NO. 21-_____

In the Supreme Court of the United States

TAYLOR & SONS, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

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

At the time the Government required Petitioners to cease doing business under their Chrysler dealer franchises, which are compensable property interests under the Fifth Amendment, each was profitable. But the courts below held that the government-caused shutoff of Petitioners' streams of income did not satisfy *Penn Central*'s economic impact element—and thus did not constitute a Fifth Amendment taking for which just compensation was due.

THE QUESTIONS PRESENTED ARE:

1. Does the fact that the property is generating profits on the date of taking satisfy the economic impact requirement to find a regulatory taking under *Penn Central*?

2. Does *Penn Central* provide an adequate rule of law to guide federal and state courts in determining whether a compensable Fifth Amendment regulatory taking has occurred?

PARTIES TO THE PROCEEDINGS

Petitioners and Appellants, Model 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.

Respondent and Appellee, Defendant Below

- United States

Other Appellants, Model Plaintiffs Below

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

CORPORATE DISCLOSURE STATEMENT

Petitioners — Taylor & Sons, Inc., Cedric Theel, Inc., Whitey's, Inc., RFJS Company, LLC, Jim Marsh American Corp., Livonia Chrysler Jeep, Inc., or Barry Dodge, Inc. — are not publicly traded, and no publicly held company holds 10% or more of their stock or the stock of a parent company.

LIST OF PROCEEDINGS

Petitioners are seven Model Plaintiffs selected from a total of 170 Chrysler dealers who filed suit in *Alley's of Kingsport, Inc. et al. v. United States*, Case No. 11-100C. The United States Court of Federal Claims consolidated Petitioners' case with two others, Case Nos. 10-647C and 12-900C, under the caption *Colonial Chevrolet Co. v United States*, Case Nos. 10-647C, 11-100C, and 12-900C. On November 2, 2020, the Court of Federal Claims issued a single opinion and entered judgment in the Model Plaintiffs' cases.

In the U.S. Court of Appeals for the Federal Circuit, the consolidated cases were docketed as No. 20-1185, *Taylor & Sons, Inc.*, *et al.*, and No. 20-1205, *Mike Finnin Motors, Inc. et al. v. United States*. The Federal Circuit issued its decision on December 29, 2020 and denied the combined petition for rehearing and rehearing en banc on March 17, 2021.

Petitioners are informed that the two other Model Plaintiffs and Appellants, Mike Finnin Motors, Inc. and Guetterman Motors, Inc., will be filing a separate petition for writ of certiorari. All Petitioners will rely on a single appendix. The Non-Model Plaintiffs' consolidated cases are stayed in *Colonial Chevrolet Co. v United States*, Case No. 10-647C, pending the resolution of these claims.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Taylor & Sons, Inc., Cedric Theel, Inc., Whitey's, Inc., RFJS Company, LLC, Jim Marsh American Corp., Livonia Chrysler Jeep, Inc., and Barry Dodge, Inc. hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Court of Federal Claims' opinion is reported at *Colonial Chevrolet Co. v. United States*, 145 Fed. Cl. 243 (2019), and reproduced at App.44a. The Federal Circuit's opinion is reported at *Taylor & Sons, Inc. v. United States*, 841 Fed. Appx. 205 (Fed. Cir. 2020), and reproduced at App.1a. The Federal Circuit's opinion denying the rehearing and rehearing en banc is unreported and reproduced at App.250a. The interlocutory appeal decision is reported at *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014), and reproduced at App.12a.

