NO. 21-_____

In the Supreme Court of the United States

MIKE FINNIN MOTORS, INC., AND
GUETTERMAN MOTORS, INC.,

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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QUESTIONS PRESENTED

During the liquidity crisis of 2008-09, the United States determined the public interest required 'saving' Chrysler and General Motors because they were too important to fail. Believing each would be more profitable with fewer dealers, the Government's restructuring plans required the confiscation of large numbers of General Motors and Chrysler dealer franchises. Petitioners' franchise rights to sell branded vehicles, parts, and service in exclusive territories were terminated and gifted to other dealers who the Government assumed would operate more productively, thereby benefitting the public. Believing state laws prohibited those dealership terminations without compensation, the Government executed a bankruptcy strategy to circumvent paying for the dealerships being taken while concomitantly blocking dealers from purchasing each other in the free market. The Court of Federal Claims ("CFC") upheld this uncompensated property seizure on two grounds: that the Chrysler dealers' property would have been worthless because their franchise contracts would have been rejected in bankruptcy if the Government had not intervened during the liquidity crisis and that the Government was not legally responsible for the actions of Chrysler. The Federal Circuit affirmed the former and declined to address the latter.

THE CENTRAL QUESTIONS PRESENTED ARE:

1. Whether the novel Federal Circuit 'but for' defense to takings liability conflicts with *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012) (categorical defenses are barred in takings cases), *Horne v. Dept. of Agric.*, 576 U.S. 351 (2015) (hypothetical anal-

ysis is not permitted to bar takings liability), *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (*ad hoc* balancing factors are required in regulatory takings cases), and *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (regulatory takings requirements may not be imported into direct takings cases), as reiterated in *Cedar Point Nursery v. Hassid*, 210 L.Ed.2d 369 (2021)?

2. Whether the dismissal of the direct takings claims that were not even defended by the Government —on a ground it never raised—departs so far from the accepted and usual course of judicial proceedings that the exercise of the Court's supervisory power is justified because it contradicts the controlling precedents of *United States v. Sineneng-Smith,* 140 S.Ct. 1575 (2020) (party presentation rule), *Day v. McDonough*, 547 U.S. 198 (2006) (entitlement to be heard before a court rules upon *sua sponte* defenses it injected for the Government), and *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017) (fairness is required in takings cases)?

3. Whether the affirmance of the economic valuation decisions conflicts with the holding of *Mission Product Holdings Inc. v. Tempnology LLC*, 139 S.Ct. 1652 (2019) (franchisee rights are not rendered worthless by rejection in bankruptcy) and *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (proof of fair market value is not required in cases of economic emergency)?

PARTIES TO THE PROCEEDINGS

Petitioners and Appellants,
Representative Plaintiffs Below

- Mike Finnin Motors, Inc.
- Guetterman Motors, Inc.

Respondent

- United States

Respondents and Co-Appellants,
Representative Plaintiffs Below

- Taylor & Sons, Inc.
- Cedric Theel, Inc., Whitey's, Inc.
- RFJS Company, LLC
- Jim Marsh American Corp.
- Livonia Chrysler Jeep, Inc.
- Barry Dodge, Inc.

RULE 29.6 STATEMENT

Neither petitioner is a publicly held company, and no publicly held company owns 10% or more of petitioners' stock.

LIST OF PROCEEDINGS

United States Court of Appeals for the Federal Circuit
No. 2020-1185, 2020-1205
Taylor & Sons, Inc., et al. v. United States
Date of Final Opinion: December 29, 2020
Date of Rehearing Denial: March 17, 2021

United States Court of Appeals for the Federal Circuit
No. 2013-5019 and 2013-5020
A&D Auto Sales, Inc., et al. v. United States
Date of Final Opinion: April 7, 2014

United States Court of Federal Claims
No. 10-647C, 11-100C, and 12-900C
Colonial Chevrolet Co., Inc. et al. v. USA
Date of Trial Opinion: October 12, 2019

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OPINIONS BELOW

The consolidated case opinion of the CFC is *Colonial Chevrolet Co. v. United States*, 145 Fed. Cl. 243 (2019). (App.12a). The Federal Circuit panel's consolidated case opinion is *Taylor & Sons, Inc. v. United States*, 841 Fed. Appx. 205 (Fed. Cir. 2020). (Appx.1a). The interlocutory appeal decision is *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014). (App.218a).

JURISDICTION

The panel judgment was entered on December 29, 2020. Rehearing and rehearing *en banc* were denied on March 17, 2021. (App.250a). This Court has jurisdiction pursuant to 28 U.S.C.§ 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V

> . . . [N]or shall private property be taken for public use, without just compensation.

15 U.S.C. §§ 1863(c)(5)
THE CHRYSLER CORPORATION LOAN GUARANTEE ACT

> The aggregate amount of nonfederally guaranteed assistance of at least $1,430,000,000 required to be provided under subsection (a) of this section shall include . . . (5) at least $180,000,000 shall be from suppliers and dealers, of which at least $50,000,000 shall be in the form of capital as defined in subsection (b).

STATEMENT OF THE CASE

As America's credit markets froze during the liquidity crisis of 2008-09, the federal government performed its admitted duty as lender of last resort to restore liquidity to critical sectors of the American economy.[1] The Government's unprecedented interventions prevented catastrophic damage threatened by an imminent collapse of the national economy and corporations it deemed too important to fail.[2]

The Government deemed the American vehicle manufacturing sector too important to fail and believed an uncontrolled Chrysler liquidation risked collapsing the domestic auto industry. While the Government's principal focus was on salvaging the jobs of thousands of auto sector workers, its intervention benefited the public by saving billions of dollars for the Pension Benefit Guaranty Corporation and avoiding massive federal and state financial losses. The intervention was motivated also by the Obama Administration's efforts to realize political advantage for its actions.

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[1] The Government judicially admitted being an important cause of the liquidity crisis and the deepening of its effects. *See also*, The Financial Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (2011).

[2] Government testimony admitted it intervened to prevent the collapse of systemically important firms as an integral part of the plan to inject liquidity into the economy, not to benefit the firms or their owners.

The auto sector intervention in 2008-09 drastically differed from the Government's bailout of Chrysler in 1979. In 1979, Government loan guarantees enabled Chrysler to successfully save itself as an entity.[3] A material part of that bailout was the Government's requirement that dealers and suppliers help recapitalize Chrysler by investing $180,000,000.[4] In 2008, facing insolvency caused by the liquidity crisis, Chrysler requested rescue by the Government on terms as before. But unlike 1979, the Government refused Chrysler's entreaties for loans to save itself and, having defined dealers as being part of the problem, excluded them from being part of the solution.

