No. 19-1252

In The
Supreme Court of the United States

CALLAN CAMPBELL, KEVIN C. CHADWICK (INDIVIDUALLY AND THROUGH HIS COURT-APPOINTED ADMINISTRATORS, JAMES H. CHADWICK), JUDITH STRODE CHADWICK, THE TYLER JUNSO ESTATE (THROUGH KEVIN JUNSO, ITS PERSONAL REPRESENTATIVE), NIKI JUNSO, AND KEVIN JUNSO, ALL ON THEIR OWN BEHALF AND ON BEHALF OF A CLASS OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

CORRECTED MOTION TO FILE AS AMICUS CURIAE AND BRIEF OF *AMICUS CURIAE* CENTER FOR AUTO SAFETY IN SUPPORT OF PETITIONERS

WILLIAM T. DEVINNEY
BAKERHOSTETLER LLP
1050 Connecticut Ave., NW
Washington, DC 20036
(202) 861-1554
wdevinney@bakerlaw.com

JASON LEVINE
CENTER FOR AUTO SAFETY
1825 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 328-7700
jlevine@autosafety.org

Counsel for Amicus Curiae

CORRECTED MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE[1]

Pursuant to this Court's Rule 37.2, Center for Auto Safety respectfully request leave to submit a brief as amici curiae in support of Petitioners.

All counsel of record for the parties received timely notice of the intention to file this brief. Counsel for Petitioners consented to the filing of this brief. Counsel for Respondent did not respond to a request to consent.

The interests of the amici are set out in the attached proposed brief. This petition presents fundamental questions about whether accident victims will be compensated for their injuries. This is an issue affecting the parties, the amici, and drivers, passengers, and pedestrians across the nation. We believe our viewpoint and this brief will be helpful to the Court, and request the Court grant this motion and accept the attached brief for filing.

Respectfully submitted,

WILLIAM T. DEVINNEY
Counsel of Record
BAKERHOSTETLER LLP
1050 Connecticut Ave., NW Washington, DC 20036
(202) 861-1554
wdevinney@bakerlaw.com

JASON LEVINE
CENTER FOR AUTO SAFETY
1825 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 328-7700
jlevine@autosafety.org

---

[1] In accordance with this Court's Rule 37.2(a), all counsel of record for the parties received timely notice of the intention to file this brief. Petitioners consented to this brief and Respondent did not respond to the request for consent. No counsel for any party authored any part of this brief, and no person or entity other than amici made a monetary contribution intended to fund its preparation or submission.

QUESTION PRESENTED

A plaintiff does not acquire standing to assert an as-applied regulatory takings claim unless and until the plaintiff suffers an injury-in-fact. The Petitioners' (accident victims) successor claims against New GM were not extinguished until Old GM's sale agreement with New GM became effective and closed on July 9, 2009, and July 10, 2009, respectively. Did the Federal Circuit err when it held that the accident victims' takings claim nevertheless accrued under the Tucker Act before their personal injury claims were affected by the sale agreement?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

TABLE OF AUTHORITIES--Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES--Continued

Page

INTEREST OF AMICUS CURIAE[2]

The Center for Auto Safety is the nation's premier independent, member driven, non-profit consumer advocacy organization dedicated to improving vehicle safety, quality, and fuel economy on behalf of all drivers, passengers, and pedestrians.

The Center protects consumers by representing their interests before the Department of Transportation and the National Highway Traffic Safety Administration, as well as other federal and state agencies. The Center advocates for smart and effective safety regulations, and active and tough law enforcement by state and federal authorities. Over its history, the Center has provided testimony over 50 times to Congress and state legislatures across the country on topics including child passenger safety, warranty law, and autonomous vehicle development.

