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United States Court of Appeals for the Federal Circuit

JAKE LATURNER, TREASURER OF THE STATE OF KANSAS, ANDREA LEA, IN HER OFFICIAL CAPACITY AS AUDITOR OF THE STATE OF ARKANSAS,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2018-1509, 2018-1510

Appeals from the United States Court of Federal Claims in Nos. 1:13-cv-01011-EDK, 1:16-cv-00043-EDK, Judge Elaine Kaplan.

Decided: August 13, 2019

DAVID CHARLES FREDERICK, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, Washington, DC, argued for all plaintiffs-appellees. Plaintiff-appellee Jake LaTurner also represented by SCOTT H. ANGSTREICH, KATHERINE COOPER, BENJAMIN SOFTNESS; JONATHAN BRETT MILBOURN, Horn Aylward & Bandy, LLC, Kansas City, MO.

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GEORGE W. NEVILLE, Office of the Mississippi Attorney General, Jackson, MS, for amici curiae State of Florida, State of Mississippi, State of Georgia, State of Indiana, State of Iowa, Commonwealth of Kentucky, State of Louisiana, Commonwealth of Pennsylvania, State of Ohio, State of South Carolina, State of Rhode Island, State of South Dakota.

Before DYK, CHEN, and HUGHES, *Circuit Judges.*

DYK, *Circuit Judge*:

During the Great Depression, President Franklin D. Roosevelt signed legislation allowing the U.S. Department of Treasury ("Treasury") to issue savings bonds, a type of debt security designed to be affordable and attractive to even the inexperienced investor. Under longstanding federal law, savings bonds never expire and may be redeemed at any time after maturity. *See, e.g.*, 31 U.S.C. § 3105(b)(2)(A); 31 C.F.R. § 315.35(c). Federal law also limits the ability to transfer bonds. 31 C.F.R. § 315.15. Kansas and Arkansas (the "States") passed so-called "escheat" laws providing that if bond owners do not redeem their savings bonds within five years after maturity, the bonds will be considered abandoned and title will transfer (i.e., "escheat") to the state two or three years thereafter. Kan. Stat. Ann. §§ 58-3935(a)(16), 58-3979(a) (2000); Ark. Code Ann. § 18-28-231(a)–(b) (2015).

Pursuant to these escheat laws, the States sought to redeem a large but unknown number of bonds, estimated to be worth hundreds of millions of dollars. When Treasury refused, the States filed suit in the Court of Federal Claims ("Claims Court"). The Claims Court agreed with the States, holding that Treasury must pay the proceeds of the relevant bonds—once it has identified those bonds—to the States. The cases were certified for interlocutory appeal to this court.

We reverse for two independent reasons. First, we hold that federal law preempts the States' escheat laws. That means that the bonds belong to the original bond owners, not the States, and thus the States cannot redeem the bonds. Second, even if the States owned the bonds, they could not obtain any greater rights than the original bond owners, and, under Federal law, 31 C.F.R. § 315.29(c), a bond owner must provide the serial number to redeem bonds six years or more past maturity, which includes all bonds at issue here. Because the States do not have the physical bonds or the bond serial numbers, Treasury properly denied their request for redemption.

BACKGROUND

This case concerns the ability of states to acquire U.S. savings bonds through escheat, the centuries-old right of the states to "take custody of or assume title to abandoned personal property." *Delaware v. New York*, 507 U.S. 490, 497 (1993). A savings bond is a contract between the United States and the bond owner, and Treasury regulations are incorporated into the bond contract. *See Treasurer of New Jersey v. U.S. Dep't of the Treasury*, 684 F.3d 382, 387 (3d Cir. 2012), *cert. denied*, 569 U.S. 1004 (2013).

Treasury "regulations do not impose any time limits for bond owners to redeem the[se] savings bonds." *Id.* at 388; *see also* 31 U.S.C. § 3105(b)(2)(A) (authorizing Treasury to adopt regulations providing that "owners of savings bonds may keep the bonds after maturity"). In addition, Treasury

regulations provide that savings bonds are generally "not transferable and are payable only to the owners named on the bonds." 31 C.F.R. § 315.15. When the sole owner of a bond dies, "the bond becomes the property of that decedent's estate." 31 C.F.R. § 315.70(a). Federal law imposes no time limit on the redemption of savings bonds, and numerous savings bonds in the country have matured but have not yet been redeemed by their owners. Generally, in order to redeem bonds not in the physical possession of the owner—for example, bonds that have been lost or destroyed—the owner must supply the serial numbers of the bonds to Treasury. 31 C.F.R. §§ 315.25, 315.26(a), 315.29(c). The States do not have the serial numbers of the bonds in question.

This case is related to an earlier litigation that resulted in a decision by the Third Circuit. In the 2000s, several states attempted to acquire the proceeds of unredeemed savings bonds through so-called "custody escheat" laws. *See New Jersey*, 684 F.3d at 389–90. These laws provided that if bond owners with last known addresses in the state did not redeem their bonds within a certain time after maturity (such as five years), the bonds would be deemed abandoned property. The state could then obtain legal custody of (but not title to) the bonds. When several states asked Treasury to redeem bonds obtained through these custody escheat laws, Treasury refused. Treasury explained that for the bonds to be paid, a state "must have possession of the bonds" and "obtain title to the individual bonds"—neither of which the states had. J.A. 507 (2004 letter to North Carolina); *accord* J.A. 509 (letter to Illinois); J.A. 511 (letter to D.C.); J.A. 513 (letter to Kentucky); J.A. 515 (letter to New Hampshire); J.A. 517 (letter to South Dakota); J.A. 519 (letter to Connecticut); J.A. 521 (letter to Florida).

A number of states filed suit in the District of New Jersey, seeking an order directing the government to pay the bond proceeds. The district court upheld Treasury's denial

of payment, holding that the states' custody escheat laws were preempted. *See New Jersey*, 684 F.3d at 394. The Third Circuit affirmed, explaining that the states' laws "conflict[ed] with federal law regarding United States savings bonds in multiple ways." *Id.* at 407. The court reasoned that unredeemed bonds are "not 'abandoned' or 'unclaimed' under federal law because the owners of the bonds may redeem them at any time after they mature." *Id.* at 409. "The plaintiff States' unclaimed property acts, by contrast, specify that matured bonds are abandoned and their proceeds are subject to the acts if not redeemed within a [certain] time period" after maturity. *Id.* at 407–08. "There simply is no escape from the fact that the Federal Government does not regard matured but unredeemed bonds as abandoned even in situations in which [state law] would do exactly that." *Id.* at 409. However, the Third Circuit declined to address whether the outcome would be different if states obtained *title* to savings bonds, as opposed to mere custody. *Id.* at 413 n.28 ("We simply are not faced with that possibility and thus we do not address it.").

After the *New Jersey* litigation, Kansas and Arkansas acted to obtain title to the bonds using "title escheat" laws—precisely the circumstance the Third Circuit's *New Jersey* decision did not reach. Kansas's title escheat law provides that a savings bond will be considered "abandoned" if it is not redeemed within five years of maturity. Kan. Stat. Ann. § 58-3935(a)(16). If the bond remains unredeemed for three more years—that is, for a total of eight years after maturity—Kansas may obtain a state court judgment that title to the bond has escheated to the state. *Id.* § 58-3979(a). Arkansas's law is similar, providing that savings bonds will be considered abandoned five years after maturity and that the state can obtain title to the bonds two years after that. Ark. Code Ann. § 18-28-231(a)–(b).

Kansas and Arkansas obtained state court judgments purporting to give them title to the category of bonds deemed abandoned under these title escheat laws—that is,

all unredeemed bonds that were sufficiently past maturity and were registered to owners with last known addresses in Kansas or Arkansas.[1] *See* J.A. 251 (Kansas); J.A. 1244 (Arkansas). These bonds were not in the States' possession.[2] Kansas and Arkansas estimated that the allegedly abandoned bonds were worth $151.8 million and $160 million, respectively.

The States then attempted to redeem these bonds, asking Treasury to redeem bonds whose registered owners had last known addresses in the state, relying on its general authority to escheat debts owed to individuals whose last known addresses were in the state. *See generally Texas v. New Jersey*, 379 U.S. 674, 680–81 (1965) (holding that as to abandoned intangible property—there, various debts—"the right and power to escheat the debt should be accorded to the State of the creditor's last known address").[3]

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[1] For Kansas, the relevant bonds are 40-year Series E bonds issued between 1941 and December 31, 1961; 30-year Series E bonds issued between 1965 and December 31, 1972; and Series A–D, F, G, H, J, and K bonds issued before December 31, 1972. J.A. 245. For Arkansas, the relevant bonds are "all unredeemed series A through D, F, G, J, and K bonds, and all series E and H bonds that were issued on or before October 16, 1978." J.A. 1243.

[2] The States also escheated and asked Treasury to redeem a much smaller number of bonds that they did possess. Treasury did so, relying on its authority under 31 C.F.R. § 315.90 to waive its other regulations. *See* Regulations Governing United States Savings Bonds, 80 Fed. Reg. 37,559, 37,3560 (U.S. Dep't of Treasury July 1, 2015). The bonds in the States' possession are not at issue in this case.

[3] Below, the government challenged the States' authority to escheat based on the last known address of the registered bond owners, since some bond owners may have moved out of state. The government does not make this

Treasury declined, stating that "[u]nless some exception or waiver in [its] regulations applies, Treasury is only authorized to redeem a savings bond to the registered owner," J.A. 368, who retains the right "to redeem their savings bonds at any time, even after maturity," J.A. 369.

The States sued for damages under the Tucker Act, 28 U.S.C. § 1491, alleging that the States were the owners of the absent bonds and that the government had breached the terms of the savings-bonds contracts by refusing to redeem the bonds. On cross-motions for summary judgment, the Claims Court sided with the States, holding that Treasury was liable to the States and had an obligation to identify the absent bonds. The Claims Court reasoned that there was no preemption because "federal law itself (i.e., 31 C.F.R. § 315.20(b)) requires Treasury to recognize claims of ownership based on title-based escheatment statutes." *Laturner v. United States*, 133 Fed. Cl. 47, 71 (2017).

The court also concluded that the States have the "right[] as an owner of the bonds to make a claim for their proceeds based on the theory that they are 'lost.'" *Id.* at 70. It determined that "Treasury breached the [bond] contract when it refused to provide [the States] with information about the bonds and demanded that [the States] produce the bond certificates as a condition of redeeming their proceeds." *Id.* at 65. Thus, the Claims Court held that the States were "entitled to receive from the government the information necessary to allow it to make a request to redeem the bonds," including the serial numbers of the absent bonds. *Id.* at 77; *see also id.* at 70; *Laturner v. United States*, 135 Fed. Cl. 501, 505 (2017).

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argument on appeal, and we assume without deciding that the States have the authority—absent preemption—to escheat savings bonds based on the last-known address of the registered owner.

The Claims Court certified its summary judgment orders for interlocutory appeal under 28 U.S.C. § 1292(d)(2),[4] noting that identifying the absent bonds would be time-intensive and expensive and that there are eight other pending cases in which other states are asserting similar claims. The court also stayed the proceedings pending appeal.

We granted the government's petitions for leave to appeal and consolidated the appeals. We have jurisdiction under 28 U.S.C. § 1292(d)(2).

DISCUSSION

I

We first address whether, as the government contends, the Treasury regulations governing U.S. savings bonds preempt the States' escheat laws regarding unredeemed savings bonds. The parties assume that the regulations in effect before December 24, 2015, are the relevant regulations.[5] We proceed on that assumption.

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[4] The language of section 1292(d)(2) "is virtually identical to 28 U.S.C. § 1292(b) . . . which governs interlocutory review by other courts of appeals." *United States v. Connolly*, 716 F.2d 882, 883 n.1 (Fed. Cir. 1983) (en banc).

[5] The government's position is that the relevant regulations are those "that were in effect at the time the requests were made"—that is, in May 2013 (for Kansas) and in November 2015 (for Arkansas), respectively. Gov't Open. Br. at 7 n.3. (There was no change in the regulations between these dates.) The Claims Court indicated that it was applying the regulations in effect when the States filed their complaints—that is, in December 2013 (for Kansas) and in November 2015 (for Arkansas), respectively. The States' position is somewhat unclear, though they agree that the pre-amendment regulations apply to this case. Given the parties' agreement as to the relevant regulations, we

A

The Constitution limits state sovereignty "by granting certain legislative powers to Congress while providing in the Supremacy Clause that federal law is the 'supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018) (quoting U.S. Const. art. VI, cl. 2) (internal citation omitted). "This means that when federal and state law conflict, federal law prevails and state law is preempted." *Id.* The Supreme Court has "identified three different types of preemption—'conflict,' 'express,' and 'field,' but all of them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Id.* at 1480 (internal citation omitted). For example, in *Arizona v. United States*, 567 U.S. 387 (2012), the Court held that federal statutes "provide a full set of standards governing alien registration" and therefore "foreclose any state regulation in the area." *Id.* at 401. In *Murphy*, the Court elaborated that "[w]hat this means is that the federal registration provisions not only impose federal registration obligations on aliens but also confer a federal right to be free from any other registration requirements." 138 S. Ct. at 1481. Authorized Federal regulations can preempt just as federal statutes can. *See Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

The Supreme Court's decision in *Free v. Bland*, 369 U.S. 663 (1962) illustrates how preemption applies in the context of the U.S. savings bond program. In that case, Treasury regulations provided that when one bond owner

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assume that the regulations in effect at the time the bonds were issued were not materially different.

died, the surviving co-owner (there, the decedent's husband) became the *sole* owner of the bond. *Id.* at 664–65. Under Texas state community property laws, however, the principal beneficiary under the decedent's will (there, the decedent's son) was entitled to a one-half interest in the bonds—despite not being a co-owner of the bond under Treasury regulations. *Id.* The Court held that the state law was preempted because it prevented bond owners "from taking advantage of the survivorship provisions" of the Treasury regulations. *Id.* at 669–70. The Court reasoned that "Federal law of course governs the interpretation of the nature of the rights and obligations created by the Government bonds," *id.* at 669–70 (quoting *Bank of Am. Tr. & Sav. Ass'n v. Parnell*, 352 U.S. 29, 34 (1956)), and a state may not "fail[] to give effect to a term or condition under which a federal bond is issued," *id.* at 669. In other words, Treasury regulations conferred a right on bond holders which Texas state law impermissibly restricted.

Here there is a similar conflict between state and Federal law. Federal law confers on bond holders the right to keep their bonds after maturity. Congress specifically authorized Treasury to prescribe regulations providing that "owners of savings bonds may keep the bonds after maturity," 31 U.S.C. § 3105(b)(2)(A), as well as regulations setting forth "the conditions, including restrictions on transfer, to which they will be subject," *id.* § 3105(c)(3), and the "conditions governing their redemption," *id.* § 3105(c)(4). Treasury regulations impose no time limit on the redemption of savings bonds. *See, e.g.*, 31 C.F.R. § 315.35(c) ("A series E bond will be paid *at any time* after two months from issue date at the appropriate redemption value . . . ." (emphasis added)); *New Jersey*, 684 F.3d at 409 ("[U]nder federal law . . . the owners of the bonds may redeem them at any time after they mature . . . ."). And 31 C.F.R. § 315.15 provides that "[s]avings bonds are not transferable and are payable only to the owners named on

the bonds, except as specifically provided in these regulations and then only in the manner and to the extent so provided." *See also id.* § 315.5(a) (providing that savings bonds "are issued only in registered form" and "must express the actual ownership of" the bond, and that "registration is conclusive of ownership" with limited exceptions). Federal law thus confers on bond holders "a federal right to engage in certain conduct"—the right to keep their bonds after maturity without the bonds expiring—"subject only to certain (federal) constraints." *See Murphy*, 138 S. Ct. at 1480.

The States' escheat laws on the other hand impermissibly restrict the bond holder's right to retain ownership of the bonds. Under the escheat laws, if bond holders do not redeem their bonds promptly enough (as decided by the States), they lose ownership and the bonds will transfer to the state. Absent Federal law authorizing such a state law restriction, the result is clear: "the federal law takes precedence and the state law is preempted." *Id.*

B

The States do not contest that Federal law would preempt their escheat laws absent Federal authorization for the state legislation. But they contend that here there is no conflict between Federal law and the States' escheat laws because Treasury regulations themselves permit the transfer of ownership under escheat laws. They rely on 31 C.F.R. § 315.20(b), which provides that "Treasury will recognize a claim [of bond ownership by a third party] . . . if established by valid, judicial proceedings, <u>but only as specifically provided in this subpart</u>" (emphasis added)—i.e., subpart E (§§ 315.20–23). The States contend that their escheat proceedings constitute "valid, judicial proceedings" under this regulation. Although the Third Circuit in the *New Jersey* litigation did not decide the question before us, the States quote language from the Third Circuit's opinion that "as provided in the federal regulations

and as recognized by the Treasury, third parties, including the States, may obtain ownership of the bonds—and consequently the right to redemption—through 'valid[] judicial proceedings,' 31 C.F.R. § 315.20(b)." 684 F.3d at 412–13 (alteration in original).

The States also argue that Treasury has made repeated statements interpreting § 315.20(b) to allow escheat-based claims so long as the state has title (which the States allegedly have here). The States rely on two sets of statements: first, statements Treasury made in denying past escheat claims by various states; and second, portions of Treasury's briefing in the *New Jersey* litigation. Treasury responds that its prior statements are entirely consistent with its present position that it "considers escheat-based redemption claims as an exercise of its discretionary waiver authority under provisions such as 31 C.F.R. § 315.90, rather than under § 315.20(b)," and that it grants such a waiver only when a state has both title <u>and possession</u>. Gov't Open. Br. at 16 & n.8.

Paradoxically, the States disclaim any reliance on *Auer* deference, but offer no other basis for deferring to Treasury's supposed interpretation of its regulations. In any event, there is no basis for *Auer* deference here. As the Supreme Court recently clarified, "a court should not afford *Auer* [*v. Robbins,* 519 U.S. 452 (1997)] deference unless the regulation is genuinely ambiguous," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), even after applying "all the 'traditional tools' of construction," *id.* (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). Even if the regulation is genuinely ambiguous, *Auer* deference is not appropriate unless "an independent inquiry into . . . the character and context of the agency interpretation" shows that the interpretation (1) constitutes the agency's "authoritative" or "official position," (2) implicates the agency's "substantive expertise," and (3) reflects the agency's "fair and considered judgment" of the issue. *Id.* at 2416–18.

Although we are dubious that the statements here (particularly those made in the *New Jersey* briefs) reflect Treasury's "fair and considered judgment" on the question of whether 31 C.F.R. § 315.20(b) requires Treasury to recognize escheat claims, *id.* at 2417 & n.6, we need not decide that question. Nor need we decide whether Treasury's earlier interpretations were overridden by its more recent interpretations of the regulations. That is so because using "the 'traditional tools' of construction," the Treasury regulations are not "genuinely ambiguous," and thus *Auer* deference is inappropriate. *Id.* at 2415.

The regulation on which the States rely, § 315.20(b), states that Treasury will recognize the "judicial proceedings" "only as specifically provided in this subpart" (emphasis added). The only judicial proceedings specifically provided in the subpart are those for bankruptcy (§ 315.21), divorce (§ 315.22), and proceedings finding a person to be entitled to the bond "by reason of a gift causa mortis" (a gift made in contemplation of impending death) "from the sole owner" (§ 315.22). Escheat proceedings are not mentioned. Accordingly, the general prohibition on transfers of ownership contained in § 315.15 applies.

The States advance a contrary interpretation of the regulation, arguing that § 315.20(b)'s "only as specifically provided in this subpart" limitation refers to "the *manner* in which judicial proceedings will be recognized, not the *sorts* of proceedings that will be recognized." Kansas Resp. Br. at 31 (emphasis in original). This is not a tenable reading of the regulation. A different provision, § 315.23, already specifies how to prove the validity of a proceeding, such as by providing certified copies of the judgment. The "only as specifically provided in this subpart" language in § 315.20(b) plainly refers to the types of judicial proceedings that will be recognized.

The States also assert that § 315.20(a), not § 315.20(b), exclusively defines the transfers of ownership that

Treasury will not recognize. Section 315.20(a) states that Treasury "will not recognize a judicial determination that gives effect to an attempted voluntary transfer inter vivos of a bond" or that "impairs the rights of survivorship conferred by these regulations upon a coowner or beneficiary." Contrary to the States' argument, § 315.20(a) simply lists additional transfers that Treasury will not recognize. It hardly suggests that all other transfers are valid.

In short, we reject the States' contention that Treasury regulations permit the transfer of ownership under escheat laws. To the contrary, the plain language of the regulations confers on bond holders the right to retain their bonds *without* losing ownership if they do not redeem the bonds within a time limit set by the States.

While we do not rely on it, we note that Treasury in December 2015 confirmed this interpretation of its regulation when it amended § 315.20 to specifically provide that "[e]scheat proceedings will not be recognized under this subpart." Treasury also added a new regulation, section 315.88, providing that Treasury "will not recognize an escheat judgment that purports to vest a State with title to a bond that the State does not possess"—as is the case here—"or a judgment that purports to grant the State custody of a bond, but not title"—as was the case in the *New Jersey* litigation.[6]

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[6] In *Estes v. U.S. Dept' of the Treasury*, the states argued that the amended regulations were arbitrary and capricious because they represented a change in policy without an explanation for that change. *See* 219 F. Supp. 3d 17, 27–28; *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies so long as they provide a reasoned explanation for the change.") The district court rejected this argument, holding that the amended regulation was not a policy change

II

There is an additional reason that the States cannot prevail. The States concede that even if Federal law recognized them as the rightful bond owners, they could have no greater rights than the original bond owners. *See* Oral Arg. at 35:45–36:00. In general, a bond owner must "present the bond to an authorized paying agent for redemption." 31 C.F.R. § 315.39(a). The States cannot do so here since they do not have physical possession of the bonds.[7] However, the States advance several reasons for why they need not present the physical bonds for redemption.

A

The States maintain that they need not present the physical bonds because the bonds should be considered "lost" and the States can meet the requirements for redeeming lost bonds. The Claims Court agreed. Under 31 C.F.R. § 315.25, "[r]elief, by the issue of a substitute bond or by payment, is authorized for the loss . . . of a bond after receipt by the owner." When a bond is lost, "the savings bond must be identified by serial number and the

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but rather "a clarification of prior guidance" and "simply elaborated on the standards" followed by Treasury before. *Estes,* 219 F. Supp. 3d at 27–31. The court also rejected the states' Constitutional challenges (based on the Appointments Clause and Tenth Amendment) to the amended regulations, *id.* at 37–41, and the States do not renew those arguments here.

[7] As discussed above, there is no issue here regarding bonds that the States possess. Treasury allowed the States to redeem such bonds, invoking its authority under 31 C.F.R. § 315.90 to waive the provisions that only the original bond owner may redeem the bond, *e.g.*, 31 C.F.R. § 315.15. And when a state possesses the bonds, it is of course able to present the physical bonds for payment.

applicant must submit satisfactory evidence of the loss." *Id.* There is an exception to the serial number requirement: "If the bond serial number is not known, the claimant must provide sufficient information to enable" the government "to identify the bond by serial number." 31 C.F.R. § 315.26(b). But if an owner seeks to redeem the bond "six years or more after the final maturity of a savings bond"—which applies to all bonds at issue here—"[n]o claim . . . will be entertained, unless the claimant supplies the serial number of the bond." 31 C.F.R. § 315.29(c). In other words, the regulations foreclose the option of redeeming a bond by providing other identifying information when the bonds at issue are six years or more past maturity.

The government contends that the bonds here are not "lost" within the meaning of the regulations, because here there is no evidence that the bonds have been lost by the original owners. We need not resolve this issue, because even if the bonds here are considered lost, the States do not have the bond serial numbers as required by 31 C.F.R. § 315.29(c).

B

Kansas argues that it is entitled to relief under the regulation governing "nonreceipt of a bond," 31 C.F.R. § 315.27, which does not require the bond owner to provide the serial number. That regulation provides that "[i]f a bond issued on any transaction is not received, the issuing agent must be notified as promptly as possible and given all information available about the nonreceipt." *Id.* "If the application is approved, relief will be granted by the issuance of a bond bearing the same issue date as the bond that was not received." *Id.* This regulation does not apply here. It is directed at the situation where an individual purchases a bond but does not receive it—in other words, where Treasury fails to deliver the bond to the original owner. Indeed, Arkansas (unlike Kansas) recognizes that this provision governs "those cases where a bond 'is not

received' by the original owner in the first place"—which is not the situation here. Arkansas Resp. Br. at 50.

C

Arkansas contends that if it can properly claim ownership of the bonds under 31 C.F.R. § 315.20—an argument rejected earlier in part I—it need not present the physical bonds or the bond serial numbers. There is no basis for this contention in the regulations. The provisions in 31 C.F.R. §§ 315.20–23 lay out requirements for establishing ownership when ownership transferred due to proceedings such as bankruptcy or divorce. They also establish certain circumstances in which Treasury will not recognize the transfer of ownership, such as when judicial proceedings are still pending. *See* 31 C.F.R. § 315.20(c) (stating that Treasury "will not accept a notice of an adverse claim or notice of pending judicial proceedings"). But the general requirements for redeeming a bond—such as presenting the physical bond, or, if the bond is lost, providing the serial number—still apply, and the States cannot meet them.[8]

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[8] Alternatively, Arkansas argues that since Treasury has exercised its waiver authority under 31 C.F.R. § 315.90(a) to allow states to redeem bonds where the states had both title and possession, its refusal to extend such a waiver here "violates its duty of good faith and fair dealing" implicit in the bond contract. Arkansas Resp. Br. at 53–54. We disagree. When a state has possession and title, Treasury has been willing to waive the prohibition on transfers of ownership and the requirement that only the registered owner may redeem a bond. *See* 31 C.F.R. § 315.15. But Treasury does *not* waive the requirement that the owner must present the physical bond (or, if applicable, the bond serial number). *See* 31 C.F.R. §§ 315.39(a), 315.25, 315.29(c). Treasury's refusal to waive those requirements here does not violate the provisions of the bond

D

Finally, both States argue that even if they must provide the bond serial numbers, the government has the obligation under the Freedom of Information Act ("FOIA") to disclose those serial numbers to the States, or, alternatively, that the government through discovery may be compelled to ascertain the serial numbers.

The States suggest that the government is obligated to provide serial numbers in response to a FOIA request, citing 31 C.F.R. § 323.2(b). But that regulation merely restricts who may obtain information through a FOIA request, providing that securities records "will ordinarily be disclosed only to the owners of such securities." *Id.* (emphasis added). It does not specify what information may be obtained and under which circumstances. In any event, whether the States have the right to obtain serial numbers of bonds through a FOIA request is not before us. Kansas filed such a FOIA request, which Treasury denied.[9] Kansas did not pursue further review in court, which it would

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contract, and the "implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Dobyns v. United States*, 915 F.3d 733, 739 (Fed. Cir. 2019) (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010)).

[9] Treasury's denial of Kansas's FOIA request rested on two grounds. First, Treasury stated that it lacked responsive records because its records are not compiled or searchable by the state listed in the bond's registration. Second, it determined that disclosing bond records to someone other than the registered owner would, under the circumstances, constitute an unwarranted invasion of personal privacy pursuant to FOIA Exemption 6. *See* 5 U.S.C. § 552(b)(6).

have had to seek in district court. *See* 5 U.S.C. § 552(a)(4)(B). The Claims Court therefore properly declined to rely on FOIA, noting that it has no jurisdiction over denials of FOIA requests. *See Laturner*, 135 Fed. Cl. at 505 n.3.

Alternatively, the States argue that they should be entitled to obtain the bond serial numbers through the ordinary discovery process. While the Claims Court opinion is not entirely clear, it appears to have agreed. However, the court recognized in certifying its orders for interlocutory appeal that "the burdens of discovery going forward (both in terms of effort and expense) will undoubtedly be formidable given the state of Treasury's savings bond records." J.A. 5. Treasury's bond records are not digitized and therefore not computer-searchable. Nor are they organized by the state listed in the bond's registration. For that reason, locating the serial numbers of the bonds would require manually searching approximately 3.8 billion savings bonds records to identify those whose registered owners had an address in Kansas or Arkansas. Treasury estimates that locating these bonds here would cost $100 million and take over 2,000 hours of employee time. J.A. 817.

We need not decide whether locating the bond serial numbers would be unduly burdensome such that it would be an abuse of discretion to grant the States' discovery request. That is so because requiring the government to disclose the bond serial numbers as a matter of discovery would impermissibly circumvent the requirement in 31 C.F.R. § 315.29(c) that the bond owner provide the serial number to redeem a bond six or more years past maturity. Adopting the States' position would effectively eliminate this requirement, as a bond holder could always file suit and then obtain the serial number through discovery. This would contravene the principle that the Federal Rules of Civil Procedure cannot "enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 423

(2010) (Stevens, J., concurring) ("A federal rule . . . cannot govern a particular case in which the rule would displace a state law that . . . functions to define the scope of the state-created right."); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503–04 (2001) (noting that if state law granted a particular right, "the federal court's extinguishment of that right" through application of a Rule of Civil Procedure "would seem to violate this limitation" contained in § 2072(b)).

The Second Circuit's decision in *Federal Treasury Enterprise Sojuzplodoimport v. SPI Spirits Ltd.*, 726 F.3d 62 (2d Cir. 2013), provides an illustration. There, the plaintiff sought to sue for trademark infringement under the Lanham Act, but could not meet the Lanham Act's statutory standing requirement, which "permits only 'registrants' to bring actions for infringement of registered marks." *Id.* at 83. The plaintiff was not the registrant but argued that it could nonetheless bring suit because the real party in interest had ratified the plaintiff's suit as permitted by Federal Rule of Civil Procedure 17(a). The Second Circuit held that the corporation could not use Rule 17(a) "to bypass the standing requirement" in the Lanham Act. *Id.* at 83. The court reasoned that "[t]o enlarge standing [by applying Rule 17] would extend the entitlement to sue to a new party that is otherwise unauthorized under the" Lanham Act, and thus "amount to an improper expansion of the substantive rights provided by the Act." *Id.*; *see also Eden Toys, Inc. v. Florelee Undergarment Co.,* 697 F.2d 27, 32 n.3 (2d Cir. 1982) ("While [Federal Rule of Civil Procedure 17(a)] ordinarily permits the real party in interest to ratify a suit brought by another party, the Copyright Law is quite specific in stating that only the 'owner of an exclusive right under a copyright' may bring suit." (internal citation omitted) (quoting 17 U.S.C. § 501(b) (1980))), *superseded on other grounds by* Fed. R. Civ. P. 52(a).

Similarly, here the States cannot use the discovery rules to bypass the serial number requirement of the

Treasury regulations. Allowing the States to do so would improperly expand the substantive right to payment under the Treasury regulations, since it would extend the right to receive payment to circumstances in which the claimant would otherwise not be entitled to payment.

This is also a situation in which the bond holders have agreed to the requirements of the Treasury regulations as part of the bond contract. It is well-established that "before suit has been filed, before any dispute has arisen," parties may waive various rights through contract—even those based in the Constitution, such as due process rights to notice and a hearing. *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 184–85 (1972); *see also Herman Miller, Inc. v. Thom Rock Realty Co.*, 46 F.3d 183, 189 (2d Cir. 1995) (enforcing contract provision waiving right to a jury trial). It follows that even if bond holders might otherwise be entitled to certain discovery, they may limit that right by agreeing to the terms of the bond contract, which require them to present the physical bonds or the bond serial numbers for payment.

III

Finally, the States assert that Treasury's denial of their redemption requests was a "taking" of their property. The essence of a takings claim is that the government "takes possession of an interest in property for some public purpose" and must therefore "compensate the former owner." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). But here the government has not taken possession of any interest in the bonds. The bonds remain the property of the original owners, who under Treasury regulations retain the right to redeem the bonds at any time. The States simply do not have a property interest in the bonds, and, even if they did, they can have no greater property interest than the original owners. *See A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1151 (Fed. Cir. 2014) ("[T]he existence of a valid

property interest is necessary in all takings claims." (quoting *Wyatt v. United States*, 271 F.3d 1090, 1097 (Fed. Cir. 2001)). Because no property interest of the States has been impaired, there can be no taking.

CONCLUSION

Because the States' escheat laws attempt to transfer ownership of the bonds to the States in contravention of Treasury regulations, they are preempted by Federal law. In addition, because the States lack the serial numbers or possession of the bonds at issue, they could not redeem the bonds even if they validly owned them.

We reverse the judgment below and remand with instructions to enter summary judgment for the government.

REVERSED

COSTS

No costs.

In the United States Court of Federal Claims

No. 16-43C
(Filed: August 8, 2017)

ANDREA LEA, Auditor of the State of Arkansas, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Keywords: Summary Judgment; Breach of Contract; U.S. Savings Bonds; Preemption; Intergovernmental Immunity; Due Process Clause of the Fourteenth Amendment; Breach of Contract; 31 C.F.R. § 315.20(b).

David H. Thompson, Cooper & Kirk, PLLC, Washington, DC, for Plaintiff. *Peter A. Patterson* and *John D. Ohlendorf*, Cooper & Kirk, PLLC, and *Joseph H. Meltzer* and *Melissa L. Troutner*, Kessler Topaz Meltzer & Check LLP, Radnor, PA, Of Counsel.

Eric P. Bruskin, Senior Trial Counsel, Civil Division, U.S. Department of Justice, Washington, DC, with whom were *Steven J. Gillingham*, Assistant Director, *Robert E. Kirschman, Jr.*, Director, and *Chad A. Readler*, Acting Assistant Attorney General, for Defendant. *Theodore C. Simms, II*, Senior Counsel, U.S. Department of the Treasury, and *Albert S. Iarossi*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Of Counsel.

OPINION AND ORDER

KAPLAN, Judge.

In this breach-of-contract case, Plaintiff Andrea Lea, Auditor of the State of Arkansas (Arkansas), claims that Arkansas has obtained title under the state's Unclaimed Property Act to a large but unknown number of matured, unredeemed United States savings bonds, and that the government has wrongfully failed to redeem those bonds. The bonds, issued by the United States Department of the Treasury (Treasury), carry thirty- or forty-year maturity periods. Although Arkansas claims that it owns the bonds, it does not possess the bond certificates that Treasury issued when the bonds were purchased. Nevertheless, pursuant to a state court judgment of escheat, Arkansas contends that it has obtained title to all unredeemed bonds whose holders' last known addresses, as shown on Treasury's records, are in the state. These bonds are known as the "absent bonds."

Arkansas has moved for partial summary judgment as to the government's liability for failing to redeem the bonds or to provide Arkansas with identifying

information about them. The government has also moved for summary judgment on all of Arkansas's claims. It contends that, for several reasons, Treasury did not breach the savings bond contracts when it refused to redeem the absent bonds. Among other things, it claims that Treasury's savings bond regulations do not permit transfers of ownership under the Unclaimed Property Act, and that Arkansas's lack of possession of the bond certificates is fatal to its claims; that the Unclaimed Property Act runs afoul of principles of federal supremacy; and that the state court judgment of escheat was constitutionally infirm.

For the reasons discussed below, the Court concludes that the government's arguments lack merit, and that the undisputed facts entitle Arkansas to summary judgment with respect to its ownership of the absent bonds and the government's liability to it. Accordingly, the government's motion for summary judgment is **DENIED**, and Arkansas's motion for partial summary judgment is **GRANTED**.

BACKGROUND

I. The United States Savings Bond Program and Implementing Regulations

A. Overview

In the exercise of its power to "borrow Money on the credit of the United States," U.S. Const. art. I, § 8, cl. 2, Congress has authorized Treasury to "issue savings bonds and savings certificates," the proceeds of which "shall be used for expenditures authorized by law," 31 U.S.C. § 3105(a); see also Free v. Bland, 369 U.S. 663, 666–67 (1962). Over the years, Treasury has issued such bonds in various Series, each designated by a letter of the alphabet. See, e.g., 31 C.F.R. Part 315 (regulations governing Series A, B, C, D, E, F, G, H, J, and K bonds). Treasury issued the bonds in paper form until 2012, when it switched to an all-electronic system. See Treasury Looks Back at 76 Years of Paper U.S. Savings Bonds As Move to Online Savings Bonds to Save Taxpayers $120 Million, TreasuryDirect.gov (Dec. 27, 2011), https://www.treasurydirect.gov/news/pressroom/pressroom_comotcend1211.htm.

"It is well established that savings bonds are contracts between the United States and the owners of the bonds . . . ." Estes v. United States, 123 Fed. Cl. 74, 81 (2015) (citing Treasurer of N.J. v. U.S. Dep't of the Treasury, 684 F.3d 382, 387 (3d Cir. 2012) and Rotman v. United States, 31 Fed. Cl. 724, 725 (1994)). The contracts' terms are set forth in Treasury's savings bond regulations, found in Part 315 of Title 31 of the Code of Federal Regulations. See id. As discussed below, the regulations prescribe (among other things) "the form and amount of an issue and series"; "the way in which [the savings bonds] will be issued"; "the conditions, including restrictions on transfer, to which they will be subject"; and "conditions governing their redemption." 31 U.S.C. § 3105(c)(1)–(4).

As noted, the bonds typically carry long maturity periods—often thirty or forty years. See The History of U.S. Savings Bonds, TreasuryDirect.gov, https://www.treasurydirect.gov/timeline.htm?src=td&med=banner&loc=consumer (last visited August 4,

2017). Treasury issued millions of savings bonds between the 1940s and the 1970s. See id. Although most of the matured bonds have been redeemed, millions remain unredeemed. See Savings Bonds and Notes (SBN) Tables and Downloadable Files, TreasuryDirect.gov, https://www.treasurydirect.gov/govt/reports/pd/pd_sbntables_downloadable_files.htm (last updated Apr. 27, 2012). As of March 2012, the value of such matured, unredeemed savings bonds was approximately $16 billion. See id.

B. Issuance and Registration

Under Treasury's regulations, "[s]avings bonds are issued only in registered form." 31 C.F.R. § 315.5(a) (2014).[1] This means that "the names of all persons named on the bond and the taxpayer identification number (TIN) of the owner, first-named coowner, or purchaser of a gift bond are maintained on [Treasury's] records." Id. § 315.2(n). According to the regulations, "[r]egistration is conclusive of ownership." Id. § 315.5(a). Thus, registration "express[es] the actual ownership of, and interest in, the bond." Id.

C. Restrictions on Transfer

The regulations contain numerous conditions restricting the transfer of savings bonds and inhibiting third-party attempts to assert rights against them. First, § 315.15 establishes that bonds "are not transferable and are payable only to the owners named on the bonds, except as specifically provided in these regulations and then only in the manner and to the extent so provided." Id.

Next, subsections 315.20–.23 set forth "limitations on judicial proceedings" applicable to "adverse claims affecting savings bonds."[2] Id. § 315.20. In particular, § 315.20(b) provides that Treasury "will recognize a claim against an owner of a savings bond . . . if established by valid, judicial proceedings, but only as specifically provided in this subpart." In that regard, § 315.20(a) specifies that Treasury "will not recognize a judicial determination that gives effect to an attempted voluntary transfer inter vivos of a bond, or a judicial determination that impairs the rights of survivorship conferred by these regulations upon a coowner or beneficiary." Id. Further, § 315.23(a) instructs that "[t]o establish the validity of judicial proceedings," a claimant must submit "certified copies of the final judgment, decree, or court order, and of any necessary supplementary proceedings."

Before 2015, the regulations did not expressly mention state court judgments of escheat of the type at issue in this case. See Estes, 123 Fed. Cl. at 83–86 (analyzing the regulations); see also id. at 90 n.13 (noting that Treasury had proposed revised

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[1] Unless otherwise noted, all references to Treasury's savings bond regulations are to the regulations in effect on November 20, 2015, the date Arkansas obtained the judgment of escheatment from the state court.

[2] These four subsections form Subpart E of the regulations.

regulations expressly tailored to state court escheat judgments); Regulations Governing United States Savings Bonds, 80 Fed. Reg. 80,258-01 (Dec. 24, 2015) (codified at 31 C.F.R. pts. 315, 353, 360) (final rule promulgating the revised regulations).

D. Redemption and Relief for Lost, Stolen, Destroyed, or Mutilated Bonds

The regulations specify that, as a general matter, "[p]ayment of a savings bond will be made to the person or persons entitled under the provisions of these regulations." 31 C.F.R. § 315.35(a). Series E bonds will be paid "at any time after two months from issue date at the appropriate redemption value," while Series H bonds "will be redeemed at face value at any time after six (6) months from issue date." Id. § 315.35(c), (e). Series A, B, C, D, F, and J bonds "will be paid at face value," while Series G and K bonds "will be paid at face value plus the final semiannual interest due." Id. § 315.35(b), (d).

Subsection 315.39, entitled "[s]urrender for payment," provides that individual owners or co-owners of Series A–E bonds "may present the bond to an authorized payment agent for redemption." Id. § 315.39(a). "[F]or all other cases," the "owner or coowner, or other person entitled to payment" must "appear before an officer authorized to certify requests for payment, establish his or her identity, sign the request for payment, and provide information as to the address to which the check in payment is to be mailed." Id. § 315.39(b).

Subsection 315.25 authorizes relief in the event of "the loss, theft, destruction, mutilation, or defacement of a bond after receipt by the owner." Id. Such relief may include "the issue of a substitute bond or . . . payment." Id. "As a condition for granting relief," Treasury "may require a bond of indemnity, in the form, and with the surety, or security [Treasury] considers necessary to protect the interests of the United States." Id. Further, "[i]n all cases[,] the savings bond must be identified by serial number and the applicant must submit satisfactory evidence of the loss, theft, or destruction." Id. If the serial number of the bond is not known, "the claimant must provide sufficient information to enable [Treasury] to identify the bond by serial number." Id. § 315.26(b) (citing id. § 315.29(c)).

E. Additional Relevant Regulations

The savings bond regulations also contain a waiver provision. Id. § 315.90. Under § 315.90, Treasury "may waive or modify any provision or provisions of [the] regulations . . . . [i]f such action would not be inconsistent with law or equity"; "if it does not impair any existing rights"; and "if [Treasury] is satisfied that such action would not subject the United States to any substantial expense or liability." Further, the regulations empower Treasury to "require . . . [s]uch additional evidence as [it] may consider necessary or advisable, or [to require] [a] bond of indemnity, with or without surety, in any case in which [it] may consider such a bond necessary for the protection of the interests of the United States." Id. § 315.91.

