No. 16-1356

In the Supreme Court of the United States

ANTHONY PISZEL, 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

Whether the government effected a Fifth Amendment taking of petitioner's contract rights when it directed the Federal Home Loan Mortgage Corporation (Freddie Mac), petitioner's former employer, not to make a golden-parachute payment to petitioner after Freddie Mac terminated his employment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 833 F.3d 1366. The opinion of the Court of Federal Claims (Pet. App. 32a-59a) is reported at 121 Fed. Cl. 793.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2016. A petition for rehearing was denied on February 8, 2017 (Pet. App. 60a). The petition for a writ of certiorari was filed on May 9, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1970, Congress created the Federal Home Loan Mortgage Corporation, known as Freddie Mac, to stabilize the home-mortgage market and to "increase the availability of mortgage credit for the financing of urgently needed housing." Federal Home Loan

Mortgage Corporation Act, Pub. L. No. 91-351, pmbl., 84 Stat. 450. Freddie Mac initially was a government entity. See U.S. Gov't Accountability Office, *Fannie Mae and Freddie Mac: Analysis of Options for Revising the Housing Enterprises' Long-term Structures*, at 2 (Sept. 2009) (*GAO Report*), http://www.gao.gov/new.items/d09782.pdf. In 1989, Freddie Mac became a publicly traded, stockholder-owned corporation, see Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 731, 103 Stat. 429-436, subject to regulatory oversight by the U.S. Department of Housing and Urban Development, see *GAO Report* at 2 n.6, 14.

In 1992, Congress established the Office of Federal Housing Enterprise Oversight (OFHEO) to oversee Freddie Mac's operations. See Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act), Pub. L. No. 102-550, Tit. XIII, § 1311, 106 Stat. 3944. Congress authorized OFHEO to place Freddie Mac into conservatorship, see § 1313(b), 106 Stat. 3945, and to supervise and limit compensation of Freddie Mac's executives, see § 1318(a), 106 Stat. 3949 ("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 * * * involving similar duties and responsibilities.").

On July 30, 2008, in the midst of severe turmoil in the national housing market that threatened the collapse of Freddie Mac, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA). See Pub. L. No. 110-289, 122 Stat. 2654. HERA restructured governmental oversight of Freddie Mac, giving the Federal

Housing Finance Agency (FHFA) conservatorship authority over that entity and clarifying various aspects of existing regulations. See *ibid.* Under HERA, FHFA had the power to "prohibit or limit, by regulation or order, any golden parachute payment," 12 U.S.C. 4518(e)(1); see 12 U.S.C. 4518(e)(2) (identifying "factors to be considered" in prohibiting or limiting a golden-parachute payment); see also 12 U.S.C. 4617(d)(1).

On September 7, 2008, Freddie Mac was placed into conservatorship pursuant to HERA. See Pet. App. 4a, 7a. On September 16, 2008, FHFA issued a regulation addressing golden-parachute payments by Freddie Mac. See 12 C.F.R. Pt. 1231. That regulation provided that a golden-parachute payment is a payment that is "contingent on, or by its terms is payable on or after, the termination of [a] party's primary employment or affiliation with the regulated entity; and [i]s received on or after the date on which" a "conservator or receiver is appointed for such regulated entity." 12 C.F.R. 1231.2. The regulation allowed Freddie Mac to make golden-parachute payments only under certain limited circumstances. See 12 C.F.R. 1231.3; Pet. App. 7a.

2. In November 2006, petitioner was hired as Freddie Mac's Chief Financial Officer. See Pet. App. 2a-3a. His employment agreement provided that he would receive payments with a value of more than $7 million if he was terminated without cause. See *id.* at 3a.

On September 22, 2008, the FHFA Director—citing the statute and regulation governing golden-parachute payments—directed Freddie Mac to terminate petitioner without cause and to decline to provide him with a severance payment or any additional vesting of stock grants. See Pet. App. 7a-8a. Freddie Mac followed that directive. Petitioner did not file suit against Freddie

Mac for breach of contract within the five-year statute of limitations for bringing such a suit. See *id.* at 8a & n.3.

