NO. 21-233

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

REPLY BRIEF OF PETITIONERS MIKE FINNIN MOTORS, INC., AND GUETTERMAN MOTORS, INC.

RICHARD FAULKNER
12770 COIT RD., SUITE 720
DALLAS, TX 75251
(972) 972-1500

JAMES H. ARENSON
ARENSON LAW GROUP, P.C.
425 2ND ST., SE #900
CEDAR RAPIDS, IA 52401
(319) 220-5850

HARRY W. ZANVILLE
COUNSEL OF RECORD
10740 EL MARBEA LANE
LA MESA, CA 91941
(619) 400-7164
HWZLAW@GMAIL.COM

NOVEMBER 16, 2021 *COUNSEL FOR PETITIONERS*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

RULE 29.6 STATEMENT

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

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

REGULATIONS

OTHER AUTHORITIES

REPLY BRIEF OF PETITIONERS MIKE FINNIN MOTORS, INC., AND GUETTERMAN MOTORS, INC.

I. THE GOVERNMENT DID NOT DISPUTE THE PETITION'S STATEMENT OF FACTS, CORE LEGAL PRINCIPLES, OR ANSWER THE QUESTIONS PRESENTED.

Even after 84 days of scrutiny, the Government could not dispute any of the facts stated in the Petition. It never disagreed with the legal predicate of this case: that the Government must pay adequate compensation to citizens whose private property[1] it took and diverted to others who it hoped would benefit the public by using it more productively, contrary to *International Paper Cop. v. United States*, 282 U.S. 399, 408 (1931). It made no attempt to address the three questions presented for review in the Petition.

This Court can proceed with the confidence of knowing that the Government did not disagree that:

- The Government required the significant reduction of Chrysler and GM franchised dealers as a condition precedent to continued performance of its duty to act as the lender of last resort during the liquidity crisis it helped cause and deepen. (*Mike Finnin Motors et al.* Petition ("Pet.") 3-5).
- The Government acted on its belief that unless it created a Plan B to circumvent state laws

[1] The private property here included the exclusive right to sell and service Chrysler-branded products within defined territories.

protecting franchised motor vehicle dealers from involuntary termination, it would be required to purchase the number of dealerships necessary to achieve its goal of reducing the distribution network to the 'right-size'. (Pet.5).

- The Government's Plan B strategy was to evade paying the dealers for their property by using bankruptcy to preempt protective state franchise laws. ATF Chief Steven Rattner justified the refusal to pay the dealers for their property as preventing "a waste of taxpayer resources." (Pet.5-6).
- Because the Government's real-world valuation of the average dealership to be terminated in 2008-09 was an estimated $1 million, compelling termination of the Chrysler dealerships in bankruptcy rather than purchasing them saved it nearly $1.5 billion (an amount it later contextually admitted was "relatively trivial"). (Pet.5).
- 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, the terminated dealers did not share the sacrifice: they were the sacrifice. (Pet.6).
- This sacrifice was unnecessary: attrition and cross dealer buyouts would have satisfied the Government's goal to reduce the number of dealers without cost. (Pet.7).
- Regardless of whether the Government was right or wrong about the economic desirability

of terminating nearly 2,000 franchised dealers, its desired dealership reduction could have been accomplished without wiping out the value of property owned by the dealers. (Pet.7).

- Only the Government demanded a plan whose outcome was the involuntary termination of dealers without compensation. (Pet.8).
- The Government took the dealers' exclusive territorial rights to itself[2] and gave them to other dealers—for free—hoping the replacement dealers would operate their new territories more profitably. (Pet.8).
- It acted despite knowing that dealer buy/sells and attrition already had eliminated underperforming dealers. (Pet.34). *See*, Appx. 1: (Chrysler's "Project Genesis to date has already heavily rationalized low performing dealers" and proposed new cuts would "largely [be] eliminating additional good dealers").

---

[2] It does not deny " . . . the Government required dealer terminations resulting in the involuntary transfer of those rights of exclusivity to itself, as the judicially admitted controlling shareholder and beneficial owner of Chrysler, which were transferred later to other dealers for free." (Pet. 23).

II. THE GOVERNMENT IS LIABLE FOR THESE DIRECT TAKINGS.

A. The Government Admits Not Defending the Direct Takings Claim.

The Government's Brief in Opposition ("Opp.Br.") admits (Opp.Br.11, fn *) it did not defend the direct takings claim below. (Pet.24).

B. The Government Cannot Be Excused from Its Decision Not to Oppose the Direct Takings Claim.

The Government airily floats the notion it should be excused from its decision not to defend the direct takings claims because "there was no need for the government to respond" to an "isolated and unsupported direct takings claim". *Id*.

