No. ____

In The
Supreme Court of the United States

CALLAN CAMPBELL, KEVIN C. CHADWICK (INDIVIDUALLY AND THROUGH HIS COURT-APPOINTED ADMINISTRATORS, JAMES H. CHADWICK), JUDITH STRODE CHADWICK, THE TYLER JUNSO ESTATE (THROUGH KEVIN JUNSO, ITS PERSONAL REPRESENTATIVE), NIKI JUNSO, AND KEVIN JUNSO, ALL ON THEIR OWN BEHALF AND ON BEHALF OF A CLASS OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Circuit concluded that "[i]n the case of a regulatory taking, . . . the taking may occur before the effect of the regulatory action is felt." It held that the Government's "final decision"—its submission of a proposed order to the bankruptcy court for approval—was an actionable taking. Consequently, the statute of limitations clock started ticking even "before . . . the actual damage to the property interest [was] entirely determinable." The question presented is:

Does the Tucker Act's statute of limitations for a regulatory takings claim accrue when the Government makes a final decision, or when the plaintiff's property rights are actually injured-in-fact as a result of that decision?

PARTIES TO THE PROCEEDING

Petitioners Callan Campbell; Kevin C. Chadwick (individually and through his court-appointed administrators, James H. Chadwick and Judith Strode Chadwick); James H. Chadwick, individually; Judith Strode Chadwick, individually; the Tyler Junso Estate (through Kevin Junso, its personal representative); Kevin Junso, individually; and Niki Junso, were the plaintiffs-appellants in the court below, in their own right and on behalf of a putative class of approximately 2,000 others (collectively "Accident Victims").

Respondent is the United States, defendant-appellee in the court below.

RELATED PROCEEDINGS

United States Court of Federal Claims
Campbell, et al. v. United States, No. 15-717C
Judgment entered: October 31, 2017

United States Court of Appeals (Federal Circuit)
Campbell, et al. v. United States, No. 2018-2014
Judgment entered: August 1, 2019

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (App. 1-23) was entered on August 1, 2019 and is reported at 932 F.3d 1331. The unreported order of the Court of Appeals denying Petitioners' combined petition for panel rehearing and rehearing *en banc* (App. 92-94) was entered on November 22, 2019.

The opinion of the Court of Federal Claims (CFC) (App 24-63) was entered on October 30, 2017 and is reported at 134 Fed. Cl. 764. The opinion of the CFC denying Petitioners' motion for reconsideration and for leave to file a second amended complaint (App. 64-91) was entered on March 23, 2018 and is reported at 137 Fed. Cl. 54. Petitioners' proposed second amended complaint ("Proposed Amended Complaint") is reprinted at App. 95-175.

JURISDICTION

The Federal Circuit entered judgment on August 1, 2019 and denied Petitioners' combined petition for panel rehearing and rehearing *en banc* on November 22, 2019. On February 10, 2020, the Chief Justice extended the time for filing this petition to and including April 20, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Just Compensation Clause of the Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Tucker Act provides:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

28 U.S.C. § 2501.

INTRODUCTION

In *Franconia Assoc. v. United States*, 536 U.S. 129, 145 (2002), this Court cautioned that there is no "special accrual rule" under the Tucker Act's statute of limitations for suits against the United States. But the Federal Circuit did just that. It carved out an entirely new rule of claim accrual in takings cases that conflicts with this Court's statute of limitations and takings jurisprudence, the Federal Circuit's own prior rulings, and those of other lower courts.

Petitioners' claims for just compensation arose out of the Government's acquisition of General Motors' assets in bankruptcy, "free and clear" of Petitioners' tort and related successor liability claims. Jettisoning Petitioners—while saving other, more preferred creditors—was a lynchpin of the largest governmental takeover of a private company in American history. The Federal Circuit determined that the submission of a proposed order to the bankruptcy court for consideration—which, when subsequently made effective by the bankruptcy court, would wipe out Petitioners' claims—was a "final decision" that started the statute of limitations clock ticking on Petitioners' takings claims, even though Petitioners' property rights were not actually injured until later.

Contrary to this Court's established "case and controversy" standing requirement that plaintiffs in every case must allege an injury-in-fact, the Federal Circuit adopted a rule unique to takings claims: "[i]n the case of a regulatory taking, . . . the taking may occur *before the effect of the regulatory action is felt* . . . ." App. 14 (emphasis added). The Federal Circuit concluded that injury-in-fact is not part of the accrual calculus. This stunning rule—that the statute of limitations starts to

run even "before the effect of the regulatory action is felt"—starkly contrasts with the customary accrual rule that a plaintiff may bring suit only after she is actually injured.

This petition deserves the Court's attention for three reasons. *First*, the Federal Circuit's decision cannot be squared with this Court's precedents. Because the Federal Circuit has unique jurisdiction, its decision jeopardizes established Fifth Amendment protections nationwide. *Second*, the Federal Circuit's decision threatens the judicial system with adverse practical impacts by muddling what should be clear rules governing the accrual of statutes of limitations for takings claims, and instead encouraging satellite litigation over whether a "final decision" has resulted in a taking even in the absence of damage to the plaintiff. *Third*, this petition presents a clean vehicle. The Court may consider the issues unburdened by factual disputes.

This petition comes before the Court at a uniquely important and challenging time. The economic fallout from coronavirus may cause upheaval not witnessed in generations. With "main street loans" from the Government soon projected in the hundreds of billions of dollars, the Government is likely to find itself gaining control of private companies in bankruptcy, much like it did when it took over GM. Government regulations in the interest of resurrecting the economy may also reach into areas that have not required this Court's review for nearly a century. In these turbulent times especially, property owners, government regulators, lower courts, creditors, and debtors deserve clear rules, so they can order their affairs accordingly, free

of the opaque and arbitrary reasoning the Federal Circuit employed in support of its accrual rule.

A regulatory takings claim cannot accrue before an owner's property rights are actually injured by the Government's final action. The Federal Circuit's conclusion that the clock began ticking even before Petitioners were injured-in-fact brings to mind a variation of a classic Zen parable: if the Government makes a decision but the property owner isn't actually injured, can the owner sue for a taking?

The Court should review this important issue.

