

No. 14-1255

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**In the Supreme Court of the United States**

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RICHARD HIGBIE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*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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DONALD B. VERRILLI, JR.  
*Solicitor General  
Counsel of Record*

BENJAMIN C. MIZER  
*Principal Deputy Assistant  
Attorney General*

ROBERT E. KIRSCHMAN, JR.  
STEVEN J. GILLINGHAM  
DOMENIQUE KIRCHNER  
*Attorneys*

*Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217*

### **QUESTION PRESENTED**

Whether the Court of Federal Claims had jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1), to adjudicate petitioner's claim for money damages against the United States relating to the government's alleged breach of a form agreement to mediate petitioner's allegations of employment discrimination.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-22) is reported at 778 F.3d 990. The opinion of the United States Court of Federal Claims (Pet. App. 23-38) is reported at 113 Fed. Cl. 358.

**JURISDICTION**

The judgment of the court of appeals was entered on January 14, 2015. The petition for a writ of certiorari was filed on April 14, 2015. Petitioner invokes (Pet. 1) the jurisdiction of this Court under 28 U.S.C. 1257, but that provision relates only to review of state court decisions. This Court has jurisdiction under 28 U.S.C. 1254(1).

**STATEMENT**

Petitioner is a federal employee who sued the United States, alleging that his supervisors had breached the confidentiality provision of an agreement to mediate his claim of employment discrimination. The Court of Federal Claims (CFC) dismissed his breach-of-contract suit for lack of jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1), holding that monetary damages are not available for the alleged breach. Pet. App. 23-38. The court of appeals affirmed. *Id.* at 1-11.

1. Petitioner is an employee of the Bureau of Diplomatic Security within the United States Department of State. Pet. App. 2. In 2009, he filed an administrative equal employment opportunity (EEO) complaint, alleging that he had been subjected to discrimination. *Id.* at 2-3. At petitioner's request, the complaint was processed through the State Department's alternative dispute resolution (ADR) program, and the case was referred to mediation. *Id.* at 3.

Before mediation commenced, the parties were asked to sign a standard form entitled "Agreement to Mediate." C.A. App. A27. The form provided basic information regarding the mediation process. *Ibid.* It explained, *inter alia*, that the parties were required to appear and negotiate in good faith but would not be forced into an agreement; that participation in the process was not an admission of wrongdoing and would not suspend EEO deadlines; that the mediator would not act as an advocate for either party; and that the aggrieved person had the right to counsel. *Ibid.* With respect to confidentiality, the agreement provided:

Mediation is a confidential process. Any documents submitted to the mediator(s) and statements made during the mediation are for settlement purposes only. Confidentiality will not extend to threats of imminent physical harm, threats of violence, criminal activity, waste, fraud or abuse.

The parties agree not to subpoena the mediator(s) or any documents prepared by or submitted to the mediator(s). In no event will the mediator(s) voluntarily testify on behalf of any party or submit any type of report in connection with this mediation.

*Ibid.* The agreement was signed by three of petitioner's supervisors. Pet. App. 3.

The mediation was unsuccessful, and an EEO investigator subsequently conducted an investigation. Pet. App. 3. During that investigation, two of the supervisors who had signed the agreement provided affidavits to the EEO investigator in which they briefly described petitioner's conduct at the mediation. One affidavit stated that petitioner and his counsel had "declined to make any opening statement at all and terminated the [mediation] after the Department's statement and a private sidebar with the mediator, basically refusing to participate in the process." C.A. App. A32. The second affidavit stated that, at the mediation, "[t]he only statement [petitioner's] attorney made was that [petitioner] plans to file an amended complaint and that he was willing to discuss [petitioner's] opportunities to obtain a GS-14 position." *Id.* at A35. That affidavit further noted that petitioner's attorney had "then asked to go off-line to talk to the mediator," that "[o]ne hour later the teleconference was terminated," and that "[n]othing was ever discussed and nothing was resolved." *Ibid.*

2. In 2011, petitioner filed suit in the United States District Court for the Northern District of Texas, asserting claims for retaliation, discrimination, and a violation of the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, 110 Stat. 3870. C.A. App. A254. In an amended complaint, petitioner replaced the ADRA claim with a breach-of-contract claim asserting that his supervisors' affidavits had violated the confidentiality provision of the mediation agreement. Pet. App. 4. Petitioner sought monetary damages on his contract claim in an amount "no less than \$500,000." C.A. App. A18. Petitioner's breach-of-contract claim, which is the subject of the certiorari petition in this case, was subsequently transferred to the CFC. *Id.* at A3.

