaction claim, a plaintiff must show that: (1) money was taken by the government and (2) the exaction violated a provision of the Constitution, a statute, or a regulation. *Andres v. United States*, No. 03-2654, 2005 WL 6112616, at *2 (July 28, 2005). The Federal Circuit has recognized that "the Tucker Act provides jurisdiction to recover an illegal exaction by government officials when the exaction is based on an asserted statutory power." *Aerolineas*, 77 F.3d at 1573. This Court recognizes that an illegal exaction occurs when "the Government has the citizen's money in its pocket." *Clapp v. United States*, 127 Ct. Cl. 505, 512 (1954). In such circumstances, an action

can be maintained under the Tucker Act to recover the money exacted. *Aerolineas*, 77 F.3d at 1573.

2. Fifth Amendment Takings

The Takings Clause of the Fifth Amendment guarantees just compensation whenever private property is "taken" for public use. U.S. Const. amend. V. The purpose of the Fifth Amendment is to prevent the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *see also Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994).

In order to have a cause of action for a Fifth Amendment takings, the plaintiff must point to a protectable property interest that is asserted to be the subject of the takings. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'") (citation omitted). Contract rights can be the subject of a takings action. *See, e.g.*, *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States."); *see also United States v. Petty Motor Co.*, 327 U.S. 372, 380-81 (1946) (holding that plaintiff was entitled to compensation for government's takings of option to renew a lease).

Courts have traditionally divided their analysis of Fifth Amendment takings into two categories–regulatory takings and physical takings. The United States Court of Appeals for the Federal Circuit has recognized that "[g]overnment action that does not directly appropriate or invade, physically destroy, or oust an owner from property but is overly burdensome may be a regulatory taking." *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1151 (Fed. Cir. 2014). In assessing whether a regulatory takings has occurred, courts generally employ the balancing test set forth in *Penn Central*, weighing the character of the government action, the economic impact of that action and the reasonableness of the property owner's investment-backed expectations. *Penn Central Transp. Co.*, 438 U.S. at 124-25. "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (regulation is a takings if it is "so onerous that its effect is tantamount to a direct appropriation or ouster").

Regulations that are found to be too restrictive, so that the regulations deprive property of its entire economically beneficial or productive use, are viewed as categorical takings. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *see also A & D Auto Sales*, 748 F.3d at 1151-52. Categorical takings do not require the application of the *Penn Central* balancing test. *Id.* at 1152. The Supreme Court has mainly applied the categorical test to regulatory takings of real property. *See Lucas*, 505 U.S. at 1015–19. In *A & D Auto Sales*, the United

States Court of Appeals for the Federal Circuit noted that it has at times applied the categorical test to tangible personal property as well. 748 F.3d at 1151-52 (citing *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1196–98 (Fed. Cir. 2004)); *see also Maritrans, Inc. v. United States*, 342 F.3d 1344, 1353–55 (Fed. Cir. 2003).[3]

In contrast, physical or *per se* takings occur when the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of "a practical ouster of [the property owner's] possession." *Transportation Company v. Chicago*, 99 U.S. 635, 642 (1878); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). When an owner has suffered a physical invasion of his property, the Supreme Court has noted that "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas*, 505 U.S. at 1015. The distinction between a physical invasion and a governmental activity that merely impairs the use of that property turns on whether the intrusion is "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." *United States v. Causby*, 328 U.S. 256, 265 (1946).

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[3] The United States Court of Appeals for the Federal Circuit has not yet addressed the question of whether the categorical takings test may apply to takings of intangible property, such as contract rights. *See A & D Auto Sales*, 748 F.3d at 1152.

