No. 09-771

In the Supreme Court of the United States

ACCEPTANCE INSURANCE COMPANIES, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioner owned a subsidiary that issued federally reinsured crop insurance policies. When the subsidiary suffered severe financial losses, petitioner attempted to sell the subsidiary's insurance policies to another insurance company. After the federal government rejected the sale pursuant to its authority as reinsurer, a state agency acting under state law seized the subsidiary in light of its financial condition. The question presented is as follows:

Whether the Fifth Amendment to the Constitution requires the federal government to pay petitioner just compensation for disallowing the sale of the insurance policies to a particular buyer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 583 F.3d 849. The opinion of the Court of Federal Claims (Pet. App. 21a-43a) is reported at 84 Fed. Cl. 111. A prior opinion of the court of appeals is reported at 503 F.3d 1328. A prior opinion of the Court of Federal Claims is reported at 72 Fed. Cl. 299.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2009. The petition for a writ of certiorari was filed on December 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Department of Agriculture (USDA) provides reinsurance to the nation's crop-insurance industry. Private providers of crop insurance can obtain reinsurance from the Federal Crop Insurance Corporation (FCIC), a federally chartered corporation supervised by USDA's Risk Management Agency (RMA). See 7 U.S.C. 1503 (Supp. II 2008), 1508(a)(1), 6933. Companies that sell crop insurance have no obligation to obtain reinsurance from the FCIC. If they wish to obtain such coverage, they must enter into a contract with the FCIC that is referred to as the Standard Reinsurance Agreement (SRA). See, *e.g.*, S. Rep. No. 301, 103d Cong., 2d Sess. 2 (1994); Pet. App. 3a-4a, 23a n.2.

2. Petitioner owned American Growers Insurance Company, a crop insurer that had entered into an SRA with the FCIC. Pet. App. 4a-5a. In 2002, after American Growers suffered financial reverses, petitioner and American Growers entered into a non-binding letter of intent to sell American Growers' crop-insurance portfolio to another federally reinsured crop insurer, Rain and Hail, LLC. Rain and Hail proposed to purchase approximately 360,000 crop-insurance policies for $21.5 million. *Id.* at 5a.

Pursuant to regulatory rights contained in the SRA, RMA rejected the proposed sale of the crop-insurance policies to Rain and Hail. Pet App. 5a-6a. The Nebraska Department of Insurance later seized American Growers because large financial losses had caused its capital surplus to fall below levels mandated by Nebraska state law. See *id.* at 25a. The Nebraska insurance regulator ultimately liquidated American Growers. *Id.* at 6a. American Growers' remaining active crop-in-

surance policies were subsequently transferred to a number of other approved crop-insurance providers, one of which was Rain and Hail. RMA supervised that reallocation of policies. *Id.* at 25a.[1]

3. Petitioner commenced this action against the United States in the Court of Federal Claims (CFC). In its amended complaint, petitioner alleged that RMA had effected a taking of petitioner's property by rejecting the proposed sale of American Growers' crop-insurance policies to Rain and Hail. Pet. App. 6a-7a, 13a-14a. The CFC initially held that it lacked jurisdiction and transferred the case to the United States District Court for the District of Nebraska. *Acceptance Ins. Cos.* v. *United States*, 72 Fed. Cl. 299 (2006). The court of appeals reversed that ruling and returned the case to the CFC. *Acceptance Ins. Cos.* v. *United States*, 503 F.3d 1328 (Fed. Cir. 2007).

4. On remand, the CFC dismissed the amended complaint for failure to state a claim. Pet. App. 21a-43a. The court concluded that petitioner did not have a cognizable property interest in the right to sell its subsidiary's insurance portfolio to Rain and Hail. The court explained that even after RMA rejected the Rain and Hail transaction, petitioner's subsidiary retained ownership of the insurance policies at issue. Thus, the court held, at most RMA's actions interfered with petitioner's interest in selling the property to Rain and Hail, not

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[1] The insureds or their agents transferred more than 92 percent of the policies to other insurers. RMA assigned the remainder to other federally reinsured companies to avoid a lapse in coverage. See Government Accountability Office, GAO-04-517, *Crop Insurance: USDA Needs to Improve Oversight of Insurance Companies and Develop a Policy to Address Any Future Insolvencies* 20-21 (June 2004), http://www.gao.gov/new.items/d04517.pdf.

with the property itself. *Id.* at 33a. The court characterized that interest in selling to Rain and Hail as "collateral." *Id.* at 33a-34a. The court further held that petitioner's interest in selling the policies was not a constitutionally protected property right because petitioner had voluntarily entered into an industry subject to pervasive government regulation, including a requirement that any sale be subject to RMA's approval. *Id.* at 35a-36a.

