No. 04-693

IN THE
Supreme Court of the United States

FRANKLIN SAVINGS CORP., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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BRIEF FOR WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Washington Legal Foundation ("WLF") is a non-profit public interest law center, based in Washington, D.C., with supporters in all 50 states. WLF regularly appears before state and federal courts to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF has devoted substantial resources over the years to protecting private property rights from government intrusion and has appeared before this Court as *amicus* or party in many of the major takings cases. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Palazzalo v. Rhode Island*, 533 U.S. 606 (2001).[1]

WLF is concerned that as a result of the categorical prohibition on takings claims announced in this case, there is a substantial risk that the decision of the court below will erode traditional concepts of property rights in a wide range of regulated industries. WLF fears that in the absence of explicit guidance from this Court substantial confusion will exist among the federal courts (and within the Federal Circuit, which has exclusive jurisdiction over Fifth Amendment takings claims against the federal government) regarding the interpretation and application of the takings doctrine to regulated industries. WLF therefore urges this Court to grant a writ of certiorari in this case to prevent such confusion and to clarify the scope of the takings doctrine as applied to government actions against financial institutions.

Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy. AEF has appeared with WLF as a co-*amici* before the Court.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the court below is the latest in a series of Federal Circuit decisions holding that, as a matter of law, federally chartered financial institutions are not entitled to the private property protections embodied in the Takings Clause of the Fifth Amendment. According to the court below, banking assets can never be "taken" for Fifth Amendment purposes because "banking is a highly regulated industry and . . . one engaged in that business is deemed to understand that if his bank becomes insolvent or, in the judgment of the regulatory authorities, is engaged in unsafe and unsound banking practices, the bank may be seized by the government and be operated and/or liquidated by them" without any compensation whatever. *Franklin Sav. Corp. v. United States*, 46 Fed. Cl. 533, 536 (Fed. Cl. 2000), *aff'd mem.*, 97 Fed. Appx. 331 (Fed. Cir. 2004).

The court below understood the law of the Federal Circuit categorically to exclude financial institutions from the scope of the Takings Clause; in the words of the Court of Federal Claims, "[t]he Federal Circuit has never upheld a claim that a seizure of a financial institution . . . constituted a taking." *Id.* at 535. According to the court below, even if—as here—the relevant bank regulator was demonstrably wrong in its conclusion that the seized institution was insolvent, the Takings Clause affords no judicial remedy for the owners of the bank. *See id.* at 536. For at least two reasons in addition to those stated by the Petitioner, this Court should grant a writ of certiorari to review and reverse the decision of the court below.

First, this Court should review the decision of the court below because its ruling has ominous implications for all "highly regulated" businesses. If the court below correctly held that participants in "highly regulated industr[ies]" have no property interests protected by the Takings Clause, then the property interests of owners not only of banks, but of telecommunications companies, airlines, securities broker-

dealers, certain manufacturing concerns, and others are in jeopardy. The fact that this Court and other courts have held that participants in these industries are in fact entitled to the legal protections ordinarily attendant to private property strongly suggests that the decision below was simply wrong. The Court should grant a writ of certiorari to ensure that the ruling below is not taken to its logical conclusion, with adverse consequences to the entire regulated sector of the national economy.

Second, this Court should review the decision below to resolve a division among panels of the Federal Circuit as to the extent to which regulated businesses (like banks) are protected by the Takings Clause. While several Federal Circuit decisions appear to have recognized a "heavily regulated industry" exception to the Takings Clause, other decisions of that court have held directly to the contrary. Such decisions have recognized that, even against the backdrop of extensive federal regulation, government seizures may amount to constitutionally prohibited takings. A subset of those decisions holds that physical intrusions by the government—such as the government's physical installation of personnel at Franklin Savings Association's premises here—are *per se* takings that always require compensation under the Fifth Amendment.

