

No. 25-856

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

WILLIAM KING, *et al.*  
*Petitioners,*

v.

UNITED STATES, *et al.*,  
*Respondents.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit**

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**REPLY IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

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**TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION .....	1
REASONS FOR GRANTING THE PETITION .....	1
I. Lower Courts Are Divided.....	1
II. The Decision Below Conflicts with This Court's Precedents.....	5
III. This Case Is Important.....	10
IV. This Case Presents an Ideal Vehicle .....	11
CONCLUSION.....	12

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Ballinger v. City of Oakland</i> , 24 F.4th 1287 (9th Cir. 2022) .....	3, 4
<i>Brown v. Legal Foundation of Washington</i> , 538 U.S. 216 (2003) .....	4, 5, 8, 9, 10
<i>Central Laborers’ Pension Fund v. Heinz</i> , 541 U.S. 739 (2004) .....	11
<i>Concrete Pipe &amp; Prods. of Cal., Inc. v. Construction Laborers Pension Trust</i> , 508 U.S. 602 (1993) .....	7, 8, 10
<i>Connolly v. Pension Benefit Guar. Corp.</i> , 475 U.S. 211 (1986) .....	7, 8, 9, 10
<i>Dugan v. Rank</i> , 372 U.S. 609 (1963) .....	9
<i>Herb v. Pitcairn</i> , 324 U.S. 117, 126 (1945) .....	11
<i>Koontz v. St. Johns River Water Management Dist.</i> , 570 U.S. 595 (2013) .....	3, 7, 8, 10
<i>Louisville Joint Stock Land Bank v. Radford</i> , 295 U.S. 555 (1935) .....	9
<i>Lynch v. United States</i> , 292 U.S. 571 (1934) .....	5, 6, 7, 9
<i>McCarthy v. City of Cleveland</i> , 626 F.3d 280 (6th Cir. 2010) .....	2, 4
<i>Swisher Int’l, Inc. v. Schafer</i> , 550 F.3d 1046 (11th Cir. 2008) .....	2
<i>Valancourt Books LLC v. Garland</i> , 82 F.4th 1222 (D.C. Cir. 2023) .....	3, 4
<i>Webb’s Fabulous Pharmacies, Inc. v. Beckwith</i> , 449 U.S. 155 (1980) .....	5, 8, 9

**STATUTES, RULES AND REGULATIONS**

The American Rescue Plan Act of 2021  
(ARPA), 29 U.S.C. § 1432. .... 11

**MISCELLANEOUS**

<https://lao.ca.gov/BallotAnalysis/Initiative/2025-024> ..... 6

## INTRODUCTION

The United States’ Brief in Opposition (BIO) does not deny that:

- Lower courts follow three competing standards to decide when an appropriation of money or monetary rights gives rise to a *per se* taking.
- The Federal Circuit’s new “underlying assets” standard empowers governments to authorize the seizure of trillions of dollars of assets.
- There are no procedural obstacles to this Court reviewing the present case.

Below, we (1) address the points made by the United States; (2) show that there *is* an outcome-determinative split among lower courts; and (3) correct the United States’ flawed analysis of this Court’s past opinions. A grant is warranted.

### REASONS FOR GRANTING THE PETITION

#### I. Lower Courts Are Divided.

The United States does not dispute that:

- Lower courts have articulated three conflicting standards for when an appropriation of money, outside of the land-exaction context, gives rise to a *per se* taking. Some courts look at whether the money is “linked to a specific, identifiable property interest.” Some look at whether the money is drawn from a “specific fund.” And one court (the Federal Circuit, below), looked to whether plaintiffs have an interest in the “underlying assets” that will be used to pay them. Pet. 16-20.<sup>1</sup>

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<sup>1</sup> A fourth option would be to hold that outright seizure of a vested contractual right to payment is, alone, a *per se* taking—

- Long before the Federal Circuit created a new, third test, courts recognized a divide on this issue. See *McCarthy v. City of Cleveland*, 626 F.3d 280, 284 (6th Cir. 2010) (“[C]ourts of appeals have differed in their analytical approaches.”).
- The split has not healed. Quite the opposite: The opinion below deepened the conflict.

The United States offers some responses that focus on the *facts* or *outcomes* of specific cases. But these factual distinctions do not refute, or even purport to refute, that there is a deep division among lower courts on the Question Presented.