Finally, Treasury has issued regulations to govern the disclosure of records and information related to outstanding securities, including savings bonds. See id. § 323.2. Specifically, § 323.2(b) states that "[r]ecords relating to the purchase, ownership of, and transactions in Treasury securities . . . will ordinarily be disclosed only to the owners of such securities, their executors, administrators or other legal representatives or to their survivors." Id. The regulation notes that "[t]hese records are confidential because they relate to private financial affairs of the owners." Id. Further, according to Treasury, these records "fall[] within the category of 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy' under the Freedom of Information Act (FOIA)." Id. (citing 5 U.S.C. § 552(b)(6)). Thus, according to Treasury, such records are exempt from FOIA requests. See id.

II. Background on State Unclaimed Property Laws

All fifty states have statutes governing the disposition of unclaimed or abandoned real and personal property. See David J. Epstein, 1-1 Unclaimed Property Law § 1.06(1) (2017). These laws are "rooted in the common-law doctrine of escheat, under which '[s]tates as sovereigns may take custody of or assume title to abandoned . . . property.'" Estes, 123 Fed. Cl. at 77 (citation omitted) (quoting Delaware v. New York, 507 U.S. 490, 497 (1993)) (alterations in original).

For the most part, state unclaimed property laws are custodial in nature. See Epstein, supra, § 1.06(2). When a state with a custody-based unclaimed property law acquires unclaimed property, it "does not take title to [the] unclaimed property, but takes custody only, and holds the property in perpetuity for the owner." Estes, 123 Fed. Cl. at 77 (quoting Unif. Unclaimed Prop. Act, prefatory note (1995), http://www.uniformlaws.org/shared/docs/unclaimed%20property/uupa95.pdf). Indeed, Arkansas's Unclaimed Property Act is custodial in nearly every respect. See Ark. Code Ann. § 18-28-204 ("Except as otherwise provided in this subchapter or by other statute of this state, property that is presumed abandoned, whether located in this or another state, is subject to the custody of this state . . . .").

With respect to U.S. savings bonds, however, Arkansas's Unclaimed Property Act allows the state to take title to (rather than assert custody over) bonds deemed abandoned under the Act. See id. § 18-28-231. Specifically, the relevant provisions provide that "a United States savings bond held or owing in this state is presumed abandoned if the savings bond remains unclaimed for five (5) years after the date of maturity of the United States savings bond"; that such bonds "shall escheat to the state two (2) years after becoming abandoned property" via an action for escheatment filed by the administrator of the unclaimed property regime; and that "[i]f no person files a claim or appears at the hearing to substantiate a claim or if the court determines that a claimant is not entitled to the property claimed by the claimant, then the court shall enter judgment that . . . [a]ll property rights and legal title to and ownership of the United States savings bond or proceeds from the United States savings bond . . . are vested solely in the state." Id. § 18-28-231(a)–(e)." Id.

III. Treasury's Historical Treatment of States' Attempts to Redeem Bonds Obtained Via Their Unclaimed Property Laws

As discussed below, the government argues that the Court owes deference to the interpretation of Treasury's regulations that it has proffered in this case. Because Treasury's historical application of its regulations is relevant to whether the Court owes deference to Treasury's proffered interpretation, the Court sets forth below Treasury's historical treatment of states' attempts to redeem U.S. savings bonds in some detail.

A. The 1952 Escheat Decision Regarding Bonds in Possession and New York's Custodial Unclaimed Property Law

Treasury first confronted a state's attempt to redeem bonds obtained under an unclaimed property law in 1952, when it refused the State of New York's request to redeem four bonds in its possession. See Def.'s Mot. for Summ. J. (Def.'s Mot.) App. at A1, ECF No. 14-2 (Bureau of the Public Debt, Public Debt Bulletin No. 111 (Feb. 27, 1952)) (hereinafter "the 1952 Escheat Decision"). New York obtained the bonds pursuant to its unclaimed property law after their owner died intestate in a state institution. Id. Treasury noted that under New York's law, the state took custody of, but not title to, abandoned property. Id. at A3–4. According to Treasury, under those circumstances, payment of the bond's proceeds into New York's custody would violate the bond's terms (as set forth in Treasury's regulations). Id. at A2–3. Treasury explained that such a payment would alter the rights of the parties to the bond contract by "substitut[ing]" the bondholder's right to claim redemption from the United States for a right to "prosecute a claim against the State Comptroller of New York"; or, alternatively, by exposing the United States to "the necessity of making double payment" and then pursuing "a right to claim relief from the Comptroller" itself. See id. at A2.

In Treasury's view, "[n]either of th[ose] possible alterations of contract is contemplated in the agreement by which the United States pledges its faith on its securities." Id. And, citing Clearfield Trust Company v. United States, 318 U.S. 363, 366 (1943), Treasury asserted the supremacy of the rights created by federal law over the operation of New York's unclaimed property law. See id. at A2–3.

Treasury then contrasted New York's request with a hypothetical request for payment made by "one who succeeds to the title of the bondholder" pursuant to the regulations, such as "the duly qualified representative of the estate of a decedent bondholder." Id. at A3 (internal quotation and emphasis omitted). In that case, Treasury stated, payment "is not regarded as a violation of the agreement, but, on the contrary, as payment to the bondholder in the person of his successor or representative." Id. (emphasis omitted). "Thus," Treasury continued, "although the regulations do not mention such a case, [Treasury] recognizes the title of the state when it makes a claim based upon a judgment of escheat." Id.

B. Subsequent Decisions Where States Were In Possession of U.S. Savings Bonds

Treasury reiterated its position on custodial unclaimed property laws in 1970, when the State of Oklahoma tried to redeem bonds it had obtained from unclaimed safe deposit boxes. See id. at A5–7. According to Treasury, one of "the problems involved in recognizing a State's right to receive payment of unclaimed or abandoned Government securities . . . . relate[d] to the issue as to whether the State has actually succeeded to title and ownership of the securities, or whether it is acting as a repository." Id. at A6. "This is a critical distinction," Treasury stated, because "the discharging of the obligation represented by the securities must have validity for all jurisdictions." Id. "Ordinarily," Treasury continued, "such a discharge results only where a valid escheat has occurred." Id. Oklahoma's unclaimed property law, however, "d[id] not purport to vest title to the abandoned property in the State," but "[was] quite clear that the State's role [wa]s essentially custodial." Id. at A7.

Over the next thirty years, Treasury repeatedly denied claims from states with custodial unclaimed property laws and bonds in their possession. See id. at A8 (Indiana, Nov. 19, 1971); id. at A10 (New Hampshire, May 12, 1976); id. at A12 (South Carolina, May 26, 1976); id. at A15 (Hawaii, July 14, 1976); id. at A17 (Indiana, Jan. 18, 1977); id. at A19 (North Dakota, June 24, 1977); id. at A22 (Illinois, Oct. 27, 1980); id. at A39 (Kentucky, Sept. 6, 1983); id. at A40 (Alaska, Oct. 25, 1983); id. at A109 (Alaska, Feb. 6, 1992); id. at A112 (Oklahoma, Aug. 5, 1999). As early as 1976, Treasury described as "long-standing" its position that it would "recognize claims by States for payment of United States securities where the States have actually succeeded to the title and ownership of the securities pursuant to valid escheat proceedings." Id. at A10.

Treasury apparently first considered a state's claim based on a title-based unclaimed property law in 1982, in response to a request for information from the Commonwealth of Massachusetts. See id. at A24–38. The request concerned approximately $250,000 in savings bonds that Massachusetts obtained via its unclaimed property law. Id. at A24. At the time, Massachusetts's unclaimed property law provided that "[p]roperty which has been surrendered to the state treasurer under [the unclaimed property law] shall vest in the commonwealth." Id. at A31. In its request, Massachusetts asked Treasury whether it "would . . . be able to either escheat to [the Commonwealth] the approximately $250,000 [in] bonds now accumulated . . . or some how [sic] through your regulation or ruling be able to return them to their rightful heirs." Id. at A24.

In its response, Treasury informed Massachusetts that it would recognize a state's claim pursuant to a title-based unclaimed property law if the law included sufficient due process protections for the named bondholders. Id. at A37. Specifically, Treasury stated that:

> In accordance with the bond contract, we will recognize a request for payment on behalf of the state pursuant to a statute which provides for the administrative escheat, i.e., vesting of title, of abandoned property, where the application of the statute is

> conditioned upon the furnishing of adequate notice and reasonable opportunities for interested parties to be heard.

Id. Further, Treasury elaborated, "[u]nder the terms of the bond contract, we could make payment to the Treasurer of the Commonwealth where the Commonwealth, through appropriate court proceedings, takes the owner's title to itself." Id. at A38. "In that event, [Treasury] would pay the owner in the person of its successor, the Commonwealth." Id.

C. Treasury's Treatment of States' Requests to Obtain the Proceeds of Bonds They Did Not Possess

1. Decisions and Guidance

By the early 2000s, the number of matured, unredeemed savings bonds ballooned as bonds purchased in the 1960s and 1970s finally reached maturity. In 2004, several states requested that Treasury redeem these bonds in bulk (the "2004 requests"). The states did not possess the vast majority of these bonds, but, according to the states, the bonds were statistically likely to be in the hands of their citizens. See, e.g., id. at A127 (March 30, 2004 letter from the treasurer of Kentucky "estimat[ing] that over $150 million" in unredeemed savings bonds "rightfully belong[] to Kentuckians" and "requesting . . . that [Treasury] return these funds to . . . Kentucky so that [the] Unclaimed Property Division . . . can begin the work of returning this money to its rightful owner[s]"); id. at A129 (April 2, 2004 letter from the treasurer of the District of Columbia estimating that "between $50 and $75 million" in unredeemed savings bonds belonged to District of Columbia citizens and "seeking to have th[o]se assets and records transferred to the District of Columbia so that we can begin to find the rightful owners"); id. at A130 (April 21, 2004 letter from the treasurer of New Hampshire positing that "somewhere between $35 million and $45 million" in unredeemed savings bonds "would likely belong to New Hampshire residents" and requesting that Treasury "provide owner information and deliver funds due" for those bonds).

Treasury denied the 2004 requests. E.g., id. at A140–41 (Kentucky); id. at A138–39 (District of Columbia); id. at A142–43 (New Hampshire). In its denials, Treasury explained that it "d[id] not have the legal authority" to grant the states' requests because "[a] U.S. Savings Bond is a federal contract between the United States and the registered owner on the bonds, and under federal regulations payment may only be made to the registered owner." E.g., id. at A140. "In order for the bonds to be paid," Treasury continued, the state "must have possession of the bonds, statutory authority to obtain title to the individual bonds, obtain an order of escheat from a court of competent jurisdiction vesting title in the [state] to the individual bonds, and apply to [Treasury] for payment." E.g., id.

In 2006, Florida submitted a similar request to redeem or obtain custody over the proceeds of bonds that it did not possess. See id. at A148. As with the 2004 requests, Treasury denied Florida's request. Id. Unlike with the denials of the 2004 requests, however, Treasury did not mention any possession requirement. See id. Rather, Treasury stated that:

> The applicable regulations would permit the state of Florida to be paid for the bonds, pursuant to an appropriate state statute and after due process, by obtaining an order of escheat from a court of competent jurisdiction vesting title in the state, and then applying for payment to the Department of the Treasury pursuant to the procedures established by the regulations that all bond owners must utilize.

Id.

2. Subsequent Litigation

In September 2004, the State of New Jersey filed an action in federal district court challenging Treasury's denial of its 2004 request to pay over the proceeds of matured but unredeemed bonds whose owners' last known addresses were in the state. See Treasurer of N.J., 684 F.3d at 392. Several more states eventually joined that litigation. See id. at 392–93. The district court dismissed the case for failure to state a claim, reasoning that the states' custodial unclaimed property laws conflicted with Treasury's regulations. Id. at 394–95. Further, the district court found that applying those laws to unredeemed bonds that the states did not possess would violate the principle of intergovernmental immunity. Id.

The states appealed the decision to the United States Court of Appeals for the Third Circuit. See id. at 395. In its brief before the Third Circuit, the government acknowledged that although Treasury's regulations "generally provide that payment on a U.S. savings bond will be made only to the registered owner," they also set forth "exceptions to this rule, including cases in which a third party obtains ownership of the bond through valid judicial proceedings." Br. for Appellees at 6, Treasurer of N.J., 684 F.3d 382 (No. 10-1963) (citing 31 C.F.R. §§ 315.20(b) and 315.23). Further, Treasury advised that "[a] State may satisfy this ownership requirement 'through escheat, a procedure with ancient origins whereby a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears.'" Id. (quoting Texas v. New Jersey, 379 U.S. 674, 675 (1965)). "Accordingly," the government continued, it had "long advised state governments that, to receive payment on a U.S. savings bond, [the] State must go through an escheat process that satisfies due process and awards title to the bond to the State, making the State the rightful owner of the bond." Id.

According to the government's brief, however, the states involved in the litigation "d[id] not claim to have obtained title to any of the U.S. savings bonds at issue," and thus "d[id] not assert a right to receive payment under the federal regulation that authorizes payment to a third party that obtains ownership of a bond through valid judicial proceedings." Id. at 8. Nowhere in its brief did the government assert the states' lack of possession as a factor affecting their claims. See id.

The Third Circuit affirmed. Treasurer of N.J., 684 F.3d at 413. With respect to preemption, it concluded that Treasury's regulations "preempt[ed] the States' unclaimed property acts insofar as the States s[ought] to apply their acts to take custody of the

proceeds of the matured but unredeemed savings bonds" because the acts "conflict[ed] with federal law regarding [the] bonds in multiple ways." Id. at 407. First, paying over the proceeds of the bonds would inhibit Treasury's "goal of making the bonds 'attractive to savers and investors.'" Id. at 407–08 (quoting Free, 369 U.S. at 669). Congress, the court noted, had authorized Treasury to "implement regulations specifying that 'owners of savings bonds may keep the bonds after maturity'"; the states' unclaimed property laws, "by contrast, specify that matured bonds are abandoned and their proceeds are subject to the acts if not redeemed within a time period as short as one year after maturity." Id. (quoting 31 U.S.C. § 3105(b)(2)(A)).

Second, by "effectively . . . substitut[ing] the respective States for the United States as the obligor on the affected savings bonds," the operation of the unclaimed property laws "would interfere with the terms of the contracts." Id. at 408. Instead of the "federal redemption process . . . set forth . . . in the relevant statutes and regulations," bondholders "would have to comply with [the] procedures set forth in the various States' unclaimed property acts." Id. The "application of the States' acts in the redemption process" would thus impermissibly "alter [the redemption] process as contemplated in the relevant federal regulations." Id. at 409.

On the principle of intergovernmental immunity, the Third Circuit determined that the operation of the states' unclaimed property laws would "interfere with Congress's '[p]ower to dispose of and make all needful Rules Acts and Regulations respecting the . . . Property belonging to the United States.'" Id. at 410 (quoting U.S. Const. art. IV, § 3, cl. 2) (alterations in original). "Although the United States must pay holders of matured bonds the sums due on the bonds when the owners present them for payment," the court reasoned, "until it does so the funds remain federal property." Id. at 411. Further, the Third Circuit determined that the states' unclaimed property laws would unlawfully regulate the federal government by requiring it to comply with state accounting, record-keeping, and reporting requirements. Id. In the court's view, "forcing the Federal Government to account to the plaintiff States for unredeemed savings bonds or their proceeds . . . would result in a direct regulation of the Federal Government in contravention of the Supremacy Clause." Id. at 412.

In the wake of the Third Circuit's ruling, Montana and four other states filed a petition for a writ of certiorari to the United States Supreme Court. See Dir. of the Dep't of Revenue of Mont. v. Dep't of Treasury, 133 S. Ct. 2735 (2013) (mem.). The Solicitor General opposed certiorari. See Pl.'s Combined Br. in Opp'n to Def.'s Mot. for Summ. J. & In Supp. of Her Cross-Mot. for Summ. J. (Pl.'s Mot.) App. at 176–209, ECF No. 15-2 [hereinafter "SG's Brief"]. As in the briefing before the Third Circuit, the Solicitor General acknowledged that under 31 C.F.R. § 315.20(b), third parties may "obtain[] ownership of . . . bond[s] through valid judicial proceedings." Id. at 183. "Accordingly," the Solicitor General continued, Treasury had "long advised the States that to receive payment on a U.S. savings bond a State must complete an escheat proceeding that satisfies due process and that awards title to the bond to the State, substituting the State for the original bondholder as the lawful owner." Id. at 184. Further, as with the government's brief before the Third Circuit, the states' lack of possession of the bonds was not presented as pertinent to the issue before the Court. See id. at 176–209. The

Supreme Court ultimately denied the petition. Dir. of the Dep't of Revenue of Mont., 133 S. Ct. at 2735.

IV. Other Guidance Provided by Treasury

From time to time, Treasury has also provided public guidance on its savings bond redemption policies. As most relevant to this case, Treasury has posted information about purchasing and redeeming U.S. savings bonds on its website, TreasuryDirect.gov. From 2000 through the initiation of this litigation, an FAQ page on that website included the following question regarding states with permanent escheat laws:

> In a state that has a permanent escheat law, can the state claim the money represented by securities that the state has in its possession[?] For example, can a state cash savings bonds that it's gotten from abandoned safe deposit boxes?

See Def.'s Mot. App. at A115; see also Estes, 123 Fed. Cl. at 87 n.11. In its answer, Treasury confirmed that it "recognize[s] claims by States for payment of United States securities where the States have succeeded to the title and ownership of the securities pursuant to valid escheat proceedings." Def.'s Mot. App. at A115. "[I]n such [a] case," Treasury continued, "payment of the securities results in full discharge of . . . Treasury's obligation and the discharge is valid in all jurisdictions." Id.

V. The Estes/LaTurner Litigation[3]

On December 20, 2013, the State of Kansas filed a complaint in this Court alleging that, as a result of a state court judgment of escheat made pursuant to its unclaimed property law, it had obtained title to two sets of U.S. savings bonds. First, it alleged that it had obtained title to approximately 1,400 bonds in its possession. Second, it claimed that it had obtained title to approximately $151 million worth of U.S. savings bonds that it admittedly did not possess. See Compl. ¶¶ 1, 84, LaTurner v. United States, No. 13-1011 (Fed. Cl. Dec. 20, 2013), ECF No. 1. It also alleged that it "made proper presentment under applicable federal regulations of the U.S. savings bond contracts" for both sets of bonds. Id. ¶ 90. But while Treasury redeemed the bonds in Kansas's possession, it refused to redeem the absent bonds. Id. ¶¶ 91–92. As a result, Kansas claimed that Treasury was liable to it for breach of contract with respect to the absent

[3] On May 12, 2017, Kansas notified the Court that it was substituting the new State Treasurer, Jake LaTurner as the named public official plaintiff in Estes v. United States. See Notice, LaTurner v. United States, No. 13-1011 (Fed. Cl. May 12, 2017), ECF No. 94. Documents filed in that case (other than this Court's decision denying the government's motion to dismiss) will be cited by referencing the updated case caption, which is LaTurner v. United States.

bonds or for taking its property for public use without just compensation in contravention of the Takings Clause of the Fifth Amendment.[4] See id. ¶¶ 93, 142.

As discussed in Estes, the government moved to dismiss Kansas's breach-of-contract claims for lack of subject matter jurisdiction, and to dismiss its takings claim for failure to state a claim. 123 Fed. Cl. at 80. The Court determined, however, that it had subject matter jurisdiction over Kansas's breach-of-contract claims because "the government's argument—that Kansas was not a party to the contract[s] because under Treasury's [r]egulations it was not the owner of the Absent Bonds—[went] to the merits of Kansas's . . . claims, not th[e] Court's jurisdiction over them." Id. at 82–83. Therefore, the Court treated the government's entire motion as a motion to dismiss for failure to state a claim, and concluded that Kansas had stated a plausible claim to relief with respect to its breach-of-contract claims and its takings claims.[5] Id. at 85, 90–91.

The Court's ruling on Kansas's breach-of-contract claims turned on a narrow issue of regulatory interpretation around which the parties framed their briefs. See id. at 81–85; see also Def.'s Mot. to Dismiss at 10–16, LaTurner, No. 13-1011 (Apr. 11, 2014), ECF No. 9; Pl.'s Resp. to Def.'s Mot. to Dismiss at 22–29, LaTurner, No. 13-1011 (July 2, 2014), ECF No. 15. In particular, the government centered its arguments on Subpart E of Treasury's regulations, 31 C.F.R. §§ 315.20–.23, which (as discussed above) sets forth "[l]imitations on [j]udicial [p]roceedings" with respect to U.S. savings bonds. See Def.'s Mot. to Dismiss at 11–12, LaTurner, No. 13-1011.

Advancing a restrictive interpretation of 31 C.F.R. § 315.20(b)—which states that Treasury "will recognize a claim against an owner of a savings bond . . . if established by valid, judicial proceedings, but only as specifically provided in this subpart"—the government contended that escheat judgments could never form the basis of claims of ownership under the regulations because such judgments were not specifically provided for elsewhere in Subpart E. Id. at 11–13. Rather, according to the government, Subpart E only specifically provided for two types of claims: "claims under a divorce decree (§ 315.22(a)) and gift causa mortis claims (§ 315.22(b))."[6] Id. at 12. Thus, the

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[4] Kansas also asserted several alternative theories of liability, which are spelled out in more detail in the Court's Opinion and Order on the parties' cross-motions for summary judgment in that case. See Opinion and Order at 15–16, LaTurner, No. 13-1011 (Aug. 8, 2017), ECF No. 102. For ease of reference, the Court refers to these claims collectively as Kansas's "breach-of contract" claims.

[5] The Court did dismiss one of Kansas's alternative claims, which was based on a third-party beneficiary theory. Estes, 123 Fed. Cl. at 90.

[6] In supplemental briefing ordered by the Court, the government expanded its argument to include the additional types of judicial proceedings listed in 31 C.F.R. § 315.21, which concern payments to judgment creditors and the treatment of U.S. savings bonds in bankruptcy proceedings. See Def.'s Suppl. Br. in Supp. of Its Mot. to Dismiss at 5, LaTurner, No. 13-1011 (Jan. 15, 2015), ECF No. 28.

government contended, "[e]scheatment actions are not one of the 'valid judicial proceedings' recognized in the regulations." Id. And because "the only 'valid judicial proceedings' are the ones set forth in the regulations," the government reasoned, "[i]t makes no difference whether the states' escheatment statute purports to take title to or custody of the bonds." Id. at 13; see also Def.'s Suppl. Br. in Supp. of Its Mot. to Dismiss at 4, LaTurner, No. 13-1011 ("Only certain judicial proceedings are covered by 31 CFR 315.20, and escheat proceedings are not among them.").

The government then sought to explain away Treasury's past statements regarding state claims to bonds obtained by escheatment proceedings by contending that those statements "were made in the context of states claiming title for bonds in their possession." Def.'s Mot. to Dismiss at 13, LaTurner, No. 13-1011 (emphasis in original). The government maintained that position even after Kansas pointed out that the Treasurer of New Jersey litigation involved state claims for redemption of absent bonds. See Def.'s Reply Br. in Supp. of Its Mot. to Dismiss at 5–7, LaTurner, No. 13-1011 (Aug. 8, 2014), ECF No. 20. Further, in supplemental briefing, the government argued that its prior statements did not reflect its "considered judgment" on the meaning of its regulations; that its current litigating position did, in fact, reflect its considered judgment; and that the Court was thus required to defer to its litigating position under Auer v. Robbins, 519 U.S. 452 (1997). See Def.'s Suppl. Brief at 10–11, 15, LaTurner, No. 13-1011.

The Court was not persuaded by the government's arguments. See Estes, 123 Fed. Cl. at 85–90. First, it rejected the government's reading of § 315.20(b) as incompatible with the text of Subpart E as a whole. Id. at 85–86. The Court noted that in § 315.20(a), Treasury expressly disavowed recognition of two types of judicial determinations. See 31 C.F.R. § 315.20(a) (stating that Treasury "will not recognize a judicial determination that gives effect to an attempted voluntary transfer inter vivos of a bond, or a judicial determination that impairs the rights of survivorship conferred by these regulations upon a coowner or beneficiary"); see also Estes, 123 Fed. Cl. at 85. Accepting the government's reading of § 315.20(b), however, would render superfluous this express disavowal. Estes, 123 Fed. Cl. at 85. Further, the Court found that the government's reading "ignore[d] what appear[ed] to be [the] actual purpose" of the restrictions found in §§ 315.21 and 315.22: "to address specific considerations and concerns attendant to the types of judgments referenced" in those subsections. Id. at 86.

In an extended discussion, the Court also rejected the government's position regarding the import of its prior statements and the deference owed to its litigating position. See id. at 86–90. First, it found that the government's litigating position actively conflicted with Treasury's prior statements regarding escheat, especially statements made in connection with the Treasurer of New Jersey litigation. See id. at 87–88. That litigation, the Court noted, involved claims for custody over the proceeds of absent bonds, undercutting the government's contention that all of its prior statements were made in the context of bonds-in-possession. Id. at 88. Further, in the Court's view, possession had never served as an essential characteristic in Treasury's prior statements regarding title-based escheat, without which an escheat judgment would not have been "valid" under the regulations. See id. at 88–89. And the government's litigating position was internally inconsistent: it claimed (without any apparent factual basis) that it had

exercised its waiver authority under 31 C.F.R. § 315.90 when it redeemed the bonds in Kansas's possession; and it argued in supplemental briefing that escheat judgments were invalid under the regulations because they were proceedings in rem. See id. at 88–90. The Court thus concluded that the government's ever-evolving litigating position did not reflect its considered judgment, and thus was not entitled to Auer deference. See id. at 90 ("If anything, deference is due to the interpretation that Treasury expressed for over sixty years until the instant controversy arose.").

Accordingly, the Court rejected the government's contention that all escheat judgments—whether under a title-based or custody-based state law scheme—fell outside the category of "valid, judicial proceedings" under § 315.20(b). See id.

With respect to Kansas's takings claim, the Court, following the Federal Circuit's lead, observed that a party may properly "alleg[e] in the same complaint two alternative theories for recovery against the Government . . . one for breach of contract and one for a taking under the Fifth Amendment to the Constitution." Id. at 91 (quoting Stockton E. Water Dist. v. United States, 583 F.3d 1344, 1368 (Fed. Cir. 2009)). It therefore denied the government's motion to dismiss Kansas's claims under the Takings Clause. See id.

VI. Treasury's Revision of the Regulations and Kansas's APA Challenge

In the meantime, on July 1, 2015, Treasury issued a Notice of Proposed Rulemaking in which it proposed revising its savings bond regulations to expressly address state court judgments of escheat pursuant to title-based unclaimed property laws. See Regulations Governing United States Savings Bonds, 80 Fed. Reg. 37,559-01 (July 1, 2015). After a period of notice and comment, Treasury issued the final revised regulations on December 24, 2015. Regulations Governing United States Savings Bonds, 80 Fed. Reg. at 80,258-01. In the preamble to the revised regulations, Treasury stated that it intended for the revisions to "clarify its prior statements on escheat and to describe more formally the criteria Treasury will use to evaluate escheat claims." Id. at 80,259. Further, by promulgating a "uniform federal rule governing title escheat claims," Treasury would "provide formal notice to all states about the escheat claims it will recognize and how it will protect the rights of bond owners still in possession of their savings bonds." Id.

As relevant to the issue presented in this case, the revised rule amended 31 C.F.R. § 315.20(b) to add a sentence stating that "[e]scheat proceedings will not be recognized under this subpart."[7] Id. at 80,264. Treasury also added a new provision, § 315.88, to govern "[p]ayment to a State claiming title to abandoned bonds." Id. Under the new provision, Treasury "may, in its discretion, recognize an escheat judgment that purports to vest a State with title to a definitive savings bond that has reached the final extended maturity date and is in the State's possession." Id. But Treasury "will not recognize an

[7] Thus, the revised § 315.20(b) expressly conformed to the arguments the government made in its motion to dismiss in LaTurner.

escheat judgment that purports to vest a State with title to a bond that the State does not possess." Id.

Kansas and four other states challenged the rule under the Administrative Procedure Act (APA), 5 U.S.C. § 706. Estes v. U.S. Dep't of Treasury, 219 F. Supp. 3d 17, 22, 27 (D.D.C. 2016). They argued (among many other things) that the rulemaking was arbitrary and capricious because the new provisions "marked a change of agency policy, without any acknowledgment of that change." Id. at 27.

The District Court for the District of Columbia disagreed. Id. at 28–33. After noting that the questions it faced and the issues before this Court were "distinct in numerous respects," it concluded that the possession requirement expressed in the revised rule was not inconsistent with any clearly established prior policy.[8] Id. at 28 n.4, 31. Alternatively, the District Court concluded that even if the new rule did work a policy change, Treasury had not violated the APA in promulgating it because Treasury did not "depart from [its] prior policy sub silentio or simply disregard rules that are still on the books." Id. at 33 (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009)). Rather, it "extensively explained its Rule and its view as to why that Rule did not contradict prior statements." Id. There was thus "no basis for concluding that [Treasury] casually ignored prior policies and interpretations or otherwise failed to provide a reasoned explanation for its [Rule]." Id. (quoting Cablevision Sys. Corp. v. FCC, 649 F.3d 695, 710 (D.C. Cir. 2011)) (second alteration in original).[9]

VII. Arkansas's Claim to Ownership Over the Bonds Involved in This Case and its Redemption Request

On March 20, 2015, Arkansas amended its unclaimed property law to make U.S. savings bonds subject to title-based escheat. See Ark. Code Ann § 18-28-231. Pursuant to that law, as noted, U.S. savings bonds "held or owing" in Arkansas are presumed abandoned if they remain unredeemed for five years after the date of maturity, and may be subject to escheat via a state-court proceeding two years later. See id.

On August 5, 2015, Arkansas filed a complaint in the Circuit Court of Pulaski County in Arkansas for a declaratory judgment awarding it title over certain U.S. savings bonds. See Def.'s Mot. App. at A151. These bonds included an unknown number of absent bonds, which Arkansas estimated had a total value of $151 million. Id. Pursuant to its Unclaimed Property Act, Arkansas also filed a motion for leave to effect service on

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[8] Thus, the District Court found that although Treasury's prior statements reflected a "longstanding policy that payment requests for escheated bonds will not be honored unless a state has title ownership over those bonds," they "d[id] not express a policy that a state may redeem bonds without possessing them." Estes v. U.S. Dep't of Treasury, 219 F. Supp. 3d at 29 (emphasis in original).

[9] Kansas has appealed the District Court's ruling. See Docketing Statement, LaTurner v. U.S. Dep't of Treasury, No. 17-5015 (D.C. Cir. Mar. 2, 2017).

the owners of the absent bonds by warning order—a method of notice by publication. See id. at A157; see also Ark. R. of Civ. P. 4(f) (setting forth the procedures for effecting service by warning order). Arkansas also requested an ex parte temporary restraining order that would "mak[e] clear that title to the savings bonds . . . ha[d] already vested in the State of Arkansas by operation of" its Unclaimed Property Act. Id. at A161.

On August 17, 2015, the Pulaski County Court denied Arkansas's motion for leave to effect service by warning order and declined to issue a temporary restraining order. See id. at A160, A165. It found that, because Arkansas had presented no evidence that it had attempted to find the owners of the savings bonds, it had not made the "diligent inquiry" required by Arkansas's Rules of Civil Procedure before effecting service by warning order. Id. at A159–60. The court also "decline[d] to address the merits of [Arkansas's] Motion for a Temporary Restraining Order on an ex parte basis." Id. at A165.

Two months later, on October 16, 2015, Arkansas filed a new action in the Circuit Court for Washington County. See Compl. ¶ 42; Pl.'s Mot. App. at 2. The action apparently involved three bonds in Arkansas's possession, as well as all those absent bonds that had matured on or before October 16, 2008, and whose holders' last known addresses (as shown on Treasury's records) were in Arkansas. See Pl.'s Mot. App. at 4–6. The Washington County Court granted Arkansas leave to effect service by warning order. Compl. ¶ 43. According to Arkansas, such an order was then "published on October 18 and 25 in the Northwest edition of the Arkansas Democrat-Gazette, which has circulation covering the county in which the suit was pending, and on October 23 and 30 in the statewide edition of the Gazette, which has circulation covering all 75 counties of Arkansas." Id.

After holding a hearing, the Washington County Circuit Court issued a judgment of escheatment on November 20, 2015. Pl.'s Mot. App. at 2–18. The Court found that "those unredeemed bonds last held by Arkansas residents" were "intangible property that was abandoned in the state and is thus subject to Arkansas's Unclaimed Property Act." Id. at 9. Further, the court determined that "by operation of" the Unclaimed Property Act, "the titles to all unclaimed United States savings bonds that were last held by a resident of the State and that matured on October 16, 2008 . . . or earlier have escheated to the State and are now the property of Arkansas." Id. at 15. These bonds included the bonds "that Arkansas does not physically possess but that have gone unclaimed in the State." Id. at 16 (emphasis omitted). The court also found that "no actual owners of these savings bonds have come forward to substantiate their claims to the bonds." Id. at 17. Accordingly, the court declared that:

> [A]ll property rights and legal title to and ownership of . . . all savings bonds that matured on or before October 16, 2008, that were not redeemed prior to the date of entry of this Judgment, that are shown in the books and records of the United States Department of the Treasury as having a last-known purchaser or owner with an address in the State

> of Arkansas, and that are not in the physical possession of the State, are vested solely in the State of Arkansas.

Id. at 18.

A few days later, on November 25, 2015, Arkansas sent Treasury a redemption request for the absent bonds at issue in the escheat proceeding.[10] Id. at 20–22. It attached a certified copy of the judgment to its request. Id. at 21.

On January 28, 2016, after it had issued its new regulations, Treasury denied the request. See id. at 24–31. In denying the request, Treasury "address[ed] Arkansas'[s] claim under both the prior regulations and the amended regulations." Id. at 25. Under the prior regulations, Treasury asserted that the state court judgment was not a "valid, judicial proceeding" for purposes of 31 C.F.R. § 315.20(b) because it "rest[ed] on a state statute that is preempted by federal law." Id. at 26. According to Treasury (and as discussed in more detail below), Arkansas's Unclaimed Property Law was preempted because Treasury's regulations "do not impose any time limits for bond owners to redeem the[ir] savings bonds." Id. (quoting Treasurer of N.J., 684 F.3d at 388).

Treasury also contrasted Arkansas's request with its historical guidance and treatment of requests to redeem escheated bonds. Id. at 27–29. In particular, it noted that it had previously "informed other states that it w[ould] redeem certain bonds that had come into [their] possession and for which the states had obtained title through a judgment of escheat," but that "Arkansas d[id] not possess these bonds and did not present evidence showing that the bonds were actually abandoned, rather than in the possession of the registered owners or their heirs." Id. at 28–29.

As an independent basis for denying Arkansas's request, Treasury stated that the state court escheat proceeding "did not comport with the Due Process Clause of the Fourteenth Amendment" because Arkansas "did not identify a constitutional basis for exercising in rem jurisdiction over the Absent Bonds" and because "the state court failed to give the owners of the Absent Bonds constitutionally adequate notice of the escheat proceeding."[11] Id. at 29.

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[10] Although the state court proceedings involved three bonds in Arkansas's possession, the redemption request in the record concerns only the absent bonds. See Pl.'s Mot. App. at 21 & n.1.

[11] Because Arkansas obtained the state-court judgment before Treasury's new rule took effect, Treasury's application of the new rule to Arkansas's request is not relevant to this case.

VIII. This Litigation

After receiving the denial from Treasury, Arkansas filed its complaint in this Court on January 11, 2016. It alleges that Treasury's regulations "allow all title to and interest in a bond to be transferred from the original purchaser to a third party if the transfer is established by a valid judicial proceeding" and that the escheat judgment met that criteria with respect to the absent bonds. Compl. ¶¶ 57–59. In Count I of its complaint, Arkansas asserts that Treasury has thus "breached the contract underlying each of the United States savings bonds in question by failing to redeem those bonds upon Arkansas's request."[12] Id. ¶ 61. In Counts III and IV of its complaint, Arkansas also alleges that Treasury's "refusal to redeem the bonds . . . constitutes an unconstitutional taking of [Arkansas's] private property for public use within the meaning of the Fifth Amendment" and/or an illegal exaction. Id. ¶¶ 84, 86–91.

The government moved to dismiss the complaint. ECF No. 5. Following a status conference, the Court determined that because "[t]he government's motion raise[d] certain issues that [we]re identical to" the issues raised in the LaTurner litigation, "the interests of judicial economy w[ould] be served" by litigating the case in parallel with LaTurner. Order (Feb. 19, 2016), ECF No. 7.

The parties in LaTurner then engaged in targeted discovery regarding "the history of the Department of Treasury's recordkeeping, registration, and redemption practices regarding the types of U.S. savings bonds involved in this case, as well as information regarding the nature of how the Department's relevant savings bond records are catalogued and may best be searched." See Order, LaTurner, No. 13-1011 (Dec. 18, 2015), ECF No. 51. Once discovery concluded, the government provided Arkansas with copies of its written responses to the LaTurner plaintiff's discovery requests. See Scheduling Order (Oct. 7, 2016), ECF No. 12.

The government has now moved for summary judgment as to all of Arkansas's claims. See Def.'s Mot. at 2–5. Arkansas has filed a cross-motion for summary judgment as to the government's liability on the absent bonds. See Pl.'s Mot. at 1–3. The Court heard oral argument on June 22, 2017.[13]

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[12] In the alternative, Arkansas alleges in Count II of its complaint that "each United States savings bond is an implied-in-fact contract between the United States and the purchaser of the bond," and that the government has breached the implied-in-fact contracts by refusing Arkansas' redemption request. Compl. ¶¶ 64, 70–75.

[13] Besides Kansas and Arkansas, seven other states with title-based escheat regimes have filed similar lawsuits seeking redemption of bonds they do not possess. See Sattgast v. United States, No. 15-1364 (South Dakota); Kennedy v. United States, No. 15-1365 (Louisiana); Ball v. United States, No. 16-221 (Kentucky); Fitch v. United States, No. 16-231 (Mississippi); Loftis v. United States, No. 16-451 (South Carolina); Zoeller v.

DISCUSSION

I. Standard For Summary Judgment

In accordance with RCFC 56(a), summary judgment may be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine if it "may reasonably be resolved in favor of either party." Id. at 250.

The material facts in this case are not in dispute. Further, Arkansas's breach of contract claim depends upon the resolution of questions of law—namely, the interpretation of Treasury's regulations, the interplay between those regulations and Arkansas's Unclaimed Property Act, and the constitutional principles raised by the government in opposition to Arkansas's claims. Therefore, Arkansas's breach of contract and other claims are appropriate for resolution by summary judgment.

II. Merits

In its motion for partial summary judgment, Arkansas seeks a ruling that the government is liable for breach of contract. To succeed on this claim, Arkansas must first demonstrate that it is in privity of contract with the government with respect to the absent bonds—i.e., it must establish that it owns the absent bonds. See Cienega Gardens v. United States, 194 F.3d 1231, 1239 (Fed. Cir. 1998); Rotman, 31 Fed. Cl. at 725. Further, it must also show that in refusing to recognize its ownership of the bonds and in declining to redeem the proceeds of the bonds, the government materially breached the terms of the bond contracts. See Bell/Heery v. United States, 739 F.3d 1324, 1330 (Fed. Cir. 2014); San Carlos Irrigation & Drainage Dist. v. United States, 877 F.2d 957, 959 (Fed. Cir. 1989).

Arkansas's contention that it is the owner of the absent bonds is predicated on 31 C.F.R. § 315.20(b), which it argues obligates the United States to recognize the state-law judgment of escheat that purported to vest it with title to the bonds. Arkansas asks the Court to direct the Department of Treasury to provide it with the information it is entitled to receive pursuant to 31 C.F.R. §§ 1.5 and 323.2 as the owner of the bonds. It further requests a ruling that—notwithstanding that it currently lacks information about the whereabouts of the bond certificates—Treasury was required to redeem the bonds upon presentation of a certified copy of the state court judgment under 31 C.F.R. §§ 315.20 and 315.23, or pursuant to 31 C.F.R. § 315.25, which provides a method for owners to redeem bonds where the certificates have been lost. Arkansas contends that Treasury's

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United States, No. 16-699 (Indiana); Atwater v. United States, No. 16-1482 (Florida). The Court has stayed these cases pending its decisions in this case and in LaTurner.

refusal to redeem the bonds constitutes both a breach of contract and a compensable taking of its property under the Fifth Amendment.

The government asserts, on the other hand, that Arkansas has not obtained ownership of the absent bonds and that, as a result, the United States is entitled to an entry of summary judgment. It briefly reprises its contention that 31 C.F.R. § 315.20(b) does not require Treasury to recognize ownership claims arising out of state court judgments under title-based escheat statutes. Further, it argues that even if Arkansas Treasury's regulations permit transfers of ownership pursuant to title-based escheat statutes, the government was not required to redeem the absent bonds because Arkansas has not and cannot submit the paper bond certificates, which the government argues is a pre-requisite to its obligation to pay Arkansas their proceeds. Finally, it contends that, in any event, ownership of the bonds cannot be transferred to Arkansas under the circumstances of this case because: (1) the state law on which the judgment rests is preempted by federal law; (2) the underlying state law violates the principle of intergovernmental immunity; and (3) the state court proceedings did not comport with the due process clause of the Fourteenth Amendment.

For the reasons set forth below, the Court agrees that Arkansas is the owner of the absent bonds pursuant to Treasury's regulations and that Treasury's refusal to recognize Arkansas's ownership of the bonds is a breach of contract. It further finds that Treasury breached the contract when it refused to provide Arkansas with information about the bonds and demanded that Arkansas produce the bond certificates as a condition of redeeming their proceeds. Accordingly, the Court grants Arkansas's motion for partial summary judgment as to liability for breach of contract.

A. Whether Treasury is Required to Redeem the Absent Bonds Under Treasury's Regulations

As discussed, 31 C.F.R. § 315.20(b) provides that Treasury "will recognize a claim against an owner of a savings bond . . . if established by valid, judicial proceedings, but only as specifically provided in this subpart." And 31 C.F.R. § 315.23(a) states that "[t]o establish the validity of judicial proceedings," a claimant must submit to Treasury "certified copies of the final judgment, decree, or court order, and of any necessary supplementary proceedings."