Instead, the Obama Administration hired a team of Wall Street dealmakers (the Auto Task Force "ATF"), all lacking auto industry experience, to create restructuring plans[5] in "only five frenzied weeks".[6] These dealmakers reimagined the product distribution systems of General Motors and Chrysler "based on a theory" that a material cause of the automakers' lack of profitability was an excess of auto dealers. They demanded the manufacturers significantly reduce

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[3] Congressional Research Service, *The Chrysler Corporation Loan Guarantee Act of 1979: Background, Provisions, and Cost*, CRS Report R40005 (Dec. 17, 2008).

[4] App.262a.

[5] The Government did not bailout GM and Chrysler in 2009. They were collapsed and their assets assigned to federally funded new corporations in bankruptcy restructures.

[6] App.263a.

the number of dealers as a condition precedent to continued governmental intervention.[7]

State laws protected the auto dealers from being involuntarily terminated. The ATF believed that, unless it created a Plan B to circumvent these state laws, the Government would be required to purchase the dealerships necessary to reduce the distribution network to the 'right-size'.[8] The Government valuation of the average dealership to be terminated was an estimated $1 million. Compelling the termination of the Chrysler dealerships rather than purchasing them saved it about $1.5 billion, an amount it later contextually admitted was "relatively trivial".

The predicate of the Government's Plan B to evade paying the dealers for seizing their property was its

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[7] Created by Congress to audit the Government's dealership reduction requirements, The Office of the Special Inspector General of the Troubled Asset Relief Program ("SIGTARP") concluded this requirement was ill-conceived. App.266a. The ATF Chief Rattner detailed nine causes of Chrysler's unprofitability, none being the dealers' fault. The Government's cause-and-effect rationale was wrong because the uncontradicted evidence proved consumers: (1) found Chrysler dealer performance equal to or superior to Toyota, the Government's gold standard; (2) found dealer performance irrelevant; and (3) avoided purchasing Chrysler vehicles viewed as unreliableand a poor value, despite incentive discount rates 200% higher than its competitors. In contrast, the ATF could not compel termination of Ford dealers because it did not control Ford's funding yet neither Ford nor its dealers suffered performance or other losses despite no involuntary termination of dealers.

[8] Rattner believed "state franchise laws . . . essentially require the dealer's consent to terminate the franchise . . . Thus, closures were . . . expensive; franchisees basically had to be bought out." App.263a.

strategy to use bankruptcy to preempt protective state franchise laws.[9] ATF Chief Steven Rattner touted this plan as "the silver lining" of bankruptcy and justified the refusal to pay the dealers for their property as preventing "a waste of taxpayer resources."[10] The Government acted on its conviction that dealers should simply tough it out and accept the outcome, to be "taking the pain and getting past it."[11]

President Obama's official policy of "shared sacrifice" was the coin of the rhetorical political realm for wiping out the dealers' property rights for nothing. In the Government's Plan B, terminated dealers did not share the sacrifice: they were the sacrifice.

Like GM, Chrysler responded to the Government's requirement by proposing to reduce the dealer network reduction by 25% within 18 months at no cost to the Government. This dealer reduction would have been achieved by December 2010 by dealers buying each other out and through attrition—without cost to the Government or Chrysler. The Government's own expert, Boston Consulting Group, supported the credibility of Chrysler's projections as did the history of Project Genesis, Chrysler's pre-existing voluntary dealer reduction program—95% of which was financed by the dealers themselves.

Chrysler executives informed the Government the terminations were a "bad move" and its Board of

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[9] Rattner knew the bankruptcy would be approved because the Government's plan "was the financial equivalent of putting a gun to the head of the bankruptcy judge . . . ". App.262a.

[10] App.264a.

[11] App.264a.

Managers denounced the use of bankruptcy to reduce the number of dealerships. After the Government pressed again for acquiescence to its dealership reduction requirement, Chrysler refused to change its plan "one iota", rejected the Government bankruptcy plan, and resisted the dealership network cuts until the witching hour of the Government's deadline.

Ultimately Chrysler was powerless to avoid having to choose the manner of its commercial death.[12] It could either auction its assets in liquidation or 'agree' to allow the Government to form and capitalize a new company bearing Chrysler's brand name and give its majority ownership to Fiat, a foreign car manufacturer.[13] Chrysler's Board had no financial interest to protect when it capitulated: its members acted to avoid being held personally liable under bankruptcy law.

The Government's *fait accompli* was wrong and unnecessary. The Government knew it could shrink the distribution network without buying or terminating the property rights of any dealers. Voluntary transactions between dealers and attrition would have met the Government's dealer reduction requirement and avoided the uncompensated seizure of the dealers' property taken through a raw exercise of Governmental authority.

Because the free market would have shrunk the dealership network to the desired level without cost to the Government, this taking was entirely gratuitous.

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[12] The Government, as lender of last resort, admitted having monopoly power over all sources of capital available to Chrysler.

[13] Fiat is a foreign OEM.

The Government's Plan B prevented terminated dealers from being purchased by their competing dealers.

Only the Government insisted upon a plan whose outcome was the involuntary termination of dealers without compensation. The Government took the dealers' exclusive territorial rights to itself and gave them to other dealers—for free—based on conjecture that replacement dealers would operate their new territories more profitably.

Petitioners sued for Takings Clause relief in the CFC in 2010. The CFC held in favor of the Government after trial in 2019. First, it held that Chrysler, not the Government, took the dealers' property. Second, in applying the 'but for' test required by *A&D* that compelled it to ignore the real-world value of the property, it declined to hold the Government liable because it found the dealers' property would have been worthless in a hypothetical scenario since their franchise contracts would have been rejected in a bankruptcy that would have followed the Government's refusal to restructure Chrysler. *Inter alia*, the CFC's opinion ignored the crucial, uncontested fact the Government's own "analysis suggest[ed] that Chrysler's disappearance need not completely destroy its dealers. Most of the jobs and profits in a dealership come not from sales of new cars but from service and used cars. Both would be needed if Chrysler liquidated" (emphasis added). App.262a.

The Federal Circuit panel affirmed the CFC's latter reasoning and chose not to rule on the former.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S 'BUT FOR' TEST SHOULD BE REVIEWED UNDER SUPREME COURT RULE 10(A) AND 10(C) BECAUSE IT IS CONTRARY TO CONTROLLING DECISIONS OF THIS COURT.

A. Relevant Takings Clause Concepts in Context.

The Takings Clause of the Fifth Amendment of the Bill of Rights was the means chosen by the Founding Fathers to protect the rights of private property owners. It requires payment of just compensation when private property is taken by the Government for public use.