JURISDICTION

The Court of Federal Claims' jurisdiction was based on 28 U.S.C. § 1491(a)(1). The Federal Circuit's jurisdiction was based on 28 U.S.C. § 1295(a)(3). The Federal Circuit issued its opinion on December 29, 2020 and denied a combined petition for rehearing and rehearing en banc on March 17, 2021. This Court's July 19, 2021 Order extended the deadline to file petitions for writs of certiorari in all cases to 150 days from the date of the order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. V

The Just Compensation Clause of the Fifth Amendment provides:

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

STATEMENT OF THE CASE

Although the Great Recession severely impacted the American auto industry, each of the Petitioners remained profitable up to the date they were required by the Government to cease doing business as franchised Chrysler auto dealers. As an auto manufacturer, Chrysler LLC was forbidden by most state dealer franchise laws from owning its distribution network. Instead, like other U.S. auto makers, Chrysler LLC entered into comprehensive franchise agreements with local dealers, including Petitioners, who bought vehicles and branded parts from Chrysler, then sold them at retail to the public because state dealer franchise laws also require that new vehicles be sold at retail only by licensed dealers.[1]

Unlike its dealers, who derive most of their profits from servicing autos and selling Chrysler-certified used cars, Chrysler LLC was on the verge of collapse. President Obama's Auto Team did not appreciate that dealers are the only means a manufacturer, Chrysler LLC, had to sell its parts and vehicles and improvidently decided that there were too many Chrysler dealers. So, as a condition of receiving Troubled Asset Recovery Program (TARP) bailout money, the Government required Chrysler to terminate 25% of its dealers —including Petitioners—utilizing bankruptcy to avoid triggering federal and state law auto franchise protections.

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[1] *See, e.g.*, App.59a (Taylor & Sons, Inc. Agreement).

Holding that these terminated dealerships had no economic value on the date their franchise agreements were rejected in bankruptcy, despite the fact that all of these dealerships were generating positive cashflows (in one case income was up 420% over the previous year), the Court of Federal Claims found no taking, which the Federal Circuit affirmed. Although the Court of Federal Claims also based its decision on its conclusion that the Government had not coerced Chrysler to terminate 25% of its dealership network, the Federal Circuit's ruling is based solely on its economic impact analysis under *Penn Central Transportation Co. v. City of New York*.[2]

A. Factual background

Between 2007 and 2009, the country suffered a deep economic recession, caused in part by the Government's economic policies, which devastated the big three auto manufacturers: Chrysler LLC, General Motors, and Ford Motor Company. To help pull the country out of recession, the Government established the Auto Industry Finance Program and agreed in December 2008 to loan $4.7 billion to the former Chrysler LLC to keep the company temporarily in business.[3] One term of the loan agreement required Chrysler to rationalize (reduce the number of) its dealer network.[4]

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[2] 438 U.S. 104, 124 (1978).

[3] App.100a-App.101a. Fiat Chrysler Automobiles NV is an Italian-American multinational corporation, established in October 2014, created by transferring all the assets of Chrysler into the newly-established company.

[4] App.276a.

Shortly afterward the Government's Auto Team, headed by Steven Rattner (known as the "Car Czar"), took over and completed Chrysler LLC's merger negotiations with Italian carmaker, Fiat, the United Auto Workers, and Chrysler LLC's creditors. The Auto Team put together a deal to transfer nearly all Chrysler LLC's valuable assets to a newly formed corporation, Fiat-Chrysler—a deal that required corporate restructuring in bankruptcy.[5]

In bankruptcy court, the Government insisted that Chrysler LLC terminate hundreds of dealer franchises because, in the opinion of the Auto Team, "it would have been a 'waste of taxpayer resources' for auto manufacturers to exit bankruptcy when they knew the networks would still have to be reduced."[6] Bankruptcy procedures allowed the franchises to be rejected without triggering state and federal laws requiring compensation.[7] Although Chrysler LLC fought the Task Force's plan until the last minute, ultimately the Board of Managers had no alternative but to accept the Government's plan and file for bankruptcy.[8]

Simultaneously with Chrysler LLC's bankruptcy filing, on April 30, 2009, President Obama announced in a nationally televised speech that the Government had agreed to loan $6 billion to a new company to be formed in accordance with the term sheet the Auto Team had negotiated with Fiat, an Italian corporation.[9]

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[5] App.106a-App.104a.

[6] App.265a.

[7] App.106a.

[8] App.107a.

[9] App.181a.

