No. 19-_____

IN THE
Supreme Court of the United States

JAKE LATURNER, TREASURER
OF THE STATE OF KANSAS,
Petitioner,

v.

UNITED STATES OF AMERICA AND
ANDREA LEA, IN HER OFFICIAL CAPACITY
AS AUDITOR OF THE STATE OF ARKANSAS,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
TOBY CROUSE
Solicitor General
BRANT M. LAUE
Deputy Solicitor General
DWIGHT R. CARSWELL
Assistant Solicitor General
OFFICE OF ATTORNEY GENERAL
120 S.W. 10th Avenue
2nd Floor
Topeka, Kansas 66612
(785) 368-6693

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
BENJAMIN S. SOFTNESS
KATHERINE C. COOPER
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

May 8, 2020

(Additional Counsel Listed On Inside Cover)

J. BRETT MILBOURN
HORN AYLWARD & BANDY, LLC
2600 Grand Boulevard
Suite 1100
Kansas City, Missouri 64108
(816) 595-7720

QUESTIONS PRESENTED

1. Whether States that have exercised their historic power to escheat title to abandoned United States savings bonds may redeem those bonds as successor owners, as the Third Circuit has concluded, or whether federal law preempts such redemption, as the Federal Circuit held below.

2. Whether Treasury regulations requiring presentation of a bond serial number may operate as a time bar to prevent a bond owner who has lost that serial number from ever redeeming that bond.

PARTIES TO THE PROCEEDINGS

Petitioner Jake LaTurner, Treasurer of the State of Kansas, was a plaintiff in the district court proceedings and an appellee in the court of appeals proceedings.

Respondent United States of America was the defendant in the district court and the appellant in the court of appeals proceedings.

Respondent Andrea Lea, in her official capacity as Auditor of the State of Arkansas, was a plaintiff in the district court proceedings and an appellee in the court of appeals proceedings.

RELATED PROCEEDINGS

The plaintiffs in the consolidated appeals before the Federal Circuit (Kansas and Arkansas) brought suit against the United States to redeem abandoned U.S. savings bonds to which those States have succeeded as owners. Nine similar suits brought by other States have been stayed by the Court of Federal Claims (Kaplan, J.) pending the resolution of those appeals:

Atwater v. United States, No. 1:16-cv-1482 (Fed. Cl. filed Nov. 9, 2016) (Florida)

Ball v. United States, No. 1:16-cv-221 (Fed. Cl. filed Feb. 12, 2016) (Kentucky);

Fitch v. United States, No. 1:16-cv-231 (Fed. Cl. filed Feb. 12, 2016) (Mississippi);

Fitzgerald v. United States, No. 1:19-cv-678 (Fed. Cl. May 8, 2019) (Iowa);

Kennedy v. United States, No. 1:15-cv-1365 (Fed. Cl. filed Nov. 12, 2015) (Louisiana);

Loftis v. United States, No. 1:16-cv-451 (Fed. Cl. filed Apr. 11, 2016) (South Carolina);

Sattgast v. United States, No. 1:15-cv-1364 (Fed. Cl. filed Nov. 12, 2015) (South Dakota);

Williams v. United States, No. 1:16-cv-1021 (Fed. Cl. filed Aug. 18, 2016) (Ohio);

Zoeller v. United States, No. 1:16-cv-699 (Fed. Cl. filed June 15, 2016) (Indiana).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, AND REGULATIONS

ADMINISTRATIVE MATERIALS

OTHER MATERIALS

Petitioner Jake LaTurner, Treasurer of the State of Kansas, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-23a) is reported at 933 F.3d 1354. The opinions and orders of the Court of Federal Claims (App. 24a-33a, 34a-100a, 101a-140a) are reported at 135 Fed. Cl. 501, 133 Fed. Cl. 47, and 123 Fed. Cl. 74, respectively.

JURISDICTION

The court of appeals entered its judgment on August 13, 2019, and denied petitions for rehearing on December 11, 2019 (App. 141a-142a). On February 26, 2020, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to and including May 8, 2020. App. 150a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Kansas Statutes Annotated § 58-3979 and § 58-3980 and relevant provisions of Part 315 of Title 31 of the Code of Federal Regulations (2014) are reproduced at App. 143a-149a.

INTRODUCTION

The federal government issued the first U.S. savings bonds 85 years ago, in the wake of the Great Depression. While helping the government fund critical national expenditures, savings bonds also provided middle-class Americans a way to save for their future through federally backed securities promising a modest, but riskless, long-term return. The most popular savings bonds – dubbed "War Bonds" because they helped the government finance World War II – took 30 or 40 years to mature, at which point they stopped

earning interest. But bonds' relatively small denominations, combined with their decades-long maturity terms, means that many owners lose, forget about, or even die without redeeming their bonds. The evidence in the Court of Federal Claims established that, since the first long-term savings bonds started maturing in the 1960s and '70s, the U.S. Department of the Treasury made only a limited and token effort (which ended nearly a decade ago and even then applied only to bonds maturing beginning in the 2000s) to advise bond owners that their bonds had matured. As a result, the federal government quietly holds tens of billions of dollars' worth of interest-free debts owed to its citizen-lenders.

States have sovereign power to "assume title to abandoned personal property." *Delaware v. New York*, 507 U.S. 490, 497 (1993). That power, reserved to the States under the Tenth Amendment, also carries with it political incentives: State Treasurers are elected officials for whom the return of abandoned or lost property is considered a feature of effective leadership. Every year, State unclaimed-property administrators return to citizens billions' worth of abandoned property, tangible and intangible. Beginning in 2004, several States requested that Treasury grant those States custody of the proceeds of U.S. savings bonds originally registered to Americans in those States. Those States, through their unclaimed-property laws, sought to replace Treasury as the payor or debtor on the bonds and, thereby, to enable the bond owners in those States to seek payment from the States instead of from Treasury.

Those States' efforts failed because the States claimed only custody of the proceeds of the bonds and not title ownership of the bonds themselves through

escheat. On appeal from the district-court decision sustaining Treasury's denial of the States' request, the Third Circuit ruled that federal law preempted the States' custody-based escheat laws as applied to U.S. savings bonds. But that "result d[id] not nullify state escheat laws" generally as to U.S. savings bonds. *Treasurer of New Jersey v. United States Dep't of Treasury*, 684 F.3d 382, 412 (3d Cir. 2012) ("*New Jersey*"), *cert. denied*, 569 U.S. 1004 (2013). Rather, the Third Circuit explained, the statute and Treasury's regulations recognized the States could use escheat to obtain title "ownership of the bonds – and consequently the right to redemption – through 'valid[] judicial proceedings'" that transfer to the States title to the abandoned bonds. *Id.* (quoting 31 C.F.R. § 315.20(b) (2014)) (alteration in original). *New Jersey* followed in the footsteps of *Arizona v. Bowsher*, 935 F.2d 332 (D.C. Cir. 1991), which likewise recognized the "manifest" importance of the distinction between escheat that transfers *title* ownership rather than mere *custody* of federal funds. *Id.* at 335.

The Federal Circuit in this case faced precisely the title-based claim the Third Circuit discussed in *New Jersey*, but it reached the opposite conclusion. Kansas (followed by other States) presented Treasury with state-court judgments granting it title ownership – not mere custody – of long-ago matured but unredeemed U.S. savings bonds. It asked that Treasury grant Kansas's redemption request under the same regulation the Third Circuit said in *New Jersey* authorized that redemption. Treasury refused. Notwithstanding *New Jersey*, the Federal Circuit approved Treasury's action. It held that Treasury's regulations do *not* recognize title escheatment.

The court below erred badly. To conclude that federal law *preempts* the sort of state claim the Third Circuit said federal law *recognizes*, the panel below ignored nearly a century of settled preemption jurisprudence. Mindful of the important role of state sovereigns in our federal system, this Court has held that traditional state powers – such as the power to escheat abandoned property – can be preempted only when Congress expresses a "clear and manifest" intent to do so. *E.g.*, *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). The Federal Circuit neither searched for nor found any preemptive purpose, much less a clear or manifest one. Instead, it *reversed* that burden, holding that, "[a]bsent Federal law authorizing" the States' escheatment of title, state escheatment laws are preempted. App. 11a.

This Court should resolve the appellate disagreement the Federal Circuit created and reject that court's overreaching approach to preemption. No future case will better present the issue, because all future Tucker Act claims will be resolved the same way, in the same court, under the panel's precedential opinion. Moreover, the stakes of the case merit prompt intervention. For decades, Treasury promised that States with title could escheat abandoned bonds, redeem those bonds for payment, and try to locate citizens Treasury would never otherwise notify. Indeed, in the Third Circuit case, the Solicitor General – representing Treasury – confirmed that reading of Treasury's regulations. Only now, after States acted in reliance on Treasury's previous interpretation of its regulations by enacting state statutes to take title to abandoned bonds and engaged in a lengthy due process procedure to comply with Treasury's previous advice, Treasury has reneged.

Treasury's ever-shifting positions concerning title ownership endanger "a principle as old as the Nation itself: The Government should honor its obligations." *Maine Cmty. Health Options v. United States*, No. 18-1023, slip op. 30 (U.S. Apr. 27, 2020). The Court should review this important case and reverse the judgment of the Federal Circuit.

STATEMENT

1. The United States created the savings bond program in 1935 to finance critical national expenditures and provide middle-class Americans a way to make a safe "savings type" of investment.[1] Savings bonds have been issued in various "series," denoted by letters of the alphabet, but by far the most popular was the Series E bond, which could be purchased first with a 40-year, and later with a 30-year, maturity term. Between 1941 and 1980, when the series was retired, Treasury issued more than 4.5 billion E bonds.[2] The last E bonds matured and stopped earning interest in 2010, yet billions of dollars' worth of E bonds remain unredeemed.[3]

Each "savings bond is a contract between the United States," as borrower, "and the bond owner," as lender. App. 2a-3a. Treasury's regulations set forth the terms of that contract. App. 3a. Although preemptive at times, the regulations commonly look to and honor state law. For example, on a bond owner's death, they

---

[1] TreasuryDirect, *Beginnings of the Savings Bond Program*, https://www.treasurydirect.gov/indiv/research/history/history_sbbegin.htm (last visited Apr. 23, 2020).

[2] *See* TreasuryDirect, "Matured Unredeemed Savings Bonds as of Dec 31, 2019," https://www.treasurydirect.gov/foia/sbmud.xlsm (last visited Apr. 23, 2020).

[3] *See id.* Accounting for all series, at least $8 billion worth of savings bonds has been matured for more than a decade.

look to whether "the estate has been settled . . . through judicial proceedings" in the decedent's State and empower "the persons entitled" by those state proceedings to "request payment" of the decedent's savings bonds. 31 C.F.R. § 315.71(b).[4]

Likewise, and consistent with States' "centuries-old" sovereignty over property within their borders, App. 2a, the regulations allowed a state-court order to transfer bond ownership: that is, for a state-court decision to change the identity of the creditor. Though the regulations limited bond transfers in some ways, they long required Treasury to "recognize a claim against an owner of a savings bond . . . if established by valid, judicial proceedings" according to requirements "specifically provided in this subpart." 31 C.F.R. § 315.20(b).[5]

2. That regulation, 31 C.F.R. § 315.20(b), featured prominently in *Treasurer of New Jersey v. United States Department of Treasury*, 684 F.3d 382 (3d Cir. 2012) ("*New Jersey*"), *cert. denied*, 569 U.S. 1004 (2013). Several States, relying on "'custody' escheat statutes rather than 'title' escheat statutes," requested that Treasury transfer to them the proceeds of matured, but unredeemed, savings bonds registered to residents of those States. *Id.* at 389. Treasury

---

[4] The 2014 publication of the Code of Federal Regulations contains the version of the regulations that govern this case. *See* App. 37a n.1. References are to that publication unless otherwise indicated. The pertinent regulations are set forth at App. 144a-149a.