1. The United States starts by noting that none of the other cases in the split “arose in the ERISA context.” BIO 11. The rule of decision in the opinion below, however, was not limited to the ERISA context. The Federal Circuit announced a sweeping rule—one it repeated for emphasis on four separate occasions (Pet. 3a, 17a, 26a (twice)): monetary rights may be seized, in any context, without triggering a *per se* rule, as long as a plaintiff lacks a property interest in the underlying assets. The holding was not limited to pension rights.

2. The United States next argues that the cases Petitioners cite are in “consensus” with one another on *other* issues, such as whether “a takings claim fails absent a cognizable property interest.” BIO 12 (quotations omitted) (citing *McCarthy* and *Swisher*). But Petitioners seek review of the issue on which there *is* a conflict: when a *per se* test is used to evaluate an appropriation of monetary rights. It is

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since that contractual right *is* (as the trial court below held) a property interest. See *infra*.

inconsequential that courts are in harmony on questions outside the ambit of the Petition.

3. The United States suggests this circuit split is not outcome-determinative. BIO 12, 13. The United States is mistaken. In at least three cases, the choice of test was outcome-determinative:

- Take *Valancourt Books, LLC v. Garland*, 82 F.4th 1222 (D.C. Cir. 2023). The United States frames *Valancourt* as being *only* about copyrights. BIO 12 (summarizing it as “requiring copyright owners to provide physical copies of books”) (quotation omitted). But that description offers an incomplete account: The case also addressed whether, for parties that refused to give the government copies of their copyrighted books, a *per se* test applied when the government required them to pay a fine—an appropriation of money. Relying on this Court’s opinions in *Koontz* and *Brown*, the *Valancourt* court held that monetary appropriations must be evaluated as a *per se* taking as long as they are “‘linked to a specific, identifiable property interest’ such as a piece of personal property.” *Id.* at 1235 (quoting *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 614 (2013)). The fine in *Valancourt* did not require payment from any specific fund. And the court did not require a showing that the plaintiffs had a property interest in the “underlying assets” that would be used to pay the fine—as the Federal Circuit now requires. Yet the monetary appropriation was *linked* to plaintiffs’ property interest in their books, which sufficed to effect a *per se* taking. *Id.*
- In another case, the court *recognized* that the split was outcome-determinative. *Ballinger v. City of*

*Oakland*, 24 F.4th 1287 (9th Cir. 2022). There, plaintiffs were landlords who argued that the defendant city engaged in a *per se* taking when it required them to provide relocation payments to departing tenants. The Court *acknowledged* that their claim would be successful under a “linked to” test like the one used by the D.C. Circuit in *Valancourt*: “We cannot deny that the relocation fee here is linked to real property ....” *Id.* at 1297. Nevertheless, the Ninth Circuit declined to apply a *per se* test because the law in question “does not ‘seize a sum of money from a specific fund.’” *Id.* (quoting the Sixth Circuit’s opinion in *McCarthy*, 626 F.3d at 284). The question of when to use a *per se* test governed the outcome here as well.

- The split was also outcome-determinative in *this* case. Pet. 18 (explaining that Petitioners would have prevailed under the D.C. Circuit/Eleventh Circuit’s standard *or* the Sixth/Ninth Circuit’s standard). Petitioners’ loss was “linked to” their property interest: The very property interest the Court of Federal Claims recognized (a vested right to payment of a specific unreduced sum, Pet. 12) was deleted from their pension agreement. And Petitioners’ money comes from a “specific fund”—their pension fund. The United States does not explain why Petitioners are mistaken in asserting that they would have prevailed in other circuits. The Federal Circuit’s novel test altered the outcome.

4. The United States next stresses that *Valancourt* is the only case in the split where the court ruled for the plaintiffs. No explanation is offered as to why this coincidence matters. The D.C. Circuit in *Valancourt* found for plaintiffs using a “linked to” test. By contrast, the Ninth Circuit in *Ballinger* affirmed

dismissal of the case by looking at whether the loss of money was tied to a “specific” fund—but would (as explained above) have found for the plaintiff under the D.C. Circuit’s test. The Federal Circuit would have decided here for Petitioners under either of the standards used in every other court involved in the split. Pet. 18. And, of course, many plaintiffs have won in *this* Court in the cases the Petition cited. In short, the Petition seeks to clarify the law and correct the error below—not to alter the specific disposition of other, prior cases.