The Center is interested in this case because it could extinguish thousands of personal injury claims arising from defective or unsafe automobiles. First, as a matter of fairness, a driver, passenger, or pedestrian that suffered an injury due to a defective GM vehicle should be compensated for his or her injuries. Second, personal injury suits benefit far more than the parties involved. Private tort actions are vital to improving vehicle safety. Federal and state regulators lack the time and resources to investigate every potential hazard or safety issue affecting the nation's highways. Personal injury claims frequently alert regulators, consumers, and even car manufacturers to design

---

[2] In accordance with this Court's Rule 37.2(a), all counsel of record for the parties received timely notice of the intention to file this brief. Petitioners consented to this brief and Respondent did not respond to the request for consent. No counsel for any party authored any part of this brief, and no person or entity other than amici made a monetary contribution intended to fund its preparation or submission.

defects, faulty parts, or other deadly hazards that could cause thousands of deaths.

SUMMARY OF ARGUMENT

This Court should review the Federal Circuit's decision holding that an as-applied regulatory takings claim becomes ripe when the government reaches its final decision—not when the decision is implemented, takes legal effect, or causes an actual injury—to take the property in question. This brief makes three points.

1. The Federal Circuit's decision violates the basic principle that a plaintiff's claim does not accrue, and the applicable statute of limitations does not run, until the plaintiff suffers an injury-in-fact. The Federal Circuit, however, held that Petitioner's claim accrued when the government forced Old GM to submit a proposal to the bankruptcy court enjoining Petitioners' personal injury claims as a condition of New GM's purchase of Old GM, not when the sale agreement enjoining those claims became effective or closed, i.e., when Petitioners suffered an injury-in-fact.

2. The Federal Circuit's holding that Petitioners' as-applied regulatory takings claim accrued when the governmental entity arrived at its final decision—not when the decision took legal effect—creates an unworkable standard for federal courts in adjudicating takings claims. Rather than determining when the plaintiff suffers an injury-in-fact, a district court now must explore the metaphysical question of when a governmental agency decided in its mind that it would issue an opinion, promulgate a regulation, or take an action that eventually resulted in the taking. This will require the parties and court to investigate the

government's entire decision-making process and speculate about the precise moment at which it would no longer change its collective mind about the challenged decision.

3. The Federal Circuit's decision enjoined thousands of successor claims against New GM. Tort law has long played a vital role in our legal system. Not only does the tort system allow plaintiffs to recover for injuries inflicted by negligent car manufacturers, private suits encourage manufacturers to make safer vehicles and bring to light facts or problems that inspire new laws and regulations that govern auto safety and eventually save lives. Enjoining these accident victims' claims could prevent regulators and the public from learning about deadly manufacturing defects, faulty components, or other hazards that put the public at risk.

ARGUMENT

I. This Court should grant the petition because the Federal Circuit's decision erroneously eliminates the injury-in-fact requirement of a takings claim.

The Federal Circuit's decision erroneously eliminates the injury-in-fact requirement from a takings claim. For over a century, this Court has held that the statute of limitations under the Tucker Act begins to run "from the time the cause of action accrues." *United States v. Martinez*, 184 U.S. 441, 449 (1902); *see also Green v. Brennan*, 136 S. Ct. 1769, 1776 (2016) ("a limitations period commences when the plaintiff has a complete and present cause of action"). The Federal Circuit recognizes this basic proposition: "[a] claim first accrues when all the events have occurred that

fix the alleged liability of the government and entitle the claimant to institute an action." *Ingrum v. United States*, 560 F.3d 1311, 1314 (Fed. Cir. 2009); *see also Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) (*citing Japanese War Notes Claimants Ass'n v. United States*, 373 F.2d 356, 358 (1966), *cert. denied*, 389 U.S. 971 (1967)). And the Federal Circuit has explicitly held a plaintiff's claim cannot accrue until the plaintiff suffers an injury-in-fact. *See Figueroa v. United States*, 466 F.3d 1023, 1029 (Fed. Cir. 2006) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)). Thus, both this Court and the Federal Circuit hold to the fundamental principle that the statute of limitations on a regulatory taking claim cannot begin to run until the plaintiff suffers an injury-in-fact.

