No. 16-1356

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

REPLY BRIEF OF PETITIONER

William E. Donnelly
Counsel of Record
MURPHY & MCGONIGLE, P.C.
555 13th Street, N.W.
Suite 410
Washington, D.C. 20004
(202) 661-7000
wdonnelly@mmlawus.com

Counsel for Petitioner

James K. Goldfarb
Michael V. Rella
MURPHY & MCGONIGLE, P.C.
1185 Avenue of the Americas
21st Floor
New York, New York 10036
(212) 880-3999
jgoldfarb@mmlawus.com
mrella@mmlawus.com

Counsel for Petitioner

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THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

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INTRODUCTION

The Federal Circuit is critically important in establishing Fifth Amendment takings jurisprudence. It is therefore paramount that its decisions are uniform – to provide certainty and clarity to citizens who are aggrieved by Government action and seek "just compensation". By its decision below, however, the Federal Circuit has now added a new element to takings law that effectively eviscerates citizens' constitutional right to sue the Government for a Fifth Amendment taking when the Government intentionally targets private contracts. This dangerous precedent has left takings law in a state of disarray and has opened the door to Governmental favoritism and abuse.

The Government disputes none of this in its Opposition. Indeed, the Government never even addresses – or attempts to defend – the Federal Circuit's narrow holding that is the subject of this Petition: the availability of a private breach remedy precludes a plaintiff from suing the Government for intentionally targeting and taking a private contract. As Mr. Piszel demonstrated in his Petition, *no* court (besides the Federal Circuit below) has ever reached the same conclusion. And the Government reveals its view of that holding by completely ignoring it in its Opposition, tacitly conceding that the Federal Circuit's holding is wrong as a matter of law. In short, the Government's response is no response at all.

We respectfully request that the Court grant this Petition to consider this important issue and correct this dangerous precedent.

I. THE FEDERAL CIRCUIT PLAYS A CRITICAL ROLE IN ESTABLISHING TAKINGS LAW, AND IT IS ESSENTIAL THAT ITS DECISIONS ARE UNIFORM

As set forth in Mr. Piszel's Petition, 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. And the Federal Circuit hears all appeals from the Court of Federal Claims. 28 U.S.C. § 1295(a)(3). While 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 "little" Tucker Act (28 U.S.C. § 1346), the Federal Circuit has exclusive jurisdiction over appeals of those matters as well (28 U.S.C. § 1295(a)(2)). The Federal Circuit therefore sets the law of the land on Fifth Amendment takings claims – subject only to this Court's review. Accordingly, it is critical that the Federal Circuit's decisions are uniform to avoid confusion and uncertainty among litigants (and their counsel) whose private contracts are intentionally targeted and taken by Government action, such as Mr. Piszel's contract here.

The Government never mentions – or otherwise disputes – the Tucker Act's mandatory jurisdiction provisions, the Federal Circuit's exclusive jurisdiction over takings claims seeking money damages, or the Federal Circuit's critical importance in establishing takings law. Indeed, the Government admits that "the Federal Circuit hears many takings cases". (Gov't Br. at 12). But the Government appears to attempt to minimize the

Federal Circuit's importance on takings law by arguing – without any support – that "other courts of appeals also regularly issue decisions in that area." (*Id.*).

To be sure, while other courts at times issue decisions in takings cases (including where plaintiffs seek less than $10,000 in damages), the Government fails to acknowledge that those courts expressly rely on Federal Circuit precedent. In fact, in a recent decision analyzing a takings claim for less than $10,000, the D.C. District Court stated that "[g]iven the extensive history of Takings Clause jurisprudence within the Court of Appeals for the Federal Circuit, the Court will look to such cases for guidance." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 240, n.48 (D.D.C. 2014), *aff'd in part and remanded in part sub nom.*, 848 F.3d 1072 (D.C. Cir. 2017).[1] Accordingly, the Government's suggestion that the Court should deny Mr. Piszel's Petition because there is no inter-circuit split (Gov't Opp. 12) is a red-herring, as all courts follow the Federal Circuit's takings precedent. The resulting confusion in takings law from the Federal Circuit's *Piszel* decision will therefore affect litigants across the country, regardless of the relief sought or venue.