Because the Federal Circuit has exclusive jurisdiction over appeals of takings claims against the United States, *see Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1383 n.10 (Fed. Cir. 2000), this divergence in authority within the Federal Circuit is sufficient in itself to justify review by this Court. As in cases presenting questions where there is a division among multiple circuits, the uncertainty created by the existence of inconsistent panel opinions within the only court of appeals with jurisdiction to decide the matter warrants issuance of a writ of certiorari. Moreover, this confusion will not be resolved by the Federal Circuit, as that court strongly has indicated that it regards the categorical takings exclusion for financial institutions as well-settled by

repeatedly denying *en banc* review of this issue. The Court should step in to provide clarity as to whether businesses engaged in regulated industries are entitled to Takings Clause protection or not, and, if so, whether physical intrusions into their premises qualify for analysis under the *per se* takings doctrine.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW THREATENS PROPERTY INTERESTS IN A WIDE RANGE OF REGULATED INDUSTRIES.

The federal government historically has created many forms of property (and, indeed, entire markets) through regulatory action. Federally-chartered corporations, tradable emissions permits, and radio and telecommunications licenses are but a few well-recognized examples of private property explicitly derived from government regulation. However, as this Court and many other courts have recognized, whether federal regulation contributes to the formation or definition of certain property interests does not alter the legal protections attendant to private property. Yet taken to its logical conclusion, that is precisely what the decision below would hold.

The premise of the decision below is that government regulation nullifies the protections afforded to private property under the Constitution. In essence, the decision below holds that property interests created or substantially defined by government regulatory schemes may be dissolved at the whim of government officials at any time and without any compensation. If that holding is correct, then property interests are at risk in any industry "where history shows consistent, intrusive, and changing government regulation[.]" *Cienega Gardens v. United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003). Such a conclusion is inconsistent with this

Court's rulings in numerous regulatory contexts. Absent reversal by this Court, the categorical exclusion of federally regulated financial institutions from Takings Clause protection adopted by the court below threatens property interests in the entire array of regulated industries.

Consider, for example, this Court's recognition of the basic protections afforded to property interests in the wireless telecommunications industry. Federal regulation of the telecommunications industry is generally considered "comprehensive" in scope. *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 248 F.Supp.2d 452, 459 (D. Md. 2003). With the Federal Communications Act of 1934 ("FCA"), Congress asserted "federal control over all interstate wire and radio communications systems" and appointed the Federal Communications Commission ("FCC") as the "sole authority for licensing radio facilities and regulating the technical aspects of radio communications." *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 216 F.Supp.2d 474, 483 (D. Md. 2002). When wireless telephony emerged as a viable industry in the 1970's, the FCC determined that its historic responsibility for regulating technical matters pertaining to the use of the radio spectrum extended to wireless transmissions. *See In re An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 86 F.C.C.2d 469 ¶¶ 80, 86, 1981 WL 158543 (1981) ("*Cellular Communications Systems*").

Pursuant to this exclusive authority, the FCC has issued licenses and set the technical standards for wireless telecommunications since the inception of commercial wireless telephone service, and has "established federal primacy over the areas of technical standards and competitive market structure for cellular service." *See Cellular Communications Systems,* ¶¶ 86-115. Congress confirmed federal control over wireless telephony in the 1993 amendments to the FCA. Among other things, Congress in 1993 amended the FCA to confirm that the FCC has exclusive authority over the regulation of

the rates charged by and market entry of wireless telephone service providers. *See* Omnibus Budget Reconciliation Act, 1993, Pub.L. No. 103-66, § 6002(b)(2)(A), 107 Stat. 312, 394 (1993), *codified at* 47 U.S.C. § 332(c)(3)(A).

Against this comprehensive regulatory backdrop, this Court determined that wireless telephone spectrum licenses created by the FCC and sold to wireless telephone service providers are property interests that may not be summarily revoked by unilateral regulatory action. *See FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003). In *NextWave*, a telecommunications firm purchased such licenses in a government-sponsored auction, and shortly thereafter filed a petition for bankruptcy protection. The FCC attempted to revoke the licenses and re-sell them in a later auction. Taking a position similar to that adopted by the court below, the FCC argued that wireless licenses were not legally protected private property interests because they were subject to a comprehensive federal regulatory regime.

If the decision of the court below were correct, then the FCC's position in *NextWave* should have been upheld. Yet this Court reached the contrary conclusion, holding that the FCC lacked authority to disregard the property characteristics of licenses created and auctioned by the federal government. This Court barred the FCC from revoking the licenses, in part because the licenses—like all other property owned by the debtor in bankruptcy—were "an important asset of the [bankruptcy] estate," 537 U.S. 309 (Stevens, J., concurring), and therefore were entitled to the legal protections that typically attend such property.

