No. 25-856

In the Supreme Court of the United States

WILLIAM KING, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF PROF. RICHARD A. EPSTEIN AND THE MANHATTAN INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Is a contractual right property under the Takings Clause?

2. Is the explicit elimination of a contractual right properly analyzed as a regulatory taking, or a taking *per se*?

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INTEREST OF *AMICI CURIAE*[1]

Professor Richard A. Epstein is the Tisch Professor of Law at New York University. His scholarship has explored the law of private property and the Takings Clause extensively, including in his seminal treatise *Takings: Private Property and the Power of Eminent Domain* (1985).

The Manhattan Institute is a nonpartisan public policy research foundation dedicated to developing and advancing ideas that foster greater economic opportunity, individual responsibility, and adherence to the rule of law.

This case interests *amici* because, like virtually all Americans, they are parties to numerous contracts under which they are owed money (or valuable goods and services) by other private entities. If the Federal Circuit's decision is allowed to stand, the government would be free to terminate contractual rights without paying just compensation under the Takings Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

A fundamental principle of constitutional law is that the government cannot take A's property for its own use, take property from A and give it to B, or destroy the property without compensating A.

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[1] All parties were timely notified of *amici*'s intent to file this brief. No party's counsel authored any part of this brief; no person or entity, other than *amici* and their counsel, paid for its preparation or submission.

Yet that is exactly what the government did in this case. The petitioning widows and orphans were owed money under a fully valid and vested contract. The government either destroyed their property by relieving the pension of the obligation to pay that debt, or it took money that would have gone to the widows and orphans and reallocated it to younger, incoming members of the pension plan. On either reading, the government must compensate these widows and orphans.

The lower court missed this obvious point. A contractual right is a property right, period. For example, when you deposit money into your bank account, all you receive in return is a contractual right to be repaid by the bank. There is no bailment, no trust, and you retain no proprietary interest in the funds deposited. That money becomes the property of the bank, which may be spent, loaned, or returned to other depositors as the bank sees fit.

Under the Federal Circuit's reading of the Takings Clause, a law providing that banks need only repay 90 cents on every dollar deposited would not amount to a taking, and no compensation would be required. That cannot be correct—especially since it is undisputed that a law allowing banks to take 10% of the value of all property held in their safety deposit boxes *would* be a taking.

Rather than admit this simple point, the lower court twisted itself into knots to avoid compensating the widows and orphans for the property that was taken from them. At one point, it said that claims not directed against specific assets are not property at all. It then backtracked to insist that even if these

contract rights are property, they are not protected by any *per se* rule but must be examined under the *Penn Central* balancing test for regulatory takings.

But the two-part balancing test that works with the land-use decisions in *Penn Central* is wholly inapplicable to cases where the government seeks to seize or destroy intangible property like financial contracts. This case demonstrates how deeply confused the current law of takings is, and how desperately lower courts need guidance. It is well known that the law of takings is riddled with key internal inconsistencies and obscure distinctions that render it the subject of constant criticism across the political spectrum. *See generally*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549 (2003).

One clear manifestation of these difficulties, most pertinent to this case, is that current takings doctrine is so focused on the distinction between physical (*per se*) and regulatory takings, that when confronted with a case involving intangible property, lower courts assume that it *must* be analyzed as a regulatory taking, since intangible property can't be physically interfered with. That's what happened here. It is a symptom of a broader problem that results in courts' trying to analyze takings of a large class of intangible assets—ranging from contract rights to various kinds of fixed and floating liens—within the totally inapplicable framework set out in *Penn Central*.

This case allows the Court to resolve lower-court confusion regarding how to apply the Takings Clause to contracts specifically and intangible property generally. Several circuits have indicated that they're

unable to handle a case where Congress by statute covers up its manifest breach of fiduciary duties by taking property from A (the holder of vested rights) and given to B (the recipient of future payments) without acknowledging how it was responsible for losses for which any private party would be held responsible. That's despite the fact that public and private fiduciary duties have long been treated as parallel. *See* Robert G. Natalson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077, 1086 (2004)) ("I have not been able to find a single public pronouncement in the constitutional debate contending or implying that the comparison of government officials and private fiduciaries was inapt.").

It is damning that neither of the two lower courts cited this Court's most squarely apposite takings decision, *Lynch v. United States*, 292 U.S. 571 (1934), which held that (1) contracts are property, and (2) a taking occurs when the government nullifies a contractual right. The seizure or destruction of contractual rights results in an identical deprivation as a physical taking of tangible property. That is what this Court recognized in *Lynch*.