Despite this fundamental principle, the Federal Circuit held that Petitioners' taking claims arose before their injury occurred. Specifically, the Federal Circuit held that these accident victims' claim accrued "on July 1, 2009—when Old GM filed the proposed sale order with the bankruptcy court." *Campbell v. United States*, 932 F.3d 1331, 1337 (Fed. Cir. 2019). But the proposed sale order did not inflict any injury on Petitioners because it lacked any legal effect until the bankruptcy court approved the order. Further, Petitioners' claims were not extinguished—Petitioners suffered no injury-in-fact—until the proposed sale became effective and closed on July 9, 2009, and July 10, 2009, respectively.

The mere fact that the government was proceeding, or coercing New GM to proceed, though a process to eliminate these accident victims' rights does not confer an injury-in-fact in-and-of itself and start the

statute of limitations running. *See Franconia Assoc. v. United States*, 536 U.S. 129, 143-45 (2002) (finding that plaintiffs did not suffer an injury, and the statute of limitations did not begin to run, merely because the government announced that it would take plaintiffs' rights in the future).[3] Rather, the statute of limitations begins to run only when the government's decision is implemented and "inflicts an actual, concrete injury." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985).

II. This Court should grant the petition because the Federal Circuit implemented an unreasonable, unworkable standard that will burden federal courts and impede litigants across the country.

The Federal Circuit is a court of national jurisdiction hearing every appeal of every taking case against the United States. *See* 28 U.S.C. 1295(a). The Federal Circuit's decision erroneously adopted an unreasonable, unworkable standard that will burden federal courts and impede litigants across the country. The Federal Circuit's opinion holds that any plaintiff's regulatory takings claim begins to accrue upon "the final decision of the government actor alleged to have caused the taking" regardless of when, or if, that decision actually inflicts any injury on the plaintiff. 938 F.3d at 1338. The Federal Circuit does not require that final decision to have been implemented or to have any legal effect. *Id.* Instead, the "final decision" is the point at which the government has made up its

[3] Because the Petitioners' brief explains *Franconia*'s application to this case in great detail, amicus will not repeat that analysis here. See Pet. Br., pp. 20-23.

metaphorical mind about its decision; the Federal Circuit found the government's decision became final on "July 1, 2009—when Old GM filed the proposed sale order with the bankruptcy court," which had no force or legal effect on the accident victims or any other party until the bankruptcy court or district court approved that proposed sale order. 932 F.3d at 1337.

First, the standard imposed by the Federal Circuit conflicts with this Court's precedent. The statute of limitations does not begin to run on a regulatory takings claim merely because the government has decided to take the plaintiff's rights or property. *See Franconia*, 536 U.S. at 149. In *Franconia*, the petitioners entered into a loan agreement with the Farmers' Home Administration that allowed the petitioners to prepay that loan. *Id.* Congress later passed a statute that severely limited those prepayment rights. The petitioners brought breach-of-contract and takings claims when, more than nine years after Congress passed the statute, the FHA refused to accept petitioners' prepayment of their loans. *Id.* at 133.

This Court rejected the government's argument that the statute of limitations began running under the Tucker Act when Congress enacted the restrictive statute. The Court held that, in passing the statute, Congress repudiated the petitioners' contractual prepayment rights, but those rights were not taken under the Fifth Amendment until the FHA rejected petitioners' tendered prepayment several years later. *Id.* at 144. Thus, the government's expressed intent—passing the statute—reflected the government's final decision to take the petitioner's contractual rights. But the plaintiffs' claim did not accrue, and the statute of limitations did not begin to run, until that decision inflicted an injury on the petitioners. *Id.* Applied here,

Old GM's filing of the proposed sale order may have signaled the government's final decision to require New GM to enjoin the accident victims' claims, but it did not give rise to their takings claim and, thus, did not start the statute of limitations under the Tucker Act.

Second, the standard imposed by the Federal Circuit is unworkable and will burden federal courts and litigants with speculative, confusing factual issues. Federal courts subject to the Federal Circuit's jurisdiction will have to make findings, and the parties will have to litigate, the exact moment when the applicable government official or agency's decision to act became final in his, her, or its mind. The Federal Circuit provides no guidance on how a trial court should determine when that decision becomes final.

