No. 08-198

In the Supreme Court of the United States

HUNTLEIGH USA CORPORATION, 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 had contracts with various airlines to provide security screening for passengers and baggage on commercial airplanes. After the September 11, 2001, attacks, Congress passed legislation assigning to the federal government the responsibility to provide such security. One airline cancelled its services contract with petitioner, while others allowed their contracts to expire. The question presented is as follows:

Whether the statutory directive that federal officials assume responsibility for the performance of airport security screening effected a compensable taking of petitioner's property.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 525 F.3d 1370. Three opinions of the Court of Federal Claims (Pet. App. 30a-46a, 50a-56a, and 57a-85a) are reported at 75 Fed. Cl. 642, 65 Fed. Cl. 178, and 63 Fed. Cl. 440. Another opinion of the Court of Federal Claims (Pet. App. 47a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2008. The petition for a writ of certiorari was filed on August 13, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 1974 and late 2001, federal law required commercial airlines to ensure that "all passengers and property that will be carried in a cabin of an aircraft in air transportation or intrastate air transportation" were subjected to security screening. 49 U.S.C. 44901(a) (2000) (amended 2001); Pet. App. 4a-5a. Most airlines complied with that requirement by hiring private security contractors to perform the required screening. Pet. 4; Pet. App. 4a.

In the wake of the September 11, 2001, attacks—which were perpetrated by hijackers who had passed through airport security—Congress determined that the responsibility for aviation security should no longer be assigned to the airlines. The Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597, created a new federal agency, the Transportation Security Administration (TSA), to provide screening services at the Nation's commercial airports. See 49 U.S.C. 114(a) (Supp. V 2005); Pet. App. 5a. Under the new statute, the Under Secretary of Transportation for Security is "responsible for security in all modes of transportation." 49 U.S.C. 114(d) (Supp. V 2005). Congress specified that the Under Secretary was to "assume civil aviation security functions and responsibilities" no later than three months after ATSA's November 19, 2001 enactment. ATSA § 101(g)(1), 115 Stat. 603.

2. Petitioner began offering passenger-screening services to airlines in 1989, and baggage-screening services in 1999, primarily under contracts that could be terminated by the airlines without cause upon 30, 60, or 90 days' notice. Pet. App. 4a, 8a, 37a. When ATSA was enacted, petitioner had contracts to provide screening for "approximately 75 airlines" at "some 35 airports

across the United States." *Id.* at 4a. After ATSA, one airline terminated its contract with petitioner, and the others allowed their contracts with petitioner to expire pursuant to their terms. *Id.* at 8a.

3. On November 14, 2003, petitioner filed this suit in the United States Court of Federal Claims. Pet. App. 61a. Petitioner alleged that ATSA's transfer of responsibility for security screening from airlines to the government resulted in a taking of its property without just compensation in violation of the Fifth Amendment. *Id.* at 7a, 30a-31a. More specifically, it alleged that the government had effectively appropriated petitioner's contracts by assuming responsibility for the performance of the functions that petitioner had previously performed. *Id.* at 7a. Petitioner also argued that the government had effected a taking by destroying the goodwill and going-concern value associated with its business. *Id.* at 8a, 31a.

After a trial, the Court of Federal Claims rejected petitioner's takings claim. Pet. App. 30a-39a. It held that, "[w]ith regard to [petitioner's] screening contracts, the government's actions amount, at most, to frustration of purpose rather than a taking." *Id.* at 37a. It also rejected petitioner's claims based upon the goodwill and going-concern value of its business, explaining that the government had not taken the "underlying property" with which the goodwill and going-concern value were associated. *Id.* at 39a.

4. The court of appeals affirmed. Pet. App. 1a-29a. The court noted petitioner's concession that the government had not actually assumed its contracts with the airlines. *Id.* at 16a. The court explained that, in light of that concession, petitioner's "argument must be that ATSA rendered the contracts and the going concern

value and goodwill associated with [petitioner's] security screening business worthless." *Ibid.*

The court of appeals analogized petitioner's claim to that of the plaintiff in *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923) (*Omnia*), whose lucrative contract came to an end when the government requisitioned the steel that was the subject of the agreement. Pet. App. 17a-18a, 20a. The Court in *Omnia* held that no Fifth Amendment taking had occurred. See 261 U.S. at 511. In this case, the court of appeals noted that ATSA does not regulate petitioner directly, but instead modifies the prior scheme of airline regulation by shifting to a new entity the responsibility for screening passengers and baggage. Pet. App. 20a. Any losses that petitioner suffered were an indirect result of ATSA's elimination of the airlines' security-screening responsibilities. *Ibid.* Under *Omnia*, the court of appeals explained, such frustration of petitioner's expectations does not effect a cognizable taking. *Ibid.*

The court of appeals further held that its reasoning applied not only to petitioner's claims concerning the alleged taking of its contracts, but also to its claims based upon going-concern value and goodwill. Pet. App. 24a n.3. The court explained that those property interests, like petitioner's contract-based claim, had been merely "frustrated" but not "taken" by the actions of the government. *Ibid.*[1]

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[1] Petitioner's complaint also alleged that ATSA itself required the government to compensate petitioner. That statutory claim was rejected by both the trial court (Pet. App. 40a-46a) and the court of appeals (*id.* at 24a-28a), and petitioner does not pursue it in this Court.

