No. 21-244

# In the Supreme Court of the United States

TAYLOR AND SONS, INC., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether petitioners were entitled to recover compensation from the United States for the alleged taking of franchise agreements authorizing them to act as dealerships for Chrysler LLC-owned vehicle lines, where the Court of Federal Claims determined that those franchise agreements would have had no value in April 2009 absent the government-funded rescue of Chrysler LLC that allegedly caused the taking.

2. Whether the Court should reconsider its decision in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978).

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page



Constitution and statutes:

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not published in the Federal Reporter but is reprinted at 841 Fed. Appx. 205.[1] The opinion of the United States Court of Federal Claims (Pet. App. 12a-217a) is reported at 145 Fed. Cl. 243. A prior opinion of the court of appeals (Pet. App. 218a-249a) is reported at 748 F.3d 1142. Prior opinions and orders of the Court of Federal Claims are reported at 106 Fed. Cl. 762 and 103 Fed. Cl. 449.

## JURISDICTION

The judgment of the court of appeals was entered on December 29, 2020. A petition for rehearing was denied on March 17, 2021 (Pet. App. 252a-253a). The petition

[1] As in the petition, the citations in this brief to "Pet. App." refer to the Petition Appendix in *Mike Finnin Motors, Inc.* v. *United States*, No. 21-233 (filed Aug. 11, 2021).

for a writ of certiorari was filed on August 13, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioners, auto dealers who formerly operated as franchisees of Chrysler LLC, filed claims in the United States Court of Federal Claims seeking just compensation from the United States for the alleged taking of their property. Following a five-week trial, the Court of Federal Claims entered judgment in favor of the United States. Pet. App. 12a-217a. The court of appeals affirmed. *Id.* at 1a-11a.

1. In 2008-2009, the United States economy experienced a significant recession and credit crisis. Several major American automobile manufacturers were particularly hard-hit, as bank loans to consumers and automobile dealerships alike had come to an "abrupt halt," causing vehicle sales to "plummet[]." Pet. App. 223a (citation omitted). In the midst of that crisis, the chief executive officers of Chrysler LLC and General Motors Corporation appeared before congressional committees in November 2008 to ask the federal government for financial assistance that would help their companies remain in operation. See *id.* at 224a.

Following those requests, the United States Department of the Treasury created a program through which it would use taxpayer dollars to provide loans and investment funds to GM and, as most directly relevant here, Chrysler. Pet. App. 224a. Treasury created that program under the auspices of the wider Troubled Asset Relief Program, which Congress had established earlier that year to help rescue troubled financial institutions. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, Div. A, 122 Stat. 3765.

As an initial stopgap measure, Treasury provided Chrysler with a bridge loan of $4 billion in December 2008 to fund continued operations. Pet. App. 3a; see *id.* at 69a. The terms of the bridge loan required Chrysler to submit a viability plan to Treasury by February 2009, in which Chrysler identified proposed steps for returning to profitability and long-term sustainability through additional financial assistance from the government. *Id.* at 69a.

A group of experts assembled by Treasury (the Auto Team Task Force, or Auto Team) reviewed Chrysler's submission, which sought an additional $11 billion in government funding in order to allow Chrysler to remain in business. See Pet. App. 69a-70a. In connection with that plan, Chrysler proposed a substantial consolidation of the independent dealerships selling new Chrysler vehicles, reducing the number of dealers from 3298 to 2005 over the course of four years (a substantial acceleration of pre-existing efforts to rationalize its dealership network). See *id.* at 147a. The Auto Team determined, however, that the plan Chrysler had laid out was unlikely to succeed (and would likely cause the government to lose the funds associated with additional loans Chrysler was requesting). *Id.* at 70a.

The Auto Team then participated in the formulation of a plan through which it believed additional government funding could enable Chrysler to regain its footing and become viable on a long-term basis. Pet. App. 149a. The Auto Team and affected stakeholders arrived at a proposal under which Chrysler would enter reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.*, and eventually merge with an Italian automaker, Fiat, to form a new company that would continue manufacturing Chrysler's existing vehicle lines.