In short, the Government cannot – and does not – dispute that the Federal Circuit is the foremost authority on takings law (besides this Court), and uniformity and clarity in the Federal Circuit's decisions are critical.

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

II. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH ESTABLISHED FEDERAL CIRCUIT AND SUPREME COURT PRECEDENT FOR WHEN THE U.S. MAY BE LIABLE FOR TAKING A PRIVATE CONTRACT, CREATING CONFUSION IN TAKINGS LAW

Mr. Piszel demonstrated in his Petition that, before the Federal Circuit's *Piszel* decision, no Court had ever extended the *Castle* rule to bar a takings claim solely because the plaintiff had an available private breach remedy. In support, Mr. Piszel cited 19 Federal Circuit and Supreme Court decisions dating back nearly a century that considered takings claims on the merits – and consistently found takings – when the Government took plaintiffs' contractual rights. (Pet. at 12-20). The Federal Circuit acknowledged as much in *Piszel*, stating 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." (Appendix at 18a). Notwithstanding that authority, the Federal Circuit issued its *Piszel* decision, effectively adding a new element to takings law and squarely contradicting Federal Circuit and Supreme Court precedent, leaving takings law in a state of disarray.

The Government does not dispute that each of the cases Mr. Piszel cites allowed takings claims to proceed even though the plaintiffs had available breach remedies – an outcome the Federal Circuit's *Piszel* decision now forecloses. And the

Government's attempt to otherwise distinguish Mr. Piszel's cases falls short.

For example, the Government argues that this Court's decision in *Lynch v. U.S.*, 292 U.S. 571 (1934) – which found a taking after expressly holding plaintiffs had an available breach remedy – is distinguishable because it concerned a *Government* contract, not a private contract. (Gov't Br. at 11). But the Federal Circuit relied on one case in *Piszel* to support its holding that a private breach remedy precludes a takings claim – *Castle v. U.S.*, 301 F.3d 1328 (Fed. Cir. 2002), *cert. denied*, 539 U.S. 925 (2003). (Appendix at 19a-20a). And *Castle* concerned a Government contract, just like *Lynch*. The Government cannot explain why it may be sued for a taking if it interferes with a Government contract, but not if it interferes with a private contract. Nor is there any support in the text, structure, or history of the Fifth Amendment that supports the Government's argument, or for that matter, the Federal Circuit's *Piszel* decision.[2]

As another example, the Government does not dispute that the Federal Circuit reversed the dismissal of takings claims in *A&D* after expressly acknowledging that the plaintiffs had available private breach remedies – just as Mr. Piszel had an available private breach remedy. (Appendix at 18a

[2] As discussed in Mr. Piszel's Petition, before the Federal Circuit's *Piszel* decision, the Federal Circuit at times applied a *more* restrictive takings analysis in *Government* contract cases, not in private contact cases, such as this one. (Pet. at 13-15).

(citing *A&D Auto Sales, Inc.*, 748 F.3d 1142, 1149 (Fed. Cir. 2014))). The Government appears to argue that *A&D* is distinguishable because it "simply remanded takings claims to the CFC for further development and further consideration of the *Penn Central* factors." (Gov.'t Br. at 13). But that is not a distinction; it is the same result Mr. Piszel seeks here, as the Federal Circuit never engaged in this Court's mandatory *Penn Central* analysis. *See Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978). Instead, it created a new per se rule to avoid that analysis, directly contravening its *A&D* holding that "[t]here is no per se rule either precluding or imposing liability when the government instigates action by a third party." *A&D*, 748 F.3d at 1153. If this Court does not correct this dangerous precedent, plaintiffs' takings claims grounded on private contracts will continue to be summarily dismissed, denying citizens the constitutional right to receive "just compensation" when the Government intentionally targets and takes their contracts.[3]