The decision of the court below would also suggest that government commitments to recognize particular accounting treatment for "supervisory goodwill" for federally chartered financial institutions are revocable at the whim of the government—and yet, again, this Court's precedents teach otherwise. In *United States v. Winstar Corp.*, 518 U.S. 839 (1996), the federal government took the position—as it did here—that it could renege on its promise to recognize certain

goodwill assets of federal savings associations, because of the government's plenary regulatory authority over financial institutions. This Court disagreed, ordering the government to compensate thrifts that had been injured by the government's decision to revoke grants of "cash substitute" accounting allowances it had made to those thrifts in order to induce them to acquire financially distressed savings associations in the wake of the late-1980's savings and loan crisis. *Id.* at 847-850. Significantly, the Court rejected the notion that the heavily regulated nature of the thrift industry deprived the thrift respondents of the property expectations any other private company or shareholder would otherwise enjoy; on the contrary, the Court was at pains to note that it "appl[ied] ordinary principles of contract construction and breach that would be applicable to any contract action between private parties." *Winstar*, 518 U.S. at 870-71. The decision below—that participants in "highly regulated" industries lack the same legal protections as other property owners—is simply irreconcilable with this Court's decision in *Winstar*.[2]

The decision below would further suggest that the airport slots and aviation routes for which airlines pay many millions of dollars to the government are not entitled to the legal protections usually accorded to private property. Notwithstanding the deregulatory reforms of the 1970's and 1980's, aviation remains comprehensively regulated by the federal government. *See, e.g., Pirolo v. City of Clearwater*, 711 F.2d 1006, 1008-09 (11th Cir. 1983) (discussing the "pervasive

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[2] The Federal Circuit recently relied on the Court's reasoning in *Winstar* in upholding a claim for contract damages against the federal government for legislation which eliminated certain federal tax deductions for corporations acquiring failing thrifts during the late 1980s. *See Centex Corp. v. United States*, No. 03-5087, 2005 U.S. App. LEXIS 945 (Fed. Cir. Jan. 19, 2005). The Federal Circuit reasoned that "if the exercise of [Congressional] power breaches a particular contractual obligation, the injured party will have redress for the breach." *Id.* at *72.

federal regulation" of aviation). Aviation is "unique among transportation industries in its relation to the federal government—it is the only one whose operations are conducted almost wholly within federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest." *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 368 (3d Cir. 1999) (citing S.Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958)). Thus, like banks and thrifts, airport slots and airline routes are "highly regulated," with whatever consequences that status has for their status as property.

Aviation industry economics are predicated heavily on the established rule, recognized by numerous federal courts, that airport "slots"[3] are entitled to the protections traditionally afforded to private property even though—like the wireless spectrum licenses at issue in *NextWave* and the accounting credits at issue in *Winstar*—they are created and conditioned by federal regulation. *See, e.g., In re Gull Air, Inc.*, 890 F.2d 1255, 1260 (1st Cir. 1989) (holding that an airline "did possess property rights in the slots" and that "the slots were property"); *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 986 (9th Cir. 1992) (holding that because the "[l]eave to land one's planes at the airport" is a "property in-

[3] "Slots" are regulatory grants of operational authority from the Federal Aviation Administration ("FAA"), pursuant to what is known as the High Density Rule, to conduct landing or takeoff operations each day during specific hour or half-hour periods at particular airports. The relevant FAA regulations state that "slots may be bought, sold or leased for any consideration and any time period and they may be traded in any combination for slots at the same airport or any other high density traffic airport." 14 C.F.R. § 93.221(a). Transfers, including leases, of slots must be confirmed by the FAA before they become effective. *Id.* Moreover, the FAA may withdraw slots, and slots are subject to recall if the carrier fails to meet utilization criteria specified by the FAA. *See* 14 C.F.R. § 93.223(a).

terest," due process rights apply); *In re McClain Airlines, Inc.*, 80 B.R. 175 (D. Ariz. 1987) (to same effect); *In re Continental Air Lines, Inc.*, 61 B.R. 758, 784 n.5 (S.D. Tex. 1986) (stating same in dicta); *In re American Cent. Airlines, Inc.*, 52 B.R. 567, 571 (N.D. Iowa 1985) (concluding that "the holder [of a slot] has a possessory interest in a slot at the given airport," making the slots property of the bankruptcy estate). If the decision of the court below were correct, then these authorities must be incorrect—with obvious and significant consequences for the airline industry.