1. The Government Waived and/or Forfeited Its New Legal Arguments.

Its excuse is squarely contrary to the doctrines of waiver and forfeiture. (Pet.27). The Government did not deny the accuracy of the Petitioners' comprehensive briefing of waiver and/or forfeiture doctrines. Instead, it blithely ignored extant law that legal arguments not raised below may not be considered. The Court should refuse to consider them.

2. Regardless, the Government's New Legal Arguments Are Contrary to Established Law.

The Government's characterization of the direct takings claim as being "isolated or unsupported" is untrue. The dealers asserted their direct takings

claim[3] in the pleadings, in pretrial disclosures of the issues to be tried, in opening statement, through unchallenged dealer and expert testimony, in closing argument, and in multiple appellate briefs.

The argument that franchise contract rights cannot be directly, physically, or taken *per se* by the Government is contrary to established law. The Government asserts its actions cannot constitute a direct or *per se* taking because its acts "did not amount to a right of physical exclusion, enforceable against the general public, that the government could physically appropriate." (Opp.Br.9). No legal principles support that argument.

It is black letter law that the Fifth Amendment protects personal and intangible rights from being taken without adequate compensation. "That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984).[4] The dealers' franchise agreements contained a suite of personal

---

[3] Variously described as a direct, physical or *per se* taking.

[4] The Government's actions here resulted in the dealers' loss of their rights of exclusion, possession, use, and disposition; the three essential characteristics of property protected by this Court. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). When the Government acquires or destroys the intangible property of a citizen, it is liable. *Id.* In *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419 (1982), this Court explained that "To the extent that the government permanently occupies physical property, it effectively destroys each of these rights." Among those, "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Id.* at 435.

and intangible property rights protected by state and federal law. (Pet.48, 51).[5]

The core of the dealers' franchise agreements was their exclusive right to sell and service Chrysler-branded products which enabled dealers to exclude usurpation by the public. As this Court stressed, "We cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary, it is a 'fundamental element of the property right,' . . . 'that cannot be balanced away.'" *Cedar Point Nursery v. Hassid,* 141 S.Ct. 2063, 2077 (2021) (internal cite omitted). It cited with approval Thomas Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) (calling the right to exclude the "*sine qua non*" of property). [6] *Id.* at 2073.

The Government did not cite any legal principle conditioning the protection of intangible personal property rights on the ability to physically exclude someone from violating those rights of exclusion.

Regardless of the semantics, the Government actions constituted a direct, *per se* taking.

---

[5] Government, six times, tried to substitute its definition of the property that was taken. (Opp.Br.6-8) (the dealers complain of the loss of their rights within the franchise agreement). The Government does not deny that the Fifth Amendment protects the property rights inhering in the franchise agreements. (Pet.30).

[6] "The law with respect to intangible rights in intellectual property is, if anything, even more striking in the degree to which the property right and the right to exclude go hand-in-hand. Copyrights, patents, trademarks, and trade secrets are all recognized as intangible forms of property. In each case, the core of the property right is the right to exclude others from interfering with or using the right in specified ways:" *Id.* at 749.

III. THE GOVERNMENT DID NOT DENY THE FEDERAL CIRCUIT'S INTERJECTION OF A DIRECT TAKINGS DEFENSE FOR THE GOVERNMENT AND RELATED DECISIONS WERE UNLAWFUL.

The Government did not deny the Federal Circuit's multiple abuses of discretion related to its raising defenses for the Government:

- The panel, *sua sponte,* interjected a direct takings defense for the Government that it relied upon to dismiss the direct takings claim;
- The panel violated the principle of party presentation;
- The Federal Circuit's refusal of supplemental briefing after its own surprise injection of a novel defense violated controlling precedent;
- Controlling precedents forbid interposing a waived or forfeited defense; and
- The decisions below were contrary to controlling decisions mandating fairness and justice in takings cases.

That the Government is utterly unconcerned with clear abuses of judicial discretion emphasizes the necessity for supervisory review.

IV. THE GOVERNMENT MADE NO ATTEMPT TO DEFEND THE FEDERAL CIRCUIT'S 'BUT FOR' TEST.

The Petitioners detailed why the Federal Circuit's novel "but for" test is bad law and a growing threat to viability of the Takings Clause of the Fifth Amendment. The Government's response: complete silence.