After the transfer, the government moved to dismiss the complaint. The government argued that the CFC lacked jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1), because the agreement to mediate defined the manner in which mediation would be conducted but did not create any right to money damages in the event of a breach. C.A. App. A51-A54. The government also argued that the agreement had not been breached because the challenged statements merely informed the investigator of the status of the negotiations, which is permissible under established law. *Id.* at A54-A56. Finally, the government argued that petitioner had "provided no indication of how the alleged breach \* \* \* caused [him] any damage at all." *Id.* at A57.

The CFC granted the government's motion to dismiss for lack of jurisdiction, concluding that the agreement to mediate could not "fairly be interpreted as contemplating money damages in the event of a

breach.” Pet. App. 37. The CFC acknowledged the “presumption that a damages remedy is available [for breach of contract] in the civil context.” *Id.* at 32. The court explained, however, that “where a contract could reasonably be interpreted to involve purely nonmonetary relief,” the court can require a showing that the contract is fairly read to contemplate monetary damages for any breach before exercising jurisdiction under the Tucker Act. *Id.* at 33 (citing *Holmes v. United States*, 657 F.3d 1303, 1315 (Fed. Cir. 2011)).

The CFC concluded that the agreement to mediate “clearly does not contemplate money damages” and does not “address anything remotely monetary.” Pet. App. 33-34. The court explained that the agreement instead was “driven by the hope that parties will fully and fairly discuss settlement, secure in the knowledge that their statements cannot be used against them in future proceedings.” *Id.* at 33. The CFC held that the appropriate remedy for any breach of the confidentiality provision is to exclude any wrongly-disclosed confidential information from any future proceedings addressing petitioner’s underlying discrimination claim. *Ibid.* The court further found that petitioner’s claimed amount of at least \$500,000 in damages is “completely arbitrary.” *Id.* at 34.

3. The court of appeals affirmed. Pet. App. 1-11. The court observed that the government “has not consented to suit under the Tucker Act for every contract,” but only for those contracts in which money damages are the proper relief in the event of a breach. *Id.* at 7. The court further explained that, when “relief for breach of contract could be entirely non-monetary,” it is “proper for the court to require a demonstration that the agreements could fairly be

interpreted as contemplating mone[y] damages in the event of a breach.” *Ibid.* (quoting *Holmes*, 657 F.3d at 1315).

The court of appeals concluded that the agreement at issue in this case “itself provides a remedy for the breach of the non-disclosure provision: exclusion of statements made during mediation from proceedings unrelated to the mediation.” Pet. App. 9. The court explained that this remedy was consistent with Rule 408 of the Federal Rules of Evidence, which excludes the content of parties’ negotiations from other legal proceedings. *Ibid.* The court further held that the agreement to mediate could not fairly be interpreted as contemplating money damages in the event of a breach. *Ibid.* The court noted that petitioner had not identified any provision in the agreement or any communication between the parties indicating that either party had contemplated the availability of monetary relief when the agreement was formed. *Id.* at 9-10.

Judge Taranto dissented. Pet. App. 12-22. He found no reason to exempt the mediation agreement at issue here from the “strong general rule” that damages are available for breach of contract. *Id.* at 12.

#### ARGUMENT

The court of appeals correctly applied established principles in interpreting the mediation agreement at issue here, and in concluding that the CFC lacked jurisdiction under the Tucker Act. Petitioner does not argue that the Federal Circuit’s decision conflicts with any decision of this Court or another court of appeals. Further review is not warranted.

1. a. The Tucker Act waives sovereign immunity with respect to any claim “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). The Tucker Act does not create substantive rights, but is simply a “jurisdictional” statute that “operate[s] to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts).” *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009). “The other source of law” on which the plaintiff’s claim is based “need not *explicitly* provide that the right or duty it creates is enforceable through a suit for damages, but it triggers liability only if it can fairly be interpreted as mandating compensation by the Federal Government.” *Ibid.* (internal quotation marks and citations omitted). Thus, “to invoke jurisdiction under the Tucker Act, a plaintiff must identify a contractual relationship, constitutional provision, statute, or regulation that provides a substantive right to money damages.” *Khan v. United States*, 201 F.3d 1375, 1377 (Fed. Cir. 2000).