ARGUMENT

The court of appeals correctly held that the government did not effect a taking of petitioner's contractual rights when Congress shifted responsibility for airline passenger and baggage screening to a new governmental entity. That decision does not conflict with any decision of this Court, of another court of appeals, or of a state court of last resort. Further review is not warranted.

1. Petitioner's chief contention (Pet. 16-19) is that the court of appeals' decision "[c]ontravenes [t]he [r]easoning" of *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923). In fact, the court of appeals correctly applied *Omnia*. In that case, the plaintiff had a contractual right to buy a large quantity of steel plate at a below-market price, but the government requisitioned all of the seller's steel production and affirmatively directed it not to fulfill its contract with the plaintiff. *Id.* at 507. The frustrated buyer sued, alleging that the government had caused the buyer to incur large losses and had thereby effected a taking. *Id.* at 508. This Court affirmed the dismissal of that claim.

The Court first explained that, although a contract is "property" within the meaning of the Fifth Amendment, "destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense. * * * There are many laws and governmental operations which injuriously affect the value of or destroy property * * * but for which no remedy is afforded." *Omnia*, 261 U.S. at 508-509. The Court stated that "the law affords no remedy" for "consequential loss or injury resulting from lawful governmental action." *Id.* at 510.

Applying that principle in the context of a contractual transaction, this Court held that, if "a contract or

other property is *taken* for public use, the Government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable." *Omnia*, 261 U.S. at 510. The Court acknowledged the plaintiff's claim that the steel was so closely identified with the contract "that the taking of the former, *ipso facto*, took the latter." *Ibid*. But the Court refused to "confound the contract with its subject-matter." *Ibid*. The Court explained that the "essence" of the executory contract was the exchange of promises in which each party came under an obligation and acquired a reciprocal right to enforce the obligation. *Ibid*. The government, however, had not acquired "the [contractual] obligation or the right to enforce it." *Id*. at 511. Thus, if the seller had failed to provide the steel, the government would have had no right to enforce the plaintiff's contract; and if the government had not paid for the steel, the seller's remedy would not have been enforcement of the contract. *Ibid*. As a result, the Court rejected the buyer's taking claim, concluding that "[f]rustration and appropriation are essentially different things," and that only the latter is compensable under the Fifth Amendment. *Id*. at 513.

With the minor distinction that the executory contract in *Omnia* involved the sale of a good, whereas petitioner's executory contracts involved the sale of services, the two cases are materially similar. In both cases, the government's actions caused contracts to come to an end, but the government did not appropriate those contracts. Rather, in each case, the government merely frustrated the plaintiff's business expectations.

Petitioner concedes that *Omnia* forecloses takings claims for "consequential losses" (Pet. 18), but it contends that its own interests were "more direct[ly]" affected (Pet. 19) than those of the frustrated steel buyer

in *Omnia*. See also Pet. 14 (arguing that Omnia's interests were "remotely impacted" by the actions of the government, while petitioner's own interests were "the avowed targets of the regulatory taking"). The court of appeals correctly rejected that argument, explaining that "the government's actions [in *Omnia*] were directed squarely at the contractual relationship that existed between" the steel seller and the steel buyer. Pet. App. 20a. Indeed, whereas the government obtained the steel in *Omnia* by expressly "direct[ing]" the seller "not to comply with the terms of [the buyer's] contract," 261 U.S. at 507, the government's actions in this case were not expressly directed at the contracts of petitioner or any other screening contractor. They were instead directed at the "subject-matter" (*id.* at 510) of those contracts: aviation security screening.[2]

As the court of appeals also correctly held (Pet. App. 20a), although ATSA undoubtedly frustrated petitioner's business expectations by changing the regulations applicable to the airlines, it did not regulate petitioner directly. The business that petitioner enjoyed before ATSA's enactment was an indirect consequence of the extant regulatory framework, in which most airlines

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[2] Because ATSA does not directly regulate petitioner's conduct, petitioner's reliance (Pet. 17) on *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), and *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), is misplaced. Those cases involved government-imposed restrictions on private parties' development *of their own land*. For similar reasons, petitioner's characterization of ATSA as "nationaliz[ing] an entire private industry" (Pet. 28) is overwrought. Although ATSA assigns to a new federal agency the security-screening responsibilities that were previously performed by petitioner and similar private contractors, the federal government has neither appropriated petitioner's tangible assets nor assumed petitioner's rights and obligations under pre-existing contracts.