[3] The Government does not even attempt to distinguish the Federal Circuit's *Stockton* decision, which held that the purported rule on which the *Piszel* court relies – limiting takings actions when "remedies are provided by the contract" – "cannot be understood as precluding a party from alleging" both breach of contract and takings claims. *Stockton East Water Dist. v. U.S.*, 583 F.3d 1344, 1368 (Fed. Cir. 2009). And while the Government tries to distinguish *Cienega Gardens* by arguing that it involved the taking of rights "grounded in real property" as opposed to a contract (Gov't Br. at 13), the Federal Circuit described plaintiffs' property interest as "the *contractual right* to prepay and exit the housing programs." *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1330 (Fed. Cir. 2003).

III. THE GOVERNMENT DOES NOT SUPPORT THE FEDERAL CIRCUIT'S NARROW HOLDING, WHICH IS THE ONLY ISSUE PRESENTED FOR THE COURT'S CONSIDERATION

The Federal Circuit's narrow holding in *Piszel* is the only issue presented in this Petition: "whether the *Castle* rule extends to preclude takings claims based on *private* contracts when the Government has not substantially taken away private breach remedies." (Petition at 16-17; *see also id.* at Question Presented). Mr. Piszel explained that the Federal Circuit's holding was based solely on *Castle* – a Government contracts case – and no court has ever extended *Castle* to limit takings claims solely because the plaintiff had available private breach claims. (*Id.* at 13-17). The Government disputes none of this.

Instead of addressing the narrow question presented, the Government studiously avoids it. It reframes the issue to the general question of *whether* the Government's actions effected a taking (Gov't Br. at Question Presented), without addressing *why* the Federal Circuit found no taking. And nowhere in its Opposition does the Government support the Federal Circuit's extension of the *Castle* rule to bar takings claims where private breach remedies are available. Tellingly, the Government never even mentions *Castle* in its Opposition (or in its original brief on appeal).

In attempting to obfuscate the Federal Circuit's *Piszel* holding and distract the Court from

the narrow question presented, the Government relies exclusively on *Omnia Commercial Co. v. U.S.*, 261 U.S. 502, 508 (1923) in its first argument. (Gov't Br. at 7-8). In doing so, it suggests that the Federal Circuit based its decision on *Omnia* because, "under the[] circumstances" in *Omnia*, "[t]he government's instruction to Freddie Mac to withhold payment did not take anything from [petitioner]." (Gov.'t Br. at 8). But contrary to the Government's suggestion, the Federal Circuit never cited *Omnia* to support its holding. Instead, the Federal Circuit cited *Omnia* (and other cases from this Court) to acknowledge that "the Supreme Court has consistently addressed takings claims even though claimants could have pursed breach of contract claims against the private parties" (Appendix at 18a) – a finding that squarely contradicts the Federal Circuit's holding that Mr. Piszel's private breach remedy against Freddie Mac precluded his takings claim (*id.* at 19a).

Moreover, *Omnia* has already been rejected in both this case and the most recent Federal Circuit case addressing it (*A&D*). In *Omnia*, the Government requisitioned all of a third-party's steel in the midst of a steel crisis during World War I, which precluded the steel company from fulfilling its contract to provide steel to plaintiff. The plaintiff then sued the Government for a taking. The Court found no taking because "the government dealt only with the steel company", which caused a "consequential loss" to the plaintiff. *Omnia*, 261 U.S. at 501-511. But the Court of Federal Claims in this case was "unpersuaded" by the exact argument, holding that *Omnia* does not apply here because Mr. Piszel's contract rights "were not merely frustrated

by the government's actions"; instead, they "were directly and intentionally terminated by the [Government's'] actions." (Appendix at 58a, n.10). The Court of Federal Claims relied on *A&D* to support its holding, which similarly rejected *Omnia* on substantively identical facts because the taking in that case was "the direct and intended result of the government's actions," just like the Government's actions here. *A&D*, 748 F.3d 1154.[4]

Finally, modern courts are "wary" of applying *Omnia* to dismiss takings claims because it was decided "many decades before the Supreme Court began actively developing its regulatory takings jurisprudence," including before the Court established its three-factor *Penn Central* test. *Perry Capital*, 70 F. Supp. 3d at 246 n.58. That likely explains why this Court has not relied on *Omnia* to dismiss a takings claim in 57 years. *See U.S. v. Grand River Dam Auth.*, 363 U.S. 229, 236 (1960).