If for no other reason than the fact that certain circuit courts have asserted that *Lynch* has been "implicitly" overturned, this Court should grant certiorari to explicitly confirm that (1) contractual rights are "property" protected by the Takings Clause; and (2) government action that explicitly destroys a contractual right (or any property) is a *per se* taking.

ARGUMENT

I. THE LOWER COURT IGNORED CLEAR PRECEDENT THAT CONTRACTS ARE PROPERTY

Contracts are treated as personal property for all purposes. They can be assigned. They can be inherited. They can be distributed to a corporation's shareholders, or a debtor's creditors. Debt can be sold many times before it is ever repaid. A bond is nothing more than a contractual right to payment, and businesses pledge their accounts receivable as security on a daily basis.

This Court recognized this status of contracts 130 years ago when it wrote that "a contract is property, and, like any other property, may be taken under condemnation proceedings for public use. . . . Its condemnation is, of course, subject to the rule of just compensation." *Long Island Water Supply Co. v. Brooklyn,* 166 U.S. 685, 690 (1897). The Court repeated that point when it held that a contract between was "property within the meaning of the Fifth Amendment." *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1923).

Yet note the key difference between these two cases. *Long Island* held that a private water company could be taken for fair market value when Brooklyn annexed part of Long Island, while *Omnia* involved a sleight of hand that allowed the federal government to acquire large amounts of steel for less than its fair market value. *See* discussion *infra* at 11; *see also King v. United States*, 151 F.4th 1348, 1360-61 (Fed. Cir. 2025); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 90-92 (1985).

This Court should expose this and other devices that judicial decisions have used to undermine the key holding in *Lynch*. There, this Court put theory into practice and concretely held that the government's termination of a contract without compensation violated the Takings Clause. *Lynch*, 292 U.S. at 579.

Lynch concerned contracts of war insurance that the government sold during WWII. After the war, the government didn't want to pay out on these contracts, so it passed a law declaring them void. Writing for a unanimous Court, Justice Brandeis answered the very question the Federal Circuit was required to answer in this case: "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States." *Id.*

This Court has cited *Lynch* for that central proposition on various occasions, including:

- *El Paso v. Simmons,* 379 U.S. 497, 533 (1965) ("Contractual rights, this Court has held, are property, and the Fifth Amendment requires that Property shall not be taken for public use without just compensation.").
- *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 278 n.31 (1969) ("we have held that 'valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.'" (quoting *Lynch*, 292 U.S. at 579)).

- *United States v. Larionoff*, 431 U.S. 864, 879 (1977) (noting that the government cannot retrospectively reduce the contractual entitlements of service members).
- *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (valid contracts are property within meaning of the Taking Clause).

The lower courts failed to mention, let alone apply, *Lynch*. That was a reversible error. Unfortunately, it was not an isolated error.

Several circuit courts have held that contractual rights are *not* property, with some panels going so far as to declare that *Lynch* is no longer good law. These courts have primarily relied on a dictum in this Court's decision in *Connolly v. Pension Benefit Guar. Corp.,* 475 U.S. 211 (1986).

In that case, Congress passed a law requiring employers to pay a fee before withdrawing from a multi-employer pension plan insured by the Pension Benefit Guaranty Corporation. An employer challenged the law as a "taking" since the contract they signed on joining the plan limited their liability to the agreed upon pension fund contributions. The employer argued that this limitation of liability had been "taken" by the new law.

This Court rejected that argument, on the basis that if a "regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking." *Id.* at

224. But the Court immediately clarified that: "This is not to say that contractual rights are never property rights or that the Government may always take them for its own benefit without compensation." *Id.* This Court should examine which contracts and which abridgement of contracts survive *Connolly*.

Some lower courts have had difficulty reconciling the two decisions. Although *Lynch* is not even cited in *Connolly*, some circuits have misinterpreted the decision as overturning or limiting *Lynch*. For example, the Seventh Circuit interpreted *Connolly*

> as effectively overruling, if it had not already been overruled, [*Lynch*] to the extent that it flatly holds that contracts are property that the government may not take without compensation. . . . The *Lynch* analysis does not resemble the takings jurisprudence of today, and, in light of *Connolly*, we do not believe it controls.

Pro-Eco v. Board of Comm'rs, 57 F. 3d 505, 510 n.2, (7th Cir. 1995). The Sixth Circuit took a similar approach in *Ohio Student Loan Comm. v. Cavazos*, 900 F. 2d 894, 901 (6th Cir. 1990), and the Second Circuit in *Buffalo Teachers Fed'n v. Tobe*, 464 F. 3d 362, 374 (2d. Cir. 2006).