3. Almost six years after his termination, in August 2014, petitioner filed suit against the government in the Court of Federal Claims (CFC). Petitioner alleged, *inter alia*, that the government's actions "in directing Freddie Mac to terminate [him] * * * without paying him his contractually-required benefits * * * constitute[d] a taking in violation of the Fifth Amendment." Pet. App. 9a (brackets in original); see *id.* at 8a. The government moved to dismiss the takings claim. See *id.* at 10a-11a.

The CFC granted the motion to dismiss. See Pet. App. 33a. First, the court ruled that petitioner did not have a cognizable property interest in his employment agreement. See *id.* at 48a-49a. The court explained that Freddie Mac "operated in a heavily regulated environment" that included "the potential for conservatorship" by a "regulatory agency," *id.* at 51a, and that Congress had "expressly authorized federal regulators to prohibit [petitioner's] executive compensation if the government found the compensation to be unreasonable," *id.* at 52a; see *id.* at 53a-54a. The court concluded that, "[g]iven the regulatory environment at the time [petitioner] entered into his employment agreement, and the authority that federal regulators had to prohibit executive compensation," petitioner "simply could not have had" the requisite property interest "in the severance compensation called for under his employment agreement." *Id.* at 54a.

The CFC further held that, "[e]ven if [petitioner] could show a cognizable property interest," his suit should be dismissed because he had not "state[d] a valid

regulatory takings claim." Pet. App. 54a-55a. The court applied the test set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), which calls for the weighing of factors that include "the extent to which the regulation has interfered with distinct investment-based expectations." *Id.* at 124; see Pet. App. 56a-57a & nn.8-9. The court determined that petitioner "could not have [had] a reasonable investment-backed expectation" of "receiv[ing] his severance compensation," given "the regulatory scheme governing Freddie Mac" and the consequent risk that the government would "decid[e] to prohibit [petitioner's] executive compensation in light of new circumstances within the nation's housing industry." Pet. App. 55a-57a. The court also concluded that the "remaining *Penn Central* factors * * * do not revive [petitioner's] takings claim." *Id.* at 57a n.9.

4. The court of appeals affirmed. Pet. App. 1a-31a; see *id.* at 2a n.* (stating that Judge Hughes "concurs in the judgment").

The court of appeals disagreed with the CFC's view that petitioner "lacked a cognizable Fifth Amendment property interest." Pet. App. 12a.[1] The court of appeals explained that contracts are a form of property and that "there was no specific regulation prohibiting golden parachute payments at the time of [petitioner's] contract formation." *Id.* at 14a; see *id.* at 13a; see also *id.* at 14a (stating that "the existence of government regulation * * * is relevant to whether there were investment-backed expectations under the *Penn Central* test").

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[1] Judge Hughes did not join that portion of the panel's analysis. See Pet. App. 2a n.*.

The court of appeals further held that petitioner's "failure to pursue a contract remedy" against Freddie Mac for nonpayment was not "an absolute bar to his bringing a takings claim against the government." Pet. App. 16a. The court stated that it was "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 (emphasis omitted).

The court of appeals determined, however, that "the existence of a remedy for breach of contract is highly relevant to the takings analysis in this case." Pet. App. 18a. The court concluded that the complaint did not sufficiently allege a taking because "the only duty a contract imposes is to perform or pay damages," and the government had acted here only to prevent contract performance, not to "substantially take away the right to damages in the event of a breach." *Id.* at 19a (citation omitted). The court analyzed the relevant statutory and regulatory provisions and concluded that they are "intended to preserve breach of contract claims, as the parties agree." *Id.* at 21a; see *id.* at 20a ("There can be no doubt that the golden parachute provision of HERA did not take away [petitioner's] ability to seek compensation for breach of his employment contract in a traditional breach of contract suit under state contract law."). The court concluded that petitioner "was left with the right to enforce his contract against Freddie Mac," and that "[t]he government's instruction to Freddie Mac" to withhold payment therefore "did not take anything from [petitioner]." *Id.* at 19a; see *id.* at 21a-29a (discussing impossibility defense).