[5] While this case was pending before the Court of Federal Claims, Treasury amended § 315.20(b) to prospectively prohibit transfers effected by state-court title escheat judgments. *See* Final Rule, Regulations Governing United States Savings Bonds, 80 Fed. Reg. 80,258, 80,264 (Dec. 24, 2015).

refused, arguing that the States' lack of title ownership of the bonds in question was decisive. Citing § 315.20(b), Treasury told the Third Circuit that it could not honor the States' claim to custody of the bond proceeds because its regulations require *Treasury* to pay out on the bonds when presented with a valid redemption request by the owner. *See* Treasury *New Jersey* 3d Cir. Br. 6, 26.[6] Disbursing those funds to the States would "substitute the State for the United States as the obligor on the bond" and either (1) impermissibly alter the bond owner's right to receive payment "from the United States" or (2) "expose Treasury to multiple obligations" – first to the State and then to the title owner – "on a single bond." *Id.* at 26-27.

By contrast, Treasury explained, its regulations *would* recognize a State that took title "ownership of a U.S. savings bond through valid judicial proceedings." *Id.* at 6, 14. In that event, payment to the State *is* payment from the United States to the bond owner, thereby discharging the federal government's obligations under the bond contract and eliminating any exposure to a second claim for payment.

Treasury's position was unsurprising. Beginning in 1952, Treasury had repeatedly acknowledged the force of the distinction between a State with custody and a State with title. *See* App. 131a (cataloguing Treasury's prior "unambiguous statements").[7] Treasury

---

[6] Br. for Appellees, *New Jersey*, No. 10-1963, 2011 WL 6935510 (3d Cir. Dec. 23, 2011), https://bit.ly/2qSbMQD ("Treasury *New Jersey* 3d Cir. Br.").

[7] One such statement appeared on a frequently-asked-questions ("FAQ") webpage that Treasury took down "[a]t some point during this litigation" (after adopting its litigating position). App. 129a n.11.

had explicitly rejected the suggestion that payment to a State that had escheated title ownership "violat[ed]" any portion of "the [savings bond] agreement." App. 105a-106a. Rather, such a payment honors that agreement, Treasury repeatedly explained, because it is "payment to the bondholder in the person of his successor." App. 106a.

Treasury prevailed in *New Jersey*. Affirming the district court, the Third Circuit held that the States had no valid custodial claim to the bond proceeds, and it distinguished the *title*-based claims that 31 C.F.R. § 315.20(b) long recognized. *See* 684 F.3d at 412-13. Specifically addressing that scenario, the court noted that its "result d[id] 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.'" *Id.* at 412 (quoting 31 C.F.R. § 315.20(b)) (second alteration in original).

Several States sought review in this Court, and the Solicitor General successfully opposed certiorari.[8] He explained that Treasury has "provided guidance to the States about how" their abandoned-property laws may "apply to U.S. savings bonds." Treasury *New Jersey* Sup. Ct. BIO 3. Specifically, "a State must complete an escheat proceeding that . . . awards title to the bond to the State, substituting the State for the original bondholder as the lawful owner." *Id.* at 4. That process, the Solicitor General explained, was covered by § 315.20(b), which contemplates "cases in which a

---

[8] *See* Br. for Resps. in Opp., *Director, Dep't of Revenue of Montana v. Department of Treasury*, No. 12-926, 2013 WL 1803570 (U.S. Apr. 26, 2013), https://bit.ly/2qSiYMk ("Treasury *New Jersey* Sup. Ct. BIO").

third party obtains ownership of the bond through valid judicial proceedings." *Id.* at 3 (citing the regulation).

That regulatory condition was not satisfied in *New Jersey*, the Solicitor General explained, because the petitioner States did not "claim to have obtained title to any of the U.S. savings bonds at issue in this case, and so they do not assert a right to receive payment under the federal regulations that authorize payment to a third party that obtains ownership of a bond through valid judicial proceedings (*i.e.*, 31 C.F.R. 315.20(b), 353.20(b))." *Id.* at 5. Therefore, transferring the proceeds of the bonds at issue in *New Jersey* to the petitioner States "would directly conflict with the federal regulatory requirement that the Department of the Treasury may make payments only to the registered owner of the bond or a party that has obtained title to the bond through a judicial proceeding." *Id.* at 13.

3. In reliance on Treasury's repeated statements, including those the Solicitor General made in this Court on Treasury's behalf, a number of States enacted statutes authorizing them to escheat title ownership of matured but long-unredeemed (and therefore abandoned) savings bonds registered to citizens with last-known addresses in those States after completing a process designed to protect the due process rights of the original owners and their families. *See*, *e.g.*, Kan. Stat. Ann. §§ 58-3979, 58-3980; *see also Texas v. New Jersey*, 379 U.S. 674, 675 (1965) (recognizing States' "ancient" sovereign power to escheat title).[9]

---

[9] These laws place the States in the shoes of the *owner* of the bond (rather than, as in *New Jersey*, the shoes of the bond's payor) and thus satisfy Treasury's regulations. Notably, however, and as a matter of state unclaimed-property policy, the laws

4. In 2013, the State Treasurer of Kansas secured a state-court escheat judgment granting it title to unredeemed savings bonds registered to owners with last-known addresses in Kansas that had matured eight or more years earlier (and thus were likely lost, forgotten, or abandoned). The judgment covered both the bonds represented by the few physical certificates Kansas had in its possession as well as the many more for which the certificates were lost. Kansas requested that Treasury recognize its title ownership and redeem all the bonds – both by accepting the bond certificates and by redeeming the lost bonds under Treasury's lost-bond regulation. *See* 31 C.F.R. § 315.25.

Treasury recognized Kansas's ownership of the bonds for which it possessed the certificates and redeemed those, without suggesting that federal law preempted or barred Kansas from redeeming those bonds. But, as to the lost bonds, Treasury refused, denying that § 315.20(b) required it to recognize the transfer of ownership to Kansas. Kansas sued in the Court of Federal Claims. App. 6a-7a.[10] Treasury moved to dismiss the Kansas case, arguing that, despite its prior statements to this Court, § 315.20(b) did not recognize the State's title ownership and moreover that federal law preempted Kansas's title escheat law. The Court of Federal Claims denied Treasury's

---

provide for payment to the original owner if the owner identifies herself to the State. *See*, *e.g.*, Kan. Stat. Ann. § 58-3980 (State must pay citizen who demonstrates original ownership). That payment is not made by the State on Treasury's behalf; it is a payment by the State of state funds that postdates satisfaction of the bond contract.

[10] Later suits by additional States followed, but those suits were stayed pending the resolution of the suit brought by Kansas and another brought by Arkansas. App. 7a-8a. Like Kansas, Arkansas applied for and received an extension of the deadline within which to petition for certiorari.

motion (in substantial part), holding that the text of § 315.20(b) allowed Kansas to escheat title and that no deference was due Treasury's novel interpretation of the regulation because that position was "merely a post-hoc rationalization." App. 128a.[11]

After limited discovery, the parties cross-moved for partial summary judgment on liability. Treasury renewed its arguments that § 315.20(b) did not require Treasury to recognize Kansas's title ownership and that federal law preempted Kansas's law. It also argued, for the first time, that, even if Kansas had valid title ownership of the savings bonds, the bonds were not "los[t]" within the meaning of 31 C.F.R. § 315.25 and thus Kansas could not redeem them despite its ownership.

The Court of Federal Claims again denied Treasury's motion in substantial part, ruling that Kansas owned the escheated savings bonds. The court first explained that, far from preempting Kansas's escheatment statute, "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." App. 86a-87a (emphasis added). Citing and distinguishing the Third Circuit's decision in *New Jersey*, the court reasoned that "[t]itle-based escheatment statutes do not raise the concerns identified [in *New Jersey*] because once ownership transfers to a state, the state is not the obligor on the bonds; it is their owner." App. 89a.

---

[11] The Court of Federal Claims also noted that the obvious purpose of the government's then-proposed (and now-adopted) mid-litigation regulatory change was "to change th[e] regulations to reflect the position that the government is taking in this case." App. 136a n.13; *see supra* note 5.

In addition, the Court of Federal Claims rejected Treasury's argument that honoring the States' assumption of title ownership would impermissibly place a time limit on the bond owners' right to redeem their matured bonds. That argument failed, the court explained, because title escheatment "determines the identity of the bond owner, and not the time period within which the bond owner may redeem it." App. 87a.

The Court of Federal Claims expressed skepticism about Treasury's new argument that the bonds were not lost and that Kansas, as owner, could not redeem them under the regulations. The court observed that the bonds are clearly "lost" as a matter of plain English – *i.e.*, location unknown to their owner (Kansas). App. 81a-82a. Ultimately, however, it was "neither necessary nor appropriate" to interpret regulations governing payment at that stage of the case because only ownership was being litigated. App. 83a.

5. Treasury appealed.[12] In addition to renewing its arguments before the Court of Federal Claims, Treasury added another new argument: even if Kansas owned the savings bonds, *and* even if those bonds were "lost," Kansas could never redeem the bonds because of their age. Treasury, the argument went, must deny redemption requests for bonds matured more than six years earlier "unless the claimant supplies the [bonds'] serial number[s]," 31 C.F.R. § 315.29(c), and that is data Kansas currently lacks.

Kansas defended the Court of Federal Claims' rulings and also responded to Treasury's new redemption argument. It first noted that appellate resolution

---

[12] The appeal consolidated parallel Court of Federal Claims rulings in favor of Kansas and Arkansas.

of the issue was inappropriate because it had not been decided below or subject to any discovery. Kansas then explained that, on the merits, a clerical requirement that redemption requests include serial numbers does not prohibit the redeeming owner from *obtaining* those serial numbers from Treasury. Reading the regulation Treasury's way – to impose a memory test or recordkeeping obligation on bond owners – would permanently preclude redemption of, and utterly devalue, bonds matured for six years or more and whose owners misplaced the bond certificates and serial numbers. Moreover, there was no evidence that Treasury had ever applied the regulation that way.

6. A panel of the Federal Circuit reversed. App. 1a-23a.

The panel held that federal law preempted Kansas's escheatment statute without considering the distinction between custody and title ownership that was critical to the decision in *New Jersey*. The panel did not identify any congressional purpose to *displace* the States' historic escheatment power (much less a "clear" or "manifest" one). *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) ("historic" state power preempted only where doing so is "the clear and manifest purpose of Congress") (citation omitted). Rather, the panel asked whether § 315.20(b) *permitted* state escheat judgments to be recognized. Calling the state escheat process a "restriction," the panel held that, "[a]bsent Federal law authorizing such a state law restriction, the result is clear: the federal law takes precedence and the state law is preempted." App. 11a (citation omitted).[13]

---

[13] In framing the escheatment laws this way, the panel accepted Treasury's classification of those laws as imposing a

Applying that test, the panel concluded that § 315.20(b) did not authorize title escheatment by States. App. 11a-14a. Unlike the panel in *New Jersey* (and contra Treasury's statements to the Third Circuit and this Court in that case), the panel reasoned that § 315.20(b) did not recognize escheat because the regulation's text, which refers generally to "judicial proceedings" determining ownership, did not specifically mention escheat. App. 13a-14a. *But see New Jersey*, 684 F.3d at 412-13 ("[A]s 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'") (quoting 31 C.F.R. § 315.20(b)) (second alteration in original).