The facts material to the application of these regulations with respect to the absent bonds are not disputed. Thus, the parties do not dispute that Arkansas obtained the state court escheat judgment, Pl.'s Mot. App. at 2–18; that the judgment concerned ownership of the absent bonds, id. at 3–4, 16; and that, when it attempted to redeem the absent bonds, Arkansas supplied certified copies of the judgment to Treasury in accordance with § 315.23(a), id. at 21.

In its motion for summary judgment, the government revives (albeit briefly) the arguments which this Court rejected in Estes regarding the proper interpretation of § 315.20(b). Thus, it contends that the ownership recognition requirements of § 315.20(b) do not under any circumstances apply to judgments entered pursuant to state escheatment

laws. See Def.'s Mot. at 19–20 & n.4. It also appears to argue that—even if title to the absent bonds has passed to Arkansas—the state may not redeem the proceeds of the bonds because it has not presented the bond certificates to Treasury. Both of these arguments lack merit.

1. Whether Treasury is Required to Recognize Arkansas's Ownership Claims Based on the State Escheat Judgment

As discussed briefly above, and in greater detail in Estes, the government's argument in support of its initial motion to dismiss was that under § 315.20(b), Treasury would recognize only those claims of ownership that arise out of the specific types of judgments referenced elsewhere in Subpart E of Part 315. Because state court escheat judgments were not referenced in the regulations, Treasury argued, they were not subject to § 315.20(b) at all. Treasury reprises this argument in its motion for summary judgment, observing once again that "Treasury's regulations do not recognize the transfer of savings bonds via escheat judgment." Def.'s Mot. at 19.

In Estes, this Court found Treasury's interpretation inconsistent with the language and structure of the regulation. See 123 Fed. Cl. at 85–86 (concluding that the government's "construction of the regulations . . . collides with the well-established canon of interpretation that holds that regulatory text should not be read in such a way as to render any portion of the language superfluous" and "ignores [the] actual purpose" of the provisions of Subpart E). The government's summary judgment briefs do not address the Court's textual analysis or provide any basis for it to depart from its conclusion in Estes that a textual analysis of the language of § 315.20(b) establishes that Treasury is required to recognize claims of bond ownership that are based on state court judgments of escheat pursuant to valid judicial proceedings.

Nor is there anything in the government's summary judgment briefs that would alter this Court's conclusion in Estes that Treasury's position in this litigation conflicts directly with Treasury's prior explicit statements interpreting § 315.20(b). These statements, which go back more than sixty years, clearly reflect that before this litigation, Treasury took the position that states could secure ownership of savings bonds on the basis of title-based escheatment statutes like Arkansas's.

Thus, as the Court explained in Estes, in its brief filed with the Third Circuit in the Treasurer of New Jersey litigation, the federal government represented that "Treasury regulations generally provide that payment on a U.S. savings bond will be made only to the registered owner," but that "[t]he regulations specify limited exceptions to this rule, including cases in which a third party obtains ownership of the bond through valid judicial proceedings." See Br. for Appellees at 6, Treasurer of N.J., 684 F.3d 382 (No. 10-1963). In particular, the government explained, "[a] State may satisfy this ownership requirement 'through escheat, a procedure with ancient origins whereby a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears.'" Id. (emphasis added) (quoting Texas, 379 U.S. at 675). In its decision, the Third Circuit went on to endorse Treasury's reading of its own regulations. See Treasurer of N.J., 684 F.3d at 412–13 (observing that "the States[] may obtain ownership of . . . bonds—and

consequently the right to redemption—through 'valid[] judicial proceedings'" as provided in 31 C.F.R. § 315.20(b) (second alteration in original)).

The Solicitor General made a similar representation regarding Treasury's interpretation of its regulations to the Supreme Court in 2013, in opposing a petition for certiorari filed by some of the states that were parties to the Third Circuit case. See Pl.'s Mot. App. at 182–86. In that brief, the Solicitor General, citing 31 C.F.R. §§ 315.20(b), 315.23, and 353.23, observed that Treasury "has long advised the States that to receive payment on a U.S. savings bond a State must complete an escheat proceeding that satisfies due process and that awards title to the bond to the State," and that this "represents the Department's considered interpretation of federal law." Id. at 184.

As the Court also explained in Estes, Treasury has long assured inquiring states that it would recognize state claims of ownership based on title-based escheat statutes. Thus, Treasury explained in the 1952 Escheat Decision that it would "recognize[] the title of the state when it makes claim based upon a judgment of escheat," because, in that case, the state has "succeed[ed] to the title of the bondholder." Def.'s Mot. App. at A3 (emphasis omitted). And Treasury continued to emphasize this position throughout the 1970s, 1980s, and 1990s in its responses to states' requests to redeem or obtain custody over the proceeds of bonds in their possession under custody-based escheat regimes. See id. at A6 (Oklahoma, June 26, 1970); id. at A8 (Indiana, Nov. 19, 1971); id. at A10 (New Hampshire, May 12, 1976); id. at A12 (South Carolina, May 26, 1976); id. at A15 (Hawaii, July 14, 1976); id. at A17 (Indiana, Jan. 18, 1977); id. at A19 (North Dakota, June 24, 1977); id. at A22 (Illinois, Oct. 27, 1980); id. at A39 (Kentucky, Sept. 6, 1983); id. at A40 (Alaska, Oct. 25, 1983); id. at A109 (Alaska, Feb. 6, 1992); id. at A112 (Oklahoma, Aug. 5, 1999).

In addition, in 1982, Treasury informed Massachusetts that under the state's title-based escheat regime, Treasury would "make payment to the Treasurer of the Commonwealth where the Commonwealth, through appropriate court proceedings, takes the owner's title to itself." Id. at A38 (observing that "[i]n that event, [Treasury] would pay the owner in the person of its successor, the Commonwealth"). Further, Treasury referred Massachusetts to 31 C.F.R. §§ 315.23(a) and 353.23(a) as the sources of "the proper evidence to be submitted if this approach is followed." Id.

Notwithstanding the foregoing, the government contends now, as it did in the context of its motion to dismiss, that the Court should discount Treasury's pre-2000 statements because they "did not address the applicability of section 315.20(b) to title-based escheat judgments for bonds a state did not possess." Def.'s Mot. at 20 (emphasis added). But there is nothing in § 315.20(b) that purports to make possession of bond certificates a condition for Treasury's recognition of ownership claims based on valid judicial proceedings. More to the point, under Treasury's interpretation, state judgments of escheat can never confer ownership, regardless of whether the state has possession of the bond certificates. That is, under Treasury's interpretation, even a state that: (1) has obtained title to the bonds through state escheatment proceedings; (2) possesses the bond certificates; and (3) presents those certificates to Treasury for redemption cannot claim an entitlement to the proceeds of the bonds. The factual distinction Treasury asks the Court

to draw thus is not relevant to the legal position it advances—i.e., that the Court ought to accept its assertion that it does not recognize claims against bond holders based on state-court escheat judgments under § 315.20(b).

Indeed, Treasury's litigating position in this case and in the related LaTurner litigation is that to redeem even the bonds in possession to which it holds title pursuant to valid judicial proceedings, the state must persuade Treasury to waive its regulations. See Def.'s Mot. to Dismiss at 15, LaTurner, No. 13-1011 (contending that "[p]ursuant to [its] discretionary authority, Treasury elected to waive its regulations for the bonds in Kansas' possession" but "found no basis to waive its regulations for the Absent Bonds"). But until Kansas initiated the related litigation, Treasury never mentioned its waiver authority in any of its many pronouncements concerning states' rights to redeem bond proceeds under title-based escheat regimes; instead, it cited § 315.20. Thus, Treasury's ever-shifting explanations for denying states' requests to redeem absent bonds resemble nothing so much as a game of "whack-a-mole" in which the federal government's rationale for denying such requests changes each time the states satisfy the most recently articulated condition for doing so.

In that regard, the government also draws the Court's attention to certain 2004 correspondence between Treasury and several states that were then seeking information about the redemption of absent bonds under their custody-based escheat statutes. See Def.'s Mot. at 20. That correspondence, which was not before the Court when it ruled in Estes, contained a passage advising the inquiring states that "[i]n order for the bonds to be paid to [the state], [it] must have possession of the bonds, . . . obtain an order of escheat from a court of competent jurisdiction vesting title in the state to the individual bonds, and apply to the Department of the Treasury for payment." E.g., Def.'s Mot. App. at A134.

The passing mention of a possession requirement in the 2004 correspondence does not persuade the Court to depart from its prior interpretation of the plain text of the applicable Treasury regulations. For one thing, that correspondence did not purport to interpret § 315.20(b). Nor did it address Treasury's treatment of claims brought under title-based escheat judgments for bonds that a state did not possess, as the correspondence arose in the context of state claims for bond proceeds under custody-based escheat regimes. The correspondence thus did not identify possession of the bonds as a condition of recognizing the state's claim of ownership under a title-based escheat regime, as Treasury appears to argue.

Further, the Court notes that in Treasury's subsequent 2006 correspondence with the state of Florida, there is no mention of a possession requirement. Instead, Treasury advised the State that "[t]he applicable regulations would permit the State of Florida to be paid for the bonds, pursuant to an appropriate state statute and after due process, by obtaining an order of escheat from a court of competent jurisdiction vesting title in the state, and then applying for payment to the Department of the Treasury pursuant to the procedures established by the regulations that all bond holders must utilize." Id. at A148. Accordingly, Treasury's mention of a possession requirement in the 2004 correspondence does not cast doubt upon its assurances over the more than sixty preceding years, or the

representations that it made to the Supreme Court almost ten years later, all of which clearly confirmed that Treasury would recognize claims of ownership based on valid state court escheatment proceedings.[14]

For the reasons set forth above and in its opinion in Estes, the Court is of the view that, under § 315.20(b), title and ownership of the absent bonds was transferred to Arkansas pursuant to the state court escheat judgment. It turns now to the government's alternative argument that, even if Arkansas has succeeded to ownership of the absent bonds, presentation of the escheated bonds is a prerequisite to their redemption. Def.'s Mot. at 21–26; Def.'s Reply at 24–25.

2. Whether Arkansas Must Present the Certificates for the Bonds it Owns as a Condition to Securing their Redemption

As noted, the government contends that even assuming that Arkansas secured ownership of the absent bonds through the state escheatment proceedings, it cannot redeem the bonds because it does not possess them. This argument—whose premise is that the Treasury's regulations allow it to keep the proceeds of bonds indefinitely even if Arkansas's ownership of the bonds has been established by valid judicial proceedings—does not withstand scrutiny.

Treasury's regulations make its payment obligation clear: under 31 C.F.R. § 315.35(a), "[p]ayment . . . will be made to the person or persons entitled under the provisions of these regulations." Id. Generally, in order to redeem the proceeds of a bond,

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[14] In support of its argument that § 315.20(b) is inapplicable to escheat judgments, the government cites the recent decision of the U.S. District Court for the District of Columbia in the litigation brought by Kansas and several other states to challenge Treasury's new rule. See Def.'s Mot. at 4–5, 20 & n.4 (citing Estes v. U.S. Dep't of Treasury, 219 F. Supp. 3d at 32). As noted, the new rule, among other things, explicitly requires a state to possess the escheated bond in order to redeem it. See Estes v. U.S. Dep't of Treasury, 219 F. Supp. 3d at 27–28. As the district court itself acknowledged, however, the issues in that case are "distinct in numerous respects" from the issues in this one. See id. at 28 n.4. Thus, in that case, the plaintiffs argued (among other things) that the new rule violated the APA "because it capriciously abandon[ed] prior Treasury policy." Id. at 22. The issue before the district court was therefore whether the new rule "altered a clearly established policy without sufficient explanation." Id. at 28 n.4 (emphasis omitted). As noted above, the district court concluded only that there was no clearly established prior policy recognizing state claims of ownership pursuant to escheatment proceedings where the bonds were not in the state's possession, and that, in any event, if there was such a policy, Treasury had adequately explained its reasons for changing it. See id. at 28–30, 33. To the extent that the district court's decision, while addressing a different issue, can be read to endorse an interpretation of the former § 315.20(b) that is at odds with this Court's interpretation, the Court respectfully disagrees.

the bond owner must surrender the bond certificate to Treasury. See id. § 315.35. But (as noted) Treasury has the authority to waive any portion of its regulations. See id. § 315.90. And in any event, as the Court already explained in Estes, presentation of the bond certificate is not the exclusive means for an individual to establish his or her ownership of the bond and consequent entitlement to redeem its proceeds. See 123 Fed. Cl. at 88–89. Thus, the regulations provide procedures by which a bond owner can secure redemption of bonds whose certificates have been "lost," or subject to "theft, destruction, mutilation, or defacement." 31 C.F.R. § 315.25 (authorizing "[r]elief, by the issue of a substitute bond or by payment" for lost, stolen, destroyed, or mutilated bonds). In such circumstances, the owner is required to provide either the serial number of the bond or other information that will allow Treasury to identify it by serial number. Id. § 315.26. Presumably, the purpose of these requirements is to enable Treasury to confirm through its records that the claimant is the bond owner, notwithstanding that he or she cannot produce the physical bond certificate.[15]

Counsel for the government in this case has taken the position that the certificates for the absent bonds cannot be deemed "lost" within the meaning of the regulations because Arkansas never physically possessed them. But it is not apparent to the Court why an item is not "lost" where its owner is unaware of its location, whether or not the owner ever had the item in his possession. Moreover, the government has not supplied the Court with any basis for determining whether Treasury's official interpretation of the scope of 31 C.F.R. § 315.25 is as narrow as the one counsel proposes, or how Treasury has applied the regulation in the past.

In fact, counsel's narrow interpretation of § 315.25 appears to conflict with the requirement in § 315.20(b) that Treasury "recognize" claims against registered owners of savings bonds if established by valid, judicial proceedings, as well as 31 C.F.R. § 315.23(a), which provides that the validity of the judicial proceedings is established by presentation of certified copies of the final judgment. For if prior possession of the paper certificate is invariably required in order for an owner to claim them "lost," then Treasury in fact would be unable to "recognize" claims of ownership based on valid judicial proceedings, as § 315.20(b) requires, where, for example, the prior owner of a bond had lost the physical certificates. It could also not recognize ownership claims where the prior owner refused to turn over the physical certificates, such as, for example, in the wake of a contentious divorce.[16]

[15] It bears noting that under the regulations, where Treasury redeems bonds that are lost, it may protect itself against duplicate claims by "requir[ing] a bond of indemnity" as "necessary to protect the interests of the United States." 31 C.F.R. § 315.25.

[16] In that vein, the Court notes that the regulation specific to divorce proceedings does not mention surrendering the physical bond; rather, it states (1) that Treasury will "recognize a divorce decree that ratifies or confirms a property settlement agreement disposing of bonds or that otherwise settles the interests of the parties in a bond"; (2) that "[t]he

It is certainly clear that 31 C.F.R. § 315.25 was intended to afford relief to bond owners in circumstances in which, for reasons beyond their control, they are unable to prove their ownership by presenting the bond certificate. And where ownership is conferred by a judicial determination, it would seem that submission of the certified judgment would suffice to prove such ownership. See id. § 315.23. But even leaving that aside, in light of the remedial purposes of § 315.25, and the anomalous results that would ensue if counsel's position were adopted, the Court finds unpersuasive Treasury's argument that bond certificates can never be considered "lost" unless they were once in the current bond owner's possession.

Finally, in any case, it is neither necessary nor appropriate for the Court to determine at this stage in the proceedings whether Arkansas is entitled to redeem the bonds under the provisions of 31 C.F.R. § 315.25. For one thing, Arkansas has not yet been afforded its rights as an owner of the bonds to make a claim for their proceeds based on the theory that they are "lost." It also has not been given access to the information that it needs to make such a claim, including the serial numbers of the absent bonds, or the names of their original owners. Presumably, with additional identifying information in hand, Arkansas may be able to determine whether or not the certificates can be located or whether instead they have been "lost" or destroyed.

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On the basis of the foregoing, and for the reasons set forth more fully in Estes, the Court stands by its ruling that state court proceedings leading to judgments of escheat are among the valid judicial proceedings referenced in Treasury's regulations at 31 C.F.R. § 315.20(b). It also continues to find unpersuasive Treasury's argument that possession of the bond certificates is a pre-requisite to the recognition of a state's ownership rights under Treasury's regulations, where such ownership is conferred through valid judicial proceedings. Finally, it rejects as unpersuasive and premature Treasury's argument that its regulations preclude Arkansas from redeeming the bonds that it owns unless it supplies Treasury with the bond certificates. The Court turns now to the government's additional bases for refusing to recognize Arkansas's ownership of the absent bonds.

B. Whether Arkansas's Escheatment Law is Preempted

In addition to its argument that § 315.20(b) does not by its terms apply to claims of ownership based on state court escheat judgments, the government contends that Arkansas cannot be the "rightful owner of the Absent Bonds because its ownership claim is based on a state court escheat judgment that rests on a state statute that is preempted by Federal law." Def.'s Mot. at 10. Treasury's preemption argument is without merit.

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evidence required under § 315.23 must be submitted in every case"; and (3) that "[p]ayment, rather than reissue, will be made if requested." See 31 C.F.R. § 315.22(a).

1. Preemption Standards

It is well established that where a state law comes into conflict with a federal law, the state law must give way. E.g., Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 712 (1985); see also Free, 369 U.S. at 669. This principle applies not only when the state law "actually conflicts" with federal law, but also if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal government. Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); see also Wyeth v. Levine, 555 U.S. 555, 565 (2009); Allergan Inc. v. Athena Cosmetics, Inc., 738 F.3d 1350, 1355 (Fed. Cir. 2013).

"In all pre-emption cases," the court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Wyeth, 555 U.S. at 565 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). "[T]he purpose of Congress," therefore, "is the ultimate touchstone in every pre-emption case." Id. (quoting Medtronic, Inc., 518 U.S. at 485); see also Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96, 103 (1963). Where Congress leaves the implementation of a statute to an agency, a "regulation with the force of law [may] pre-empt conflicting state requirements." Wyeth, 555 U.S. at 576; see also Hillsborough Cty., 471 U.S. at 713 ("[S]tate laws can be pre-empted by federal regulations as well as by federal statutes."); Free, 369 U.S. at 666–69 (operation of state community property law displaced by right of survivorship embedded in Treasury's savings bond regulations).

Unless Congress has specified otherwise, agencies have no special authority to pronounce on preemption. See Wyeth, 555 U.S. at 576–77. Nevertheless, agencies are "likely to have a thorough understanding of [their] own regulation[s] and [their] objectives," Geier v. Am. Honda Motor Co., 529 U.S. 861, 883 (2000), and thus may have "an attendant ability to make informed determinations about how state requirements may pose an obstacle" to federal law, Wyeth, 555 U.S. at 577 (quotation omitted); see also Geier, 529 U.S. at 883. The weight accorded to the agency's explanation "depends on its thoroughness, consistency, and persuasiveness." Wyeth, 555 U.S. at 577 (citing United States v. Mead Corp., 533 U.S. 218, 234–35 (2001) and Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

2. Application of Standards

Treasury urges the Court to find that the Arkansas law, which presumes bonds abandoned five years after their maturity date if the owner has not communicated with Treasury, conflicts with federal law, which it contends "allows savings bond owners to hold their bonds after maturity and has no deadline for owners to redeem their bonds."[17]

[17] As noted above, under its Unclaimed Property Act, bonds that have been presumed abandoned do not escheat to Arkansas until two years after the end of this five-year period. See Ark. Code Ann § 18-28-231.

Def.'s Mot. at 10–12; Def.'s Reply at 6–13. Further, the federal government argues, the Arkansas law creates an obstacle to the accomplishment of the objectives of the federal savings bond program. It reasons that "[f]ederal savings bonds are attractive to purchasers in part because they have no expiration date," and that "confidence in the U.S. savings bond program would be undermined" if a state were permitted "to impair [the bond owner's] contract rights." Def.'s Mot. at 12–13.

Treasury's arguments that the Arkansas law and federal law are in conflict lack merit. First and foremost, for the reasons set forth above, and in Estes, this Court has concluded that federal law itself (i.e., 31 C.F.R. § 315.20(b)) requires Treasury to recognize claims of ownership based on title-based escheatment statutes. In fact, Treasury has not only represented to both the Third Circuit and the Supreme Court that it so interprets its regulations, but, in the related litigation, it redeemed the bonds in the State of Kansas's possession that Kansas obtained via a nearly identical unclaimed property law. See Pl.'s Cross-Mot. for Partial Summ. J. & Br. in Opp'n to Def.'s Mot. for Summ. J. App. at A358–59, 362, LaTurner, No. 13-1011 (Jan. 13, 2017), ECF No. 87-1.

Further, Arkansas's law determines the identity of the bond owner, and not the time period within which the bond owner may redeem it. If Arkansas lawfully becomes the owner of bonds pursuant to Treasury's regulations via a judgment of escheat (as the Court has already concluded), then the former bond holders no longer have a right under federal law to redeem the bonds because they no longer own them. As Treasury expressly observed in its 1952 Escheat Decision, in such circumstances payment of the proceeds to the State is "not regarded as a violation of the agreement, but, on the contrary, as payment to the bondholder in the person of his successor or representative."[18] Def.'s Mot. App. at A3 (emphasis omitted).

For similar reasons, the Court is not persuaded by the government's argument that the Arkansas law makes ownership of federal bonds less attractive, thereby impairing the objectives of the federal savings bond program. The Court does not agree with Arkansas that there is no value at all to a right to hold onto a bond over an extended period of time after it has stopped earning interest. But even under Treasury's own interpretation of its regulations, that right is subject to another party's claim of ownership based on "valid,

[18] Treasury's argument based on 31 U.S.C. § 3105(b)(2)(A) fails for similar reasons. That provision authorizes Treasury to "prescribe regulations providing that . . . owners of savings bonds may keep the bonds after maturity or after a period beyond maturity during which the bonds have earned interest and continue to earn interest." Id. Section 3105(b)(2)(A) thus concerns the rights that Treasury may choose to confer upon "owners"; it is agnostic as to who the owner is. Further, Treasury's argument is purely academic, as Treasury has not, in fact, prescribed regulations allowing the absent bonds at issue in this case to continue to earn interest. The Court therefore is not confronted with a situation where a state seeks recognition of its ownership of bonds that are still earning interest.

judicial proceedings" for at least some categories of judgments. See 31 C.F.R. § 315.20(b).

Put another way, Treasury's regulations themselves expressly contemplate that the original bond owner may be deprived of his ownership interest in the bond, and thereby lose the right he once held as the owner to redeem the bond at any time after maturity. Thus, anyone who chooses to purchase a savings bond is already aware (at least constructively) that his right to hold onto the bond after it matures (and even while it is still earning interest) is not unlimited and may be affected by rulings issued in the course of valid judicial proceedings.

Finally, Treasury's reliance upon the Third Circuit's decision in Treasurer of New Jersey, which found certain custody-based state escheatment laws preempted by federal law, is unavailing. In that case, the Third Circuit held that "the federal statutes and regulations pertaining to United States savings bonds preempt the States' unclaimed property acts insofar as the States seek to apply their acts to take custody of the proceeds of the matured but unredeemed savings bonds." 684 F.3d at 407. "Most critically," it stated, "application of the States' unclaimed property acts would interfere with the terms of the contracts between the United States and the owners of the bonds because, according to the States' complaint, they effectively would substitute the respective States for the United States as the obligor on affected savings bonds." Id. at 408. Therefore, once the states took custody of the bonds' proceeds, the bonds' owners would have to follow the "procedures set forth in the various States' unclaimed property acts" rather than the federal redemption process, in order to secure their proceeds. See id. Further, the Third Circuit observed, the original bondholders (who remained the bond's owners) "still would have a contractual right to payment from the United States based on the terms of the bonds," exposing the federal government to the risk of double liability on the bonds. Id. at 409.

Title-based escheatment statutes do not raise the concerns identified by the Third Circuit in Treasurer of New Jersey because once ownership transfers to a state, the state is not the obligor on the bonds; it is their owner. And when the state takes title, the former owners' rights to payment from the federal government are extinguished. The government therefore cannot be liable for double payment. Further, the state must follow existing federal regulations to redeem the bonds. Thus, as the Third Circuit recognized, its holding "does not nullify state escheat laws for, as provided in the federal regulations and as recognized by the Treasury, third parties, including the States, may obtain ownership of the bonds—and consequently the right to redemption—through 'valid[] judicial proceedings.'"[19] Id. at 412–13 (quoting 31 C.F.R. § 315.20(b) (alteration in original)).

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[19] In Treasurer of New Jersey, the Third Circuit explicitly observed that "in concluding that the State custody-based unclaimed property acts are preempted we are distinguishing, as does the Government itself, those acts from title-based acts." 684 F.3d at 413 n.28. It stated, however, that it did not wish to "imply that our result would be

In short, the federal government's argument that the Arkansas law is preempted because it conflicts with or presents an obstacle to federal law is without merit. The Court now turns to its related argument that the Arkansas law is inconsistent with principles of intergovernmental immunity.

C. Whether the State Statute Violates Principles of Intergovernmental Immunity

Under the principle of intergovernmental immunity, states may not "directly regulate the federal government's operations or property." Id. at 410 (citing Arizona v. Bowsher, 935 F.2d 332, 334 (D.C. Cir. 1991)); see also Hancock v. Train, 426 U.S. 167, 178–80 (1976); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 426–27 (1819). In other words, states may not "regulate the [federal] [g]overnment directly." North Dakota v. United States, 495 U.S. 423, 434 (1990) (plurality opinion); see also United States v. City of Arcata, 629 F.3d 986, 991 (9th Cir. 2010) (invalidating local ordinances prohibiting military recruiters from contacting teenagers because the ordinances "s[ought] to directly regulate the conduct of agents of the federal government").

Treasury argues that Arkansas's unclaimed property law directly regulates the federal government because that law seeks to "compel payment of unredeemed bond proceeds from the Federal Treasury based on [a] state imposed deadline[] for registered owners to redeem their bonds." Def.'s Mot. at 15. According to the government, "Kansas would then be able to use money now in the Federal Treasury to fund its own state programs and operations." Id.

This argument lacks merit for many of the reasons articulated above. First, it is incompatible with Treasury's decision in the related LaTurner litigation to redeem the bonds the State of Kansas had in its possession, which Kansas had obtained via an essentially identical title-based escheat regime. Second, nothing in Arkansas's law requires the government to pay funds to Arkansas on terms set by Arkansas. Rather, Arkansas seeks payment pursuant to Treasury's own regulations—i.e., by obtaining title to the bonds via judicial proceedings under 31 C.F.R. § 315.20(b) and then seeking redemption as the owner of the bonds.

Treasury's reliance on Treasurer of New Jersey and Bowsher is thus unavailing. In the Treasurer of New Jersey litigation, the states acknowledged that they did not own the bonds they wanted to redeem and framed their claim as an APA claim seeking relief other than monetary damages. See McCormac v. U.S. Dep't of Treasury, 185 F. App'x

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different" in the event that (1) the government was "confronted with a judgment of escheat under a title-based escheat act," and (2) Treasury "abandoned its long held position as reflected in the Escheat Decision and refused to recognize the enforceability of the judgment with respect to savings bonds or their proceeds." Id. Thus, the Third Circuit recognized that so long as Treasury's regulations require Treasury to recognize state claims of ownership based on title-based escheatment statutes (which the Court has concluded the former regulations did), such statutes are not pre-empted by federal law.

954, 956 (Fed. Cir. 2006) (concluding that it would be improper to transfer the Treasurer of New Jersey litigation to the Court of Federal Claims and observing that "the States neither assert[ed] that they currently ha[d] title to the bonds, nor s[ought] transfer of title to the bonds"). Bowsher similarly involved states seeking only custody over funds in the government's hands. See 935 F.2d at 334 (observing that states seeking custody over funds in a federal unclaimed property fund "claim[ed] no escheat," but rather "s[ought] only temporary custody over the money until the rightful owners appear with valid claims").

Indeed, the court in Bowsher seemingly anticipated a situation like this one, noting that "escheat of the claimant's right might well substitute the state for the claimant and entitle it to payment." See id. at 335. In such a case, the court cautioned, the substitution would need to occur in a manner "consistent" with the relevant statutes. See id. As described above, Treasury has long acknowledged that transfers pursuant to title-based escheat proceedings are consistent with its regulations, leaving open the possibility that Arkansas might be substituted for the original owners of the absent bonds pursuant to such proceedings. Bowsher thus does not support Treasury's intergovernmental immunity argument.

In sum, because under Treasury's regulations, the operation of Arkansas's Unclaimed Property Act grants Arkansas title over the savings bonds at issue, the Act does not directly regulate the federal government's operations or property. The principle of intergovernmental immunity therefore does not invalidate Arkansas's unclaimed property law.

D. Whether the State Proceedings Were Invalid Because They Did Not Comport with the Due Process Clause

The government's final contention is that the state court proceedings did not effect a valid transfer of ownership because those proceedings did not comport with the due process requirements of the Fourteenth Amendment. Def.'s Mot. at 17–19; Def.'s Reply at 16–18. First, it argues that the judgment was defective because the "state court did not identify a constitutional basis for exercising in rem jurisdiction over the Absent Bonds." Def.'s Mot. at 17; see also Def.'s Reply at 17–18. Second, it claims that "the state court failed to give the owners of the Absent Bonds constitutionally adequate notice of the escheat proceeding." Def.'s Mot. at 18; see also Def.'s Reply at 16–17. Both arguments lack merit.

Regarding the first issue, as Arkansas correctly observes, savings bonds are a form of intangible property. See Pl.'s Mot. at 6, 13. As the Supreme Court has observed, "intangible property, such as a debt which a person is entitled to collect, is not physical matter which can be located on a map." Texas, 379 U.S. at 677; see also Hanson v. Denckla, 357 U.S. 235, 246–47 (1958) (noting, with respect to in rem jurisdiction, that "the situs of intangibles is often a matter of controversy" and that "[i]n considering restrictions on the power to tax, th[e] Court has concluded that jurisdiction over intangible property is not limited to a single State" (quotation, citations, and footnote omitted)); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950)

(observing that "[t]he legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions" between in rem and in personam proceedings).

Further, in Texas, the Supreme Court held in a similar context that when in rem escheat proceedings involve intangible property that may be subject to several states' unclaimed property regimes, "the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." 379 U.S. at 680–81. According to the Court, this "clear rule" would "govern all types of intangible obligations." Id. at 678. The Court stated that the virtues of this rule include that it involves only "a factual issue [that is] simple and easy to resolve"; that it "recognizes that the debt was an asset of the creditor"; and that it "tend[s] to distribute escheats among the States in the proportion of the commercial activities of their residents." Id. at 681. "It may well be that some addresses left by vanished creditors will be in States other than those in which they lived at the time the obligation arose or at the time of the escheat," the Court continued, "[b]ut such situations probably will be the exception, and any errors thus created, if indeed they could be called errors, probably will tend to a large extent to cancel each other out." Id.

Treasury offers no persuasive reason why the Texas rule ought not apply here. Its observation that "the state court did not find that the Absent Bonds are in Arkansas" is of no moment: because the bonds are intangible property, the inquiry turns on what the facts reveal about the bondholders' last known addresses. See Def.'s Mot. at 18. Treasury's concern that addresses in its records may "reveal[] nothing about the present location of the bonds or their current owners" was addressed in Texas, as just described. See id. And its protest that bonds may "pass by inheritance to persons other than the purchaser" who live elsewhere is unavailing: under 31 C.F.R. § 315.70, surviving heirs may request reissue or payment upon the bondholder's death, obviating Treasury's concern. See id.

There is also no merit to Treasury's argument that Texas is distinguishable because, unlike the property at issue in that case, U.S. savings bonds are "a form of property created under Federal laws that establish the registered owners' right to redeem them at any time and the United States' expectation that the physical bond be presented for payment in all but exceptional cases." Def.'s Reply at 17. This contention, like Treasury's preemption argument, cannot be reconciled with the governing regulations, which provide for transfers of ownership that displace the original registered owners' expectations regarding redemption.

Treasury's argument as to the constitutional adequacy of the notice Arkansas provided to the absent bondholders is also inconsistent with Supreme Court precedent. In Mullane, the Court held that to comport with the Due Process clause, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. Whether this standard has been met depends on "the practicalities and peculiarities" of the individual case. Id. And, as Mullane shows, the Due Process Clause allows for the disposition of property interests where, as here, notice by publication is the only practical option.

Thus, in Mullane, a state law allowing for common administration of small trusts permitted the administrator from time to time to seek judicial settlement of claims arising against the trustee. Id. at 307–09. Regarding notice, the law required only that the administrator publish notice of the settlement proceedings in a local newspaper for four consecutive weeks. Id. at 309–10.

In assessing the adequacy of this procedure under the Due Process Clause, the Court divided the trust's beneficiaries into two categories: beneficiaries "whose interests or whereabouts could not with due diligence be ascertained," and "known present beneficiaries of known place of residence." Id. at 317–18. The Court held that notice by publication satisfied the Due Process Clause with respect to the first category of beneficiaries. Id. Acknowledging that "publication alone" was hardly a "reliable means of acquainting interested parties of the fact that their rights are before the courts," id. at 315, the Court nevertheless concluded that it was "not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable," id. at 317.

In contrast, "[a]s to [the] known present beneficiaries of known place of residence," notice by publication did not suffice. Id. at 318 (observing that "[e]xceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties" and that "[w]here the names and . . . addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.").

According to the Court, "[i]t [was] not an accident that the greater number of cases reaching th[e] Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers." Id. at 315. Among these were several cases involving state unclaimed property regimes and their treatment of languishing bank deposits. See Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944); Sec. Sav. Bank v. California, 263 U.S. 282 (1923). As most relevant here, the Court in Luckett held that, in addition to the notice afforded by publication, "[t]he [unclaimed property] statute itself is notice to all depositors of banks within the state[] of the conditions on which the balances of inactive accounts will be deemed presumptively abandoned, and their surrender to the state compelled." 321 U.S. at 243. Further, the Court cautioned, "[a]ll persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes." Id.

Here, as in Mullane, Arkansas would have been unable to discover individualized information about the absent bondholders through the exercise of reasonable diligence because Treasury's regulations prohibited the disclosure of any identifying information about the original owners.[20] Further, as in Luckett, the 2015 amendment to Arkansas's

[20] Indeed, in the related litigation, Treasury rejected the State of Kansas's attempts to obtain information about the original bondowners. See Pl.'s Cross-Mot. for Partial

unclaimed property law (as well as Treasury's regulations and its decades-long position regarding states' rights to secure title to federal savings bonds pursuant to valid judicial proceedings) provided some notice of the possibility that bonds might escheat in the future. Accordingly, considering the "practicalities and peculiarities" of this case, the Court concludes that Arkansas supplied constitutionally adequate notice of the state court proceedings to the absent bondholders.

In summary, the Court concludes that the state court did not violate the Due Process Clause when it asserted in rem jurisdiction over the absent bonds, and that Arkansas's efforts to notify the absent bondholders of the proceeding via publication passed constitutional muster. Accordingly, for the reasons discussed above, the Court rejects the government's argument that the state court escheatment proceedings were not valid judicial proceedings within the meaning of 31 C.F.R. § 315.20(b).

E. Arkansas's Fifth Amendment Takings Claim

As noted above, in Count III of its complaint, Arkansas alleged that Treasury's failure to redeem the absent bonds amounted to a taking of its property without just compensation. See Compl. ¶¶ 77–84. In its ruling on the government's motion to dismiss, the Court denied the government's motion with respect to the takings claim because, under Federal Circuit precedent, a plaintiff may "alleg[e] in the same complaint two alternative theories for recovery against the Government . . . one for breach of contract and one for a taking under the Fifth Amendment to the Constitution." See Estes, 123 Fed. Cl. at 91 (quoting Stockton E. Water Dist. v. United States, 583 F.3d 1344, 1368 (Fed. Cir. 2009)). In Stockton East, the Federal Circuit also observed that "[i]t has long been the policy of the courts to decide cases on non-constitutional grounds when that is available, rather than reach out for the constitutional issue." 583 F.3d at 1368. For that reason, "when a case arises in which both a contract and a taking cause of action are pled, the trial court may properly defer the taking issue . . . in favor of first addressing the contract issue." Id. "[O]f course," the Federal Circuit continued, "when a plaintiff is awarded recovery for the alleged wrong under one theory, there is no reason to address the other theories." Id.

Here, the Court has determined that Arkansas has succeeded to title over the bonds but it has not yet "awarded recovery" to Arkansas on its breach-of-contract claims.

Summ. J. & Br. in Opp'n to Def.'s Mot. for Summ. J. at A208–09, LaTurner, No. 13-1011 (denying FOIA request); id. at A345–47 (same); id. at A355 (denying FOIA appeal). Notably, Treasury did not deny that such bondholders existed; instead, it stated that it withheld the requested records because, in Treasury's view, they were FOIA-exempt. See id. at A347.

Accordingly, the Court will defer ruling on the parties' cross-motions for summary judgment as to Arkansas's takings claim pending further proceedings in the case.[21]

CONCLUSION

For the reasons discussed above, the Court concludes that Arkansas is the lawful owner of the absent bonds pursuant to 31 C.F.R. § 315.20(b). As such, it is entitled to receive from the government the information necessary to allow it to make a request to redeem the bonds. Accordingly, Plaintiff's motion for partial summary judgment as to liability is **GRANTED** as to Counts I and II of its complaint. The government's motion for summary judgment is **DENIED**.

The parties shall file a joint status report by **August 21, 2017** suggesting further proceedings in this case.

IT IS SO ORDERED.

s/ Elaine D. Kaplan
ELAINE D. KAPLAN
Judge

[21] For the same reason, the Court also defers ruling on the Arkansas's illegal exaction claim.

In the United States Court of Federal Claims

No. 16-43C
(Filed: December 1, 2017)

ANDREA LEA, Auditor of the State of Arkansas, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	Keywords: 28 U.S.C. § 1292(d)(2); Interlocutory Appeal; Stay Pending Appeal.

David H. Thompson, Cooper & Kirk, PLLC, Washington, DC, for Plaintiff. *Peter A. Patterson* and *John D. Ohlendorf*, Cooper & Kirk, PLLC, and *Joseph H. Meltzer* and *Melissa L. Troutner*, Kessler Topaz Meltzer & Check LLP, Radnor, PA, Of Counsel.

Eric P. Bruskin, Senior Trial Counsel, Civil Division, U.S. Department of Justice, Washington, DC, with whom were *Steven J. Gillingham*, Assistant Director, *Robert E. Kirschman, Jr.*, Director, and *Chad A. Readler*, Principal Deputy Assistant Attorney General, for Defendant. *Theodore C. Simms, II*, Attorney-Advisor, U.S. Department of the Treasury, and *Albert S. Iarossi*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Of Counsel.

OPINION AND ORDER

KAPLAN, Judge.

On August 8, 2017, this Court issued an Opinion and Order (Order) granting the motion for partial summary judgment filed by Plaintiff Andrea Lea, Auditor of the State of Arkansas (Arkansas). See Lea v. United States, 132 Fed. Cl. 705 (2017). The Court ruled that under the Department of Treasury's regulations, Arkansas is the rightful owner of certain U.S. savings bonds that it does not possess but to which it asserted title pursuant to a state court judgment of escheat issued under the authority of the state's unclaimed property law. See Lea, 132 Fed. Cl. at 724. The federal government has now filed a motion under 28 U.S.C. § 1292(d)(2) to certify this Court's Order for interlocutory appeal and to stay proceedings pending appeal. See Def.'s Mot. to Certify the Court's Order of Aug. 8, 2017 for Interlocutory Appeal and to Stay Proceedings Pending Appeal (Def.'s Mot.), ECF No. 32.

For the reasons set forth below, the Court agrees that its August 8, 2017 opinion involves "a controlling question of law . . . with respect to which there is a substantial

ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation." See 28 U.S.C. § 1292(d)(2). Accordingly, the motion to certify is **GRANTED**. In addition, the government's motion to stay proceedings pending appeal is also **GRANTED.**

DISCUSSION

I. The Motion to Certify

Section 1292(d)(2) of Title 28 provides, in pertinent part, as follows:

> [W]hen any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.[1]

Thus, to certify an interlocutory appeal of its order, the Court must find that the order (1) "involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) "that an immediate appeal may materially advance the ultimate termination of the litigation." As the Wright and Miller treatise observes, "[t]he three factors should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal." 16 Charles Alan Wright et al., Fed. Prac. & Proc. Juris. § 3930 (3d ed. Apr. 2017 Update) (footnote omitted).

The Court finds that its Order involves a "controlling question of law." Thus, the federal government's liability in this case turns largely on the proper interpretation of a Treasury Department regulation that was in effect at the time Arkansas requested redemption of the bonds at issue. That regulation—31 C.F.R. § 315.20(b) (2012)—then provided that Treasury "will recognize a claim against an owner of a savings bond . . . if

[1] The language of section 1292(d)(2) "is virtually identical to 28 U.S.C. § 1292(b) . . . which governs interlocutory review by other courts of appeals." United States v. Connolly, 716 F.2d 882, 883 n.1 (Fed. Cir. 1983) (en banc). "Because the operative language is identical, the legislative history and case law governing the interpretation of section 1292(b) is persuasive in reviewing motions for interlocutory appeal under section 1292(d)(2)." Abbey v. United States, 89 Fed. Cl. 425, 429 (2009) (citation omitted).

established by valid, judicial proceedings, but only as specifically provided in this subpart."[2]

As described in Lea (and in its ruling on the government's motion to dismiss in LaTurner), the Court held that the state-law proceedings that purported to vest Arkansas with title to the savings bonds at issue, which had been deemed abandoned under state law, were "valid judicial proceedings" within the meaning of the regulation, and that Arkansas was therefore the owner of those bonds. In so holding, the Court rejected the federal government's interpretation of the Treasury regulations (which it found inconsistent with both the language of the regulations and the position that Treasury had previously taken regarding the effect of a state court judgment of escheat on bond ownership). It also rejected the federal government's contentions: 1) that Arkansas's unclaimed property law was preempted by federal law; 2) that the state court judgment was invalid under the doctrine of intergovernmental immunity; and 3) that the state court judicial proceedings violated the due process rights of the former owners of the absent bonds. Further, the Court rejected as premature the federal government's argument that even assuming that Arkansas owned the bonds pursuant to the state court escheat proceedings, Treasury regulations precluded it from recovering the proceeds of bonds that were not in the state's possession.

