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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This Court should grant the petition to correct the Federal Circuit's judgment that conflicts with this Court's seminal decisions. The significance of this case, however, extends well beyond its borders. The Government's response to the dramatic economic slowdown precipitated by COVID-19 lockdowns has included a raft of recourse loan programs under the "Main Street Lending Program."[1] The statute of limitation issue raised here—along with the substantive issues remaining should the petition be granted and the decision below reversed and remanded—provide the Court with an opportunity at the beginning of a financial crisis, instead of at the middle or end of it, to establish the constitutional boundaries of governmental action when the government is the sole and exclusive source of rescue financing for a distressed business.

[1] The program was established by the Federal Reserve Bank "to support lending to small and medium-sized businesses and nonprofit organizations that were in sound financial condition before the onset of the COVID-19 pandemic." It currently offers loans to eligible businesses of up to $300 million (or more than six times the Government's total advances in the GM Bankruptcy). *See https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm*.

ARGUMENT

I. THE GOVERNMENT'S FINAL DECISION ONLY BECOMES ACTIONABLE AS A TAKING AFTER IT INFLICTS A CONCRETE INJURY ON A PROPERTY OWNER.

A takings claim does not challenge the validity of the government action (that is a due process problem), but asks whether the economic impact on property of an otherwise valid act is the functional equivalent of an exercise of the eminent domain power. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (a challenge to a regulatory action sounds in due process, "[b]ut such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment"). It is not the government's regulatory action itself that is the constitutional wrong, but rather the impact on property. *Id.* (discussing the "magnitude or character of the burden a particular regulation imposes upon private property rights"). Consequently, before the decision below, a takings claim was understood to accrue when it ripened and a concrete, particularized injury had been inflicted on the owner's vested property rights. *See Franconia Assoc. v. United States*, 536 U.S. 129, 143 (2002) (takings claim does not accrue until actual injury); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733 n.7 (1997) (a taking claim arises when the plaintiff "presents a genuine 'case or controversy' sufficient to satisfy Article III"). The Opposition, however, downplays the Federal Circuit's most telling marker, its holding that "[i]n the case of a regulatory taking, . . . the taking may occur before the effect of the regulatory action is felt." App. 14.

The Opposition sidesteps the Federal Circuit's error in focusing on the Government's conduct instead of the impact and wrongly concluding that "it is the final decision of the government actor alleged to have caused the taking that triggers accrual of a takings claim, not the ultimate impact of that decision." App. 15. *Cf. Lingle*, 544 U.S. at 543 (the focus in takings analysis is "about the actual burden imposed on property rights, or how that burden is allocated"). Instead, the Opposition asserts this holding was "simply observing that, once a plaintiff has suffered a concrete injury from a final agency action, damages need not be fully liquidated in order for a claim to accrue." Opp. 11. That assertion is both contrary to the factual record, and the Federal Circuit opinion itself, which recognized that Petitioners were not actually injured by the Government's final decision, but concluded the lack of injury was irrelevant for accrual purposes. App. 14 ("[i]n the case of a regulatory taking, . . . the taking may occur before the effect of the regulatory action is felt"). *Cf. Franconia*, 536 U.S. at 134 (breach of contract claim accrued when the contract was breached, not when Congress authorized the breach).

The Opposition also rejects the relevance of *Franconia*, asserting the case is distinguishable because it "rested on contract-law principles that do not apply here." Opp. 13. But *Franconia* is nearly on-point because the Court made clear that the Government's final decision (*i.e.*, Congress' authorization to repudiate the Government's obligations), must actually have impacted the plaintiffs' vested contract rights before the statute of limitations clock started ticking. Mere enactment of adverse legislation, standing alone, was insufficient. *Franconia*, 536 U.S. at 149. Instead, claim

accrual depended on when the plaintiffs' vested contract rights were actually breached, regardless of whether the plaintiffs "treat[ed] the repudiation as a breach and sue[d] immediately" or whether the time "the government actually refused to accept prepayment" would be the time of the breach. Opp. 13. The Federal Circuit, however, failed to adopt that rationale and instead concluded that Petitioners' takings claims accrued when the Sale Order was uploaded since that act reflected the Government's "final decision" on the matter and "clearly inflicted" the requisite injury-in-fact "by diminishing the value of [petitioners'] claimed property rights." App. 15.

The Opposition does not respond to the long line of decisions holding that mere fluctuations in value before a final decision becomes effective are "incidents of ownership" that do not constitute a taking. *See* Pet. 23.[2] The Opposition's glaring silence is for good reason: this Court has long held there that no taking exists if "there would be no practical consequence" resulting

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[2] *Danforth v. United States*, 308 U.S. 271, 285 (1939); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967); *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980). The decision below is also inconsistent with *Thole v. U.S. Bank N.*A., 140 S. Ct. 1615 (2020), where the Court reiterated the long-standing rule that "reject[s] the argument that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.' " *Id*. at 1620 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)). If this argument is rejected in the statutory context, then surely it has not applicability in takings cases since these cases are "designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." Pet. 18 (citing *Lingle*, 544 U.S. at 536-37).

from the government's action"; that "would be an inconsequential abstraction." *Phillips v. Washington Legal Found.*, 524 U.S. 156, 174-75 (1998).