The panel also held in the alternative that States could not redeem the bonds even if they owned them and even if they were lost because "the States do not have the bond serial numbers." App. 17a (citing 31 C.F.R. § 315.29(c)). The panel did not acknowledge that it was deciding an issue not passed upon below and without evidence of how Treasury has applied that regulation in the past.

7. Kansas and Arkansas petitioned the Federal Circuit for rehearing en banc. The full court called for a response to the petitions and later denied them. App. 141a-142a. The Chief Justice granted an extension for the filing of this petition.

---

time limit on redemption. App. 11a. The panel did not address the lower federal court's explanation that escheatment did not affect redemption timing but rather changed the identity of the bond's owner. *See supra* p. 12.

REASONS FOR GRANTING THE PETITION

In allowing Treasury to abandon decades of statements allowing States to escheat title ownership of a matured U.S. savings bond, the Federal Circuit created a disagreement among the federal courts of appeals and made erroneous new preemption law that contravenes this Court's precedents. The result is a decision that tramples longstanding principles of federalism and questions the willingness of the United States to honor its legal obligations as a debtor. That decision merits this Court's review.

I. THE FEDERAL CIRCUIT'S DECISION IS AT ODDS WITH DECISIONS FROM THE THIRD AND D.C. CIRCUITS

Two prior decisions from the federal courts of appeals highlight the critical distinction between escheat that grants a State title ownership of a savings bond, which federal law permitted, and escheat that merely grants a State custody of federal funds, which federal law preempts. The Federal Circuit broke with those courts by ignoring that distinction.

A. The Third And D.C. Circuits Accept The Key Distinction Between Title And Custody

1. *New Jersey* is the mirror image of this case. In *New Jersey*, seven States sought to recover from Treasury the "proceeds of matured but unredeemed" savings bonds on behalf of the registered owners of those bonds, even though the States did not possess the bond certificates. 684 F.3d at 386. The States' claim to those proceeds was based on "'custody' escheat statutes rather than 'title' escheat statutes in that under them the State does not take title to abandoned property." *Id.* at 389. The Third Circuit rejected the States' attempt.

The court first observed that, *since 1952*, Treasury has taken the position "that the Federal Government would pay the proceeds of savings bonds to [a State] if it actually obtained title to the bonds, but would not do so where the State merely obtained a right to the custody of the proceeds." *Id.* at 390 (citing 1952 Treasury bulletin). Quoting another Treasury statement, this one from 2000, the court further explained that

> 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 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 also there seems to be no basis for believing that payment to a State custodian would discharge Treasury of its obligation.

Id. at 391 (quoting 2000 FAQ webpage cited at App. 52a).[14] In other words, payment to a State with title satisfies the Treasury's obligation on its debt; payment to a State without title leaves the Treasury exposed to a second claim for payment from the bond's actual owner. *See* App. 88a-90a.

Mindful of that distinction, the *New Jersey* court reasoned that federal law preempted a State's attempt to obtain custody of the savings bonds proceeds because releasing funds to the State as custodian would

---

[14] Treasury revised this FAQ webpage "[a]t some point during this litigation" after Kansas cited it in its briefing. App. 129a n.11.

contravene federal regulations requiring payment *by the United States* to the bond owner at redemption. "[A]pplication 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 . . . they effectively would substitute the respective States for the United States as the obligor." *New Jersey*, 684 F.3d at 408.

The same issue would not arise, the court explained, if the States were title owners of the bonds. That is because, "*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" – by taking title ownership under § 315.20(b). *Id.* at 412 (citing the regulation) (emphasis added). Such ownership would render the States "successors" to the registered bond purchasers, and payment to a state owner would therefore satisfy Treasury's obligation and discharge, rather than breach, the bond contract.

2. *Arizona v. Bowsher*, 935 F.2d 332 (D.C. Cir. 1991), likewise recognized that, at the intersection of state escheat law and federal payment obligations to citizens, "the distinction" between custodial possession and title ownership "is manifest." *Id.* at 335. There, 23 States sued the Comptroller General of the United States as well as the Treasury Department, claiming a custodial right to funds the Treasury, by federal statute, was holding in trust for citizens owed money by federal agencies. *Id.* at 333-34 (citing 31 U.S.C. § 1322).[15] The court observed that the States sought "only temporary custody over the money." *Id.* at 334.

---

[15] The statute at issue in *Bowsher* did not apply to U.S. savings bonds. *See* 31 U.S.C. § 1321(a)(1)-(91).

The Supremacy Clause thwarted the States' claims, the court held, because it would alter the federally regulated relationship between the federal government, as debtor, and the citizens entitled to the funds. The purpose of the relevant federal statute was to locate "all unclaimed money accounts" within the Treasury to make them "more accessible" to eventual claimants; re-locating the money to the States "would surely make it less, not more, accessible to claimants, who presumably picture the federal government as the relevant payor." *Id.* at 335 (citation to legislative history omitted).

As the Third Circuit did in *New Jersey*, however, the D.C. Circuit qualified its holding. Unlike the States' custodial claims, *title* "escheat of the claimant's right" to the money "might well substitute the state for the claimant and entitle" the State "to payment" as the owner of the funds. *Id.* Nothing in its ruling, the court stressed, "prevent[ed] state substitution for the claimant where that is consistent with" federal law. *Id.*

B. The Third And D.C. Circuits Would Have Decided This Case Differently

The critical role played by the distinction between title ownership and mere custody in *New Jersey* and *Bowsher* leaves little doubt that those circuits would have affirmed the Court of Federal Claims. The concern that most animated the Third and D.C. Circuits was that a State with custody of federal funds interposes itself as the "obligor" of the relevant debt. *New Jersey*, 684 F.3d at 408; *accord Bowsher*, 935 F.2d at 335 (federal government is "the relevant payor"). That concern is absent when the State has title ownership: in that event, the State steps not into the shoes of the debtor but rather into the shoes of the creditor or bond owner. Payment to the State in that posture does not

complicate or alter the federal government's obligation; it performs it by paying the successor-owner.

More specifically, the Third Circuit explicitly stated that Treasury regulations in force at the time (and that govern this case) *permitted* "the States [to] obtain [title] ownership of the bonds – and consequently the right to redemption." *New Jersey*, 684 F.3d at 412 (citing 31 C.F.R. § 315.20(b)). The Federal Circuit held the opposite. It held (with minimal analysis) that § 315.20(b) unambiguously does *not* recognize transfers of ownership through escheat proceedings. App. 13a-14a. The disagreement is square.

New Jersey noted that States that came to court with title ownership might not necessarily prevail in a similar case if "the Government abandoned its long held position . . . and refused to recognize the enforceability of the judgment with respect to savings bonds." 684 F.3d at 413 n.28. But that qualification has no application here because Treasury did not argue that it was "abandon[ing]" its long-held position. On the contrary, Treasury argued "that its prior statements are entirely consistent with" the position it took in the Federal Circuit. App. 12a. Thus, the question the Third Circuit left open is *not* the question this case presents. Rather, this case presents precisely the situation that the Third Circuit – and Treasury – said would have resulted in the States prevailing. *See New Jersey*, 684 F.3d at 412 ("our result does not nullify state escheat laws").

Indeed, Treasury itself repeatedly took that position in *New Jersey*. "[T]he federal regulations," it told the Third Circuit, citing 31 C.F.R. § 315.20, "include cases in which a third party establishes its ownership of a U.S. savings bond through valid judicial proceedings. *A State may satisfy this ownership requirement*

through escheat." Treasury *New Jersey* 3d Cir. Br. 14 (citation omitted, emphasis added). Then, in this Court, the Solicitor General doubled down: "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." Treasury *New Jersey* Sup. Ct. BIO 4.

The Federal Circuit decided that question precisely the opposite way: notwithstanding the Third Circuit's conclusion, and notwithstanding Treasury's statements to the Third Circuit and this Court, the Federal Circuit held that § 315.20(b) unambiguously did *not* contemplate title transfers through escheat proceedings. App. 13a-14a.[16]

II. CORE FEDERALISM PRINCIPLES AT STAKE IN THIS BILLION-DOLLAR CASE MERIT THIS COURT'S INTERVENTION

A. The Federal Circuit's Invented Preemption Standard Tramples State Sovereignty

The States' authority to escheat property is a traditional and fundamental aspect of state sovereignty and has been recognized as such since the Founding. *See*, *e.g.*, *Delaware v. New York*, 507 U.S. 490, 497, 502

---

[16] Notably, and without any evidence, the Federal Circuit was "dubious" the briefs the United States filed in this Court and in the Third Circuit "reflect[ed] Treasury's 'fair and considered judgment' on the question of whether 31 C.F.R. § 315.20(b) require[d] Treasury to recognize escheat claims." App. 13a. The Federal Circuit's assertion is particularly hard to credit given the many decades in which States had sought guidance from Treasury on the very question at issue here: is title ownership sufficient for States to stand in the shoes of original bond owners when the physical bond cannot be found?

(1993); *Bowsher*, 935 F.2d at 335 (title escheat has "a patina of ancient history"). For that reason, in preemption cases, this Court requires a heightened showing that it is "the clear and manifest purpose of Congress" to displace the "historic" state power. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (citation omitted); *see also Kansas v. Garcia*, 140 S. Ct. 791, 806 (2020) (federal immigration law did not preempt Kansas criminal law; "criminal law enforcement has been primarily a responsibility of the States"). "That approach is consistent with both federalism concerns and the historic primacy of state regulation" in certain areas, such as health, safety, and private property. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

That principle of federalism has been settled law in this Court for nearly a century. *See Altria*, 555 U.S. at 77; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[T]he 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."); *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926) ("The intention of Congress to exclude states from exerting their police power must be clearly manifested."). The Federal Circuit's departure from that long line of cases, in favor of a far less demanding showing, upends that well-worn standard.

Notwithstanding this Court's clear guidance, which Kansas relied on in its briefs below, the Federal Circuit never acknowledged that escheatment is a core state power subject to preemption only upon the "clear and manifest purpose" of Congress. Instead, the panel ruled that, "[a]bsent Federal law" affirmatively "authorizing" state escheat, federal law preempted state title escheat statutes. App. 11a.

That analysis was not only in the teeth of this Court's cases; it was outcome-determinative and led the Federal Circuit to err. The Federal Circuit was unable to point to any provision of federal law affirmatively evincing Congress's purpose to displace state-law escheat.

The panel first asserted a "conflict between state and Federal law" on the basis of a statute authorizing "Treasury to prescribe regulations" allowing bond owners "to keep their bonds after maturity" and regulatory language allowing for redemption at "any time" after maturity. App. 10a. But those provisions govern the *timing* of redemption by the bond's owner and are inapposite here. As the Court of Federal Claims explained, escheatment "determines the *identity* of the bond owner, and not the time period within which the bond owner may redeem it." App. 87a (emphasis added). The state laws at issue in this case do not alter the right to redeem at any time after the bond matures; rather, that redemption right is *transferred* to the new owner as occurs with any state judicial proceeding that transfers ownership of a savings bond. *See* Treasury *New Jersey* Sup. Ct. BIO 4 (title escheat "substitut[es] the State for the original bondholder as the lawful owner").