STATEMENT

I. FACTS

A. Petitioners' Personal Injury Claims Against GM

Petitioners hold allowed prepetition claims ("Accident Claims") in the bankruptcy case captioned *In re Motors Liquidation Company, et al., f/k/a General Motors Corp.*, Case No. 09-50026 (Bankr. S.D.N.Y) based on deaths or personal injuries resulting from defective motor vehicles (or component parts) manufactured, sold, or delivered by General Motors Corporation and affiliates ("Old GM") before June 1, 2009, the date Old GM filed its bankruptcy petition for relief.

The claims of Petitioners and the other members of the putative class aggregate $320 million and are fixed, liquidated, and not disputed by the successor to Old GM—a Government-sponsored enterprise, General Motors LLC ("New GM"), that was formed at the time of the GM Bankruptcy and that acquired Old GM's assets—or by any other party in the GM bankruptcy.

B. The Government Acquired Old GM's Assets In Bankruptcy

Through New GM, on July 10, 2009 (the "Closing" or "Closing Date"), the Government closed on its purchase of substantially all of Old GM's operating assets, "free and clear" under 11 U.S.C. § 363(f) (the "Sale"). App. 8.

The Purchase and Sale Agreement (the "Sale Agreement") provided that New GM would voluntarily assume and pay in full approximately $60 billion in prepetition unsecured liabilities, including the

unsecured claims of trade vendors, senior executives, unions, and pension plans. App. 134. The Sale Agreement identified "fifteen sets of liabilities that New GM voluntarily, and without legal compulsion, took on as its own" as "Assumed Liabilities" in the Sale Agreement. *See Elliott v. General Motors, LLC*, 829 F.3d 135, 163 (2d Cir. 2016); App. 189-193. The Sale Agreement also reserved in New GM the right at any time before Closing to assume other liabilities without the need for further court approval. App. 197.

C. The Government Preserved Some Claims But Jettisoned Others

Not everyone, however, was allowed to ride along with New GM. Many creditors were simply jettisoned. A small minority with valid successor claims under Michigan law, such as Petitioners, additionally had their successor liability claims against New GM enjoined under the bankruptcy court's order approving the Sale Agreement (the "Sale Order"). App. 178-182. The Sale Order, however, was itself not determinative of which claims would survive, be left behind, or also be enjoined on the Closing Date since none of the broad injunctive provisions of the Sale Order specifically referenced Petitioners' successor liability claims. *Id*.

D. "Economic Dragooning" – The Government Gave Old GM No Option But To Ask The Bankruptcy Court To Enjoin Petitioners' Liability Claims

The Government advised Old GM and the bankruptcy court that it would cut off financing and force Old GM into liquidation on July 10, 2009 unless a final Sale Order was entered that enjoined Petitioners' successor liability claims, and those of asbestos claimants and others similarly situated. App. 143-44. At the sale hearing between June 30, 2009 and July 2, 2009, however, the Government repeatedly emphasized that the decision to leave Petitioners' claims behind was not necessary to the financial survival of New GM. Rather, the Government advised, it was simply doing what it believed any commercial buyer would do in a bankruptcy sale (not assume liability claims). App. 121, 134-135. When Petitioners attempted to probe the nature of the Government's apparent decision to leave their claims behind and to prohibit them from pursuing successor liability claims after the Closing Date, the Government objected on the basis of "presidential privilege," and the bankruptcy court sustained this objection.[1]

In his book recounting the events of the bailout, Steve Rattner—the "czar" of the government's "Team Auto"[2]—characterized these threats as "the financial

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[1] *See* Transcript of sale hearing before the bankruptcy court, at PDF 2536:9-2537:12 (July 1, 2009), http://www.motorsliquidationdocket.com/pdflib/12982_50026.pdf.

[2] Steven Rattner, *Overhaul: An Insider's Account of the Obama Administration's Emergency Rescue of the Auto Industry* 251 (2010). On February 15, 2009, President Obama convened a

(*footnote continued on next page*)

equivalent of putting a gun to the heads of the bankruptcy judge, GM's stakeholders, and of course Team Auto itself." App. 107, 129-130, 144. This Court has described similar threats as "economic dragooning" designed to leave "no real option but to acquiesce." *Nat'l Fed'n of Indep. Businesses v. Sebelius*, 567 U.S. 519, 581-82 (2012) ("[T]he financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head. . . . [It] is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.").

E. Four Days After Old GM Uploaded The Proposed Sale Order For Bankruptcy Court Approval, The Court Entered An Order Authorizing Broad Injunctions Of Successor Liability Claims

The Federal Circuit held that Petitioners' complaint alleged a taking that occurred when the Government forced Old GM on July 1, 2009, to submit a proposed form of Sale Order to the bankruptcy court providing that all successor liability claims not assumed by New GM in the Sale Agreement would be permanently enjoined. App. 13. The bankruptcy court entered the Sale Order on July 5, 2009, but by its own terms the Sale Order would not become effective until noon, local (Eastern) time, on July 9, 2009. App. 8. The bankruptcy court also entered an opinion in support of

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Presidential Task Force on the automobile industry to handle the bailouts of GM and Chrysler. A group known as "Team Auto" was formed and charged with responsibility to evaluate the specific restructuring plans of GM and Chrysler, negotiate the terms of any further financial assistance, and make day-to-day decisions on behalf of the task force. App. 119-120.

the Sale Order. *In re General Motors, Inc.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009) ("Sale Opinion").

In the Sale Opinion, the bankruptcy court noted, the "only truly debatable issues in this case" are "how any approval order should address successor liability." *Id*. at 475. The bankruptcy court concluded that the successor liability rights of these parties were "interests in property" that could be extinguished by a "free and clear" sale under 11 U.S.C. § 363(f)(5).

F. The Order Became Effective July 9, 2009

Importantly, the Sale Order by its own terms did not become effective until noon, local (Eastern) time, on July 9, 2009, to give Petitioners and an *ad hoc* committee of asbestos claimants similarly affected by the Sale Order injunctions (the "Asbestos Claimants") time to seek a stay pending appeal. After the entry of the Sale Order on July 5, 2009, and continuing through oral argument on July 9, 2009 before the United States District Court for the Southern District of New York, the Government repeatedly threatened to terminate both its financing of the bankruptcy case and the Sale Agreement itself if the provisions of the Sale Order enjoining the successor liability claims against New GM of personal injury claimants like the Asbestos Claimants and the Accident Victims were stayed pending appeal. App. 107, 129-130, 144.