Cedar Point Nursery v. Hassid, 210 L.Ed.2d 369, 380-82 (2021), a veritable takings law primer, defines the key terms of the Takings Clause.

- "*Property*" includes tangible, intangible, real, and personal property. *Id.*[14]
- "*Takings*" can be *direct or regulatory. Id.*
- *Direct takings*, often referred to being 'physical' or its equivalent, can occur even if no title passes to the Government. Direct takings can result when the effects of Government action occupy the property. A simple *per se* rule applies in a direct takings case: the Government must pay for what it takes. *Id.*

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[14] The property here includes the contractual rights of the dealers to sell and service vehicles, parts, and related services under the Chrysler brand in exclusive geographic territories.

- *Regulatory takings* occur when Government regulations unfairly restrict the use of private property. Whether a use restriction constitutes a taking requires a flexible analysis that balances factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the Government action. *Id.*
- The Government must pay just compensation if has directly "taken property for itself or someone else [such as a third party] by whatever means". *Id.*

Soon after nationhood this Court held "it is against all reason and justice" to presume the Government was entrusted with the power to engage in actions that "takes property from A and gives it to B". *Calder v. Bull*, 3 U.S. 386 (1798). Notwithstanding that clarity, two centuries later the Federal Circuit saw nothing constitutionally wrong with the Government taking Petitioners' property without compensation and giving it for free to their competitors.

There were ominous warnings this could happen. Justice Scalia presciently foresaw the Takings Clause could be rendered futile in the circumstances like those occurring here:

> Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the Government's extraction of wealth from those who own it is so cleverly achieved, and the object of the Government's larcenous beneficence is so highly favored

> by the courts . . . that the normal rules of the Constitution protecting private property are suspended.

Brown v. Legal Found. of Washington, 538 U.S. 216, 252 (2003) (dissent). The panel's *sua sponte* deployment of its novel 'but for' doctrine to rescue the Government from liability is the desultory realization of the scenario warned of by Justice Scalia.

Justice Thomas provided insight as to how this could happen when he purposefully recited concern that current regulatory takings doctrine may be enabling "unprincipled, subjective decision-making", the outcomes of which are "dependent on the identity of the decisionmakers". *Bridge Aina Le'a, LLC v. Hawaii Land Use Com'n,* 141 S.Ct. 731 (dissent) (2021).

B. The Dismissal of the *Direct* Takings Claim for Failing to Satisfy an Element of a *Regulatory* Takings Case Is Contrary to *Tahoe-Sierra* and *Cedar Point*.

This Court's holdings are exceptionally clear: it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Tahoe-Sierra, supra* at 323 (2002). Removing any chance of confusion on this stricture, this Court reiterated that when "a *per se* taking has occurred, . . . *Penn Central* has no place." *Cedar Point, supra* at 382.

Disregarding this clear constraint, the panel's sole basis for dismissing this direct takings claim was that the dealers failed to prove their *direct* takings claim constituted an exception to the *regulatory*

takings 'but for' defense it raised for the Government *sua sponte*. *Taylor, supra* at 208, fn. 1. That unprecedented holding, buried in a footnote bereft of citation of legal authority, found the dealers failed to prove the hypothetical 'economic impact' of conjecture of what might have occurred if the Government took no action. That holding relied upon *A&D*, the first appeal of this case, where the Federal Circuit panel created a new economic impact proof requirement in regulatory takings[15] cases.[16] That 'but for' defense requires the dealers to prove the hypothetical economic impact on their property 'but for' the Government's economic intervention during a national liquidity crisis. The Federal Circuit intends that defense to operate as threshold barrier in a new territory it carved out between takings liability and valuation issues.[17]

Grafting *A&D's* regulatory takings test into a direct taking case was like trying to pound a square peg into a round hole. The panel relied upon *A&D's*

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[15] *A&D expressly* stated the case before it at that time was not a direct takings case.

[16] *A&D*'s "but for" test later was bootstrapped into immunity for airport regulation and flood control projects. *St. Bernard Parish Gov't v. United States,* 887 F.3d 1354, 1366 (Fed. Cir. 2018), *cert. den.*, 2019 U.S. LEXIS 359; *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331 (Fed. Cir. 2018), *cert. den.*, 2019 U.S. LEXIS 4211 (2019). As here, all these opinions were authored by the same judge.

[17] The Federal Circuit explained its 'but for' test operates like the 'relative benefits doctrine', another novel quasi-valuation category which it defined as being "closely related to, but distinct from, the issue of causation". *Alford v. United States*, 961 F.3d 1380, 1383 (Fed. Cir. 2020). Like the 'but for' test, the Federal Circuit is using it to "foreclose[s] liability". *Id.*

regulatory takings decision as exclusive authority for denial of Colonial's *direct* taking claim (*Id.* at 1150).

The liability issue in a *regulatory* takings case is whether Government actions went "too far" in restricting the use of private property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Measuring whether Government regulation went 'too far' requires *ad hoc* balancing of many factors, one of which with particular significance being the "economic impact of the [government action] on the claimant." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

The liability question in a *direct* takings case is simple: did the Government take the property? Proof of 'economic impact' of Governmental action is irrelevant to direct takings cases and not required.

In doing so, the panel disregarded the law holding it is improper to graft *regulatory* taking elements into the *direct* takings cases rescued the Government from liability.

C. The Use of the "But for" Test to Dismiss the Direct and the Regulatory Takings Claims Is Contrary to Controlling Decisions of This Court.

1. The 'But For' Test Is Based on a Misreading of a Footnote in *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003).

The "but for" test of *A&D* is based on a misreading of footnote 11 in *Brown*, *supra* at 240. *Brown's* footnote did not announce a new liability barrier: it merely stated a method of calculation of compensation being used in an unusual set of factual circumstances. *Id.*

Brown's predecessor, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), was expressly limited to its "narrow circumstances" because the challenged government program created income where there had been none before, and "would never benefit the client under any set of circumstances." *Id.* Like *Webb, Brown* should be limited to its unique facts. The state government program there also could not generate net income without violating its rules. Thus, "any conceivable net loss to petitioners was the consequence of . . . incorrect private decisions" and "the compensation due . . . for any taking of their property would be nil." *Id.* Thus, unlike *A&D*, *Brown* was shaped by the ordinary *ad hoc* considerations common to properly decided takings cases.

Brown's footnote, relied upon by the Federal Circuit in creating its "but for" test, addressed Government actions that create property value as an act of genesis—not as acts impacting property that already had obvious value.[18] *See*, Christopher Serkin, *Valuing Interest: Net Harm and Fair Market Value in Brown v. Legal Foundation of Washington*, 37 IND. L. REV. 417 (2004); Ross Saxer, *Paying for Disasters,* 68 U. KAN. L. REV. 413 (2020). Thus, in this regard, *Brown* is *sui generis*. Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?* 59 ALA. L. REV. 453, 482 (2008).