The Federal Circuit also cited a statute *authorizing* Treasury to promulgate "restrictions on transfer," App. 10a, but it cited no regulation actually *adopting* a relevant restriction. That absence proves the panel's error. The most relevant regulation governing transfer expressly *allowed* bond ownership to transfer pursuant to a state-law escheat judgment. *See New Jersey*, 684 F.3d at 412 (citing 31 C.F.R. § 315.20(b)).

The absence of any statutory or regulatory language clearly displacing state unclaimed-property law as to

savings bonds is particularly significant because, elsewhere in the U.S. Code, Congress has demonstrated the requisite "clear and manifest" purpose to preempt those laws in unmistakable terms. For example, the statute at issue in *Bowsher* explicitly directs Treasury to handle unclaimed money in 91 denominated "trust funds," 31 U.S.C. § 1321(a) – a list that excludes U.S. savings bonds – "without regard to the State law or the law of other jurisdictions of deposit concerning the disposition of unclaimed or abandoned property," *id.* § 1322(a), (c)(1). In other statutes, Congress has provided specifically for the "[d]isposition of unclaimed property," *e.g.*, 12 U.S.C. § 216b (heading), in ways that would necessarily preempt a competing state-law scheme. *See*, *e.g.*, *id.* (disposition of unclaimed property recovered from closed national banks); 24 U.S.C. § 420 (disposition of unclaimed property of deceased Armed Forces Retirement Home residents). Congress's silence here – coupled with regulations that *recognize* state-court judgments concerning ownership – confirms that the state laws at issue here were not preempted. *See Wyeth v. Levine*, 555 U.S. 555, 574-75 (2009) (where Congress expressly preempted state law governing medical devices but not prescription drugs, its "silence on the issue" was "powerful evidence" against preemption).

At bottom, the panel was satisfied that federal law preempted the Kansas state law because "[e]scheat proceedings are not mentioned" in 31 C.F.R. § 315.20(b). App. 14a. But "[m]ere silence" cannot "establish a clear and manifest purpose." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432 (2002) (citation omitted). Rather, "because the States are independent sovereigns in our federal system," this Court has "long presumed that Congress does not cavalierly pre-empt" state law – not least when the state

law is "'in a field which the States have traditionally occupied.'" *Lohr*, 518 U.S. at 485 (quoting *Rice*, 331 U.S. at 230). The Federal Circuit's refusal to recognize that longstanding doctrine requires this Court's correction. *Cf. Sorich v. United States*, 555 U.S. 1204, 1208 (2009) (Scalia, J., dissenting from denial of certiorari) (noting serious "federalism interests" at stake).

B. The Decision Below Upends A Longstanding Federal Commitment To Honor State Law

As the Third Circuit recounted in *New Jersey*, Treasury itself long "recognized" that "third parties, including the States, may obtain ownership of the bonds – and consequently the right to redemption – through 'valid[] judicial proceedings'" under § 315.20(b). 684 F.3d at 412 (alteration in original).[17] That court traced Treasury statements dating back nearly 70 years emphasizing the critical distinction between title and custody and announcing the government's policy that "'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.'" *Id.* at 391 (quoting 2000 FAQ webpage); *accord id.* at 390-91 (citing 1952 statement); App. 42a-46a (Court of Federal Claims citing additional statements and letters); App. 105a-107a (same); App. 128a-131a (same).

---

[17] After this litigation began, Treasury promulgated a rule amending § 315.20(b) to explicitly exclude escheat. App. 15a, 27a n.2. The new rule is not before the Court, but, if the amendment is to have any force, it must be that the prior rule did recognize escheat. It moreover shows Treasury's ability to express a clear preemptive purpose in its regulations when that is what it wishes to do. *See supra* Part II.A.

The Federal Circuit dismissed those *decades* of clear statements as unimportant to its analysis and not likely "Treasury's 'fair and considered judgment,'" App. 13a – again, notwithstanding contrary reasoning in *New Jersey* and repeated representations to the Third Circuit and this Court. *See* 684 F.3d at 391-92 (2000 FAQ webpage is Treasury's "interpretation of federal savings bond regulations"); *supra* p. 16. In so doing, the court below risked serious harm to the federal government's credibility as a legally bound debtor.

The United States created the savings bonds program in 1935 to finance critical national expenditures like World War II; in turn, Treasury "pledge[d] [the United States'] full faith and credit" behind each obligation[18] and promised small savers "an absolutely safe" investment with "a reasonable return."[19] But because bonds take decades to mature, billions' worth of Treasury's debts have never been repaid to those bonds' owners, and the size of Treasury's unpaid debt, currently more than $26 billion, grows every year.

States like Kansas attempt to correct that discrepancy in the very manner Treasury long held out as permissible. *Cf. American Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 365 (3d Cir. 2012) (purpose of abandoned-property laws is "to reunite . . . abandoned property with its owner"). Yet rather than honor its debt to the successor bond

---

[18] Treasury, *A History of the United States Savings Bonds Program* 4 (1991), https://www.treasurydirect.gov/indiv/research/history/history_sb.pdf.

[19] Treasury, *United States Savings Bonds Program: A Study Prepared for the Committee on Ways and Means, U.S. House of Representatives* 13, 30 (Jan. 1981), *available at* https://catalog.hathitrust.org/Record/000102054.

owners in the very manner it committed to do, the federal government changed its mind, preferring to keep these long-abandoned debts as donations – and not loans – to the public fisc. The Federal Circuit blessed Treasury's about-face, to the tune of billions of unearned dollars.

Letting Treasury elude its lenders is not without a cost. As this Court recently observed, quoting Alexander Hamilton, "'States . . . who observe their engagements . . . are respected and trusted: while the reverse is the fate of those . . . who pursue an opposite conduct.'" *Maine Cmty. Health Options*, slip op. 30.[20] Hamilton considered that particularly true for the "debt of the United States," which he called "the price of liberty." Hamilton Papers 69. "The faith of America has been repeatedly pledged for it, and with solemnities, that give peculiar force to the obligation." *Id.* By approving Treasury's Lucy-with-the-football approach to its obligations as a debtor, the Federal Circuit undermined that solemn pledge.

III. THE FEDERAL CIRCUIT'S ALTERNATIVE HOLDING IS NO OBSTACLE TO CERTIORARI

The Federal Circuit cited "an additional reason" for reversing the Court of Federal Claims. App. 15a. It believed that, even if the States are the bonds' title owners, they may never redeem them in light of 31 C.F.R. § 315.29(c). That "reason" is no obstacle to certiorari.

---

[20] Quoting Report Relative to a Provision for the Support of Public Credit (Jan. 9, 1790), *in* 6 The Papers of Alexander Hamilton 68 (Harold C. Syrett ed., 1962) ("Hamilton Papers") (first alteration added), *online version available at* https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0001.

The presence of an important and circuit-splitting issue meriting this Court's review justifies reviewing additional questions present in the case to the extent necessary. *Cf. Janus v. American Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2462 (2018) ("Before reaching this question, however, we must consider a threshold issue."). That justification carries additional force here, where the preemption question is unlikely to recur if certiorari is denied. Under the Tucker Act, future disputes of this nature – if any – will all arise in the Federal Circuit. *See* 28 U.S.C. § 1491(a)(1). If § 315.29(c) dooms any certiorari petition, the government will always argue, and under the decision below always win, the same point in future litigation.

Moreover, deciding the additional issue will not unduly burden the Court, because the Federal Circuit's decision on that issue can be easily disposed of.

First, the Federal Circuit's holding was premature; it can (and should) be vacated on that basis. As the case reached the Federal Circuit, the parties had briefed, and the Court of Federal Claims had decided, only the question whether the plaintiff States could take title ownership of the savings bonds. The question whether § 315.29(c) would bar – or even apply to – an eventual redemption request by those state owners was not briefed or subjected to any discovery. Indeed, the Court of Federal Claims noted that it was "neither necessary nor appropriate" to decide questions concerning bond *redemption* while ruling on the antecedent question of bond *ownership*. App. 83a. As that court explained:

> Kansas 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.

Id.

The Federal Circuit's willingness to reach out and rule on a question of redemption mechanics that was not briefed or decided below was improper, especially in a case of this magnitude. To deprive the parties "the opportunity to litigate, and the [Court of Federal Claims] in the first instance to decide," how § 315.29(c) should be interpreted, *In re England*, 375 F.3d 1169, 1182 (D.C. Cir. 2004) (Roberts, J.), violates appellate best practices, offends fundamental fairness, and, of course, risks error. Therefore, this Court can simply vacate as prematurely decided the Federal Circuit's § 315.29(c) holding as a "threshold issue," *Janus*, 138 S. Ct. at 2462, then decide the critical preemption question and remand the case for proper litigation of the § 315.29(c) question at a later stage.

Second, even if the issue must be decided, the Federal Circuit's interpretation of § 315.29(c) was manifestly incorrect.

Section 315.29(c) provides that "[n]o 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." The panel read that rule as a substantive recordkeeping requirement for owners: with respect to a bond that matured six or more years ago, an owner who has lost her physical bond certificate and forgotten (or never knew) her bond serial number can *never* redeem her bond. She is a bond owner with no rights whatever.

That is an absurd result that, in any event, cannot be justified by the regulation's text. The requirement

that the claimant "suppl[y] the serial number" much more naturally reads as a procedural requirement. Yes, a redemption request six-plus years after maturity must include the serial number. But an owner without that number need not forfeit the entire value of her bond; on the contrary, nothing in the rule prohibits the owner from contacting Treasury and attempting to learn what the serial number is. Nor does anything in the rule require (or even permit) Treasury to refuse such a request. Furthermore, there was no discovery into how § 315.29(c) is applied in practice or Treasury's practices when faced with requests for serial-number information from bond owners who lost their bonds.

The Federal Circuit's interpretation of § 315.29(c) is also at odds with that court's own opinion. At Treasury's urging, the Federal Circuit held that federal law allows bond owners to redeem their bonds in perpetuity. The state laws were problematic, so the argument went, because they penalize owners who "do not redeem their bonds promptly enough." App. 11a. Yet the Federal Circuit's reading of § 315.29(c) imposes a far harsher penalty. By the panel's lights, the owner of a bond who lacks the certificate and serial number has just six years before forfeiting all rights to the bond's proceeds forever – a stunning repudiation of the promise of a safe investment backed by the federal government's full faith and credit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
TOBY CROUSE
Solicitor General
BRANT M. LAUE
Deputy Solicitor General
DWIGHT R. CARSWELL
Assistant Solicitor General
OFFICE OF ATTORNEY GENERAL
120 S.W. 10th Avenue
2nd Floor
Topeka, Kansas 66612
(785) 368-6693

May 8, 2020

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
BENJAMIN S. SOFTNESS
KATHERINE C. COOPER
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

J. BRETT MILBOURN
HORN AYLWARD & BANDY, LLC
2600 Grand Boulevard
Suite 1100
Kansas City, Missouri 64108
(816) 595-7720

APPENDIX

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Nos. 2018-1509 & 2018-1510

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.