The Federal Circuit has held that, “in a contract case, the money-mandating requirement for Tucker Act jurisdiction normally is satisfied by the presumption that money damages are available for breach of contract.” *Holmes v. United States*, 657 F.3d 1303, 1314 (2011). The court has further explained, however, that “[t]he government’s consent to suit under the Tucker Act does not extend to every contract.” *Ibid.* (quoting *Rick’s Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008)). If the remedy for breach of a particular contract could be entirely non-monetary, it is “proper for the court to require a demonstration that the agreements could

fairly be interpreted as contemplating money damages in the event of breach.” *Id.* at 1315.

b. Consistent with that general framework, the court of appeals correctly held that the CFC lacked jurisdiction over petitioner’s claim that the government had breached the mediation agreement. Pet. App. 6-11. The court explained that the Tucker Act grants the CFC jurisdiction over claims arising from other sources of substantive law that create a right to monetary damages. *Id.* at 6. The court acknowledged that, “[t]ypically, in a contract case, the presumption that money damages are available satisfies the Tucker Act’s money-mandating requirement.” *Id.* at 7 (citing *Holmes*, 657 F.3d at 1314). The court further explained, however, that this is not a hard-and-fast rule; that the available relief for breach of some contracts can be “entirely non-monetary”; and that in such cases it is “proper for the court to require a demonstration that the agreements could fairly be interpreted as contemplating money damages in the event of breach.” *Ibid.* (quoting *Holmes*, 657 F.3d at 1315).

The court of appeals then reasonably applied those principles to the “Agreement to Mediate” at issue here. Pet. App. 7-11. The court noted that, under the agreement, statements made during mediation may be used for “settlement purposes *only*.” *Id.* at 8. The court inferred from that restriction that “the agreement itself provides a remedy for the breach of the non-disclosure provision: exclusion of statements made during mediation from proceedings unrelated to the mediation.” *Id.* at 9. The court concluded that, because this provision creates a “purely non-monetary remedy,” the CFC was required to consider whether the agreement “could be fairly interpreted” as also

“contemplating money damages.” *Ibid.* The court then analyzed the text and history of the agreement, along with relevant precedent, and held that the agreement does not authorize money damages in the event of a breach. *Id.* at 9-11. The court therefore affirmed the CFC’s decision dismissing petitioner’s claim for lack of jurisdiction. *Id.* at 11.

2. Petitioner does not appear to take issue with the legal principles that the court of appeals applied in conducting its analysis. Petitioner agrees with the court of appeals that (1) the Tucker Act establishes jurisdiction over contract claims only when the contract at issue “creates [a] right to mone[y] damages,” Pet. 6 (quoting *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005)), and (2) if relief for breach of a particular contract “could be entirely non-monetary,” then it is “proper for the court to require a demonstration that the agreement[] could fairly be interpreted as contemplating mone[y] damages in the event of a breach,” Pet. 8 (quoting *Holmes*, 657 F.3d at 1315).<sup>1</sup>

Rather than disputing the court of appeals’ articulation of the governing legal principles, petitioner challenges the court’s application of those principles to the mediation agreement at issue here. Petitioner’s criticism lacks merit.

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<sup>1</sup> Petitioner observes that the Tucker Act does not confer jurisdiction when the contract at issue (1) “expressly disavow[s] money damages” or (2) entirely “concern[s] the conduct of parties in a criminal proceeding.” Pet. 8. Neither of those jurisdictional barriers is applicable here. Petitioner acknowledges, however, that “Tucker Act jurisdiction may also be lacking if relief for breach of contract could be entirely non-monetary.” *Ibid.*

Under established rules of contract interpretation, “a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract.” *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543-544 (1903) (citations omitted). Petitioner urges this Court to apply the “default rule” favoring money damages as a remedy for breach of contract, on the ground that refusing to do so “is likely to frustrate the parties’ intent and produce perverse consequences.” Pet. 7 (quoting *US Airways, Inc. v. McCutcheon*, 133 S. Ct. 1537, 1549 (2013)). But there is no textual, historical, or logical reason to believe that either petitioner or the Department of State intended the form “Agreement to Mediate” to expose the United States (or petitioner) to damages liability in the event of a breach. See Pet. App. 7-11. The mediation agreement is not concerned with anything “remotely monetary.” *Id.* at 34. Rather, it is a form agreement required by the sponsoring EEO office that specifies the conditions under which that office conducts mediations. The agreement is designed to inform the parties of the process involved when they engage in mediation, and it does not involve the sort of exchange of promises that might be seen as implicating money damages. See C.A. App. A27.

The specific terms of the confidentiality provision likewise do not suggest that monetary damages are available for a breach. As the CFC explained, that provision helps to ensure that the parties can freely discuss settlement, “secure in the knowledge that their statements cannot be used against them in future proceedings.” Pet. App. 33. The “logical remedy” for any breach of that promise is “the exclusion

from [further] proceedings [of] any evidence uncovered by way of the breach.” *Ibid.* That analysis is consistent with the text of the provision, which makes clear that “statements made during the mediation are for settlement purposes only.” C.A. App. A27; Pet. App. 8-9. It is also consistent with adjacent portions of the agreement, which provide further assurance that information gleaned from the mediation cannot be used in subsequent proceedings or litigation. *Ibid.* (prohibiting mediator from voluntarily testifying or submitting a report, and forbidding parties from subpoenaing mediator or documents prepared by or submitted to mediator).