Title to virtually all of Chrysler LLC's valuable assets were transferred to Fiat-Chrysler clear of creditors' claims.[10] Chrysler LLC, which retained virtually all of the debts, ceased doing business.[11]

On June 9, 2009, the bankruptcy court issued an order rejecting the terminated dealers' franchise contracts, prohibiting them from continuing in business as Chrysler dealers.[12] By June 10, 2009, 789 franchised dealerships had been shuttered.[13]

Despite the recession, each of the former dealers were profitable up to the date of termination. Each of these terminated franchised dealerships had been profitable throughout 2008 and up to April 30, 2009, the date of taking, and were generating income on the day they were shut down by order of the bankruptcy judge.[14] Barry Dodge turned a profit for every year it was in business and "[i]n 2009, the financial condition for [the] franchise was going well. . . . Barry's profits were up 420 percent[.]"[15] Cedric Theel's net profit was $776,745 in 2009.[16] Jim Marsh's "Chrysler dealership was profitable through the recession of 2006, 2007, 2008, and 2009 . . . even though Chrysler never invested

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[10] App.20a.

[11] *Id.*

[12] App.4a.

[13] *Id.*

[14] App.68a, App.75a, App.78a, App.82a, App.85a-App.86a, App. 88a, App.90a.

[15] Trial Tr. 1217:7-10 (Apr. 11, 2014).

[16] Trial Tr. 471:18-20 (Apr. 9, 2014).

any funds in the dealership."[17] Livonia Chrysler Jeep's profitability "was [$]916,084 in 2006, [$]793,307 in 2007 and [$]1,164,211 in 2008. . . . [The] dealership was consistently profitable through the recession[.]"[18] In 2009, RFJS was "profitable up until the termination of . . . the franchise."[19] Taylor & Sons was profitable in 2008 and 2009.[20] Whitey's, expanded during the difficult financial times and "did not anticipate that the value of [Whitey's] could potentially be at risk" [21] even though Chrysler was in financial trouble.

After their franchise agreements were rejected in bankruptcy, and because they were given no time for orderly wind down, on June 10, 2009, the rejected dealers—including Petitioners—were forced to sell their inventory of new Chrysler vehicles and parts at fire sale prices, terminate their employees, and shut down their showrooms.[22] Fiat-Chrysler also sent letters to the rejected dealers' former customers telling them who their new government-favored local dealer would be.[23] Many of the rejected dealers' competitors bought the inventories that the rejected dealers were forced

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[17] Trial Tr. 371:8-19 (Apr. 9, 2014).

[18] Trial Tr. 1358:23-1359:4 (Apr. 15, 2014).

[19] Trial Tr. 968:20-21 (Apr. 10, 2014).

[20] Trial Tr. 343:10-12 (Apr. 8, 2014).

[21] Trial Tr. 824:7-14 (Apr. 10, 2014).

[22] Trial Tr. 587:22-588:1 (Apr. 9, 2014).

[23] Trial Tr. 541:14-17 (Apr. 9, 2014).

to liquidate and hired many of the rejected dealers' best terminated employees.[24]

B. Procedural background

Following the 2009 restructuring of Chrysler LLC, 170 dealers whose franchise agreements had been terminated in bankruptcy sued for a taking of their dealer franchises in the U.S. Court of Federal Claims on February 17, 2011, in *Alleys of Kingsport, Inc. v. United States*, Case No. 11-100C.[25] Petitioners are seven Model Plaintiffs selected from a total of 170 Chrysler dealers who filed suit in *Alley's of Kingsport, Inc. et al. v. United States*, Case No. 11-100C. Their claims were consolidated with two other cases, *Colonial Chevrolet Co. v. United States*, Case No. 10-647C (lead), and *Spitzer v. United States,* Case No. 12-900C. Denying the Government's motion to dismiss these three cases, the trial court agreed to certify an interlocutory appeal to the Federal Circuit.[26] On appeal, under the name of *A&D Auto Sales, Inc. v. United States*, the Federal Circuit affirmed the trial court's decision denying the Government's motion to dismiss on April 7, 2014, but required the terminated dealerships to amend their complaint to allege economic impact resulting from the Government's action.[27] Citing *Penn Central*, the Federal Circuit held:

> [B]y necessity, proving economic loss requires a plaintiff to show what use or value its

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[24] *Id.*

[25] App.45a.