On July 9, 2009, following oral argument that morning and shortly before the Sale Order was scheduled to become effective, the district court denied the stay pending appeal that had been requested by the Asbestos Claimants and supported by Petitioners. The next day, the July 10, 2009 Closing Date, the Government closed on the Sale Agreement. App. 8. Despite

significant political pressure being exerted through the closing to have New GM assume what the Government called the "politically-sensitive" claims of the Accident Victims, these claims were excluded from assumption by New GM. App. 145.

Accordingly, the successor liability claims of the Petitioners against New GM that arose "upon the Closing" (because that is when New GM became the successor to Old GM under Michigan law) were simultaneously permanently enjoined by operation of the Sale Order, "[e]ffective upon the Closing." App. 178, 181. In effect, as this Court recently characterized the simultaneous birth and death of a claim, Petitioners' successor liability claims "die[d] aborning" on the Closing Date. *Knick v. Township of Scott*, 139 S. Ct. 2162, 1267 (2019). In exchange, the Accident Victims received nothing more than a contingent interest in an indeterminate portion of New GM that might trickle down to them in a liquidating plan years later. App. 162.

II. PROCEEDINGS BELOW

A. Petitioners Sued Within Six Years Of July 9, 2009

On July 9, 2015, within six years of the July 10, 2009 Closing Date and the July 9, 2009 effective date of the Sale Order, Petitioners instituted a takings lawsuit in the CFC against the Government. App. 4. The complaint alleged a taking resulted from "the government's actions in directing the extinguishment in the Sale of the rights of [Petitioners and the other Accident Victims] to assert successor liability claims against New GM[.]" App. 160, 163. Petitioners alleged that the taking occurred "upon the Closing" of the Sale because that was the moment that their successor liability

claims were enjoined and lost all use and value.[3] App. 181.

The complaint alleged that targeting Petitioners' successor liability claims for elimination in the bailout "went too far" because the Government was financially indifferent to assumption of these claims yet it forced them and other Accident Victims to absorb a disproportionate burden that in all fairness and justice should have been borne by the public as a whole. App. 152, 166; *Armstrong v. United States*, 364 U.S. 40, 46 (1960) (compensation claims spread the economic burden of public benefits "that in all fairness and justice should [have been] borne by the public as a whole"). Petitioners amended the complaint as of right on July 30, 2015. App. 22.

The Government moved to dismiss but did not assert the statute of limitations jurisdictional defense. *See* Government's Motion to Dismiss, CFC Case No. 15-717, ECF Docket No. 8. When asked at oral argument whether the Government was objecting on statute of limitations grounds, it told the court it was not. *See* Transcript, CFC Case No. 15-717, ECF Docket No. 17 at 12:3-6 ("We're not taking the position that the claim is barred by the statute of limitations. If there was a taking, it occurred, if at all, on July 10th, 2009.").

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[3] This was not a facial claim challenging the Government's action "in all its applications." *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). In a facial challenge the "only issue" "is whether the 'mere enactment' of the [statute] constitutes a taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

B. The CFC *Sua Sponte* Dismissed Because The Limitations Clock Expired

Over 18 months later, without requesting supplemental briefing in advance, the CFC concluded *sua sponte* that the complaint was untimely because the Tucker Act's six-year limitations period began running on July 5, 2009 (the date the Sale Order was *entered*), not on July 10, 2009 (the Closing Date of the Sale), or July 9, 2009 (the date the Sale Order became *effective*). App. 35. The CFC concluded that "[t]he complaint's specific references to government coercive action . . . all point to activity that predates the Sale Order issued by the bankruptcy court . . . [and] those advocacy activities could not have extended past July 5, 2009." *Id.* Alternatively, the CFC concluded, Petitioners' successor liability claims were too "highly contingent" to qualify as compensable property interests within the meaning of the Fifth Amendment. App. 56. The court reasoned that "when a property interest is contingent on a favorable decision of a federal agency, it is not a cognizable property interest under the Takings Clause." App. 61.

Petitioners sought reconsideration and leave to amend the complaint to allege facts showing the complaint was timely filed. Because the Government had disclaimed any interest in a statute of limitations defense, the CFC had never received or considered any arguments about it. An amended complaint would, Petitioners argued, address the CFC's timing concerns by alleging facts that showed that even under the CFC's coercion-based takings theory, the Government's coercive conduct continued through the conclusion of oral argument before the district court on July 9, 2009. The

CFC court denied Petitioners' request to amend the complaint as futile. App. 91.

C. Federal Circuit: "the taking may occur before the effect of the regulatory action is felt"

The Federal Circuit affirmed. App. 2. It first assumed without deciding that Petitioners' successor liability claims were compensable property interests. App. 5-6.

Turning to the statute of limitations, the court focused its takings "accrual analysis on the government's alleged coercion of Old GM." App. 12. Equating accrual of a takings claim with *Williamson County* ripeness,[4] the court concluded the Government's coercion ended on July 1, 2009 when it reached its "final decision" and Old GM lodged the proposed form of Sale Order with the bankruptcy court for approval. App. 18 (takings claims ripen when "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue") (citing *Williamson County*, 473 U.S. at 186; *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)).

Because a takings claim does not challenge the Government's public purpose, but rather seeks compensation because that action affects private property, Petitioners argued July 10, 2009 was the date their taking claims accrued and the earliest date the limitations clock started counting down. App. 16. Petitioners asserted that they did not suffer an actual injury to

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[4] *Williamson Cnty. Reg. Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

their property rights until the Sale closed and the injunctive provisions of the Sale Order became "[e]ffective upon the [July 10, 2009] Closing." App. 181.

The Federal Circuit, however, rejected Petitioners' assertion that uploading the proposed form of Sale Order did not in itself constitute a taking and that lacking injury-in-fact, any takings claim would have been premature if filed on July 1, 2009:

> [I]t is the final decision of the government actor alleged to have caused the taking that triggers accrual of a takings claim not the ultimate impact of that decision.