See Pet. App. 149a. The reorganization proposal also embraced Chrysler's earlier proposal to accelerate consolidation of its dealership network, calling for Chrysler to reject franchise agreements with low-performing dealerships while in bankruptcy (though the Auto Team did not attempt to identify either specific dealerships or the total number to be eliminated). See *id.* at 150a-151a. If Chrysler opted to move forward with the Fiat alliance, Treasury indicated that it, in conjunction with the Canadian government, would provide up to $4.5 billion in financing in exchange for a substantial stake in the new company. *Id.* at 149a-150a. Alternatively, Treasury indicated that it would provide $750 million to facilitate an orderly wind-down if Chrysler chose instead to enter bankruptcy on its own and liquidate its remaining assets. *Id.* at 200a.

Chrysler chose the reorganization proposal, filing its Chapter 11 petition in April 2009. Pet. App. 4a. The following month, Chrysler invoked its power under 11 U.S.C. 365 as a debtor-in-possession to "assume or reject any executory contract" by filing a motion asking the district court to approve the rejection of 789 of its franchise agreements with dealerships, including those of petitioners. Pet. App. 4a. In June 2009, the bankruptcy court granted the motion, immediately terminating the rejected franchise agreements and declaring that the former franchisees could no longer exercise rights under those agreements, such as holding themselves out as Chrysler dealers or providing authorized warranty service. *Ibid.*

2. Petitioners and other former franchisees sued the United States in the Court of Federal Claims, alleging that the government had coerced Chrysler to reject their franchise agreements in bankruptcy and that, in

doing so, had committed a taking and therefore owed them "just compensation" under the Fifth Amendment. Pet. App. 4a, 13a. The government moved to dismiss for failure to state a claim, but the Court of Federal Claims denied the motion. See 103 Fed. Cl. 449. On the government's motion, the trial court certified its decision for interlocutory appeal. See 106 Fed. Cl. 762.

The court of appeals affirmed the denial of dismissal and remanded the case to the Court of Federal Claims. Pet. App. 218a-249a. In doing so, it held that petitioners might be able to recover under the Just Compensation Clause if they could establish (*inter alia*) that (1) the government had coerced Chrysler to reject petitioners' franchise agreements, *id.* at 240a-241a, and (2) that those franchise agreements would have had any value in the absence of the government's conduct, *id.* at 243a-247a.

3. On remand, petitioners amended their complaint to allege that their franchise agreements would have had economic value in a "but for world" in which the government did not provide financial assistance to Chrysler. Pet. App. 16a (citation omitted). Following a five-week bench trial, the Court of Federal Claims ruled in favor of the government in a lengthy opinion containing extensive findings of fact and conclusions of law. *Id.* at 12a-217a.

The Court of Federal Claims identified two independently sufficient respects in which petitioners had failed to establish their claims. First, based on the voluminous testimony and documentary evidence before it, the court found that "Chrysler's decision to accept the government's terms for financial assistance through bankruptcy was voluntary and not coerced." Pet. App.

198a. Because Chrysler had made a free choice to exercise its right to terminate petitioners' franchise agreements in bankruptcy, petitioners could not recover from the government for the result of Chrysler's lawful actions. Pet. App. 210a-212a.

Second, the Court of Federal Claims also found that petitioners had failed to prove that those terminations deprived them of valuable property that they would have retained in the absence of the government's actions. Pet. App. 208a-210a, 212a-217a. Crediting the expert testimony offered by the government about the possibilities open to Chrysler in 2009 and the effects Chrysler's various options would have had on its dealers, the court concluded that petitioners' franchise agreements would have lost all their value if Chrysler had not accepted the government's conditional financing offer. See *id.* at 212a-217a. Specifically, the court found that if the government had not made the conditional financing offer that Chrysler ultimately accepted, Chrysler instead would have liquidated under Chapter 7 of the Bankruptcy Code, 11 U.S.C. 701 *et seq.* Pet. App. 214a. A bankruptcy trustee then would have rejected *all* franchise agreements to protect the assets of the bankruptcy estate, and Chrysler also would have ceased all operations (including the manufacture of new parts and the honoring of repair warranties for existing vehicles). *Id.* at 214a-217a. Under that scenario, petitioners "would have suffered a worse fate than they experienced under the government's negotiated bankruptcy plan," because they "would not have had any ability to, among other things, do warranty and other service work requiring Chrysler parts while they closed their franchises." *Id.* at 203a.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-11a.