[26] App.46a.

[27] App.16a.

> property would have but for the government action. We have often rejected takings claims where plaintiffs failed to make such a showing. Absent an allegation that GM and Chrysler would have avoided bankruptcy but for the government's intervention and that the franchises would have had value in that scenario, or that such bankruptcies would have preserved some value for the plaintiffs' franchises, the terminations actually had no net negative economic impact on the plaintiffs because their franchises would have lost all value regardless of the government action. Having failed to include such allegations, the dealers fail to satisfy the pleading standards necessary to survive a motion to dismiss.[28]

On remand, the terminated dealerships amended their complaint to allege economic impact under the standards articulated by the Federal Circuit, and the trial court denied the Government's second motion to dismiss.[29] On December 4, 2015, the trial court consolidated this case with another pending case, *Colonial Chevrolet Co. v. United States*, No. 10-647C, severing from *Colonial* the claims of former General Motors franchisees so as to move forward with discovery and trial on only the claims of the terminated Chrysler dealers.[30] The trial court then ordered that the claims of nine Model Plaintiffs (including these seven terminated dealerships: Barry Dodge, Inc., Cedric Theel,

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[28] App.38a-App.40a.

[29] App.48a.

[30] App.49a.

Inc., Jim Marsh American Corp., Livonia Chrysler Jeep, Inc., RFJS Company, Taylor & Sons, Inc., and Whitey's, Inc.) be tried, staying the claims of the remaining Plaintiffs.[31]

1. The Court of Federal Claims

Trial of the Model Plaintiffs' claims commenced on April 8, 2019 and ended May 8, 2019.[32] The two main issues at trial were whether the Government coerced Chrysler LLC to terminate 25% of its dealership network and whether the Former Dealers suffered any economic impact from losing their franchises.[33] On October 2, 2019, the trial court issued its decision, holding that the Model Plaintiffs failed to establish that the Government coerced Chrysler to reject any of the Plaintiffs' franchise agreements in bankruptcy and failed to establish their franchise agreements would have had value without government financial assistance to Chrysler.[34] On October 2, 2019, judgment was entered, and the rejected dealers appealed to the U.S. Court of Appeals for the Federal Circuit on November 15, 2019.

2. The Federal Circuit's Opinion

On December 29, 2020, the Federal Circuit affirmed the trial court's denial of just compensation on the sole ground that the rejected dealers had failed to prove that their dealerships would have had value

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[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] App.55a.

in the absence of governmental financial assistance to Chrysler LLC—despite the fact that each of these dealers was profitable and was generating income on the day they were shut down by Government action.[35]

To reach its counterintuitive decision, the Federal Circuit ignored its ruling in *Love Terminal Partners v. United States*[36] issued just two years earlier that found no economic impact because the property in that case was not turning a profit at the time of taking.[37] Instead, the Federal Circuit applied a decline-in-market value test to be determined after the date of taking to conclude that cancellation of the dealers' franchises, although they were generating significant profits at the time of the taking, inflicted no economic impact as *Penn Central* requires.[38]

The Federal Circuit would have reversed the trial court had it simply followed its own recent precedent, namely *Anaheim Gardens, L.P. v. United States*,[39] where the court held just the opposite of its ruling in this case—reversing the trial court's finding of insufficient economic impact for failure to consider lost profits attributable to the governmental action:

> [T]he properties at issue were income-producing properties. The value of each property to its respective owner derived, not from any inherent objective "fair market value" of the

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[35] App.6a-App.11a.

[36] 889 F.3d 1331 (Fed. Cir. 2018).

[37] *Id.* at 1344.