App. 15.

The court concluded, "under plaintiffs' theory as to the coercion of Old GM, the alleged taking occurred on July 1, 2009—when Old GM filed the proposed sale order with the bankruptcy court." App. 13. The court analogized uploading of the Government's proposed order to the Surface Transportation Board's issuance of a Notice of Interim Trail Use or Abandonment ("NITU"), which, in rails-to-trails compensation cases, is the action that takes property by legally eliminating state law reversionary property interests. In sum, the Federal Circuit held, a taking may occur—and the owner is obligated to sue—even though the actual injury resulting from the Government's final decision has not been felt:

> In the case of a regulatory taking, . . . the taking may occur before the effect of the regulatory action is felt.

App. 14.

Petitioners argued that—even under a coercion theory—the record in the GM Bankruptcy established that the date of the Government's "final decision" to leave Petitioners' successor liability claims behind was inherently unknowable and could have occurred as late as the Closing Date given the significant political pressure being exerted through the Closing on the Government to cause New GM to assume in the Sale Agreement what the government called the "politically-sensitive" claims of the Accident Victims. App. 145. Petitioners also argued that their proposed amended complaint alleged facts showing that the Government's coercion of Old GM extended through the close of oral argument in the district court. App. 144-145, 147-150. The Federal Circuit disagreed, holding that "collateral action" in the courts between the uploading of the Sale Order and the final decision of the district court denying a stay pending appeal "does not alter the finality of the government's action for the purpose of accrual of a takings claim." App. 18. The court concluded, "determining accrual based on the possibility the government actor would change its mind would make the date of accrual entirely indeterminate in many situations." App. 17.

A summary of the key events and dates is on the next page.

KEY DATES

Event	**Date**
Proposed Sale Order submitted to bankruptcy court for approval	July 1, 2009[5]
Bankruptcy Court entered Sale Order and Sale Opinion	July 5, 2009
District court denied motion for stay pending appeal	July 9, 2009 (morning)
Sale Order effective by its terms	July 9, 2009 (Noon)
Closing Date of Sale Agreement and effective date of injunction provisions of Sale Order	July 10, 2009[6]
Petitioners' CFC lawsuit filed	July 9, 2015

[5] Federal Circuit's accrual date.

[6] Petitioners' accrual date.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S ACCRUAL RULE CONFLICTS WITH DECISIONS OF THIS COURT AND LOWER COURTS

The Federal Circuit's decision contravenes established precedent of this Court. This case is an opportunity to explain that a regulatory takings claim cannot accrue before a property owner's property rights were actually injured by the Government's final action.

When private property is pressed into public service, the Fifth Amendment requires just compensation. *See Armstrong*, 364 U.S. at 49 (The overarching purpose of takings is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). The doctrine is not a limitation on Government's power to act for the public good, and the usual remedy does not seek to enjoin the taking, but to obtain after-the-fact compensation. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-37 (2005) (takings doctrine "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking") (quoting *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 314-15 (1987)). To pursue an as-applied claim for compensation, the property owner must admit or concede—as Petitioners do here—that except for the lack of compensation, the Government's action was otherwise valid.

This Court instructs that takings claims must be brought both by a plaintiff with standing, and only

after the claim is prudentially ripe. *See*, *e.g.*, *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733 n.7 (1997) (a regulatory taking claim arises when the plaintiff "presents a genuine 'case or controversy' sufficient to satisfy Article III," and it is "ready for review under prudential ripeness principles").

The Federal Circuit, however, adopted a new, contrary rule that conflicts with these established precedents in three important ways. *First*—and most critically—the Federal Circuit carved out takings challenges from the universal requirement that a plaintiff must be injured-in-fact before it can sue. *Second*, it concluded that prudential takings ripeness could stand in for injury. *Third*, by looking only to the Government's coercive action as the basis for the taking, the Federal Circuit wrongly shifted the focus in takings cases from the *effect* of the regulation on the property owner (in which the character of the government action is but a factor) to the character of the Government's action alone.

A. Injury-In-Fact Is Required In Takings Claims

The Federal Circuit abandoned the injury-in-fact requirement by interpreting Petitioners' complaint as alleging that the Government's coercion alone constituted a taking and was ripe for judicial review when Old GM submitted the proposed Sale Order to the bankruptcy court for approval. To have standing in the CFC, a plaintiff must allege an "injury-in-fact "that is both fairly traceable to the challenged conduct of the defendant and likely redressable by a favorable judicial decision." *Figueroa v. United States*, 466 F.3d 1023, 1029 (Fed. Cir. 2006); *Anderson v. United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003) (CFC, "though

an Article I court . . . applies the same standing requirements enforced by other federal courts created under Article III."). Had Petitioners filed a lawsuit on July 2, 2009, they surely would have faced an assertion that they had no standing because they had not yet been actually injured by mere submission of the proposed order for approval.

It has long been the Court's requirement that "a limitations period commences when the plaintiff has a complete and present cause of action" and "can file suit and obtain relief." *Green v. Brennan*, 136 S. Ct. 1769, 1776 (2016). The Federal Circuit held that Petitioners' takings claims were complete when the proposed Sale Order was submitted to the bankruptcy court for approval. That conclusion, however, squarely conflicts with *Franconia Assoc. v. United States*, 536 U.S. 129 (2002)—a case remarkably similar to ours—in which the unanimous Court reversed the Federal Circuit, holding that a breach of contract claim accrued under the Tucker Act when the contract was arguably breached, not when Congress authorized the breach and repudiated the Government's contractual obligations. *Id*. at 134.

