No. 15-5100

IN THE

United States Court of Appeals for the Federal Circuit

ANTHONY PISZEL,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellees.

On Appeal from the United States
Court of Federal Claims
Case No. 1:14-CV-00691
Judge Lydia Kay Griggsby

BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT'S MOTION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTEREST

Counsel for *Amici* certifies the following:

1. **The full name of every party or amicus represented by me is:**

   The Cato Institute, the Southeastern Legal Foundation.

2. **The name of the real party in interest represented by me is:**

   N/A.

3. **All parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties or amicus curiae represented by me are listed below:**

   N/A.

4. **The names of all law firms and the partners and associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:**

   None appeared in the lower court. David G. Cabrales, Lucas C. Wohlford, W. Scott Hastings, and Andrew Buttaro appear in this court for *Amici*.

Dated: October 14, 2016

/s/ *W. Scott Hastings*
Signature of counsel

W. Scott Hastings
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IDENTITY AND INTEREST OF THE *AMICI*

The Cato Institute ("Cato") is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, and conducts conferences and forums.

Southeastern Legal Foundation ("SLF"), founded in 1976, is a national non-profit, public interest firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and regularly files *amicus curiae* briefs with federal and state courts at all levels.

Amici are interested in this case because it represents an unwarranted expansion of the government's power to interfere with private contracts. This case is of great public importance and it deserves further judicial scrutiny.[1]

INTRODUCTION

Through its decision, the panel allows an unwarranted and unwise extension of governmental power. Never before has regulatory authority included the power

[1] This brief was prepared by Cato, SLF, and their counsel. No party to this appeal, counsel for a party, or other person has authored this brief or contributed money for its preparation.

to order the taking of private contract rights without cause and without compensation. Here, however, the panel allows the government to escape all liability for its decision to order the termination of a private contract by shifting the compensatory burden of the taking to another private entity. This cannot and should not be the law. The Fifth Amendment's requirement to pay "just compensation" for a taking is a burden on government, not private entities.

ARGUMENT

I. Government Interference with Private Contractual Rights Has Been an Issue of Significant Concern Since the Founding.

"[L]aws impairing the obligation of contracts are contrary to the first principle of the social compact, and to every principle of sound legislation." The Federalist No. 44, at 278-79 (James Madison) (Clinton Rossiter ed., 1961). Protections for contract rights were needed to "inspire a general prudence and industry, and give a regular course to the business of society." *Id.* In response to those concerns, the Framers of the Constitution provided that "No State shall … pass … any Law impairing the Obligations of Contracts." U.S. Const. art I, §10, cl. 1. The goal was to protect "persons and their property from the effects of those sudden and strong passions to which men are exposed." *Fletcher v. Peck*, 10 U.S. 87, 137-38 (1810). The Framers "intended to adopt a great principle, that contracts should be inviolable." *Sturges v. Crowninshield*, 17 U.S. 122, 205-06 (1819). "[M]en should not have to act at their peril, fearing always that the State might

change its mind and alter the legal consequences of their past acts so as to take away their lives, their liberty or their property." *City of El Paso v. Simmons*, 379 U.S. 497, 522 (1965).[2]

The Fifth Amendment extends protections against governmental interference with contractual rights to the federal government. *See* U.S. Const. amend V; *Lynch v. United States*, 292 U.S. 571, 579 (1934). It also compels both federal and state governments to pay just compensation when their regulations strip citizens of their contract rights and those rights rise to the level of a property right. *See Penn-Central Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978).

Here, acting under statutory authority enacted *after* Mr. Piszel entered into his contract with Freddie Mac, the FHFA's Director terminated Mr. Piszel's property right in his contracts "without cause" and without compensation.[3] In

[2] Despite the absolute wording of the Contracts Clause, the Supreme Court has recognized the need to balance the protection of private contractual rights against the government's regulatory needs. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445 (1934). The regulation at issue must be "addressed to a legitimate end; that is, the legislation was not for the mere advantage [or disadvantage] of particular individuals but for the protection of a basic interest of society." *Id.* And the contractual interference must be reasonable under the circumstances. *Id.* Thus, for example, contractual rights are subject to the power of eminent domain, but only upon the condition of reasonable compensation. *Id.* at 435-36. Or, as in *Blaisdell*, a mortgage redemption period was extended in a time of emergency, but on the condition that the hold-over tenant who benefited from the extension continued to pay the rental value of the premises. *Id.* at 446.