The Federal Circuit's standard will lead to wasteful, and potentially absurd, proceedings. For example, a plaintiff's regulatory takings claim is not ripe until, at a minimum, a challenged statute is enacted. *See Suitum v. Tahoe Regl. Plan. Agency*, 520 U.S. 725, 736 & n.10 (1997). But under the Federal Circuit's standard, a plaintiff's claim would be ripe when Congress made its final decision to enact the statute. Thus, a claim challenging the statute could become ripe, and trigger the statute of limitations, if Congress passed a bill with a veto-proof majority in both houses. Or the claim could become ripe if Congress passes a bill the President has already announced he or she will sign. Or the claim could become ripe when the President *decides* to sign the bill, rather than when he or she *physically* signs it, into law.

Resolving these questions could require the parties to litigate, and the court to decide, factual questions such as when the Speaker of the House or the Senate

Majority leader affirmed his or her support for a bill, or when the Secretary of Health and Human Services decided that he or she would sign off on a proposed regulation. Also, the court would have to decide how firm each official's support must be in order to be a "final decision." Must each official be fully committed to the statute or regulation, or would grudging support constitute a final decision? Those inquiries would require burdensome, excessive discovery and presentation of evidence on factual questions that are entirely speculative and ultimately unknowable.

III. This Court should grant the petition because denying these accident victims' claims—in contradiction of fundamental principles this Court has consistently upheld—will stifle needed future safety reforms in the automobile industry, which is promoted by private litigation.

The Court should review the Federal Circuit's decision, not only to compensate Petitioners for their injuries, but also because private litigation plays a vital role in ensuring consumer safety in the auto industry. *See*, *e.g.*, Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 Wake Forest L. Rev. 293, 328-32 (2018).

Potential liability for tort claims provides significant economic incentives for manufacturers to make safer products. *See*, *e.g.*, *Wyeth v. Levine*, 129 S. Ct. 1187, 1200 (2009) (recognizing that state-law tort "remedies further consumer protection by motivating manufacturers to produce safe and effective drugs and to give adequate warnings"); *see also* Restatement (Third) of Torts: Products Liability Section 2 cmt a (1998) (personal injury suits under state tort law serve "the instrumental function of creating safety incentives

[and] encourage[] greater investment in product safety"). This is particularly true in the automotive industry. The National Highway Traffic Safety Administration (NHTSA), which regulates the auto industry, suffers from a limited budget and staff. Also, NHTSA's mission is susceptible to changes due to shifting politics and public attitudes. Jerry L. Mashaw & David L. Harfst, The Struggle for Auto Safety 172-201 (1990) (discussing NHTSA's vulnerability to shifts in political winds). Thus, manufacturers often develop and implement safety features more to avoid financial losses and attendant negative publicity that arises from large personal injury verdicts than to comply with NHTSA.

When design defects or other safety issues do arise, they are often discovered and exposed by private plaintiffs rather than NHTSA or other regulators. Joanna C. Schwartz, *Introspection Through Litigation*, 90 Notre Dame L. Rev. 1055, 1069 (2015). *Id.* Plaintiffs' attorneys typically have more time and financial incentive to procure as much information as possible. *Id.* Plaintiffs' attorneys also have the ability to do so under most courts' permissive discovery rules. An injured plaintiff can obtain an automobile manufacturer's design specifications through discovery and then uncover flaws in that design through expert witnesses. Similarly, discovery can reveal incriminating documents showing that an automaker concealed potential problems from the public. *Id.* at 1068-69. By contrast, NHTSA may be limited in its authority to investigate some situations or be constrained by limited budgets or staff. Also, NHTSA investigators may have allegiances to the industry it regulates.[4] *Id.*

---

[4] Former Senator Claire McKaskill complained that NHTSA was

The most famous example of private litigation changing the auto industry is likely the Ford Pinto. In 1978, a plaintiff won a highly-publicized $125 million verdict for burn injuries suffered when he was a passenger in a Ford Pinto. Jon S. Vernick, *et al.*, *Role of Litigation in Preventing Product-Related Injuries*, 25 Epidemiol. Rev. 90, 90-91 (2003).[5] The jury found that Ford knew that the location of the Pinto's gas tank made it more likely to rupture in an accident but did nothing to change the design to avoid the costs. *Id.* The resulting public outcry caused Ford to recall and redesign the Pinto. *Id.* After the Pinto, several other significant threats to drivers' safety were discovered and exposed by private plaintiffs, not regulators, bringing suits.