ARGUMENT

Petitioner challenges the Federal Circuit's holding that the government did not effect a Fifth Amendment taking when it directed Freddie Mac not to perform its contract with him. The court of appeals correctly rejected petitioner's takings claim, and its decision does not conflict with any decision of this Court, of the Federal Circuit, or of any other court of appeals. In any event, this case would be a poor vehicle for addressing the question presented. Further review is not warranted.

1. The court of appeals correctly held that the government did not take petitioner's property when it directed Freddie Mac not to make the golden-parachute payment provided for in his employment contract.

Contract rights can be "property" for purposes of the Just Compensation Clause of the Fifth Amendment. See, *e.g.*, *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 508 (1923). But a taking of contract rights occurs only when the government has stepped into the shoes of a contracting party, thereby arrogating to itself the benefits that the contract provides. See *id.* at 510-511. A taking does not occur when the government simply bars performance of a private contract. See *ibid.* Governments frequently enact laws that have that effect, and such a prohibition is not naturally understood as "taking" anyone's contract rights.

The Court's decision in *Omnia* confirms those principles. In that case, the government requisitioned the entire output of a steel company and "directed that company not to comply with the terms of [a] contract" requiring it to deliver steel to another customer. 261 U.S. at 507. The Court ruled that there had been no taking of the customer's contract. See *id.* at 508-514. The Court explained that, although the government had

appropriated the subject matter of the contract and directed that performance not take place, it had not acquired the customer's rights under the contract. See *id.* at 511. Because the contract "was not appropriated[,] but ended," no taking of contract rights had occurred. *Ibid.*; see, *e.g.*, *Norman* v. *Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 310 (1935).

Omnia dictates rejection of petitioner's takings claim. The government did not step into petitioner's shoes as a party to the contract, or otherwise obtain for itself the contractual rights that petitioner had previously possessed. Rather, as in *Omnia*, it simply directed petitioner's counter-party not to perform. The Federal Circuit correctly held that, under these circumstances, "[t]he government's instruction to Freddie Mac" to withhold payment "did not take anything from [petitioner]." Pet. App. 19a.[2]

2. a. Petitioner asserts (Pet. 17) that "this Court has considered takings claims on the merits—and found takings—when the Government took plaintiffs' contractual rights." Contrary to petitioner's contention (Pet. 17-20), however, the decision below does not conflict with any decision of this Court.

Many of the decisions that petitioner identifies as conflicting with the decision below do not address the question of when government action that affects performance of a contract violates the Fifth Amendment. In *Franconia Associates* v. *United States*, 536 U.S. 129

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[2] Petitioner contends (Pet. 22) that the decision below is likely to give rise to "favoritism and abuse" as the government reaches out to affect particular contracts, thus broadly discouraging contract formation. Petitioner identifies no evidence, however, that such consequences have arisen in the nearly one hundred years since *Omnia* was decided.

(1993), the "sole issue" before the Court was whether "petitioners' complaints [were] initiated within the six-year limitations period prescribed in 28 U.S.C. § 2501." *Id.* at 141. The Court explained that "[t]o answer the question presented—when does the statute of limitations on petitioners' claims begin to run * * * —we need not separately address petitioners' * * * theory of recovery based on the Takings Clause of the Fifth Amendment." *Id.* at 149. In *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945), and *United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946), the Court addressed only the proper measure of the compensation to be paid when takings had concededly taken place through the government's exercise of eminent domain. See 323 U.S. at 380; see also *id.* at 379-383; 327 U.S. at 373, 377-380.

The decisions cited by petitioner that do touch on the taking of private contract rights do not suggest that a government action like the one at issue here effects a taking. In *Norman*, the Court upheld a Depression-era statute that nullified provisions in private contracts requiring payment in gold. See 294 U.S. at 279, 316. The Court held that "[t]here is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt." *Id.* at 309-310; see *id.* at 310 (stating that a different rule would "withdraw from the control of the Congress so much of the field" of interstate commerce as private individuals might choose to "bring within the range of their agreements"). Nothing in *Norman* suggests that a taking occurs when the government bars a private party from performing

its end of the bargain but does not arrogate to itself the other party's contractual rights.