[38] App.6a-App.11a.

[39] 953 F.3d 1344 (Fed. Cir. 2020).

> land or the fixtures on the property, but rather from the property's ability to generate a future stream of rental income as of the prepayment date . . . 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.[40]

Because the Federal Circuit failed to apply its own precedents in determining economic impact in this case, the court reached the jarring result that government can order the destruction of thriving, family-owned businesses for a governmental purpose, without any constitutional consequences.

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40 *Id.* at 1353 (quoting *Cienega Gardens v. United States (Cienega X)*, 503 F.3d 1266, 1282 (Fed. Cir. 2007)).

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE FEDERAL CIRCUIT'S INTRA-CIRCUIT CONFLICT ON THE PROPER TEST FOR ECONOMIC IMPACT IN REGULATORY TAKING CASES INVOLVING PROFIT-GENERATING PROPERTY

1. As the Federal Circuit held, the dealers' franchises are property within the meaning of the Fifth Amendment.[41] And, as the uncontested evidence showed, each of the dealers was turning a profit from their franchise right up to June 9, 2009—when governmental action required them to cease business as franchised Chrysler dealers. Barry Dodge turned a profit for every year it was in business and "[i]n 2009, the financial condition for [the] franchise was going well . . . Barry's profits were up 420 percent[.]"[42] Cedric Theel's net profit was $776,745 in 2009.[43] Jim Marsh American Corp.'s "Chrysler dealership was profitable through the recession of 2006, 2007, 2008, and 2009 . . . even though Chrysler never invested any funds in [the] dealership."[44] Livonia Chrysler Jeep's profitability "was [$]916,084 in 2006, [$]793,307 in 2007 and [$]1,164,211 in 2008 . . . [The] dealership was consistently profitable through the recession[.]"[45] In 2009,

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41 App.27a.

42 Trial Tr. 1217:7-10 (Apr. 11, 2014).

43 Trial Tr. 471:18-20 (Apr. 9, 2014).

44 Trial Tr. 371:8-19 (Apr. 9, 2014).

45 Trial Tr. 1358:23-1359:4 (Apr. 15, 2014).

RFJS was "profitable up until the termination of . . . the franchise."[46] Taylor & Sons was profitable in 2008 and 2009.[47] Whitey's expanded during the difficult financial times and "did not anticipate that the value of [Whitey's] could potentially be at risk"[48] even though Chrysler was in financial trouble.

Even in the face of Chrysler LLC's economic woes that it had previously encountered, the dealerships' owners had reasonably invested in their dealerships, planned for and managed their dealerships to succeed.[49] Each of the terminated dealerships' owners testified that they anticipated to continue making money, sell new and used cars, and service new and used Chrysler vehicles on the date of taking, June 9, 2009, in the but-for world in which they were not terminated and would have continued to be profitable, some for many months after June 9, 2009.

But, under the Federal Circuit's economic impact rule announced in this case, the Government can destroy profitable automobile franchises without compensation if it provides financial assistance to a third party, here the newly formed Fiat-Chrysler. While the $6 billion loan to Fiat-Chrysler may have facilitated the corporate restructuring and improved the businesses of the manufacturers (Fiat and Chrysler) and dealers who were not terminated, the Government sacrificed Petitioners' dealerships as the price of achieving this public benefit. While it can be debated whether gov-

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46 Trial Tr. 968:20-21 (Apr. 10, 2014).

47 Trial Tr. 343:10-12 (Apr. 8, 2014).

48 Trial Tr. 824:7-14 (Apr. 10, 2014).

49 *Penn Cent. Transp. Co.*, 438 U.S. at 152.

ernmental intervention in the auto marketplace during a deep recession benefits the American economy, here there is no question that the Government foisted a heavy burden on these dealers, many of whom lost family-owned businesses that they had built up over a lifetime and, in some cases, over several generations.