In *Franconia*, plaintiffs secured low-interest loans conditioned on their agreement to devote their properties to affordable rental housing during the life of the loan. *Id*. at 132-33. The plaintiffs could free themselves of this condition by redeeming their loans before the due dates. But later, "in the face of increasing prepayment of mortgages," *id*. at 136, Congress amended the statute to permanently restrict prepayment. *Id*. Plaintiffs raised contract and takings claims in the CFC. The Federal Circuit affirmed dismissal, holding that the action was filed beyond the Tucker Act's six-year

limitations period. The court held that plaintiffs' claims accrued when Congress amended the statute, not later, when—after a plaintiff tendered prepayment of a loan—the Government actually dishonored its obligation to accept early tender and free the property from the affordable housing condition. *Id*. Any breach by the Government occurred "immediately upon enactment of [the statute] because, by its terms, [the statute] took away the borrowers' unfettered right of prepayment." *Id*. at 139. The Federal Circuit also "rejected the plaintiffs' argument that the passage of [the statute] qualified as a repudiation [of their contract rights]." "Were [the statute] so regarded," the court stated, "petitioners' suit would be timely if filed within six years of either the date performance fell due (the date petitioners tendered payment) or the date on which petitioners elected to treat the repudiation as a present breach." *Id*. The Federal Circuit then analyzed the takings claim similarly:

> Petitioners' takings claims were time barred for essentially the same reason, the Federal Circuit held. The "property" allegedly taken without just compensation was petitioners' contractual "right to prepay their FmHA loans at any time," the takings claim thus arose when, upon passage of ELIHPA, the Government "took away and conclusively abolished" the unrestricted prepayment option.

Id. at 140 (citation omitted).

This Court disagreed. The Government's duty extended not only to keep its promise to allow the borrowers to prepay their loans, but the corresponding obligation to accept tender of prepayment and release the affordable housing conditions. *Id*. at 142. "Absent an

obligation on the lender to accept prepayment, the obligation 'to allow' borrowers to prepay would be meaningless." *Id.* Congress' adoption of the statute prohibiting prepayment was a mere anticipatory repudiation, which only resulted in an injury to the plaintiffs when they later attempted to prepay, and the Government chose to reject it. *Id.* at 143.

Similarly here, the Government's duty to provide just compensation when it takes private property is not defined solely by the coercive character of its action. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (takings determined by examining the impact of the government action on the owner's use, the owner's distinct investment-backed expectations, and the character of the government action). In *Franconia*, the Government's obligation to *perform* the contract was the key, not its "announcement" that in the future it would not perform. *Franconia*, 536 U.S. at 143 ("The Act conveyed an announcement by the Government that it would not perform . . . Such a repudiation ripens into a breach prior to the time for performance only if the promisee 'elects to treat it as such.'") (citation omitted).

Here, as in *Franconia*, the submission of the proposed order to the bankruptcy court was simply reflective of an "announcement" of the Government's position. It had no effect on Petitioners' successor liability claims, however, since a *proposed order* by a party in litigation—standing alone—can have no effect on Petitioners' property rights in their tort and related claims against successors. The Government's requirement that the Sale Agreement leave Petitioners' claims behind and that their successor liability claims be enjoined "[e]ffective upon the Closing," only resulted in true injury to Petitioners "upon the Closing" on July

10, 2009 when the injunctive provisions of the Sale Order enjoined Petitioners' successor liability claims. Only then were plaintiffs' rights actually impaired. *Franconia* concluded with this Court's recognition that section 2501 does not "create a special accrual rule for suits against the United States." *Franconia*, 536 U.S. at 145. The language in the Tucker Act is similar to a "number of contemporaneous state statutes of limitations." *Id*.

In sum, the Government's proposed order was a form of "anticipatory repudiation" this Court soundly rejected as constituting "accrual." *See*, *e.g.*, *Danforth v. United States*, 308 U.S. 271, 285 (1939) ("reduction[s] . . . in the value of property" before title passes to the government represent "changes in value [that] are incidents of ownership [and] cannot be considered as a 'taking' in the constitutional sense"); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967) ("a possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action"); *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980) ("Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.") (internal quotation marks omitted).

The Federal Circuit, however, abandoned these dictates when it concluded that Petitioners' takings claims accrued immediately upon the submission of the proposed Sale Order to the bankruptcy court, concluding instead that the time of the taking "may occur before the effect of the regulatory action is felt." In so doing, the Federal Circuit departed from the "irreducible minimum" required by this Court for a claim to be ripe for judicial review; that "the plaintiff must have

suffered an injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 590 (1992).

Simple logic drawn from this Court's ruling (A-equals-B-and-B-equals-C, therefore A-equals-C) reveals the Federal Circuit's fundamental error that a taking claim may accrue "before the effect of the regulatory action is felt." App. 14. This Court instructs that "the time of the taking" (Time A) is the same time a takings claim accrues (Time B). *Knick*, 139 S. Ct. at 2174. This Court also holds that the earliest time a claim can accrue (Time B) is when the plaintiff has standing because the plaintiff has suffered an injury-in-fact (Time C). *Suitum*, 520 U.S. at 733. Therefore, the "time of the taking" (Time A) is—at the earliest—the same time that the claim is ripe for judicial review (Time C) because the plaintiff has suffered an actual injury.

The decision below, however, rejects this straightforward logic and held that the time of the taking can somehow *precede* the time the plaintiff suffers an actual injury. App. 14. The Federal Circuit bypassed the bedrock principle that a claim cannot possibly be raised for judicial review until the plaintiff has suffered actual injury. *Suitum*, 520 U.S. at 733 n.7.

Certainly, in some cases, the date of the final decision and time the property owner is affected can be the same date. But they need not be, even in physical takings cases where the invasion of the owner's property rights can be much more apparent than in a regulatory taking. For example, the decision below squarely conflicts with *Cobb v. City of Stockton*, 120 Cal. Rptr. 3d 389, 395 (Cal. Ct. App. 2011). There, the city filed an eminent domain action in a California court to take Cobb's property for a road. The city entered into

possession and built the road. *Id*. at 390. But the city never actually completed the condemnation process, nor did it provide final compensation. Nine years later, the court dismissed the condemnation action. *Id*. at 390-91. After Cobb brought an inverse condemnation claim for a physical occupation taking, the city demurred, arguing Cobb's takings claim accrued under California's five-year statute of limitations when the city first occupied Cobb's land. The Court of Appeal rejected the argument, concluding that Cobb's takings claim accrued not when the city occupied Cobb's property, but only after the occupation became unlawful (when the trial court dismissed the city's eminent domain complaint). *Id*. at 392, 395 ("It was only after that temporary right [of occupation] expired, with dismissal of the eminent domain action, that the applicable statute of limitations began to run.").