IV. DISCUSSION

A. Plaintiff Fails to State a Plausible Illegal Exaction Claim

In the complaint, plaintiff alleges that the government illegally exacted the severance compensation in his employment agreement when the FHFA terminated his employment. Compl. at ¶¶ 60-65. The government argues that the Court should dismiss this claim for three reasons: (1) the government has not exacted any money from plaintiff; (2) plaintiff's claim is precluded because his breach of contract claim against Freddie Mac has lapsed;[4] and (3) plaintiff asserts an Administrative Procedure Act claim to review the FHFA's termination decision, which falls outside the jurisdiction of this Court. Def. Mot. at 6-10. For the reasons discussed below, dismissal of plaintiff's illegal exaction claim is appropriate.

It is well-established that this Court lacks jurisdiction to consider claims brought pursuant to the Administrative Procedure Act ("APA"). *Lawrence v. United States*, 69 Fed. Cl. 550, 554 (2006). The Court does not, however, construe plaintiff's claim as a claim seeking judicial review under the APA. In his complaint, plaintiff alleges that the FHFA unlawfully exacted his rights to severance

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[4] While the Court finds that plaintiff fails to state a plausible illegal exaction claim, the Court does not agree with the government's argument that this claim is precluded because plaintiff allowed a potential breach of contract claim against Freddie Mac to lapse. *See* Def. Mot at 8-9. The government cites to no legal authority for this novel proposition. Moreover, plaintiff can certainly pursue alternative legal remedies regarding the termination of his employment agreement.

compensation under his employment agreement. *Id.* The Court has long exercised jurisdiction over illegal exaction claims. *See, e.g.*, *Aerolineas*, 77 F.3d at 1572-73 (citing *Eastport S.S. Corp.*, 372 F.2d at 1007). And so, it is appropriate for the Court to examine whether plaintiff's complaint states a plausible illegal exaction claim. RCFC 12(b)(6).

A plain reading of the complaint shows that plaintiff fails to state a plausible illegal exaction claim. An illegal exaction occurs where a "'plaintiff has paid money over to the [g]overnment, directly or in effect, and seeks return of all or part of that sum' that 'was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.'" *Aerolineas*, 77 F.3d at 1572-73 (quoting *Eastport S.S. Corp.*, 372 F.2d at 1007). And so, to assert a valid legal exaction claim here, plaintiff must show that: (1) money was taken by the government and (2) the exaction violated a provision of the Constitution, a statute, or a regulation. *Andres*, 2005 WL 6112616, at *2.

Here, plaintiff alleges that the FHFA's directive to terminate him without paying the severance compensation called for in his employment agreement constitutes an illegal exaction, in violation of HERA and the Due Process Clause of the Fifth Amendment. Compl. at ¶¶ 60, 71. Plaintiff concedes that he has not paid any money over to the government directly. *See generally* Complaint. And so, to state a plausible illegal exaction claim, plaintiff must show that he has paid money to the government "in effect." *Bowman v. United States*, 35 Fed. Cl. 397, 401 (1996). Plaintiff cannot make such a showing.

This Court has recognized an "in effect" illegal exaction in two distinct situations: First, an "in effect" illegal exaction can occur when the government requires a plaintiff to make a payment on its behalf to a third-party. For example, in *Aerolineas,* the United States Court of Appeals for the Federal Circuit held that where the government required an airline to make payments that by law the Immigration and Naturalization Service was obligated to make, the government has "in its pocket" money corresponding to the payments that were the government's statutory obligation to make. *Aerolineas*, 77 F.3d at 1573-74. Second, an "in effect" illegal exaction can also occur when the government exacts property which it later sells and for which it receives money. For example, this Court held in *Bowman* that money received by the government for the sale of property it had taken from a plaintiff constitutes an illegal exaction "in effect." *Bowman*, 35 Fed. Cl. at 401 (stating that "cases such as the instant one—where the [g]overnment exacts property which it later sells and for which it receives money—must necessarily qualify for consideration under the established illegal exaction jurisdiction").