Finally, the decision of the court below would suggest that seats on securities exchanges exist only by dint of regulatory grace and lack the protections ordinarily attendant to property interests. Yet this Court has long held that exchange seats are property for purposes of bankruptcy and other legal regimes, notwithstanding the significant regulatory control over those property interests. *See, e.g., Citizens Nat'l Bank v. Durr*, 257 U.S. 99, 108 (1921) (holding that membership in the New York Stock Exchange was personal property); *Chicago Board of Trade v. Johnson*, 264 U.S. 1, 12 (1924) (holding that membership in the Chicago Board of Trade was property of bankruptcy estate). If the mere fact of being "highly regulated" is enough to deprive an investment of the legal protections normally associated with property, then these decisions would be wrong—yet the decisions of this Court unequivocally hold the contrary.

Taken to its logical conclusion, the reasoning in this case encompasses numerous other heavily regulated industries. Indeed, the Federal Circuit has made clear that it regards the federally regulated banking industry as merely one "example" of "an extreme field" of economic activity "where history shows consistent, intrusive, and changing government regulation[.]" *Cienega Gardens*, 331 F.3d at 1350. In the modern regulatory state, there are numerous other sectors of the economy that are just as consistently and intrusively regulated. A holding that the mere fact of this regulation justifies exclusion from the protections afforded by the Takings

Clause is a matter of breathtaking constitutional significance. Even if the Federal Circuit limited the application of its categorical takings exclusion to the financial services industry, the broad implications for property rights in that industry alone justify review by this Court. This Court should grant a writ of certiorari to review the decision below and establish clearly that owners of regulated businesses are property owners entitled to the constitutional protections associated with that status.

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CONTINUING DIVISION AMONG PANELS OF THE FEDERAL CIRCUIT REGARDING WHETHER HEAVILY REGULATED INDUSTRIES ARE CATEGORICALLY EXEMPT FROM THE PRIVATE PROPERTY PROTECTIONS EMBODIED IN THE TAKINGS CLAUSE.

This Court typically grants certiorari to resolve issues that have divided the lower courts after mature consideration. A conflict among the federal circuit courts provides compelling indicia of such divergent views. However, this Court also has granted certiorari to resolve conflicts within the Federal Circuit on issues over which that court has exclusive appellate jurisdiction. *See, e.g., Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83, 89 (1993) (granting certiorari to resolve question within the Federal Circuit relating to patents). This is such a case. Where, as here, the Federal Circuit provides the only venue for appellate review, inconsistent panel opinions within the Circuit (which the Circuit has refused to resolve through *en banc* review) call for resolution by this Court.

The decision of the court below, finding that the seizure and physical occupation of a solvent financial institution by the Office of Thrift Supervision does not constitute a taking, creates profound confusion within the Federal Circuit. By adopting a rule which categorically excludes financial institutions from Fifth Amendment protection without inquiry into

the nature of the property interests at stake or the character of the governmental conduct, the decision below squarely conflicts with the established takings jurisprudence of this Court. Moreover, the notion that financial institutions are uniquely exempt from the protection of the Takings Clause simply because they operate in a "highly regulated" environment has been inconsistently applied within the Federal Circuit. *Compare Franklin Sav. Corp.*, 46 Fed. Cl. at 535-36, *with Cienega Gardens*, 331 F.3d at 1330-31. Because the Federal Circuit has exclusive appellate jurisdiction over claims based upon the Takings Clause, 28 U.S.C. §§ 1346(a)(2), 1491(a)(1), the confusion perpetuated by the decision below is tantamount to a conflict between the circuits on the vital issue of whether private property interests in regulated industries are protected by the Fifth Amendment. This confusion, plus the substantial risk of irreparable damage to traditional notions of property rights resulting from the decision below, makes review by this Court not only appropriate but essential.