A. Private litigants, not regulators, discovered and exposed problems with GM ignition switches.

A private plaintiff brought to light a dangerous flaw in one of GM's ignition switches and exposed GM's coverup of that problem. On March 10, 2010, Brooke Melton's 2005 Chevy Cobalt abruptly turned off, hydroplaned on a wet road, and collided with another vehicle. Engstrom, p. 329. The airbags failed to deploy and Ms. Melton died in the wreck. *Id.* The police investigation into the accident blamed Ms. Melton's

---

"more interested in singing 'Kumbaya' with the manufacturers than being a cop on the beat." Hilary Stout & Aaron M. Kessler, *Senators Take Auto Agency to Task over G.M. Recall*, New York Times, Sept. 16, 2014, http:// www.nytimes.com/2014/09/17/business/senate-hearing-on-nhtsa-and-recalls.html.

[5] Available at <http://epirev.oxfordjournals.org/cgi/content/full/25/1/90> (last visited May 28, 2020).

speed, finding that she was driving too fast—58mph in a 55mph zone—for the wet roadway conditions. *Id.*

Brooke Melton's parents doubted the police findings, so they hired a personal injury attorney. The Meltons' counsel and investigator discovered that Brooke's key had fallen from the ignition system three seconds before the accident, which disabled the car's power brakes, power steering, and airbag. *Id.* Discovery further revealed that, as early as 2002, GM knew that a design flaw in the ignition switch allowed the keys to fall from the ignition. GM, however, rejected implementing a fix because of the cost. *Id.* Instead, in 2006, a GM engineer approved a redesign of the faulty switch but did not tell others within GM about the redesign. Schwartz, at 1067. Thus, GM did not disclose or fix the faulty ignition switches on older models. *Id.*

Unlike the Melton's counsel, NHTSA failed to uncover the problems with GM's ignition switch. *See* Schwartz, at 1068 (2015); Anton R. Valukas, Jenner & Block, *Report to Board of Directors of General Motors Company Regarding Ignition Switch Recalls* (May 29, 2014).[6] By 2007, NHTSA had noticed a suspicious pattern of airbags failing to deploy in GM cars, particularly the Cobalt. Office of Inspector Gen., Nat'l Highway Traffic Safety Admin., U.S. Dep't Of Transp., Inadequate Data And Analysis Undermine NHTSA's Efforts To Identify And Investigate Vehicle Safety Concerns 1 (2015).[7] NHTSA, however, failed to

---

[6] Available at <https://www.aieg.com/wp-content/uploads/2014/08/Valukas-report-on-gm-redacted2.pdf> (last visited May 28, 2020).

[7] Available at <https://www.oig.dot.gov/sites/default/files/NHTSA%20Safety-

open an investigation or take other action because it lacked the expertise or the resources to fully examine and understand the problem. *See* Staff of H. Comm. on Energy & Commerce, 113th Cong., Staff Report on the GM Ignition Switch Recall: Review of NHTSA 2-3 (2014); Office of Inspector Gen., 249, at 3, 20, 23, 26.

Thus, it was a result of the Melton's suit that the GM ignition switch defect came to light. GM eventually recalled over 600,000 vehicles and paid a $35 million fine to NHTSA. Engstrom, p. 332-33. GM also was forced to pay a $900 million penalty to the United States Department of Justice. Congress haled GM's CEO to testify several times, and GM fired fifteen engineers for their role in the scandal. *Id.*

B. Private litigation led to a judicially-mandated recall of Ford vehicles prone to stalling.

It took a private class action lawsuit to force Ford Motor Company to recall a faulty ignition system that had been installed in more than 20 million vehicles manufactured from 1983 to 1995. Vernick, at 95. Ford had installed part of its ignition system, the thick film ignition (TFI), by attaching it to the underside of the vehicle's hood and directly over the distributor.