Neither of those situations are present here. Rather, plaintiff seeks to recover under an illegal exaction theory based upon the premise that the government failed to pay *him* severance compensation provided for under his employment agreement. *See* Compl. at ¶ 75. As this Court noted in an analogous case, if the plaintiff's theory of illegal exaction was correct, then "[e]very successful back pay claim this Court hears could also be characterized as an illegal exaction . . . [t]he same could be said of a breach of contract claim, as the

[g]overnment would be holding the money it allegedly owed the government contractor in its pocket." *Andres*, 2005 WL 6112616, at *3. ("[W]hat distinguishes an illegal exaction from a back pay or breach of contract claim[ ] is that in an illegal exaction case the claimant has paid money over to the [g]overnment that he once had in his pocket, and in a back pay or breach of contract claim the claimant is seeking payment of money the claimant has never received."). *Id.* Because plaintiff cannot show that he has paid any money to the government directly or "in effect," he fails to state a plausible illegal exaction claim in the complaint.

B. Plaintiff Fails to State a Plausible Takings Claim

Plaintiff similarly fails to state a valid takings claim in his complaint. Plaintiff alleges that the FHFA's directive to terminate him without honoring the severance compensation terms of his employment agreement constitutes a takings without just compensation. Compl. at ¶ 69. In moving to dismiss this claim, the government offers five lines of defense: First, the government argues that plaintiff's contract-based takings claim is jurisdictionally barred by his lapsed contract remedies. Def. Mot. at 25-27. Second, the government maintains that plaintiff has no cognizable property interest in the severance payment terms of his employment agreement. Def. Mot. at 13-20. Third, the government argues that plaintiff fails to show that he had a reasonable investment-backed expectation that Freddie Mac would honor the severance payment terms of his employment agreement. Def. Mot. at 20-23; Def. Rep.

at 7-8. Fourth, the government maintains that the FHFA's actions merely frustrated plaintiff's employment agreement and, therefore, could not effectuate a taking. Def. Mot. at 23-24. Finally, the government argues that plaintiff fails to allege that the government's actions in enacting and implementing HERA were unauthorized. Def. Mot. at 11-13. For the reasons discussed below, the Court agrees that dismissal of plaintiff's takings claim is warranted.

1. Plaintiff's Contract Remedies Do Not Foreclose His Takings Claim

As an initial matter, plaintiff's alternative contract remedies against Freddie Mac do not bar his takings claim. In its motion to dismiss, the government relies upon *United States v. Sherwood*, 312 U.S. 584 (1941), to seek dismissal of plaintiff's takings claim, because plaintiff allowed his breach of contract claim against Freddie Mac to lapse. Def. Mot. at 25-27. The government's reliance upon *Sherwood* is misplaced.

In *Sherwood*, the Supreme Court recognized that this Court is without jurisdiction to consider a suit brought against private parties.[5] But here, plaintiff's constitutional claims are appropriately

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[5] In *Sherwood*, a judgment creditor sought to sue the federal government under the Tucker Act to recover damages for breach of a contract that the government entered into with his judgment debtor. Because the Supreme Court found that the judgment debtor would have been a necessary party to those proceedings, the Supreme Court held that such a lawsuit was not within the jurisdiction of the Tucker Act. 312 U.S. at 588-89.

brought against the government and Freddie Mac is not a necessary party to this action. It is well-established that this Court has jurisdiction over takings claims brought pursuant to the Constitution. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1020 (1984); *see also* 28 U.S.C. § 1491(a)(1) (Under the Tucker Act, the Court has jurisdiction to adjudicate "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . . ."). And so, plaintiff's takings claim is not jurisdictionally barred because he could have pursued breach of contract remedies against Freddie Mac.[6]

2. Plaintiff Has No Cognizable Property Interest in His Employment Agreement

While plaintiff's takings claim is not jurisdictionally barred, he fails to state a plausible takings claim. In its motion to dismiss, the government argues that plaintiff has no cognizable property interest in his employment agreement because plaintiff's private contractual rights stand on more fragile footing than tangible property