[Decided: August 13, 2019]

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, 113 S.Ct. 1550, 123 L.Ed.2d 211 (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, 133 S.Ct. 2735, 186 L.Ed.2d 192 (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

---

[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.

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, 85 S.Ct. 626, 13 L.Ed.2d 596 (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] 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

---

[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, 37,560 (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 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.

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).

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

---

[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).

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.

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*, —— U.S. ——, 138 S. Ct. 1461, 1476, 200 L.Ed.2d 854 (2018) (quot-

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

ing 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, 132 S.Ct. 2492, 183 L.Ed.2d 351 (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, 132 S.Ct. 2492. 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, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985).

The Supreme Court's decision in *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (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 died, the surviving co-owner (there, the decedent's husband) became the *sole* owner of the bond. *Id.* at 664-65, 82 S.Ct. 1089. 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, 82 S.Ct. 1089. 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, 82 S.Ct. 1089 (quoting *Bank of Am. Tr. & Sav. Ass'n v. Parnell*, 352 U.S. 29, 34, 77 S.Ct. 119, 1 L.Ed.2d 93 (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, 82 S.Ct. 1089. 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, but only as specifically provided in this subpart" (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 and possession. 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, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)] deference

unless the regulation is genuinely ambiguous," *Kisor v. Wilkie*, —— U.S. ——, 139 S. Ct. 2400, 2415, 204 L.Ed.2d 841 (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, 104 S.Ct. 2778, 81 L.Ed.2d 694 (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]

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

---

[6] In *Estes v. U.S. Dep't 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*, —— U.S. ——, 136 S. Ct. 2117, 2125, 195 L.Ed.2d 382 (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 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.

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 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.

---

[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.

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]

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

---

[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 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)).

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 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

---

[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).

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 years 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, 130 S.Ct. 1431, 176 L.Ed.2d 311 (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, 121 S.Ct. 1021, 149 L.Ed.2d 32 (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, 92 S.Ct. 775, 31 L.Ed.2d 124 (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, 122 S.Ct. 1465, 152 L.Ed.2d 517 (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.

UNITED STATES COURT OF FEDERAL CLAIMS

No. 13-1011C

JAKE LATURNER, TREASURER OF THE STATE OF KANSAS,
Plaintiff,
v.
UNITED STATES,
Defendant.

[Filed: December 1, 2017]

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 Jake LaTurner, Treasurer of the State of Kansas (Kansas). *See LaTurner v. United States*, 133 Fed.Cl. 47 (2017); *see also Estes v. United States*, 123 Fed.Cl. 74 (2015) (denying the government's motion to dismiss). The Court ruled that under the Department of Treasury's regulations, Kansas 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 Kansas Disposition of Unclaimed Property Act (Unclaimed Property Act). *See LaTurner*, 133 Fed.Cl. at 69. 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. 108.

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]

---

[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

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

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).

[2] On July 1, 2015 (while the government's motion to dismiss in this case was pending), 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

As described in its prior decisions in this case, the Court held that the state-law proceedings that purported to vest Kansas 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 Kansas 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 the Unclaimed Property Act 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 Kansas 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.

(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.*

The issues the Court decided in granting-in-part Kansas'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 Kansas, which may entitle it to an award of damages given Treasury's refusal to grant Kansas'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 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 Kansas'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 wildly in their estimates of the time and expense of the discovery that will be required to resolve the remaining issues in this case. On the one hand, 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. 108-1 (Declaration of Michael J. McDougle) (emphasis in original). Kansas, on the other hand, argues that the government's estimates are "demonstrably false" and that "existing technol-

---

[3] The federal government contends that this Court decided a controlling question of law by supposedly "suggest[ing] that Kansas 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 Kansas's argument. *See LaTurner*, 133 Fed.Cl. at 65. It did not make any determination regarding Kansas'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.

ogies will enable the parties to identify Kansas's bonds efficiently and cost-effectively, without the type of costly and time-consuming reorganization of records Treasury proposes." Pl.'s Resp. in Opp'n to Def.'s Mot. to Certify the Court's Order of Aug. 8, 2017 for Interlocutory Appeal and to Stay Proceedings Pending Appeal (Pl.'s Opp'n) at 16, ECF No. 111.

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 parties by a wrong ruling." Wright et al., *supra*, § 3930. Regardless of which party's estimates are more accurate, the Court does not doubt that considerable effort and expense will be required to identify the absent bondholders whose last known addresses were in Kansas. 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 Kansas.[4] If the Court's decision is found erroneous by the court of appeals on interlocutory review, it will save both

---

[4] *See Sattgast v. United States*, No. 15-1364 (South Dakota); *Kennedy v. United States*, No. 15-1365 (Louisiana); *Lea v. United States*, No. 16-43, 2017 WL 5929229 (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 *Lea*, 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.

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 Kansas (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 that 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 balance." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6, 118 S.Ct. 1761, 140 L.Ed.2d 1070 (1998) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 81 L.Ed. 153 (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, Plaintiff Kansas will not be materially prejudiced by a stay of proceedings during the pendency of any appeal. And the Court is not persuaded by Kansas's assertion that in the time it takes for an appeal to be adjudicated "Kansas's prospects of *ever* obtaining the bond information to which it is entitled" will be materially "endanger[ed]." Pl.'s Opp'n at 17-18 (emphasis in original).

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.

UNITED STATES COURT OF FEDERAL CLAIMS

No. 13-1011C

JAKE LATURNER, TREASURER OF THE STATE OF KANSAS,
Plaintiff,
v.
UNITED STATES,
Defendant.

[Filed: August 8, 2017]

OPINION AND ORDER

KAPLAN, Judge.

In this breach-of-contract case, Plaintiff Jake LaTurner, Treasurer of the State of Kansas (Kansas) claims that Kansas has obtained title under the state's Disposition of Unclaimed Property Act (Unclaimed Property Act) to a large but unknown number of matured, unredeemed United States savings bonds, and that the federal 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 Kansas 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, Kansas 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."

Kansas has moved for partial summary judgment as to the government's liability for failing to redeem the bonds or to provide Kansas with identifying information about them. The government has also moved for summary judgment on all of Kansas'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 Kansas'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 Kansas to summary judgment with respect to its ownership of the absent bonds and the government's liability. Accordingly, the government's motion for summary judgment is **DENIED**, and Kansas'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, 82 S.Ct. 1089, 8 L.Ed.2d 180 (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

---

[1] Unless otherwise noted, all references to Treasury's savings bond regulations are to the regulations in effect on December 20, 2013, the date Kansas filed its complaint.

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 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,"

---

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

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 semi-annual 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, 113 S.Ct. 1550, 123 L.Ed.2d 211 (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, Kansas's Unclaimed Property Act is custodial in nearly every respect. *See* Kan. Stat. Ann. § 58-3936 ("Except as otherwise provided in this act 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 . . . .").

In 2000, however, the Kansas legislature amended its Unclaimed Property Act with respect to U.S. savings bonds to allow Kansas to take title (rather than assert custody over) bonds deemed to be abandoned under the Act. *See id.* § 58-3979. Specifically, the relevant provision provides that "United States savings bonds which are unclaimed property [as defined

by the Act] . . . 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."[3] *Id.* § 58-3979(a). Then, "[w]ithin 180 days . . . the administrator [of the unclaimed property scheme, i.e., the state treasurer] 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." *Id.* § 58-3979(b).

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

---

[3] A number of other states have since enacted similar amendments to their unclaimed property laws. *See* Ark. Code Ann. § 18-28-231; Fla. Stat. §§ 717.1382-.83; Ind. Code § 32-34-1-20.5; Ky. Rev. Stat. Ann. § 393.022; La. Stat. Ann. § 9:182; Miss. Code Ann. § 89-12-59; S.C. Code Ann. §§ 27-18-75 to -76; S.D. Codified Laws § 43-41B-44.

request to redeem four bonds in its possession. *See* Def.'s Mot. for Summ. J. (Def.'s Mot.) App. at A1, ECF No. 86-1 (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, 63 S.Ct. 573, 87 L.Ed. 838 (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 repre-

sentative 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, 2011 WL 6935510, *Treasurer of N.J.*, 684 F.3d 382 (No. 101963) (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, 85 S.Ct. 626, 13 L.Ed.2d 596 (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, 82 S.Ct. 1089). 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 Cir-

cuit 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*, 569 U.S. 1004, 133 S.Ct. 2735, 186 L.Ed.2d 192 (2013) (mem.). The Solicitor General opposed certiorari. *See* Pl.'s Cross-Mot. for Partial Summ. J. & Br. in Opp'n to Def.'s Mot. for Summ. J. (Pl.'s Mot.) App. at A304-37, ECF No. 87-1 [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 A311. "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 A312. 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 A320-36. 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. Kansas's Claim to Ownership Over the Bonds at Issue in This Case

A. Kansas's Initial Requests for Information Regarding Bonds It Did Not Possess

On June 19, 2000, Kansas's state treasurer sent Treasury a letter informing Treasury that Kansas intended to appoint an agent to conduct "an examination of [Treasury's] books and records" related to "unredeemed US Savings Bonds subject to escheat"

under its Unclaimed Property Act. *Id.* at A116. Kansas's letter also purported to grant the agent the authority to "instruct [Treasury] to deliver all unredeemed US Savings Bonds found due and owing to a custodian on behalf of, and in trust for, the State." *Id.*

Treasury responded on August 11, 2000. *Id.* at A118. In line with its prior guidance, it explained 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.* Treasury acknowledged that Kansas claimed to have recently "changed its custodial statutes to provide for the escheat of savings bonds" and suggested that Kansas's Attorney General provide Treasury with "[an] analysis and opinion regarding these statutes." *Id.*

Kansas provided the analysis and opinion on October 30, 2000. *Id.* at A120. In the analysis, Kansas's Attorney General stated that "[c]learly, once applicable court proceedings have been favorably concluded, Kansas law provides that unclaimed United States savings bonds escheat to the State of Kansas, and all property rights to such United States savings bonds or their proceeds vest solely in the State of Kansas." *Id.* at A122.

Treasury responded on December 27, 2000. *Id.* at A124. It observed that under the Kansas Attorney General's analysis, "it would appear that . . . title is not vested in the state of Kansas unless and until the judgment of the court has been rendered that the savings bonds have escheated to the state." *Id.* Treasury noted, however, that it had "not received a court order or similar evidence supporting [Kansas's]

request to redeem the bonds on behalf of the state." *Id.* Treasury then asked Kansas a number of additional questions about the application of its unclaimed property law to U.S. savings bonds, and concluded that it would "consider this matter further" after it received Kansas's response. *Id.* at A124-25. Kansas apparently never responded to the letter.

More than a decade later, on June 4, 2012, Kansas sent Treasury a FOIA request "seeking records, or access to records, concerning unclaimed U.S. savings bonds that were issued before December 31, 1974[,] to bondholders with last known addresses in the state of Kansas." Pl.'s Mot. App. at A201. Treasury responded on July 17, 2012. *Id.* at A208. Treasury explained that, in its view, "[r]ecords of an individual's securities" were exempt from FOIA as "files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* (citing 5 U.S.C. § 552(b)(6)). Further, Treasury pointed to its own regulation, 31 C.F.R. § 323.2, which (as noted above) states that "[r]ecords relating to the purchase, ownership of, and transactions in Treasury securities or other securities handled by the Bureau of the Public Debt . . . will ordinarily be disclosed only to the owners of such securities, their executors, administrators or other legal representatives." *Id.* Based on these provisions, Treasury denied Kansas's request. *Id.* at A209.