chose to fulfill their security-screening responsibilities by retaining contractors like petitioner. Pet. 4; Pet. App. 4a. That legal backdrop, however, was always subject to change. *Id.* at 35a. ATSA did not cause the TSA to appropriate any of petitioner's contracts. Rather, Congress simply relieved the airlines of the security responsibilities it had previously imposed on them, thereby frustrating petitioner's business expectations by eliminating the airlines' demand for its services. *Id.* at 20a. As in *Omnia*, that frustration of business expectations did not effect a taking.[3]

Petitioner also contends that the Court in *Omnia* "acknowledged" an exception for "cases where the contract at issue is 'an integral part of' the property taken." Pet. 18 (quoting *Omnia*, 261 U.S. at 513) (citing *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 329 (1893)). That purported exception, however, has no application to petitioner's suit. The underlying case, *Monongahela Navigation Co.*, involved an undisputed physical taking of "a lock and dam." *Omnia*, 261 U.S. at 513. The contract right mentioned in *Omnia* was the accompanying "franchise to exact tolls," which was relevant to determining the "value" of the "lock and dam" that had been taken—not to the question of whether there had been a taking. *Ibid.*; see *Monongahela Navi-*

[3] Petitioner suggests (Pet. 19) that this case is distinguishable from *Omnia* because it occurred on a greater scale—*i.e.*, because ATSA "was specifically designed to nationalize the entire baggage screening industry." In fact, the *Omnia* Court acknowledged that the steel contract at issue was only one of "an appalling number of existing contracts" related to industrial production that the government had taken over as part of the war effort. 261 U.S. at 513. The Court found, however, that the broad scope of the government's procurement measures did not change the "essential[] differen[ce]" between "[f]rustration and appropriation." *Ibid.*

gation Co., 148 U.S. at 328-329 (concluding that "just compensation for this lock and dam" corresponds to "the whole value" of the property, which "depends largely upon * * * the franchise to take tolls"). Thus, the exception petitioner infers from *Omnia* is irrelevant to the present case, where the issue is whether the government has taken property for purposes of the Fifth Amendment.

2. Petitioner contends (Pet. 19-21) that the court of appeals' passing reference (Pet. App. 24a n.3) to *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), provides an independent basis for this Court's review. The court of appeals explained that its analysis of petitioner's contractual rights applied equally to petitioner's claims based on deprivation of going-concern value and goodwill because "those property interests, like [petitioner's] contracts, were merely 'frustrated' by the government's enactment of ATSA. They were not taken." Pet. App. 24a n.3. In the sentence petitioner finds objectionable, however, the court noted that in certain prior cases going-concern value "ha[d] been held to be compensable in the context of a temporary, but not a permanent, taking." *Ibid.* (citing, *inter alia*, *Kimball Laundry Co.*, 338 U.S. at 15).

Petitioner asserts (Pet. 21) that the court of appeals' reference to petitioner's going-concern and goodwill interests has incorrectly "limit[ed] the compensation due to claimants whose property has been permanently taken." But because the court of appeals expressly concluded that there had been no taking here (whether temporary or permanent), anything that could be inferred about its views on the amount of "compensation due" in permanent-taking cases would necessarily be dictum and unworthy of review. See *Chevron U.S.A. Inc.* v.

NRDC, 467 U.S. 837, 842 (1984) ("this Court reviews judgments, not opinions").[4]

3. Petitioner contends (Pet. 22-26) that the Federal Circuit's ruling conflicts with that court's earlier decision in *Cienega Gardens* v. *United States*, 331 F.3d 1319 (Fed. Cir. 2003). That claim is unfounded and provides no sound basis for this Court's review.

a. *Cienega Gardens* involved low-income housing programs under the National Housing Act, 12 U.S.C. 1701 *et seq*. See 331 F.3d at 1325. In those programs, the Department of Housing and Urban Development (HUD) provided real-estate developers with mortgage insurance that facilitated low-interest, 40-year mortgages on properties they owned. *Ibid*. In return, HUD and the owners entered into regulatory agreements that required the properties to be used for low-income housing projects regulated by HUD for as long as the mortgage insurance remained in effect, but allowed the owners to leave the program after 20 years by prepaying the remaining debt on their mortgages. *Ibid.* When the 20-

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[4] Although petitioner correctly notes (Pet. 20) that *Kimball Laundry Co.* acknowledged some permanent takings in which going-concern value could be compensable, see 338 U.S. at 12 (referring to instances where "public-utility property has been taken over for continued operation by a governmental authority"), petitioner elides the fact that those circumstances involved a *physical* taking, see *id.* at 12-13 (referring to "the condemned facilities" of a public utility operated by the government). By contrast, petitioner alleges a regulatory taking. As the Court explained in *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), it is often "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Id.* at 323 (footnote omitted). Petitioner cites no cases dealing with goodwill or going-concern value in the context of a permanent regulatory taking.

year mark approached, Congress grew concerned that many owners would exercise their prepayment option and reduce the stock of federally assisted low-income housing. *Id.* at 1326. Congress therefore enacted two statutes that effectively prevented the owners from leaving the program for several years. *Id.* at 1326-1327. Numerous owners filed suit, contending that the government had effected a regulatory taking by abrogating their right to prepay the mortgages. *Id.* at 1323-1324.