The court of appeals focused on the Court of Federal Claims' finding "that the dealers failed to prove a positive value that their franchise agreements would have had but for the challenged government actions," determining that "[t]hat conclusion suffices for affirmance." Pet. App. 6a-7a. The court of appeals held that the lower court had not clearly erred in finding that the franchise agreements would have been terminated in a Chapter 7 liquidation if Chrysler had not accepted the government's financing offer. *Id.* at 7a-9a. The court of appeals also determined that the Court of Federal Claims did not err in rejecting the "unpersuasive assumptions" that underlay petitioners' attempts to show that their franchise agreements would have retained value, such as their contention that the "federal government would have chosen to continue to cover Chrysler warranties after Chrysler began to liquidate" even if Chrysler had rejected the government's proposal about how to maintain long-term operations. *Id.* at 9a-10a. Thus, the court of appeals held, the record supported the Court of Federal Claims' "finding that [petitioners] did not provide a reliable proof that, in the but-for world, the franchise agreements would have had a positive value." *Id.* at 10a. Because that alone was sufficient to support affirming the judgment, the court of appeals did not reach the trial court's separate holding that the government had not coerced Chrysler into accepting the reorganization proposal. *Id.* at 6a-7a.

The court of appeals denied petitioners' request for panel rehearing and rehearing en banc without noted dissent. Pet. App. 251a-253a.

## ARGUMENT

As the court of appeals correctly determined, the Court of Federal Claims did not commit clear error in finding that the alleged taking in this case did not decrease the value of petitioners' franchise agreements. The court of appeals' affirmance of the lower court's factual finding does not conflict with any decision of this Court or any other court of appeals. Moreover, because petitioners' franchise agreements were terminated as the result of a free and lawful choice of a private party (Chrysler) rather than direct governmental action, this case would be an unsuitable vehicle for addressing either of the questions presented even if they otherwise warranted this Court's consideration. The petition for a writ of certiorari should be denied.

1. a. The Just Compensation Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. The government may take property for public use even if it does not directly appropriate or physically destroy an owner's property, if the government adopts a regulation that "goes too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). To determine whether such a taking has occurred, courts examine (1) "the character of the government action," (2) "the extent to which the [action] has interfered with distinct investment-backed expectations," and (3) "[t]he economic impact of the regulation on the claimant." *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978).

Applying the last of those considerations, the court of appeals correctly recognized at an earlier stage of this case that "[i]n order to establish a regulatory taking, a plaintiff must show," at the very least, that the

challenged "government action" caused "a diminution in value or a deprivation of economically beneficial use" to the plaintiff's property. Pet. App. 243a. Because "just compensation for a net loss of zero is zero," *Brown* v. *Legal Foundation of Washington*, 538 U.S. 216, 240 n.11 (2003), petitioners do not dispute that a plaintiff cannot recover under the Just Compensation Clause unless it can show that its property would have been more valuable but for the government's challenged action.

The court of appeals correctly determined that the Court of Federal Claims did not clearly err in finding, after a five-week trial involving extensive testimony from fact and expert witnesses, that petitioners failed to make that necessary showing here. See Pet. App. 6a-11a; see also *id.* at 208a-210a, 212a-217a. Indeed, the Court of Federal Claims found that petitioners "would have suffered a worse fate" if the government had not taken the actions petitioners challenge in this case. *Id.* at 203a. It explained that but for the government's actions to allow Chrysler to remain in business while terminating only a subset of its franchise agreements, Chrysler would instead have gone out of business entirely, liquidating its remaining assets through a Chapter 7 bankruptcy, ceasing all manufacture of new vehicles and replacement parts, and terminating the franchise agreements with *all* of its dealers. See *id.* at 212a-214a. Had that happened, petitioners would have had no source of parts with which they could perform service on previously sold vehicles (limiting that independent stream of revenue), and the Chrysler vehicles remaining in petitioners' inventories would have lost value because they would no longer have been backed by a manufacturer's warranty. See *id.* at 164a-169a, 203a.

b. Petitioners contend (Pet. 13-20) that the lower courts should have found that their property retained value at the time the franchise agreements were terminated because the evidence allegedly showed that "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." Pet. 13. That contention is flawed in multiple respects.