[6] The government also errs in relying upon *Castle v. United States*, 48 Fed. Cl. 187, 218 (2000), *affirmed in relevant part*, 301 F.3d 1328 (Fed. Cir. 2002), to argue that plaintiff fails to state a valid takings claim because of his lapsed contract remedies. Def. Mot. at 26. As this Court noted in *Century Exploration New Orleans, Inc. v. United States*, 103 Fed. Cl. 70, 77 (2012), "the Federal Circuit did not hold in *Castle* that a plaintiff is precluded from raising a takings claim when its asserted property rights were created by contract; rather, the court merely held that the plaintiffs in that particular case had failed to demonstrate the existence of a compensable property right under the contract." *Id.*

interests under the takings analysis and because plaintiff voluntarily entered into his employment agreement with the understanding that he would be working in a highly-regulated industry. Def. Mot. at 14-15. The Court must agree.

It is well established that "the existence of a valid property interest is necessary in all takings claims." *Wyatt v. United States*, 271 F.3d 1090, 1097 (Fed. Cir. 2001). As a result, a threshold element of a takings claim is whether a plaintiff has a cognizable property interest for purposes of the Fifth Amendment. *Am. Pelagic Fishing Co. L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). If a plaintiff cannot prove that he held a protected property interest, his takings claim must fail. *Webster v. United States*, 74 Fed. Cl. 439, 446 (2006) (citing *Wyatt*, 271 F.3d at 1096 (Fed. Cir. 2001)).

In this regard, this Court has long recognized that valid contracts are property. *See, e.g.*, *Lynch*, 292 U.S. at 579; *see also U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n. 16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."). Nonetheless, background principles derived from legislation enacted prior to the execution of a contract "'define the range of interests that qualify for protection as "property" under the Fifth'" Amendment. *Perry Capital LLC v. Lew*, No. CV 13-1025 (RCL), 2014 WL 4829559, at *20 (D.D.C. Sept. 30, 2014) (quoting *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1028–30 (1992)); *see also Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2012) ("Where a citizen voluntarily enters into an area which from

the start is subject to pervasive Government control, a property interest is likely lacking.”).

The Supreme Court has long recognized that “the ‘right to exclude’ is doubtless . . . ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 528 (1992) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). And so, while “‘[c]ontracts may create rights of property . . . when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity.’” *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223-24 (1986) (“‘Contracts, however express, cannot fetter the constitutional authority of Congress. . . . Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.’”) (quoting *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240, 307-08 (1935)).

The United States Court of Appeals for the Federal Circuit has twice held that the shareholders of statutorily regulated financial institutions lacked the requisite property interests to support a takings claim. *Golden Pacific Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994); *Cal. Housing Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992). In *Golden Pacific*, the Federal Circuit found that, given the existing regulatory structure permitting the appointment of a conservator or receiver, the financial institutions in that case “lacked the fundamental right to exclude the government from its property at those times when the government could legally impose a conservatorship or receivership” on the institutions. *Golden Pacific*, 15

F.3d at 1073 (quoting *California Housing*, 959 F.2d at 958) (internal quotation marks omitted). In *California Housing*, the Federal Circuit similarly held that the owner of a failed savings and loan institution had no cognizable property interest in the institution's assets, because the owner had no right to exclusive possession given that the government could place the institution into conservatorship and receivership. *California Housing*, 959 F.2d at 958. "*Golden Pacific* and *California Housing* stand for the general notion that investors have no right to exclude the government from their alleged property interests when the regulated institution in which they own shares is placed into conservatorship or receivership." *Perry Capital*, 2014 WL 4829559, at *22; *see also California Housing*, 959 F.2d at 958 (finding no right to exclude when a conservatorship or receivership is legally imposed).