Without analyzing either the property interests or the character of the governmental conduct at issue, the court below concluded that "the seizure of a financial institution does not constitute a taking." *Franklin Sav. Corp.*, 46 Fed. Cl. at 535. The court divined this categorical rule from a line of cases which denied takings claims brought by financial institutions based on conduct of federal banking regulators. *See id.* at 535-36 (citing *Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1996); *Golden Pac. Bancorp. v. United States*, 15 F.3d 1066, 1073-74 (Fed. Cir. 1994); *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992)). The "fundamental rationale" of these cases is that a bank's shareholders cannot possess any "reasonable, investment-backed expectation to support a taking claim" because the company they own operates in a "highly regulated industry." *Id.* at 536. The court declined to pursue any inquiry into the nature of the property interests or character of the government's challenged conduct, despite the fact that a fi-

nal, res judicata judgment held that Franklin Savings Association was fully solvent at the time of the government's seizure, *Franklin Sav. Corp. v. OTS*, 303 B.R. 488, 493 (D. Kan. 2004), but emerged bankrupt from the government-imposed conservatorship. The court below effectively concluded that highly regulated financial institutions *never* possess a protectible property interest for purposes of the Fifth Amendment. Indeed, it specifically said as much, stating that no takings claim will lie even when a federal banking regulator's "conclusion or some aspect of it turns out to be legally vulnerable." *Franklin Sav. Corp.*, 46 Fed. Cl. at 536 (quoting *Golden Pac. Bancorp*, 837 F.2d at 512).

That conclusion squarely conflicts with other Federal Circuit decisions and the decisions of this Court in three respects. First, the panel's summary exclusion of an entire class of property interests from Takings Clause protection cannot be reconciled with Federal Circuit decisions that require a fact-based initial inquiry into whether the interests at stake are cognizable under the Takings Clause. *See, e.g.*, *Adams v. United States*, 391 F.3d 1212, 1220 (Fed. Cir. 2004) (stating in case involving application of the Fair Labor Standards Act that "[i]n light of the complex nature of property interests and associated rights, we must identify the precise nature of Appellants' takings claim on appeal."); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (stating in a maritime regulation case that "a court must [first] evaluate whether the claimant has established a 'property interest' for purposes of the Fifth Amendment"). Other panel decisions within the Federal Circuit expressly have rejected the notion, adopted by the panel below, that a history of government regulation categorically excludes property from takings protection.[4] *See, e.g.*, *Cienega Gar-*

[4] This Court similarly has acknowledged that a categorical takings rule based solely upon the regulatory backdrop threatens the basic principles of government accountability that inform the Takings Clause:

dens, 331 F.3d at 1330-31 (rejecting the argument that "enforceable rights sufficient to support a taking claim against the United States cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control"); *Preseault v. United States*, 100 F.3d 1525, 1539 (Fed. Cir. 1996) (rejecting argument that a "history of federal regulatory enactments" modified a fee simple ownership interest in real property). In *Cienega Gardens*, a panel of the Federal Circuit reasoned that such an interpretation of the Takings Clause would "eviscerate[] century-old understandings of the stable and enduring nature of contract and real property rights." *Cienega Gardens*, 331 F.3d at 1330-31. While pervasive industry regulation might reduce the "range of expectations" regarding the right to exclusive use or possession of private property, extensive regulation, in itself, cannot give rise to "a blanket rule that disqualifies par-

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> If investment-backed expectations are given exclusive significance . . . and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights. . . . Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any 'set formula.' The temptation to adopt what amount to *per se* rules in either direction must be resisted.

Palazzolo v. Rhode Island, 533 U.S. 606, 635-36 (2001) (O'Connor, J., concurring) (internal citations omitted). The Court's concern that excessive reliance on the regulatory context would provide the State "too much power to redefine property rights" applies with particular force where, as here, the challenged government conduct involves a physical occupation of private property. *Loretto v. Tele. Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) ("[O]ccupation is qualitatively more severe than a regulation of the *use* of the property.") (emphasis in original).

ties' expectations without inquiry." *Id.* at 1350.

The rule perpetuated by the decision below already has created a profound division among panels of the Federal Circuit regarding takings claims in other "highly regulated" industries. *Compare Franklin Sav. Corp.*, 46 Fed. Cl. at 536 (defining banking as a "highly regulated" industry) *with Cienega Gardens*, 31 F.3d at 1334 (defining the private mortgage industry as "not at all one that is highly regulated") *and Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1191 (Fed. Cir. 2004) (defining poultry industry as "highly regulated"). Without clear direction from this Court, the decision below creates confusion and uncertainty about the legal protections applicable to whole swaths of property interests that exist within the modern regulatory state.