The Federal Circuit, having expanded *Brown's* footnote into a rigid categorical test for *regulatory* takings, here applied it as a liability barrier to the *direct* takings claim (not as a compensation issue as

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[18] That the dealerships had obvious value is not contestable: the Government believed it was nearly $1.5 billion.

in *Brown*). This 'but for' test has never been reviewed by this Court or an *en banc* Federal Circuit.

2. The 'but for' test conflicts with *Ark. Game* by carving out a categorical exception to Takings Clause liability and conflicts with *Penn Central* by obviating the requirement to balance the *ad hoc* factors.

The panel affirmed the dismissal of the direct and regulatory takings claims based on its' categorical finding that the dealers failed to satisfy the 'but for' test. It is reversible error to use a categorical test to bar takings claims. The 'but for' test is categorical because it acts as a blanket exclusionary rule.

In *Ark. Game*, *supra* at 24, this Court unanimously reversed the Federal Circuit's categorical exemption of direct takings liability for Governmental temporary flooding impacting private property. This Court mandated balancing the "particular circumstances of each case" and "not by resorting to blanket exclusionary rules". *Id.* at 39.

Similarly, in the context of regulatory takings, the 'but for' test's categorical constriction of liability is the converse of the requirement to balance *ad hoc* factors. Because "[t]he central dynamic of the Court's regulatory takings jurisprudence . . . is its flexibility," the use of categorical rules is prohibited. *Murr, supra at* 1943. Instead, federal courts always are required to consider "a complex of factors". *Id.* [19]

Proof that this was categorical is that the panel ignored significant *ad hoc* balancing factors including:

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[19] *Penn Cent., supra* at 124, partially listed those factors.

- "the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the Government . . . alike." *Lucas*, *supra* at 1031 (1992).
- the fact that the taking was gratuitous (in stark contrast to the doctrine of necessity and the requirement of proportionality),[20]
- the fact that dealers' property was targeted for takings to benefit the public under the official Governmental policy of "shared sacrifice", and
- the fact that the economic losses suffered by terminated dealers like Petitioners were disproportionate.

Categorical tests are only permitted to establish takings liability, not deny it. "When the Government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe-Sierra, supra* at 322; *Cedar Point, supra.*

Without this Court's supervisory intervention, the Federal Circuit will continue to create and impose categorical rules so that the "judicial thumb [is] firmly on the Governmental side of the balance" of the scales in takings cases. Gideon Kanner & Michael Berger, *The Nasty, Brutish, and Short Life of Agins v. City of Tiburon*, 50 URBAN LAWYER 1, 34 n.140 (2019).

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[20] Permitting such gratuitous takings sidesteps the protective cautions developed by the 'doctrine of necessity'. *Id. at* 1029, fn. 16 (1992); *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1880).

3. The 'but for' Test Conflicts with *Horne's* Prohibition on Hypothetical Takings Analysis.

In *Horne*, *supra*,[21] the Government denied liability on the ground that plaintiffs failed to prove the hypothetical valuation of raisins "in the absence of" ('but for') the Government ensuring the existence of the raisin market. It urged this Court to adopt its *Brown*-based hypothetical 'but for' by arguing: "Even if a taking occurred, there is no constitutional violation-and no remedy required—if the "net loss was zero." *Horne v USDA*, 2015 U.S. S.Ct. Brief LEXIS 1254, *89. The Government insisted "it would be appropriate to consider what value all of the raisins would have had in the absence of the marketing order." *Id.* In other words, the Government demanded that property owners be required to prove as fact a conjecture of what would have happened if the Government did nothing.

Chief Justice Roberts, writing for the majority, rejected the Government's *Brown*-based 'but for' test, holding that "the Government cites no support for its hypothetical-based approach" and refused to displace the "clear and administrable rule for just compensation." *Horne, supra* at 368.

Astonishingly, the panel adopted the losing argument in *Horne* to justify applying its 'but for' test. The panel solely relied on a circular reference to *A&D,* which it described as "collecting cases", even though none of those 'collected' cases employed the 'but for' test. It was breathtaking that the panel lodged its

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[21] *Horne* was decided after *A&D*.

decision of an unbriefed, *sua sponte* question of first impression[22] in a footnote and then designated it as non-precedential.

4. The "but for" test created an unworkable standard contrary to the controlling decision of *Presley v. Etowah County Com'n*, 502 U.S. 491 (1992).

Penn Central, supra at 130, limits the consideration of the 'economic effect' factor to the "particular Government action" about which the property owner complains. Petitioners pinpointed that particular Governmental action in the CFC: "The Government took an action by which it compelled Chrysler to terminate a subset of its dealers. It is the Government action that we're here about." The CFC responded by saying: "That is correct".

But the Federal Circuit panels misstated the "particular Government action" about which the dealers complained and substituted their own definitions for that of the dealers. The panel contextual references were to "the Government action", "the regulatory imposition" and "Government's intervention".

The 'but for the Government action' requirement is an unworkable standard given the wide variety of potential actions. These ambiguous substituted terms could have meant many of the following: Government financial assistance only to Chrysler after the bridge loan, or before the bridge loan, or reaching back to Chrysler's 1979 bailout, or the financial assistance to both GM and Chrysler, or to the entirety of financial

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[22] *A&D's* 'but for' test arose from another unbriefed question raised during oral argument.

intervention to auto financing, parts suppliers, states, tax breaks, energy subsidies, and a myriad of other federal interventions to restore liquidity. Federal intervention included, *inter alia*, Cash for Clunkers, massive vehicle pre-purchasing, supplier guarantees, and the $17 billion bail-out of GMAC which specifically enabled the Government to participate in choosing which Chrysler dealers to terminate.

The CFC agreed *A&D's* definition of the 'but for' Government action was ambiguous but failed to identify which 'but for' would be used. This formulation creates a heuristic morass and conflicts with the requirement of workable standards for legal tests. *Presley, supra* at 504.

5. The "but for" Test Converts This Court's Carefully Developed Mosaic of Cases Instructing How to Value Property Taken During Economic Emergencies into a License to Seize Valuable Property Without Paying for It.

First, economic emergencies do not suspend the Constitutional requirement of just compensation for taking private property. *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1933). Strikingly similar to this case, the precedent of the *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102 (1974) is highly instructive.