B. Escheat Proceedings in Kansas State Court

After receiving this denial, on January 3, 2013, Kansas's state treasurer filed an escheatment action in the District Court of Shawnee County "seeking 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." *See id.* at A178. Along with its petition, Kansas filed a motion seeking leave to effect service by publication on the "purchasers or owners" of certain U.S. savings bonds who had "last known addresses in the state of Kansas according to the records of the U.S. Treasury Department."[4] *Id.*

In the motion, Kansas noted that it had in its possession 1,481 bonds "originally owned by 213 individual apparent owners." *Id.* at A181. It had obtained these bonds "[i]n most cases" when they were "turned over to the Treasurer's office because they had remained unclaimed in bank safe deposit boxes for a period of at least five years." *Id.* at A180. Kansas believed that it had obtained current addresses for twelve of these 213 individuals. *Id.* at A181. On the other hand, Kansas had been "unable to locate" the other 201 individuals. *Id.* at A182.

"Separate and apart" from the bonds in its possession, Kansas stated that "most of the Kansas Unclaimed U.S. Savings Bonds at issue in the . . . case" were "not in the physical possession of the Kansas Treasurer." *Id.* Rather, according to Kansas, those bonds "h[ad] been lost, stolen, destroyed, or otherwise made unavailable." *Id.* Kansas described these as "the absent bonds." *Id.* (quotation omitted). Kansas noted that, as to the absent bonds, it had no infor-

---

[4] The specific bonds at issue included "40-year Series E bonds issued between 1941 and December 31, 1964"; "30-year Series E bonds issued between 1965 and December 31, 1974"; "Series A, B, C, D, F, G, J and K bonds (all of which were issued prior to 1958)"; and "Series H bonds issued before December 31, 1974." Pl.'s Mot. App. at A178.

mation "concerning the identity or location of [the] apparent owners." *Id.* It further advised the Court that Treasury had "refused to provide such information to [Kansas]" because of its policy against "provid[ing] such information to anyone other than the title owner of the bonds." *Id.* Thus, according to Kansas, there was "no way for [it] to search for the names and addresses of the unknown owners" of the absent bonds "until [Kansas] obtains title by way of this escheat proceeding." *Id.* at A183. "Under these circumstances," Kansas contended, "it is appropriate for this escheat proceeding to be initiated by service of process by publication." *Id.* at A185.

The court granted Kansas's motion on January 4, 2013. *Id.* at A214. Pursuant to Kansas's Unclaimed Property Act, Kansas then published notice of the escheatment action in newspapers across the state for three consecutive weeks. *Id.* at A219. It also published notice on the Kansas state treasurer's website. *Id.* Soon after, on March 29, 2013, the state court issued a judgment of escheat. *Id.* at A213-21. The court found that at the time Kansas filed its petition, it had "physical custody of approximately 1,481 Kansas Unclaimed U.S. Savings Bonds." *Id.* at A214. Further, it found that "it is estimated, upon information and belief, that there are approximately $151.8 million in absent Kansas Unclaimed U.S. Savings Bonds that have been lost, stolen, or destroyed, and are thus[] not currently in the possession of [Kansas]." *Id.* at A215. The court also found that "those unredeemed bonds belonging to Kansas citizens confer a right to collect matured principal and interest from the U.S. Treasury," and that "[t]his right is intangible property subject to" Kansas's Unclaimed Property Act. *Id.* at A216-17.

Based on these findings, the court determined that Kansas was "seeking to take ownership of and title to the subject bonds and the right to proceeds thereof through this state's valid judicial escheat proceedings as the sole owner of and ultimate heir to such bonds and proceeds." *Id.* at A217-18. Further, the court concluded that "all of the above-described Kansas Unclaimed U.S. Savings Bonds . . . have been unclaimed and abandoned property pursuant to the provisions of" Kansas's Unclaimed Property Act. *Id.* at A218. Finally, the court found that "exceptional efforts ha[d] been undertaken to locate the owners of [the] bonds and [to] provide notice of these proceedings far in excess of the due diligence and notice requirements" set forth in Kansas law. *Id.* at A219.

For these reasons, the court issued a declaratory judgment stating that the bonds at issue "constitute abandoned and unclaimed property pursuant to the laws of the State of Kansas and are therefore subject to escheatment." *Id.* at A220. It further declared that "such unclaimed and abandoned Bonds . . . include the Absent Kansas Unclaimed U.S. Savings Bonds, which have been lost, stolen, or destroyed, and which have registered owners with last known addresses in the State of Kansas." *Id.* at A220-21. "[P]ursuant to [its] powers of escheatment," the court then decreed that "all rights and legal title to, and ownership of the above described Kansas Unclaimed U.S. Savings Bonds and the proceeds thereof . . . shall escheat to the State of Kansas." *Id.* at A221.

C. Kansas's Request to Redeem the Purportedly Escheated Bonds

On May 13, 2013, Kansas sent Treasury a "two-fold" redemption request for the bonds that were the subject of the state court proceedings. *Id.* at A341.

First, it requested redemption of the bonds in its possession.[5] *Id.* Second, it requested "payment of the proceeds of those Absent Kansas Unclaimed U.S. Savings Bonds which the Kansas District Court, in its Judgment of Escheatment, declared lost, stolen, or destroyed, and which had registered owners with last known addresses in Kansas." *Id.* at A341-42. According to Kansas, "[t]he state of Kansas . . . gained title to and ownership of the Absent Bonds and their proceeds by valid judicial escheatment proceedings." *Id.* at A342. "Therefore," it continued, "Kansas, as owner of the Absent Bonds, can now redeem these bonds and collect their proceeds." *Id.*

Further, "[w]ith respect to [its] claim for redemption of the proceeds of the Absent Bonds," Kansas "request[ed] that [Treasury] either re-issue the bonds to the state of Kansas as owner *or* provide the records, including serial numbers, regarding the Absent Bonds that U.S. Treasury will require for redemption of each Absent Bond." *Id.* at A343 (emphasis in original). Noting that under 31 C.F.R. § 323.2(b) records regarding U.S. Savings Bonds will "ordinarily be disclosed only to the *owners* of such securities," Kansas claimed that "[t]he information regarding the securities that have escheated to the state of Kansas must be made available to the owner of those securities, Kansas." *Id.* (emphasis in original).

On October 9, 2013, Treasury responded to the first portion of Kansas's redemption request (regarding the bonds in its possession). *Id.* at A358. Treasury requested that Kansas provide it with a certified copy of the judgment of escheat, certain information

---

[5] Although the state court proceedings involved 1,481 bonds in Kansas's possession, the state requested that Treasury redeem just 1,445 of those bonds. *See* Pl.'s Mot. App. at A341.

about the state treasurer, and the bonds themselves, signed by the state treasurer. *Id.* "Assuming the savings bonds you surrender are legitimate and have not previously been redeemed," Treasury stated, it "anticipate[d] redeeming them in the normal course after receiving" the requested information.[6] *Id.* at A359.

About a week later, on October 16, 2013, Treasury responded to the second portion of Kansas's redemption request (regarding the absent bonds). *Id.* at A360-61. Treasury stated that it was "unable to grant [Kansas's] request to redeem" the absent bonds. *Id.* at A360. Under its regulations, Treasury claimed, registration was "conclusive of ownership," and Treasury was "only authorized to redeem a savings bond to the registered owner." *Id.* According to Treasury, however, "[e]scheatment claims by states are not an explicit exception to the conclusive ownership requirements." *Id.* (citation omitted). "In the past," Treasury acknowledged, it had "interpreted its regulations to allow some state escheatment claims, but only when the state possesse[d] the savings bonds in its claim." *Id.* at A360-61. Kansas, however, was neither "the registered owner of the savings bonds, nor d[id] it possess them." *Id.* at A361.

Treasury also noted that because Kansas did not possess the bonds, it could not "comply with requirements in the savings bond contract concerning surrender of the Absent Bonds." *Id.* "As provided in [Treasury's] regulations," Treasury stated, "an owner seeking to redeem a savings bond must surrender it to the Treasury Department . . . unless the owner can show that the savings bond was lost, stolen,

---

[6] Treasury in fact redeemed the bonds a short time later. *See* Pl.'s Mot. App. at A362.

or destroyed." *Id.* (footnote omitted). But "Kansas [could not] present the Absent Bonds for payment, presumably because the savings bonds are in the possession of the registered owners or their heirs." *Id.* And, according to Treasury, its "regulations do not provide that owners abandon their right to payment simply because they have not redeemed a matured savings bond." *Id.* Rather, the owners' "contract[s] with the United States allow[] them to redeem their savings bonds at any time, even after maturity." *Id.* (footnote omitted).

Finally, Treasury rejected Kansas's request for information about the absent bonds. *Id.* In its view, "turn[ing] over the Absent Bond records would violate the rights of the registered owners" under the Privacy Act. *Id.* Further, Treasury noted that it "does not index its registration records according to the state of the registered owner." *Id.* Treasury thus "would have to search millions of records by hand to fulfill Kansas'[s] request," which "would be prohibitively expensive." *Id.*

VI. Commencement of This Action and the Government's Motion to Dismiss

After receiving these responses, Kansas filed this action on December 20, 2013. Compl., ECF No. 1. It alleges that as a result of the state court judgment of escheat, it is in privity of contract with the United States with respect to the absent bonds. *Id.* ¶¶ 1, 84. It also alleges that it "made proper presentment under applicable federal regulations of the U.S. savings bond contracts" for both sets of bonds. *Id.* ¶ 90.

Kansas's complaint incorporates several theories of liability. First, in Count I, Kansas claims that Treasury's "refusal to provide necessary and required information regarding the Absent Bonds, and its

further refusal to accept presentment and redeem the Absent Bonds" constituted a breach of express contracts between it and the United States—i.e., the savings bonds to which it claims title. *Id.* ¶¶ 93, 95. It requests damages "believed to be in excess of $151,800,000" based on "the matured value . . . of all lost, stolen, destroyed or otherwise abandoned U.S. savings bonds . . . now owned by [Kansas] which are registered with [Treasury] and having last known addresses in the State of Kansas."[7] *Id.* at 24. Relatedly, in Count III, Kansas claims that the government has breached fiduciary duties in connection with the express contracts, and that it is entitled to damages as a result. *Id.* ¶¶ 109-115. And in Count VII, Kansas claims that the government's refusal to redeem the bonds constitutes a taking of private property without just compensation in violation of the Fifth Amendment's Takings Clause.[8] *Id.* ¶¶ 141-43.

---

[7] In Count II of its complaint, Kansas alternatively claims that the bonds constitute implied-in-fact contracts between it and the United States, and that the government has breached those contracts. *See* Compl. ¶¶ 96-108. And in Count V of its complaint, it alternatively claims that it is a third-party beneficiary of the savings bond contracts, and that the government's breach of those contracts entitles it to damages. *See id.* ¶¶ 125-32.