[3] Mr. Piszel's contract was terminated under the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. §4511, *et seq.*, which was adopted two years after Mr. Piszel left his previous employment (including valuable compensation benefits) and signed his contract with Freddie Mac. HERA established the Federal Housing Finance Agency ("FHFA") as regulator over Freddie Mac, 12 U.S.C. §4511, and authorized FHFA's Director to "prohibit or limit, by regulation or order, any golden parachute payments." 12 U.S.C. §4518(e)(1). The Director

effect, the government completely eliminated Mr. Piszel's valuable contractual rights for the sole purpose of eliminating the economic burdens imposed by the contract on Freddie Mac. *Amici* have found no case (federal or state) in which any court has endorsed such a sweeping view of governmental powers.

II. The Panel Decision Conflicts with this Court's Precedents.

A&D Auto Sales, Inc. v. United States, 748 F.3d 1142 (Fed. Cir. 2014), presents the most analogous factual circumstance to the present case. Chrysler and GM franchisees whose franchises were terminated as part of the federal government bailouts sued to recover compensation from the government under the Fifth Amendment. *Id.* at 1147. As in the present case, the terminated franchisees had protected property interests in the franchise agreements. *Id.* at 1152-53. Also like the present case, the challenged government action—the requirement to terminate franchises—was imposed long after the claimants signed their contracts with Chrysler and GM. *Id.* But unlike the present case, this Court held that the franchisees had the right to pursue takings claims based on the termination of their contracts. *Id.* at 1153-59. The decisions are irreconcilable.

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adopted a regulation prohibiting all golden parachute payments unless they fell within an exception such as the one for persons terminated without committing any wrongdoing. 12 C.F.R. §1231.3(b) (2014). Neither HERA nor the FHFA's regulations required Mr. Piszel's termination from employment. Indeed, based on the current record, it appears Mr. Piszel received excellent job performance ratings. Nevertheless, the FHFA Director made a voluntary decision to order the termination without compensation under the contract, for which Mr. Piszel now seeks to hold the government liable.

After finding a protected property right in the franchise agreements, the Court in *A&D Auto Sales* next focused on whether the government's interference with those contracts was intentional. *Id.* at 1153-54. The government is not necessarily liable for effects that "are merely unintended or collateral." *Id.* But the government's action in seeking termination of the franchises was "neither collateral nor unintended." *Id.* Rather, it was the "direct and intended result of the government's actions directed to Chrysler and GM." *Id.* at 1154. The government conditioned the receipt of bailout financing on the termination of franchises. *Id.* at 1154-55. Here, the termination of Mr. Piszel's contract was the direct and intended result of the FHFA Director's orders. Accordingly, as in *A&D Auto Sales*, the question whether the government's level of involvement in the decision rose to the level of interference characterized in *A&D Auto Sales* as coercion sufficient to support a takings claim should have been a question of fact to be developed during discovery. *Id.* at 1155-56.

The economic impact of the government's decision should also have been an issue to be developed during discovery. *Id.* at 1157-59. Mr. Piszel's allegations of economic impact are much stronger than those asserted by the terminated Chrysler and GM franchisees. The franchisees ultimately had to address complex issues of valuation in light of the Chrysler and GM bankruptcies, as well as the likelihood that the franchises would have been viable but for the government's assistance. *Id.*

By contrast, the FHFA Director ordered the termination of Mr. Piszel's contract as an act of regulatory authority. It was not an express condition on Freddie Mac's right to receive federal funding. The impact on Mr. Piszel is easily determined—it is the value of the benefits he was entitled to receive, but denied.

Despite the similarity between this case and *A&D Auto Sales*, the panel nonetheless affirmed the dismissal of Mr. Piszel's claims on the pleadings and without the benefit of discovery. The panel's stated reason was that Mr. Piszel *may* have had a right to sue Freddie Mac for his loss. Op. at 19-25. This reasoning is puzzling. It is inconsistent with the panel's earlier holding 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." Op. at 16. Moreover, the same point could have been made in *A&D Auto Sales*—the terminated franchisees could have asserted claims against Chrysler and GM, even in a bankruptcy adversary proceeding if necessary. The Court correctly allowed the franchisees to pursue their claim. Mr. Piszel should be granted the same opportunity.

III. The Panel Decision Shifts the Burden to Private Entities to Answer for the Government's Actions.

Not only does the panel expand government power to impair contracts, it does so by placing the burden of governmental actions on private entities. Here, the panel's answer to Mr. Piszel's claim is to say Freddie Mac could have paid the bill for the government's order to terminate his contract. Forcing private parties to

pay for government action is the opposite of what the Fifth Amendment requires. The Fifth Amendment requires "just compensation" from the government.

The panel provides no workable standard for future claimants to know when they must first pursue a claim against a private entity. Following this case, it appears it is necessary to pursue claims against a private entity under government conservatorship unless the claimant can show that the private defendant would succeed on an impossibility defense. But it is not necessary to pursue claims against private entities in bankruptcy. There is no logical reason to distinguish between the two. And what happens if the claim against a private entity would be theoretically possible, yet likely uncollectable?