5. The court of appeals affirmed. Pet. App. 1a-20a.

The court of appeals first examined "what, if anything, was the subject of the alleged taking." Pet. App. 12a. The court observed that petitioner's allegations in its amended complaint had focused solely upon RMA's rejection of the proposed sale to Rain and Hail and that petitioner had made no allegations concerning the state insurance regulator's seizure of American Growers or RMA's subsequent redistribution of the insurance policies. *Id.* at 13a-14a. The court further noted that petitioner had "made it clear" at oral argument that the basis of its taking claim was the rejection of the proposed sale. *Id.* at 14a-15a. Accordingly, the court of appeals proceeded to examine whether petitioner had a cognizable property interest in the power to sell its subsidiary's portfolio. *Id.* at 15a.

The court of appeals held that petitioner's "ability to freely sell American Growers' insurance portfolio to Rain & Hail" was not a cognizable property interest. Pet. App. 16a. The court assumed that, as a general matter, an insurer's ability to sell or assign its insurance policies would qualify as a protected property right. *Id.* at 17a. The court concluded, however, that no such assumption was warranted in the specialized context of federally reinsured crop insurance. The court explained that petitioner had voluntarily availed itself of the bene-

fits of the government crop-reinsurance program and had accepted the associated restrictions, including relinquishing its right to transfer its policies without RMA's approval. *Id*. at 17a-19a. The court concluded that, although RMA's withholding of such approval "prevented [petitioner] from realizing a business expectation," that regulatory decision had not left petitioner with any lesser property interest than it had possessed before RMA's action. *Id.* at 19a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly identified the gravamen of petitioner's claim. Examining the complaint that was the subject of the government's motion to dismiss, as well as petitioner's statements at oral argument, the court of appeals concluded that petitioner's claim focused on RMA's disapproval of the sale to Rain and Hail, "[n]otwithstanding" various broader arguments petitioner had sought to make in its appellate briefs. Pet. App. 13a; see *id.* at 12a-15a.

Petitioner now contends (Pet. 18-23) that the court of appeals incorrectly identified the basis of its claim, and that it did so on the basis of a supposed "'pinpoint' doctrine." The court of appeals' ruling was based not on any rigid doctrinal principle, however, but on petitioner's own pleadings and statements at oral argument. The court of appeals' interpretation of petitioner's complaint, as clarified by petitioner's subsequent litigation conduct, lacks any legal significance beyond this case and does not warrant further review by this Court.

Because the court of appeals interpreted petitioner's allegations to be challenging *only* the disapproval of the sale to Rain and Hail, several of the contentions petitioner makes in the petition for a writ of certiorari do not relate to any aspect of the court of appeals' reasoning. For instance, petitioner repeatedly insists (Pet. 18-19, 22) that the liquidation of American Growers by the Nebraska Department of Insurance and the subsequent redistribution of American Growers' insurance policies are part and parcel of its taking claim. But the court of appeals did not interpret petitioner's complaint as encompassing such allegations, and it therefore did not address those contentions.[2] Petitioner presents no reason why this Court should review a claim that the court of appeals concluded was outside the scope of the pleadings and therefore did not analyze.

2. Petitioner also contends (Pet. 10-18) that the court of appeals contravened decisions of this Court in analyz-

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[2] In any event, petitioner cites no case in which the United States has been required to pay just compensation for the actions of a State exerting its own sovereign authority, as Nebraska did here when it seized American Growers. To the contrary, such claims have repeatedly been rejected. See, *e.g.*, *B&G Enters., Ltd.* v. *United States*, 220 F.3d 1318 (Fed. Cir. 2000) (rejecting takings claim because State had not acted as an agent of federal government when State enacted statute in response to federal conditions for block grants), cert. denied, 531 U.S. 1144 (2001); *Adolph* v. *FEMA,* 854 F.2d 732 (5th Cir. 1988) (rejecting federal taking claim where federal government had conditioned local participation in its subsidized insurance program upon a locality's outlawing construction in flood-prone areas); cf. *Griggs* v. *Allegheny County*, 369 U.S. 84, 89-90 (1962) (holding that locality, not United States, was liable for taking effected by construction of airport, because although federal agency approved locality's proposed design and construction, "[t]he Federal Government t[ook] nothing").

ing petitioner's asserted property interest in selling its subsidiary's portfolio. That argument lacks merit.