In *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), the Court held that no taking had occurred when Congress enacted legislation imposing "withdrawal liability" on an employer that withdraws from a multiemployer pension plan. See *id.* at 641-642. Applying the *Penn Central* factors, the Court stated that the government had not physically invaded or permanently appropriated a private party's assets; that the liability in question did not create a disproportionate economic impact; and that the party did not have a reasonable expectation, given the heavily regulated nature of pension plans, that such liability would never be imposed. The Court explained that "[c]ontracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity." *Id.* at 642 (quoting *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 223-224 (1986)). The decision of the court below is not in any tension with that analysis. To the contrary, *Concrete Pipe* supports the conclusion that no taking occurred here.

In *Lynch* v. *United States*, 292 U.S. 571 (1934), the Court considered an Act of Congress that had nullified certain war insurance contracts between the government and private parties by repealing "all laws granting or pertaining to" the insurance. *Id.* at 578-579. The Court observed that "[t]he repeal, if valid, abrogated outstanding contracts and relieved the United States from all liability on the contracts without making compensation to the beneficiaries." *Id.* at 579. The Court held that, although Congress retained its authority to

withdraw the government's consent to be sued on the contracts, see *id.* at 581, it could not permissibly divest the plaintiffs of their substantive contractual rights because "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States," *id.* at 580. Central to the *Lynch* Court's analysis, however, was that the statute in question represented a disavowal of the government's *own* contractual obligations. The Court had no occasion to consider the Fifth Amendment status of a law, like the one at issue here, that bars performance of a contract between two private parties.[3]

b. Petitioner also asserts (Pet. 9-17) that the decision below conflicts with other decisions of the Federal Circuit. Even if that were so, it would not warrant this

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[3] The additional decisions of this Court that petitioner cites in a footnote (see Pet. 18 n.8) are also inapposite. Those decisions involved government requisitioning of property or circumstances in which the government either appropriated private property or contract rights for itself or took action having the same practical effect. See *International Paper Co.* v. *United States*, 282 U.S. 399, 405, 407-408 (1931) (stating that the government had relied on the "power of eminent domain" to take entire property at issue); *Phelps* v. *United States*, 274 U.S. 341, 343 (1927) (discussing what would constitute just compensation for government requisitioning of a pier); *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 120 (1924) ("[The] expropriation of claimant's contract and rights was intended. By its orders [the government] put itself in the shoes of claimant and took from claimant and appropriated to the use of the United States all the rights and advantages that an assignee of the contract would have had."); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 414 (1922) (finding that government action making "it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying" the coal).

Court's review. Although the Federal Circuit hears many takings cases, other courts of appeals also regularly issue decisions in that area, and there is consequently no reason to depart from this Court's usual understanding that review is not warranted to address a claim of intra-circuit conflict. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam); see also *Davis* v. *United States*, 417 U.S. 333, 340 (1974). In any event, no such intra-circuit conflict exists.

The Federal Circuit has often found, as it did here, that no taking occurs when government action alters contract performance but does not nullify the parties' rights under a contract. For instance, in *Palmyra Pacific Seafoods, L.L.C.* v. *United States*, 561 F.3d 1361, 1365 (Fed. Cir. 2009) (cited in Pet. 11 n.4), cert. denied, 559 U.S. 1106 (2010), the court rejected a claim that a government regulation prohibiting commercial fishing in a particular area effected a taking of a party's contractual right to use an island in the area to carry out such fishing. See *id.* at 1370. The court stated that the government "does not 'take' contract rights pertaining to a contract between two private parties simply by engaging in lawful action that affects the value of one of the parties' contract rights." *Id.* at 1365. In contrast, a taking does occur if the government "put[s] itself in the shoes of [the] claimant and [takes] from claimant * * * all the rights and advantages" associated with the contract. *Id.* at 1365-1366 (quoting *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 120 (1924)); see also, *e.g.*, *Huntleigh USA Corp.* v. *United States*, 525 F.3d 1370, 1379-1380 (Fed. Cir.) (plaintiff that "conceded that the government did not actually assume its contracts" failed to state a claim "predicated upon a taking of the contracts") (citing *Omnia*), cert. denied, 555 U.S. 1045

(2008); *Air Pegasus of D.C., Inc.* v. *United States*, 424 F.3d 1206, 1216 (Fed. Cir. 2005) (finding no taking where "the FAA, by regulating helicopters owned by third parties, frustrated [plaintiff's] business expectations"); *767 Third Ave. Assocs.* v. *United States*, 48 F.3d 1575, 1582 (Fed. Cir. 1995) (citing *Omnia*).