There, "a rail transportation crisis [was] precipitated when eight major railroads . . . entered [bankruptcy] reorganization proceedings." *Id.* at 108. Those railroads would have failed without Government intervention. Just as in 2008-09, the Government intervened because the railroads were too important to be allowed to fail. Just as in 2008-09, the Government

dissolved the operating companies, created a new entity, and anointed non-Government corporations to operate and own the new entity.

As in 2008-09, the Government knew the railroad property was obviously valuable. It decided to pay for the property it was taking—but only equal to or less than the Congressionally approved sum. That was drastically different than here, where the Government rolled the dice on the legality of its strategy to use the bankruptcy code to immunize itself from liability for the obvious value it placed on the Chrysler dealerships: nearly $1.5 billion.

This Court granted certiorari to review the Congressional attempt to limit compensatory relief for railroad creditors and held the Fifth Amendment requires the Government to pay property owners for property it takes, even during economic emergencies. *Id.* at 126.[23] Significantly, it rejected Government insistence that valuation compensation be computed on a hypothetical, speculative basis. *Id.* at 146-47.

Second, the panel's decision relies upon a snapshot of value taken in the peak of the liquidity crisis when the definition of fair market value ("FMV") could not be satisfied (because in a national liquidity crisis there are no buyers and sellers free from compulsion of the circumstances). That is why the panel's decision flies in the face of controlling precedent expressly

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[23] Similarly, when the Government attempted to wipe out its financial obligations to World War 1 military insurance policy holders to save money during the Great Depression, this Court held policy holders had the right to a Fifth Amendment remedy, notwithstanding the economic emergency. *Lynch v. United States*, 292 U.S. 571 (1934).

permitting 'hold and wait' strategies to allow markets to normalize after economic emergencies and denies permission for the Government to value its takings based on 'fire sale' prices. *Bfp, supra* at 538-39; *Tahoe*, *supra*; *Kimball, supra*. *Accord, Anchor Sav. Bank, FSB v. United States*, 597 F.3d 1356, 1370 (Fed. Cir. 2010).

Third, the underlying purpose of the 'but for' test might be sound if it was needed to prevent property owners from using the Takings Clause to profit from a windfall at the expense of the public. But it is not needed. This Court already has a method of avoiding such windfalls—the black letter law doctrine of offsetting benefits. *Penn Central, supra* at 137. The Federal Circuit knows that doctrine well: it properly applied it to benefit the Government in *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) (*en banc*).

For reasons unknown, the Federal Circuit invented a new, unnecessary and incorrect method to avoid such windfalls when, eschewing the economic impact of what Government actually did, it required the dealers to prove the hypothetical economic impact of what might have happened if the Government did nothing.

The panel was oblivious to this Court's rejection of the Government's convenient concern about what might have happened in the hypothetical (not real) world. *Horne, supra*. And, as if that was not enough, another consequence of its novel 'but for' test was the unfair and unlawful switching of the burden of proof required by the offsetting benefits doctrine. The Government, not the dealers, was required to bear the burden of proof to establish offsetting benefits to

plaintiff's valuation, *CCA Assocs. v. United States,* 667 F.3d 1239, 1245 (Fed. Cir. 2011).

Finnin and Guetterman dutifully followed the law at trial by properly subtracting the value of the offsetting benefit of the Government's dealership reduction requirements (the specific Government action they complained about); the Government having made no proffer of evidence of offsetting benefits.

Fourth, if unreversed, the 'but for' test would immunize Government from liability when taking private property claimed 'worthless' in the absence of Governmental action. Simply put, it licenses the Government to opportunistically seize obviously valuable property without paying for it during an economic crisis. One's imagination reels at the limitless possibilities if this is to be the law.

II. THE METHODS USED TO DISMISS THE DIRECT TAKINGS CLAIMS CONTRADICT THIS COURT'S CONTROLLING PRECEDENTS AND DEPART SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT THE EXERCISE OF THE COURT'S SUPERVISORY POWER IS JUSTIFIED.

A. The Government Did Not Defend the Direct Takings Claim.

1. The direct takings claim was uncontested at trial.

The factual basis of the direct takings case rests on uncontested trial evidence proving the dealers' valuable core property right was their territorial exclusivity of the Chrysler brand to sell vehicles and related parts and services. Uncontradicted evidence

proved the Government required dealer terminations resulting in the involuntary transfer of those rights of exclusivity to itself, as the judicially admitted controlling shareholder and[24] beneficial owner of Chrysler, which were transferred later to other dealers for free.

The Government chose not to defend the direct takings claim at trial.

The CFC, inexplicably, made no findings of fact nor conclusions of law concerning the direct takings claim, despite it having been proven by the preponderance of the evidence (there being no contrary Government evidence or argument).

The legal basis of the direct takings claim is the principle that the Fifth Amendment protects the commercial property right to exclude competition through exclusive territoriality. This Court recently reiterated "the right to exclude is 'one of the most treasured' rights of property ownership" and "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests the Government cannot take without compensation." *Cedar Point, supra* at 382. "The economic value of that property right lies in the competitive advantage over others that [its owner] Monsanto enjoys by virtue of its exclusive"

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[24] App.265a. The Government had power over the disposition of the Chrysler and GM transferred dealerships. The Consolidated Appropriation Act of 2010, § 747, PL 111-117, 123 Stat. 3220 (Dec. 16, 2009). It is self-evident that without that power, the manufacturers could not have been required to return the franchises to the original dealers.

rights. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984).

Here, as in *Cedar Point*, the Government "appropriate[d] for the enjoyment of third parties the owners' right to exclude." *Id.* Where "the Government has physically taken property for itself or someone else—by whatever means", "a per se taking has occurred, and *Penn Central* has no place." *Cedar Point, supra.*

2. The direct takings claim was uncontested on appeal.

The direct takings claim was a centerpiece of the Finnin and Guetterman appellate briefs. The Government, again, chose not to defend this claim on appeal, despite being granted extra time and an increased word count. Nor did it offer an excuse for its lack of response.

The Government's subsequent briefs in *Cedar Point* are in complete agreement with the dealers' legal position here. Its' briefs informed this Court that an incontestable *per se* case for compensation categorically arises when it "provides authorization" or "deliberately brings it about" for third parties to physically take private property. *Cedar Point Nursery v. Hassid*, 2021 U.S. S.Ct. Briefs Lexis 11, No. 20-107, Jan. 7, 2021.

Like its *Cedar Point* arguments, it could not ethically cite any background principles of state property law justifying this Government-authorized taking because it admitted state laws barred the proposed terminations. *Id.*

B. The Panel's *Sua Sponte* Interjection of a Direct Takings Defense for the Government Violated Four Core Tenets of the Administration of Justice.