a. Petitioner construes the court of appeals' opinion as announcing an "absolutist" rule that permits the "total extinguishment" of property rights and leaves "no cognizable property interest in *any* circumstances." Pet. 15, 16; see Pet. 10. In fact, the court of appeals' ruling focused narrowly on the particular regulatory framework at issue here, and on RMA's conceded authority to disapprove precisely the action to which petitioner now claims a constitutionally protected entitlement. See Pet. App. 17a-19a. The court of appeals emphasized that participation in the crop reinsurance program is voluntary, that petitioner had retained possession of its insurance policies after the RMA rejection, and that RMA had barred petitioner only from selling them to a particular buyer. *Ibid.*

The court of appeals held that "[u]nder these circumstances," petitioner's claim was not distinguishable from other taking claims the court had rejected "where physical property was retained but a business expectation was frustrated." Pet. App. 19a-20a. Petitioner contends that other decisions by the same court of appeals are to the contrary, but those cases stand—at most—for the proposition that a *change* in an existing regulatory framework may sometimes lead to a compensable taking. See, *e.g.*, *Cienega Gardens* v. *United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003) ("A business that operates in a heavily-regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments. But that does not mean that all regulatory changes are reasonably foreseeable or that regulated businesses can have no reasonable investment-backed expectations whatsoever."). Peti-

tioner cites no case in which a plaintiff successfully claimed a protected property right in the exercise of some power that the *existing* regulatory framework authorized the government to disallow.

For similar reasons, petitioner's reliance upon *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), is misplaced. See, *e.g.*, Pet. 17 n.9. *Lucas* involved real property, which the Court described as enjoying, in our "constitutional culture," somewhat greater protection against total regulatory elimination of its value. 505 U.S. at 1028. Even in that context, moreover, the Court acknowledged the "surely unexceptional" rule that no compensable taking occurs when the government applies *existing* regulatory authority to bar an already-prohibited use. *Id.* at 1030; see *id.* at 1027-1028 (explaining that "in the case of personal property" the power to reach a similar result by adopting *new* restrictions may be greater, and that the owner of personal property "ought to be aware of the possibility that new regulation might even render his property economically worthless") (citing *Andrus* v. *Allard*, 444 U.S. 51, 66-67 (1979)). Here, by entering into the SRA in order to obtain federal reinsurance, petitioner voluntarily relinquished any right to sell the reinsured policies without RMA's agreement. RMA's disapproval of the proposed sale to Rain and Hail therefore did not deprive petitioner of any constitutionally protected property interest, but rather left petitioner with precisely the same property rights in its subsidiary's insurance policies that it had previously possessed. Pet. App. 19a; see Pet. 22.

b. Contrary to petitioner's contention (Pet. 10-11, 16), the court of appeals acted appropriately by first examining whether petitioner had identified a protected property right. The Fifth Amendment requires just

compensation only when private property is taken. Petitioner is therefore incorrect in suggesting that the court of appeals should have proceeded directly to analyze whether a regulatory taking occurred under *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). The lack of any property right that could have been impaired by the government action eliminated any need to perform a *Penn Central* analysis.[3]

In *Allard*, *supra*, for example, this Court held that the adoption of a complete ban on the sale of eagle feathers had not effected a taking of privately owned feathers. The Court emphasized that a restriction on sale, even a prohibition, does not eliminate the owner's possessory rights or eliminate the property's entire value. The Court therefore saw no need to examine whether the owners had reasonable, investment-backed expectations in the artifacts they had made from eagle feathers before the ban was adopted. See 444 U.S. at 65-67. The restriction at issue here affected only a single transaction with a single buyer, and RMA's authority to disapprove the proposed sale resulted directly from petitioner's voluntary decision to obtain federal reinsurance. The restriction was therefore far less burdensome than the regulation the Court upheld in *Allard*. See Pet. App. 19a.

Petitioner also suggests (Pet. 14-15) that the court of appeals should have begun by examining RMA's regulatory actions for consistency with the governing frame-

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[3] Furthermore, petitioner did not advance a *Penn Central* regulatory-taking theory before the court of appeals; it contended instead that the government had categorically taken its property's entire economic value. Any *Penn Central* theory therefore is not properly presented in this Court. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998).

work, and that it should have found a taking on the ground that RMA had exercised its authority for a "strained, irrelevant, unexpected and unprecedented reason." But petitioner does not actually contend that RMA lacked authority to prevent the sale—only that it misapplied that authority. Even if that contention (which petitioner did not make in the court of appeals) were accepted, it would not call into question the court of appeals' reasoning. As the court of appeals explained, RMA's alleged previous willingness to approve similar transactions did not give petitioner (or any other regulated entity) a property right to continued forbearance by the agency. See Pet. App. 18a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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