Under the Federal Circuit's rule in this case, the Government could also have appropriated, without compensation, the businesses of the lenders, suppliers, and Chrysler itself on the argument that their companies were worthless without the federal financial assistance given to Fiat-Chrysler. The Federal Circuit's rationale that the property interests of all participants in the automobile industry were worthless without Government intervention would also extend to advertisers, auto transporters (trucks and railroads), steel companies, electronics companies, and software producers (since modern cars now contain numerous computer parts).

The Federal Circuit's economic impact analysis also directly implicates the trillions of dollars in financial assistance that the Government has and is currently providing in response to the COVID-19 pandemic. As such, this decision amply underscores the wisdom of Justice Holmes's warning in *Pennsylvania Coal Co. v. Mahon*,[50] that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[51]

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[50] 260 U.S. 393 (1922).

[51] *Id.* at 416.

2. This case reveals the deep intra-circuit split on how to analyze the economic impact standards. The court below simply ignored the lost-profits economic impact test for the taking of income-generating property in *Anaheim Gardens* and other Federal Circuit decisions and instead applied a forward-looking economic impact standard that ignores the income-producing, profitability of the property on the actual date of taking.

The Federal Circuit's holding that governmental expropriation of profitable auto dealerships does not meet the economic impact standard of *Penn Central* directly conflicts with several decisions of the same court. This intra-circuit conflict on how to analyze the economic impact in a claim for the taking of income-producing property can only be resolved by this Court, since the Court of Federal Claims has exclusive jurisdiction over all taking claims against the federal government.[52] Unless this Court accepts a petition for review, for all taking claims against the United States, the Federal Circuit is the court of last resort and the final arbiter of federal takings law.[53]

Prior rulings by the Federal Circuit, in which the court found a taking based on its economic impact analysis, are irreconcilable with the court's ruling in this case. In *Florida Rock Industries v. United States*,[54] the Federal Circuit held that, in analyzing the economic impact of the federal wetlands regulations on development property, "the owner's opportunity to recoup its investment or better, subject to the regulation, cannot

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[52] 28 U.S.C. § 1491.

[53] 28 U.S.C. § 1295.

[54] 791 F.2d 893 (Fed. Cir. 2004).

be ignored."[55] In *Rose Acre Farms, Inc. v. United States*,[56] the Federal Circuit noted that "there are a number of different ways to measure the severity of the impact of the restrictions."[57] In *Cienega Gardens v. United States*,[58] the Federal Circuit identified both lost profits and decrease-in-fair-market-value as appropriate ways of measuring economic impact in a regulatory taking case:

> There appear to be at least two ways to compare the value of the restriction to the value of the property as a whole so as to determine if there has been severe economic loss . . . First, a comparison could be made between the market value of the property with and without the restrictions on the date that the restriction began (the change in value approach). The other approach is to compare the lost net income due to the restriction . . . Neither approach appears to be inherently better than the other . . . "[59]

The Federal Circuit's holding here is also directly at odds with its ruling in *Anaheim Gardens, L.P. v. United States*,[60] issued only a few months earlier, which reversed the trial court for limiting its economic impact analysis to a fair market value comparison

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55 *Id.* at 1986.

56 373 F.3d (Fed. Cir. 2004).

57 *Id.* at 1188.

58 503 F.3d 1266 (Fed. Cir. 2007).

59 *Id.* at 1283.

60 953 F.3d 1344 (Fed. Cir. 2020).

while ignoring the loss of income from the plaintiffs' income-producing apartments:

> [L]ost 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 . . . a change in fair market value approach would not accurately account for the fact that the governmental action targeted their going business concerns.[61]

Equally at odds with its ruling in this case is the Federal Circuit's ruling in *Love Terminal Partners*,[62] where the court concluded that the property interest—an airport leasehold—had zero value on exactly the opposite rationale—that the property had not produced a profit because at no time "did revenue exceed plaintiffs' carrying costs so as to meet plaintiffs' expert's definition for an 'economically beneficial use.' Since there was no adverse economic impact, there can be no taking."[63]

3. By virtue of its ruling in this case, the Federal Circuit creates a heads-I-win-tails-you-lose analysis in which there can be no taking if the property does not produce profit, but if the property is profitable the Court can still ignore that profitability and find no economic impact as a predicate for a taking.