The issues the Court decided in granting-in-part Arkansas's motion for partial summary judgment were purely legal ones. The legal issues were "controlling" because—if the Court had agreed with the federal government's position—then the result would have been judgment as a matter of law in favor of the government. Instead, the Court has concluded that title to the absent bonds lies with Arkansas, which may entitle it to an award of damages given Treasury's refusal to grant Arkansas's request to redeem the bonds.

The Court reached its decision after careful consideration of the legal issues presented and the parties' arguments, and is convinced that its decision is correct. Nonetheless, the questions of regulatory interpretation presented in this case involve

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[2] On July 1, 2015 (while the government's motion to dismiss in the related case of LaTurner v. United States was pending, see 133 Fed. Cl. 47, 63–64 (2017)), Treasury issued a Notice of Proposed Rulemaking in which it proposed revising its savings bond regulations to expressly address state court judgments of escheat pursuant to title-based unclaimed property laws. See Regulations Governing U.S. Savings Bonds, 80 Fed. Reg. 37,559-01 (July 1, 2015). After a period of notice and comment, Treasury issued the final revised regulations on December 24, 2015. Regulations Governing U.S. Savings Bonds, 80 Fed. Reg. 80,258-01 (Dec. 24, 2015). As relevant to the issue presented in this case, the revised rule amended 31 C.F.R. § 315.20(b) to add a sentence stating that "[e]scheat proceedings will not be recognized under this subpart." Id. at 80,264. It also added a new provision, § 315.88, which stated that Treasury "may, in its discretion, recognize an escheat judgment that purports to vest a State with title to a definitive savings bond that has reached the final extended maturity date" but only if the bond "is in the State's possession." Id.

issues of first impression. Moreover, the Department of Treasury recently engaged in a formal rulemaking process in which it promoted an interpretation of its former regulations that is at odds with the Court's views. See 80 Fed. Reg. at 80,258–60.

In addition, in Estes v. United States Department of the Treasury, 219 F. Supp. 3d 17 (D.D.C. 2016), Judge Cooper—albeit in another context—took a somewhat different view of the Department of Treasury's previous pronouncements regarding whether Treasury would recognize state claims of bond ownership based on state court escheat judgments. This Court concluded that for more than sixty years, the Department of Treasury had advised inquiring states, the public, and the federal courts (including the Supreme Court) that it would recognize claims of ownership that were based on judgments pursuant to title-based escheatment statutes like Arkansas's. Judge Cooper found it less clear than did this Court that Treasury's prior statements governing the recognition of state ownership claims applied when the state did not have the bonds in its possession. See Estes v. U.S. Dep't of the Treasury, 219 F. Supp. 3d at 28–30. Given that this Court relied at least in part on the Department of Treasury's historical interpretation of its regulations, Judge Cooper's perspective provides another basis for the Court to conclude that there exist grounds for a difference of opinion regarding this Court's opinion on this controlling legal issue.[3]

Finally, the Court is of the view that an immediate appeal of its disposition of these legal issues "may materially advance the ultimate termination of the litigation." The parties differ in their view of the time and expense of the discovery that will be required to resolve the remaining issues in this case. The government claims that in order to comply with its discovery obligations, Treasury will be required to search "approximately 3.8 billion savings bond records, at an estimated cost exceeding $100 million and a level of effort exceeding 2000 years of employee time." See Def.'s Mot. App. at 2, ECF No. 32-1 (Declaration of Michael J. McDougle) (emphasis in original). Arkansas, on the other hand, argues that "it is difficult to believe that the technology does not exist to make Treasury's records electronically text-searchable." Pl.'s Resp. in Opp'n to Def.'s Mot. to Certify an Interlocutory Appeal and to Stay Proceedings Pending Appeal (Pl.'s Opp'n) at 13, ECF No. 35.

As Wright and Miller observe, "[t]he advantages of immediate appeal increase" with, among other conditions "the length of the district court proceedings saved by reversal of an erroneous ruling, and the substantiality of the burdens imposed on the

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[3] The federal government contends that this Court decided a controlling question of law by supposedly "suggest[ing] that Arkansas was entitled to receive the bond serial numbers . . . pursuant to 31 C.F.R. §§ 1.5 and 323.2," Treasury's regulations implementing the Freedom of Information Act (FOIA). Def.'s Mot. at 10–12. The Court referenced those regulations only in summarizing Arkansas's argument. See Lea, 132 Fed. Cl. at 720–21. It did not make any determination regarding Arkansas's right to secure such information under FOIA, which the federal government correctly points out would be beyond this Court's jurisdiction. See Def.'s Mot. at 11.

parties by a wrong ruling." Wright et al., supra, § 3930. Even if there exists technology that the government could employ to reduce the burden, the Court does not doubt that considerable effort and expense will be required to identify the absent bondholders whose last known addresses were in Arkansas. Thus, at the present time, the savings bond records are either contained on microfilm or have been digitized from microfilm but are not readily searchable by address. Further, there are currently eight other cases in this Court in which other states assert claims similar to those asserted by Arkansas.[4] If the Court's decision is found erroneous by the court of appeals on interlocutory review, it will save both the parties and the Court from bearing the burden of an enormous and unnecessary expenditure of effort.

In fact, under the circumstances, it is clear to the Court that an immediate appeal "may materially advance the ultimate termination of the litigation" even if the court of appeals agrees with this Court's reasoning and affirms its decision. Thus, the government likely will remain reluctant to make the investments that will be needed to identify the relevant former bond owners and to redeem the absent bonds to Arkansas (or the other states) before the ownership issue has been finally adjudicated. The Court thus anticipates that contentious and protracted discovery and damages phases lie ahead in this case if they must proceed before an authoritative determination on the question. On the other hand, the Court expects that if its ruling is upheld through subsequent appeals, the parties may be able to work on a cooperative basis to resolve the practical and logistical challenges of the remainder of the litigation.

II. The Government's Request for a Stay

Section 1292(d)(3) of Title 28 provides that "[n]either the application for nor the granting of an appeal under this subsection shall stay proceedings in the . . . Court of Federal Claims . . . unless a stay is ordered by a judge of the . . . Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court." The government asks the Court to exercise its discretion to stay the proceedings in this case pending appeal on the grounds that "further proceedings in this case would impose massive burdens on Treasury and the taxpayer, jeopardize fragile bond records, and invade the privacy rights of U.S. savings bond owners." Def.'s Mot. at 12.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even

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[4] See LaTurner v. United States, No. 13-1011; Sattgast v. United States, No. 15-1364 (South Dakota); Kennedy v. United States, No. 15-1365 (Louisiana); (Arkansas); Ball v. United States, No. 16-221 (Kentucky); Fitch v. United States, No. 16-231 (Mississippi); Loftis v. United States, No. 16-451 (South Carolina); Zoeller v. United States, No. 16-699 (Indiana); Atwater v. United States, No. 16-1482 (Florida). With the exception of LaTurner, on which the Court ruled the same day that it ruled in the present case, the Court has stayed the other cases pending disposition of the instant case.

balance." Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 879 n.6 (1998) (quoting Landis v. N. Am. Co., 299 U.S. 248, 254–55 (1936)) (alteration in original).

In this case, the Court concludes that a stay of proceedings is warranted for the same reasons that it has decided to certify its decision for interlocutory appeal in the first instance. As noted above, the burdens of discovery going forward (both in terms of effort and expense) will undoubtedly be formidable given the state of Treasury's savings bond records for the years in question. On the other hand, the Court is not persuaded that Arkansas would be materially prejudiced by a stay of proceedings during the pendency of any appeal, despite its conclusory assertion that "[e]ach day that passes with the Government refusing to cooperate in identifying Arkansas's bonds causes [it] substantial injury." Pl.'s Resp. at 14. Accordingly, the government's motion to stay the case is **GRANTED**.

CONCLUSION

On the basis of the foregoing, the federal government's Motion to Certify the Court's Order of August 8, 2017 for Interlocutory Appeal and to Stay Proceedings Pending Appeal is **GRANTED**. The Court's Opinion and Order of August 8, 2017 is therefore **AMENDED** to include the following express finding:

> The Court finds that this order involves a controlling question of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Further, this case is **STAYED** pending the court of appeals' disposition of any appeal.

IT IS SO ORDERED.

s/ Elaine D. Kaplan
ELAINE D. KAPLAN
Judge

In the United States Court of Federal Claims

No. 13-1011C
Filed: August 20, 2015

RON ESTES, Treasurer of the State of Kansas, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	RCFC 12(b)(1); RCFC 12(b)(6); U.S. Savings Bonds; 31 C.F.R. § 315.20; "Valid, Judicial Proceedings"; Title-Based Escheat; Breach of Contract; Third-Party Beneficiary; Fifth Amendment Taking

J. Brett Milbourn, Walters, Bender, Strohbehn & Vaughan, P.C., Kansas City, KS, with whom was *David Charles Frederick*, Kellogg, Huber, et al., Washington, DC, for Plaintiff.

Kenneth David Woodrow, with whom were *Stuart F. Delery*, Assistant Attorney General, *Robert E. Kirschman*, Jr., Director, and *Steven Gillingham*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for Defendant. *Theodore C. Simms, II*, Bureau of Fiscal Service, U.S. Department of Treasury, Washington, DC, Of Counsel for Defendant.

OPINION AND ORDER

KAPLAN, Judge.

In this action, Plaintiff Ron Estes, Treasurer of the State of Kansas ("Kansas" or "the State"), requests an award of damages equal to the matured value (plus interest) of all lost, stolen, destroyed or otherwise abandoned U.S. savings bonds that are registered to individuals with last known addresses in Kansas. According to Kansas, it has succeeded to ownership of these bonds by virtue of a state court judgment in which title to the bonds escheated to the State under the Kansas Disposition of Unclaimed Property Act, Kan. Stat. Ann. § 58-3979 (West 2000).

In its complaint, Kansas states its belief that the value of the abandoned bonds is in excess of $151 million. It asserts a number of causes of action, including, among others, breach of contract, equitable estoppel, and Fifth Amendment takings. Kansas also seeks an accounting

of the benefits to which it claims entitlement, including serial numbers, addresses, and other information that would identify those bonds registered with last known addresses in the State of Kansas.

Before the Court is the government's motion to dismiss for lack of jurisdiction under Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC") and for failure to state a claim under RCFC 12(b)(6). For the reasons that follow, the government's motion under Rule 12(b)(1) is **DENIED**. Its motion to dismiss pursuant to Rule 12(b)(6) is **GRANTED IN PART AND DENIED IN PART**.

BACKGROUND

I. The United States Savings Bond Program

Pursuant to its power "[t]o borrow money on the credit of the United States" under Article I, section 8, clause 2 of the Constitution, Congress has delegated authority to the Secretary of the Treasury ("the Secretary"), with the approval of the President, to issue savings bonds, the proceeds of which may be used "for expenditures authorized by law." 31 U.S.C. § 3105(a); Free v. Bland, 369 U.S. 663, 666-67 (1962). The statute gives the Secretary the authority to prescribe regulations governing, among other things, the bonds' investment yield, maturity period, redemption, ownership and transfer. See § 3105(b)-(c). These regulations appear in Title 31 of the Code of Federal Regulations, Parts 315, 353, and 360.[1]

Section 315.5 provides that the person to whom a bond is registered is the owner of the bond. 31 C.F.R. § 315.5(a) ("Registration is conclusive of ownership."). The regulations do not impose any time limits for bond owners to redeem the savings bonds that are the subject matter of this case. Therefore, owners can present them for payment at any time. See 31 U.S.C. § 3105(b)(2)(A) (authorizing the Secretary to promulgate regulations providing that "owners of savings bonds may keep the bonds after maturity"). As of 1989, and at least up through 2012, the Department of the Treasury ("Treasury") was receiving claims of $7,000 to $10,000 a day for payment on savings bonds that had matured many years earlier. Treasurer of N.J. v. U.S. Dep't of Treasury, 684 F.3d 382, 388 (3d Cir. 2012).[2]

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[1] Savings bonds are issued in various Series, designated by letters of the alphabet. Part 315 of Title 31 of the Code of Federal Regulations governs Series A, B, C, D, E, F, G, H, J, and K. Part 353 governs Series EE and HH. Part 360 governs Series I. In general, the corresponding sections of each part—e.g., §§ 315.5, 353.5, and 360.5—are identical. The bonds at issue in this case are Series E, A-D, F, G, H, J, and K, and therefore are subject to Part 315. Compl. ¶ 44.

[2] The relevant statutes and regulations do not contain provisions for locating owners of matured but unredeemed bonds. In 2000, the Treasury Department created a "Treasury Hunt" website, which provides information on matured but unredeemed Series E bonds issued after 1974 in a database searchable by Social Security Number. Treasurer of N.J., 684 F.3d at 388-389.

Section 315.15 provides that savings bonds are "not transferable and are payable only to the owners named on the bonds, except as specifically provided in these regulations and then only in the manner and to the extent so provided." 31 C.F.R. § 315.15. This case concerns the interpretation of the Secretary's regulations governing the redemption of bonds by parties other than their registered owner. In particular, 31 C.F.R. § 315.20(b) provides that:

> The Department of the Treasury will recognize a claim against an owner of a savings bond and conflicting claims of ownership of, or interest in, a bond between coowners or between the registered owner and the beneficiary, if established by valid, judicial proceedings, but only as specifically provided in this subpart. Section 315.23 specifies the evidence required to establish the validity of the judicial proceedings.

II. States' Unclaimed Property Statutes and Their Claims for Payment on Savings Bonds

Historically, at least as early as the 1950s, states have sought to recover the proceeds from matured but unredeemed savings bonds pursuant to their unclaimed property statutes. Treasurer of N.J., 684 F.3d at 390. Most of these state statutes have been based on the Uniform Unclaimed Property Act ("Uniform Act"). Id. at 389. Under the Uniform Act, a state may acquire rights to abandoned property if the last known address of the apparent owner is in the state.[3] Uniform Unclaimed Property Act § 4 (1995), available at http://www.uniformlaws.org/shared/docs/unclaimed%20property/uupa95.pdf.

The Uniform Act is rooted in the common-law doctrine of escheat, Treasurer of N.J., 684 F.3d at 389, under which "[s]tates as sovereigns may take custody of or assume title to abandoned . . . property." Delaware v. New York, 507 U.S. 490, 497 (1993).[4] Under the Uniform Act—and consequently, under many states' unclaimed property acts—"the State does not take title to unclaimed property, but takes custody only, and holds the property in perpetuity for the owner." Uniform Unclaimed Property Act prefatory note. As explained in greater detail below, however, the Kansas statute at issue in this case, as amended in 2000, allows the State to take title as well as custody to unclaimed U.S. savings bonds, based upon a state court judgment.

In 1952, Treasury issued Bulletin No. 111, setting forth its position with respect to "state statutes purporting to vest abandoned property, including United States securities, in certain State

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[3] To register a savings bond, the owner completes a registration form, on which the owner identifies his or her address at the time of registration. Treasury initially kept registration records for Series E savings bonds on paper but later converted the paper records to microfiche. Treasury is currently in the process of digitizing those records. Compl. ¶ 46.

[4] "At common law, abandoned personal property was not the subject of escheat, but was subject only to the right of appropriation by the sovereign as bona vacantia. [Supreme Court] opinions, however, have understood 'escheat' as encompassing the appropriation of both real and personal property. . . ." Delaware v. New York, 507 U.S. at 497 n. 9 (internal citations omitted).

officers." Pl.'s Resp. to Def.'s Mot. to Dismiss [hereinafter "Pl.'s Resp."] App. 281. The Bulletin reproduced a letter dated January 28, 1952 [hereinafter the "Escheat Decision"] from the Secretary to the Comptroller of the State of New York. Pl.'s Resp. App. 281-84; Treasurer of N.J., 684 F.3d at 390. In that letter, the Secretary explained that Treasury would pay the proceeds of savings bonds to New York if it actually obtained title to the bonds based upon a judgment of escheat, but it would not do so if the state merely acquired a right to take custody of the proceeds. Pl.'s Resp. App. 283-84; Treasurer of N.J., 684 F.3d at 390. The Secretary reasoned as follows:

> "[p]ayment according to [the] explicit terms of [the] regulations is plainly an obligation of the Government . . . . But even where no explicit reference is made in the regulations to a particular case, the Department will pay one who succeeds to the title of the bondholder. This is not regarded as a violation of the agreement, but, on the contrary, as payment to the bondholder in the person of his successor or representative. Thus, although the regulations do not mention such a case, the Department recognizes the title of the state when it makes claim based upon a judgment of escheat.

Id. App. 283.

More recently, Treasury articulated the same position in a page on its website entitled "EE/E Savings Bonds FAQs." Pl.'s Resp. App. 289-90 (providing a screenshot of the FAQs page). Among a list of frequently asked questions, the page poses the following: "In a state that has a permanent escheatment law, can the state claim the money represented by securities that the state has in its possession[?] For example, can a state cash savings bonds that it's gotten from abandoned safe deposit boxes?" Pl.'s Resp. App. 290. Treasury's answer mirrors the position it stated in the Escheat Decision:

> The Department of the Treasury will recognize claims by States for payment of United States securities where the States have succeeded to the title and ownership of the securities pursuant to valid escheat proceedings. The Department, however, does not recognize claims for payment by a State acting merely as custodian of unclaimed or abandoned securities and not as successor in title and ownership of the securities.

Id.

Since promulgating its view distinguishing between custody- and title-based escheat statutes, Treasury has cited it consistently to defeat claims for payment on unredeemed savings bonds by states with custody-based unclaimed property statutes. See, e.g., Treasurer of N.J., 684 F.3d at 391 (noting the parties' stipulation that Escheat Decision "'is defendants' interpretation of federal savings bond regulations . . . and reflects defendants' understanding of existing laws" and that "the Department has no intention of deviating from the statement"). As recently as April of 2013, the Solicitor General, opposing the State of Montana's petition for certiorari seeking review of the Third Circuit's decision in Treasurer of New Jersey, observed that: (1) "the Department [of Treasury] has long advised the States that to receive payment on a U.S. savings

bond a State must complete an escheat proceeding that satisfies due process and that awards title to the bond to the State, substituting the State for the original bondholder as the lawful owner"; and (2) "given the regulatory prohibition on payment to anyone other than the lawful owner, the Department has also made clear that it will not make payment to a State on a bond if a State does not obtain title to the bond but instead merely seeks 'custody' of bond proceeds until the bondholder redeems the bond." Pl.'s Resp. App. 9.

III. Kansas's Unclaimed Property Act and Escheatment Proceedings

Prior to 2000, Kansas's unclaimed property statute allowed the state to take custody of, but not title to, such property. Pl.'s Resp. 14. In 2000, however, the Kansas legislature amended the statute specifically to allow Kansas to take title to unclaimed U.S. savings bonds. Id. Thus, the Kansas Disposition of Unclaimed Property Act now provides:

> (a) . . . United States savings bonds which are unclaimed property[5] . . . shall escheat to the state of Kansas three years after becoming unclaimed property . . . and all property rights to such United States savings bonds or proceeds from such bonds shall vest solely in the state of Kansas.
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> (b) Within 180 days after the three years in subsection (a), if no claim has been filed [with the administrator] . . . for such United States savings bonds, the administrator shall commence a civil action in the district court of Shawnee county for a determination that such United States savings bonds shall escheat to the state. The administrator may postpone the bringing of such action until sufficient United States savings bonds have accumulated in the administrators [sic] custody to justify the expense of such proceedings.
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> (c) If no person shall file a claim or appear at the hearing to substantiate a claim or where the court shall determine that a claimant is not entitled to the property claimed by such claimant, then the court, if satisfied by evidence that the administrator has substantially complied with the laws of this state, shall enter a judgment that the subject United States savings bonds have escheated to the state.

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[5] Under § 58-3935(c) of the Kansas Disposition of Unclaimed Property Act, "[p]roperty is unclaimed if,"

> for the applicable period set forth in subsection (a) [for the specific type of property], the apparent owner has not communicated in writing or by other means reflected in a contemporaneous record prepared by or on behalf of the holder, with the holder concerning the property or the account in which the property is held, and has not otherwise indicated an interest in the property. A communication by an owner with a person other than the holder or the holder's representative who has not in writing identified the property to the owner is not an indication of interest in the property by the owner.

(d) The administrator shall redeem such United States savings bonds escheated to the state and the proceeds from such redemption of United States savings bonds shall be deposited in the state general fund . . . .

Kan. Stat. Ann. § 58-3979.

Pursuant to this statutory scheme, on January 3, 2013, Kansas filed a Petition for Declaratory Judgment in the district court of Shawnee County, Kansas, requesting "a determination that all right and legal title in, and ownership of, certain matured, unredeemed United States savings bonds, which are unclaimed property under the Kansas Disposition of Unclaimed Property Act, . . . shall escheat to the State of Kansas." Pl.'s Resp. App. 87 (Petition ¶ 49). Of the bonds referenced in the petition, some were in the physical possession of the Kansas Treasurer ("Bonds in Possession"), whereas others had been "lost, stolen, destroyed, or otherwise made unavailable" and thus were not in the possession of the Kansas Treasurer ("Absent Bonds"). Id. App. 88-89 (Petition ¶¶ 52-53). In Kansas's estimation, the total matured value of the Bonds in Possession is $876,836.18, and the total matured value of the Absent Bonds is approximately $151.8 million. Id.

According to the petition, "extensive efforts were made to identify and verify accurate addresses of bond owners and to the extent possible reunite [the Bonds in Possession] with their owners," but such efforts failed. Id. App. 88. To give notice of the proceedings to the owners whose interests were implicated by them, the court authorized service by publication. Id. App. 157. On March 29, 2013, the court held a hearing on the petition, at which no bond owner appeared. Id. App. 166 (Judgment of Escheatment 8). After reviewing the evidence, the court entered a judgment of escheatment, in which it declared that all rights and legal title to, and ownership of both the Bonds in Possession and the Absent Bonds, "shall escheat to the State of Kansas." Id. App. 167 (Judgment of Escheatment 9).

IV. Requests by Kansas to Redeem the Bonds

On May 13, 2013, Kansas filed a claim with Treasury for redemption of the bonds now owned, according to the Kansas court's escheatment judgment, by the State. Id. App. 251-54. On October 9, 2013, Treasury responded to Kansas's request with respect to the Bonds in Possession, informed Kansas of the redemption procedures, and noted that Treasury anticipated "redeeming [the Bonds in Possession] in the normal course." Id. App. 276-77. Kansas has since delivered the Bonds in Possession to Treasury and received the proceeds. Compl. ¶ 82.

On October 16, 2013, however, Treasury denied Kansas's claim with respect to the Absent Bonds. Pl.'s Resp. App. 279-80. It explained that "under Treasury's regulations, Treasury is bound to its contract with the registered owners of these savings bonds, and would violate that contract if it redeemed them to a third party." Id. App. 279. Further, Treasury observed, "[i]f the registered owner of one of the Absent Bonds were to present that bond, Treasury would be obligated to redeem that bond." Id. According to the letter, Treasury regulations provided that in the absence of an exception or waiver, Treasury could only redeem a savings bond to its registered owner. Id. It asserted that "[e]scheatment claims by states are not

an explicit exception to the conclusive ownership requirements of 31 C.F.R. § 315.5(a)." Id. Moreover, the Treasury letter explained, the exceptions to the ownership requirements of 31 C.F.R. § 315.5(a) set forth in § 315.5(b) for "rights established by valid, judicial proceedings" include only ownership claims pursuant to a divorce decree (§ 315.22(a)) and claims based on gifts causa mortis (§ 315.22(b)). Id. App. 279 n.5.

The letter stated that "[i]n the past, Treasury has interpreted its regulations to allow some state escheatment claims, but only when the state possesses the savings bonds in its claim." Id. App. 279-80. Kansas could not redeem the Absent Bonds, the letter concluded, "because it is not the registered owner of the bonds, nor does it possess them." Id. App. 280.

V. Kansas's Claims in This Court

On December 20, 2013, Kansas filed this lawsuit. Its complaint consists of eight counts: (1) breach of express contract; (2) breach of implied-in-fact contract; (3) breach of fiduciary duties with respect to express contracts; (4) equitable estoppel; (5) third-party beneficiary contract; (6) declaratory judgment; (7) Fifth Amendment taking of property for public use; and (8) action for accounting. Compl. 22-38. For counts I, II, III, IV, V, and VII, Kansas seeks "damages in an amount equal to the matured value, plus applicable interest, of [the Absent Bonds]—believed to be in excess of $151,800,000," as well as "the expense of this action" and any "further relief that this Court deems just and equitable." Compl. 24-25, 27-29, 31, 33, 36. In addition, for Count VI, Kansas requests "that this Court enter an order declaring:"

> that Defendants have no right, title, or interest to the Absent Bonds; that Defendant has wrongfully asserted custody and/or ownership over Plaintiff's Absent Bonds, and failed to turn over to Plaintiff required and necessary information regarding the Absent Bonds, namely serial numbers, addresses, and other information which would identify those bonds with last known addresses in the State of Kansas; that Plaintiff, having been awarded all right, title and interest in the Absent Bonds and their proceeds by valid judicial escheat proceedings, should not be deprived of its property and Defendant must therefore provide Plaintiff the information necessary to identify those Absent Bonds registered with last known addresses in the State of Kansas; that Defendant accept Plaintiff's presentment and redemption of the subject Absent Bonds; [and] that Plaintiff be awarded [the damages and costs specified in Counts I, II, III, IV, V, and VII].

Compl. 35. Finally, for Count VIII, Kansas requests that this Court order the government to "provide an accounting of the Absent Bonds, namely serial numbers, addresses, and other information which would identify those bonds registered with last known addresses in the State of Kansas, and [the] value of the Absent Bonds and their proceeds," as well as "the expense of this action" and any other relief. Compl. at 38.

VI. The Government's Motion to Dismiss

The government has moved to dismiss Kansas's complaint. It contends that Kansas's contract claims, its equitable estoppel claim, and its declaratory judgment claim must be

dismissed for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1). Moreover, although it does not dispute that Kansas's takings claim falls within this Court's Tucker Act jurisdiction, the government contends that this claim must be dismissed for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(6).

The Court held oral argument on the government's motion to dismiss on October 21, 2014. Subsequent to the argument, the Court requested and the parties filed two rounds of supplemental briefs. Most recently, on June 30, 2015, the government submitted a Notice of Proposed Rulemaking, to which Kansas has since responded.

For the reasons that follow, the Court concludes that it has jurisdiction over the claims in the complaint. Therefore, the government's motion to dismiss under Rule 12(b)(1) is **DENIED**. The Court further finds that Kansas has stated claims on which relief can be granted with respect to its allegations of breach of contract and a Fifth Amendment taking of property. On the other hand, it finds that Kansas's allegations do not support a claim for relief as a third party beneficiary. Therefore, the government's motion to dismiss pursuant to Rule 12(b)(6) is **GRANTED IN PART AND DENIED IN PART**.

DISCUSSION

I. Standards for Motions to Dismiss

In deciding a motion to dismiss for lack of subject matter jurisdiction, the court accepts as true all undisputed facts in the pleadings and draws all reasonable inferences in favor of the plaintiff. Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1163 (Fed. Cir. 2011). The court may "inquire into jurisdictional facts" to determine whether it has jurisdiction. Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991). The burden of establishing jurisdiction is on the plaintiff. Trusted Integration, 659 F.3d at 1163.

When considering a motion to dismiss for failure to state a claim under RCFC 12(b)(6), the court "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in [the plaintiff's] favor." Boyle v. United States, 200 F.3d 1369, 1372 (Fed. Cir. 2000). The motion will be granted when the facts asserted by the plaintiff fail "to raise a right to relief above the speculative level." Am. Contractors Indem. Co. v. United States, 570 F.3d 1373, 1376 (Fed. Cir. 2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In other words, plaintiff's claim must be plausible on its face. Twombly, 550 U.S. at 570; Acceptance Ins. Cos., Inc. v. United States, 583 F.3d 849, 853 (Fed. Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 556). "Conclusory allegations of law and unwarranted inferences of fact do not," however, "suffice to support a claim." Bradley v. Chiron Corp., 136 F.3d 1317, 1322 (Fed. Cir. 1998) (citations omitted).

II. Subject Matter Jurisdiction

The United States Court of Federal Claims is a court of limited jurisdiction that, pursuant to the Tucker Act, may hear "any claim against the United States 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) (2012). In addition, the Tucker Act gives this court limited jurisdiction to grant equitable and declaratory relief, but only when such relief is "an incident of and collateral to" a money judgment. 28 U.S.C. § 1491(a)(2); Bobula v. U.S. Dep't of Justice, 970 F.2d 854, 859 (Fed. Cir. 1992).

A. Contract-Based Claims[6]

It is well established that savings bonds are contracts between the United States and the owners of the bonds and that the regulations prescribed by the Secretary constitute the contract terms. Treasurer of N.J., 684 F.3d at 387 (citing Rotman v. United States, 31 Fed. Cl. 724, 725 (1994)). The government has nonetheless moved to dismiss Kansas's complaint for lack of subject matter jurisdiction, arguing that the escheatment proceedings in Kansas state court did not effect a valid transfer of ownership under Treasury regulations with respect to the Absent Bonds. See Def.'s Mot. to Dismiss 7-15. Because Kansas is not the owner of the Absent Bonds, the government reasons, it is not party to the contracts that those bonds represent. Id. Therefore, the government concludes, Kansas's claims cannot be "founded . . . upon any express or implied contract with the United States," as required for this Court to exercise jurisdiction under the Tucker Act, § 1491(a)(1). Def.'s Mot. to Dismiss 7-8.

In the Court's view, the government's argument—that Kansas was not a party to the contract because under Treasury's Regulations it was not the owner of the Absent Bonds—goes to the merits of Kansas's contract claims, not this Court's jurisdiction over them. The Federal Circuit has long held that a well-pleaded allegation that an express or an implied-in-fact contract underlies the plaintiff's claim suffices to confer subject matter jurisdiction in the Court of Federal Claims. Trauma Serv. Grp. v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997) (citing Gould, Inc. v. United States, 67 F.3d 925, 929 (Fed. Cir. 1995)). See also Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637, 639-40 (Fed. Cir. 1989) ("Jurisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." (quoting Bell v. Hood, 327 U.S. 678, 682 (1946))); Moden v. United States, 404 F.3d 1335, 1340 (Fed. Cir. 2005) ("The forum has jurisdiction to hear the matter in the first instance—that is, subject-matter jurisdiction existed—as long as the petitioner asserted nonfrivolous claims" (quoting Spruill v. Merit Sys. Prot. Bd., 978 F.2d 679, 687-88 (Fed. Cir. 1992))). See also Oswalt v. United States, 41 F. App'x 471, 473 (Fed. Cir. July 12, 2002) (observing that, "[b]ecause plaintiffs alleged contracts with the United States, and resolution of the jurisdictional issue of privity of contract under the Tucker Act is intertwined

[6] As the government did in its motion, the Court refers to the following four of Kansas's claims as its contract-based claims: breach of express contract; breach of implied-in-fact contract; breach of fiduciary duties with respect to express contracts; and action for accounting.

with the merits of [plaintiffs'] express and implied breach of contract claims," the Court of Federal Claims should not have dismissed for lack of jurisdiction and should have analyzed the issue as one on the merits).

Here, Kansas's complaint contains a well-pleaded allegation that there is a contract between Kansas and the United States. This allegation, moreover, is not frivolous; indeed, as explained below, Kansas's allegations give rise to a plausible claim for relief. See Twombly, 550 U.S. at 556. Therefore, this Court has subject matter jurisdiction under the Tucker Act to resolve Kansas's contract claims.

B. Third-Party Beneficiary Claim

In moving to dismiss Kansas's third-party beneficiary claim for lack of jurisdiction, the government argues that, as a matter of law, Kansas does not constitute a third-party beneficiary of the savings bond contracts. Def.'s Mot. to Dismiss 16-17. The Court also views this question as going to the merits of Kansas's claim, and not the Court's jurisdiction. Thus, the Court shall address the government's arguments with respect to Kansas's third-party beneficiary claim, like the government's arguments with respect to Kansas's contract claims, in connection with its determination on the merits.

C. Equitable Estoppel and Declaratory Judgment Claims

The government's argument that the Court should dismiss Kansas's equitable estoppel and declaratory judgment claims proceeds as follows: per the Tucker Act, 28 U.S.C. § 1491(a)(2), this Court has jurisdiction over claims for equitable and declaratory relief only when such claims are "an incident of and collateral to" a claim for money damages; the Court must dismiss all of Kansas's claims for money damages either for lack of jurisdiction or for failure to state a claim upon which relief can be granted; thus, the Court also must dismiss Kansas's equitable estoppel and declaratory judgment claims for lack of jurisdiction. Def.'s Mot. to Dismiss 19-20. The government's argument for dismissal of Kansas's equitable estoppel and declaratory judgment claims, therefore, depends upon a dismissal of all of Kansas's other claims. As set forth below, the Court denies the government's motion to dismiss as to Kansas's contract claims and its takings claim. Accordingly, Kansas's claims for equitable estoppel and declaratory judgment remain "an incident of and collateral to" claims for money damages, and the government's motion to dismiss them pursuant to Rule 12(b)(1) must be denied.

III. Sufficiency of Kansas's Claims Under RCFC 12(b)(6)

A. Kansas's Contract Claims

1. The Parties' Contentions

As the basis for its motion to dismiss Kansas's contract claims, the government argues that, under Treasury regulations—and therefore under the savings bond contracts—Treasury was not required to recognize Kansas's claims of ownership of the bonds based on the state

escheatment proceedings. See Mot. to Dismiss 8, 11. Thus, the merits of the government's motion to dismiss for failure to state a claim hinge upon the meaning of the regulations.

The pertinent regulatory provisions are contained at Subpart E of 31 C.F.R. Part 315 (captioned "Limitations on Judicial Proceedings"). Entitled "General," 31 C.F.R. § 315.20 states as follows:

> The following general rules apply to the recognition of a judicial determination on adverse claims affecting savings bonds:
>
> (a) The Department of the Treasury will not recognize a judicial determination that gives effect to an attempted voluntary transfer inter vivos of a bond, or a judicial determination that impairs the rights of survivorship conferred by these regulations upon a coowner or beneficiary. All provisions of this Subpart are subject to these restrictions.
>
> (b) The Department of the Treasury will recognize a claim against an owner of a savings bond and conflicting claims of ownership of, or interest in, a bond between coowners or between the registered owner and the beneficiary, if established by valid, judicial proceedings, but only as specifically provided in this subpart. Section 315.23 specifies the evidence required to establish the validity of the judicial proceedings.
>
> (c) The Department of the Treasury and the agencies that issue, reissue, or redeem savings bonds will not accept a notice of an adverse claim or notice of pending judicial proceedings, nor undertake to protect the interests of a litigant not in possession of a savings bond.

Kansas contends that its claim of ownership of the Absent Bonds pursuant to the state court escheat judgment is one that 31 C.F.R. § 315.20(b) requires Treasury to recognize because it is a "claim against an owner of a savings bond" that is "established by valid, judicial proceedings." Further, Kansas argues, its claim is one "established by valid, judicial proceedings . . . as specifically provided" in Subpart E because the state court judgment satisfies the requirements that 31 C.F.R. § 315.23 (entitled "Evidence") sets forth for establishing the validity of judicial proceedings. See Pl.'s Resp. 27-28; see also 31 C.F.R. § 315.23(a) ("To establish the validity of judicial proceedings, certified copies of the final judgment, decree, or court order, and of any necessary supplementary proceedings, must be submitted. If the judgment, decree, or court order was rendered more than six months prior to the presentation of the bond, there must also be submitted a certificate from the clerk of the court, under court seal, dated within six months of the presentation of the bond, showing that the judgment, decree, or court order is in full force.").[7]

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[7] Subsections 315.23(b) and (c), which are not directly at issue in this case, set forth specific requirements for the recognition of the validity of judicial proceedings in cases involving the payment of the proceeds of a bond to a trustee in bankruptcy or receiver in equity, as follows:

The government, on the other hand, argues that state court escheatment proceedings are not among the "valid, judicial proceedings" to which section 315.20(b) refers. Def.'s Mot. 12-13. It focuses on the phrase in that regulation stating that a claim of ownership may be established by valid, judicial proceedings "only as specifically provided in this subpart." Id. The government does not deny that Kansas satisfied the evidentiary requirements set forth in 31 C.F.R. § 315.23 to establish the validity of the state court escheatment proceedings upon which its claim of ownership is based. Rather, it argues that the regulatory phrase providing that Treasury will recognize a claim of ownership established through valid, judicial proceedings "but only as provided in this subpart" means that Treasury will only recognize the specific categories of judgments that are referenced elsewhere in Subpart E—i.e., the judgments referenced in § 315.21, entitled "[p]ayment to judgment creditors,"[8] and those identified in § 315.22, entitled "[p]ayment or reissue pursuant to judgment."[9] According to the government,

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> (b) Trustee in bankruptcy or receiver of an insolvent's estate. A request for payment by a trustee in bankruptcy or a receiver of an insolvent's estate must be supported by appropriate evidence of appointment and qualification. The evidence must be certified by the clerk of the court, under court seal, as being in full force on a date that is not more than six months prior to the presentation of the bond.
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> (c) Receiver in equity or similar court officer. A request for payment by the receiver in equity or a similar court officer, other than a receiver of an insolvent's estate, must be supported by a copy of an order that authorizes the presentation of the bond for redemption, certified by the clerk of the court, under court seal, as being in full force on a date that is not more than six months prior to the presentation of the bond.

[8] Section 315.21 states as follows:

> (a) Purchaser or officer under levy. The Department of the Treasury will pay (but not reissue) a savings bond to the purchaser at a sale under a levy or to the officer authorized under appropriate process to levy upon property of the registered owner or coowner to satisfy a money judgment. Payment will be made only to the extent necessary to satisfy the money judgment. The amount paid is limited to the redemption value 60 days after the termination of the judicial proceedings. Payment of a bond registered in coownership form pursuant to a judgment or a levy against only one coowner is limited to the extent of that coowner's interest in the bond. That interest must be established by an agreement between the coowners or by a judgment, decree, or order of a court in a proceeding to which both coowners are parties.
>
> (b) Trustee in bankruptcy, receiver, or similar court officer. The Department of the Treasury will pay, at current redemption value, a savings bond to a trustee in bankruptcy, a receiver of an insolvent's estate, a receiver in equity, or a similar court officer under the provisions of paragraph (a) of this section.

[9] Section 315.22 states as follows:

"exceptions to § 315.5(a) [the rule stating that registration is conclusive of ownership] by judicial proceedings include claims of ownership based on a divorce decree (§ 315.22(a)) and claims based on a gift causa mortis (§ 315.22(b))" but not claims of ownership arising out of an escheatment judgment because "escheatment actions are not one of the 'valid judicial proceedings' recognized in the regulations." Def.'s Mot. to Dismiss 12.

Thus, Kansas interprets the phrase "valid, judicial proceedings" in § 315.20(b) as a catchall category, subject only to the exceptions identified in § 315.20(a) (for judicial determinations that "give[] effect to an attempted voluntary transfer inter vivos of a bond," or that "impair[] the rights of survivorship conferred by [the] regulations upon a coowner or beneficiary"). Its argument is that the phrase "as specifically provided in this subpart" in § 315.20(b) was not intended to limit the types of judicial proceedings that could confer bond ownership rights but instead refers to the manner in which the validity of judicial proceedings must be established. The government, on the other hand, asserts that the otherwise broad term "valid, judicial proceedings" is narrowed by the "specifically provided" language, with the result

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(a) Divorce. The Department of the Treasury will recognize a divorce decree that ratifies or confirms a property settlement agreement disposing of bonds or that otherwise settles the interests of the parties in a bond. Reissue of a savings bond may be made to eliminate the name of one spouse as owner, coowner, or beneficiary, or to substitute the name of one spouse for that of the other spouse as owner, coowner, or beneficiary pursuant to the decree. However, if the bond is registered in the name of one spouse with another person as coowner, there must be submitted either:

(1) A request for reissue by the other person or

(2) A certified copy of a judgment, decree, or court order entered in proceedings to which the other person and the spouse named on the bond are parties, determining the extent of the interest of that spouse in the bond.

Reissue will be permitted only to the extent of that spouse's interest. The evidence required under § 315.23 must be submitted in every case. When the divorce decree does not set out the terms of the property settlement agreement, a certified copy of the agreement must be submitted. Payment, rather than reissue, will be made if requested.

(b) Gift causa mortis. A savings bond belonging solely to one individual will be paid or reissued at the request of the person found by a court to be entitled by reason of a gift causa mortis from the sole owner.

(c) Date for determining rights. When payment or reissue under this section is to be made, the rights of the parties will be those existing under the regulations current at the time of the entry of the final judgment, decree, or court order.

that only those claims of ownership that arise out of the types of judicial proceedings explicitly referenced in Subpart E must be recognized.[10]

For the reasons set forth in greater detail below, the Court concludes that Kansas's reading of the regulatory text is the more persuasive one. By contrast, the government's position is inconsistent with the position that Treasury has articulated for over sixty years through interpretive guidance, statements on its website, and positions taken in litigation as recently as April of 2013, just one month before Kansas requested payment on the bonds in this case. Accordingly, the Court concludes that Kansas has stated a claim for relief with respect to its allegations of breach of contract.

2. The Regulatory Text

To determine the meaning of the regulations, the Court begins with their text. See Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 204 (2011). As noted, 31 C.F.R. § 315.20(b) states that Treasury "will recognize a claim against an owner of a savings bond . . . if established by valid, judicial proceedings, but only as specifically provided in this subpart." Subsection (a) of § 315.20, in turn, identifies the specific judicial determinations that Treasury will not recognize (those that give effect to "an attempted voluntary transfer inter vivos of a bond" and those that "impair[] the rights of survivorship conferred by these regulations upon a coowner or beneficiary").

In the Court's view, the best reading of the phrase "but only as specifically provided in this subpart" is that it was intended to: (1) preclude the recognition of claims of ownership where the evidentiary requirements set forth in Subpart E for establishing the validity of judicial proceedings (§ 315.23) have not been met; and (2) reference the particular requirements, limitations and/or conditions that Subpart E imposes on the redemption or reissuance of bonds in the context of the particular types of judicial proceedings that are governed by §§ 315.21 and 315.22.