1. The panel violated the principle of party presentation.

Federal courts must "rely on the parties to frame the issues for decision". *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020. Known as 'the principle of party presentation', that requirement is fundamental to our adversarial system of adjudication and limits courts to "the role of neutral arbiter of matters the parties present." *Id.*

That principle is based upon "the premise the parties represented by competent counsel know what is best for them and are responsible for advancing the facts and argument entitling them to relief." *Castro v. United States,* 540 U.S. 375, 386 (2003) (Scalia, J., concurring). "[T]his must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us." *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold concurrence).

Only in narrow and extraordinary circumstances, not present here, may an appellate court raise a defense on its own initiative. *Wood v. Milyard*, 566 U.S. 463, 472 (2012). "A federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system." *Id.* Writing for the Court, Justice Ginsberg emphasized Judge Arnold's concurrence in *Samuels*, *supra*, which explained that "courts are essentially passive instruments of Government" and "do not, or should not,

sally forth each day looking for wrongs to right." *Sineneng-Smith, supra* at 1579.

The panel's intervention to rescue the Government from liability on the direct takings claim was a heavy-handed tipping of the scales of justice. Not only does the judiciary need to be impartial: it needs to "appear to be such". *Id.* at 890 (Roberts, C.J., dissent). By raising its novel defense for the Government, *sua sponte*, the panel abandoned its role as a neutral arbiter even though "it is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process". *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009).

The party presentation rule prohibited the panel from interposing a defense to benefit the Government, much less creating one out of whole cloth.

2. The refusal of supplemental briefing after the surprise injection of a novel defense violated controlling precedent.

The dealers' motion to reply to the novel defense, interposed by the court without opportunity to reply in advance, was met by an unexplained refusal. It is a *sine qua non* that "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." *Day*, *supra* at 210.

The panel abused its discretion by failing to provide the dealers with fair notice of its intent to inject a defense to benefit the Government and to permit supplemental briefing before or after acting upon its own initiative.

3. Controlling precedents forbid interposing a waived or forfeited defense.

The Government either waived or forfeited any direct takings defense by its silence. "[F]orfeiture is the failure to make the timely assertion of a right while waiver is the intentional relinquishment or abandonment of a known right." *Kontrick v. Ryan*, 540 U.S. 443, 458, fn. 13 (2004). 470, fn. 4 (2012). "A party forfeits the right to advance on appeal a non-jurisdictional claim, structural or otherwise, that he fails to raise at trial." *Freytag v. Commissioner,* 501 U.S. 868, 894 (1991) (Scalia concurrence). Forfeiture is "not a mere technicality and is essential to the orderly administration of justice." 9C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2472, p. 455 (1971).

Federal courts are not permitted to decide cases on arguments waived by a party. This Court used its supervisory authority to reverse the Tenth Circuit for abusing its discretion when it raised a defense *sua sponte* for the Government, holding that "[a] court is not at liberty . . . to bypass, override, or excuse a State's deliberate waiver of a . . . defense. *Wood*, *supra* at 466. It reversed the Ninth Circuit for abusing its discretion when, *sua sponte*, it raised an outcome-determinative issue not raised by the parties. *Sineneng-Smith, supra* at 1579.

4. The decisions below are contrary to controlling decisions mandating fairness and justice in every takings case.

The panel decision conflicts with the fairness and justice required "in all instances" of takings cases. *Murr*, *supra*. *Arguendo*, even the erroneous

'but for' test may have at least satisfied the 'fair and just' test of *Armstrong v. United States*, 364 U.S. 40, 49 (1960), if it compared the Government's action (terminating dealers without compensation) to a hypothetical Government decision not to act (what would have happened if it had not blocked Chrysler's proposal to allow dealers to purchase each other). But it did not.

There was nothing fair or just about the panel's injection of its novel 'but for' doctrine to rescue the Government from liability. There was nothing fair or just for the Federal Circuit to refuse to apply controlling precedents.

III. THE RULING THAT DEALERS' PROPERTY WAS WORTHLESS IN A HYPOTHETICAL BANKRUPTCY WORLD IS CONTRARY TO CONTROLLING PRECEDENTS OF THIS COURT.

A. The Affirmance That Rejection Would Render the Dealers' Property Worthless Is Contrary to *Mission Product.*

The CFC required the dealers to prove their property had economic value in an imaginary world where the Government did not intervene.[25] The CFC found the dealerships would be worthless in the hypothetical world because two assumed events would both occur: (1) Chrysler would declare bankruptcy, (2) the bankruptcy court would 'reject' the franchise agreements which, as a matter of law, would auto-

[25] That required ignoring the law (the Government's testimonial admission it has the duty to intervene) and key facts (the Government's decision that GM and Chrysler were too important to fail).

matically render the dealers' franchisee rights worthless.[26]

The panel's affirmance was dead wrong. It is established law that rejection does not "vaporize" the rights of franchisees or leave them worthless. *MPH, supra* at 1659. Like the CFC, it conflated *rejection* with *avoidance*, diametrically opposed concepts both in substance and procedure controlling the survival of franchisee rights in bankruptcy. *Id.* at 1663.

Rejection is treated as franchisor's breach of contract that leaves intact the rights of franchisees. Rejection of an executory contract "cannot rescind rights that the contract previously granted." *Id.* at 1666. In contrast, the substantive effect of an *avoidance* order is elimination of franchisee rights.

Government briefs and oral argument in *MPH,* along with its legal manuals, painstakingly distinguish rejection from avoidance. "Rejection does not extinguish the contract. . . . the terms of the contract still control the relationship of the parties." DOJ Civil Resource Manual, *Executory Contracts in Bankruptcy*, § 60. It admitted that terminating franchisee rights would "significantly disrupt a licensee's strong reliance interests", *MPH* Briefs, *supra* at 42-43, and warned extinguishing franchisee rights through rejection would be "a damaging precedent . . . that . . . undermines the . . . stability and value of trademark licenses". *MPH*, 2018 U.S. S.Ct. Oral argument, LEXIS Tr. 24:3-11

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[26] Petitioners contested being required to speculate what would happen if the Government did not intervene and contested the second assumption as a matter of law because a bankruptcy court cannot reject franchise agreements where franchisee assistance is needed to efficiently liquidate estate assets.

(Feb. 20, 2019). Furthermore, the Government represented to this Court that, procedurally, an "[a]voidance requires an adversary proceeding, akin to a 'full-blown federal lawsuit,' whereas rejection does not." 2018 U.S. S.Ct. Briefs LEXIS 4815 at 34, fn. 4.

The panel repeated the CFC's legal error in failing to distinguish between rejection and avoidance.