"Although the standard rule can be displaced such that the limitations period begins to run before a plaintiff can file a suit," the Court has stated that it "will not infer such an odd result in the absence of any such indication in the text of the limitations period." *Green*, 136 S. Ct. at 1776 (citations omitted). This Court has held that such an "odd result" is also inappropriate under the Tucker Act. *Franconia*, 536 U.S. at 145 (there is no "special accrual rule for suits against the United States" under the Tucker Act). Yet that is exactly what the decision below does by categorically holding that a takings claim accrues under the Tucker Act at the "time of the taking"—even where the plaintiff has not yet suffered an injury-in-fact. The Federal Circuit's stunning rule—that the statute of limitations started to run even "before the effect of the regulatory action [was] felt and the actual damage to the property interest [was] entirely determinable," App. 14, stands in

stark contrast to the usual accrual rules in this Court and in courts across the country, both state and federal. The panel has adopted a rule for regulatory takings claims against the Government that is unique among claims the CFC considers. Other Federal Circuit decisions recognize the separate injury requirement, and the panel's decision conflicts with these cases. *See*, *e.g.*, *Weddel v. Sec'y of Health & Human Servs*., 100 F.3d 929, 931 (Fed. Cir. 1996) ("The statute begins to run on its date of accrual, which is the date the plaintiff discovers (or should discover) *he has been injured*.") (emphasis added); *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1482 (Fed Cir. 1994) (takings claim accrued not when 1941 treaty was signed, but when it "went into force in April 1942").

Here, the Federal Circuit concluded that Petitioners had standing to sue for a taking when the proposed Sale Order was uploaded to the bankruptcy court for approval, not when their property actually rights "died aborning" on the Closing Date of the Sale. *See* App. 13. But the decisions the panel relied on—*Ladd v. United States*, 630 F.3d 1015, 1023-24 (Fed. Cir. 2010); *Barclay v. United States*, 443 F.3d 1368, 1378 (Fed. Cir. 2006), *cert. denied*, 549 U.S. 1209 (2007); and *Caldwell v. United States*, 391 F.3d 1226, 1234-35 (Fed. Cir. 2004), *cert. denied*, 546 U.S. 826 (2005)—actually conflict with the decision below.[7]

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[7] The Federal Circuit's intra-circuit conflict is demonstrated by the panel's conclusion that the mere submission of the proposed order for approval opened their window to sue. The panel considered the proposed order to have the same effect as a "NITU" in rails-to-trails cases. *See* App. 16. These cases concluded that the issuance of a NITU was the final decision that triggered the

(*footnote continued on next page*)

Further, the Federal Circuit in other cases employs a two-part inquiry—contrary to the panel's decision—that looks both at "when the scope of what is taken is fixed," and when "the plaintiff knew or should have known of the acts that fixed the government's alleged liability." *Katzin v. United States*, 908 F.3d 1350, 1358 (Fed. Cir. 2018) (citing *Samish Indian Nation v. United States*, 419 F.3d 1355, 1369 (Fed. Cir. 2005); *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (*en banc*); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)).

B. Injury And Prudential Ripeness Are Distinct

The Federal Circuit's second fundamental conflict with this Court's rules was its assumption that prudential ripeness substitutes for the injury-in-fact requirement. This Court has never conflated the two, and instead considers prudential ripeness as distinct from the injury-in-fact standing requirement.

This Court's recent decision in *Knick*—a ruling the entire Court recognized opened federal courts to Fifth Amendment claims for compensation—should only have confirmed this analysis. But the Federal Circuit rationale turned the case on its head, relying on a single sentence from the opinion to slam closed the door *Knick* just opened. Specifically, the Federal Circuit stated that *Knick* held "[a] property owner has an actionable Fifth Amendment takings claim when the

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obligation to provide compensation. But a NITU is vastly different. Most critically, a NITU needs no further confirmation (unlike the proposed form of order submitted to the bankruptcy court for approval here), and the NITU itself is an instrument that itself wipes out an owner's state law reversionary property interest as a matter of law. *See* 16 U.S.C. § 1247(d).

government takes his property without paying for it[.]" *Knick*, 139 S. Ct. at 2170).

But critically, this is not all that *Knick* held. The panel overlooked the important statement in *Knick* that the "government violates the Takings Clause when it takes property without compensation, and that a property owner *may* bring a Fifth Amendment claim . . . at that time." *Id.* at 2177 (emphasis added). The Court's use of "may" is critical because it demonstrates that the usual accrual rule—which examines when the plaintiff was injured—remains an integral part of the statute of limitations analysis. Of course, *Williamson County* provides that the "final decision" requirement means that the time the claim is ripe for judicial review can be *later* than the time the plaintiff has suffered actual injury due to "prudential reasons" for refusing to exercise jurisdiction. *See Suitum*, 520 U.S. at 733, n.3. However, that time can never be *earlier* than the time the plaintiff suffers injury-in-fact.

Knick concluded that "the self-executing character" of the Takings Clause means that "a property owner has a constitutional claim for just compensation at the time of the taking." *Knick*, 139 S. Ct. at 2172. This language should have confirmed that Petitioners' claims for compensation only accrued upon the Closing of the Sale (July 10, 2009); that is when any taking became *actionable* because that is when Petitioners were actually injured.

But according to the Federal Circuit, the "time of the taking" was when the Government made its "final decision," and that is when Petitioners' obligation-to-sue began. App. 14. However, as set out above, the final decision only determines when a takings claim is prudentially ripe and presumes the existence of injury-

in-fact. The injury requirement serves to avoid judicial involvement in abstract or hypothetical questions. By contrast, *Williamson County*'s final decision ripeness inquiry focuses on the substance of a takings claim. The point of requiring the government to have made a final decision is that only then can a court evaluate the extent of the plaintiff's loss of use of the property, for example by comparing the property's permitted use under the regulation as applied to its possible uses without the regulation. Absent a final decision as to the application of the regulation, the remaining permissible uses are uncertain and therefore not ripe for judicial review. *Williamson County*, 473 U.S. at 186 (final decision requirement only relates to "the application of the [challenged] regulations to the property at issue"); *Suitum*, 520 U.S. at 746, 750 (a final decision fixes "the extent of the governmental restriction on [a property's] use") (Scalia, J., concurring in part).