Thus, there are essentially two ways to read the phrase "but only as specifically provided in this subpart." Kansas argues that the word "as" in this context means "in the manner of."

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[10] In its first supplemental brief, the government raised for the first time two new bases for refusing to recognize ownership rights arising out of state court escheatment proceedings: (1) that such proceedings do not involve a claim against the owner, coowner, or beneficiary of a savings bond, as required under subsection 315.20(b), because an escheat judgment involves a proceeding that is brought against the property itself (in rem), and (2) that "[t]o the extent that Kansas claims title over savings bonds with a co-owner or beneficiary," such a claim would be inconsistent with the language of § 315.20(a) "because it would interfere with the rights of survivorship conferred by Treasury regulations." Def.'s 1st Supp. Br. 4-5. The Court addresses these arguments in subsection 3 below, which concerns the apparent inconsistency of the positions the government has taken both historically and in this matter concerning whether rights of ownership based on title-based escheatment statutes must be recognized under Treasury's regulations.

Pl.'s 1st Supp. Br. 12-13, Feb. 16, 2015, ECF No. 29. It contends that "used in the phrase 'as specifically provided' the word 'as' describes the manner in which Treasury should determine the validity of a judicial proceeding, not whether it will recognize a particular proceeding." Id. at 13. On the other hand, under the government's argument, the word "as" means "to the extent" or "if"—i.e. that Treasury will recognize claims based on valid, judicial proceedings only to the extent that, or if, such recognition is specifically provided for in Subpart E.

The problem with reading the word "as" in the manner the government would read it (to mean "if") is that the result would be a construction of the regulations that collides with the well-established canon of interpretation that holds that regulatory text should not be read in such a way as to render any portion of the language superfluous. See Glover v. West, 185 F.3d 1328, 1332 (Fed. Cir. 1999) ("[W]e attempt to give full effect to all words contained within [a] statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible."). For if the government is correct that only those categories of judgments specifically referenced in §§ 315.21 and 315.22 are entitled to recognition, then the exceptions set forth in subsection (a) of § 315.20 to the general rule recognizing claims established pursuant to valid, judicial proceedings would be unnecessary.

Moreover, the government's reading of the effect of §§ 315.21 and 315.22 (which posits that those sections contain an exhaustive enumeration of the particular types of judicial proceedings that can confer ownership rights) ignores what appears to be their actual purpose: to address specific considerations and concerns attendant to the types of judgments referenced in those sections. Thus, section 315.21(a) places limitations on the extent to which Treasury will recognize claims of bond purchasers at a sale under levy or to an officer authorized to levy upon the property of an owner to satisfy a money judgment, specifying, for example, that "[p]ayment will be made only to the extent necessary to satisfy the money judgment" and that "[t]he amount paid is limited to the redemption value 60 days after the termination of the judicial proceedings." And § 315.21(b) specifies that, in contrast, Treasury will pay the proceeds of the bond to a trustee in bankruptcy, receiver in equity, or similar court officer "at current redemption value," but does not authorize the reissuance of the bonds in such circumstances.

Similarly, § 315.22(a) concerns recognition of a divorce decree ratifying a property settlement that disposes of savings bonds or otherwise settles each spouse's interest in such bonds. It prescribes specific rules for the reissuance of a bond in that particular context. Section 315.22(a) also serves the purpose of clarifying that such a decree would not fall within the language of § 315.20(a), which states that Treasury will not recognize a judicial determination that gives effect to "an attempted voluntary transfer inter vivos of a bond." And § 315.22(b) specifies that Treasury will—upon request—either pay or reissue a savings bond to a person found by a court to be entitled to such bond as the result of a gift causa mortis.

For these reasons, the Court concludes that Kansas's reading of the scope of the phrase "valid, judicial proceedings" contained in the regulations—which includes state court escheatment proceedings whose validity is established in accordance with section 315.23—is more persuasive than the government's. The Court now turns to the question of whether, notwithstanding this conclusion, it owes deference to Treasury's interpretation of its regulations,

as set forth in this litigation and in its October 2013 letter denying Kansas's request for payment on the Absent Bonds.

3. Previous Administrative Interpretation of the Regulations

It is well established that an agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945))). "[T]his general rule," however, "does not apply in all cases." Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012). Thus, deference is "unwarranted" where "there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" Christopher, 132 S. Ct. at 2166 (quoting Auer, 519 U.S. at 462). The Supreme Court has withheld deference on this basis, for instance, "when the agency's interpretation conflicts with a prior interpretation," id. (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)); "when it appears that the interpretation is nothing more than a 'convenient litigating position,'" id. (quoting Bowen v. Georgetown Hosp., 488 U.S. 204, 213 (1988)); or when it appears that the interpretation is a "'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack," id (quoting Auer, 519 U.S. at 462).

Here, the Court does not believe that the government's interpretation is "plainly erroneous or inconsistent with the regulation." Auer, 519 U.S. at 461. There are ample reasons to find, however, that the interpretation being proffered in this case "does not reflect the agency's fair and considered judgment on the matter in question.'" Christopher, 132 S. Ct. at 2166. Foremost among these is the fact that the government's "interpretation conflicts with [Treasury's] prior interpretation" of its regulations. Id. (citing Thomas Jefferson Univ., 512 U.S. at 515). Indeed, this conflict, in conjunction with other inconsistencies within the arguments the government has made in this litigation, convinces the Court that the position being advanced in this case is merely a post-hoc rationalization for Treasury's decision not to honor the Kansas state court judgment as to the Absent Bonds.

Thus, as described above, in the Escheat Decision, issued in 1952, Treasury rejected the State of New York's request to redeem bonds it held pursuant to its custodial escheatment statute. The Secretary explained that the critical criterion for granting such a request by a state was that it possess legitimate ownership of a bond. He noted that "even where no explicit reference is made in the regulations to a particular case, the Department will pay one who succeeds to the title of the bondholder" and that "[t]his is not regarded as a violation of the agreement, but, on the contrary, as payment to the bondholder in the person of his successor or representative." Pl.'s Resp. App. 283 (emphasis in original). "Thus," the Secretary observed, "although the regulations do not mention such a case, the Department recognizes the title of the state when it makes claim based upon a judgment of escheat." Id.

Treasury reiterated this view in 1983, in a letter to the Secretary of Revenue of the State of Kentucky. It stated that "[b]asically, the Department's position is that claims by States for payment of United States securities will be recognized only where the States have actually

succeeded to the title and ownership of the securities pursuant to valid escheat proceedings." Id. App. 285.

This exact statement also had appeared on Treasury's web site from 2000 until very recently.[11] Id. App. 290. Moreover, the government recently restated and relied on this position and interpretation of its regulations in litigation, including in briefs filed with the Third Circuit and the Supreme Court in which the government expressly characterized the position as representing Treasury's "considered interpretation of federal law." See, e.g., id. App. 9.

In the Treasurer of New Jersey case, six states (New Jersey, Montana, Kentucky, Oklahoma, Missouri, and Pennsylvania) sought payment on savings bonds pursuant to their custody-based escheatment statutes. In that case, the government told both the Third Circuit and the Supreme Court that title-based escheatment constitutes a "valid, judicial proceeding" within the meaning of its regulations. Further, in explaining its position, it made no mention of the "as specifically provided in this subpart" proviso or of its regulations at § 315.21 or § 315.22.

Thus, in its brief in the United States Court of Appeals for the Third Circuit, the government observed that "Treasury regulations generally provide that payment on a U.S. savings bond will be made only to the registered owner" but that "[t]he regulations specify limited exceptions to this rule, including cases in which a third party obtains ownership of the bond through valid judicial proceedings." Brief for Appellees at 6, Treasurer of N.J. v. U.S. Dep't of Treasury, 684 F.3d 382 (3d Cir. 2012) (No. 10-1963), 2011 WL 6935510 (citing 31 C.F.R. §§ 315.20(b), 315.23, 353.20(b), 353.23). Significantly, it further explained that "[a] State may satisfy this ownership requirement 'through escheat, a procedure with ancient origins whereby a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears.'" Id. (emphasis added) (quoting Texas v. New Jersey, 379 U.S. 674,675 (1965)). The Third Circuit agreed with Treasury and ruled against the states, explaining that this "result does not nullify state escheat laws for, as provided in the federal regulations and as recognized by the Treasury, third parties, including the States, may obtain ownership of the bonds—and consequently the right to redemption—through "valid[ ] judicial proceedings." Treasurer of N.J., 684 F.3d at 412 (citing 31 C.F.R. § 315.20(b)).

The states then filed a petition for certiorari in the case. Then, as described above, the government's brief in opposition citing only 31 C.F.R. §§ 315.20(b), 315.23, and 353.23 (and not mentioning § 315.21 or § 315.22 at all) explained that it "has long advised the States that to receive payment on a U.S. savings bond a State must complete an escheat proceeding that satisfies due process and that awards title to the bond to the State," and that this "represents the Department's considered interpretation of federal law." Pl.'s Resp. App. 9 (Brief for the

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[11] The statement appeared on Treasury's EE/E Savings Bonds FAQs web page, a screen shot of which appears at Pl.'s Resp. App. 289-90. At some point during this litigation, however, Treasury revised this page, and it now omits any mention of escheatment. See https://www.treasurydirect.gov/indiv/research/indepth/ebonds/res_e_bonds_eefaq.htm (last visited Aug. 20, 2015).

Respondents in Opposition, Dir. of Dep't of Revenue of Montana v. U.S. Dep't of Treasury, cert. denied, 133 S. Ct. 2735 (2013)).

Despite these unambiguous statements, Treasury claims that it never actually took the position that its regulations required it to recognize claims of ownership pursuant to an escheat judgment. See, e.g., Def.'s Reply 5 (calling the argument that Treasury had stated many times in the past that it would recognize title-based escheatment judgments a "misapprehension of Treasury's past statements"). It attempts to reconcile its position in this litigation with its past statements on the grounds that because those statements "were made in the context of states claiming title for bonds in their possession," they "pertain[ed] only to the effect of state escheatment laws on bonds the state has in its possession." Def.'s Mot. 13 (emphasis in original).

This contention is unpersuasive. First, as Kansas points out, the first paragraph in the Second Amended Complaint in the Treasurer of New Jersey case clearly states that the unclaimed bonds at issue in that matter were "in the hands of missing owners" and not the states. Pl.'s 1st Supp. Br. Add. 2. Second, and in any event, even though Treasury had proffered its interpretation of its regulations in the context of cases in which States were seeking redemption of bonds in their possession, the rationale Treasury offered for its position—that under the regulations, "to receive payment on a U.S. savings bond a State must complete an escheat proceeding that satisfies due process and that awards title to the bond to the State"—is not limited to circumstances in which a State has the bonds in its possession. To the contrary, that rationale was based on the understanding that a judgment pursuant to a title-based escheat statute would serve for purposes of Treasury regulations as a "claim against an owner of a savings bond" that Treasury would recognize, if "established by valid, judicial proceedings." 31 C.F.R. § 315.20(b).

In that regard, the Court is also not persuaded by Treasury's argument that possession of the bonds is uniformly a prerequisite to their redemption under the regulations. Def.'s Mot. to Dismiss 14 (citing 31 U.S.C. § 3105(b)(2)) (asserting that "Treasury regulations require presentation and surrender of the bonds as a prerequisite for payment" and that "[p]hysical surrender ensures that Treasury can close out the bond contract, ensures that the bonds are legitimate, and prevents double payment on the same bond"). To begin with, the regulations explicitly provide for the circumstance in which an owner does not possess the bond, such as when a bond has been lost, stolen, or destroyed. See 31 C.F.R. § 315.25. In such a case, Treasury "may require a bond of indemnity, in the form, and with the surety, or security . . . necessary to protect the interests of the United States." Id. In addition, the regulations provide that a lost, stolen or destroyed bond "for which relief has been granted" (i.e., which has been paid) "is the property of the United States and, if recovered, must be promptly submitted to the Bureau of Fiscal Service . . . for cancellation." 31 C.F.R. § 315.28(b).

In addition, nothing in 31 C.F.R. § 315.20 states that possession is required where a claim of ownership is established pursuant to valid, judicial proceedings. To the contrary, the only reference to a possession requirement that is made in § 315.20 is in subsection (c), which specifies that the government will not accept a notice of an adverse claim or of pending judicial proceedings, "nor undertake to protect the interests of a litigant not in possession of a savings

bond." 31 C.F.R. § 315.20(c). This section addresses how Treasury will deal with unadjudicated claims of ownership. Subsection (b), on the other hand, concerns recognition of claims of ownership that are no longer in litigation but that have been established pursuant to valid, judicial proceedings.

Moreover, as the government explained in the Supreme Court brief, the regulatory prohibition on payment to anyone other than the lawful owner is what prevents double payment on the same bond, not a requirement of physical surrender. Pl.'s Resp. App. 9. See also id. App. 285 (stating in the 1983 letter that payment to a state that has succeeded to the legal ownership of the savings bonds "results in the full discharge of the Treasury's obligation"). If Treasury recognizes that title to a bond transfers from the original registrant to the state, and if it only honors claims for redemption of that bond by one who holds title to it, there is no chance that the government would incur multiple obligations on a single bond.

Finally, the position that Treasury is taking in this litigation is internally inconsistent. Thus, it has claimed for the first time in the briefing of its motion to dismiss that its decision to allow Kansas to redeem the Bonds in Possession was based on an exercise of its waiver authority" under § 315.90(a) of the regulations,[12] rather than the rationale expressed in its Escheat Decision and in the briefs that it filed in the Treasurer of New Jersey litigation. Def.'s Reply 7. But the letter in which Treasury instructed Kansas on how to proceed in redeeming the Bonds in Possession said nothing to indicate that Treasury was exercising any waiver authority. See Pl.'s Resp. App. 276-77. To the contrary, Treasury noted that it would redeem the bonds "in the normal course," after it received a certified copy of the Judgment of Escheatment and other documentation. Id. at 277.

Treasury's explanation of the basis for its denial of Kansas's request with respect to the Absent Bonds has also continued to morph throughout this case. In its October 2013 denial letter (and in its initial motion to dismiss), Treasury relied upon its newly articulated narrow interpretation of the "valid, judicial proceedings" language in § 315.20(b). But in its first supplemental brief, the government argues for the first time that an escheat judgment does not involve "a claim against an owner of a savings bond" within the meaning of § 315.20(b) because an escheat proceeding was not against the owner of the bond; it is an in rem proceeding against the property itself. Def.'s 1st Supp. Br. 5, Jan. 15, 2015, ECF No. 28. This post-hoc rationale is

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[12] 31 C.F.R. § 315.90(a) provides that:

> The Commissioner of the Fiscal Service, as designee of the Secretary of the Treasury, may waive or modify any provision or provisions of these regulations. He may do so in any particular case or class of cases for the convenience of the United States or in order to relieve any person or persons of unnecessary hardship:
>
> (a) If such action would not be inconsistent with law or equity, (b) if it does not impair any existing rights, and (c) if he is satisfied that such action would not subject the United States to any substantial expense or liability.

contrary to the position Treasury has taken in the past and also lacks merit. While an escheatment judgment is obtained by a proceeding "in rem" (i.e., against the property) the result of such a judgment is the substitution of the state for the bond's lawful owner. Thus, an escheat proceeding may readily be treated as "a claim against the owner of the bond" for purposes of the Treasury regulations. Indeed, as described above, it has been so treated (at least implicitly) in Treasury's prior statements on the issue.

Treasury further argues (again for the first time in its supplemental brief and again contrary to its historically expressed views) that to the extent that Kansas claims title to savings bonds for which there exists a coowner or beneficiary, such claims would be inconsistent with 31 C.F.R. § 315.20(a), which provides that Treasury will not recognize "a judicial determination that impairs the rights of survivorship conferred by these regulations upon a coowner or beneficiary." Def.'s 1st Supp. Br. 4. This argument is unpersuasive because once a determination is made through an escheatment proceeding that the former owner has abandoned the bond, the State becomes its lawful owner. Therefore, the former coowner or beneficiary no longer has any rights of survivorship to be impaired.

In short, Treasury's litigating position cannot be reconciled with its prior statements expressing what it then characterized as its "considered interpretation" of its regulations. Pl.'s Resp. App. 9. And while an agency is certainly entitled to change its interpretation of its own regulations (see Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015)), the Court cannot conclude that the new position represents the agency's considered judgment, where Treasury resists acknowledging that its position has changed, and where the rationale for its position continues to shift as the litigation itself progresses. Therefore, the Court concludes that the interpretation of its regulations that is set forth in Treasury's briefs in this case is entitled to no deference at all. If anything, deference is due to the interpretation that Treasury expressed for over sixty years until the instant controversy arose. Accordingly, and for the reasons set forth above in Part III.A.2, the Court concludes that Kansas's interpretation of the relevant Treasury regulations is correct and that it has stated a claim for relief with respect to its allegations of breach of contract.[13]

[13] On June 30, 2015, the government filed a notice with the Court advising it that on June 26, 2015, Treasury had issued a Notice of Proposed Rulemaking. The proposed regulation adds a new subpart O, which requires states seeking to redeem bonds to possess the bonds for which they claim title and to produce evidence that the bonds have been abandoned by all persons entitled to payment. 80 Fed. Reg. 37,559-01 (proposed July 1, 2015) (to be codified at 31 C.F.R. § 315.88). The government appears to argue that this Notice has some bearing on the issues before the Court in this case; it observes that "[w]hen evaluating the issue of deference, a court may consider an interpretation formally promulgated in a rulemaking after the controversy or litigation arose." Def.'s Notice of Proposed Rulemaking 2, ECF No. 36 (citing Smiley v. Citibank, 517 U.S. 735, 741 (1996) and Motorola, Inc. v. United States, 436 F.3d 1357, 1366 (Fed. Cir. 2006)). But the Federal Register Notice does not purport to interpret existing regulations (or a statute, as in Smiley and Motorola); its purpose is to change those regulations to reflect the position that the government is taking in this case. The Court, therefore, does not

B. Third-Party Beneficiary Claim

The Court turns next to Kansas's third-party beneficiary claim, which the government has moved to dismiss for lack of jurisdiction but which, as noted above, the Court tests for its sufficiency to state a claim upon which relief can be granted. With respect to this claim, Kansas alleges in its complaint that the Treasury regulations "demonstrate the intent of the parties to [the savings bond] contracts to provide a means of transferring ownership of U.S. savings bonds" and provide that valid, judicial proceedings are one means of transferring such ownership. Compl. ¶ 127. Thus, Kansas alleges, "Kansas falls within the class clearly intended to benefit from the U.S. savings bond contracts because it is an owner of U.S. savings bonds and it has established its ownership of the contracts by valid judicial proceedings." Compl. ¶ 128. According to Kansas, these allegations demonstrate that "the State of Kansas is a third-party beneficiary to the subject U.S. savings bond contracts." Id.

The Court agrees with the government that the facts that Kansas has alleged do not support a claim of third-party beneficiary status. A third-party beneficiary is not a party to the contract but rather is one on whom the contracting parties intend that the contract will confer a direct benefit. Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (citing German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 230 (1912)). As discussed above, Kansas has adequately alleged that it has become a party to the savings bonds contracts, but nothing in its complaint suggests, in contrast, that Treasury and the registered owners of the bonds entered contracts with the intention of benefitting Kansas. Therefore, the government's motion to dismiss is granted with respect to Kansas's third-party beneficiary claim.

C. Fifth Amendment Takings Claim

The final issue that the government raises in its motion is the sufficiency of Kansas's claim that the government's refusal to allow redemption of the Absent Bonds constituted a taking without just compensation under the Fifth Amendment. In addition to repeating the argument rejected above, that Kansas has not gained ownership of the bonds in accordance with Treasury regulations, the government contends that Treasury's actions in relation to the savings bonds contracts were proprietary, and therefore, Kansas's claim, asserted as a Fifth Amendment taking, is better treated as one for breach of contract. Def.'s Mot. 19 (citing Hughes Commc'ns Galaxy, Inc. v. United States, 271 F.3d 1060, 1070 (Fed. Cir. 2001)).

It is well established that "[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid." U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 19 n.16 (1977) (citing Contributors to Pa. Hosp. v. Philadelphia, 245 U.S. 20, 23 (1917)). See also A&D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1152 (Fed. Cir. 2014). As the government argues in its motion, however, the Federal Circuit has observed that "[t]aking claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity."

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consider the Notice relevant in any way to the proper interpretation of the existing regulations at issue in this case.

Hughes Commc'ns Galaxy, 271 F.3d at 1070. "Proprietary government action typically involves bargaining with private actors for the provision or procurement of goods and services; the action is deemed proprietary even though the government may enter into the contractual relationship in pursuit of a larger governmental objective." A&D Auto Sales, 748 F.3d at 1156. In such cases, the court of appeals continued, "remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights." Hughes Commc'ns Galaxy, 271 F.3d at 1070.

The Federal Circuit clarified this observation, however, in Stockton East Water District v. United States, 583 F.3d 1344 (Fed. Cir. 2009). Specifically, the court explained that its statements in Hughes "cannot be understood as precluding a party from alleging in the same complaint two alternative theories for recovery against the Government, for example, one for breach of contract and one for a taking under the Fifth Amendment to the Constitution." Stockton, 583 F.3d at 1368. "On the other hand," the court further explained,

> it can be understood to mean that, when a case arises in which both a contract and a taking cause of action are pled, the trial court may properly defer the taking issue, as it did here, in favor of first addressing the contract issue. It has long been the policy of the courts to decide cases on non-constitutional grounds when that is available, rather than reach out for the constitutional issue. See Nw. Austin Mun. Util. Dist. No. One v. Holder, [557 U.S. 193, 205] (2009). And of course when a plaintiff is awarded recovery for the alleged wrong under one theory, there is no reason to address the other theories.

Stockton, 583 F.3d at 1368.

Here, the Court takes instruction from Stockton and finds that dismissal of Kansas's claim under the Takings Clause is inappropriate at this stage. Thus, the government's motion to dismiss is denied as to this claim.

CONCLUSION

Based on the foregoing, the Court rules on the government's motion to dismiss as follows:

1. The government's motion to dismiss Kansas's contract-based claims for lack of subject-matter jurisdiction pursuant to RCFC 12(b)(1) is **DENIED**.

2. The government's motion to dismiss Kansas's claims for equitable estoppel and declaratory judgment for lack of subject-matter jurisdiction pursuant to RCFC 12(b)(1) is **DENIED**.

3. The government's motion to dismiss Kansas's third-party beneficiary claim, construed as a motion for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(6), is **GRANTED**.

4. The government's motion to dismiss Kansas's claim under the Takings Clause of the Fifth Amendment for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(6) is **DENIED**.

IT IS SO ORDERED.

s/ Elaine D. Kaplan
ELAINE D. KAPLAN
Judge

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

JAKE LATURNER, TREASURER OF THE STATE OF KANSAS, ANDREA LEA, IN HER OFFICIAL CAPACITY AS AUDITOR OF THE STATE OF ARKANSAS,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2018-1509, 2018-1510

Appeals from the United States Court of Federal Claims in Nos. 1:13-cv-01011-EDK, 1:16-cv-00043-EDK, Judge Elaine Kaplan.

ON PETITIONS FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

O R D E R

Appellee Jake LaTurner and Appellee Andrea Lea filed separate petitions for rehearing en banc. A response to the petitions was invited by the court and filed by Appellant United States. The petitions were first referred as petitions for rehearing to the panel that heard the appeals, and thereafter the petitions for rehearing en banc were referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petitions for panel rehearing are denied.

The petitions for rehearing en banc are denied.

The mandate of the court will issue on December 18, 2019.

FOR THE COURT

December 11, 2019 /s/ Peter R. Marksteiner
Date Peter R. Marksteiner
Clerk of Court

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

31 U.S.C. § 3105. Savings bonds and savings certificates

(a) With the approval of the President, the Secretary of the Treasury may issue savings bonds and savings certificates of the United States Government and may buy, redeem, and make refunds under section 3111 of this title. Proceeds from the bonds and certificates shall be used for expenditures authorized by law. . . .

. . .

(c) The Secretary may prescribe for savings bonds and savings certificates issued under this section—

(1) the form and amount of an issue and series;

(2) the way in which they will be issued;

(3) the conditions, including restrictions on transfer, to which they will be subject;

(4) conditions governing their redemption;

(5) their sales price and denominations;

(6) a way to evidence payments for or on account of them and to provide for the exchange of savings certificates for savings bonds; and

(7) the maximum amount issued in a year that may be held by one person.

. . .

ARK. CODE § 18-28-231. Escheatment—United States savings bond

(a) Notwithstanding any law to the contrary, including § 18-28-202(a)(10) and (14) and § 18-28-219(b), a United States savings bond held or owing in this state is presumed abandoned if the savings bond remains unclaimed for five (5) years after the date of maturity of the United States savings bond.

(b) If a United States savings bond is presumed abandoned under subsection (a) of this section, the United States savings bond shall escheat to the state two (2) years after becoming abandoned property according to subsections (c)-(f) of this section.

(c)(1) If no claim for the United States savings bond is filed under § 18-28-215, the administrator shall file a civil action for escheatment of the United States savings bond within one hundred eighty (180) days after the two-year period under subsection (b) of this section.

(2) The administrator may postpone filing a civil action under subdivision (c)(1) of this section until additional United States savings bonds accumulate to justify the expense of the proceeding.

(d) The administrator shall provide notice of the civil action to an individual named as a defendant in the civil action in the manner provided for under § 16-3-101 et seq., and prescribed by Rule 4 of the Arkansas Rules of Civil Procedure.

(e) If no person files a claim or appears at the hearing to substantiate a claim or if the court determines that a claimant is not entitled to the property claimed by the claimant, then the court shall enter judgment that:

(1) The United States savings bond escheats to the state; and

(2) All property rights and legal title to and ownership of the United States savings bond or proceeds from the United States savings bond, including all rights, powers, and privileges of survivorship of any owner, co-owner, or beneficiary, are vested solely in the state.

(f) Notwithstanding §§ 18-28-213 and 18-28-225, the administrator shall redeem any United States savings bonds escheated to the state and deposit the proceeds recovered by the administrator into the Unclaimed Property Proceeds Trust Fund.

(g)(1) Notwithstanding § 18-28-215(c), a person may file a claim with the administrator for a United States savings bond or the proceeds from the savings bond that has escheated to the state under this section.

(2)(A) Upon submission of sufficient proof of the validity of a claim for a United States savings bond that has escheated to the state, the administrator may pay the claim after deducting the expense incurred by the administrator in securing full title and ownership of the United States savings bond by escheatment.

(B) Upon payment of a valid claim, no action thereafter shall be maintained by any other claimant against the state for the funds.

(h) The administrator may contract with and obtain outside legal counsel in the administration of this section.

31 C.F.R. § 315.15. Transfer

Savings bonds are not transferable and are payable only to the owners named on the bonds, except as specifically provided in these regulations and then only in the manner and to the extent so provided.

31 C.F.R. § 315.20 (2015). General

The following general rules apply to the recognition of a judicial determination on adverse claims affecting savings bonds:

(a) The Department of the Treasury will not recognize a judicial determination that gives effect to an attempted voluntary transfer inter vivos of a bond, or a judicial determination that impairs the rights of survivorship conferred by these regulations upon a coowner or beneficiary. All provisions of this subpart are subject to these restrictions.

(b) The Department of the Treasury will recognize a claim against an owner of a savings bond and conflicting claims of ownership of, or interest in, a bond between coowners or between the registered owner and the beneficiary, if established by valid, judicial proceedings, but

only as specifically provided in this subpart. Section 315.23 specifies the evidence required to establish the validity of the judicial proceedings.

(c) The Department of the Treasury and the agencies that issue, reissue, or redeem savings bonds will not accept a notice of an adverse claim or notice of pending judicial proceedings, nor undertake to protect the interests of a litigant not in possession of a savings bond.

31 C.F.R. § 315.21. Payment to judgment creditors

(a) Purchaser or officer under levy. The Department of the Treasury will pay (but not reissue) a savings bond to the purchaser at a sale under a levy or to the officer authorized under appropriate process to levy upon property of the registered owner or coowner to satisfy a money judgment. Payment will be made only to the extent necessary to satisfy the money judgment. The amount paid is limited to the redemption value 60 days after the termination of the judicial proceedings. Payment of a bond registered in coownership form pursuant to a judgment or a levy against only one coowner is limited to the extent of that coowner's interest in the bond. That interest must be established by an agreement between the coowners or by a judgment, decree, or order of a court in a proceeding to which both coowners are parties.

(b) Trustee in bankruptcy, receiver, or similar court officer. The Department of the Treasury will pay, at current redemption value, a savings bond to a trustee in bankruptcy, a receiver of an insolvent's estate, a receiver in equity, or a similar court officer under the provisions of paragraph (a) of this section.

31 C.F.R. § 315.22. Payment or reissue pursuant to judgment

(a) Divorce. The Department of the Treasury will recognize a divorce decree that ratifies or confirms a property settlement agreement disposing of bonds or that otherwise settles the interests of the parties in a bond. Reissue of a savings bond may be made to eliminate the name of one spouse as owner, coowner, or beneficiary, or to substitute the name of one spouse for that of the other spouse as owner, coowner, or beneficiary pursuant to the decree. However, if the bond is registered in the name of one spouse with another person as coowner, there must be submitted either:

(1) A request for reissue by the other person or

(2) A certified copy of a judgment, decree, or court order entered in proceedings to which the other person and the spouse named on the bond are parties, determining the extent of the interest of that spouse in the bond.

Reissue will be permitted only to the extent of that spouse's interest. The evidence required under § 315.23 must be submitted in every case. When the divorce decree does not set out the terms of the property settlement agreement, a certified copy of the agreement must be submitted. Payment, rather than reissue, will be made if requested.

(b) Gift causa mortis. A savings bond belonging solely to one individual will be paid or reissued at the request of the person found by a court to be entitled by reason of a gift causa mortis from the sole owner.

(c) Date for determining rights. When payment or reissue under this section is to be made, the rights of the parties will be those existing under the regulations current at the time of the entry of the final judgment, decree, or court order.

31 C.F.R. § 315.23. Evidence

(a) General. To establish the validity of judicial proceedings, certified copies of the final judgment, decree, or court order, and of any necessary supplementary proceedings, must be submitted. If the judgment, decree, or court order was rendered more than six months prior to the presentation of the bond, there must also be submitted a certificate from the clerk of the court, under court seal, dated within six months of the presentation of the bond, showing that the judgment, decree, or court order is in full force.

(b) Trustee in bankruptcy or receiver of an insolvent's estate. A request for payment by a trustee in bankruptcy or a receiver of an insolvent's estate must be supported by appropriate evidence of appointment and qualification. The evidence must be certified by the clerk of the court, under court seal, as being in full force on a date that is not more than six months prior to the presentation of the bond.

(c) Receiver in equity or similar court officer. A request for payment by the receiver in equity or a similar court officer, other than a receiver of an insolvent's estate, must be supported by a copy of an order that authorizes the presentation of the bond for redemption, certified by the clerk of the court, under court seal, as being in full force on a date that is not more than six months prior to the presentation of the bond.

31 C.F.R. § 315.25. General

Relief, by the issue of a substitute bond or by payment, is authorized for the loss, theft, destruction, mutilation, or defacement of a bond after receipt by the owner or his or her representative. As a condition for granting relief, the Commissioner of the Fiscal Service, as designee of the Secretary of the Treasury, may require a bond of indemnity, in the form, and with the surety, or security, he considers necessary to protect the interests of the United States. In all cases the savings bond must be identified by serial number and the applicant must submit satisfactory evidence of the loss, theft, or destruction, or a satisfactory explanation of the mutilation or defacement.

31 C.F.R. § 315.26. Application for relief—after receipt of bond

(a) Serial number known. If the serial number of the lost, stolen, or destroyed bond is known, the claimant should execute an application for relief on the appropriate form and submit it to the Bureau of the Fiscal Service, Parkersburg, WV 26101.

(b) Serial number not known. If the bond serial number is not known, the claimant must provide sufficient information to enable the Bureau of the Fiscal Service to identify the bond by serial number. See § 315.29(c). The Bureau will furnish the proper application form and instructions.

(c) Defaced or mutilated bond. A defaced bond and all available fragments of a mutilated bond should be submitted to the Bureau.

(d) Execution of claims application. The application must be made by the person or persons (including both coowners, if living) authorized under these regulations to request payment of the bonds. In addition—

(1) If the bond is in beneficiary form and the owner and beneficiary are both living, both will ordinarily be required to join in the application.

(2) If a minor named on a bond as owner, coowner, or beneficiary is not of sufficient competency and understanding to request payment, both parents will ordinarily be required to join in the application.

(e) If the application is approved, relief will be granted by the issuance of a bond bearing the same issue date as the bond for which the claim was filed or by the issuance of a check in payment.

31 C.F.R. § 315.27. Application for relief—nonreceipt of bond

If a bond issued on any transaction is not received, the issuing agent must be notified as promptly as possible and given all information available about the nonreceipt. An appropriate form and instructions will be provided. If the application is approved, relief will be granted by the issuance of a bond bearing the same issue date as the bond that was not received.

31 C.F.R. § 315.29. Adjudication of claims

(a) General. The Bureau of the Fiscal Service will adjudicate claims for lost, stolen or destroyed bonds on the basis of records created and regularly maintained in the ordinary course of business.

. . .

(c) Claims filed six years after final maturity. No claim filed six years or more after the final maturity of a savings bond will be entertained, unless the claimant supplies the serial number of the bond.

31 C.F.R. § 315.90. Waiver of regulations

The Commissioner of the Fiscal Service, as designee of the Secretary of the Treasury, may waive or modify any provision or provisions of these regulations. He may do so in any particular case or class of cases for the convenience of the United States or in order to relieve any person or persons of unnecessary hardship:

(a) If such action would not be inconsistent with law or equity, (b) if it does not impair any existing rights, and (c) if he is satisfied that such action would not subject the United States to any substantial expense or liability.

31 C.F.R. § 323.2. Rules governing availability of information

(a) General. The records of the Bureau of the Fiscal Service required by 5 U.S.C. 552 to be made available to the public shall be made available in accordance with the regulations on the Disclosure of Records of the Office of the Secretary issued under 5 U.S.C. 552 and published as part I of title 31 of the Code of Federal Regulations, 32 FR 9562, July 1, 1967, except as specifically provided in this part.

(b) Limitations on the availability of records relating to securities. Records relating to the purchase, ownership of, and

transactions in Treasury securities or other securities handled by the Bureau of the Fiscal Service for government agencies or wholly or partially Government-owned corporations will ordinarily be disclosed only to the owners of such securities, their executors, administrators or other legal representatives or to their survivors or to investigative and certain other agencies of the Federal and State governments, to trustees in bankruptcy, receivers of insolvents' estates or where a proper order has been entered requesting disclosure of information to Federal and State courts. These records are confidential because they relate to private financial affairs of the owners under this part. In addition, the information falls within the category of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" under the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(6). FOIA Exemption (b)(6) protects the privacy of living persons who own securities as well as the close survivors of deceased owners. Privacy interests, in the sense of the right to control, use, or disclose information about oneself, cease at death. However, the exemption protects the deceased person's family-related privacy interests that survive death where disclosure would cause embarrassment, pain, grief, or disrupt the peace of mind, of the surviving family. The Bureau of the Fiscal Service will determine, under FOIA exemption (b)(6), whether disclosure of the records is in the public interest by balancing the surviving family members' privacy interest against the public's right to know the information.

#9998-3142794

ORIGINAL

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FILED
JAN 11 2016
U.S. COURT OF
FEDERAL CLAIMS

ANDREA LEA, in her official capacity as
Auditor of the State of Arkansas,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 16-43 C

COMPLAINT

Plaintiff Andrea Lea, Auditor of the State of Arkansas, files this complaint by and through the undersigned attorneys against the United States. Plaintiff seeks damages for the United States Department of the Treasury's refusal to redeem certain savings bonds owned by the State of Arkansas, a refusal which breaches the contracts underlying those bonds and also effects an unconstitutional taking or illegal exaction of Arkansas's property interest in them. Plaintiff hereby alleges as follows:

INTRODUCTION

1. Over $17 billion of unclaimed savings bonds are currently being held in custody by the United States Department of the Treasury. These bonds have matured—in many cases, several decades ago—but for whatever reason, they were never redeemed by their owners upon maturity. Treasury makes no effort to affirmatively seek out the owners of these unclaimed bonds. Instead, Treasury simply retains these unredeemed bonds indefinitely, for the use and enjoyment of the United States. Based on Arkansas's share of the national population, approximately $160 million worth of these bonds were last held by residents of Arkansas. Arkansas has come into possession of the physical bond certificates corresponding to a small

fraction of these abandoned bonds, but the vast majority of those certificates have simply been lost.

2. States have long had in place abandoned property laws to provide for the safekeeping of property—like these unclaimed savings bonds—that has been abandoned. The ultimate goal of these abandoned property, or "escheatment," laws is to reunite the lost property with its real owner. In addition, because the abandoned property is held by the State until the actual owner claims it, the value of that property is used for the benefit of the State's residents in the meantime.

3. On March 20, 2015, the Arkansas General Assembly adopted an abandoned property law that specifically addresses matured, unredeemed United States savings bonds. Under the provisions of that law, a savings bond that goes unredeemed for five or more years after it matures is presumed abandoned, and title to those abandoned bonds escheats to the State two years after that. On November 20, 2015, the Arkansas Circuit Court for the Fourth Judicial Circuit entered a Judgment of Escheatment declaring that all legal right and title to certain of these abandoned bonds has vested in the State by operation of this new statute.

4. Under federal law and Treasury's regulations—as interpreted by this Court in *Estes v. United States*, 123 Fed. Cl. 74 (2015), and as long interpreted by Treasury itself—this valid judgment of escheatment effectively transferred title to the bonds in question, requiring Treasury to recognize Arkansas as the new owner of the bonds and to comply with Arkansas's request to redeem them. But Treasury has recently reversed its own decades-old reading of the federal regulations governing United States savings bonds, adopting a transparently self-serving interpretation that requires a State to produce the physical bond certificate corresponding to each savings bond that has escheated to it. And relying on this newly-minted interpretation of its

regulations—which simply cannot be squared with those regulations' plain terms—Treasury has refused to redeem the abandoned bonds that have escheated to Arkansas, as established by the November 20 Judgment.

5. Treasury's refusal to redeem the bonds breaches its most fundamental obligation under the contract that underlies each of the savings bonds in question (contracts to which Arkansas has now succeeded in interest): to pay back the value of the loan, plus the interest that has accrued at the stipulated rate, after maturity and upon request. Treasury's refusal also wholly deprives Arkansas's property interest in the abandoned bonds of any economic value. Plaintiff brings this action on behalf of the State to obtain compensation for the United States' illegal and unconstitutional actions.

JURISDICTION

6. This Court has subject-matter jurisdiction over this case because it involves claims for damages against the United States founded upon the Constitution and upon express contracts with the United States, and that jurisdiction is exclusive because the amount in controversy exceeds $10,000. 28 U.S.C. §§ 1346, 1491.

PARTIES

7. The plaintiff in this action is Andrea Lea, Auditor of the State of Arkansas. Her duties include keeping the accounts of the State and directing prosecutions against all those who possess property owned by the State. Her official address is 1401 West Capitol Avenue, Suite 325, Little Rock, AR 72201. She brings this suit in her official capacity, on behalf of the State of Arkansas.

8. The defendant in this action is the United States of America ("United States"). The actions relevant to this lawsuit were taken by the United States Department of the Treasury ("Treasury"), and a division of the Treasury, the Bureau of the Fiscal Service. Treasury is an

executive-branch department of the United States Government, created by Congress and tasked with managing the finances of the United States. Its principal place of business is 1500 Pennsylvania Avenue, Washington, D.C. 20220. The Bureau of the Fiscal Service is an agency within the Treasury Department. It provides accounting services for the United States Government and manages the public debt—including the United States savings bond program. Its principal places of business are 401 14th Street S.W., Washington, D.C. 20227, and 200 Third Street, Parkersburg, WV 26101.

FACTUAL ALLEGATIONS

The United States Savings Bond Program

9. Treasury began selling United States savings bonds at the conclusion of the First World War, and has sold them continuously ever since. Most savings bonds bear long maturities: 30 or 40 years, on average.

10. United States savings bonds have been sold in several different "series," and the terms of the bonds vary by series. Series A, B, C, and D bonds were sold from March 1935 through April 1941. Series A, B, C, and D bonds were sold with 10-year terms. All Series A–D bonds reached maturity by April 1951.

11. Series E bonds were first sold in 1941. Nearly 4.6 billion Series E bonds were sold in this country between 1941 and 1980. Series E bonds sold between 1941 and 1965 were given 40-year terms. Between 1966 and 1980, they carried 30-year terms. The last Series E bond was sold in 1980. The first Series E bonds matured and ceased earning interest in 1981; the last such bonds matured in 2010.

12. Series F and G bonds were sold from May 1941 through April 1952. Series F and G bonds were sold with 12-year terms. All Series F and G bonds reached maturity by April 1964.

13. Series H bonds were sold from June 1952 through December 1979. Series H bonds sold between 1952 and 1957 carried a term of 29 years and 8 months; Series H bonds sold between 1957 and 1979 had a term of 30 years. All Series H bonds reached maturity by December 2009.

14. Series J and K bonds were sold from May 1952 through April 1957. Series J and K bonds were sold with a term of 12 years. All Series J and K bonds reached maturity by April 1969.

15. Treasury does not keep reliable records of current bond-holders. Moreover, because the bonds have long maturities, their original purchasers often transfer the bonds in some way—or at least move from their initial address—before the bonds mature. Accordingly, the owner addresses contained in Treasury's registration records are often no longer accurate when the bonds reach maturity. Indeed, the Government has admitted as much. In litigation in this Court, the Government recognized that its ownership information "is decades old," and it acknowledged "the possibility that most bond purchasers have moved or that the bonds have passed by inheritance to persons other than the purchaser." *See* Transcript of Hearing at 21:18–22:2, *Estes v. United States*, No. 13-1011C (Fed. Cl. Oct. 24, 2014), ECF No. 26; Defendant's Supplemental Reply Brief in Support of its Motion to Dismiss at 8, *Estes*, No. 13-1011C (Fed. Cl. Mar. 3, 2015), ECF No. 30. And because of the limitations of Treasury's records, the United States General Accounting Office has concluded that even if "a thorough search for owners [of matured savings bonds] were completed, the success rate might not be very high." UNITED STATES GEN. ACCOUNTING OFFICE, UNCLAIMED MONEY: PROPOSALS FOR TRANSFERRING UNCLAIMED FUNDS TO STATES 22 (May 1989), *available at* http://goo.gl/6En4aU.