## **II. The Decision Below Conflicts with This Court’s Precedents.**

The Federal Circuit held that parties whose contractual rights to payment are appropriated must show they had an interest in the “underlying assets” for a *per se* test to apply to their claim. Pet. 18. This new rule clashes with this Court’s precedent in cases such as *Brown* (bank accounts), *Webb’s* (same), *Lynch* (insurance contracts), and others—all of which applied a *per se* test in situations where the plaintiff *lacked* a property interest in the underlying assets that would be used to pay them. Pet. 20-24. The Federal Circuit sought in vain to reconcile that rule with this Court’s precedent. *See* Br. of Prof. Richard A. Epstein and the Manhattan Institute as Amici Curiae Supp. Pets. (Epstein/Manhattan Institute Br.) 2 (the opinion below “twisted itself into knots”). The United States now does the same.

1. The United States does not dispute that a depositor of money in a bank account has no interest in the underlying assets of the bank. Yet it does not dispute that this Court in *Brown* and *Webb’s* found that a *per se* test governs whether a government owes compensation when it seizes money from a bank

account: The United States responds that *Brown and Webb's* “involved the government’s appropriation of specific physical or intangible property for its own use *or the use of others’...*” BIO 10 (quoting opinion below) (emphasis added). That admission proves our point: Petitioners’ vested pensions were cut precisely to let “others” use the money they had earned. The cuts were designed to allow the pension fund to retain that money, invest it for years, and eventually give it to active workers rather than the retirees with a vested right to it and their widows and widowers.

Amici Prof. Richard A. Epstein and the Manhattan Institute make a related point in their brief about the implications of the opinion below for bank accounts:

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....

Epstein/Manhattan Institute Br. 2. The United States does not respond to this argument—even though states are actively pursuing similar options. *See, e.g.*, <https://lao.ca.gov/BallotAnalysis/Initiative/2025-024> (explaining California’s ballot measure to appropriate approximately 5% of each California billionaire’s net worth).

2. The United States aims to cast *Lynch v. United States*, 292 U.S. 571 (1934), as only a Due Process Clause case. That view is hard to reconcile with the opinion in *Lynch*, which tracks the language of the Takings Clause:

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. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.

*Id.* at 578 (emphasis added). This Court has since read *Lynch* repeatedly for the rule that governments cannot take contracts without just compensation. *See* Epstein/Manhattan Institute Br. 6-7, 10-11 (collecting cases, and describing how the opinion below up-ends *Lynch*).<sup>2</sup>

3. The United States suggests that *Koontz* applies only when there is a “direct link between the government’s demand and a *specific parcel of real property*.” BIO 10 (quoting *Koontz*) (emphasis added). But *Koontz* itself rejects that reading. *See Koontz*, 570 U.S. at 614 (*per se* test applies to “the relinquishment of funds linked to a specific, identifiable property interest *such as a bank account*”).

4. In the face of *Brown*, *Webb’s*, *Lynch* and *Koontz* (all of which counsel for reversal), the United States contends that Petitioners’ case is more like *Connolly* and *Concrete Pipe*. BIO 8-10. Although those two cases were about private pensions, they involved facts

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<sup>2</sup> The United States wonders why Petitioners did not cite cases such as *Lynch* in its papers below. BIO 11. The answer is simple: Neither the Court of Federal Claims nor the United States had proposed an “underlying assets” rule before the Federal Circuit announced it. Pet. 4. By creating a new doctrine, the Federal Circuit has placed Petitioners in a position to explain the novel test’s problems.

fundamentally different than what occurred here: In both cases, Congress had enacted laws that obligated companies to pay more money into pension plans than their agreements required. That money, however, could be paid from any source. No specific fund or contractual right was appropriated—or else a *per se* test would have been used.

That this is the correct reading of those opinions can be seen in this Court’s later decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a case that asked how *Connolly* and *Concrete Pipe* should apply to a statute (the Coal Act) that had imposed liability on various companies for the medical expenses of retirees. Four Justices would have found a taking. But even the five Justices who did not explained that the way to distinguish *per se* takings cases like *Webb*’s from regulatory taking cases like *Connolly* and *Concrete Pipe* is to ask whether the money in question (1) is appropriated from a specific fund or, rather, (2) is a general liability that the regulated entity can pay however it sees fit. Five Justices concluded that the Coal Act was an example of a financial liability. *Id.* at 540 (Kennedy, J., concurring) (“The Coal Act ... does not operate upon or alter an identified property interest.... The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so.”); *id.* at 555 (Breyer, J., dissenting for four Justices) (“Here there is no specific fund of money; there is only a general liability....”).

That same principle was then adopted by this Court to find a *per se* taking in *Koontz*: “Unlike the financial obligation in *Eastern Enterprises*, the demand for money at issue here did ‘operate upon ...

an identified property interest.’” 570 U.S. at 613-14 (citations and brackets omitted).