As an initial matter, the expert testimony before the Court of Federal Claims established that petitioners had failed to distinguish between the revenue and profits directly connected to the allegedly taken franchise agreements (such as the right to obtain new Chrysler vehicles for sale and to be reimbursed for Chrysler warranty service) and other lines of business that were not directly dependent on holding a franchise (such as selling used vehicles or performing service work paid for by customers). See Pet. App. 38a, 110a, 162a & n.40, 182a, 213a-214a & n.46; see also *id.* at 10a. Petitioners repeat that error here (Pet. 6-7, 13-14), failing to distinguish between profits generated by activities dependent on the franchise agreements (such as "sell[ing] new * * * cars") and profits generated by other activities that did not depend on the franchise agreements (such as "sell[ing] * * * used cars"). Pet. 14.

Even if petitioners had introduced evidence sufficient to prove that the franchise agreements themselves were generating profits up to the time of the allegedly confiscatory government actions, the Court of Federal Claims correctly determined that petitioners would have been worse off if the government had not assisted Chrysler. See Pet. App. 203a; see also *id.* at 10a (recognition by the court of appeals that petitioners failed to

"provide a reliable proof that, in the but-for world, the[ir] franchise agreements would have had a positive value"). The Court of Federal Claims found that if the government had not provided conditional financing for Chrysler's Chapter 11 bankruptcy, Chrysler instead would have proceeded into a Chapter 7 bankruptcy in which petitioners' franchise agreements *still* would have been terminated—and petitioners would have lost other income streams as well. See *id.* at 212a-214a; see also p. 9, *supra*. Petitioners identify no error, clear or otherwise, in those factual findings, and have no "just compensation" to recover from the government for actions that the trial court found had placed petitioners in no worse position than they would have been if the government had not acted. U.S. Const. Amend. V.

2. Petitioners do not contend that the decision below conflicts with any decision of this Court or of another court of appeals. See Pet. 13-20. Instead, they argue (Pet. 16) that it implicates only an "intra-circuit split on how to analyze the economic impact standards." For at least two reasons, that argument does not provide a sound basis for further review in this case.

First, petitioners' claim of an intracircuit conflict is unsound. Petitioners identify (Pet. 16-20) five decisions of the Federal Circuit that are purportedly inconsistent with the decision here, but in each of those cases—as here—the court of appeals recognized that economic impact should be evaluated by comparing the relevant valuations of the plaintiffs' property both with and without the governmental action alleged to be a taking. For instance, in *Anaheim Gardens, L.P.* v. *United States*, 953 F.3d 1344 (Fed. Cir. 2020), the court of appeals concluded that the Court of Federal Claims had erred by

focusing only on the fair-market value of real estate, rather than the income that the property produced for its owners. *Id.* at 1353. But the alternative income-based approach still required a comparison between "the lost net income due to the restriction" and "the total net income *without the restriction*." *Ibid.* (citation omitted, emphasis added). And in *Love Terminal Partners, L.P.* v. *United States*, 889 F.3d 1331 (Fed. Cir. 2018), cert. denied, 139 S. Ct. 2744 (2019), the court explained that "a showing that property is valueless *after* a government action only suggests that a taking has occurred if there is evidence showing that the property would have had value *absent* the government action." *Id.* at 1343. The other cases that petitioners identify also recognized the need to evaluate the economic effects of an alleged regulatory taking by considering what would have happened in the absence of the challenged action. See *Cienega Gardens* v. *United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007) (directing the Court of Federal Claims to consider, under any approach to valuation, "the economic impact of the regulation on the value of the property as a whole"), cert. dismissed, 554 U.S. 938 (2008); *Rose Acre Farms, Inc.* v. *United States*, 373 F.3d 1177, 1185 (Fed. Cir. 2004) ("[I]t is not possible to determine the economic impact of a regulatory scheme applied to a private actor without casting the appropriate absolute measures of the effect of the regulation against the backdrop of relevant indicators of the economic vitality of the actor."), cert. denied, 545 U.S. 1104 (2005); *Florida Rock Industries* v. *United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) ("On remand, the court should consider, along with other relevant matters, the relationship of the owner's basis or investment, and the fair market value before the alleged taking, to the fair market value

after the alleged taking."), cert. denied, 479 U.S. 1053 (1987).