Furthermore, *MPH* and other controlling cases hold that rejected franchise contracts still contain property rights inhering in those franchise agreements. As a matter of law, the dealers' property rights included a suite of rights inhering in the franchise contract. This Court's precedents unambiguously protect the entire "group of those rights inhering in the" franchise contract. *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 82, fn.6 (1980); *United States v. General Motors,* 323 U.S. 373, 378 (1945).

The Government never contested the definition of those franchise rights, established as unrebutted fact by industry experts and dealers, and virtually identical to the list of continuing dealer activities barred by the bankruptcy court's order. The CFC was silent on the crucial fact that Government and dealer witnesses agreed the dealers would have maintained profitable service operations as Chrysler-branded dealers for three to seven years. *See*, III.C, *infra*.

The panel compounded its errors by affirming the CFC's refusal to consider the scope of rights inhering in the franchise agreements. The panel's reliance on *Taylor v. United States*, 959 F.3d 1081, 1087 (Fed Cir. 2020), affirming that the only property 'taken' was the franchise agreement, conflicted with the requirement to recognize the "entire group of

rights inhering in" the contract. *Pruneyard*, *supra* (emphasis added); *General Motors, supra*. That error disregarded the wide range of valuable rights inhering in the franchise agreements.

The panel's rejection of the dealers' economic valuations of their franchise agreements was based on another two-step reasoning process: "they rested on premises about how Chrysler or a bankruptcy trustee would have treated the franchise agreements in . . . liquidation" and that the expert opinion of Ted Stockton assumed "the franchise agreements of the Chrysler franchisees would remain in full force and effect". *Id.* It was wrong on both points because the concept of rejection is entirely irrelevant. Under *MPH*, regardless of the breach of Chrysler's duties as franchisor, the dealers' franchisee rights would have remained intact.

The Government's strategy on appeal, again, was to make no reply to the dealers' comprehensive briefing of the law showing that the worthlessness conclusion was founded on fundamental legal error concerning 'rejection'. When the panel ignored the law concerning rejection, it was not an ordinary error: it was a refusal to follow this Court's controlling cases to provide the Government with an escape to Fifth Amendment's liability.

B. The Affirmance of Requiring Proof of Fair Market Value ("FMV") Is Contrary to *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) and *Bfp*, *supra*.

Private property is not rendered worthless just because no marketplace for buying and selling business property exists at the height of a national crisis.

The panel's affirmance of the CFC's FMV methodologies was contrary to *Kimball* and *Bfp* which held that, where there is no market price due to exigent circumstances and because fairness requires avoidance of extreme outcomes and inflexible tests, the use of the loss of income streams is "the proper measure of compensation is the rental that probably could have been obtained."[27]

C. The Affirmance of the CFC's Failure to Make Historical and Subsidiary Fact Findings Concerning the Profitability of the Exercise of Franchisee Rights After Rejection is Contrary to *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948) and *U.S. Bank National Ass'n, v. the Village at Lakeridge, LLC.*, 138 S.Ct. 960 (2018).

In disregarding this Court's holding in *MPH*, the CFC failed to discharge its duty to make proper historical and subsidiary fact findings concerning the uncontroverted evidence establishing that the dealers would have continued to profit from their franchisees' rights even after a hypothetical Chrysler bankruptcy rejection.

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[27] The affirmance discredited Stockton's expert opinion for including "plaintiff's income stream profits" and "other elements of value" "separate from the franchise agreement" in conflict with *Kimball* and *Bfp*. *Compare*, *Anaheim Gardens, L.P v. United States*, 953 F.3d 1344 (Fed. Cir. 2020) ("lost future rental income, rather than fair market value, is the appropriate measure of economic impact because that is what the Government actually took from them. The FWPs' position is that a change in fair market value approach would not accurately account for the fact that the Governmental action targeted their "going business concerns." *Id.* 1354.).

A prime example was the Government's crucial admission that its "analysis suggest[ed] that Chrysler's disappearance need not completely destroy its dealers. Most of the jobs and profits in a dealership come not from sales of new cars but from service and used cars. Both would be needed if Chrysler liquidated." (emphasis added).[28]

Reinforcing that admission, additional trial evidence proved the suite of franchisee rights enabled the dealers who were not forced to be terminated to continue profitable Chrysler-branded operation post-liquidation. It was unrebutted that 31,000,000 Chrysler vehicles would need service and parts, and that franchisee rights would provide the post-bankruptcy dealers with competitive advantages for service-related work including branded dealers, branded training, branded parts, branded service provider computer diagnostic electronics and engine system codes, Chrysler specialized tools, and goodwill of established Chrysler locations like Finnin Motors and Guetterman Motors, who had been operating in their communities for decades.

Those continuing valuable franchisee advantages were independent of Chrysler warranty payments. Because customers would pay for services and parts out of their pockets without Chrysler warranties, Government and plaintiff witnesses agreed customer-pay[29] repairs would be profitable for three to four years. The Government offered no defense for the CFC's obliviousness to uncontradicted evidence that

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[28] App.263a.

[29] "Customer-pay" means no warranty would cover the bills for the labor or parts for the repair.

warranties also would be available from private sources. These failures to make findings conflict with the controlling decisions in *U.S. Bank, supra* at 966 and *Gypsum*, *supra* at 395-96,

Also, in conflict with *Gypsum*, *supra,* the panel affirmed erroneous conclusions that franchisee rights to service millions of Chrysler vehicles were worthless upon rejection and that Ted Stockton's expert opinion for the dealers was properly excluded for assuming the Government would have continued to cover Chrysler warranties after Chrysler liquidated in a hypothetical 'but for' world.

That affirmance was simply wrong. Stockton presented separate valuation scenarios, one of which expressly excluded Chrysler warranty payments. He calculated value with and without assumption of Chrysler warranties,[30] and "backed out" warranties. Tellingly, no Government expert trial witness attacked Stockton's economic analysis.[31]

Finally, it was uncontroverted that the Government believed the dealers' exclusive Chrysler territories such as those of Finnin and Guetterman would be more profitably operated by other franchisees. It acted to take and transfer these rights despite knowing that the ineffective Chrysler dealerships were purchased already by other dealers. The CFC made no findings about these facts and the panel was oblivious to cited, controlling law that the Government must compensate prior owners when it takes property to

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[30] Stockton's expert testimony and exhibits painstakingly differentiated warranty from non-warranty assumptions.

[31] Colonial's case materially differs from Taylor's.

divert it to other uses it decides would be more productive, provide a political advantage to the current administration, or benefit society as a whole. *International Paper Co. v. United States*, 282 U.S. 399, 408 (1931).