The holdings in *Golden Pacific* and *California Housing* are instructive here. In this case, Freddie Mac—like the financial institutions in *Golden Pacific* and *California Housing*—operated in a heavily regulated environment. Congress established the FHFA's predecessor, OFHEO, in 1992 under the Safety and Soundness Act. *See* Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102–550, §§ 1301–95, 106 Stat. 3672, 3941–4012, 12 U.S.C. § 4561 *et seq.* Since that time, Freddie Mac has been subject to regulatory oversight, including the potential for conservatorship under which the regulatory agency succeeds to "all the powers of the shareholders, directors, and officers of the enterprise." *See* 12 U.S.C. § 4620(a) (1992); *see also* 12 U.S.C. § 4617(b)(2)(A)(i) (2008) (authority to place Freddie Mac into

conservatorship). In addition, the Safety and Soundness Act–and later HERA–expressly authorized federal regulators to prohibit plaintiff's executive compensation if the government found the compensation to be unreasonable. 12 U.S.C. § 4518(a).[7] Given this regulatory environment,

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[7] The relevant portion of the Safety and Soundness Act provides as follows:

> **Prohibition of excessive compensation.**
>
> (a) IN GENERAL.–The Director shall prohibit the enterprises from providing compensation to any executive officer of the enterprise that is not reasonable and comparable with compensation for employment in other similar businesses (including other publicly held financial institutions or major financial services companies) involving similar duties and responsibilities.

12 U.S.C. § 4518(a) (1992).

The relevant portion of the Housing and Economic Recovery Act provides as follows:

> **Prohibition and withholding of executive compensation.**
>
> (a) IN GENERAL.–The Director shall prohibit the regulated entities from providing compensation to any executive officer of the regulated entity that is not reasonable and comparable with compensation for employment in other similar businesses (including other publicly held financial institutions or major financial services companies) involving similar duties and responsibilities.
>
> (b) FACTORS. In making any determination under subsection (a), the Director may take into consideration any factors the Director considers relevant, including any wrongdoing on the part of the executive officer, and such wrongdoing shall include any fraudulent act or omission,

plaintiff "lacked the fundamental right to exclude the government" from his property rights under his employment agreement when the FHFA placed Freddie Mac into conservatorship in 2008. *Cf. California Housing Sec.*, 959 F.2d at 959; *see also Perry Capital*, 2014 WL 4829559, at *22.

Plaintiff attempts to distinguish this case from the holdings in *Golden Pacific* and *California Housing* by arguing that he has a cognizable property interest here, because Congress enacted HERA after he entered into his employment agreement. Pl. Opp. at 20-21. And so, plaintiff contends that the regulatory scheme governing Freddie Mac changed when Congress enacted that law in 2008. *Id.* Plaintiff's argument is unavailing.

The government demonstrated during oral argument that the Safety and Soundness Act, which was in effect at the time plaintiff entered into his employment agreement, "authorized the regulator to put Freddie Mac into conservatorship and . . . provided authority to regulate executive compensation." Tr. at 8. Moreover, when Congress enacted HERA in 2008, Congress modified these existing authorities to make clear that the FHFA

> breach of trust or fiduciary duty, violation of law, rule, regulation, order, or written agreement, and insider abuse with respect to the regulated entity. *The approval of an agreement or contract pursuant to section 1723a(d)(3)(B) of this title or section 1452(h)(2) of this title shall not preclude the Director from making any subsequent determination under subsection (a).*

12 U.S.C. § 4518 (2008) (emphasis supplied).

could prohibit executive compensation that had previously been approved. 12 U.S.C. § 4518(c) (2008); Tr. at 11. Plaintiff contends that Congress changed the regulatory environment concerning executive compensation when it enacted HERA, by expressly providing that the FHFA could prohibit executive compensation previously approved by OFHEO. But, plaintiff points to no authority in the Safety and Soundness Act that could have guaranteed that the government could not later change its mind after OFHEO approved his compensation.

Given the regulatory environment at the time he entered into his employment agreement, and the authority that federal regulators had to prohibit executive compensation, plaintiff simply could not have had a cognizable property interest in the severance compensation called for under his employment agreement. For this reason, the Court must dismiss plaintiff's takings claim. RCFC 12(b)(6); *see also Iqbal*, 556 U.S. at 679 ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.").