But it is bedrock taking law that in a taking case courts evaluate the economic impact of governmental

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61 *Id.* at 1355.

62 889 F.3d 1331 (Fed. Cir. 2018).

63 *Id.* at 1344.

action by looking at the value of the property before and after the date of taking.[64] This requires the court to first identify the date of taking, value the property on that date, and then compare that value after the taking occurs.[65] Another way of stating the same test is that the economic impact of the government action must be evaluated in a but-for analysis (which the Federal Circuit purported to be doing in this case)—what would have been the value of the property but-for, or without regard to, the governmental action that caused the taking: "Thus, by necessity, proving economic loss requires a plaintiff to show what use or value its property would have but for the government action."[66]

Applying that legal test here, the questions that the Federal Circuit should have asked were whether the franchised dealerships had any value before (or but for) the government's action requiring termination, and whether franchised dealerships' streams of income from sale and servicing of the existing stock of 340,000 existing, unsold new cars, and over 31 million Chrysler vehicles already on the road would have had value absent government-caused termination.[67] But the courts below instead valued the franchised dealerships at zero on the assumption they would eventually in the future have ceased doing business and generating income—and would at that point have no value.

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[64] App.37a.

[65] App.37a-App.39a.

[66] App.38a.

[67] Trial Tr. 533:12-21 (Apr. 9, 2019).

The problem with the Federal Circuit's economic impact analysis is that it values the franchises as though they had already been terminated (that is, after the government action) rather than before the government action that caused that termination.

The panel ignored the economic impact of the Government's requirement that these dealers, which were profitable up to the date they were shut down, immediately cease doing business as Chrysler franchisees. Because the record amply shows that these franchised dealerships would have continued to generate income streams even after rejection, as the dealers sold off the existing backlog of 397,600 unsold new Chrysler automobiles and continued to service the 31 million Chrysler vehicles still on the road, the Federal Circuit's economic impact standard was not factually supported even in this case.

II. THE COURT SHOULD GRANT CERTIORARI TO REVIEW WHETHER *PENN CENTRAL* PROVIDES AN ADEQUATE TEST FOR DETERMINING WHEN GOVERNMENTAL ACTION AMOUNTS TO A FIFTH AMENDMENT TAKING

1. Although consistently cited as the polestar of this Court's regulatory taking jurisprudence, *Penn Central Transportation Co. v. City of New York*[68] provides no direction on how regulatory taking cases should be decided. *Penn Central* is rooted in indecision itself:

> The question of what constitutes a taking for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty, that this Court, quite simply, has been unable to

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68 438 U.S. 104 (1978).

> develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government," and that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that] case.[69]

Characterizing its takings jurisprudence as "essentially ad hoc, factual inquiries,"[70] the Court went on to state that its "decisions have identified several factors that have particular significance,"[71] including "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . "[72] and the "character of the governmental action."[73]

The Federal Circuit, and other state and federal courts, have variously interpreted *Penn Central* as either a balancing test (in which a single element could prove liability) or a three-element test (in which the plaintiff must prevail on each element).[74] The

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69 *Id.* at 123-24 (internal quotations omitted).

70 *Id.* at 124.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Compare Cienega Gardens v. United States*, 331 F.3d 1319, 1337 (Fed. Cir. 2003) ("Under *Penn Central*, courts use a three-factor analysis to assess claimed regulatory takings"), *with Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990) ("When

result has been disarray and inconsistency in Fifth Amendment inverse condemnation law within the Federal Circuit and among state and other federal courts. Quite simply, *Penn Central* fails to provide a discernable rule of law, leading to subjectivity and inconsistency in the application of Fifth Amendment protections of private property across the land.