The source of the Federal Circuit's error extends back decades to its flawed reliance on this Court's holding in *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), in which this Court held that a Title VII discrimination claim accrues for statute of limitations purposes "upon the time of the [discriminatory] acts, not upon the time at which the *consequences* of the acts became most painful." *Id.* at 258.[3] But a challenge to a government action for discrimination rests on an entirely different foundation than a takings challenge. Three reasons support this distinction.

First: in discrimination cases, the discriminatory act itself is the precise "injury . . . the statute was intended to guard against." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982) ("That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d)."). The bad act itself inflicts the injury. *Second*: by contrast, the focus in takings is not on the government's allegedly bad action, but the impact of an otherwise-legitimate action on the use or value of property. *Lingle*, 544 U.S. at 543. *Third*, the discrimination challenge in *Ricks* was not predicated on the plaintiff's possession of a vested right (unless one argued that

[3] *See* App. 15-16 (citing *Goodrich v. United States*, 434 F.3d 1329, 1336 (Fed. Cir. 2006)). *Goodrich*, in turn, relied on *Fallini v. United States*, 56 F.3d 1378 (Fed. Cir. 1995), another case which misapplied the discrimination rationale in *Ricks*, 449 U.S. at 258.

every person is "vested" with the right to not be discriminated against). In takings, however, this Court has long held that property rights must be "vested" to be protected by the Takings Clause. *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994) ("The Fifth Amendment's Takings Clause prevents the Legislature . . . from depriving private persons of vested property rights [without just compensation]."); *cf. Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").

Petitioners are not seeking the theoretical gains their contingent interests in possible successor liability claims might have garnered but for the Government's coercive conduct in the bailout. App. 15 ("[T]he filing of the proposed bankruptcy sale order clearly inflicted an injury on the plaintiffs by diminishing the value of their claimed property rights"). Rather, they are suing for the taking of their successor liability claims, which died aborning at the close of the Sale because the injunctive provisions of the Sale Order precluded Petitioners, "effective upon the [c]losing [of the Sale]," from ever prosecuting these vested claims. App. 180, ¶9; 181, ¶49. Here, Petitioners possessed no vested property rights in a successor liability claim against New GM until the Sale closed and New GM became the successor-in-fact to Old GM. Before then, Petitioners had nothing more than a contingent interest in a future successor liability claim that might vest if the Government (1) closed on the Sale *and* (2) did not amend the Sale Agreement before closing to provide for assumption (as it did with other general unsecured

claims aggregating $60 billion) of Petitioners' direct claims against Old GM. App. 131-34, ¶¶ 114-20).

Rather than focus on the vested property rights taken (*i.e.*, the successor liability claims against New GM), the Federal Circuit focused on Petitioners' contingent interests in potential successor liability claims. Those contingent interests, however, much like an expiring option, vanished when the Sale closed. Yet the Government consistently—and wrongly—equates the vested property rights at issue with Petitioners' direct product liability claims against Old GM. Failure to recognize these distinctions explains why the Opposition's arguments necessarily fail. Opp. 9, 10, 11 n.4, 15, 17, 19.

II. THE FEDERAL CIRCUIT'S ERROR IS OF NATIONAL IMPORTANCE AND NOT LIMITED TO THIS CASE.

The Government denies that the decision by the Federal Circuit—the only lower federal appellate court with nationwide jurisdiction which rules on all takings claims against the Government—will spawn premature lawsuits. *See* Opp. 16 (petition is based on a "misreading" of the decision and a "disregard [of] the court['s] stated rationale for treating July 1, 2009 as the date when petitioners' claims accrued"). Petitioners have surely suffered from the decision, but—as noted above—they have not misread it. Petitioners' policy concerns, therefore, stand unrebutted.

The Government argues the petition is rooted in an "atypical legal theory," Opp. 17, but no one can dispute that takings itself, as this Court has recognized, is not

subject to "typical" analysis. There are "nearly [an] infinite variety of ways in which government actions or regulations can affect property interests." *Arkansas Game and Fish Comm' n v. United States*, 568 U.S. 23, 31 (2012). While this Court's regulatory takings jurisprudence since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), defies linear progression or easy categorization, the "atypical legal theory" being advanced is not that of Petitioners, but of the Federal Circuit, which has sharply deviated from this Court's decisions in *Franconia*, *Suitum*, *Danforth*, *Abbott*, *Agins,* and even *Penn Central* itself. *See* Pet. 19-32; Section I, *supra*; Sup. Ct. R. 10(c). The need to grant review, therefore, is compelling.