Thus, even assuming—contrary to the allegations plead by Petitioners—that the submission of the proposed Sale Order to the bankruptcy court reflected the Government's "final decision" regarding the treatment of Petitioners' successor liability claims, it was only when the Sale Order became effective and the Sale closed that the injunctive provisions of the Sale Order became effective and concretely injured Petitioners by causing their successor liability claims to die aborning.[8] Contrary to the Federal Circuit below,

[8] The Sale Order itself was not determinative of what claims would survive the Closing. Rather, only the Sale Agreement, not the generic provisions of the Sale Order, identified the specific "fifteen sets of liabilities that New GM voluntarily, and without legal compulsion, took on as its own" as "Assumed Liabilities" in the Sale Agreement. *Elliott*, 829 F.3d at 163. The possibility that

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Williamson County never held that that the final decision alone triggers a property owner's obligation to sue, only that—consistent with the injury-in-fact requirement—*application* of the final decision resulting in injury to the plaintiff constitutes accrual.

C. Takings Claims Turn On The Effect Of The Action On The Property Owner

The Federal Circuit's ruling also conflicts with this Court's established takings "polestar" that the "character of the government action" is but one of the factors a court considers when analyzing a takings claim, not the sole factor as the Federal Circuit concluded. *See Palazzolo*, 533 U.S. at 633 (describing the three factors in *Penn Central* as the "polestar" in regulatory takings cases) (O'Connor, J., concurring).

Accordingly, while coercion forms a necessary backdrop to Petitioners' takings claim, it is not itself dispositive of whether there *was* a taking—and importantly here—*when* any taking occurred. Those inquiries are determined by examining the impact of the action on the owner's use, and other factors such as "the character of the government action." Consequently, in their complaint, Petitioners did not seek to enjoin the Government's "economic dragooning." Rather, they sought compensation for the effect the

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the government would similarly amend the Sale Agreement before the Closing to allow for assumption of Petitioners' successor liability claims, therefore, was plausibly plead, particularly since Sale Agreement could be amended any time through the Closing without the need for further approval by the bankruptcy court. *Id.* ("[T]he GM sale was a negotiated deal with input from multiple parties—Old GM, New GM, Treasury, and other stakeholders [and] [t]he Sale Order and Sale Agreement reflect this polycentric approach."); App. 197.

Closing of the Sale on Petitioners' property rights through the Government's "directing the extinguishment in the Sale of the rights of [Petitioners and the other Accident Victims] to assert successor liability claims against New GM." App. 160, 163. *See Lingle*, 544 U.S. at 537 (regulation may be a taking if it is "so onerous that its *effect* is tantamount to a direct appropriation") (emphasis added); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (when one "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, . . . he has suffered a taking"); *see also Penn Central*, 438 U.S. at 124-25 (factfinder looks at the "economic impact" of the action on the property's use or value resulting from the action) (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)).

The Federal Circuit, however, focused only on the Government's coercive conduct, which the court concluded became final—and actionable—when the proposed form of order was submitted to the bankruptcy court for approval.[9] This critical error resulted in the court's holding that this submission itself constituted the "time of the taking" and so was the time that Petitioners' claims began to accrue. *Cf. Reoforce, Inc. v. United States*, 853 F.3d 1249, 1264 (Fed. Cir.), *cert. denied*, 138 S. Ct. 517 (2017) ("[a] claim must ripen to be 'complete and present' and begin accruing, even if a

[9] The Federal Circuit also derided Petitioners' complaint as a "mine-run challenge" to the Sale Order. App. 20. But Petitioners' complaint was filed precisely because the Federal Circuit recognizes such takings challenges. *See A & D Auto Sales, Inc. v. United States*, 748 F.3d 1148, 1156 (Fed. Cir. 2014) ("coercion is a necessary—but not sufficient—feature to establish takings liability").

taking might have begun at an earlier date for purposes of measuring compensation").

Regardless, there is nothing in the record from which to plausibly infer that the government's "final decision" had been made before the district court decided the motion for a stay pending appeal since no one knew what that decision would be until it was rendered. The government had already stated that it considered a shutdown of Old GM's business to be "unthinkable." App. 124. It also had told Old GM's board of directors when it convened on the eve of Old GM's bankruptcy filing that if, for whatever reason, it were to agree before the close of the Sale to assume Old GM's liabilities to Accident Victims, then the Government would neither attempt to renegotiate a reduction of the purchase price nor walk from the deal. App. 105.

In light of the government's representations to Old GM's board, it follows that the government had not made a "final decision" regarding the treatment of the Accident Victim's claims in the Sale until after the district court's decision on July 9, 2009. Had the district court ruled in favor of the Asbestos Claimants and Accident Victims, the government would have been required to make one more "final decision": that is, whether to assume these claims or not close on the Sale at the expense of the national economy and in breach of its pre-filing representation to Old GM's board. Given the *de minimis* value of these claims in comparison to the $91.3 to $93.5 billion paid by New GM in the Sale—Petitioners plausibly pleaded that no "final decision" was reached in respect of their claims until July 9, 2009, exactly six years before they filed their action. App. 150. Even under the Federal Circuit's "final decision" theory of timeliness, therefore, this case was timely filed.

II. PRACTICAL IMPACTS

A. Clear Rules For Statutes Of Limitations

The Federal Circuit's decision, however, cannot be squared with this Court's precedent, and because of the Federal Circuit's unique jurisdiction, this takings decision will have nationwide influence.[10] This case is especially critical, therefore, since the Tucker Act categorically bars consideration of a claim on the merits upon expiration of the applicable limitations period. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 136 (2008) (Tucker Act's six-year limitations period is a jurisdictional limitation that cannot be waived).

Takings law is notoriously opaque. *See*, *e.g.*, Charles M. Haar & Michael Allan Wolf, *Land-Use Planning: A Casebook on the Use, Misuse, and Re-Use of Urban Land* 875 (4th ed. 1989) (takings is "the lawyer's equivalent of the physicist's hunt for the quark"). This Court has long recognized that statutes of limitation "are not just simple technicalities," but rather are fundamental to a well-ordered judicial system." *Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980). "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). Clarity and predictability in this area, therefore, are essential. Susan Rose-

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[10] The Federal Circuit exercises exclusive appellate jurisdiction over all just compensation claims brought against the Government, whether from the CFC (claims over $10,000) or the District Courts (claims under $10,000). *See* 28 U.S.C. §§ 1295(a)(3), 1346(a)(2), 1491(a)(1), (c).