16. But Treasury has not conducted a thorough search for owners of matured savings bonds. When savings bonds mature, Treasury does not attempt to locate or notify their current owners—even by using the addresses it has on record, or through some general form of publication. Instead, to redeem a long-matured United States savings bond from Treasury, an owner must affirmatively contact Treasury with a formal request and present to Treasury either the physical paper bond, its serial number, or other identifying information.

17. Owners of matured savings bonds are frequently unaware, however, that they possess bonds that have matured and are being held, without earning further interest, by Treasury. Because Treasury takes no steps to notify owners when their bonds mature, and because those bonds have both lengthy terms and a relatively small face value, many bond owners have misplaced or simply forgotten about their bonds. And children and other beneficiaries of bond-holders may never even have learned of their existence. Moreover, even if these owners recall that they once purchased or received savings bonds, many cannot meet Treasury's demand that they present either the physical paper bond or its serial number, as the bond may have been lost, stolen, damaged, or destroyed.

18. As a result, there are approximately $17.2 billion worth of United States savings bonds that have matured and stopped earning interest—many, several decades ago—but have never been redeemed. Plaintiff estimates that approximately $160 million, or 0.93%, of that amount corresponds with owners whose last known addresses are in Arkansas. The bulk of these bonds are series E bonds. Until they are claimed, the proceeds due these unredeemed, matured bonds are held by Treasury, for the use and enjoyment of the United States.

19. Each of those unredeemed bonds is "a contract between the United States and the person to whom it is registered." *Rotman v. United States*, 31 Fed. Cl. 724, 725 (1994). Like any

other debt contract, to the creditor—here, the bondholder—it is also a form of intangible personal property. Those bonds that were last held by Arkansas residents and have since been abandoned in the State are thus subject to Arkansas's Unclaimed Property Act.

Escheatment of Unclaimed Property

20. Like most states, Arkansas has long had a general "escheat" statute providing that property that is abandoned in-state is to be reported and delivered into the custody of the State, until such time as its owner comes forward to claim it. ARK. CODE § 18-28-201 et seq.

21. Again like most states, Arkansas's general abandoned property statute contains what is known as a "custody" escheat regime: property that has escheated to the State is merely held by the State for safekeeping until claimed by its rightful owner, who at all times retains title. *See, e.g.*, *id.* § 18-28-210(b). Most states moved towards this "custody" type of escheat regime in the mid-twentieth century, under the influence of the Uniform Law Commission's model Uniform Abandoned Property Act.

22. Before this shift, most States had traditional "title" escheat regimes. Under this more traditional type of abandoned property regime, when abandoned property escheats to the State, the State takes *title*—not simply custody—of the property. While a title escheat regime also preserves the ability of the original owner to come forward and reclaim once-abandoned property, in the interim, all legal rights in the property belong to the State.

23. While "escheat" regimes are most commonly associated with *tangible* personal property, such as lost or unclaimed valuables, they also apply to intangible property like savings bonds or other forms of debt. Such intangible property, of course, does not have a physical location, so it cannot literally be abandoned "in" a particular State. But in *Texas v. New Jersey*, 379 U.S. 674, *supplemented by* 380 U.S. 518 (1965), the Supreme Court established a straightforward rule governing escheat of intangible property: "each item of [intangible

property . . . is subject to escheat only by the State of the last known address of the creditor, as shown by the debtor's books and records." 379 U.S. at 677, 681–82.

24. The State Unclaimed Property Acts seek to protect the rights of missing owners. Other holders of unclaimed property have the opposite incentive. It is to their benefit to sit back and do nothing, treating the unclaimed property as their own, rather than to expend the resources necessary to find the actual owners. By contrast, States like Arkansas have both the resources and the solemn responsibility to locate the missing property owners and reunite them with their property.

25. Indeed, Plaintiff, acting on behalf of Arkansas, undertakes robust efforts to locate the owners of unclaimed property that has escheated to the State. Every year, the State publishes in prominent state newspapers lists of all property abandoned that year waiting to be claimed—an event known as the Great Arkansas Treasure Hunt. And the State also maintains a convenient online portal, https://goo.gl/eSZXIj, that individuals can use to determine whether they own any property that has been abandoned and has escheated to the State.

26. Arkansas's Unclaimed Property Act benefits the rightful owners of unclaimed property directly, because the State actively attempts to reunite owners with their property. Citizens and taxpayers of the State also benefit indirectly because valuable property held in safekeeping by Arkansas may be used for the public good, until returned to its owner. The alternative, to permit the *de facto* holders of unclaimed property to keep and use valuable property—in which they have no legitimate right or interest—would bestow an unjustified windfall on those individuals. And the same reasoning follows for the valuable unclaimed United States savings bonds that Defendant has continued to keep in its *de facto* possession.

Escheatment of United States Savings Bonds

27. Congress has authorized Treasury to prescribe "restrictions on [the] transfer" of savings bonds, as well as "conditions governing their redemption." 31 U.S.C. § 3105(c)(3)–(4). Those restrictions make up part of the terms of the contract between the United States and each individual creditor.

28. Pursuant to this statutory grant of authority, Treasury has issued rules providing that savings bonds are generally "payable only to the owners named on the bonds" and are not transferrable, except "as specifically provided in [its] regulations." 31 C.F.R. § 315.15. Importantly, however, neither Congress nor Treasury has purported to preempt the entire field of state property or contracts law. Indeed, Treasury's regulations in several places affirmatively contemplate that ordinary principles of state common law will continue to govern such things as estate and divorce law. *See, e.g.*, *id.* §§ 315.22, 315.71. And in particular, Treasury's rules provide that it will recognize a transfer of title to a savings bond if it is "established by valid, judicial proceedings." *Id.* § 315.20(b).

29. As this Court has recently held, although escheat of an abandoned savings bond under a *custody* escheat regime does not amount to a valid transfer of the rights and interests in the bond, escheat of the bond's *title* to a State, confirmed by a "valid, judicial proceeding[ ]," vests the legal ownership of an abandoned bond—and, under Section 315.20(b), the right to redeem it—in the State. *Estes v. United States*, 123 Fed. Cl. 74 (2015).

30. Indeed, until quite recently, Treasury had long understood its regulations as requiring it to recognize a valid escheatment of title. For example, in a 1952 Bulletin, Treasury maintained that it would "recognize[ ] the title of the state when it makes claim based upon a judgment of escheat" pursuant to which it "*succeeds to the title of the bondholder*." TREASURY

DEPARTMENT, FISCAL SERVICE, BUREAU OF THE PUBLIC DEBT, PD Bulletin No. 111 at 3 (Feb. 27, 1952) (attached as Exhibit 1). It would not, however, recognize a mere custody escheatment—which would "not purport to substitute the State . . . as the owner of the bonds." *Id.*

31. Treasury took the same position in a 1983 letter to the Kentucky Department of Revenue:

> [T]he Department's position is that claims by States for payment of United States securities will be recognized only where the States have actually succeeded to the title and ownership of the securities pursuant to valid escheat proceedings. The Department does not recognize claims for payment by a State acting merely as custodian . . . .

Letter from C. Gardner, Director, Div. of Transactions and Rulings, to Ronald G. Geary, Sec'y of Revenue, State of Ky. Dep't of Revenue (Sept. 6, 1983) (attached as Exhibit 2).

32. Treasury again took this position only a few years ago, in litigation with New Jersey, North Carolina, Montana, Kentucky, Oklahoma, Missouri, and Pennsylvania. Those States had attempted to take custody of unclaimed savings bonds that were last held in-state, under their general custody escheat statutes. Treasury refused to deliver custody of the bonds to the States, and the States sued. The case was ultimately appealed to the Third Circuit, which concluded that the States' attempt to take custody of the abandoned bonds was preempted by Treasury's regulations—because they had obtained mere *custody*, rather than *title*, escheatment:

> [A]s provided in the federal regulations and as recognized by the Treasury, third parties, including the States, may obtain ownership of the bonds—and consequently the right to redemption—through "valid[ ] judicial proceedings," 31 C.F.R. § 315.20(b), so long as they submit certified copies of the judgment or order affecting ownership and other evidence that may be necessary to support the validity of the judgment or order. *See* 31 C.F.R. § 315.23. The Government through its issuance of the Escheat Decision admits as much. Here, however, the States merely seek custody of, not title to, the funds at issue under their unclaimed property acts.

Treasurer of N.J. v. United States Dep't of Treasury, 684 F.3d 382, 412–13 (3d Cir. 2012) (alteration in original) (footnote omitted).

33. In its brief opposing the States' petition for certiorari in the case, the Solicitor General represented to the Supreme Court on behalf of Treasury that the Third Circuit's conclusion that title escheatment would effect a valid transfer of title under Section 301.20's "judicial proceedings" exception "represents the Department's considered interpretation of federal law." Brief for Resp'ts in Opp'n at 4, *Director of the Dep't of Revenue of Mont. v. Department of Treasury*, 133 S. Ct. 2735 (2013) (No. 12-926), 2013 WL 1803570, at *4.

34. Finally, a statement that was posted on Treasury's website until as recently as May 3, 2015 represented that

> The Department of the Treasury will recognize claims by States for payment of United States securities where the States have succeeded to the title and ownership of the securities pursuant to valid escheat proceedings. The Department, however, does not recognize claims for payment by a State acting merely as custodian of unclaimed or abandoned securities and not as successor in title and ownership of the securities."

EE/E Savings Bonds FAQs, TREASURYDIRECT.COM (attached as Exhibit 3).[1]

35. Recognizing this distinction between title and custody escheatment, the State of Kansas recently amended its Abandoned Property Act to provide for *title* escheatment of savings bonds. When Kansas attempted to redeem those bonds that had escheated to it, however, Treasury refused, maintaining that unless Kansas could provide the physical bond certificates, it would not recognize the judgment of escheatment Kansas obtained as a "valid, judicial proceeding." In doing so, Treasury blithely reversed its own decades-long position.

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[1] In the current version of Treasury's FAQ's, available at http://goo.gl/d9XxiM, the section on escheatment law has been deleted. But the website Archive.org preserved a "cached" copy of the web page, http://goo.gl/e0bRfN, as it appeared on May 3, 2015, which contains the language as it is shown in Exhibit 3.

36. Kansas sued Treasury over the bonds in this Court, and this Court recently denied Treasury's motion to dismiss the case, concluding that, consistent with Treasury's previous, longstanding position, its regulations require it to recognize the escheatment of title in abandoned bonds to a State if that transfer is "established by valid, judicial proceedings"—whether or not the State physically possesses the bond certificates. *Estes*, 123 Fed. Cl. 74 (quoting 31 C.F.R. § 315.5(b)).

37. On July 1, 2015, Treasury published notice of a proposed amendment to 31 C.F.R. Part 315 making official its newly-minted position that even a valid escheatment of *title* to abandoned savings bonds does not amount to a "valid, judicial proceeding[ ]" capable of legally transferring title. That rule became final on December 24, 2015, but under binding Supreme Court precedent, its operation can only be prospective, and it thus cannot be applied to the bonds at issue in this case.

Escheatment of Savings Bonds Abandoned in Arkansas

38. On March 20, 2015, Arkansas amended its Abandoned Property Act to provide for title escheatment of United States savings bonds abandoned in the State. The new Section 18-28-231 of the Arkansas Code provides that a "United States savings bond held or owing in this state is presumed abandoned if the savings bond remains unclaimed for five (5) years after the date of maturity of the United States savings bond." ARK. CODE § 18-28-231(a). Once such a bond is presumed abandoned, it "shall escheat to the state two (2) years after becoming abandoned property . . . ." *Id.* § 18-28-231(b).

39. To establish the escheatment, the new statute authorizes the State Auditor to "file a civil action for escheatment of the United States savings bond . . . ." *Id.* § 18-28-231(c)(1). Notice to any defendant is to be given by publication of a "warning order," according to ARK.

CODE § 16-3-101 et seq. and Rule 4 of the Arkansas Rules of Civil Procedure. *Id.* § 18-28-231(d).

> If no person files a claim or appears at the hearing to substantiate a claim or if the court determines that a claimant is not entitled to the property claimed by the claimant, then the court shall enter judgment that: (1) The United States savings bond escheats to the state; and (2) All property rights and legal title to and ownership of the United States savings bond or proceeds from the United States savings bond, including all rights, powers, and privileges of survivorship of any owner, co-owner, or beneficiary, are vested solely in the state.

Id. § 18-28-231(e).

40. Unlike a custody escheat law, then, Arkansas's new statute results in the transfer of *title* to the abandoned bonds in the State. But a putative owner of an escheated bond retains the right to file a claim for the proceeds of the bond—less any "expense incurred by the [State] in securing full title and ownership of the United States savings bond by escheatment." *Id.* § 18-28-231(g)(2)(A).

41. Section 18-28-231 provides for escheatment of two types of savings bonds. First, it includes bonds for which the State currently physically possesses the corresponding certificates. Those "bonds-in-possession" have been yielded up to Arkansas over the years under the pre-existing custody escheatment regime. Second, there are many more bonds for which Arkansas does *not* physically possess certificates, but that have gone unclaimed in the State and that are presumed abandoned under Section 18-28-231(a). Under Section 18-28-231, the titles to both these "absent" bonds and the bonds-in-possession are subject to escheatment.

42. On October 16, 2015, Plaintiff filed a complaint in Arkansas Circuit Court seeking a declaratory judgment, pursuant to Section 18-28-231, that all absent bonds that had been abandoned on or before October 16, 2008 were presumed abandoned as of October 16, 2013, and had now escheated to the State.

43. Because Plaintiff was unable to ascertain the identity or location of any of the persons interested in the absent bonds, despite several attempts to gain that information from Treasury, Plaintiff effected service on those unknown individuals through publication of a "warning order" certified by the Clerk of Court, as authorized in Rule 4(f) of the Arkansas Rules of Civil Procedure. A warning order giving notice of the pending lawsuit to anyone with an interest in the absent bonds was published on October 18 and 25 in the Northwest edition of the Arkansas Democrat-Gazette, which has circulation covering the county in which the suit was pending, and on October 23 and 30 in the statewide edition of the Gazette, which has circulation covering all 75 counties of Arkansas.

44. On November 20, 2015, the circuit court held a hearing to hear testimony and argument, take evidence, and allow anyone interested in the absent bonds to come forward and present their claim. No interested persons attended the hearing or otherwise asserted a claim to the absent bonds.

45. Later that day, the court entered a final judgment of escheatment. *Lea v. Martin*, No. 72 CV-15-1910-5 (Ark. Cir. Ct. Washington Cnty. Nov. 20, 2015) (attached as Exhibit 4). The Court held that every prerequisite established by Section 18-28-231 had been satisfied and that that state law was valid and not preempted by federal law because Section 315.20 of Treasury's regulations expressly contemplated that title to a savings bond could be transferred by a valid judicial proceeding. It therefore held that

> all property rights and legal title to and ownership of . . . all savings bonds that matured on or before October 16, 2008, that were not redeemed prior to the date of entry of this Judgment, that are shown in the books and records of the United States Department of the Treasury as having a last-known purchaser or owner with an address in the State of Arkansas, and that are not in the physical possession of the State, are vested solely in the State of Arkansas.

Id. at 17.

46. On November 25, Plaintiff wrote to Treasury to formally request redemption of the absent bonds. A copy of this letter is attached as Exhibit 5. Plaintiff included a certified copy of the November 20 Judgment of Escheatment, as required by 31 C.F.R. § 315.23, and although Plaintiff by definition does not possess the physical bond certificates for the absent bonds, she provided sufficient information to enable Treasury to identify the bonds, as required by 31 C.F.R. § 315.26(b). Plaintiff requested a response by Treasury within 30 days.

47. Treasury did not respond. Instead, on December 24, Treasury finalized the amendments to its regulations governing redemption of escheated bonds, described above in paragraph 37, purporting to foreclose redemption of escheated bonds claimed by a State that does not physically possess the corresponding certificates. Those amendments—which Treasury apparently intends to apply retroactively, in contravention of binding Supreme Court precedent, *see* Regulations Governing United States Savings Bonds, 80 Fed. Reg. 80258, 80262 (Dec. 24, 2015) (to be codified at 31 C.F.R. pts. 315, 353, and 360)—make clear that Treasury has decided not to redeem Plaintiff's savings bonds.

48. By refusing to redeem these matured bonds, Defendant has breached its single most important obligation under the contracts that underlie each of these bonds: to pay back the principal of the loan and the interest that has accrued at the stipulated rate when they are due.

49. Moreover, Defendant's actions have deprived the State of Arkansas of *the entirety* of its property interest in the absent bonds. These abandoned bonds, worth an estimated $160 million upon redemption, are plainly worth *nothing* if the United States refuses to redeem them. Indeed, each day that Defendant refuses to redeem the bonds, it causes additional injury to the State by preventing Plaintiff from fulfilling the two public-interest goals underlying its Abandoned Property Act: working to reunite the abandoned bonds with their true owners and

using the value of that property for the benefit of the citizens of Arkansas until it is lawfully claimed.

CLAIMS FOR RELIEF

COUNT I

Breach of Express Contract

50. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

51. Each United States savings bond is an express contract between the United States and the purchaser of the bond.

52. Whenever an individual purchases a United States savings bond, there is an objective manifestation of voluntary assent by both parties to the contract underlying the bond.

53. The money paid by the purchaser of each United States savings bonds, and the United States' promise to repay the principal and accrued interest after maturity and upon request, constituted the mutual, bargained-for consideration for the contracts underlying each bond.

54. Whenever an individual purchases a United States savings bond, there is an unambiguous offer and acceptance of the terms of the contract underlying the bond.

55. The agents of the United States who sold each of the United States savings bonds at issue in this case had actual authority to bind the United States in contract for the value of the bond.

56. The contract underlying each United States savings bond obligates the United States to repay the principal of the bond, and the interest that has accrued at the stipulated rate, to the valid owner of the bond once the bond matures and upon request.

57. The federal law and regulations governing the United States savings bonds in question allow all title to and interest in a bond to be transferred from the original purchaser to a third party if the transfer is established by a valid judicial proceeding.

58. The November 20, 2015 Judgment of Escheatment transferred to the State of Arkansas all right and title to all United States savings bonds that matured on or before October 16, 2008 but had not been redeemed prior to the entry of judgment, that are shown in Treasury's books and records as having a last-known purchaser or owner with an address in the State of Arkansas, and that are not in the physical possession of the State.

59. The November 20, 2015 Judgment was entered pursuant to a valid judicial proceeding within the meaning of the relevant federal law and regulations.

60. The November 20, 2015 Judgment, by substituting Arkansas in the place of the previous bondholder under the contract underlying each of the United States savings bonds in question, brought Arkansas and the United States into privity of contract.

61. The United States has breached the contract underlying each of the United States savings bonds in question by failing to redeem those bonds upon Arkansas's request.

62. The United States' breach of each of the contracts underlying the United States savings bonds in question has directly caused Plaintiff substantial damages, in an amount to be proved at trial.

COUNT II

Breach of Implied Contract

63. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

64. In the alternative, each United States savings bond is an implied-in-fact contract between the United States and the purchaser of the bond.

65. Whenever an individual purchases a United States savings bond, there is an objective manifestation of voluntary assent by both parties to the contract underlying the bond.

66. The money paid by the purchaser of each United States savings bonds, and the United States' promise to repay the principal and accrued interest after maturity and upon request, constituted the mutual, bargained-for consideration for the contracts underlying each bond.

67. Whenever an individual purchases a United States savings bond, there is an unambiguous offer and acceptance of the terms of the contract underlying the bond.

68. The agents of the United States who sold each of the United States savings bonds at issue in this case had actual authority to bind the United States in contract for the value of the bond.

69. The contract underlying each United States savings bond obligates the United States to repay the principal of the bond, and the interest that has accrued at the stipulated rate, to the valid owner of the bond once the bond matures and upon request.

70. The federal law and regulations governing the United States savings bonds in question allow all title to and interest in a bond to be transferred from the original purchaser to a third party if the transfer is established by a valid judicial proceeding.

71. The November 20, 2015 Judgment of Escheatment transferred to the State of Arkansas all right and title to all United States savings bonds that matured on or before October 16, 2008 but had not been redeemed prior to the entry of judgment, that are shown in Treasury's books and records as having a last-known purchaser or owner with an address in the State of Arkansas, and that are not in the physical possession of the State.

72. The November 20, 2015 Judgment was entered pursuant to a valid judicial proceeding within the meaning of the relevant federal law and regulations.

73. The November 20, 2015 Judgment, by substituting Arkansas in the place of the previous bondholder under the contract underlying each of the United States savings bonds in question, brought Arkansas and the United States into privity of contract.

74. The United States breached the contract underlying each of the United States savings bonds in question when it refused to redeem those bonds upon Arkansas's request.

75. The United States' breach of each of the contracts underlying the United States savings bonds in question has directly caused Plaintiff substantial damages, in an amount to be proved at trial.

COUNT III

Unconstitutional Taking of Private Property

76. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

77. The contractual rights under each of the United States savings bonds at issue in this case to receive payment of the principal and interest due under each matured bond upon request constitute a cognizable form of intangible personal property.

78. The federal law and regulations governing the United States savings bonds in question allow all property interest in a bond to be transferred from the original purchaser to a third party if the transfer is established by a valid judicial proceeding.

79. The November 20, 2015 Judgment of Escheatment transferred to the State of Arkansas all title and property interest in all United States savings bonds that matured on or before October 16, 2008 but had not been redeemed prior to the entry of judgment, that are

shown in Treasury's books and records as having a last-known purchaser or owner with an address in the State of Arkansas, and that are not in the physical possession of the State.

80. The November 20, 2015 Judgment was entered pursuant to a valid judicial proceeding within the meaning of the relevant federal law and regulations.

81. The United States' refusal to redeem the bonds at issue in this case upon Arkansas's request deprives Plaintiff of all economically beneficial or productive use of its property in the bonds.

82. The United States' refusal to redeem the bonds at issue in this case upon Arkansas's request also severely impacts and destroys the economic value of the State's property in the United States savings bonds, thwarts its reasonable, investment-backed expectations as the owner of the savings bonds, and imposes upon the State of Arkansas burdens that, in all fairness and justice, should be borne by the public as a whole.

83. The United States' refusal to redeem the bonds at issue in this case upon Arkansas's request is not justified by any background principles of property law.

84. The United States' refusal to redeem the bonds at issue in this case upon Arkansas's request constitutes an unconstitutional taking of Plaintiff's private property for public use within the meaning of the Fifth Amendment of the United States Constitution, and Plaintiff is entitled to just compensation and interest in an amount to be proved at trial.

COUNT IV

Illegal Exaction

85. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

86. The contractual rights under each of the United States savings bonds at issue in this case to receive payment of the principal and interest due under each matured bond upon request constitute a cognizable form of intangible personal property.

87. The federal law and regulations governing the United States savings bonds in question allow all property interest in a bond to be transferred from the original purchaser to a third party if the transfer is established by a valid judicial proceeding.

88. The November 20, 2015 Judgment of Escheatment transferred to the State of Arkansas all title and property interest in all United States savings bonds that matured on or before October 16, 2008 but had not been redeemed prior to the entry of judgment, that are shown in Treasury's books and records as having a last-known purchaser or owner with an address in the State of Arkansas, and that are not in the physical possession of the State.

89. The November 20, 2015 Judgment was entered pursuant to a valid judicial proceeding within the meaning of the relevant federal law and regulations.

90. The United States' refusal to redeem the bonds at issue in this case upon Arkansas's request violates Plaintiff's right, under federal law and regulations, to receive payment for those matured savings bonds it validly owns upon request. *See* 31 C.F.R. § 315.35.

91. The United States' refusal to redeem the bonds at issue in this case in violation of its duties under federal law and regulations deprived Plaintiffs of their property rights in the bonds without due process of law within the meaning of the Fifth amendment of the United States Constitution, and Plaintiff is entitled to damages, including interest, in an amount to be proved at trial.

PRAYER FOR RELIEF

92. WHEREFORE, Plaintiff prays for an order and judgment:

a. Awarding to Plaintiff damages in an amount equal to the matured value of those United States savings bonds that matured on or before October 16, 2008, that were not redeemed prior to November 20, 2015, that are shown in Treasury's books and

records as having a last-known purchaser or owner with an address in the State of Arkansas, and that are not in the physical possession of the State;

b. Awarding to Plaintiff just compensation for Defendant's taking of Arkansas's property interest in those United States savings bonds that matured on or before October 16, 2008, that were not redeemed prior to November 20, 2015, that are shown in Treasury's books and records as having a last-known purchaser or owner with an address in the State of Arkansas, and that are not in the physical possession of the State, in an amount equal to the matured value of those bonds plus applicable interest;

c. Declaring that Plaintiff owns all legal right, title, and interest in those United States savings bonds that matured on or before October 16, 2008, that were not redeemed prior to November 20, 2015, that are shown in Treasury's books and records as having a last-known purchaser or owner with an address in the State of Arkansas, and that are not in the physical possession of the State;

d. Awarding Plaintiff her reasonable costs, including attorneys' fees, incurred in bringing this action; and

e. Granting such other and further relief as this Court deems just and proper.

Dated: January 11, 2016

Respectfully submitted,

s/ David H. Thompson
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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, WASHINGTON COUNTY, ARKANSAS FIFTH DIVISION

FILED FOR RECORD 2015 NOV 20 AM 9:52

ANDREA LEA, *Plaintiff*, v. MARK MARTIN, DIANE MARTIN, RACHEL REAGAN, SUSAN REAGAN, U.S. SAVINGS BOND NO. Q6132327840E, U.S. SAVINGS BOND NO. Q6141634466E, U.S. SAVINGS BOND NO. Q5150616922E, UNKNOWN JOHN AND JANE DOE OWNERS, and MATURED, UNREDEEMED, AND UNCLAIMED UNITED STATES SAVINGS BONDS WITH PURCHASERS OR OWNERS WITH LAST KNOWN ADDRESSES IN THE STATE OF ARKANSAS, *Defendants.*	Civil Action No. 72 CV-15-1910-5

I CERTIFY THAT THIS INSTRUMENT IS A TRUE COPY OF THE ON FILE IN THIS OFFICE
DATE 11/23/15
Kyle Sylvester, Circuit Clerk
D.C.

JUDGMENT

NOW on this 20 day of November, 2015, comes on to be heard the Plaintiff's Complaint for Declaratory Judgment, and from the pleadings as filed herein,

statements of counsel, evidence in open court, and other things and matters appearing, this Court does find:

1. That this Court has subject-matter jurisdiction pursuant to ARK. CONST. amend. 80, § 6, ARK. CODE § 16-13-201, and ARK. SUP. CT. ADMIN. ORDER 18, because it is a civil matter where the amount in controversy exceeds $5,000.

2. This Court's determination of venue is made pursuant to ARK. CODE § 16-106-101 and § 16-60-101, as recently amended by Act 830, H.B. 1252, 2015 Arkansas Laws Act 830 (Mar. 31, 2015), because the last known address of four individual Defendants, Mark Martin, Diane Martin, Rachel Reagan, and Susan Reagan, is in Washington County.

3. Plaintiff, Andrea Lea, is the Auditor of the State of Arkansas. Her duties include keeping the accounts of the State and directing prosecutions against all those who possess property lawfully owned by the State of Arkansas. Her official address is 1401 West Capitol Avenue, Suite 325, Little Rock, AR 72201.

4. This matter is brought before the Court pursuant to Rule 55 of the Arkansas Rules of Civil Procedure, as the Defendants to this action are in default.

5. The Court finds that the Plaintiff attempted service by Warning Order in both the Northwest Arkansas edition of the Arkansas Democrat Gazette and the statewide edition of the Arkansas Democrat Gazette. The Court finds that service by Warning Order was appropriate under Rule 4(f) of the Arkansas Rules of Civil Procedure.

6. Arkansas State Auditor, Andrea Lea ("Plaintiff") has brought this action in her official capacity pursuant to Arkansas Code Annotated § 18-28-231, seeking a declaratory judgment that certain matured but unredeemed United States Savings Bonds that were last held by Arkansas residents are unclaimed property within the meaning of the State's escheatment

laws, and that all right and title to those bonds has vested to the State of Arkansas by operation of law.

7. The Court finds, based upon the unrebutted pleadings and evidence before this Court, that there are over $17 billion worth of unclaimed savings bonds currently being held in the custody of the United States Department of Treasury (hereinafter "the Treasury"). These bonds have matured, in many cases several decades ago, and for whatever reason have never been redeemed by their owners upon maturity.

8. The Court finds that the Treasury makes little or no effort to affirmatively seek out the owners of these unclaimed bonds. Instead, the Treasury simply retains these unclaimed bonds for its own use and enjoyment. Arkansas's share of these bonds on national population figures would be approximately one hundred and sixty million dollars ($160,000,000.00). Despite the efforts of the Plaintiff, the Treasury has refused to disclose the identity of the bond holders. The Auditor of the State of Arkansas, Andrea Lea, has testified that it is her intent to seek redemption from Treasury of the approximately one hundred and sixty million dollars' worth of bonds that are matured, unredeemed, and unclaimed with purchasers or owners with last known addresses in the State of Arkansas once the Auditor has obtained a judgment declaring that title to the bonds has escheated to the State. In the event that Treasury refuses to redeem the bonds, it is her intent to file an action similar to the action filed by the State of Kansas in the United States Court of Federal Claims in Washington, D.C. The Kansas case is docketed as *Estes v. United States*, docket no. 13-101C.

9. Earlier this year the Arkansas General Assembly adopted an abandoned property law that specifically addresses matured, unredeemed United States savings bonds. Under the provisions of that law, a savings bond that goes unredeemed for five (5) or more years after it

matures is presumed abandoned, and the title to those abandoned bonds escheats to the State two (2) years after that.

10. Andrea Lea, the Auditor of the State of Arkansas, has brought this civil action for a declaratory judgment making clear that all legal right and title to bonds that were last held by state residents and have now been abandoned has escheated to Arkansas by operation of law, for use and safekeeping by the State until such time as the State is able to locate their owners. The Court finds that it should grant Plaintiff's request for declaratory relief as such relief places all property rights and legal title to and ownership of all bonds set forth herein currently held in the United States Treasury with the State of Arkansas.

11. Defendants, Mark Martin and Diane Martin are the last-known owners of two Series E savings bonds, numbers Q6132327840E and Q6141634466E, also named here as defendants *in rem*, which were issued on February 1 and March 1, 1977, respectively. Those bonds have since been abandoned to the State and, accordingly, are in the State's possession. On information and belief, and according to the information printed on the savings bonds, Mr. Martin and Ms. Martin are residents of Springdale, Arkansas.

12. Defendants Rachel Reagan and Susan Reagan are the last-known owners of a Series E savings bond, number Q5150616922E, also named here as a defendant *in rem*, which was issued on January 1, 1974. That bond has since been abandoned to the State and, accordingly, is in the State's possession. On information and belief, and according to the information printed on the savings bond, Ms. Reagan and Ms. Reagan are residents of Fayetteville, Arkansas.

13. Defendant John Doe and Jane Doe Owners are those persons who have an ownership interest in those United States savings bonds that matured on or before October 16,

2008, that have not yet been redeemed, are not in the physical possession of the State, and have Purchasers or Owners who last had a known address in the State of Arkansas, according to the records of the United States Department of the Treasury. The identity and location of these Defendants are unknown.

14. Those United States savings bonds that matured on or before October 16, 2008, that have not yet been redeemed, are not in the physical possession of the State, and have Purchasers or Owners who last had a known address in the State of Arkansas according to the records of the United States Department of the Treasury, are also named in this action as Defendants *in rem*. These bonds are a type of intangible property.

15. The Treasury Department began selling United States savings bonds at the conclusion of the First World War, and has sold them continuously ever since. Most savings bonds bear long maturities: 30 or 40 years, on average.

16. U.S. savings bonds have been sold in several different "series," and the terms of the bonds vary by series. Series A, B, C, and D bonds were sold from March 1935 through April 1941. Series A, B, C, and D bonds were sold with 10-year terms. All Series A–D bonds reached maturity by April 1951.

17. Series E bonds were first sold in 1941. Nearly 4.6 billion Series E bonds were sold in this country between 1941 and 1980. Series E bonds sold between 1941 and 1965 were given 40-year terms. Between 1966 and 1980, they carried 30-year terms. The last Series E bond was sold in 1980. The first Series E bonds matured and ceased earning interest in 1981; the last such bonds matured in 2010.

18. Series F and G bonds were sold from May 1941 through April 1952. Series F and G bonds were sold with 12-year terms. All Series F and G bonds reached maturity by May 1964.

19. Series H bonds were sold from June 1952 through December 1979. Series H bonds sold between 1952 and 1957 carried a term of 29 years and 8 months; Series H bonds sold between 1957 and 1979 had a term of 30 years. All Series H bonds reached maturity by December 2009.

20. Series J and K bonds were sold from May 1952 through April 1957. Series J and K bonds were sold with a term of 12 years. All Series J and K bonds reached maturity by April 1969.

21. The Court finds that the Treasury Department does not disclose records of current bond-holders. Moreover, because the bonds have long maturities, their original purchasers often transferred the bonds in some way—or at least moved from their initial address—before the bonds matured. Accordingly, the owner addresses contained in Treasury's registration records are often no longer accurate when the bonds reach maturity. Indeed, the government has admitted as much. In litigation in federal court, the government recognized that its ownership information "is decades old," and it acknowledged "the possibility that most bond purchasers have moved or that the bonds have passed by inheritance to persons other than the purchaser." *See* Transcript of Hearing at 21:18–22:2, *Estes v. United States*, No. 13-1011C (Fed. Cl. Oct. 24, 2014), ECF No. 26; Defendant's Supplemental Reply Brief in Support of its Motion to Dismiss at 8, *Estes*, No. 13-1011C, ECF No. 30. And because of the limitations of Treasury's records, the United States General Accounting Office concluded that even if "a thorough search for owners [of matured savings bonds] were completed, the success rate might not be very high." U.S. Gen. Accounting Office, Unclaimed Money: Proposals for Transferring Unclaimed Funds to States 22 (May 1989), *available at* http://www.gao.gov/assets/150/147740.pdf

22. The Court finds that when savings bonds mature, the Treasury does not attempt to locate or notify their current owners—even by using the addresses it has on record, or through some general form of publication. Instead, to redeem a long-matured U.S. savings bond from Treasury, an owner must affirmatively contact Treasury with a formal request and present to Treasury either the physical paper bond, its serial number, or other identifying information.

23. Owners of matured savings bonds are frequently unaware, however, that they possess bonds that have matured and are being held, without earning further interest, by Treasury. Because Treasury takes no steps to notify owners when their bonds mature, and because those bonds have both lengthy terms and a relatively small face value, many bond owners have misplaced or simply forgotten about their bonds. And children and other beneficiaries of bond-holders may never even have learned of their existence. Moreover, even if these owners recall that they once purchased or received savings bonds, many cannot meet Treasury's demand that they present either the physical paper bond or its serial number, as the bond may have been lost, stolen, damaged, or destroyed.

24. The Court finds that as a result, there are approximately $17.2 billion worth of United States savings bonds that have matured and stopped earning interest—many, several decades ago—but have never been redeemed. The Court determines that approximately $160 million, or 0.93%, of that amount corresponds with owners whose last known addresses are in Arkansas. The bulk of these bonds are series E bonds. Until they are claimed, the proceeds due these unredeemed, matured bonds are held by Treasury, for the use and enjoyment of the federal government.

25. The Court finds that those unredeemed bonds last held by Arkansas residents represent a right to collect matured principal and interest from Treasury, an intangible property that was abandoned in the state and is thus subject to Arkansas's Unclaimed Property Act.

26. Like most states, Arkansas has long had a general "escheat" statute providing that property—real, personal, and intangible—that is abandoned in-state is to be reported and delivered into the custody of the State, until such time as its owner comes forward to claim it. ARK. CODE § 18-28-201 – 233. Again like most states, Arkansas's abandoned property statute enacts what is known as a "custody" escheat regime: property that has escheated to the State is merely held by the State for safekeeping until its rightful owner, who at all times retains title, comes forward to claim it. *See, e.g., id.* § 18-28-210(b).

27. Most states moved towards this "custody" type of escheat regime in the mid-twentieth century, under the influence of the Uniform Law Commission's model Uniform Abandoned Property Act. Before this shift, most states had traditional "title" escheat regimes. Under this more traditional type of abandoned property regime, when abandoned property escheats to the State, the State takes *title*—not simply custody—of the property. While a title escheat regime may also preserve the ability of the original owner to come forward and reclaim once-abandoned property, in the interim, all legal rights in the property belong to the State.

28. The Court finds that all States' Unclaimed Property Acts, whether they provide for title or custody escheatment, share the same public policy underpinnings: to protect the rights of missing owners. States like Arkansas have the solemn responsibility to locate the missing property owners and reunite them with their property.

29. The Court finds that Plaintiff, acting on behalf of Arkansas, undertakes efforts to locate the owners of unclaimed property that has escheated to the State. Every year, the State

publishes in prominent state newspapers lists of all property abandoned that year waiting to be claimed—an event known as the Great Arkansas Treasure Hunt. And the State also maintains a convenient online portal, https://www.ark.org/auditor/unclprop/index.php/search/searchCrit, that individuals can use to determine whether they own any property that has been abandoned and has escheated to the State.

30. Arkansas's Unclaimed Property Act benefits the rightful owners of unclaimed property directly, because of the State's efforts to reunite owners with their property. Citizens and taxpayers of the State also benefit indirectly because valuable property held in safekeeping by Arkansas may be used for the public good, until returned to its owner.

31. The Court finds that a United States savings bond constitutes a contract between the United States and the current owner of the bond. The terms of that contract are set, in part, by regulations promulgated by Treasury. Congress has authorized Treasury to prescribe "restrictions on [the] transfer" of savings bonds, as well as "conditions governing their redemption." 31 U.S.C. § 3105(c)(3)–(4).

32. Pursuant to this statutory grant of authority, Treasury has issued rules providing that savings bonds are transferrable only "as specifically provided in [its] regulations." 31 C.F.R. § 315.15. Importantly, however, neither Congress nor Treasury has purported to preempt the entire field of state property or contracts law. Indeed, Treasury's regulations in several places affirmatively contemplate that ordinary principles of state common law will continue to govern such things as estate and divorce law. *See, e.g., id.* §§ 315.22, 315.71. And in particular, Treasury's current rules provide that it will recognize a transfer of title to a savings bond if it is "established by valid, judicial proceedings." *Id.* § 315.20(b).

33. The Court finds that as the United States Court of Federal Claims recently held, although escheat of an abandoned savings bond under a *custody* escheat regime does not amount to a valid transfer of the rights and interests in the bond, escheat of the bond's *title* to a State, confirmed by a "valid, judicial proceeding[ ]," vests the legal ownership of an abandoned bond—and, under § 315.20(b), the right to redeem it—in the State. *Estes v. United States*, 123 Fed. Cl. 74 (2015).

34. The Court finds that the Treasury has long understood its regulations as requiring it to recognize a valid escheatment of title. In a 1952 Bulletin, Treasury maintained that it would "recognize[ ] the title of the state when it makes claim based upon a judgment of escheat" pursuant to which it "*succeeds to the title of the bondholder.*" TREASURY DEPARTMENT, FISCAL SERVICE, BUREAU OF THE PUBLIC DEBT, PD Bulletin No. 111 (Feb. 27, 1952). It would not, however, recognize a mere custody escheatment—which would "not purport to substitute the State . . . as the owner of the bonds." *Id.*

35. The Court finds that Treasury took the same position in a 1983 letter to the Kentucky Department of Revenue:

> [T]he Department's position is that claims by States for payment of United States securities will be recognized only where the States have actually succeeded to the title and ownership of the securities pursuant to valid escheat proceedings. The Department does not recognize claims for payment by a State acting merely as a custodian . . . .

Letter from C. Gardner, Director, Division of Transactions and Rulings, to Ronald G. Geary, Sec'y of Revenue, State of Kentucky Dep't of Revenue (Sept. 6, 1983).

36. A few years ago, several States attempted to take custody of unclaimed savings bonds that were last held in-state, under their general custody escheat statutes. Treasury refused to redeem them, and the States sued. The case was ultimately appealed to the Third Circuit, which concluded that the States' attempt to take custody of the abandoned bonds was preempted

by Treasury's regulations—but which reaffirmed the crucial distinction between *custody* and *title* escheatment. *Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382, 406–12 (3d Cir. 2012).

37. The Third Circuit held that the States' attempt to take custody of the bonds would have effectively substituted the *States* as custodian of the unclaimed bonds in place of Treasury. Because the procedures that each State provided for an actual bond-holder to regain custody of his bonds were different than Treasury's procedures governing redemption, the court concluded that this attempt to impose different redemption procedures was preempted as in conflict with the federal procedures.

38. The Third Circuit explicitly noted, however, that this holding followed only because the State plaintiffs had attempted to take merely *custody* of the abandoned bonds, rather than title. In line with Treasury's then-longstanding position, then, the court concluded:

> [A]s provided in the federal regulations and as recognized by the Treasury, third parties, including the States, may obtain ownership of the bonds—and consequently the right to redemption—through "valid[ ] judicial proceedings," 31 C.F.R. § 315.20(b), so long as they submit certified copies of the judgment or order affecting ownership and other evidence that may be necessary to support the validity of the judgment or order. *See* 31 C.F.R. § 315.23. The Government through its issuance of the Escheat Decision admits as much. Here, however, the States merely seek custody of, not title to, the funds at issue under their unclaimed property acts.

Id. at 412–13 (footnote omitted).

39. In its brief opposing the States' petition for certiorari to the Third Circuit in the case, the Solicitor General represented on behalf of Treasury, once again, that a full transfer of title to the state—under a title escheat regime—would come within Section 315.20's "judicial proceedings" exception, and that this "represents the Department's considered interpretation of federal law." Brief for Resp'ts in Opp'n at 4, *Director of the Dep't of Revenue of Mont. v. Department of Treasury*, 133 S. Ct. 2735 (No. 12-926), 2013 WL 1803570.