[8] As a corollary to these claims, Kansas also asserts, in Count IV, that the government "should be equitably estopped from asserting that [its] claims for relief are wrongful." *Id.* ¶ 117; *see also id.* ¶ 118 (contending that the government "misled" Kansas by "making statements and taking action indicating that it would redeem Kansas's absent Bonds," including the government's "recognition of Kansas's ownership of the Bonds in Possession and redeeming the proceeds thereof upon request"); *id.* ¶ 120 (asserting that the government "concealed material facts" by "engag[ing] in self-serving refusals to honor FOIA and other requests that would reveal necessary and requested information about . . . Kansas['s] Absent Bonds").

Finally, in Count VI, Kansas also seeks a declaratory judgment that the government has breached its obligations on the savings bond contracts. *Id.* ¶¶ 133-40. In particular, it asks the Court to enter an order declaring (among other things) that the government has "no right, title, or interest to the Absent Bonds"; that the government has "wrongfully asserted custody and/or ownership over [Kansas's] Absent Bonds"; and that the government has "failed to turn over to [Kansas] 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." *Id.* at 35. Kansas also asks the Court to order the government to "provide [Kansas with] the information necessary to identify those Absent Bonds registered with last known addresses in the State of Kansas" and to "accept [Kansas's] presentment and redemption of the subject Absent Bonds." *Id.*

As discussed in *Estes*, the government moved to dismiss Kansas's claims other than its takings 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 contract, estoppel, and declaratory judgment 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 for relief with respect to its contract, estoppel, declaratory judgment, and

takings claims. *Id.* at 85, 90-91. On the other hand, it dismissed Kansas's third-party beneficiary claim. *Id.* at 90.

The Court's ruling on Kansas's contract and declaratory judgment 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, ECF No. 9; Pl.'s Resp. to Def.'s Mot. to Dismiss at 22-29, 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.

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))."[9] *Id.* at 12. Thus, the government contended, "[e]scheatment actions are

---

[9] 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, ECF No. 28.

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 ("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 (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, 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, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). *See* Def.'s Suppl. Brief at 10-11, 15.

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 in-

consistent: 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.*

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

In the meantime, on July 1, 2015 (while the government's motion to dismiss was pending), 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."[10] *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 escheat judgment that purports to vest a State with title to a bond that the State does not possess." *Id.*

---

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

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.[11] *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, 129 S.Ct. 1800, 173 L.Ed.2d 738 (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.*

---

[11] 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).

(quoting *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 710 (D.C. Cir. 2011)) (second alteration in original).[12]

VIII. The Pending Cross-Motions

After the Court denied the government's motion to dismiss, the parties 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 (Dec. 18, 2015), ECF No. 51. Once discovery concluded, the government moved for summary judgment. ECF No. 86. Kansas then filed a cross-motion for partial summary judgment on liability, "which it asserted would fully resolve Count VI of Kansas's Complaint and partially resolve Counts I, II, III, and VII." Pl.'s Mot. at 3. The Court heard oral argument on June 22, 2017.[13]

---

[12] 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).

[13] Since Kansas filed its complaint, eight 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); *Lea v. United States*, No. 16-43 (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 *Lea*, the Court has stayed these cases pending this decision. The Court is issuing a separate Opinion and Order on cross-motions for summary judgment in *Lea*.

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, 106 S.Ct. 2548, 91 L.Ed.2d 265 (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, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute is genuine if it "may reasonably be resolved in favor of either party." *Id.* at 250, 106 S.Ct. 2505.

The material facts in this case are not in dispute. Further, Kansas'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 Kansas's Unclaimed Property Act, and the constitutional principles raised by the government in opposition to Kansas's claims. Therefore, Kansas's breach of contract and other claims are appropriate for resolution by summary judgment.

II. Merits

In its motion for partial summary judgment, Kansas seeks a ruling that the government is liable for breach of contract. To succeed on this claim, Kansas 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).

Kansas'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. Kansas 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. Kansas contends that Treasury's 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 Kansas 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 Kansas Treasury's regulations permit transfers of ownership pursuant to title-based escheat

statutes, the government was not required to redeem the absent bonds because Kansas has not and cannot submit the paper bond certificates, which the government argues is a prerequisite to its obligation to pay Kansas their proceeds. Finally, it contends that, in any event, ownership of the bonds cannot be transferred to Kansas 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 Kansas is the owner of the absent bonds pursuant to Treasury's regulations and that Treasury's refusal to recognize Kansas's ownership of the bonds is a breach of contract. It further finds that Treasury breached the contract when it refused to provide Kansas with information about the bonds and demanded that Kansas produce the bond certificates as a condition of redeeming their proceeds. Accordingly, the Court grants Kansas'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 Kansas obtained the state court escheat judgment, Pl.'s Mot. App. at A213-22; that the judgment concerned ownership of the absent bonds, *id.* at A215; and that, when it attempted to redeem the absent bonds, Kansas supplied certified copies of the judgment to Treasury in accordance with § 315.23(a), *id.* at A342.

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.3; Def.'s Reply at 30-32. It also appears to argue that—even if title to the absent bonds has passed to Kansas—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 Kansas'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 Kansas'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, 2011 WL 6935510, *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, 85 S.Ct. 626). 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 A304-37. 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 A311-12.

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 here 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 (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 this 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 19-20. 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]

---

[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, 20-21 n.3 & 5 (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

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 Kansas pursuant to the state court escheat judgment. It turns now to the government's alternative argument that, even if Kansas has succeeded to ownership of the absent bonds, presentation of the escheated bonds is a prerequisite to their redemption. Def.'s Mot. at 20-26; Def.'s Reply at 25-30.

2. Whether Kansas 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 Kansas 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 Kansas'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,

---

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.

in order to redeem the proceeds of a bond, 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 Kansas 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

---

[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.

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]

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,

---

[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 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).

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 Kansas is entitled to redeem the bonds under the provisions of 31 C.F.R. § 315.25. For one thing, Kansas 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, Kansas may be able to determine whether or not the certificates can be located or whether instead they have been "lost" or destroyed.

* * * * * *

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 prerequisite to the recog-

nition 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 Kansas 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 Kansas's ownership of the absent bonds.

B. Whether Kansas'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 Kansas 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.

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, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985); *see also Free*, 369 U.S. at 669, 82 S.Ct. 1089. 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, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)); *see also Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (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, 129 S.Ct. 1187 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (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, 116 S.Ct. 2240); *see also Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (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, 129 S.Ct. 1187; *see also Hillsborough Cty.*, 471 U.S. at 713, 105 S.Ct. 2371 ("[S]tate laws can be preempted by federal regulations as well as by federal statutes."); *Free*, 369 U.S. at 666-69, 82 S.Ct. 1089 (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, 129 S.Ct. 1187. 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, 120 S.Ct. 1913, 146 L.Ed.2d 914 (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, 129 S.Ct. 1187 (quotation omitted); *see also Geier*, 529 U.S. at 883, 120 S.Ct. 1913. The

weight accorded to the agency's explanation "depends on its thoroughness, consistency, and persuasiveness." *Wyeth*, 555 U.S. at 577, 129 S.Ct. 1187 (citing *United States v. Mead Corp.*, 533 U.S. 218, 234-35, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

2. Application of Standards

Treasury urges the Court to find that the Kansas 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] Def.'s Mot. at 10-12; Def.'s Reply at 3-15. Further, the federal government argues, the Kansas 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.

Treasury's arguments that the Kansas 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 escheat-

---

[17] As noted above, under its Unclaimed Property Act, bonds that have been presumed abandoned do not escheat to Kansas until three years after the end of this five-year period. *See* Kan. Stat. Ann. § 58-3979(a).

ment statutes. In fact, Treasury has not only represented to both the Third Circuit and the Supreme Court that it so interprets its regulations, it redeemed the bonds in Kansas's possession that Kansas obtained via the very unclaimed property law that Treasury now argues is preempted. Pl.'s Mot. App. at A358-59, 362.

Further, Kansas's law determines the identity of the bond owner, and not the time period within which the bond owner may redeem it. If Kansas 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 Kansas law

---

[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.

makes ownership of federal bonds less attractive, thereby impairing the objectives of the federal savings bond program. The Court does not agree with Kansas 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, 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)).

---

[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 different" in the event that

In short, the federal government's argument that the Kansas 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 Kansas 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, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426-27, 4 L.Ed. 579 (1819). In other words, states may not "regulate the [federal] [g]overnment directly." *North Dakota v. United States*, 495 U.S. 423, 434, 110 S.Ct. 1986, 109 L.Ed.2d 420 (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 Kansas's unclaimed property law directly regulates the federal government because

---

(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.

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 to redeem the bonds in Kansas's possession, which Kansas obtained via the same unclaimed property law Treasury now contests. Second, nothing in Kansas's law requires the government to pay funds to Kansas on terms set by Kansas. Rather, Kansas 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 Fed.Appx. 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 Kansas 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 Kansas's Unclaimed Property Act grants Kansas 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 Kansas'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.[20] Def.'s Mot. at 17-18; Def.'s Reply

---

[20] Kansas asserts that the government lacks standing to raise the due process issue "on behalf of the bond owners." *See* Pl.'s Mot. at 43. But the government is not raising the due process issue on behalf of the owners; rather, it asserts the issue as a

at 20-25. 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 24-25. 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 23. Both arguments lack merit.

Regarding the first issue, as Kansas correctly observes, savings bonds are a form of intangible property. *See* Pl.'s Mot. at 46-47 (citing *Blodgett v. Silberman*, 277 U.S. 1, 10, 48 S.Ct. 410, 72 L.Ed. 749 (1928)). 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, 85 S.Ct. 626; *see also Hanson v. Denckla*, 357 U.S. 235, 246-47, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (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, 70 S.Ct. 652, 94 L.Ed. 865 (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

---

basis for finding that the state's claims of ownership are not based on valid judicial proceedings, so that Treasury is not contractually obligated to honor them. The Court therefore rejects Kansas's suggestion that the government somehow lacks standing to raise this defense to Kansas's breach of contract action.

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, 85 S.Ct. 626. According to the Court, this "clear rule" would "govern all types of intangible obligations." *Id.* at 678, 85 S.Ct. 626. 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, 85 S.Ct. 626. "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 Kansas" 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 17. 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.* at 18.

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 24. 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 Kansas 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, 70 S.Ct. 652. 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 admin-

istrator from time to time to seek judicial settlement of claims arising against the trustee. *Id.* at 307-09, 70 S.Ct. 652. 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, 70 S.Ct. 652.

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, 70 S.Ct. 652. 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, 70 S.Ct. 652, 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, 70 S.Ct. 652.

In contrast, "[a]s to [the] known present beneficiaries of known place of residence," notice by publication did not suffice. *Id.* at 318, 70 S.Ct. 652 (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, 70 S.Ct. 652. 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, 64 S.Ct. 599, 88 L.Ed. 692 (1944); *Sec. Sav. Bank v. California*, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301 (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, 64 S.Ct. 599. 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*, the necessary notice had to be provided to two categories of property owners: the individuals whose bonds were in Kansas's possession and the original owners of the absent bonds. Regarding the bonds-in-possession, Kansas attempted to locate bond owners "us[ing] both internet search sites and LexisNexis record searches . . . . as well as searching obituaries[] and records of probate proceedings." Pl.'s Mot. App. at A189. Upon locating potential owners, Kansas sent them "claim packets . . . informing them of the existence" of the bonds. *Id.*

With respect to the absent bonds, Kansas attempted to obtain information about the original owners' names and last known addresses from Treasury, but

Treasury refused to provide it. *See id.* at A208-09 (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.

