NO. 21-244

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

REPLY BRIEF OF PETITIONERS TAYLOR & SONS ET AL.

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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.

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Respondent makes two fallacious arguments for why this case is not, as Petitioners contend, an excellent vehicle for this Court to examine the economic impact factor of the *Penn Central Transportation Co. v. City of New York*[1] regulatory takings test: (1) that without government assistance Chrysler would have filed bankruptcy anyway, and that bankruptcy would have rendered all Chrysler franchises worthless; and (2) the trial court's alternative holding that the Government did not require Chrysler to terminate Petitioners' franchises complicates the economic impact issue for this Court's analysis.[2] Both of these contentions are incorrect.

First, Petitioners testified at trial that their dealerships would have continued to be profitable, as they were on the day their franchise agreements were terminated, for at least many months after the termination order.[3] The undisputed facts are that each franchised dealership was generating profits, in some instances significant profits, on the day their dealerships were ordered to cease doing all business.[4] Even

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[1] 438 U.S. 104 (1978).

[2] App.212a-217a.

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

[4] Trial Tr. 1217:7-10 (Apr. 11, 2019) ("[i]n 2009, the financial condition for [the] franchise was going well. . . . Barry's profits were up 420 percent[.]"); Trial Tr. 471:18-20 (Apr. 9, 2019) (testifying

if Chrysler never made another vehicle (Chrysler did not make the parts used in servicing cars, as Respondent states), there were hundreds of thousands of unsold vehicles and parts suppliers that would have kept their businesses going for many more months.[5] The issue is whether this Government-required termination of Petitioners' immediate cash flow from their franchises satisfies the economic impact prong of the *Penn Central* test.

Second, because the Federal Circuit ruled only on one issue, economic impact under *Penn Central*, this case presents an unusual opportunity for this Court to examine that issue in isolation. The Federal Circuit's ruling states:

> [T]he Claims Court, after a full trial, rejected the claims on two grounds—first, that the government's actions did not amount to coercion of Chrysler's decision to reject the franchise agreements and, second, that plaintiffs did not prove that the franchise agree-

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that Theel's profit was $776,745 in 2009); Trial Tr. 371:8-19 (Apr. 9, 2019) (testifying that the Marsh "dealership was profitable through the recession of 2006, 2007, 2008, and 2009" without Chrysler investing any funds); Trial Tr. 1358:23-1359:4 (Apr. 15, 2019) (testifying that Livonia Chrysler Jeep's profitability "was [$]916,084 in 2006, [$]793,307 in 2007 and [$]1,164,211 in 2008. . . . [The] dealership was consistently profitable through the recession[.]"); Trial Tr. 968:20-21 (Apr. 10, 2019) (testifying that RFJS was "profitable up until the termination of . . . the franchise."); Trial Tr. 343:10-12 (Apr. 8, 2019) (testifying that Taylor & Sons was profitable in 2008 and 2009); Trial Tr. 824:7-14 (Apr. 10, 2019) (testifying that Whitey's even expanded during the recession and did not anticipate the dealerships value at risk).

[5] Trial Tr. 172:21-173:24 (Apr. 8, 2019); Tr. 645:17-646:3 (Apr. 9, 2019).

> ments would have had value but for those actions. . . . On plaintiffs' appeal, we now affirm on the latter ground and do not address the former.[6]

The Government also argues that the intra-circuit split within the Federal Circuit should not be reviewed by this Court—such conflicts within a circuit, the Government argues, should be left to be sorted out by this Court if and when a split occurs among the circuits.[7] Normally, the process Respondent describes makes perfect sense and is consistent with this Court's rules.[8] But because all takings claims against the United States must be brought under the Tucker Act[9] and the Federal Circuit has exclusive jurisdiction over all Tucker Act claims,[10] there will never be a split among the circuits on this issue, as with patent cases over which the Federal Circuit also has exclusive jurisdiction.[11] In the unique instance of Tucker Act claims, the Court should grant certiorari on important issues of constitutional law, like this one, even where

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[6] App.2a-App.3a.

[7] Br. for the United States in Opp'n at 11 (Nov. 5, 2021).

[8] S. Ct. R. 10.

[9] 28 U.S.C. § 1491.

[10] 28 U.S.C. § 1295.

[11] *Id.*; *see e.g., Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 324 (2015) (granting certiorari because the Federal Circuit reviews all patent decisions and the Court "consequently believe[d] it important to clarify the standard").

the split is among different panels of the Federal Circuit.[12]

CONCLUSION

For these and all the reasons previously stated, Petitioners ask this Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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[12] Daniel Kazhdan, *The Federal Circuit Should Be More Tolerant of Intra-Circuit Splits*, 26 FED. CIRCUIT B.J. 105 (2016) ("The problems with the Federal Circuit's exclusive jurisdiction are well-documented. First, because the Federal Circuit is the only circuit court of appeals to review certain areas of law . . . it is essentially never part of a circuit split. As a result, it is not subject to the regular extra-circuit pressures to reconsider its earlier decisions").