Although petitioner suggests (Pet. 11) that excluding evidence from subsequent proceedings “does not suffice to cure all normally compensable injuries from breach of confidentiality in mediation agreements,” he does not explain why that is so. As noted above, the purpose of the confidentiality provision is to promote a candid settlement discussion that does not prejudice either party in any further proceedings. Contrary to petitioner’s assertion (*ibid.*), it seems highly unlikely that new information uncovered during mediation would result in “reputational harms” or “job-related harms,” or would “increase[] [the] costs of resolving the dispute that gave rise to the litigation.” In any event, petitioner has not alleged that he actually suffered any concrete harm as a result of the disclosure, let alone any harm that could not be addressed by exclusion of the statements in any future proceedings. See C.A. App. A77 (response to motion to dismiss); *id.* at A13-A18 (Transfer Complaint).

3. Petitioner does not argue that the court of appeals’ decision in this case conflicts with any decision

of this Court or another court of appeals. Instead, he cites two district court decisions and one state court decision for the proposition that “[c]ourts have readily found monetary damages to be available for breach of confidentiality provision[s] of contracts in a variety of contracts.” Pet. 8; see Pet. 8-10. Petitioner’s reliance on those decisions is misplaced. Two of the cases involved agreements not to disclose confidential business information, a situation in which disclosure has a natural tendency to cause economic harm. See *Youtie v. Macy’s Retail Holding, Inc.*, 626 F. Supp. 2d 511, 523-527 (E.D. Pa. 2009); *Davidson v. Cao*, 211 F. Supp. 2d 264, 280-284 (D. Mass. 2002) (magistrate decision). The third case involved a hospital’s disclosure of confidential information about its patient, which is likewise far removed from the circumstances presented here. *Doe v. Portland Health Ctrs., Inc.*, 782 P.2d 446, 448-449 (Or. Ct. App. 1989). Nothing in the reasoning of any of those decisions suggests that damages must be available for a breach of the mediation agreement at issue in this case.

Petitioner also cites (Pet. 9-10) the unpublished district court decision in *Bethlehem Area School District v. Zhou*, No. 09-03493, 2012 WL 930998 (E.D. Pa. Mar. 20, 2012). There, the court awarded nominal damages for the breach of a confidentiality provision in an agreement to mediate a dispute concerning the Individuals with Disabilities Education Act. *Id.* at \*1, \*4. The court based its decision on a rule of Pennsylvania law under which “any breach of contract entitles the injured party at least to nominal damages.” *Id.* at \*4 (quoting *Scobell Inc. v. Schade*, 688 A.2d 715, 719 (Pa. Super. Ct. 1997)). Here, by contrast, the mediation agreement is not subject to Pennsylvania law.

See *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1298 (Fed. Cir. 1986) (citing decisions recognizing the “well settled” proposition that contracts to which the federal government is a party are normally governed by federal law). And petitioner concedes (Pet. 8) that some contracts with the government do not provide for money damages. There is accordingly no conflict between the decision below and the district court’s ruling in *Zhou*.<sup>2</sup>

4. Even if petitioner could prevail on the jurisdictional issue presented here, he would not be entitled to any relief on the merits. As the CFC recognized, petitioner’s claim for \$500,000 in damages is “completely arbitrary.” Pet. App. 34. The CFC further observed that, under the terms of the mediation agreement, petitioner would be entitled to exclude in future proceedings any statements made by his supervisors in violation of the confidentiality provision. *Id.* at 33. So long as that limitation is enforced, petitioner identifies no reason to believe that the alleged violation will cause him any injury that would support a monetary award.

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<sup>2</sup> *Bashaw v. Johnson*, No. 11-2693, 2012 WL 1623483 (D. Kan. May 9, 2012) (cited at Pet. 9), likewise does not support petitioner’s argument. In that case, which was litigated under Kansas law, neither party appeared to dispute that money damages could potentially be recoverable for breach of a confidentiality provision in a mediation agreement. See *id.* at \*3-\*4.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

DONALD B. VERRILLI, JR.  
*Solicitor General*  
BENJAMIN C. MIZER  
*Principal Deputy Assistant  
Attorney General*  
ROBERT E. KIRSCHMAN, JR.  
STEVEN J. GILLINGHAM  
DOMENIQUE KIRCHNER  
*Attorneys*

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