A group of plaintiffs filed a putative class action in California Superior Court alleging that, when the affected vehicles became hot, the TFI could fail, which caused the vehicle to stall and disabled the vehicle's power steering and power brakes. On October 11, 2000, the trial judge found that Ford knew, since at least 1982, that the TFI modules were "prone to

---

Related%20Vehicle%C20Defects%20-%20Final%20Report%5E6-18-15.pdf> (last visited May 28, 2020).

failure due to excessive exposure to heat and thermal stress." *Id.* at 93. The judge also found that Ford withheld critical information from NHTSA in five different investigations into stalling issues. *Id.* As a result, the court ordered Ford to issue a recall for the at-risk vehicles and repair the defect. This was the first time that a court, rather than NHTSA, ordered a car manufacturer to initiate a recall.

C. Private litigants exposed problems with the Firestone tires on the Ford Explorer.

In other situations, it has been a flurry of individual suits, rather than a single high-profile suit, that initiates change. In 1991, Firestone created a new tire for the Ford Explorer. Beginning in 1996, Ford began receiving reports and customer complaints that the tire tread was separating from the tire body on the Firestone tires on its Ford Explorer. Vernick, at 92.[8] Ford issued recalls—it referred to the recalls as "customer notification enhancement actions"—for some foreign vehicles but did not notify regulators or United States consumers. *Id.*

Private plaintiffs began initiating tort claims against Ford and Firestone almost immediately. In 1995, Firestone faced thirty-seven personal injury claims for accidents relating to the Ford Explorer model. *Id.* at 98. By May 2001, that number rose to 280 personal injury claims and thousands of property damage claims. *Id.* Further, plaintiffs' attorneys began public information campaigns to alert consumers about the dangers of the Firestone tires. Attorneys also provided material gleaned from discovery to

---

[8] Available at <http://epirev.oxfordjournals.org/cgi/content/full/25/1/90> (last visited May 28, 2020).

congressional staff, reporters, and consumer advocacy groups. *Id.*

By contrast, regulators lagged behind private attorneys in investigating and publicizing the problem. NHTSA did not learn about Ford's recall of foreign models until well after the fact. Also, NHTSA received numerous complaints in 1997 and 1998 from auto insurance carriers and consumers about the Firestone tires on the Ford explorer, but NHTSA failed to open an investigation until 2000. *Id.*

As a result of plaintiffs' suits, both Ford and Firestone issued recalls costing billions of dollars. Firestone also settled claims brought by fifty-three states and territories for $15.5 million. *Id.* Most significantly, the Firestone suits led Congress to pass the Transportation Recall Enhancement, Accountability, and Documentation Act (the "TREAD Act"). *Id.* at 93. The TREAD Act increased NHTSA's budget, enhanced penalties on automobile manufacturers for failing to report defects, encouraged electronic tire pressure monitors in automobiles, addressed testis and ratings for rollover risk and child safety seats, and allowed NHTSA to require disclosure of overseas automobile safety recalls.

These cases demonstrate that private plaintiffs can effectively: 1) respond to potential safety issues in the auto industry before regulators; 2) acquire sensitive industry information that can reveal actual safety hazards; 3) alert the public or regulators about those safety hazards; and 4) ultimately lead to industry, regulatory, and legislative change to address those hazards.

These accident victims' personal injury claims, which were erroneously rejected by the Federal

Circuit, play a vital role in disclosing information that improves safety in the automobile industry. Thus, this Court should review the Federal Circuit's decision below and allow the accident victims to be compensated for their claims.

CONCLUSION

For the foregoing reasons, and those expressed by the Petitioners, the Court should grant the petition for certiorari.

Respectfully submitted.

WILLIAM T. DEVINNEY
Counsel of Record
BAKERHOSTETLER LLP
1050 Connecticut Ave., NW Washington, DC 20036
(202) 861-1554
wdevinney@bakerlaw.com

JASON LEVINE
CENTER FOR AUTO SAFETY
1825 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 328-7700
jlevine@autosafety.org

Counsel for Amicus Curiae

JUNE 8, 2020.