Ackerman, *Against Ad Hockery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988) ("Takings law should be predictable . . . so that private individuals confidently can commit resources to capital projects.").

Property owners nationwide, however, now face a dilemma in light of the decision below: should they conform to the Federal Circuit's new accrual rule, or instead risk following this Court's *Franconia* analysis and potentially having the suit dismissed as untimely? As a Fifth Amendment scholar wrote:

> That ruling, by the court that hears most appeals of takings cases brought against the federal government, could potentially make it harder for plaintiffs in regulatory takings cases to initiate their claims in time to avoid the statute of limitations, while simultaneously also having enough evidence to demonstrate the extent of compensation necessary to offset the damage caused by the government action in question.

Ilya Somin, Knick v. Township of Scott*: Ending a Catch-22 That Barred Takings Cases From Federal Court*, 2018-2019 Cato S. Ct. Rev. 153, 186-87 (2019) (footnote omitted).

A ruling in this case clarifying when takings claims against the United States are both ripe and accrue for statute of limitations purposes will be illuminating for courts and practitioners alike. *Knick* re-opened the federal courthouse doors to 42 U.S.C. § 1983 Fifth Amendment takings claims against local governments. These claims are frequently subject to statutes of limitations similar to section 2501. *See Franconia*, 536 U.S. at 145 ("We do not agree that § 2501 creates

a special accrual rule for suits against the United States. Contrary to the Government's contention, the text of § 2501 is unexceptional."). A ruling by this Court will clarify the meaning of "accrue" and bring nationwide certainty to this issue.

B. The Federal Circuit's Rule Encourages Premature Lawsuits And Pointless Jurisdictional Disputes

The Federal Circuit's decision promotes the filing of premature "defensive" takings lawsuits every time the Government may have made a decision that might be later deemed "final." Property owners now face the prospect of being whipsawed between reasonable fear of their claims either being challenged as too late or not yet ripe depending on which argument best matches the Government's goal of having the case dismissed. The Federal Circuit's rule that a takings claim must be brought before the plaintiff has been injured will result in an incalculable amount of wasted time and energy as parties and the courts alike grapple with timing irrelevancies based on final decisions that will often be unknowable.

Placing such an unfair onus on plaintiffs will cause their litigation costs to spiral. To avoid this, plaintiffs can be expected to initiate suit earlier than ever to avoid protracted jurisdictional discovery battles over the timing and nature of a "final decision." *Cf. Oppenheimer v. Sanders*, 437 U.S. 340, 351 n.13 (1978) ("Parties are entitled "to ascertain the facts bearing on [jurisdictional] issues."). As noted above, however, this defeats the precise purpose of a limitations period, which is to provide "firmly defined, easily applied rules." *Wilson*, 471 U.S. at 266. Even worse, the decision may lead plaintiffs to bring such suits offensively,

much like a strike suit, as soon as an alleged "final decision" has purportedly been rendered in advance of any real injury in hopes that the commencement of litigation itself will pressure the applicable governmental entity to change its mind before the regulation becomes effective or the plaintiff has suffered actual injury.

The decision below is striking fear among plaintiffs that they risk missing jurisdictional deadlines. If the mere submission of an order for approval—one of the most frequent and routine tasks in civil litigation—can be deemed the beginning of an accrual period, how else might the Government use this doctrine as a sword and a shield to thwart usual accrual rules? *Bayou Des Familles Dev. v. United States*, 130 F.3d 1034, 1038-38 (Fed. Cir. 1997) ("The Government, as a defendant, uses the ripeness doctrine as both a sword and a shield"). If left unreviewed, the CFC and the Federal Circuit—along with all other federal courts hearing Section 1983 takings cases—will surely see a significant uptick in defendants claiming the case is now overripe because the plaintiff's claim began to accrue when the government rendered its final decision.

Ironically, the Federal Circuit's decision resurrected a form of a Catch-22 this Court recently exposed and rejected. *See Knick*, 139 S. Ct. at 2167 ("The takings plaintiff thus finds himself in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning."). The "final decision" doctrine of *Williamson County* was meant as a shield against suit until a final decision had been rendered. Armed with the decision below, one can expect it will be wielded as a sword to argue that a case is overripe even though no injury-in-

fact has been suffered by the plaintiff. Under the Federal Circuit's decision below, one's action might be too early or it might be too late. Either way, it is exactly the type of roadblock this Court swept away in *Knick*.

III. THIS CASE IS AN IDEAL VEHICLE

This case is an ideal vehicle to bring more clarity to the Tucker Act's accrual date, and to reemphasize that takings claims are subject to the injury-in-fact requirement, not merely prudential ripeness.

1. This case presents no unresolved fact issue. The CFC dismissed under Rule 12(b)(1) for lack of jurisdiction. This case is in the same procedural posture as *Franconia*, 536 U.S. at 133. *Cf. First English*, 482 U.S. at 309 (trial court sustained a demurrer to the complaint).

2. The CFC raised and decided the issue *sua sponte*. In that court, the Government did not advocate that the statute of limitations accrued on the date the proposed order was submitted to the bankruptcy court, but agreed that the taking occurred on the July 10, 2009 Closing of the Sale.

3. The Federal Circuit accepted the predicate question of whether Petitioners possess property under Michigan law, and assumed without deciding that the CFC's contrary conclusion was erroneous. A favorable ruling in this Court would result in a remand to the Federal Circuit.

4. Petitioners squarely presented and preserved the question here below, and the Federal Circuit ruled on that narrow issue. App. 11-18.

CONCLUSION

The submission of the proposed form of order to the bankruptcy court was the proverbial tree falling in the empty forest. Standing alone, it did not affect Petitioners' property. Only later, "[e]ffective upon the Closing," when Petitioners were actually injured, did their takings claims accrue.

The Court should review the judgment of the Federal Circuit.

Respectfully submitted.

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