3. Plaintiff Fails To Advance a Plausible Takings Theory

Even if plaintiff could show a cognizable property interest in the severance compensation under his employment agreement−which he cannot−his takings claim would fail under applicable takings precedent.

First, plaintiff fails to allege a plausible categorical or physical takings in his complaint. As discussed above, a categorical takings occurs "where regulation denies all economically beneficial or

productive use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. at 1015; *Lost Tree Vill. Corp. v. United States*, No. 2014-5093, 2015 WL 3448943, at *4 (Fed. Cir. June 1, 2015) (finding a regulatory takings under *Lucas* even if *de minimis* residual value remains in the land). Even assuming that a categorical takings analysis could apply to intangible property—such as plaintiff's employment agreement—plaintiff's categorical takings theory must fail, because plaintiff acknowledges that he has received 19,735 of the 78,940 shares of restricted stock units granted under his employment agreement. Compl. at ¶ 56; Def. Rep. at 14.

Plaintiff fares no better under a physical takings theory. A physical or *per se* takings occurs when the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of "a practical ouster of [the property owner's] possession." *Transportation Company v. Chicago*, 99 U.S. 635, 642 (1878); *see also Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 428 (1982); *Norman v. United States*, 429 F.3d 1081, 1090 (2005) (A court cannot find a physical takings of property unless the government has authorized physical occupation of, or taken title to, the property.). But, here, the government has neither physically occupied, nor taken title to, plaintiff's property.

Plaintiff likewise fails to state a valid regulatory takings claim because he could not have a reasonable investment-backed expectation to receive his severance compensation. "In determining whether a reasonable investment-backed expectation exists, one relevant consideration is the extent of

government regulation within an industry." *Ascom Hasler Mailing Sys., Inc.* v. *U.S. Postal Serv.*, 885 F. Supp. 2d 156, 195 (D.D.C. 2012) (collecting cases); *see also Monsanto*, 467 U.S. at 1005 ("[T]he force of [the reasonable investment-backed expectations] factor [here] is so overwhelming . . . that it disposes of the takings question . . . ."). Given the regulatory scheme governing Freddie Mac, plaintiff simply could not have had a reasonable investment-backed expectation to receive the severance compensation under his employment agreement.[8] *See* 12 U.S.C. § 4518(a).

Nonetheless, plaintiff argues that he has a reasonable investment-backed expectation here, because no regulatory authority existed at the time that allowed the government to nullify the severance compensation provisions under his contract once that compensation had been approved. Pl. Opp. at 18-19. But, as discussed above, there is no provision in the Safety and Soundness Act that would have prohibited the government from changing its mind—as it did here—and later deciding to prohibit plaintiff's executive compensation in light of new

[8] The Court evaluates plaintiff's regulatory takings claim under the *ad hoc* analysis set forth in the Supreme Court's decision in *Penn Central* by weighing (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124. Plaintiff is not required to demonstrate favorable results under all three *Penn Central* factors in order for the Court to find a taking—it is a balancing test. *See Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 878–79 (D.C. Cir. 1999) (*Penn Central* submits "three primary factors [to be] weigh[ed] in the balance").

circumstances within the nation's housing industry. To be sure, plaintiff voluntarily entered into his employment agreement within this regulatory environment and that environment did not change in any material way when Congress enacted HERA.