The decision of the court below conflicts with other Federal Circuit panel decisions in a second respect as well—namely, its refusal to follow this Court's teachings concerning *per se* takings. The Takings Clause exception for "highly regulated industries" indulged by the court below would effectively insulate *all* governmental conduct with respect to financial institutions from Fifth Amendment scrutiny—including the physical ouster of executives from bank premises and the installation of federal personnel as receivers or conservators on those premises. That interpretation cannot be reconciled with the *per se* takings doctrine, which holds that a permanent physical occupation of private property by the government, however minor, constitutes a taking. *See Loretto v. Tele. Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982) ("[W]hen the 'character of governmental action,' is a permanent physical occupation of property, our cases uniformly have found a taking.") (citing *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 124 (1928)); *see also Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) ("When the government physically takes possession of an interest in private property for some public purpose, it has a categorical duty to compensate the former owner.") (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)).

The *Loretto* Court explicitly rejected the proposition, elemental to the decision below, that a "permanent physical occupation would ever be exempt from the Takings Clause." *Loretto*, 458 U.S. at 432. In direct conflict with this clear mandate, the line of cases on which the court below relied rejected takings claims by financial institutions even where the governmental conduct at issue was, "in a very real sense, a physical invasion and permanent occupation." *Golden Pac. Bancorp.*, 15 F.3d at 1073. The Federal Circuit's rationale for effectively ignoring "the most serious form of invasion of an owner's property interest," *Loretto*, 458 U.S. at 435, rests on the indefensible understanding that financial institutions—and, under the lower court's rationale, all "highly regulated" industries—should be treated differently under the Fifth Amendment. That interpretation cries out for correction by this Court.

The decision below creates an independent conflict with other panel decisions of the Federal Circuit in that, even if (contrary to established law) the government's conduct here did not constitute a *per se* taking, the court below refused to conduct even the more nuanced analysis applicable to regulatory takings cases. This Court has repeatedly described its regulatory takings jurisprudence as characterized by "'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all the relevant circumstances.'" *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002) (citations omitted). Under this approach, "[i]nvestment-backed expectations, though important, are not talismanic" to the regulatory takings analysis. *Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring); *see also Maritrans Inc.*, 342 F.3d at 1351-1352 (identifying investment-backed expectations as one of "several factors that have particular significance" to the regulatory takings analysis). The decision below entirely eliminates this fact-intensive inquiry into the effect of the regulation and the circumstances surrounding the alleged taking by relying on the regulatory backdrop as the single, dispositive

factor in the regulatory takings analysis.

Simply put, the decision of the court below conflicts with the decisions of this Court and creates profound confusion within the Federal Circuit by singling out "highly regulated" financial institutions for unique (and uniquely disfavored) status under the Takings Clause. *See Franklin Sav. Corp.*, 46 Fed. Cl. at 536 ("highly regulated industry" context provides "fundamental rationale" for denying the takings claim). By adopting a single, categorical rule that deprives an entire industry of Fifth Amendment protection, the panel below placed itself squarely at odds with the established Takings Clause jurisprudence of this Court and the Federal Circuit. Given its exclusive appellate jurisdiction over Fifth Amendment takings claims, a fractured view within the Federal Circuit on this constitutional issue is tantamount to inconsistent judgments between the various federal circuit courts of appeal. *See United States v. Hohri*, 482 U.S. 64, 71 (1987) ("A motivating concern of Congress in creating the Federal Circuit was the 'special need for nationwide uniformity' in certain areas of the law.") (citation omitted). Moreover, there is no indication that the Federal Circuit itself will intervene to resolve the confusion as that court denied *en banc* review not only in this case, but in the entire line of cases on which the decision below relies. *See Franklin Sav. Corp. v. United States*, 2004 U.S. App. LEXIS 16996 (2004); *Branch v. United States*, 1996 U.S. App. LEXIS 3921 (1996); *Golden Pac. Bancorp. v. United States*, 1994 U.S. App. LEXIS 9347 (1994). The Federal Circuit's summary disposition of this case without opinion only highlights that court's understanding that the categorical takings exclusion applied to financial institutions is well-established. This Court should grant certiorari to resolve the confusion created by the decision below.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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