A slew of thoughtful law review articles have decried the lack of sound legal guidance provided by *Penn Central*. Professor Sax describes *Penn Central* as an "open-ended, I-(hope)-I-know-it-when-I-see-it approach"[75] to deciding regulatory taking cases.[76] Professor Eagle writes that *Penn Central* "started with a concept of explaining the regulatory taking that was explicitly ad hoc, and has, over time, become a fossilized branching of tests and subtests,"[77] demonstrating "the need for a fresh examination of *Penn Central* and the need for a vibrant and coherent law of takings."[78] Professor Echeverria states that "the *Penn Central* test . . . is so vague and indeterminate

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adverse economic impact and unanticipated deprivation of an investment backed interest are suffered . . . compensation under the Fifth Amendment is appropriate" and the character of the Government's action did not matter).

[75] Joseph L. Sax, *The Property Rights Sweepstakes: Has Anyone Held the Winning Ticket?*, 34 VT. L. REV. 157, 157 (2009).

[76] *Id.*

[77] Steven J. Eagle, *"Economic Impact" In Regulatory Takings Law*, 19 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 407 (2013).

[78] *Id.* at 441.

that it invites unprincipled, subjective decision making by the courts."[79] And Loyola Professor Kanner writes:

> The fundamental flaw in the U.S. Supreme Court's *Penn Central* opinion, which transcended the opinion's other *lacunae*, was the Court's explicit refusal to articulate the elements of a regulatory taking cause of action, pleading judicial inability to do so, and claiming to make its decisions in this field by making ad hoc, factual, case-by-case inquiries.[80]

This Court itself has admitted: "[W]e have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking."[81] Thirty years ago, Justice Stevens stated that "[e]ven the wisest of lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."[82] In a recent dissent from denial of certiorari, Justice Thomas aptly described the *Penn Central* test as one that "nobody—not States, not property owners, not courts, nor juries—has any idea how to apply this standardless standard. . . . If there is no such thing as a regulatory taking, we should

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[79] John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History's Dustbin?*, 52 LAND USE L. & ZON. DIG. 3, 7 (2000).

[80] Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective On Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679, 687 (2005).

[81] *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

[82] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

say so. And if there is, we should make clear when one occurs."[83]

Several statistical studies demonstrate that courts attempting to apply *Penn Central* rarely find that a taking has occurred. One study finds that plaintiffs prevail in only 9.5% of *Penn Central* cases decided by the Federal Circuit, 12.5% in the First Circuit, and 6.25% in the Ninth Circuit.[84] Another study of 133 taking cases shows plaintiffs prevailing 9.8% of the time.[85] A third study of 1,700 taking cases citing *Lucas v. South Carolina Coastal Commission*,[86] most of which also cite *Penn Central*, found plaintiffs prevailing in only 27 federal and state cases—a 1.6%-win rate.[87]

2. This case offers the Court an excellent opportunity to review *Penn Central* to determine whether it provides adequate guidance for determining when a Fifth Amendment violation has occurred and, if not, to provide more precise guidance on the nature and extent of just compensation guarantees under the Fifth

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[83] *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 141 S. Ct. 731 (2021) (Thomas, J., dissenting).

[84] Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test Or A One Strike Rule?*, 22 FED. CIRCUIT B.J. 677 (2013).

[85] F. Patrick Hubbard et al., *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, 121-22 (2003).

[86] 505 U.S. 1003 (1992).

[87] Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847, 1850 (2017).

Amendment. The franchise each dealer held was (as the Federal Circuit conceded) a Fifth Amendment compensable property interest which, on the date of taking, provided a stream of profits that was abruptly cut off by the Government's action. Yet, relying on this Court's decision in *Penn Central*, the Federal Circuit found no Fifth Amendment regulatory taking, illustrating the failure of *Penn Central* to support the text and purpose of Fifth Amendment regulatory taking compensation, which is to weigh "the effect of a regulation on specific property rights as they are established at state law."[88]

88 *Murr v. Wisconsin*, 137 S. Ct. 1933, 1955 (2017) (Thomas, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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