IV. TRADITIONAL CONSIDERATIONS SUPPORT THE ISSUANCE OF A WRIT OF CERTIORARI.

A. The Petition Does Not Request Mere Correction of a Legal Error.

Petitioners are not complaining about a few isolated errors of law: what occurred below was a wholesale indifference to controlling precedents amplified by blatant violation of the party presentation rule and denial of the right to reply to a *sua sponte* defense interjected to benefit the Government. Such indifference could only have been occasioned by result-oriented reasoning.

Result-oriented reasoning is universally condemned as an improper judicial decision-making method. *Me. Cmty. Health Options v. United States*, 140 S.Ct. 1308, 1331, fn. 14 (2020).[32] It is the converse of the universal belief that "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). As a former federal appellate judge implored: "Now, more than ever, it is vital that the judiciary reject result-oriented decision-making and adhere strictly to the ideal of principled decision-making, both

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[32] Douglas Lind, *The Mismeasurement of Legal Pragmatism*, 4 WASH. U. JUR. REV. 213, 217-18 (2012); Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 8 (1983).

to defend constitutional liberties and to defend itself against an institutional devaluation in the eyes of the public." Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 840.[33]

The panel's use of result-oriented reasoning, clearly "a Machiavellian, end-justifies-the-means process." Robert G. Miller, *Perspective: Machiavellian Justice: A Response To "Law, Morality, and Judicial Decision-Making*", 65 TEX. B.J. 916, 917 (2002), is unconstitutional because it is beyond debate that "the Constitution . . . is concerned with means as well as ends." *Cedar Point, supra* at 383.

The exercise of this Court's Rule 10(a) supervisory power is the only obstacle to the Federal Circuit's determined dismantling of the guarantees of the Takings Clause. *Sienang-Smith, supra,* is the most recent but not the only case where this Court invoked that power. *See*: *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010); *Frazier v. Heebe*, 482 U.S. 641, 645 (1987); *Khanh Phuong Nguyen v. United States*, 539 U.S. 69, 74 (2003); *see also*, *Kalamazoo County Rd. Comm'n v. Deleon*, 574 U.S. 1104 (2015) (Alito, J., dissenting).

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[33] Federal Circuit judges themselves have openly criticized the "result-oriented judicial activism" occurring in that circuit. *See* dissents of Judges Moore and O'Malley in *Am. Axle & Mfg. v. Neapco Holdings LLC*, 966 F.3d 1347, 1366 (Fed. Cir. 2020) and 967 F.3d 1285, 1305 (Fed. Cir. 2020) (patent cases).

B. Left Unchecked, the Federal Circuit's Expansion of the 'but for' Test and Side-Stepping of Controlling Precedents Will Have a Significant Impact Beyond the Decision.

1. Continued Extension of the 'But For' Test Will Unduly Expand the Immunization of the Government from Takings Liability.

Justice Thomas' dissent in *Bridge Aina, supra,* analyzed the abysmal state of Takings Clause jurisprudence. Noting that only 1.6% of 1,700 *Lucas*[34] claims were successful from 1992-2017, he cited legal scholars who concluded "[t]he current [regulatory takings] doctrine is "so vague and indeterminate that it invites unprincipled, subjective decision making" dependent upon the decision-maker." *Id.* (emphasis added). Justice Thomas' purposeful citation of that concern about unprincipled decision-making enabling outcomes dependent on the identity of the decision-makers provides a frame of reference for focus on the actual data directly related to it.

Additional federal court statistical data further substantiates his concerns because it demonstrates that:

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[34] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

- Where the decision-maker was the Supreme Court, Takings Clause relief was granted to 35% of private property owners from 1979-2015. *See*, Robert Meltz, *Takings Decisions of the U.S. Supreme Court: A Chronology*, Congressional Research Service, 7-5700, 97-122 (July 20, 2015).[35]
- In stark contrast, where the decision-maker was the Federal Circuit, the claims of private property owners were found sufficient to justify monetary relief in only two of 81 takings case appeals from 2001-2020. App. 253a.
- It is shocking that the Federal Circuit affirmed only one of 16 CFC trial verdicts entered in favor of private property owners between 2001-2020. App.255a.

Review by this Court will help assure private property owners that the judicial system is not rigged in favor of the Government and ensure that the Fifth Amendment's guarantee of property rights is upheld.

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35 *See*, Daniel R. Mandelker, *Litigating Land Use Cases in Federal Court: A Substantive Due Process Primer*, 55 REAL PROP., TRUST & ESTATE L.J. 69, 96-97 (Spring 2020); F. Patrick Hubbard, Shawn Deery, Sally Peace, John Fougerousse, *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?* 14 DUKE ENVTL. L. & POL'Y F. 121 (2003-04); Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695 (2000).

2. Review Is Necessary to Assure Fair Hearing to the GM Dealers Whose Case Awaits the Finality of the Chrysler Dealer's Case.

This case was filed more than 13 years ago by the GM and Chrysler dealers. After three motions to dismiss, one interlocutory appeal, and an unsuccessful Government motion for summary judgment in the GM side of the case, the CFC acceded to the Government's request and bifurcated the GM dealer claims. The CFC order stopped all progress in the GM side of the case until a final decision is issued in the Chrysler case.

In contrast to the Federal Circuit's rationale for granting interlocutory appeal to provide guidance to the CFC in trying the dealers' claims, here the panel issued its decision as non-precedential. That designation had the practical effect of denying guidance to the CFC of how to evaluate the GM dealers' takings claims.

Review by this Court is necessary to provide guidance in what surely will be another lengthy and expensive case to prosecute and to provide prophylactic avoidance of another appeal.

C. This Case Provides a Unique Opportunity to Answer the Questions Presented Here and to End the Result-Oriented Reasoning Used by the Federal Circuit to Bypass This Court's Controlling Precedents.

There are no aspects of this case which would distract from the ability of this Court to direct the Federal Circuit to enforce the Fifth Amendment by following its precedents and to avoid even the

semblance of result-oriented decision making in takings cases favoring the Government.

Granting review by issuing a writ of certiorari will make less likely federal Takings Clause jurisprudence will continue to treat it as "a poor relation" of the Constitution. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994); *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2170 (2019); *Cedar Point*, *supra; Pakdel v. City and County of San Francisco*, 594 U.S. ___ (2021).

CONCLUSION

Constitutional guarantees are only as effective as the ability to vindicate them, Alexander Hamilton, FEDERALIST No. 78 and 80 (1788). This Court's supervision under Rule 10(a) is necessary to ensure enforcement of the Fifth Amendment's Takings Clause.

The petition should be granted for the reasons stated above.

Respectfully submitted,

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