The Federal Circuit ruled in the owners' favor, explaining that it found the facts of *Omnia* distinguishable from the circumstances before it. In *Omnia*, this Court explained that "the effect of the [government's] requisition [of steel] was to bring the contract to an end, not to keep it alive for the use of the Government." 261 U.S. at 513. In *Cienega Gardens*, by contrast, the Federal Circuit concluded that the government *had* kept the plaintiffs' contracts alive for its own use by preventing the plaintiffs from prepaying their mortgages (as the original agreements would have allowed). 331 F.3d at 1335. And, unlike its actions in *Omnia*, the government had done so by altering "the contract rights themselves" (*i.e.*, the "clear, unqualified contract right[]" to prepay a mortgage after 20 years), rather than by acquiring "the subject matter of the contract." *Id.* at 1333, 1334, 1335 & n.29.

The Federal Circuit's reasoning in *Cienega Gardens* is inapposite here. Petitioner could not plausibly contend that the government kept petitioner's contracts with the airlines alive for its own use. Indeed, petitioner's entire case is built upon the termination (or expiration without renewal) of those contracts. Moreover, the government here dealt with the subject matter of petitioner's contracts ("civil aviation security functions

and responsibilities," ATSA § 101(g)(1), 115 Stat. 603), and it did not alter any of the terms of those agreements. In light of those factors, the court of appeals correctly held that the governmental conduct alleged to effect a taking in this case is analogous to the federal requisition of steel in *Omnia* rather than to the alteration of contractual terms in *Cienega Gardens*. See Pet. App. 20a-21a, 22a-23a.

b. Even if there were inconsistencies between the decision below and *Cienega Gardens*, such an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).[5] Petitioner attempts to evade that principle by asserting (Pet. 21) that a conflict within the Federal Circuit is "tantamount to a conflict within the circuits." But petitioner cites only patent-law cases to support that proposition. Pet. 22 (citing *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002); *Warner-Jenkinson Co.* v. *Hilton Davis Chem. Co.*, 520 U.S. 17 (1997); *Cardinal Chem. Co.* v. *Morton Int'l*, 508 U.S. 83 (1993)). Of course, the Federal Circuit has exclusive appellate jurisdiction over those cases. See 28 U.S.C. 1295(a)(1) and (4).

Petitioner is mistaken, however, in claiming (Pet. 22) that the Federal Circuit has "virtually complete jurisdiction over Fifth Amendment takings cases." Even in takings suits against federal entities, the Federal Circuit does not have exclusive jurisdiction. In some circumstances, equitable relief might be appropriate to prevent the operation of a federal statute that allegedly amounts to a taking. Because the Court of Federal

[5] Despite its current claim of a conflict between Federal Circuit decisions, petitioner did not file a petition for rehearing en banc in this case. See Fed. R. App. P. 35(a)(1) and (b)(1)(A).

Claims cannot grant such relief, see *United States* v. *King*, 395 U.S. 1, 5 (1969); *Massie* v. *United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000), such a claim would need to be pursued in a federal district court. Accordingly, this Court has adjudicated takings challenges to federal statutes in reviewing decisions of the regional courts of appeals. See, *e.g.*, *Eastern Enters.* v. *Apfel*, 524 U.S. 498 (1998) (reviewing First Circuit decision); *Babbitt* v. *Youpee*, 519 U.S. 234 (1997) (reviewing Ninth Circuit decision); *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (reviewing Ninth Circuit decision).[6]

Moreover, takings claims may also be brought against state and local governments, see *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 241 (1897), and takings suits against non-federal entities are frequently decided by state courts and by federal courts of appeals other than the Federal Circuit. This Court regularly decides takings issues on review of such decisions. Indeed, many of the cases that petitioner cites fall within that category. See *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992); *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987); *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104 (1978); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962). Because petitioner has identified no conflict between the

[6] In addition, when the United States initiates a physical taking, it files a condemnation proceeding in federal district court, see 40 U.S.C. 3113 (Supp. V 2005); 28 U.S.C. 1345; Fed. R. Civ. P. 71.1, and the district court's judgment is subject to review by the relevant regional court of appeal, see 28 U.S.C. 1294(1).

decision in this case and any decision from another federal court of appeals or a state court of last resort, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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