40. A statement that was posted on Treasury's website until as recently as May 3, 2015 represented that:

> The Department of the Treasury will recognize claims by States for payment of United States securities where the States have succeeded to the title and ownership of the securities pursuant to valid escheat proceedings. The Department, however, does not recognize claims for payment by a State acting merely as custodian of unclaimed or abandoned securities and not as successor in title and ownership of the securities."

EE/E Savings Bonds FAQs, TREASURYDIRECT.COM.[1]

41. The Court finds that States have recently begun to amend their abandoned property laws to provide for *title* escheatment of savings bonds abandoned in state. Such amendments extend to savings bonds the great public benefits that those general abandoned-property laws provide: a locally-responsible public agency dedicated to reuniting abandoned bonds with their lawful owners, and the ability to use that valuable property for the public benefit in the meantime.

42. In 2000, Kansas amended its Abandoned Property Act in just this way: to provide for *title* escheatment of savings bonds. When Kansas attempted to redeem the bonds it had validly taken title to, however, Treasury refused, maintaining for the first time that unless Kansas could provide the physical, paper bonds, it would not recognize the judgment of escheatment Kansas obtained as a "valid, judicial proceeding." In doing so, Treasury blithely reversed its own decades-long position.

43. Kansas sued Treasury over the bonds in the United States Court of Federal Claims, and that court recently denied Treasury's motion to dismiss the case, concluding that,

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[1] In the current version of Treasury's FAQ's, available at http://goo.gl/d9XxiM, the section on escheatment law has been deleted. But the website Archive.org preserved a "cached" copy of the web page, as it appeared on May 3, 2015, which contains the language as it is shown in Exhibit 3. http://goo.gl/e0bRfN.

consistent with Treasury's previous, longstanding position, its regulations required it to recognize the escheatment of title in abandoned bonds to a State if that transfer was "established by valid, judicial proceedings." *Estes*, 123 Fed. Cl. 74 (quoting 31 C.F.R. § 315.5(b)).

44. On July 1, 2015, Treasury published notice of a proposed amendment to 31 C.F.R. Part 315 that would make official its newly-minted position that even a valid escheatment of *title* to abandoned savings bonds does not amount to a "valid, judicial proceeding" capable of legally transferring title. That proposed rule, however, has not yet gone into effect. Accordingly, there is nothing in Treasury's regulations that would change what Treasury for so long recognized—and what the Court of Federal Claims explicitly held: a court's judgment that title to an abandoned savings bond has escheated to the State amounts to a "valid, judicial proceeding" that legally vests title to the bond in the State.

45. On March 20, 2015, Arkansas amended its Abandoned Property Act to provide for title escheatment of United States savings bonds abandoned in the State. That amendment took effect on July 22, 2015.

46. The new Section 18-28-231 of the Arkansas Code provides that a "United States savings bond held or owing in this state is presumed abandoned if the savings bond remains unclaimed for five (5) years after the date of maturity of the United States savings bond." ARK. CODE § 18-28-231(a). Once such a bond is presumed abandoned, it "shall escheat to the state two (2) years after becoming abandoned property . . . ." *Id.* § 18-28-231(b).

47. To establish the escheatment, the new statute authorizes the State Auditor to "file a civil action for escheatment of the United States savings bond . . . ." *Id.* § 18-28-231(c)(1). Notice to any defendant is to be given according to ARK. CODE § 16-3-101 et seq. and Rule 4 of the Arkansas Rules of Civil Procedure. *Id.* § 18-28-231(d).

> If no person files a claim or appears at the hearing to substantiate a claim or if the court determines that a claimant is not entitled to the property claimed by the claimant, then the court shall enter judgment that: (1) The United States savings bond escheats to the state; and (2) All property rights and legal title to and ownership of the United States savings bond or proceeds from the United States savings bond, including all rights, powers, and privileges of survivorship of any owner, co-owner, or beneficiary, are vested solely in the state.

Id. § 18-28-231(e).

48. The Court finds that unlike a custody escheat law, then, Arkansas's new statute results in the transfer of *title* to the abandoned bonds in the State. But as with custody escheatment, a putative owner of an escheated bond retains the ability to come forward, offer proof of ownership, and regain title to the bond—less any "expense incurred by the [State] in securing full title and ownership of the United States savings bond by escheatment." *Id.* § 18-28-231(g)(2)(A).

49. The Court finds that by operation of this new statutory provision, the titles to all unclaimed United States savings bonds that were last held by a resident of the State and that matured on October 16, 2008 (seven years before the filing of this suit) or earlier have escheated to the State and are now the property of Arkansas. That class of bonds includes all unclaimed series A through D, F, G, J, and K bonds, which have long-since matured. It also includes all series E and H bonds that were issued on or before October 16, 1978, as all of those matured seven years before this suit was filed and are now presumed abandoned and have escheated to the State.

50. The Court finds that this category of unclaimed savings bonds—that have now escheated to Arkansas—is made up of two types of bonds. First, it includes bonds that Arkansas currently physically possesses. Those "bonds-in-possession" have been yielded up to the State over the years under the pre-existing custody escheatment regime. Three of these bonds in

possession, and their record owners, are defendants in this lawsuit. By operation of the new Section 18-28-231, title to those bonds has now escheated to the State.

51. In addition to the "bonds-in-possession," there are many more bonds that Arkansas does *not* physically possess but that have gone unclaimed in the State and that are presumed abandoned under Section 18-28-231(a). The titles to these "absent bonds," too, have escheated to the State by operation of law. Despite diligent efforts, Plaintiff has not been able to learn from Treasury the identity of their last-known owners. Accordingly, they are identified here simply as John and Jane Doe Owners and as Matured, Unredeemed, and Unclaimed United States Savings Bonds with Purchasers or Owners with Last Known Addresses in the State of Arkansas.

52. The Court finds that these absent bonds are subject to Section 18-28-231, and the title to those bonds has now vested in the State by operation of law. Plaintiff seeks on behalf of the State of Arkansas and its citizens a declaratory judgment establishing the State's legal ownership of these bonds.

53. Andrea Lea, in her capacity as Auditor of the State of Arkansas, brings this civil action pursuant to ARK. CODE § 18-28-231(c), for a declaration that all right and legal title in, and ownership of, certain matured, unredeemed United States savings bonds has escheated to the State of Arkansas.

54. Section 18-28-231(a) provides that "a United States savings bond held or owing in this state is presumed abandoned if the savings bond remains unclaimed for five (5) years after the date of maturity of the United States savings bond." Section (b) further provides that savings bonds that are thus presumed abandoned "escheat to the state two (2) years after becoming abandoned property."

55. The Court specifically finds that defendant bonds Q6132327840E, Q6141634466E, and Q5150616922E are presumed abandoned by operation of Section 18-28-231, and under Section 18-28-231(b), title to those bonds has escheated to the State.

56. The Court further finds that all absent savings bonds held or owing in the State of Arkansas, according to the records of Treasury, that were abandoned on or before October 16, 2013—two years before the commencement of this action—were presumed abandoned as of October 16, 2013 and have now escheated to the State of Arkansas by operation of law. All title, right, and interest in those absent bonds is now vested in the State.

57. The Court finds that the category of absent savings bonds includes all unredeemed series A through D, F, G, J, and K bonds, and all series E and H bonds that were issued on or before October 16, 1978.

58. The Court finds that because no actual owners of these savings bonds have come forward to substantiate their claims to the bonds, Plaintiff is entitled to a judgment declaring that "All property rights and legal title to and ownership" of those bonds "are vested solely in the state." *Id.* § 18-28-231(e).

IT IS THEREFORE CONSIDERED, ORDERED, DECREED and ADJUDGED that the above set forth findings of fact and conclusions of law of the Court shall constitute the lawful order of this Court and this Court specifically finds that all property rights and legal title to and ownership of savings bonds Q6132327840E, Q6141634466E, and Q5150616922E, as well as all savings bonds that matured on or before October 16, 2008, that were not redeemed prior to the date of entry of this Judgment, that are shown in the books and records of the United States Department of the Treasury as having a last-known purchaser or owner with an address in the State of Arkansas, and that are not in the physical possession of the State, are vested solely in the State of Arkansas.

IT IS SO ORDERED.

Honorable Beth Storey Bryan, Circuit Judge

DEPARTMENT OF THE TREASURY
BUREAU OF THE FISCAL SERVICE
WASHINGTON, DC 20227

September 28, 2015

John W. Ahlen
Legal Counsel
Office of the Auditor of State Andrea Lea
230 State Capitol
Little Rock, AR 72201

RE: 2015-08-142

Sent via email at: John.Ahlen@auditor.ar.gov

Dear Mr. Ahlen:

This is in response to your letter dated August 20, 2015, seeking assistance of the United States Treasury in restoring lost property to Arkansas residents. Given that you are requesting savings bond registration records we are processing this request under the Freedom of Information Act (FOIA). Your request was received in our office on August 28, 2015, seeking "...a list of those Arkansas residents who are registered owners of United States Savings Bonds that have matured and remained unclaimed for a period of five years or more."

DISCUSSION

I. Scope of the terms "bondholder"

Your request seeks records related to "bondholders" of United States savings bonds owned by Arkansas residents. Your request does not expressly define the terms "bondholders". Treasury interprets your request as seeking securities records of all individual or non-individual bondholders whose bond registration has an Arkansas address.

II. Scope of Requested Records

Your request specifically seeks, "...a list of Arkansas residents who are registered owners of matured, unredeemed savings bonds."

III. Securities records of non-individual bondholders (Series H)

Records for matured, unredeemed Series H savings bonds of non-individual bondholders are publicly-available records. Records responsive to your request for securities records of non-individual bondholders are available on Treasury's website at: http://www.treasurydirect.gov/foia/foia_mud.htm under the subheading: Matured, unredeemed savings and marketable Treasury securities. The information is updated twice each year, usually in January and July. This information relates only to non-individuals.

IV. Securities records of non-individual bondholders (Series A-G, Series J and Series K)

Series A-G, Series J, and Series K savings bonds records are not compiled or searchable based on the State listed in the bond's registration. To respond to your request, Treasury would essentially need to create new records organized by State for non-individual bondholders of Series A- G, Series J, and Series K savings bonds. The FOIA, however, imposes no such duty on Treasury. See Borom v.Crawford, 651 F.2d 500, 502 (7th Cir. 1981). Even if an agency has the requested data within its control, it need not compile or aggregate that information into a new form for the sole purpose of satisfying a FOIA request. Id. (citing Goland v. CIA, 607 F.2d 339, 353 (D.C.Cir. 1978)). Therefore, Treasury has no responsive records to your request for non-individual bondholders of Series A-G, Series J, and Series K savings bonds.

V. Securities records of individual bondholders (All Series of Requested Records)

Similar to records of non-individual bondholders, records of individual bondholders for the requested bond series are also not compiled or searchable based on the State in the bond's registration. For the same reasons set out in Section IV above, Treasury has no records of individual bondholders of Series A-G, Series H, Series J, and Series K savings bonds that are responsive to your request.

Alternatively, Treasury has determined that records of an individual's securities fall within the category of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" under the FOIA. 5 U.S.C. 552(b)(6); see generally U.S. Dep't of State v. Washington Post Co., 456 U.S. 595, 602 (1982) (noting that exemption 6 applies to disclosure of "[g]overnment records on an individual which can be identified as applying to that individual."). FOIA Exemption 6 protects the privacy of living individuals who own securities as well as the close survivors of deceased bondholders. Additionally, Treasury regulations assure the confidentiality of securities records relating to individuals, stating:

> (b) Limitations on the availability of records relating to securities.
>
> Records relating to the purchase, ownership of, and transactions in Treasury securities ... will ordinarily be disclosed only to the owners of such securities, their executors, administrators or other legal representatives or to their survivors or to investigative and certain other agencies of the Federal and State governments, to trustees in bankruptcy, receivers of insolvents' estates or where a proper order has been entered requesting disclosure of information to Federal and State courts. These records are confidential because they relate to private financial affairs of the owners under this Part.

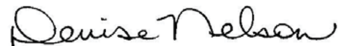
See 31 C.F.R. § 323.2(b). Accordingly, we are alternatively withholding records of individual bondholders of Series A-G, Series H, Series J, and Series K savings bonds with last known addresses in the state of Arkansas, on the basis that the disclosure of this information would constitute a clearly unwarranted invasion of personal privacy pursuant to Exemption 6 of the FOIA. Disclosure of this information would not serve the core purpose of the FOIA, which is to shed light on an agency's performance of its statutory duties.

DETERMINATION and APPEAL RIGHTS

For these reasons, your FOIA request is being partially denied, without prejudice. Should you choose to appeal this response, you must do so within 35 days from the date of this letter. Your appeal must be in writing, must be signed by you, and should contain the reason(s) why you believe an adequate search was not conducted. Your appeal should be addressed to the Department of the Treasury, Bureau of the Fiscal Service, 401 14th Street, SW, Room 508C, Washington, DC 20227. The appeal should specify the date of your initial request and the date of this letter. If possible, please provide a copy of your request and this letter.

No fees were incurred in processing your request.

Sincerely,



Denise Nelson
Co-Disclosure Officer

cc: FOIA Files

Andrea Lea
Auditor of State

230 State Capitol
Little Rock, AR 72201

State of Arkansas

November 25, 2015

By Electronic & U.S. Mail

Commissioner Sheryl Morrow
Department of the Treasury
Bureau of the Fiscal Service
401 Fourteenth Street, S.W.
Washington, D.C. 20221

RE: Request for Redemption of U.S. Savings Bonds that have Escheated to the State of Arkansas

Dear Commissioner Morrow,

As Auditor of the State of Arkansas, I am writing on behalf of the State concerning certain matured and unredeemed savings bonds that have been abandoned by purchasers or owners with last-known addresses in the State of Arkansas, according to the records of the United States Department of the Treasury ("Treasury"). By operation of ARK. CODE § 18-28-231, and as established in a Judgment of Escheatment issued on November 20, 2015 by the Arkansas Circuit Court in Washington County, the title to these bonds is now vested in Arkansas. I write to request the redemption of Arkansas's bonds.

Like most States, Arkansas has a general "escheat" statute providing that property that is abandoned in-state is to be reported and delivered into the custody of the State for protection until its previous owner comes forward to claim it. ARK. CODE § 18-28-201 – 233. Arkansas recently amended its general escheat laws to extend similar protection to United States savings bonds that have been abandoned in the State. Importantly, while the rest of Arkansas's escheatment provisions provide merely for a transfer of "custody" over the abandoned property to the State, Section 18-28-231 provides that upon entry of a judgment of escheatment by a court of competent jurisdiction, "All property rights and legal title to and ownership of the United States savings bond or proceeds from the United States savings bond, including all rights, powers, and privileges of survivorship of any owner, co-owner, or beneficiary, are vested solely in the state." *Id.* at § 18-28-231(e).

Under Section 18-28-231, a "United States savings bond held or owing in this state is presumed abandoned if the savings bond remains unclaimed for five (5) years after the date of maturity of the United States savings bond." *Id.* § 18-28-231(a). Once such a bond is presumed abandoned, it "shall escheat to the state two (2) years after becoming abandoned property . . . ."

Id. § 18-28-231(b). The statute authorizes my office to file a civil action for a judgment declaring that the bonds in question have escheated, with notice to anyone with an interest in the bonds through newspaper publication. Following a hearing, Section 18-28-231(e) provides that if no one has come forward to claim a bond subject to escheatment, "the court shall enter judgment that . . . [t]he United States savings bond escheats to the state."

As State Auditor, I filed an action for escheatment in Washington County Circuit Court on October 16, 2015, published notice of the lawsuit in the northwest edition of the Democrat-Gazette on October 18 and 25, and published notice of the lawsuit in the Democrat-Gazette's statewide edition on October 23 and 30. On November 20, the Court held a hearing to give anyone with an interest in those bonds that Arkansas does not currently physically possess—the "absent bonds"—an opportunity to come forward. No one appeared at the hearing or otherwise filed any claim to the bonds in question, and on November 20, the Court entered a final judgment of escheatment declaring that the State now holds title in any savings bonds that (1) matured on or before October 16, 2008; (2) were not redeemed prior to November 20, 2015; (3) are shown in the books and records of Treasury as having a last-known purchaser or owner with an address in the State of Arkansas; and (4) are not in the physical possession of the State. A certified copy of this Judgment is enclosed with this letter.

I am writing to formally request the redemption of these absent bonds. Section 315.20(b) of the regulations currently governing the issuance and redemption of savings bonds requires Treasury to recognize a transfer of title to a bond that is "established by valid, judicial proceedings." 31 C.F.R. § 315.20(b). The November 20 Judgment was issued at the conclusion of such a valid judicial proceeding; and the enclosed certified copy of that judgment satisfies Section 315.23(a)'s evidentiary requirements. Accordingly, pursuant to ARK. CODE § 18-28-231, the November 20 final judgment of escheatment, and Treasury's regulations, Arkansas is now the title owner of the absent savings bonds described in the judgment. *See Estes v. United States*, 123 Fed. Cl. 74, 85–90 (2015); *see also Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382, 406–12 (3d Cir. 2012).

Of course, by definition Arkansas does not possess the bond certificates of these absent bonds. But Treasury's regulations conveniently anticipate situations such as this, where the title owner of a savings bond desires to redeem it even though he no longer possesses the bond's certificate. Those regulations provide for redemption of lost or destroyed savings bonds if they are identified by serial number, 31 C.F.R. § 315.25 or, if the serial number is not known, by "sufficient information to enable the Bureau of the Fiscal Service to identify the bond by serial number," *id.* § 315.26(b). Here, Arkansas has provided information sufficient to enable your office, after investigation of your records, to identify the bonds in question: Arkansas is requesting redemption of all bonds that (1) matured on or before October 16, 2008; (2) were not redeemed prior to November 20, 2015; and (3) are shown in Treasury's books and records as having a last-known purchaser or owner with an address in the State of Arkansas.[1] In the alternative, Arkansas hereby requests a list of the serial numbers of all such bonds pursuant to 31 C.F.R. §§ 323.2, 323.4 which

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[1] In this letter Arkansas is pursuing redemption only of those savings bonds that it does not physically possess. I have enclosed a list of all relevant bonds that Arkansas *does* possess, so that your office can exclude those bonds when identifying the absent bonds that are the subject of this request.

provide for the disclosure of such information to the owner of the bonds in question. Under ARK. CODE § 18-28-231, the November 20 final judgment of escheatment, and 31 C.F.R. § 315.20, the State of Arkansas is now the title owner of the absent bonds in question.

Arkansas looks forward to your prompt attention to this matter and to your cooperation in the redemption of the absent bonds. Should you have any questions about this request, or should you decide that you are not willing to cooperate with Arkansas in the redemption of these savings bonds, you may contact either my office at the address above or our outside legal counsel in this matter:

David H. Thompson
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Joseph H. Meltzer
Kessler Topaz Meltzer & Check LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706
jmeltzer@ktmc.com

If neither my office nor our counsel have heard from you regarding this matter after the expiration of 30 days, we will assume that you have decided not to cooperate in the redemption of the bonds in question, and we reserve the right to take any legal action necessary to vindicate Arkansas's rights as title owner of the absent bonds at that time.

Thank you for your time and anticipated cooperation.

Sincerely,

Andrea Lea
Arkansas State Auditor

cc: Christopher Meade, General Counsel
Margaret Marquette, Chief Counsel

DEPARTMENT OF THE TREASURY
BUREAU OF THE FISCAL SERVICE
WASHINGTON, DC 20227

January 28, 2016

Andrea Lea
Arkansas State Auditor
230 State Capitol
Little Rock, AR 72201
(sent via First Class Mail)

Dear Ms. Lea:

By letter dated November 25, 2015, Arkansas requested that the U.S. Department of the Treasury ("Treasury") redeem certain U.S. savings bonds. Arkansas claims to have acquired valid title to all matured, unredeemed Series A through D, F, G, J, and K United States Savings Bonds and all Series E and H United States Savings Bonds that have purchasers or owners who last had a known address in Arkansas, and which were issued on or before October 16, 1978.

Arkansas specifically requests Treasury redeem savings bonds that the state does not possess – which Arkansas refers to as the "Absent Bonds." Arkansas does not seek redemption of bonds it possesses, and those bonds are not the subject of this determination. For the reasons discussed below, Arkansas's request to redeem the Absent Bonds is denied. This letter and the documents referenced in it complete the administrative record for Arkansas's November 25, 2015, request to redeem the Absent Bonds.

Background

Treasury has issued savings bonds since 1935 on the credit of the United States to raise funds for federal programs and operations. Article 8, Section 8, Clause 2 of the Constitution authorizes the federal government to "borrow money on the credit of the United States." Under this grant of power, Congress authorized Treasury to establish the terms and conditions that govern the savings bond program. 31 U.S.C. 3105(c). Treasury's savings bond regulations implement this authority, setting forth a contract between the United States and savings bond purchasers. This contract gives purchasers confidence that the United States will honor its debts when a purchaser surrenders a savings bond for payment. The contract also protects the public fisc by ensuring that Treasury does not face multiple claims for payment on a single savings bond.

To make bonds "attractive to savers and investors," *Free v. Bland*, 369 U.S. 663, 669 (1962), Congress authorized Treasury to provide that "owners of savings bonds may keep the bonds after maturity." 31 U.S.C. 3105(b)(2)(A). The Treasury regulations "do not impose any time limits for bond owners to redeem the savings bonds" at issue here. *New Jersey v. United States Treasury,* 684 F.3d 382, 388 (3d Cir. 2012). "Consequently, their owners can present them for payment to an authorized agent of the United States at any time." *Id.*

The redemption process is not complex. *New Jersey*, 684 F.3d at 388. The registered owner need only present the physical bond to an authorized payment agent, 31 C.F.R. 315.39(a), 353.39(a), establish his identity, sign the request for payment, and provide his address. The agent then may pay the bond with a check drawn against funds of the United States. 31 C.F.R. 315.38, 353.38. The owner may also mail them to Treasury Retail Securities Site with the required information, as described on Treasury's web site.[1]

Discussion

Arkansas asks Treasury to redeem U.S. savings bonds that have matured but have not yet been redeemed by their registered owners. Arkansas contends that, under its own law, the registered bond owners are deemed to have "abandoned" their right to payment by the United States if they fail to redeem their bonds within five years of maturity, and that this "abandoned" property escheats to the State two years after it is deemed "abandoned." Based on this law, Arkansas obtained an escheat judgment on November 20, 2015.

The November 2015 escheat judgment was Arkansas's *second* attempt to convince a state court to award title over the Absent Bonds.[2] In August 2015, Arkansas filed a complaint for declaratory judgment in the Circuit Court of the 6th Judicial District, Pulaski County, Arkansas. *See* Arkansas Complaint (Aug. 5, 2015). At the outset of this case, Arkansas asked the court to issue a temporary restraining order (TRO) that would prevent savings bond owners from redeeming their bonds, without prior notice to any of these owners. The court denied this request, and issued an opinion recognizing the conflict between federal law and the Arkansas escheat statute regarding savings bonds, and finding that Arkansas had not provided savings bond owners with due process. *See* Order (Aug. 17, 2015) (attached). Rather than continuing to litigate in this court, Arkansas voluntarily withdrew its complaint and re-filed the case six days after it was dismissed without prejudice in the Circuit Court of the 4th Judicial District, Washington County, Arkansas. *See* Arkansas Complaint (Oct. 16, 2015). That court issued an uncontested escheat judgment approximately one month later.[3]

Treasury recently amended its regulations to clarify the circumstances under which it will consider a state's request to redeem savings bonds that have ostensibly escheated to the state. We are addressing Arkansas' claim under both the prior regulations and the amended regulations. As discussed below, Arkansas's redemption request fails regardless of whether the amended regulations are considered.

A. Application of the Prior Regulations in 31 C.F.R. Parts 315 and 353, subpart E to Arkansas's Request to Redeem the Absent Bonds

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[1] *See* http://www.treasurydirect.gov/indiv/research/indepth/ebonds/res_e_bonds_eeredeem.htm#how.

[2] We are attaching pertinent documents from the state court escheat proceedings in the Pulaski County and Washington County Circuit Courts in Arkansas. By this reference, all documents filed in Civil Action No. 60CV-15-3638 in the 6th Judicial District of Pulaski County, Arkansas and Civil Action No. 72-CV-15-1910-5 in the 4th Judicial District of Washington County, Arkansas, are incorporated into Treasury's administrative decision record for Arkansas' November 25, 2015, request for redemption.

[3] The court's orders entered in Civil Action No. 72-CV-15-1910-5 in the 4th Judicial District of Washington County, Arkansas, made no reference to the August, 17, 2015, Order in Civil Action No. 60CV-15-3638 in the 6th Judicial District of Pulaski County, Arkansas. It is unclear whether Arkansas disclosed the August 17, 2015 Order during the subsequent proceeding in Civil Action No. 60CV-15-3638 in the 6th Judicial District of Pulaski County, Arkansas.

1. The state court escheat judgment is not a "valid, judicial proceeding" because it rests on a state statute that is preempted by federal law

Under longstanding Treasury regulations, "[s]avings bonds are not transferable and are payable only to the owners named on the bonds, except as specifically provided in [the federal] regulations and then only in the manner and to the extent so provided." *New Jersey*, 684 F.3d at 388 (quoting 31 C.F.R. 315.15, 353.15). Arkansas admits that it is not the registered owner of the bonds it seeks to redeem. Instead, Arkansas contends that it has secured title to the Absent Bonds through "valid, judicial proceedings." *See* 31 C.F.R. 315.20(b), 353.20(b) ("The Department of the Treasury will recognize a claim against an owner of a savings bond . . . if established by valid, judicial proceedings.").

The state court escheat judgment on which Arkansas relies is not a valid, judicial proceeding because (*inter alia*) the judgment rests on a state statute that is preempted by federal law. Arkansas law provides that a U.S. savings bond is presumed abandoned if it "remains unclaimed for five (5) years after the date of maturity." Ark. Code 18-28-231(a) (quoted in the State Court Judgment at 15, ¶ 54). Arkansas law further provides that such bonds shall escheat to the state "two (2) years after becoming abandoned property," Ark. Code 18-28-231(b) (quoted in State Court Judgment at 15, ¶ 54), and that "all property rights and legal title to and ownership of such United States savings bonds or proceeds from such bonds, including all rights, powers, and privileges of survivorship of any owner, co-owner or beneficiary, shall vest solely in the state." Ark. Code 18-28-231(e) (quoted in State Court Judgment at 14, ¶ 47). The state court relied on these state law provisions in declaring that the Absent Bonds "were presumed abandoned as of October 16, 2013, and have now escheated to the State of Arkansas by operation of law." State Court Judgment at 16, ¶ 56.

The provisions of Arkansas law on which the state court relied are preempted by federal law. These state law provisions have the same fundamental defect as the state laws that were found to be preempted in the *New Jersey* litigation: they purport to deem U.S. savings bonds "abandoned" even though they are not "abandoned" for purposes of federal law. As the Third Circuit explained, "[i]t is highly significant that the [federal] regulations do not impose any time limits for bond owners to redeem the savings bonds" at issue here. *New Jersey*, 684 F.3d at 388. "Consequently, their owners can present them for payment to an authorized agent of the United States at any time." *Id.* By contrast, Arkansas law provides that "matured bonds are abandoned . . . if not redeemed within a [specified] time period" after maturity. *Id.* at 407-08. Arkansas' "efforts to impose the status of 'abandoned' or 'unclaimed' on the Federal Government's obligations only underscores the conflict between federal and state law, in which federal law must prevail." *Id.* at 409. "There simply is no escape from the fact that the Federal Government does not regard matured but unredeemed bonds as abandoned even in situations in which [the] state would do exactly that." *Id.*[4]

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[4] In a 1989 report to Congress, the General Accounting Office ("GAO") explained that amounts that the United States owes to owners of matured U.S. savings bonds are not "unclaimed" for purposes of federal law "because these moneys are currently payable to the rightful owners upon presentation of a proper claim and without any time limitation." GAO, *Unclaimed Money: Proposals for Transferring Unclaimed Funds to States*, at 23 (1989); *see also id.* at 17 (noting that Treasury as of 1989 was receiving claims of $7,000 to $10,000 a day for payment on savings bonds that had matured many years earlier). In letters that Treasury sent in 2004 and 2006 in response to various state inquiries, Treasury noted that it had contacted approximately 25,000

A state cannot transform U.S. savings bonds into "abandoned" property by enacting a state law deadline for the bonds' redemption and declaring that registered owners who miss that deadline have "abandoned" their right to payment by the United States. U.S. savings bonds are attractive to purchasers because they have no expiration date. Purchasers pay valuable consideration for U.S. savings bonds, and they are entitled to the benefits of their contracts with the United States. By contrast, if a state was permitted to impair those contract rights, confidence in the U.S. savings bond program would be undermined. The purpose of the U.S. savings bond programs is to raise funds for the operations of the federal government. 31 U.S.C. 3105(a). State law that impairs that objective is void by operation of the Supremacy Clause.

Arkansas' request to redeem the Absent Bonds does not find support in the historical Treasury guidance on which it relies. In 1952, Treasury issued a bulletin reprinting a letter from the Secretary to the Comptroller of the State of New York.[5] The Comptroller was seeking guidance regarding four U.S. savings bonds that had come into New York's possession when the registered owner died in a state hospital. Because no person claimed the bonds, the hospital delivered them to the Comptroller, who sought guidance regarding redemption of the bonds.[6] In that context, the Secretary advised the Comptroller that Treasury would not redeem the bonds in the New York's possession unless the state obtained a judgment that conferred title to the state.[7]

Nothing in the Secretary's 1952 letter suggested that a state could deem U.S. savings bonds to be "abandoned" simply because their registered owners did not meet a state-imposed deadline for redemption. Nor did the Secretary's letter suggest that a state could redeem U.S. savings bonds that the state did not possess. To the contrary, New York had physical possession of the bonds, and the circumstances under which it came into possession of those bonds—the death of the registered owner as a ward of the state and the failure of any other person to claim the bonds—provided evidence that the bonds were, in fact, abandoned property.

The guidance that Treasury posted on its website in 2000 likewise referred to bonds in a state's possession and contemplated that their abandonment would be established by factual evidence. That 2000 guidance responded to the following frequently asked question (FAQ):

> In a state that has a permanent escheatment law, can the state claim the money represented by securities that the state has in its possession. For example, can a state cash savings bonds that it's gotten from abandoned safe deposit boxes?

In answering that question, Treasury made clear that it was insufficient for a state to come into possession of bonds found in abandoned safe deposit boxes. Treasury explained that it would not redeem such bonds unless the state also obtained title through valid escheat proceedings. The 2000 guidance did not suggest that a state could deem a bond "abandoned" simply because the registered owner failed to meet a state-imposed deadline for its redemption. Nor did the 2000 guidance suggest that a state could redeem a bond that it does not possess.

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owners of matured savings bonds; that about 90 percent had the bonds in their possession; and that the remaining 10 percent indicated that they probably would file a claim for lost bonds so that they could receive payment from the United States. Illustrative letters to South Dakota and Florida are attached.

[5] Public Debt Bulletin No. 111, Subject: *State Statutes Concerning Abandoned Property* (Feb. 27, 1952), at 1.

[6] *Id.*

[7] *Id.* at 3.

In letters sent in response to various state inquiries in 2004 and 2006, Treasury repeatedly advised states that it would not consider requests to redeem bonds that the state did not possess.[8] You have not identified any instance in which a state has redeemed a U.S. savings bond that was not in its possession.

Arkansas may also rely on the Brief in Opposition to the Petition for a Writ of Certiorari in the *New Jersey* case. But that opposition brief expressly relied on the preemption principles that foreclose Arkansas' claim. The opposition brief explained that the states' argument

> ignores the fact that the bond proceeds they demand are not "unclaimed" under the federal statutory and regulatory framework. See Pet. App. 49a. Rather, federal law provides that a bondholder may redeem a savings bond at any time after maturity, thus permitting bondholders to delay redemption without fear that the proceeds of their bonds will be paid out to a third party. See 31 C.F.R. 315.35(c), 353.35(b). It is therefore puzzling that petitioners contend that "Congress and Treasury have declined to address" the circumstance "where the registered owner has not come forward to redeem a bond at maturity." Pet. 19. They clearly have, and the federal scheme does not leave room for States to upset the bargain between the United States and the bondholder by enacting laws that declare the proceeds of the bonds to be "unclaimed." See *Arizona v. Bowsher*, 935 F.2d 332, 333-334 (D.C. Cir.), cert. denied, 502 U.S. 981 (1991); see also Pet. App. 49a ("[T]he bond proceeds are not 'abandoned' or 'unclaimed' under federal law because the owners of the bonds may redeem them at any time after they mature, and thus Congress has not been silent with respect to the fate of the proceeds of the unclaimed bonds.").

Brief for Respondents in Opposition, *Director of the Department of Revenue of Montana v. Department of the Treasury*, No. 12-926 (2013), 2013 WL 1803570, at *15-16. For the same reason, Arkansas cannot transform matured U.S. savings bonds into "abandoned" property by imposing a deadline for their redemption.

Consistent with its prior guidance and prior regulations, Treasury has informed other states that it will redeem certain bonds that had come into the state's possession and for which the states had obtained title through a judgment of escheat.[9] In various cases Treasury has reviewed, the states indicated that most of those bonds had been turned over to the states by banks because they had remained in a safe deposit box for some amount of time after the lease or rental period on the box expired.[10] The states also submitted evidence indicating their substantial efforts to locate the registered owners, whom the states identified by name, and to reunite them with their lost securities.[11] In those cases, Treasury concluded that, overall, the facts presented supported the state's claims that the bonds were actually abandoned."[12] Because those states

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[8] In 2004, Treasury sent nearly identical letters to Connecticut, the District of Columbia, Illinois, Kentucky, New Hampshire, North Carolina and South Dakota rejecting their claims to a class of bonds they did not possess. In 2006, Treasury sent a similar letter to Florida. *See* n.4, supra (discussing the same letters).

[9] *See, e.g.*, Letter of October 1, 2015 from Treasury to South Dakota Treasury Secretary Sattgast, at 5. We understand that you already possess copies of South Dakota's redemption request letters to Treasury.

[10] *See, e.g.*, South Dakota's Motion Seeking Leave to Effect Service by Publication at 4, ¶10.

[11] Letter of October 1, 2015 from Treasury to South Dakota Treasury Secretary Sattgast, at 5.

[12] *Id.*

possessed the bonds and could surrender them for redemption, "the risk of liability or expense resulting from double payment on the bonds" was decreased.[13]

By contrast, Treasury is not granting Arkansas' request to redeem the Absent Bonds. Arkansas does not possess these bonds and did not present evidence showing that the bonds were actually abandoned, rather than in the possession of the registered owners or their heirs. As Treasury explained in denying an analogous redemption request made by Kansas, "Treasury is bound by its contract to the registered owners of these savings bonds, and would violate that contract if it redeemed them to a third party."[14] "Federal law of course governs the interpretation of the nature of the rights and obligations created by the Government bonds themselves." *Free,* 369 U.S. at 669-70. Federal law allows the registered owners of U.S. savings bonds to keep their bonds after maturity and to present them for payment at any time. And as the Third Circuit correctly held, a state has no power to abrogate the contract between a registered bond owner and the United States.

2. The state court proceeding is not a "valid, judicial proceeding" because it did not comport with due process

Arkansas' Absent Bond claim also fails under the prior regulations for the independent reason that the state court proceeding did not comport with the Due Process Clause of the Fourteenth Amendment.

First, the state court did not identify a constitutional basis for exercising *in rem* jurisdiction over the Absent Bonds. Although a state court may exercise *in rem* jurisdiction over property within its borders, *Burnham v. Superior Court of California*, 495 U.S. 604, 617 (1990), the state court did not find that the Absent Bonds are in Arkansas and there was no evidence in the state court record that would have supported such a finding. The bonds are "Absent" and Arkansas knows nothing of their whereabouts. The fact that bonds may have been issued many decades ago to persons with Arkansas addresses reveals nothing about the present location of the bonds or their registered owners. Indeed, in the parallel *Estes* litigation, Kansas admitted that the long maturities of U.S. savings bonds meant that "registered owners, if still living, had likely moved one or more times while the bonds were outstanding." *Estes* Complaint at 12-13 ¶ 46. Also, "[i]n many cases, bonds pass by inheritance to persons other than the purchaser," *id.*, and there is no reason to believe that the heirs reside in the state in which the purchaser lived when the bonds were purchased decades earlier.

Second, the state court failed to give the owners of the Absent Bonds constitutionally adequate notice of the escheat proceeding. Under the Due Process Clause, "individuals whose property interests are at stake are entitled to 'notice and an opportunity to be heard.'" *Dusenbery v. United States*, 534 U.S. 161, 167 (2001) (citation omitted). Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 168 (citation omitted). In

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[13] *Id.* Treasury subsequently reached the same conclusion with respect to certain additional bonds that had come into South Dakota's possession and to which the state had obtained title through a judgment of escheat. See Letter of November 9, 2015 from Treasury to Mr. Milbourn.

[14] Letter of October 16, 2013 from Treasury to Kansas Treasurer Estes, at 1.

Dusenbery, the Supreme Court concluded that this standard was met because the government had (among other things) sent notice of a forfeiture action by certified mail to the property owner care of the federal prison where he was then incarcerated; to the address of the residence where he was arrested; and to an address in the town where his mother lived. *Id.* at 164. Here, by contrast, Arkansas merely published a general notice of the escheat proceeding in various local newspapers around the state. *See* State Court Judgment, at 2 ¶ 5. That notice did not name the Absent Bond owners. *See* Warning Order (image of notice attached). Moreover, there is no reason to believe that the Absent Bond owners reside in Arkansas. The failure of even a single Absent Bond owner to appear at the hearing only confirms that the notice gave them no reason to believe that their property interests were at risk.

In sum, even assuming that Arkansas' request to redeem the Absent Bonds should be considered under 31 C.F.R. 315.20(b) and 353.20(b), the state's claim of ownership was not "established by valid, judicial proceedings" and is therefore denied.

B. Application of the Final Rule to Arkansas's Request to Redeem the Absent Bonds

Treasury also considered Arkansas's request to redeem the Absent Bonds under the final rule issued last month. *See* 80 Fed. Reg. 80258 (Dec. 24, 2015). The final rule clarifies the circumstances under which Treasury will consider a state's request to redeem savings bonds based on a judgment of escheat.

As particularly relevant here, Treasury clarified that it will not redeem bonds that the state does not possess. *See* 31 C.F.R. 315.88(a) and 353.88(a) (providing that Treasury "will not recognize an escheat judgment that purports to vest a State with title to a bond that the State does not possess"). The fact that a bond has come into the possession of a state demonstrates that the bond is not in the possession of the registered bond owner, because the physical bond can be in only one place at a time. And, as discussed above, a registered owner may present his physical bond for payment by the United States at any time. Allowing a state to redeem bonds that it does not possess would impair the rights of the registered owners, undermine confidence in the U.S. savings bond program, and expose the United States to multiple claims on a single bond. Because Arkansas does not possess the Absent Bonds, its request to redeem those bonds is denied.

The final rule also confirms that Treasury is not bound by a state court escheat judgment and may require a state to present evidence that the bonds have been abandoned by all persons entitled to payment under federal law. *See* 31 C.F.R. 360.77(a). Arkansas's assertion that the state court judgment binds Treasury turns the principle of federal supremacy on its head. It has been settled since *McCulloch v. Maryland*, 17 U.S. 316, 322 (1819), that states have no power to regulate the operations of the federal government. *See New Jersey*, 684 F.3d at 409-10. The U.S. savings bond is a federal program to raise funds for the operations of the federal government. If Arkansas wishes to raise funds for its own operations, it is free to sell Arkansas bonds, but it cannot interfere with the federal savings bond program.

The final rule also clarifies that Treasury will not consider escheat proceedings under 31 C.F.R. Parts 315, 353, and 360, subpart E. That subpart does not apply to claims derived from *in*

rem proceedings, judicial determinations that impair the rights of survivorship of co-owners and beneficiaries, or other proceedings that are not specifically listed in subpart E. Arkansas's claim is properly considered under the regulations that specifically apply to escheat proceedings.

If you have any questions, please direct your inquiries to Paul Wolfteich, our Acting Chief Counsel.

Sincerely,

Dara Seaman
Assistant Commissioner
Treasury Securities Services
Bureau of the Fiscal Service
United States Department of the Treasury

Enclosures: *Selected documents filed in Civil Action No. 60CV-15-3638, 6th Judicial Circuit Court, Pulaski County, Arkansas*

Complaint for Declaratory Judgment (Aug. 5, 2015)
Motion for Service by Warning Order (Aug. 5, 2015)
Motion for Temporary Restraining Order (Aug. 5, 2015)
Order (Aug. 17, 2015)
Renewed Motion for Service by Warning Order (Aug. 27, 2015)
Order (Sept. 16, 2015)
Motion for Voluntary Dismissal (Oct. 8, 2015)
Order of Dismissal (Oct. 9, 2015)

Selected documents filed in Civil Action No. 60CV-15-3638, 4th Judicial Circuit Court, Washington County, Arkansas

Complaint for Declaratory Judgment (Oct. 16, 2015)
First Affidavit for Service by Warning Order (Oct. 16, 2015)
Second Affidavit for Service by Warning Order (Oct. 16, 2015)
Warning Order (Oct. 16, 2015)
Motion for Temporary Restraining Order (TRO) (Oct. 19, 2015)
Order granting TRO (Oct. 20, 2015)
Order extending TRO (Nov. 2, 2015)
Second Order extending TRO (Nov. 16, 2015)

Treasury Letters to South Dakota (2004) and Florida (2006)

cc: David H. Thompson, Esq. (via email – dthompson@cooperkirk.com)
Joseph H. Meltzer, Esq. (via email – jmeltzer@ktmc.com)

SE-5033

DEPARTMENT OF THE TREASURY
BUREAU OF THE PUBLIC DEBT
WASHINGTON, DC 20239-0001

AUG 0 2 2004

The Honorable Vernon L. Larson
South Dakota State Treasurer
500 East Capitol Avenue
Pierre, SD 57501-5070

Dear Mr. Larson:

I am responding to your letter to Secretary Snow about matured but unredeemed U.S. Savings Bonds. As overseer of South Dakota's Unclaimed Office, you asked that Treasury disburse to South Dakota an amount equal to its estimate of the value of matured but unredeemed savings bonds held by residents of the state.