IV. THIS CASE IS THE RIGHT VEHICLE TO DECIDE THE NARROW ISSUE PRESENTED

In their amicus brief supporting Mr. Piszel, the Cato Institute and Southeastern Legal Foundation argued that this case is an excellent vehicle for deciding the narrow issue presented because Mr. Piszel's claims were decided on a motion

[4] Curiously, the Government argues that the lower court's decision was "correct" for certain issues (Gov't Opp. at 14), but it does not mention the lower court's rejection of *Omnia*.

to dismiss (without Mr. Piszel receiving the benefit of any discovery). (Amicus Br. at 15). As a result, there is a clear record with no facts in dispute, and the Court is faced with a pure legal issue. (*Id.*).

The Government ignores the amici's argument – as well as every other argument in the amici's brief. Instead, the Government argues that this case would be a poor vehicle for deciding the narrow issue presented because the Court of Federal Claims already held that Mr. Piszel did not satisfy one of the three *Penn Central* factors for finding a regulatory taking. (Gov't Br. at 14-15). Specifically, the Government argues that the Court of Federal Claims "correctly held" that Mr. Piszel did not have a reasonable investment-backed expectation to receive his contractual benefits. (*Id.* at 14).

The Government concedes, however, that the *Federal Circuit* "did not reach the issue" of whether Mr. Piszel had a reasonable investment-backed expectation. (*Id.* at 14, n.6). And that issue is not presently before this Court. The Government also admits that the Federal Circuit rejected the Court of Federal Claims' holding that Mr. Piszel "lacked a cognizable Fifth Amendment property interest." (*Id.* at 5 (citing Appendix at 12a)). Importantly, the standard for finding a property interest is similar to the standard for finding an investment-backed expectation. Indeed, in finding that Mr. Piszel lacked a reasonable investment-backed expectation, the Court of Federal Claims cited the same reasons and same authority as it cited for erroneously finding that Mr. Piszel lacked a cognizable property interest. (*Compare* Appendix at 50a-54a *with id.*

56a-58a). Accordingly, if it addresses this issue on remand, the Federal Circuit would likely reject the lower court's investment-backed expectation holding for the same reasons it rejected the lower court's property interest holding. Either way, speculation as to what the Federal Circuit might do if this Court instructs it to conduct the mandatory *Penn Central* analysis is no reason for the Court to pass on the opportunity to correct a dangerous new precedent that eviscerates a constitutional right.[5]

CONCLUSION

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

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[5] The Government questions Mr. Piszel's assertion that the Federal Circuit's *Piszel* holding "is likely to give rise to favoritism and abuse", arguing that Mr. Piszel has not identified any evidence "that such consequences have arisen in the nearly one hundred years since *Omnia* was decided." (Gov't Br. at 8, n.2). The Government's argument is puzzling. *Omnia* does not hold that available private breach remedies preclude takings actions, which is the narrow holding at issue here. Indeed, the Federal Circuit's *Piszel* decision is the first court to ever reach such a holding, which as explained in the Petition, is likely to lead to Government favoritism and abuse going forward. (Petition at 22-23).

Dated: August 22, 2017
Washington, D.C.

Respectfully Submitted,

MURPHY & MCGONIGLE, P.C.

By: /s/ William E. Donnelly

William E. Donnelly
wdonnelly@mmlawus.com
555 13th Street, N.W., Suite 410
Washington, D.C. 20004
(202) 661-7000

James K. Goldfarb
jgoldfarb@mmlawus.com
Michael V. Rella
mrella@mmlawus.com
1185 Avenue of the Americas
21st Floor
New York, New York 10036
(212) 880-3999

Attorneys for Plaintiff-Appellant Anthony Piszel