Even if their interpretation of *Connolly* was correct, each of these courts—like the Federal Circuit below—erred by not applying *Lynch*. Circuit courts are not allowed to overrule or disregard Supreme Court decisions, even if they think the decision has been implicitly overruled or superseded. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some

other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

If *Lynch* is good law, the Court should review this case to correct the lower-court confusion and reaffirm the proprietary status of contracts. If *Lynch* is *not* good law, the Court should still grant review to clarify the relationship between contracts and the Takings Clause.

II. VOIDING A CONTRACT IS A *PER SE* TAKING

The court below properly conceded that a taking occurs when the government seizes intangible property for its own use or transfers it to a third party. *King*, 151 F.4th at 1362. That court erred by treating *destruction* of intangible property as somehow different from a seizure or compulsory transfer. That is an unjustifiable distinction that finds no support in this Court's jurisprudence.

Consider a privately owned boat. A taking occurs if the government: (1) expropriates the boat for its navy; (2) declares the boat is now the property of a local ferry company; or (3) scuttles the boat as part of a military exercise. In all three cases, the owner has been deprived of their property. In all three cases, the owner must be compensated.

The Takings Clause requires that the government compensate those it deprives of property. Deprivation

is deprivation, whether it results from seizure, a compelled transfer, or the property's destruction.

This logic applies with equal force to intangible property. Consider a lien against a boat. A taking occurs if the government: (1) takes the rights of the lienholder for itself; (2) transfers the lienholder's rights to a third party; or, (3) destroys the lien by rendering it void and unenforceable.

That last example happened in *Armstrong v. United States*, 364 U.S. 40 (1960). There, the government took title to a ship and extinguished (*i.e.*, destroyed) the liens of various vendors who had not been paid by the shipbuilder. This Court held that the "total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking,' and is not a mere 'consequential incidence' of a valid regulatory measure." *Id.* at 48.

The *Armstrong* Court went on to express the justification for the Takings Clause—a justification it clearly thought applied to intangible property:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Id. at 49.

Like *Lynch*'s holding that contracts are property, *Armstrong*'s holding that the destruction of intangible

property "has every possible element" of a taking was binding on the court below.

Instead of following *Lynch* and *Armstrong*, the court below attempted to recast this case as one challenging "a regulation burdening a claimant's right to use property," which are properly analyzed as regulatory takings under *Penn Central*. *King*, 151 F.4th at 1359. To support that characterization, the court below cited *Omnia*, where a law appropriating the entire output of a steel mill for a year was held not to be a taking of the contractual rights of the mill's existing customers. *Omnia Commercial Co.*, 261 U.S. at 511.

Omnia usefully clarifies the distinction between the seizure or destruction of a contractual right (which is a *per se* taking), and a regulation that impairs, or even frustrates, a contract (which is at most a regulatory taking). In that case, to support the war effort, the government requisitioned all the steel a mill could produce. It paid for the steel—because if it didn't, that would certainly be a taking—but the mill was not able to fulfil orders (contracts) placed by other customers. One customer, Omnia, had a call option allowing it to purchase a certain quantity of steel at a favorable price. *Id.* at 508.

This Court recognized that the "contract in question was property within the meaning of the Fifth Amendment . . . and, if taken for public use, the government would be liable." *Id.* The *Omnia* Court ultimately held that there was no taking of the contract because while the law frustrated or devalued Omnia's option, it did not nullify the contract between Omnia and the mill. As the Court explained:

> Parties and a subject matter are necessary to the existence of a contract, but neither constitutes any part of it; the contract consists in the agreement and obligation to perform. If one makes a contract for the personal services of another, or for the sale and delivery of property, the government, by drafting one of the parties into the army, or by requisitioning the subject matter, does not thereby take the contract.

Id at 511.

The distinction between a law that happens to frustrate a contract, and a law that explicitly destroys a contract, is both obvious and significant. The government cannot know the terms of every contract that may be affected by a new law. Every time the government outlaws a product—be it alcohol, a narcotic, or lawn darts—some uncertain number of pre-existing contracts for that product's manufacture and sale will be frustrated. Treating each contract frustrated by a law of general application as a taking would impose an administrative and financially unworkable burden on the government's legitimate exercise of its legislative power.

That is radically different from what the government did here, or in *Lynch*. When the government already knows about a specific contract, and it passes a law (or exercises an administrative power) to explicitly and deliberately destroy that contract, there is no uncertainty.

In cases like this, the government knows *exactly* what it is doing. It knows the value of the property being destroyed. It knows who the owner is. It knows

what the consequence of its actions will be. The government then chooses to inflict a concrete and ascertainable loss on a known party.

That is a taking, and compensation is owed.

CONCLUSION

For the foregoing reasons and those advanced by the petitioner, the Court should grant the petition.

Respectfully submitted,

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