Thus, this Court has given lower courts an instruction manual on when to apply a *per se* test: Ask whether the law in question creates a general financial liability (*Connolly* and *Concrete Pipe*) or instead acts on an identified property interest such as a specific fund or a specific contractual right to payment of money (*Brown*, *Webb’s*, and *Lynch*, as well as others such as *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (mortgage payments)). The Federal Circuit disregarded this guidance.

Tellingly, the United States insists that the *Connolly* legislation “*affected* rights in contract.” BIO 8 (emphasis added). But that is not the same as seizing or rewriting the contract. As amici have explained, this difference is critical: “The distinction between a law that happens to frustrate a contract, and a law that explicitly destroys a contract, is both obvious and significant.” Epstein/Manhattan Institute Br. 12; *id.* at 7-8 (explaining how the Federal Circuit and other courts have misread *Connolly* in a way that clashes with *Lynch*).

Finally, Respondent misconstrues this language in *Connolly*: “[T]he fact that legislation disregards or destroys existing contractual rights does not *always* transform the regulation into an illegal taking.” 475 U.S. at 223-24 (emphasis added). The government pounces on the word “always” to posit that contractual rights are *never* covered by a *per se* test. BIO 9. This ambitious reading would functionally overrule *Brown*, *Webb’s*, *Lynch*, *Radford*, and *Dugan*: Those cases all applied *per se* rules to takings claims arising out of contracts. It would also conflict even with the Federal Circuit’s test, which called for applying a *per se* rule

when a contractual right to payment is seized and the plaintiff has a property interest in the underlying assets.

If nothing else, the collision between (1) *Brown, Koontz, Lynch* and the other cases discussed above and (2) *Connolly* and *Concrete Pipe* plainly is creating confusion in the lower courts—ample reason on its own for this Court to grant review.

5. For all of the Federal Circuit’s and the United States’ digressions about how ERISA defines insolvency (BIO 2-4; Pet. 4a-9a), neither the Federal Circuit nor the United States suggests that Petitioners’ fund was insolvent. It was not. Their lengthy meditations about the steps Congress can take as to insolvent entities ignore that Petitioners’ fund *was* solvent, so Congress’s bankruptcy powers do not apply.

### **III. This Case Is Important.**

The United States does not dispute that the “underlying assets” rule bestows governments with the authority to appropriate and reallocate monetary rights in a wide range of contexts: bank accounts, credit-card obligations, private student loans, wages, stock options, insurance obligations, and most bonds, among others. Large percentages of *any* unsecured property interest can be appropriated under the Federal Circuit’s rule. Pet. 24-26. Amici sound similar alarms. Epstein/Manhattan Institute Br. 1-2; Br. of Steven L. Schooner as Amicus Curiae Supp. Pets. 8-14 (describing how the opinion below jeopardizes government contracts). The United States’ striking suggestion that it has always possessed these powers (BIO 11) is of scant comfort—and flies in the face of this Court’s decisions in *Brown, Webb’s, Lynch,*

*Radford*, and the many other cases discussed in the Petition.

#### **IV. This Case Presents an Ideal Vehicle.**

The United States offers two vehicle objections. Neither withstands scrutiny.

1. The United States contends that Petitioners *might* lack a cognizable property interest. BIO 13. But that issue was fully briefed in the Court of Federal Claims; that court concluded that the undisputed record established that Petitioners have a property interest, Pet. 12; and the United States chose not to notice that issue for appeal—as the Federal Circuit expressly decided, Pet. 18a (agreeing with Petitioners that while “the government disagrees with this holding, it ‘has not appealed the finding of a cognizable interest.’”) (quoting Petitioners’ brief). And contrary to the United States’ reference to *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945), this case definitively comes to this Court on a final “judgment[]”, not on some interlocutory or advisory “opinion[]”: The decision below was a conclusive adjudication of Petitioners’ takings claim. Pet. 14. At any rate, whether a vested pension gives rise to a property interest has an obvious, controlling answer: “[V]esting” is “the process by which an employee’s already-accrued pension account becomes irrevocably his property.” *Central Laborers’ Pension Fund v. Heinz*, 541 U.S. 739, 749 (2004).

2. The United States also suggests that this case is a flawed vehicle because ARPA reduced the stakes: Through ARPA, Congress ensured that “Make Up Payments” would be provided to most potential classmembers. BIO 14. But the United States does not contend that any claims are moot. Nor could it. Every potential class member has a claim for interest for the

five-year period that money they had earned was withheld from them. And the United States does not contest that more than 1,100 potential classmembers received incomplete—or no—Make Up payments. Pet. 12.

### CONCLUSION

This Court should grant the Petition.

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