Any differences in outcome between those decisions and this case are not attributable to the application of different legal standards about how to measure property values, either with or without the challenged governmental actions. Instead, the outcome here follows from the exhaustive post-trial factual findings of the Court of Federal Claims, which demonstrate that the government's challenged actions put petitioners in no worse financial position than they would otherwise have occupied. In the absence of the governmental assistance that petitioners contend resulted in the termination of their franchise agreements, the "evidence established that Chrysler would have been forced into immediate liquidation," which would also have resulted in the termination of their franchise agreements, and petitioners "would have suffered a worse fate than they experienced under the government's negotiated bankruptcy plan," because they "would not have had any ability to, among other things, do warranty and other service work requiring Chrysler parts while they closed their franchises." Pet. App. 203a. Given those factual conclusions, the government's actions would not have constituted a regulatory taking under any of the other Federal Circuit cases that petitioners cite.

Second, even if the asserted intracircuit conflict were genuine, this Court ordinarily does not grant review to resolve such conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Petitioners emphasize (Pet. 16) that "all taking claims against the United States" are heard in the Federal Circuit, but other courts of appeals and

state courts of last resort routinely consider claims against state and local governments under the same *Penn Central* framework that the Federal Circuit applied here. See, *e.g.*, *Penn Central Transportation Co.* v. *City of New York*, 366 N.E.2d 1271 (N.Y. 1977), aff'd, 438 U.S. 104 (1978). There is accordingly no special reason in this case to depart from the Court's ordinary practice of allowing lower courts to address alleged intracircuit conflicts on their own.

3. Finally, petitioners assert (Pet. 24) that this case offers an "excellent opportunity" to revisit and reconsider the regulatory taking test first set forth in *Penn Central*, *supra*. That assertion is likewise misplaced.

This Court has repeatedly reaffirmed the *Penn Central* framework and declined invitations to revisit it. See, *e.g.*, *Murr* v. *Wisconsin*, 137 S. Ct. 1933, 1942-1943 (2017) ("[a] central dynamic of regulatory takings jurisprudence * * * is its flexibility" to balance competing policy concerns); *Lingle* v. *Chevron USA Inc.*, 544 U.S. 528, 539-540 (2005) (recognizing that *Penn Central* shares a common touchstone with other regulatory takings standards in that it turns on the "magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests"); *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002) (endorsing use of *Penn Central* standard); see also *Bridge Aina Le'a, LLC* v. *Hawaii Land Use Comm'n*, 141 S. Ct. 731 (2021) (denying petition for a writ of certiorari that invited the Court to reconsider *Penn Central*). Petitioners identify no new developments that would warrant a different outcome here.

Even if the Court were inclined to revise or reconsider the *Penn Central* framework, this case would be a

poor vehicle in which to do so. That is true for at least two reasons. First, the lower courts determined that petitioners' franchise agreements would have been rejected in Chapter 7 bankruptcy—and thus completely valueless—even if the government did not take the challenged actions. See Pet. App. 7a-9a. Petitioners accordingly failed to demonstrate that the alleged taking had any economic impact on the value of their franchise agreements at all, making this a poor case in which to reevaluate the degree of impact required to satisfy the *Penn Central* test. And second, the evidence at trial overwhelmingly demonstrated (and the Court of Federal Claims found) that petitioners' franchise agreements were terminated in bankruptcy because of a free and lawful choice made by a private actor (Chrysler), not as a result of any coercive regulatory act by the government. See *id.* at 197a-212a. While the court of appeals found it unnecessary to address the Court of Federal Claims' factual findings on that point, those findings would provide an independent basis for affirming the Court of Federal Claims' decision. And the fact that a private party took the allegedly confiscatory actions here might also complicate any attempt to devise a new standard for adjudicating Just Compensation Clause claims involving actual takings by the government (regulatory or otherwise).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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