The Government did not deny these dealers' arguments are correct:

- *Horne v. Dept. of Agric.*, 576 U.S. 351 (2015) *precisely* prohibits the kind of hypothetical analysis required by and inherent in the Federal Circuit's 'but for' test. (Pet.17);
- *Tahoe Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002) and *Cedar Point*, *supra*, prohibit dismissal of the direct takings claim for failing to satisfy an element of a regulatory takings case. (Pet.11);
- *Ark. Game & Fish Comm'n v. United States,* 568 U.S. 23 (2012) prohibits carving out a categorical exception to Takings Clause liability. (Pet.15)*;* and
- *Penn Cent. Transp. Co., v. City of New York,* 438 U.S. 104 (1978) requires balancing, not ignoring, crucial *ad hoc* factors. (Pet.15-16).

V. THE GOVERNMENT MADE NO ATTEMPT TO DENY THE ILLEGALITY OF APPLYING OF A REGULATORY TAKINGS DEFENSE TO THIS DIRECT TAKING CASE.

Even if the 'but for' test, *arguendo*, was valid in a regulatory takings case, the Petition carefully applied controlling law to demonstrate the prohibition of its importation into direct takings case analyses. (Pet.11-13). The Government's response: complete silence.

VI. THE GOVERNMENT WAIVED ITS *MISSION PRODUCT* ARGUMENT THAT THE DEALERS' PROPERTY WAS WORTHLESS AND, EVEN IF IT HAD NOT, ITS NEW THEORY IS WRONG AS A MATTER OF LAW.

A. The Government Waived and/or Forfeited Its Absurd Argument Concerning *Mission Product*.

In opposing certiorari, the Government asserts—for the first time—the dealers were required to appeal the real-world bankruptcy rejection order in 2010 to preserve their claims that the rejection of their franchise contracts did not terminate their hypothetical franchisee rights. The Government waived and/or forfeited this defense on this issue.

B. The Government's *Mission Product* Argument Is Ridiculous.

The Government complains that the dealers "identify no reason" that "they would have retained greater rights had their franchise agreements been rejected" "in the but for world than they did when" they "were rejected" "in the real world." (Opp.Br.13).

This Court held in *Mission Product Holdings Inc., v. Tempnology LLC*, 139 S.Ct. 1652 (2020) that a bankruptcy court rejection cannot terminate franchisee rights (not franchisor rights) under the plain language of 11 U.S.C. § 365. The Government's own legal manuals and arguments to this Court in *Mission Product* support the dealers position. (Pet.28-31).

The Federal Circuit's requirement to evaluate what would have occurred in a hypothetical bankruptcy

court cannot mean that the Federal Circuit (or any court) could require the assumption a hypothetical court would commit the same grievous error in violation of the statute that the bankruptcy court did in 2010. The converse is surely true: the CFC or Federal Circuit must assume a hypothetical court will obey the law–not disobey it. It is truly shocking that the Government thinks it can fool this Court into assuming a hypothetical bankruptcy court would violate black letter law that distinguishes rejection from avoidance.

It is a legal certainty the dealers would have retained their franchisee rights, including their exclusivity rights, even after a rejection. *Ipso facto*, that the Chrysler franchisee rights remained intact negate the loss of all economic value of being a branded Chrysler dealer.

C. The Petition Properly Described the Uncontroverted Evidence That the Dealers Would Have Continued to Profit from Using Their Franchisee Rights After a Hypothetical Bankruptcy Rejection.

The Government's own analysis admitted that the dealers would have remained in business and profited even if Chrysler hypothetically liquidated. The Government did not deny the accuracy of the Petition's quote of the Government's own crucial admission 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." (Pet.8, 33) (emphasis added). Government and dealer witnesses agreed that the lifespan of nearly 31,000,000 Chrysler vehicles would

result in continued sales of service and parts for years by these dealers who had the advantage of being branded Chrysler repair facilities known and relied upon by their loyal customers.

The dealers detailed a wide range of uncontested facts supporting the likelihood of profitability even if Chrysler liquidated. (Pet.33-34). As an example, they detailed the non-warranty profits that would have continued in the post-liquidation operation of Mike Finnin Motors. That the dealers could have maintained profitability solely based on sales of service and used cars also was based on the historic fact that federal regulations prohibited the manufacture and sales of new vehicles to the public for several years during and after World War II. *See*, *e.g.*: Federal Register Volume 7 No. (January 6, 1942).

D. The Government Simply Did Not Respond to the Dealers' Arguments That It Was Clear Legal Error to Require Proof of Fair Market Value and the Failures to Make Historical and Subsidiary Fact Findings.

The Government made no response to the lower court's failure to make required historic and subsidiary fact findings. (Pet.32).