Thus, as in *Mullane*, Kansas could not discover individualized information about the absent bondholders through the exercise of reasonable diligence. Further, as in *Luckett*, the 2000 amendment to Kansas's 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 Kansas 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 Kansas'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).[21]

---

[21] In Count IV of its complaint, Kansas argues that the government should be equitably estopped from denying its requests to redeem the absent bonds based on its recognition of Kansas's ownership of the bonds in possession, and upon the 1952 Escheat Decision as well as "other, similar statements made over the

E. Kansas's Fifth Amendment Takings Claim

As noted above, in Count VII of its complaint, Kansas alleged that Treasury's failure to redeem the absent bonds amounted to a taking of its property without just compensation. *See* Compl. ¶¶ 141-43. 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.*

---

past sixty years that Treasury would recognize title-based state escheat statutes." Compl. ¶ 118. As the government points out, however, equitable estoppel may not be used as a basis to impose liability on the United States. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 426-30, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990); *Doe v. United States*, 372 F.3d 1347, 1356-57 (Fed. Cir. 2004) (citing *Schweiker v. Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981)). Accordingly, the government is entitled to judgment as a matter of law with respect to Count IV.

Here, the Court has determined that Kansas has succeeded to title over the bonds but it has not yet "awarded recovery" to Kansas on its breach-of-contract claims. Accordingly, the Court will defer ruling on the parties' cross-motions for summary judgment as to Kansas's takings claim pending further proceedings in the case.

CONCLUSION

For the reasons discussed above, the Court concludes that Kansas 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, II, III, and VI of its complaint. The government's motion for summary judgment is **GRANTED** as to Count IV of Plaintiff's complaint; otherwise it is **DENIED**.

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

IT IS SO ORDERED.

UNITED STATES COURT OF FEDERAL CLAIMS

No. 13-1011C

RON ESTES, TREASURER OF THE STATE OF KANSAS,
Plaintiff,
v.
UNITED STATES,
Defendant.

[Filed: August 20, 2015]

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, 82 S.Ct. 1089, 8 L.Ed.2d 180 (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]

---

[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

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]

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

---

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.

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/unclaimedproperty/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, 113 S.Ct. 1550, 123 L.Ed.2d 211 (1993).[4] Under the

---

[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 appropri-

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 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 ref-

---

ation 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, 113 S.Ct. 1550 (internal citations omitted).

> erence 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.

(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.

(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,

---

[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.

> 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.
>
> (d) The administrator shall redeem such United States savings bonds escheated to the state and the proceeds from such redeemption 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, Treas-

ury 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, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). In other words, plaintiff's claim must be plausible on its face. *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955; *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, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). "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.

---

[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.

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, 66 S.Ct. 773, 90 L.Ed. 939 (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 Fed.Appx. 471, 473 (Fed. Cir. 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 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, 127 S.Ct. 1955. 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 neces-

sary 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]

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

---

[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:

> (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.

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, "exceptions

---

[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:

(a) Divorce. The Department of the Treasury will recognize a divorce decree that ratifies or confirms a property

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.

---

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.

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

---

[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.

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, 131 S.Ct. 871, 178 L.Ed.2d 716 (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." 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, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945))). "[T]his general rule," however, "does not apply in all cases." *Christopher v. SmithKline Beecham Corp.*, —— U.S. -—, 132 S.Ct. 2156, 2166, 183 L.Ed.2d 153 (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, 117 S.Ct. 905). 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, 114 S.Ct. 2381, 129 L.Ed.2d 405 (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, 109 S.Ct. 468, 102 L.Ed.2d 493 (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, 117 S.Ct. 905).

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, 117 S.Ct. 905. 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, 114 S.Ct. 2381). 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, Mis-

---

[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).

souri, 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, 85 S.Ct. 626, 13 L.Ed.2d 596 (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 Respondents in Opposition, *Dir. of Dep't of Revenue of Montana v. U.S. Dep't of Treasury*, *cert. denied*, —— U.S. ——, 133 S.Ct. 2735, 186 L.Ed.2d 192 (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;

---

[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.

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 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*, —— U.S. ——, 135 S.Ct. 1199, 1207,

191 L.Ed.2d 186 (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, 116 S.Ct. 1730, 135 L.Ed.2d 25 (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 consider the Notice relevant in any way to the proper interpretation of the existing regulations at issue in this case.

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, 33 S.Ct. 32, 57 L.Ed. 195 (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, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (citing *Contributors to Pa. Hosp. v. Philadelphia*, 245 U.S. 20, 23, 38 S.Ct. 35, 62 L.Ed. 124 (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." *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, 129 S.Ct. 2504, 174 L.Ed.2d 140] (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.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Nos. 2018-1509 & 2018-1510

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.

[Filed: December 11, 2019]

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.

ORDER

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

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Kansas Statutes Annotated § 58-3979 provides:

§ 58-3979. United States savings bonds; unclaimed property; escheat; procedure. (a) Notwithstanding the provisions of subsection (b) of K.S.A. 58-3953, and amendments thereto, United States savings bonds which are unclaimed property and subject to the provisions of K.S.A. 58-3934 et seq., and amendments thereto, shall escheat to the state of Kansas three years after becoming unclaimed property and subject to the provisions of K.S.A. 58-3934 et seq., and amendments thereto, and all property rights to such United States savings bonds or proceeds from such bonds shall vest solely in the state of Kansas.

(b) Within 180 days after the three years in subsection (a), if no claim has been filed in accordance with the provisions of K.S.A. 58-3934 et seq., and amendments thereto, 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 custody to justify the expense of such proceedings.

(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.

(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 in accordance with the provisions of K.S.A. 58-3956, and amendments thereto.

2. Kansas Statutes Annotated § 58-3980 provides:

§ 58-3980. United States savings bonds; claim for such bonds. Any person making a claim for the United States savings bonds escheated to the state under K.S.A. 58-3979, and amendments thereto, or for the proceeds from such bonds, may file a claim in accordance with the provisions of K.S.A. 58-3934 et seq., and amendments thereto. Upon providing sufficient proof the validity of such person's claim, the administrator may pay such claim in accordance with the provisions of K.S.A. 58-3934 et seq., and amendments thereto.

3. 31 C.F.R. § 315.20 (2014) provides:

§ 315.20 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.

4. 31 C.F.R. § 315.25 (2014) provides:

§ 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.

5. 31 C.F.R. § 315.29 (2014) provides:

§ 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.

(b) *Claims filed ten years after payment.* A bond for which no claim has been filed within ten years of the recorded date of redemption will be presumed to have been properly paid. If a claim is subsequently filed, a photographic copy of the bond will not be available to support the disallowance. This provision will be effective 60 days after the effective date of the Eleventh Revision of Department of the Treasury Circular No. 530 (31 CFR part 315).

(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.

6. 31 C.F.R. § 315.71 (2014) provides:

§ 315.71 Decedent's estate.

(a) *Estate is being administered.* (1) A legal representative of a deceased owner's estate may request payment of savings bonds to the estate, or may distribute the savings bonds to the persons entitled. (2) Appropriate proof of appointment for the legal representative of the estate is required. Letters of appointment must be dated not more than one year prior to the date of submission of the letters of appointment.

(b) *Estate has been settled previously.* If the estate has been settled previously through judicial proceed-

ings, the persons entitled may request payment or reissue of the savings bonds. A certified copy of the court-approved final accounting for the estate, the court's decree of distribution, or other appropriate evidence is required.

(c) *Special provisions under the law of the jurisdiction of the decedent's domicile.* If there is no formal or regular administration and no representative of the estate is to be appointed, the person appointed to receive or distribute the assets of a decedent's estate without regular administration under summary or small estates procedures under applicable local law may request payment or reissue of savings bonds. Appropriate evidence is required.

(d) *When administration is required.* If the total redemption value of the Treasury securities and undelivered payments, if any, held directly on our records that are the property of the decedent's estate is greater than $100,000, administration of the decedent's estate will be required. The redemption value of savings bonds and the principal amount of marketable securities will be used to determine the value of securities, and will be determined as of the date of death. Administration may also be required at the discretion of the Department for any case.

(e) *Voluntary representative for small estates that are not being otherwise administered*—(1) *General.* A voluntary representative is a person qualified according to paragraph (e)(3) of this section, to redeem or to distribute a decedent's savings bonds. The voluntary representative procedures are for the convenience of the Department; entitlement to the decedent's savings bonds and held payments, if any, is determined by the law of the jurisdiction in which the decedent was domiciled at the date of death. Voluntary representative procedures may be used only if:

(i) There has been no administration, no administration is contemplated, and no summary or small estate procedures under applicable local law have been used;

(ii) The total redemption value of the Treasury securities and held payments, if any, held directly on our records that are the property of the decedent's estate is $100,000 or less as of the date of death; and

(iii) There is a person eligible to serve as the voluntary representative according to paragraph (e)(3) of this section.

(2) *Authority of voluntary representative.* A voluntary representative may:

(i) Redeem the decedent's savings bonds on behalf of the persons entitled by the law of the jurisdiction in which the decedent was domiciled at the date of death;

(ii) Distribute the decedent's savings bonds to the persons entitled by the law of the jurisdiction in which the decedent was domiciled at the date of death.

(3) *Order of precedence for voluntary representative.* An individual eighteen years of age or older may act as a voluntary representative according to the following order of precedence: A surviving spouse; if there is no surviving spouse, then a child of the decedent; if there are none of the above, then a descendant of a deceased child of the decedent; if there are none of the above, then a parent of the decedent; if there are none of the above, then a brother or sister of the decedent; if there are none of the above, then a descendant of a deceased brother or sister of the decedent; if there are none of the above, then a next

of kin of the decedent, as determined by the law of the jurisdiction in which the decedent was domiciled at the date of death. As used in this order of precedence, child means a natural or adopted child of the decedent.

(4) *Liability*. By serving, the voluntary representative warrants that the distribution of payments or savings bonds is to the persons entitled by the law of the jurisdiction in which the decedent was domiciled at the date of death. The United States is not liable to any person for the improper distribution of payments or savings bonds. Upon payment or distribution of the savings bonds at the request of the voluntary representative, the United States is released to the same extent as if it had paid or delivered to a representative of the estate appointed pursuant to the law of the jurisdiction in which the decedent was domiciled at the date of death. The voluntary representative shall indemnify and hold harmless the United States and all creditors and persons entitled to the estate of the decedent. The amount of the indemnification is limited to an amount no greater than the value received by the voluntary representative.

(f) *Creditor*. If there has been no administration, no administration is contemplated, no summary or small estate procedures under applicable local law have been used, and there is no person eligible to serve as a voluntary representative pursuant to paragraph (e) of this section, then a creditor may make a claim for payment for the amount of the debt, providing the debt has not been barred by applicable local law.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

SCOTT S. HARRIS
Clerk of the Court
(202) 479-3011

February 26, 2020

Mr. David C. Frederick
Kellogg, Hansen, Todd,
Figel & Frederick, P.L.L.C.
1615 M Street, NW
Suite 400
Washington, DC 20036

Re: Jake LaTurner, etc. v. United States, et al.
Application No. 19A948

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on February 26, 2020, extended the time to and including May 8, 2020.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk
by /s/ Lisa Nesbitt
LISA NESBITT
Case Analyst

[attached notification list omitted]