The decisions on which petitioner relies are not inconsistent with those principles. *Chancellor Manor* v. *United States*, 331 F.3d 891 (Fed. Cir. 2003), and *Cienega Gardens* v. *United States*, 331 F.3d 1319 (Fed. Cir. 2003), both involved the asserted taking of rights "grounded in real property." 331 F.3d at 903; see 331 F.3d at 1344 (discussing "the taking of the real property interests reflected in the mortgage loan notes and the Regulatory Agreements"). In neither case did the court address whether retention of a right to sue for breach of a private contract precludes a claim that government action effected a taking of that contract.[4] And the Federal Circuit's decision in *A&D Auto Sales, Inc.* v. *United States*, 748 F.3d 1142 (Fed. Cir. 2014), which is cited and discussed in the decision below, see Pet. App. 18a, 29a n.9, simply remanded takings claims to the CFC for further development and further consideration of the *Penn Central* factors. See 748 F.3d at 1147. The court in *A&D Auto Sales* stated that "[t]here is no per se rule either precluding or imposing liability when the government instigates action by a third party." *Id.* at 1153. But the court did not, as petitioner implies

[4] The Federal Circuit has disavowed its suggestion in *Cienega Gardens* (see 331 F.3d at 1335) that *Omnia* does not apply when a government directive targets a particular contract. See *Palmyra Pacific Seafoods*, 561 F.3d at 1369; see also *Cienega Gardens* v. *United States*, 503 F.3d 1266, 1274-1278 (Fed. Cir. 2007) (en banc), cert. dismissed, 554 U.S. 938 (2008).

(Pet. 10), analyze the implications for a takings claim of the potential existence of a breach-of-contract remedy. There is consequently no conflict between *A&D Auto Sales* and the decision below.[5]

3. Finally, this case would be a poor vehicle for addressing the question presented. The CFC correctly held that petitioner's takings claim failed under the *Penn Central* test for determining whether a regulatory taking has occurred. In particular, the court observed that petitioner had no reasonable expectation of receiving golden-parachute benefits in light of "the regulatory scheme governing Freddie Mac" and the very real possibility that the government would "decid[e] to prohibit [petitioner's] executive compensation in light of new circumstances within the nation's housing industry." Pet. App. 55a-57a; see *id.* at 57a n.9.[6] Given petitioner's inability to demonstrate the existence of a regulatory tak-

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[5] Petitioner states that the district court in *Perry Capital LLC* v. *Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014), aff'd in part and remanded in part on other grounds, No. 14-5243, 2017 WL 3078345 (D.C. Cir. July 17, 2017), applied "Federal Circuit precedent" when it analyzed the plaintiffs' takings claim on the merits "even though the plaintiffs *also* sued Freddie Mac for breach of contract." Pet. 12. But the district court in *Perry* did not address the question presented here or rely on any Federal Circuit precedent addressing it. Rather, the court rejected plaintiffs' takings claims because the plaintiffs lacked a cognizable property interest, see 70 F. Supp. 3d at 240-242; because "*Penn Central*'s first two factors weigh[ed] strongly enough against the plaintiffs' takings claims that dismissal would be proper in th[e] case," *id.* at 245; and because the claims were unripe, see *id.* at 246.

[6] Although the court of appeals did not reach the issue, it noted that "the existence of government regulation * * * is relevant to whether there were investment-backed expectations under the *Penn Central* test." Pet. App. 14a.

ing under the *Penn Central* factors, a decision in his favor on the question presented would not change the result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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