In sum, plaintiff simply could not have developed a historically rooted expectation of compensation in the event that the government placed Freddie Mac into conservatorship−as it eventually did in 2008. *See California Housing*, 959 F.2d at 958; *Perry Capital*, 2014 WL 4829559, at *23; *Connolly*, 475 U.S. at 227 ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.") (citations omitted); *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Trust for Southern California*, 508 U.S. 602, 645 (1993) (same).[9] Given this, dismissal of plaintiff's takings claim is appropriate. *See Chang v. United States*, 859 F.2d 893, 898 (Fed. Cir. 1988) (affirming dismissal of Fifth Amendment takings

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[9] The remaining *Penn Central* factors−the character of the government action and economic benefit−do not revive plaintiff's takings claim. Plaintiff acknowledges that Congress enacted HERA for important reasons−"to preserve Freddie Mac's assets for the benefit of the general public so that Freddie Mac could continue fulfilling its [g]overnment-mandated mission." Compl. at ¶¶ 51, 58. Moreover, plaintiff acknowledges that he received a portion of the shares of the restricted stock provided for under his employment agreement at the time Freddie Mac terminated his employment. *Id.* at ¶ 56. And so, it would appear that the economic impact of the government's actions are far outweighed by the absence of a reasonable investment-backed expectation that the plaintiff would receive this compensation.

claim for failure to state a claim upon which relief could be granted).[10]

The Court does not take the decision to dismiss this case lightly. Plaintiff has not had the opportunity to conduct discovery to further develop his claims. But, there are no set of material facts that plaintiff could demonstrate *via* discovery that would make either his illegal exaction claim or takings claim viable.

Plaintiff concedes that he has not paid any money to the government and there is no way to

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[10] Given the Court's determination that plaintiff has no cognizable property interest in the severance compensation under his employment agreement, the Court need not reach the question of whether his takings claim is precluded by the Supreme Court's decision in *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), and its progeny. Nonetheless, the Court is unpersuaded by the government's argument that no takings occurred here, because the FHFA's actions merely frustrated plaintiff's employment agreement. Def. Mot. at 23-24. The Federal Circuit recently held in *A & D Auto Sales* that government action may give rise to a takings where the effect of the government action is direct and intended, rather than collateral or unintended, or where the action affected a general class. *See A & D Auto Sales*, 748 F.3d at 1154. Here, the FHFA's directive specifically directed that Freddie Mac not pay the severance compensation under plaintiff's employment agreement. *See* Compl. at ¶ 53. And so, plaintiff's rights under this agreement were not merely frustrated by the government's actions. Rather, those rights were directly and intentionally terminated by the FHFA's actions. The Court is equally unpersuaded by the government's argument that plaintiff's takings claim should be dismissed because he fails to allege that the FHFA's actions were authorized. *See* Def. Mot. at 11-13; Compl. at ¶ 70. To the extent that plaintiff's complaint is defective for this reason, the appropriate remedy is to amend the complaint, rather than to dismiss his claim. *See* RCFC 15(a).

read the allegations in the complaint to state a plausible illegal exaction claim. Furthermore, plaintiff cannot show that he has a cognizable property interest to give rise to a valid takings claim, given the regulatory scheme governing Freddie Mac when plaintiff entered into his employment agreement. And so "[w]hile regulatory takings require a 'more fact specific inquiry'. . . no supplementation of the factual record could alter dismissal here." *Perry Capital*, 2014 WL 4829559, at *23 (internal citation omitted).

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the government's motion to dismiss.

The Clerk shall enter judgment accordingly.

Each party to bear their own costs.

IT IS SO ORDERED.

s/ Lydia Kay Griggsby
LYDIA KAY GRIGGSBY
Judge

[ENTERED: February 8, 2017]

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ANTHONY PISZEL,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2015-5100

Appeal from the United States Court of Federal Claims in No. 1:14-cv-00691-LKG, Judge Lydia Kay Griggsby.

ON PETITION FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, SCHALL*, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

O R D E R

Appellant Anthony Piszel filed a petition for re- hearing en banc. A response to the petition was

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* Circuit Judge Schall participated only in the decision on the petition for panel rehearing.

invited by the court and filed by Appellee United States. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for panel rehearing is denied.

(2) The petition for rehearing en banc is denied.

The mandate of the court will issue on February 15, 2017.

FOR THE COURT

February 8, 2017
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court