Petitioners agree that this case is unique in that it alleges the Government has takings liability based on its coercive conduct in bailing out a too-big-to-fail company using federal bankruptcy laws that were designed for privately-led restructurings, not government takeovers. From a purely legal perspective, however, the case result turns on events separated by mere days. Therefore, this case uniquely enables the Court to deliver "firmly-defined" and "easily applied" rules regarding when a takings claims accrues under the Tucker Act. *See*, *infra*, at 11-12. The Government responds that the case is mired in unique, complex facts unworthy of this Court's attention. But this case was dismissed on the pleadings under Fed. R. Civ. P. 12(b)(1) and (6). As such, all factual allegations are presumed true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982). Accordingly, this case presents no unresolved fact issues, which the Opposition does not dispute.

Based on the facts as pleaded, the issue presented is not whether the Government changed its mind after having made a final decision, but whether any decision—final or not—adversely affected Petitioners' vested successor liability claims before the July 10, 2009 closing of the Sale. The proposed second amended complaint (App. 95-197) plausibly alleges that no decision of the Government adversely affected Petitioners' vested successor liability claims until the Sale closed and Petitioners' claims died aborning. In sum, this case is an ideal vehicle to clarify, consistent with existing case law, that there is no special accrual rule in takings cases and that prudential ripeness alone, without Article III standing, is insufficient to give rise to a takings claim. *See Franconia*, 536 U.S. at 145 (the Court cautioned that there is no "special accrual rule" under the Tucker Act's statute of limitations for suits against the United States). The issue of whether the Government entered a "final decision," therefore, is a red herring that—to Petitioners' great misfortune—has been elevated by the Federal Circuit into a rule of law.

Thus far, the collateral damage from the decision has been minimal, but it is sure to follow. Pet. 35-37. Pointless jurisdictional disputes are sure to proliferate once it is understood that the law in the Federal Circuit, even after *Suitum* and *Franconia*, is that "the question of damages is discrete from the question of claim accrual." *Goodrich*, 434 F.3d at 1336. Notably, in so holding, the Federal Circuit made clear its purpose: to enable a plaintiff to effectively enjoin a taking before it ever happens and just compensation would be due:

> As a practical matter, it will often be much easier for the parties to correct a wrongful taking if litigation is initiated *before* its effects are felt. If Goodrich was required to wait until [someone]'s cattle appropriated his water, then it might be impractical, if not nearly impossible, to right the wrong.

Id.

The Federal Circuit's decision, therefore, will promote the initiation of takings suits that look more like strike suit seeking injunctive relief than takings cases seeking just compensation. This Court, however, has long held rejected the availability of such relief in takings cases. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2175 (2019) (injunctive relief is "an equitable remedy [that is] not available" in takings cases) (citing *Regional Rail Reorganization Act Cases*, 417 U.S. 102 (1974); *Hurley v. Kincaid*, 285 U.S. 95 (1932)). As such, this case additionally provides the Court with yet another unique opportunity to redress a flagrant conflict between the decisions of Federal Circuit and the decisions of this Court.

The Opposition contends that the Court need not shed tears for Petitioners since they had five years and 356 days to sue from the date (July 10, 2009) that petitioners regard as the true accrual date." Opp. 17. But "close only counts in horseshoes and hand grenades," as the old saying goes, and this Court admonished that "procedural rigidities should be avoided" when addressing the timeliness of a takings claim. *United States v. Dickinson*, 331 U.S. 745, 748-49 (1947). A claim is timely whether filed on the first day after accrual or the last moment before the statute of

limitations expires, and this Court has long recognized the importance of having limitations rules that are "firmly defined" and "easily applied." *Wilson v. Garcia*, 471 U.S. 261, 267 (1985), *partially superseded by statute as stated in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 371 (2004) ("Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations."). One commentator succinctly summarized these benefits:

> Having a bright-line rule is simple, fast, and predictable. By taking the guesswork out of the court's determination, the judiciary's limited time and resources can be spent elsewhere.

Suzette M. Malveaux, *Statues of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 Geo. Wash. L. Rev. 68, 80 (2005).

Finally, even before the recent dislocations to the national economy from COVID-19, government-sponsored entities have become increasingly involved in corporate restructurings through the mechanism of "rescue financing."

> Government claims that disorderly business failure will lead to systemic harm, or conversely that going-concern restructuring or orderly liquidation is in the public interest, are all but impossible to rebut. . . .
>
> The government, as a reluctant actor and repository of the public trust, essentially has an elbow on the scale. Existing formal and informal restructuring rules are not suited to restrict government conduct in a meaningful way, or to

> ferret out ulterior policy or political motives behind the terms and conditions of rescue financing.

Mark J. Heimowitz, *Government as Rescue Financier*, 19 U. Pa. J. Bus. L. 49, 53-54 (2016).

The Federal Circuit's decision conflicts with many foundational decisions of this Court and needs to be reversed while the ink is still fresh and before the ramifications of that decision debase the "few invariable rules in this area." *Arkansas Game* 568 U.S. at 31. The impending economic crisis only reinforces the need for this Court's intervention here.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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