The Department of the Treasury does not have the legal authority to pay the State of South Dakota the estimated value of matured but unredeemed bonds held by the citizens of South Dakota. The Secretary of the Treasury issues U.S. Savings Bonds pursuant to the authority contained in Article I, Section 8, Clause 2 of the United States Constitution, and Title 31, United States Code, Section 3105. A U.S. Savings Bond is a federal contract between the United States and the registered owner on the bonds, and under federal regulations payment may only be made to the registered owner. In order for the bonds to be paid to South Dakota, it must have possession of the bonds, statutory authority to obtain title to the individual bonds, obtain an order of escheat from a court of competent jurisdiction vesting title in the state to the individual bonds, and apply to the Department of the Treasury for payment.

As of June 30, 2004, there were approximately 31 million savings bonds in the hands of the public with a value of approximately $12.3 billion that are matured but unredeemed. The $12.3 billion represents our obligation to pay, in perpetuity, the owners of these securities when the bonds are presented for redemption. We have worked to encourage owners of matured savings bonds to redeem those bonds and put their money back to work. In addition to outreach through the media, our website, and more directed communications, we have staff who work to locate owners.

Over the past few years we located some 26,000 owners of matured bonds to advise them that their bonds had stopped earning interest and to encourage them to redeem the bonds. In doing so we found that:

- 70 percent had the bonds in question in their possession and knew they had stopped earning interest but chose not to redeem them at present.

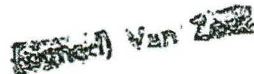
- 20 percent had the bonds but were unaware that the bonds had stopped earning interest.

- 10 percent didn't know they had bonds or didn't know where they were and indicated they would probably file a claim for lost bonds so we could make payment.

As you can see, many people holding matured bonds have made a conscious decision to hold on to their securities despite the fact that they are no longer earning interest. It has also been our experience that approximately 75 percent of matured bonds are redeemed within nine years after they stop earning interest, which tends to confirm that many owners or their successors have these bonds and eventually redeem them.

At present, we believe that continued outreach to bond owners directly and through public education efforts will help convince these investors to put their money back to work. If you have any questions or would like to discuss this further please feel free to contact me.

Sincerely,



Van Zeck
Commissioner

cc: Ms. Matty
PA
Dean Adams

DEPARTMENT OF THE TREASURY
BUREAU OF THE PUBLIC DEBT
PARKERSBURG, WV 26106-1328

October 6, 2006

Richard I. Donelan, Jr.
Chief Counsel, Division of Legal Services
200 Eastgaines Street
Fletcher Building Suite 464
Tallahassee, FL 32399-0333

Dear Mr. Donelan:

I am responding to your letter to Commissioner Zeck about matured but unredeemed United States Savings Bonds. As counsel for the Florida Chief Financial Officer and head of the Department of Financial Services, you requested that the Department of the Treasury pay to the state of Florida an amount of money representing the proceeds of all matured but unredeemed savings bonds belonging to Florida residents. In support of your request, you cited Section 716.01, et seq., Florida Statutes.

The Secretary of the Treasury issues United States Savings Bonds pursuant to the authority contained in Article I, Section 8, Clause 2 of the United States Constitution, and Title 31, United States Code, Section 3105. A United States Savings Bond is a federal contract between the United States and the registered owner named on the bonds, and, under the governing federal regulations, the registered owner of a bond is conclusively presumed to be the owner. See, e.g., 31 C.F.R. §§ 315.5 and 353.5. Payment on a bond may only be made to the owner of the bond upon presentation and delivery of the bond. See, e.g., 31 C.F.R. §§ 315.15, 315.35, 315.39, 353.15, 353.35, and 353.39. The regulations are incorporated into the bond contract by reference and are governed by federal law. See, e.g., Free v. Bland, 369 U.S. 663 (1962). To the extent there is any conflicting or interfering state law, the federal law governing the bonds governs. Id. at 668. The obligation to pay the registered owner is in perpetuity, and does not cease when the bond matures.

The applicable regulations would permit the state of Florida to be paid for the bonds, pursuant to an appropriate state statute and after due process, by obtaining an order of escheat from a court of competent jurisdiction vesting title in the state, and then applying for payment to the Department of the Treasury pursuant to the procedures established by the regulations that all bond owners must utilize. The Treasury Department has no authority to pay Florida (or anyone else) the proceeds of matured but unredeemed savings bonds owned by the residents of Florida outside the context of these procedures.

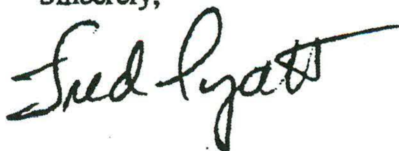
While not strictly relevant to the procedures that Florida must follow to obtain the proceeds of matured but unredeemed savings bonds, it may be useful to know that a bond owner's failure to redeem matured savings bonds in no way suggests that the bond owner

has abandoned the property. A recent survey of owners of matured bonds showed that over 54 percent of the individuals who were contacted had possession of the securities. The remaining bond owners were planning to file a claim for the proceeds of the bonds. It has also been our experience that approximately 75 percent of matured bonds are redeemed within 9 years after they stop earning interest, which tends to confirm that many owners or their successors have these bonds and eventually redeem them.

Over the past few years we have been successful in over 64 percent of our attempted contacts with owners of matured savings bonds. The purpose of these contacts was to advise owners that their bonds had stopped earning interest and to encourage them to redeem the bonds. In doing so, we found that an average of less than 28 percent of the individuals who were contacted chose to redeem the bonds or file a claim requesting payment for the securities within one year of our contact. This is another indication that the bond owners will request payment at a time that is most beneficial for them and not necessarily when the securities have ceased to earn interest.

I hope this information is useful. If you have any questions or would like to discuss this further, please feel free to contact me.

Sincerely,



Fred Pyatt
Assistant Commissioner
Office of Investor Services

051/054

TREASURY DEPARTMENT
Fiscal Service
Washington, February 27, 1952

PD Bulletin No. 111

Bureau of the Public Debt

To Federal Reserve Banks, Fiscal Agents of the United States, and Others Concerned:

Subject 137: STATE STATUTES CONCERNING ABANDONED PROPERTY.

For the information of Federal Reserve Banks as to the present attitude of the Department toward State statutes purporting to vest abandoned property, including United States securities, in certain State officers, there follows a copy of a letter from the Secretary of the Treasury to the State Comptroller of the State of New York, dated January 28, 1952.

E. F. Bartelt
Fiscal Assistant Secretary

"With your letter to the Department dated April 16, 1951 was enclosed a copy of your letter of same date to the Bureau of the Public Debt. This correspondence deals with questions concerning the right, or the prospective right, of the State of New York, acting through its State Comptroller, to receive payment of certain United States securities of which it is not the registered owner.

"While your letter to the Department describes a contemplated legislative program by which New York would greatly broaden its program of custody or escheat of the proceeds of securities of the United States, the letter to the Bureau of the Public Debt is confined to claiming redemption of four bonds registered in the name of one William H. Thompson. These bonds total $350 in face amount, and will mature at various dates in 1952 and 1954. Mr. Thompson died in 1946 at Hudson River State Hospital, a state institution for mental patients. No person claiming possession, the hospital authorities delivered the bonds to the State Comptroller on March 31, 1951 pursuant to Sec. 128 of the State Finance Law and Sec. 1304 of the Abandoned Property Law (both of New York).

"One paragraph of your letter to the Bureau reads as follows:

'On prior occasions we have sought redemption of similar bonds received by the state comptroller under similar circumstances and have met with technical obstacles raised by your Bureau. You have,

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at times, advised us that you would not pay the state comptroller as successor under the provisions of the State Finance Law and the Abandoned Property Law and have indicated that you would pay the state comptroller were he claiming as a creditor of the estate and that you would pay the state comptroller if he were claiming as an administrator of the estate of the deceased obligee. We have not been able to reconcile your position. The title of an administrator would rest upon the statutory law of this state. The title of the state comptroller as custodian under the Abandoned Property Law and the State Finance Law also rests upon the statutes of this state. We do not understand why you would recognize a title under one statute while denying claim of a person holding title under another statute. In other words, we fail to understand why the Surrogate's Court Act of this state, under which an administrator would act, would be recognized by you, and the State Finance Law and Abandoned Property Law provisions would be ignored by you.'

"The Department's position as to the claim to the four Thompson bonds will throw some light on your legislative project, and I do not discuss such project further at this time.

"The Department is of course aware of Anderson National Bank v. Luckett, Commr. (1944) 321 U.S. 233 and Connecticut Mutual Life Insurance Co. v. Moore, Comptroller (1948) 333 U.S. 541. However, as we read these cases they fail to support the present claim of New York, and at least the Connecticut Mutual case indicates that this Department cannot accede to your request. On page 546 thereof the Supreme Court recognized that the provisions of the New York Abandoned Property Law, as applied to the proceeds of insurance policies, effected changes in the contracts between the insurers and the persons insured. Now the proceedings under the New York statute, and particularly the payment of funds into the custody of the state, either provide the obligor with a discharge, valid within and without New York, or fail to provide such discharge. If the discharge is provided in the case of the ordinary debtor, then the other party to the contract has had substituted for his right to pursue his obligor in any jurisdiction, a right merely to prosecute a claim against the State Comptroller of New York; if an effective discharge is not provided, the obligor is subject to suit outside the State of New York and to the necessity of making double payment--in exchange he has a right to claim relief from the Comptroller under Sec. 1406 of the Abandoned Property Law.

"Neither of these possible alterations of contract is contemplated in the agreement by which the United States pledges its faith on its securities. And it is established that even in the case of negotiable

instruments 'The rights and duties of the United States * * * are governed by federal rather than local law.' Clearfield Trust Co. v. United States (1943) 318 U.S. 363, 366; see also National Metropolitan Bank v. United States (1945) 323 U.S. 454, 456. Accordingly, the alterations proposed by New York law must fail as affecting federal contracts.

"This position is not, we think, in any sense inconsistent with the Department's willingness to pay in certain cases, as noted in your above-quoted letter. Payment according to explicit terms of regulations is plainly an obligation of the Government. See, for example, 31 CFR 315.13(b) dealing with payment of a savings bond to a judgment creditor, and 31 CFR 315.47(a) dealing with payment to the 'duly qualified representative of the estate' of a decedent bondholder. But even where no explicit reference is made in the regulations to a particular case, the Department will pay one who succeeds to the title of the bondholder. This is not regarded as a violation of the agreement, but, on the contrary, as payment to the bondholder in the person of his successor or representative. Thus, although the regulations do not mention such a case, the Department recognizes the title of the state when it makes claim based upon a judgment of escheat. As remarked by Cardozo, J. in Re Melrose Ave. in Borough of The Bronx (1922) 234 N.Y. 48, 136 N.E. 235, 236, in escheat the state is 'the ultimate heir.' Similarly, I may add, if the regulations neither recognized nor prohibited payment to the estate of a decedent the Department would nevertheless think its obligation clear to recognize the title of an executor or administrator. On the subject of payment of an original creditor or claimant through payment to one who stands in his shoes, see Kane v. Paul (U.S. 1840) 14 Pet. 33, 40 (for the purposes of administration an executor is "'as much the legal proprietor of those chattels, as was the testator himself while alive'"); New York Mutual Life Ins. Co. v. Armstrong (1886) 117 U.S. 591, 597 ("The term 'legal representatives' is not necessarily restricted to the personal representatives of one deceased, but is sufficiently broad to cover all persons who, with respect to his property, stand in his place and represent his interests, whether transferred to them by his act or by operation of law"); Harris v. Balk (1905) 198 U.S. 215, 226 (an attaching creditor is 'a representative of the creditor of the garnishee'). For cases where the United States, as debtor, recognized the right of a new party to step into the shoes of a claimant, see Houston, Secretary of the Treasury v. Ormes (1920) 252 U.S. 469 and Mellon, Secretary of the Treasury v. Orinoco Iron Co. (1924) 266 U.S. 121.

"Now the statutes under which you claim payment of the bonds registered in the name of Mr. Thompson do not purport to substitute the State of New York for him as the owner of the bonds. This is clear from opinions of the Attorney-General of New York, addressed to the Department of Audit and Control. (In (N.Y.) 1947, Op. Atty. Gen. 135, relying upon Secs. 128 and 1304, supra, he stated that the New York Abandoned Property Law

> 'is not an escheat statute * * *. Abandoned property upon being turned over to the Comptroller does not become the property of the State;

instead the State assumes its care and custody in a special fund (State Finance Law Sec. 95) for the benefit of those entitled to receive it, and any person who can prove his right to such property is entitled to have it paid over to him at any time (Abandoned Property Law Sec. 1406).'

In (N.Y.) 1945, Op. Atty. Gen. 132 the Attorney-General advised, with reference to proposed payments by the Comptroller out of the fund, that an executor of a will or the administrator of the estate of a decedent generally has 'the legal title of the decedent.' See also (N.Y.) 1945, Op. Atty. Gen. 116; 1945, Op. Atty. Gen. 131; 1945, Op. Atty. Gen. 153.

"Instead of substituting New York for Mr. Thompson as the legal person entitled, the New York statutes recognize the continued existence of Thompson's claim, while attempting to change the obligor's responsibilities. (Whether state administrative proceedings--as distinguished from judicial proceedings--might under any circumstances be competent to transfer title from a bondholder to the State of New York it is not necessary to decide at this time.)

"Since the claim which you make is neither within the explicit language of the regulations nor based upon the state's succession to the interest of Mr. Thompson, compliance with it would violate the agreement of the United States with the bondholder.

"I hope that this somewhat detailed statement of the Department's views in this matter will lead to your concurrence. If, however, the State of New York does not agree, and will so advise the Department, then upon the State's request I shall be pleased to refer the case to the Court of Claims, pursuant to 28 U.S.C. Supp. IV, 1493, for the rendition of a judgment which will establish the respective rights of the parties herein.

"Very truly yours,

(Signed) JOHN W. SNYDER

Secretary of the Treasury"

GOV00000095

049/054

BUREAU OF THE PUBLIC DEBT

THE DEPARTMENT OF THE TREASURY
FISCAL SERVICE
WASHINGTON, D.C. 20226

NOV 19 1971

Dear Mr. Zaban:

This refers to the correspondence you sent earlier to our Chicago office and to the Office of the General Counsel, concerning the redemption of some $14,000 in the United States Treasury and Series E savings bonds which were received by your office pursuant to the Indiana Unclaimed Property Act.

I regret the delay in furnishing you a substantive reply. Your letters have been under study by our Chief Counsel's office. I am advised that they were grouped together with inquiries from several other jurisdictions for the purpose of working out, if possible, an acceptable legal solution to the general problem of recognizing claims made by the several States (or local jurisdictions) to so-called unclaimed or abandoned United States securities.

Although our legal study of the matter has not been concluded, I believe it might be helpful to discuss some of the problems involved in recognizing a State's right to receive payment of unclaimed or abandoned Government securities. The first of these relates to the issue as to whether the State has actually succeeded to the title and ownership of the securities, or whether it is acting as a repository. This is a critical distinction as the discharging of the obligation represented by the securities must have validity for all jurisdictions. Ordinarily, such a discharge results only where a valid escheat has occurred.

The point discussed above is, of course, a critical element of contract law, i.e., the undertaking of the United States to pay a security to its rightful owner cannot be legally satisfied by paying the obligation to some State or local governmental authority, at least in the absence of a showing that such authority has been duly appointed to act as the legal representative of the owner's estate, or that it has succeeded to the legal ownership of the security.

To put the matter a little differently, there can be no substitution of the United States as obligor on its securities. It might be pointed out, in this connection, that the right to prosecute a claim against a particular State or local governmental office is not the same as the right to prosecute a claim in any jurisdiction.

The foregoing considerations have particular relevance to your inquiry, if, as appears to be the case, redemption is being sought pursuant to Section 23 of the above Act, without benefit of adjudication under Section 35. In fact, as you point out, the State's role is essentially that of trustee.

GOV00000071

While there are, as explained, formidable objections to recognizing the claims by State and local authorities to unclaimed United States securities, the Fiscal Service, no less than your office, is anxious to find a fair and reasonable means of dealing with these forgotten property interests. I might add, however, that efforts in that direction have now been further complicated by the fact that the Department has received inquiries from several States about funds in various Federal Government accounts to which they feel they may have some right of claim.

It is my understanding that our General Counsel's Office, in cooperation with the Internal Revenue Service and the Department of Justice, are presently seeking to find a common position on this matter. I am sure you will understand our feeling that at this juncture it would be only prudent to defer action until these interdepartmental considerations of this kindred problem have been completed.

You will be further advised as soon as possible.

Very truly yours,

H. J. Hintgen

H. J. Hintgen
Commissioner

Honorable Robert A. Zaban
Deputy Attorney General
State of Indiana
219 State House
Indianapolis, Indiana

copy for: Mr. Smith, Chicago

cc: PD Files

TO BE FILMED AND FILED WITH PREVIOUS MATERIAL RE SAME SUBJECT DATED 6-4-69 UNDER:

316.26 M. Disposition of found and unclaimed bonds 11-19-71
Cross to: 315.15 H. 1. General
and: 315.15 H. 2. By state - Indiana
and: 315.70 F. 1. General
and: 315.70 F. 2. By state - Indiana

Letter to Deputy Attorney General of Indiana discussing some of the problems involved in recognizing a State's right to receive payment of unclaimed or abandoned Government securities.

Inquiry From New Hampshire State Treasurer Concerning Unclaimed Or Abandoned Securities

ESCHEAT
Inquiry From New Hampshire State Treasurer Concerning Unclaimed Or Abandoned Securities

May 12, 1976

The Honorable Robert W. Flanders
State Treasurer
The State of New Hampshire
State House
Concord, New Hampshire

Dear Mr. Flanders:

Upon receipt of your letter of April 16, 1976, I inquired as to whether the Department had arrived at a position on the recognition of State statutes purporting to escheat property that is abandoned or remains unclaimed by its owner.

I am informed that the Department has had a position on the matter of escheat of United States securities for many years, but for reasons explained in the 1969 letter to you, this position was described as still open. This long-standing position is that the Department will recognize claims by States for payment of United States securities where the States have actually succeeded to the title and ownership of the securities pursuant to valid escheat proceedings. The Department, however, does not recognize claims for payment by a State acting merely as custodian of unclaimed or abandoned securities and not as successor in title and ownership of the securities.

In other words, the Treasury recognizes escheat statutes that provide that a State has succeeded to the legal ownership of securities because in such case payment of the securities results in the full discharge of the Treasury's obligation and this discharge is valid in all jurisdictions. On the other hand, payment of securities to a State claiming only as a custodian results in the substitution of one obligor, the Department of the Treasury, for another, the State. Not only is there serious question whether there is authority for a State to effect such a substitution, but there seems to be no basis for believing that payment to a State custodian would effectively discharge the Treasury of its obligation. Even if the discharge were claimed effective in the State to which the payment is made, it is believed that the Treasury's obligation and liability would still remain in force in all other jurisdictions.

In the 1969 letter, reference was made to a then pending case in the U.S. District Court, Indianapolis, Indiana. This litigation dealt directly with the rights of several States to obtain payment, as unclaimed property, of United States postal savings accounts, which had been entrusted to the Treasury for liquidation. At the time the 1969 letter was

written, there was a possibility of some modification of our traditional position as a result of the court decision in that litigation. However, after some delay that controversy was resolved through Congressional legislation and the litigation was terminated.

I also understand that a few years later the Treasury participated in extensive deliberations with the Department of Justice, which were prompted by an inquiry made by the State of New York about unclaimed Federal obligations held by the Treasury. The result was to reinforce the view that there are formidable constitutional and legal barriers to the recognition of State claims to so-called abandoned property.

Other States have inquired over the years as to how they might escheat unclaimed United States securities. The principal problem seems to be that the cost of compliance with the constitutional due process safeguards, as reflected in U.S. Supreme Court decisions, as well as provided in most State statutes, renders attempts to escheat relatively small amounts of securities completely unprofitable. This could be the case with you with securities totaling $543.41. As you suggest, your better course of action would probably be to present the securities in another six years with an appropriate order from your Superior Court.

I have outlined the Treasury's case at some length to give you a greater appreciation of the complexities of dealing with abandoned securities. While the Department postponed providing you with a further response in the hope that these later developments to which I referred would provide a basis for modifying its position, it certainly should have informed you sooner that it could not recognize your office's claim except in compliance with the law of escheat under New Hampshire statutes, i.e., pursuant to a court order following 15 years' custody of the securities. I apologize for the delay that occurred.

Sincerely yours,
William E. Simon

Guerin: Mosso: 05-06-76
Bk17 doc009

Bk 70 Sect D

HISTORICAL

OCT 0 1 1982

Mr. Paul D. Connor
Assistant Director
Abandoned Property
State Treasury
One Ashburton Place
12th Floor
Boston, MA 02108

Dear Mr. Connor:

This refers to your letter of July 13, 1982, concerning approximately $250,000 in United States Savings Bonds turned over to your Department pursuant to the Massachusetts Abandoned Property Law.

A United States Savings Bond is a contract between the United States and the person(s) named in the registration. We are enclosing the regulations governing savings bonds, Department Circular No. 530, Eleventh Revision, and Department Circular No. 3-80. These regulations are incorporated in the bond contract by reference and are matters of federal law. Your attention is called to the following pertinent sections: 315.5 and 353.5, which provide that with exceptions not pertinent in this case, the registration used must express the actual ownership of and interest in the bonds and will be considered conclusive of such ownership and interest; 315.15 and 353.15, which provide that savings bonds are not transferable and are payable only to the owners named thereon, except as specifically provided in the regulations, and then only in the manner and to the extent so provided; and 315.70 and 353.70, which set out the rules governing entitlement where one or both of the persons named on a bond have died without the bond having been surrendered for payment or reissue.

In accordance with the bond contract, we will recognize a request for payment on behalf of the state pursuant to a statute which provides for the administrative escheat, i.e., vesting of title, of abandoned property, where the application of the statute is conditioned upon the furnishing of adequate notice and reasonable opportunities for interested parties to be heard. In this connection we note the decision of the United States District Court, District of Massachusetts, in Application of Commonwealth of Massachusetts, 206 F. Supp. 106 (1962). In construing the Massachusetts abandoned property law with respect to undistributed bankruptcy dividends held in the United States Treasury, the Court denied the Commonwealth's contention that the escheat statute, Section 6 of Chapter 200A, was self-executing and that no judicial decree was required to effectuate an escheat based on a presumption of abandonment after 14 years. The Court held that either a judicial decree of escheat was an indispensable requirement or at least some prior notice to the unknown claimants was necessary as a condition precedent for the Commonwealth to have acquired a good title to the funds.

Under the terms of the bond contract, we could make payment to the Treasurer of the Commonwealth where the Commonwealth, through appropriate court proceedings, takes the owner's title to itself. In that event, we would pay the owner in the person of its successor, the Commonwealth. See Sections 315.23(a) and 353.23(a) for the proper evidence to be submitted if this approach is followed.

In lieu of such a judgment, the Department would consider evidence showing that the procedural due process requirements of notice and hearing have been satisfied as a condition precedent to the acquiring of title by the Commonwealth pursuant to Chapter 200A of the Laws of Massachusetts. In the alternative, the bonds could be transmitted to the Bureau to be held pending a claim from the owner or his rightful sucessors.

It is possible that many of the owners of these bonds have filed claims with the Department resulting in the issuance of substitute securities. In those cases the original bonds are the property of the United States Government and should be submitted to the Department for cancellation. If you will furnish the serial numbers of the bonds in your possession, we will provide a list of the securities which should be returned to us.

If you have any further questions concerning this matter, please do not hesitate to contact us.

Very truly yours,

CGardner

C. Gardner, Director
Division of Transactions and Rulings

Enclosures:
DC 530, 11th Rev.
DC 3-80

DAdams:cas 9-23-82

JWB
9-30-82

VAN

DEPARTMENT OF THE TREASURY
BUREAU OF THE PUBLIC DEBT
WASHINGTON, DC 20239-0001

April 6, 2004

The Honorable Richard H. Moore
Treasurer, State of North Carolina
325 North Salisbury Street
Raleigh, NC 27603-1385

Dear Mr. Moore:

I am responding to your letter to Secretary Snow about matured but unredeemed U.S. Savings Bonds. As administrator of North Carolina's Unclaimed Property Program, you asked that Treasury disburse to the state an amount equal to the state's estimate of the value of matured but unredeemed savings bonds held by residents of North Carolina.

The Department of the Treasury does not have the legal authority to pay North Carolina the estimated value of matured but unredeemed bonds held by the citizens of North Carolina. The Secretary of the Treasury issues U.S. Savings Bonds pursuant to the authority contained in Article I, Section 8, Clause 2 of the United States Constitution, and Title 31, United States Code, Section 3105. A U.S. Savings Bond is a federal contract between the United States and the registered owner on the bonds, and under federal regulations payment may only be made to the registered owner. In order for the bonds to be paid to North Carolina, the state must have possession of the bonds, statutory authority to obtain title to the individual bonds, obtain an order of escheat from a court of competent jurisdiction vesting title in the state to the individual bonds, and apply to the Department of the Treasury for payment.

As of February 29, 2004, there were approximately 30 million savings bonds in the hands of the public with a value of approximately $11.9 billion, which are matured but unredeemed. The $11.9 billion represents our obligation to pay, in perpetuity, the owners of these securities when the bonds are presented for redemption. We have worked to encourage owners of matured savings bonds to redeem those bonds and put their money back to work. In addition to outreach through the media, our website, and more directed communications, we have staff who work to locate owners.

Over the past few years we located some 25,000 owners of matured bonds to advise them that their bonds had stopped earning interest and to encourage them to redeem the bonds. In doing so we found that:

- 70 percent had the bonds in question in their possession and knew they had stopped earning interest but chose not to redeem them at present.

- 20 percent had the bonds but were unaware that the bonds had stopped earning interest.

- 10 percent didn't know they had bonds or didn't know where they were and indicated they would probably file a claim for lost bonds so we could make payment.

As you can see, many people holding matured bonds have made a conscious decision to hold on to their securities despite the fact that they are no longer earning interest. It has also been our experience that approximately 75 percent of matured bonds are redeemed within nine years after they stop earning interest, which tends to confirm that many owners or their successors have these bonds and eventually redeem them.

At present, we believe that continued outreach to bond owners directly and through public education efforts will help convince these investors to put their money back to work. I do appreciate your effort to help us in this work by featuring information about savings bonds on your website. If you have any questions or would like to discuss this further please feel free to contact me.

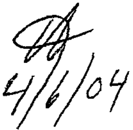
Sincerely,

(signed) Van Zeck

Van Zeck
Commissioner

cc: Linda Matty
Exec Sec 2004-SE-001843

Phollenbach:ph 4/1/04



DEPARTMENT OF THE TREASURY
BUREAU OF THE PUBLIC DEBT
PARKERSBURG, WV 26106-1328

October 6, 2006

Richard I. Donelan, Jr.
Chief Counsel, Division of Legal Services
200 Eastgaines Street
Fletcher Building Suite 464
Tallahassee, FL *32399-0333*

Dear Mr. Donelan:

I am responding to your letter to Commissioner Zeck about matured but unredeemed United States Savings Bonds. As counsel for the Florida Chief Financial Officer and head of the Department of Financial Services, you requested that the Department of the Treasury pay to the state of Florida an amount of money representing the proceeds of all matured but unredeemed savings bonds belonging to Florida residents. In support of your request, you cited Section 716.01, et seq., Florida Statutes.

The Secretary of the Treasury issues United States Savings Bonds pursuant to the authority contained in Article I, Section 8, Clause 2 of the United States Constitution, and Title 31, United States Code, Section 3105. A United States Savings Bond is a federal contract between the United States and the registered owner named on the bonds, and, under the governing federal regulations, the registered owner of a bond is conclusively presumed to be the owner. See, e.g., 31 C.F.R. §§ 315.5 and 353.5. Payment on a bond may only be made to the owner of the bond upon presentation and delivery of the bond. See, e.g., 31 C.F.R. §§ 315.15, 315.35, 315.39, 353.15, 353.35, and 353.39. The regulations are incorporated into the bond contract by reference and are governed by federal law. See, e.g., Free v. Bland, 369 U.S. 663 (1962). To the extent there is any conflicting or interfering state law, the federal law governing the bonds governs. Id. at 668. The obligation to pay the registered owner is in perpetuity, and does not cease when the bond matures.

The applicable regulations would permit the state of Florida to be paid for the bonds, pursuant to an appropriate state statute and after due process, by obtaining an order of escheat from a court of competent jurisdiction vesting title in the state, and then applying for payment to the Department of the Treasury pursuant to the procedures established by the regulations that all bond owners must utilize. The Treasury Department has no authority to pay Florida (or anyone else) the proceeds of matured but unredeemed savings bonds owned by the residents of Florida outside the context of these procedures.

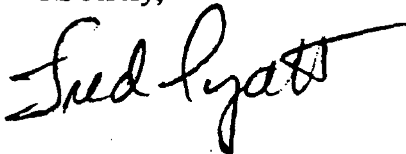
While not strictly relevant to the procedures that Florida must follow to obtain the proceeds of matured but unredeemed savings bonds, it may be useful to know that a bond owner's failure to redeem matured savings bonds in no way suggests that the bond owner

has abandoned the property. A recent survey of owners of matured bonds showed that over 54 percent of the individuals who were contacted had possession of the securities. The remaining bond owners were planning to file a claim for the proceeds of the bonds. It has also been our experience that approximately 75 percent of matured bonds are redeemed within 9 years after they stop earning interest, which tends to confirm that many owners or their successors have these bonds and eventually redeem them.

Over the past few years we have been successful in over 64 percent of our attempted contacts with owners of matured savings bonds. The purpose of these contacts was to advise owners that their bonds had stopped earning interest and to encourage them to redeem the bonds. In doing so, we found that an average of less than 28 percent of the individuals who were contacted chose to redeem the bonds or file a claim requesting payment for the securities within one year of our contact. This is another indication that the bond owners will request payment at a time that is most beneficial for them and not necessarily when the securities have ceased to earn interest.

I hope this information is useful. If you have any questions or would like to discuss this further, please feel free to contact me.

Sincerely,



Fred Pyatt
Assistant Commissioner
Office of Investor Services

TreasuryDirect.

EE/E Savings Bonds FAQs

- What should I do if my paper savings bond has been lost, stolen, or destroyed?
- If my paper EE bond contains a misspelling, incorrect address, or incorrect Social Security Number, do I need to get this corrected?
- What is the Education Savings Bond Program?
- What is the penalty if I cash my bond during the first 5 years?
- What are Patriot Bonds?
- I'd like to buy a savings bond as a gift. What if I don't know the owner's Social Security Number?
- In a state that has a permanent escheatment law, can the state claim the money represented by securities that the state has in its possession? For example, can a state cash savings bonds that it's gotten from abandoned safe deposit boxes?
- I noticed savings bonds are being sold through auction sites such as eBay™, but I thought ownership was non-transferable. How does this work?

What should I do if my paper savings bond has been lost, stolen, or destroyed?

Simply fill out and sign the form Lost, Stolen, or Destroyed U.S. Savings Bonds (Form PD F 1048) according to the form's instructions and mail it to the address provided on the form.

We need the following information before searching for the record of your bond :

Bond serial number -- If you don't have the bond serial number, provide all of the following:

Specific month and year of purchase

Complete social security number (for example 123-45-6789)

Names, including middle names or initials

Address (street, city, state)

We can replace your savings bonds if we can establish that a person entitled to cash the bonds hasn't done so. See Replacing or Reissuing a Lost or Destroyed Paper EE Bond.

If my paper EE Bond contains a misspelling, incorrect address, or incorrect Social Security Number do I need to get this corrected?

Misspelled Name -- EE Bonds don't need to be reissued to correct small typographical errors in names. The bond needs to be reissued if the error is significant enough to prevent the bond owner from cashing it. To get a bond reissued, just fill out and sign form PD F 4000 as indicated on the form and mail it with the bonds to the Treasury Retail Securities site at the address provided on the form.

Incorrect Address -- EE Bonds don't need to be reissued to correct the address that appears on the bonds.

Incorrect Social Security Number -- EE Bonds don't need to be reissued to correct a Social Security Number. The Social Security Number does not establish ownership or tax liability. It's used to find savings bond records if, for example, the bonds are lost and the owner has not kept a record of serial numbers. Be sure to keep a record of all your bonds including serial numbers.

On any paper savings bonds issued on August 1, 2006, or later the first five digits of your Social Security number or Employer Identification number are masked and replaced with asterisks. This was done to protect your privacy and to prevent the information from being used for identity theft.

Back to Top

What is the Education Savings Bond Program?

Qualified taxpayers may be able to exclude all or part of the interest earned from eligible EE and I Bonds issued after 1989 when paying qualified higher education expenses. Bonds must be issued in the name of a taxpayer age 24 or older at the time of issuance. Other restrictions and income limits apply. See more details on the education tax exclusion or IRS Form 8815

What is the penalty if I cash my bond during the first 5 years?

If you cash a bond before it is 5 years old, you will forfeit the last 3 months' interest.

What are Patriot Bonds?

Patriot bonds are paper EE Bonds that were purchased through financial institutions. They are inscribed with the words "Patriot Bond."

I'd like to buy a savings bond as a gift. What if I don't know the owner's Social Security Number?

To purchase an electronic savings bond as a gift, the TreasuryDirect account holder needs to know the recipient's full name and Social Security Number and/or taxpayer ID number. The gift bond is placed in the account holder's "Gift Box" until the account holder obtains the TreasuryDirect account number of the recipient and is ready to transfer the bond into the recipient's account.

When you buy savings bonds as gifts, you must hold them in your TreasuryDirect account for at least five business days before you can deliver them to the gift recipient. The five-day hold protects Treasury against loss by ensuring the ACH debit has been successfully completed before the funds can be moved.

The gift recipient will then receive an e-mail announcing the transfer of the bond.

In a state that has a permanent escheatment law, can the state claim the money represented by securities that the state has in its possession. For example, can a state cash savings bonds that it's gotten from abandoned safe deposit boxes?

The Department of the Treasury will recognize claims by States for payment of United States securities where the States have succeeded to the title and ownership of the securities pursuant to valid escheat proceedings. The Department, however, does not recognize claims for payment by a State acting merely as custodian of unclaimed or abandoned securities and not as successor in title and ownership of the securities.

In other words, the Treasury recognizes escheat statutes that provide that a State has succeeded to the legal ownership of securities because in such case payment of the securities results in full discharge of the Treasury's obligation and this discharge is valid in all jurisdictions.

But, payment of securities to a State claiming only as a custodian results in the substitution of one obligor, the State , for another, the Department of the Treasury. Not only is there serious question whether there is authority for a State to effect such a substitution, but also there seems to be no basis for believing that payment to a State custodian would discharge Treasury of its obligation. Even if the discharge were claimed effective in the State to which the payment is made, it is believed that the Treasury's obligation and liability would still remain in force in all other jurisdictions.

I noticed savings bonds are being sold through auction sites such as eBay™, but I thought ownership was non-transferable. How does this work?

Savings bonds are sometimes sold as souvenirs or collectors' items. The sale doesn't affect the ownership of the savings bond, since by regulation, a savings bond is a registered security and ownership is non-transferable. The United States Treasury still has a contractual relationship with the owner or co-owners named on the bond, not the person who bought the bond at auction. Because of this, the person buying it at auction can't cash it--he's just purchased a piece of paper showing a bond that still is the property of the owner or co-owners named on the bond. In some cases, the bond may be the property of the United States Treasury, if it's a bond that was lost and has since been replaced. Bottom line: it's not a good idea to buy a savings bond at an auction, because you do not acquire any title to the bond or have any ownership rights.

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Translate

No. 10-1963

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TREASURER OF THE STATE OF NEW JERSEY; DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; TREASURER OF THE STATE OF KENTUCKY; TREASURER OF THE STATE OF OKLAHOMA; ATTORNEY GENERAL OF THE STATE OF MISSOURI; TREASURER OF THE STATE OF PENNSYLVANIA,
Plaintiffs-Appellants,
v.

UNITED STATES DEPARTMENT OF THE TREASURY; SECRETARY OF THE TREASURY; BUREAU OF THE PUBLIC DEBT, a Division of the Treasury; COMMISSIONER OF THE BUREAU OF THE PUBLIC DEBT,
Defendants-Appellees.

On Appeal From The United States District Court
For The District Of New Jersey (Civ. No. 04-4368, Hon. Mary L. Cooper)

BRIEF FOR APPELLEES

GEORGE W. MADISON
General Counsel

PAUL G. WOLFTEICH
Chief Counsel

EDWARD C. GRONSETH
Deputy Chief Counsel

DEAN A. ADAMS
Assistant Chief Counsel

THEODORE C. SIMMS II
Attorney-Adviser

Department of the Treasury

TONY WEST
Assistant Attorney General

PAUL J. FISHMAN
United States Attorney

MARK B. STERN
(202) 514-5089
ALISA B. KLEIN
(202) 514-1597
Attorneys, Appellate Staff
Civil Division, Room 7235
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

2. As noted above, Treasury regulations generally provide that payment on a U.S. savings bond will be made only to the registered owner. The regulations specify limited exceptions to this rule, including cases in which a third party obtains ownership of the bond through valid judicial proceedings. 31 C.F.R. §§ 315.20(b), 315.23, 353.20(b), 353.23.

A State may satisfy this ownership requirement "through escheat, a procedure with ancient origins whereby a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears." *Texas v. New Jersey*, 379 U.S. 674, 675 (1965) (footnote omitted). Accordingly, Treasury has long advised state governments that, to receive payment on a U.S. savings bond, a State must go through an escheat process that satisfies due process and awards title to the bond to the State, making the State the rightful owner of the bond. *See*, *e.g.*, JA 136 (1952 letter of the Secretary of the Treasury to the Comptroller of New York), JA 139 (1983 letter from Treasury to the Commonwealth of Kentucky).

Treasury has made equally clear that it will *not* make payment on a bond if, as in this case, a State does not obtain title to the bond and merely seeks "custody" of bond proceeds while the bond owner retains the underlying right to payment on the bond. JA 135-137, 139. Treasury has explained that "[p]ayment of securities

to a State claiming only as a custodian results in the substitution of the State for the Department of the Treasury as obligor on the securities." JA 139. "Not only is there serious question whether there is authority for a State to effect such a substitution, but there seems to be no basis for believing that payment to a State as custodian would effectively discharge the Treasury of its obligation" to the owner of the bond. *Ibid.*; *see also* JA 135-136.

The same distinction between state ownership and custody is set out on Treasury's website. JA 142. The parties stipulated that the website provides Treasury's interpretation of its own savings bond regulations. *Ibid.*

B. Proceedings Below

Plaintiffs are six state governments that seek to compel the U.S. Treasury to pay them billions of dollars that, plaintiffs allege, represent monies owed to the owners of federal savings bonds that have matured but have not yet been redeemed. Plaintiffs allege that there are approximately 40 million matured U.S. savings bonds outstanding and that their proceeds are collectively worth about $16 billion. JA 97 ¶ 36. They allege that about $1.6 billion of the proceeds are owed to bond owners whose last known addresses were in the plaintiff States. JA 87 ¶ 3.

No. 12-926

In the Supreme Court of the United States

DIRECTOR OF THE DEPARTMENT OF REVENUE OF MONTANA, ET AL., PETITIONERS

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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period beyond maturity during which the bonds have earned interest and continue to earn interest." 31 U.S.C. 3105(b)(2)(A). Pursuant to that statutory authorization, the Department's regulations allow the bonds to be redeemed at any time after maturity. See 31 C.F.R. 315.35(c) ("A Series E bond will be paid *at any time* after two months from issue date at the appropriate redemption value.") (emphasis added); see also 31 C.F.R. 353.35(b). Because payment on a savings bond is made from the general funds in the federal Treasury, during the period before the bondholder redeems the bond, the funds continue to be available to the federal government for any "expenditures authorized by law." 31 U.S.C. 3105(a).

b. States have enacted statutes enabling them to assume title to or take custody of property that appears to have been abandoned by its owner, "a process commonly * * * called escheat." *Delaware* v. *New York*, 507 U.S. 490, 497 (1993). The Department has provided guidance to the States about how those laws may apply to U.S. savings bonds in light of the strict limitations on redemptions and transfer established by the federal scheme. As discussed above, the regulations generally provide that payment on a U.S. savings bond will be made only to the registered owner, thus precluding payment to a State invoking its unclaimed-property statute. The regulations include an exception, however, for cases in which a third party obtains ownership of the bond through valid judicial proceedings. 31 C.F.R. 315.20(b) ("The Department of the Treasury will recognize a claim against an owner of a savings bond * * * if established by valid, judicial proceedings."); see also 31 C.F.R. 315.23, 353.20(b), 353.23.

Accordingly, the Department has long advised the States that to receive payment on a U.S. savings bond a State must complete an escheat proceeding that satisfies due process and that awards title to the bond to the State, substituting the State for the original bondholder as the lawful owner. See Pet. App. 12a. But given the regulatory prohibition on payment to anyone other than the lawful owner, the Department has also made clear that it will not make payment to a State on a bond if a State does not obtain title to the bond but instead merely seeks "custody" of bond proceeds until the bondholder redeems the bond. See *ibid.*

That guidance was first set forth in a 1952 letter to the State of New York, was reiterated in a 1983 letter to the State of Kentucky, and, since 2000, has appeared on the Department's official website. See Pet. App. 10a-13a & n.8. Petitioners have referred to the online explanation as the "Escheat Decision," *id.* at 11a-12a, and both parties have acknowledged that the Escheat Decision represents the Department's considered interpretation of federal law, *id.* at 13a.

2. Petitioners are officials of five state governments. They sued the Department in the United States District Court for the District of New Jersey to compel the United States to pay them funds out of the federal Treasury equal to the amount of proceeds on certain matured federal savings bonds that have not yet been redeemed by their registered owners. They allege that $1.6 billion of the proceeds of matured U.S. savings bonds are owed to bondholders whose last known addresses were in the States of the original seven plaintiffs in this case (two of whom have not joined the certiorari petition). C.A. App. 87 ¶ 3. Petitioners seek "an order directing the [federal] Government to pay the proceeds