The panel also sets a dangerous precedent for solvent regulated entities and people who, like Mr. Piszel, choose to do business with regulated entities. The panel places the regulated entity in the untenable position of having to choose between defiance of its regulator's orders to terminate the contract or accepting financial responsibility for the governmental decision by complying and facing breach of contract liability. Under no circumstances should the government be allowed to exert such an abuse of its authority—especially where, as here, the government asserted no cause for its contract termination order.

This case involves the termination of an employment contract. But its application is potentially much broader. For example, there is no limiting principle

to stop a regulator from using its coercive powers to force private entities to terminate contracts with vendors or suppliers, solely because the regulator would prefer for them to use someone else (perhaps the regulator's friends). What would stop a regulator from using authority to pressure regulated employers to reduce the salaries of existing employees in order to ensure that those employees are not paid more than their government counterparts? Under the panel decision, the affected parties—the vendors, private employees, etc.—would have no recourse against the governmental actor that caused the harm. This cannot possibly be the law. If so, it represents an extension of governmental power that is unwarranted under the Constitution, and is the opposite of the result intended by the Framers.

IV. Allowing Cases Like This One to Proceed on the Merits Promotes Government Accountability and Discourages Public Corruption.

Allowing claims like Mr. Piszel's to proceed into discovery furthers the public interest by promoting government accountability. "The takings clause has emerged as an important vehicle for evaluating government actions during the [2008] financial crisis and its aftermath." Julia D. Mahoney, *Takings, Legitimacy, and Emergency Actions: Lessons from the Financial Crisis of 2008*, 23 Geo. Mason L. Rev. 299, 300 (2016). Cases like this one have "served an important purpose by uncovering information about how and why the United States Department of the Treasury ('Treasury'), the Federal Reserve, and other key actors chose to do what they did." *Id.* This is a necessary step to "better the odds of

avoiding serious errors" in the next crisis. *Id.* "Second, the availability of relief for takings claims can bolster the legitimacy of public action that stems from financial crisis." *Id.* Providing relief means that the unfortunate, disadvantaged, or politically-disconnected are not left paying the price for recovery. Finally, in a "political economy," allowing judicial and public scrutiny of government decisions prevents "the use of crisis to subvert government for private ends."[4] *Id.* at 301.

Here, Mr. Piszel alleges that he was the victim of the FHFA Director's decision to terminate his employment contract without cause. He consistently received exemplary performance reviews and has been cleared of any wrongdoing in the 2008 financial crisis. Nevertheless, the government took his valuable contractual rights, including those used to induce him to leave a lucrative job and join Freddie Mac. This is precisely the type of case that deserves full and public scrutiny to establish what happened and why.[5]

[4] Many scholars recognize the important values that are served by subjecting post-crisis government decision-making to public scrutiny. *See, e.g.*, Anthony J. Casey & Eric A. Posner, *A Framework for Bailout Regulation*, 91 Notre Dame L. Rev. 479, 512 (2015); David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1424-32 (2014). Professors Casey and Posner favorably cited this Court's decision in *A&D Auto Sales* as setting a standard that "might block the worst forms of government abuse." 91 Notre Dame L. Rev. at 521. They warned, however, that the protection may not go far enough to protect against more subtle forms of abuse by government officials using their influence to obtain benefits for some favored stakeholders at the expense of others. *Id.* Professor Zaring has also commented on the need for scrutiny of the government's decisions during crisis, citing the Takings Clause as "the only way the government's actions during the crisis will be evaluated by the courts." 100 VA. L. REV. at 1425.

[5] By focusing on whether Mr. Piszel has an alternative remedy against Freddie Mac, the panel implicitly recognized that similar government action could rise to the level of a constitutional violation if no other remedy exists—such as where the claimant could show in his pleadings that his ability to pursue recovery against a private entity is barred by the doctrine of impossibility.

By relegating the right to relief to a claim against a private entity, the panel eliminates the opportunity to scrutinize the reasons for and legitimacy of the government action. In private litigation, the parties would have significantly less access to discovery from the government. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-70 (1951). The private litigation likely would focus on whether there was a breach of contract and the extent of the damage caused by the breach. It is questionable whether a court could even reach questions regarding the legitimacy of the government's actions and the extent of its culpability in litigation to which the government is not a party. This not only leaves a private entity holding the bill for government action, it insulates the government action from scrutiny, thereby increasing the likelihood that constitutional violations will occur again. This is a recipe for abuse.

CONCLUSION

Amici request that the Court grant rehearing *en banc*.

Dated: October 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 14, 2016, a copy of this document was filed using the U.S. Court of Appeals for the Federal Circuit's ECF/CM system and all counsel of record listed below were served using the court's electronic Notice of Docket Activity pursuant to Fed. Cir. R. 25.

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