VII. THE GOVERNMENT DID NOT DENY THAT PUBLIC POLICY CONSIDERATIONS SUPPORT REVIEW HERE.

The Government did not deny that the last twenty years of the Federal Circuit's decisions disproportionately favor the Government and does not deny that these one-sided outcomes are the product of

result-oriented reasoning which circumvent this Court's controlling precedents. The decision below continues the expansion of the Federal Circuit's 'but for' test and side-stepping controlling precedents.

VIII. EVEN AS THE GOVERNMENT CONCEDED THAT THE LEGAL ISSUE OF WHETHER THE GOVERNMENT COERCED CHRYSLER IS NOT BEFORE THE COURT, IT CONCOMITANTLY DID NOT DENY THAT ALL THE CONTRARY CHRONOLOGIC FACTS ARE ACCURATE.

The Government candidly admitted the issue of whether it is responsible for seizing the dealer's property rights is not before the Court. (Opp.Br.7). Nevertheless–seven times–it asserts the legal conclusion that Chrysler was solely responsible for the dealers' loss of property. (Opp.Br.5, 7, 8, 15).

The Government never denies targeting the dealers' rights to exclusivity of territory to benefit itself—it merely points the finger at Chrysler with the claim: 'they did it, not us'.[7]

Although the Government repeats its conclusory free will/no coercion mantra, it was unable to deny the five key chronologic facts of the Petition proving Chrysler was opposed to the uncompensated destruction of the dealer's property. (Pet.6-7):

---

[7] Compare, *Zoltec Corp. v. United States*, 672 F.3d 1309 (Fed. Cir. 2012) (*en banc*), where the Government, through a third party, used a patented process without permission or paying for it, it did not conjure about such an outrageous theory. But there the Government did not appropriate the rights to exclusively market the invention—for if it had, it would have been a *per se* taking as here. The Government is responsible for takings of third parties in situations like this. *Cedar Point, supra.*

- Chrysler responded to the Government requirements by proposing to reduce the dealer network by 25% within 18 months through buy/sells and attrition without cost to the Government or Chrysler.
- The Government 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. (Reply.App.1a).
- Chrysler executives informed the Government the terminations were a "bad move" and its Board of Managers denounced the use of bankruptcy to reduce the number of dealerships.
- When 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 immediately before the Government deadline.

The dealers' briefing of the law addressing the coercion issue at the Federal Circuit remains unchallenged by the Government. The dealers are eager to address the coercion issue if certiorari is granted and its scope covers that issue. This is the perfect case for that increasingly critical judicial discussion.

CONCLUSION

Petitioners respectfully request issuance of a writ of certiorari.

Respectfully submitted,

HARRY W. ZANVILLE
COUNSEL OF RECORD
10740 EL MARBEA LANE
LA MESA, CA 91941
(619) 400-7164
HWZLAW@GMAIL.COM

RICHARD FAULKNER
12770 COIT RD., SUITE 720
DALLAS, TX 75251
(972) 427-1500

JAMES H. ARENSON
ARENSON LAW GROUP, P.C.
425 2ND ST., SE #900
CEDAR RAPIDS, IA 52401
(319) 220-5850

COUNSEL FOR PETITIONERS

NOVEMBER 16, 2021

REPLY APPENDIX
BOSTON CONSULTING GROUP
REPORT TO GOVERNMENT

Confidential draft – do not distribute

OEMS start in different positions driving different results

GM	Chrysler
Limited aggressive prior consolidation of dealer network • Primarily attrition based historically	Project Genesis to date has already heavily rationalized low performing dealers
VP4 plan relies heavily on forced dealer closures which have higher share loss	Viability plan relies more heavily on consolidations which has smaller share loss
Significant elimination of low-performing dealers resulting in a significant long-term improvement in dealer network quality	Largely eliminating additional good dealers given past project efforts so limited upside
Larger near term share losses	More limited near-term downside losses
Greater upside potential long-term	Limited upside potential

Appx11858

Transcription:

OEMS START IN DIFFERENT POSITIONS DRIVING DIFFERENT RESULTS

GM	Chrysler
Limited aggressive prior consolidation of dealer network • Primarily attrition based historically	Project Genesis to date has already heavily rationalized low performing dealers
VP4 plan relies heavily on forced dealer closures which have higher share loss	Viability plan relies more heavily on consolidations which has smaller share loss
Significant elimination of low-performing dealers resulting in a significant long-term improvement in dealer network quality	Largely eliminating additional good dealers given past project efforts so limited upside
	
Larger near term share losses	More limited near-term downside losses
Greater upside potential long-term	Limited upside potential