No. 21-233

In the Supreme Court of the United States

MIKE FINNIN MOTORS, 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

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
MARTIN F. HOCKEY, JR.
KENNETH M. DINTZER
ELIZABETH M. HOSFORD
CHRISTOPHER J. CARNEY
ALISON S. VICKS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and rule—Continued: Page

In the Supreme Court of the United States

No. 21-233

MIKE FINNIN MOTORS, 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

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. 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. 619 and 103 Fed. Cl. 570.

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 for a writ of certiorari was filed on August 11, 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. 570. On the government's motion, the trial court certified its decision for interlocutory appeal. See 106 Fed. Cl. 619.

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) those franchise agreements would have had 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. 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. That failure of proof, the court of appeals concluded, foreclosed all of petitioners' claims, including their claim that the government actions at issue were "akin to a physical taking." *Id.* at 7a n.1 (citation omitted). The court of appeals accordingly 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, and its determination that that finding was sufficient to foreclose all of petitioners' asserted claims, do 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 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 Fifth Amendment's Just Compensation Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This Court has explained that the "paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). The Court has also "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Ibid.*

The Court's precedents "stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." *Lingle*, 544 U.S. at 538; see *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015-1016 (1992) (same). The first is when the "government requires an owner to suffer a permanent physical invasion of her property—however

minor"; in such a case, the government "must provide just compensation." *Lingle*, 544 U.S. at 538; see *Lucas*, 505 U.S. at 1015. The second is when a regulation "completely deprive[s] an owner of '*all* economically beneficial use' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019) (brackets omitted). "Outside these two relatively narrow categories (and the special context of land-use exactions * * *), regulatory takings challenges are governed by the standards set forth in" *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). *Lingle*, 544 U.S. at 538. Under those standards, 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*, 438 U.S. at 124.

b. Petitioners contend (Pet. 11-13, 15, 23-28) that their claims should be evaluated under this Court's framework for physical takings. Yet petitioners point to no action on the part of the federal government that could be characterized as "a direct government appropriation or physical invasion of private property." *Lingle*, 544 U.S. at 537. Petitioners' franchise agreements with Chrysler gave them responsibility for selling certain Chrysler-owned vehicle lines in the areas around their dealerships, and generally prevented Chrysler—as a matter of contract law—from authorizing additional dealerships within those defined regions. See Pet. App. 27a, 59a, 65a. But, contrary to petitioners' assumption (Pet. 23-24), their contractual rights vis-à-vis Chrysler did not amount to a right of physical exclusion, enforceable against the general public, that the government could physically invade or appropriate.

Rather than losing a physical property interest through government invasion or appropriation, petitioners lost their franchise agreements through the application of longstanding bankruptcy-law provisions that "predated the creation of th[ose] franchise agreements" and that "allow[] trustees or debtors-in-possession to reject executory contracts" in bankruptcy. Pet. App. 235a; see *id.* at 4a. Once the bankruptcy court entered its order approving the rejection of petitioners' franchise agreements, "the result [was] that the now-former franchisees could no longer exercise franchise-agreement rights, such as holding themselves out as authorized Chrysler dealers and providing warranty-covered service for which Chrysler would pay." *Id.* at 4a (citing 09-50002 Docket Entry No. 3802 (Bankr. S.D.N.Y. June 9, 2009) (Order Rejecting Executory Contracts, *In re Chrysler LLC*)). That application of a pre-existing regulatory provision allowing for those effects on their contractual rights was not in any relevant sense "akin to a physical taking." *Id.* at 7a.

Petitioners do not appear to dispute that a plaintiff's failure to establish economic impact—as the Court of Federal Claims found here, see Pet. App. 208a-210a, 212a-217a—requires rejection of a regulatory-takings claim. Instead, they contend (Pet. 13) that they did not have to prove that the governmental actions they challenge had any "economic impact" because such proof "is irrelevant to direct takings cases."* Petitioners attrib-

---

* Petitioners appear to contend (Pet. 24-25) that the court of appeals should have granted them default judgment on their "direct takings claim," asserting that the "direct takings claim was a centerpiece" of their appellate briefs yet "was uncontested on appeal." Pet. 24 (emphasis omitted). Those assertions are misplaced. As the

ute (Pet. 9) their fundamental distinction between "direct" and "regulatory" takings to *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063 (2021). But the Court in *Cedar Point* found that there had been a *per se* taking not because it was somehow more direct than one effectuated through regulation, but because the challenged provision was a "government-authorized physical invasion[]." *Id.* at 2073; see *id.* at 2074 ("The regulation appropriates a right to physically invade the growers' property—to literally 'take access,' as the regulation provides. It is therefore a *per se* physical taking under our precedents.") (citation omitted). Similarly, in *Horne* v. *United States Department of Agriculture*, 576 U.S. 351 (2015), the Court found that the requirement to reserve a portion of a grower's raisin crop was "a clear physical taking" because "[a]ctual raisins [we]re transferred from the growers to the government" and were required to "be physically segregated" from the

---

court of appeals recognized, the argument that the government's actions amounted to "a per se direct taking, akin to a physical taking" accounted for approximately one page of petitioners' appellate brief. Pet. App. 7a n.1; see Pet. C.A. Br. 38-39. The government's response explained that petitioners lost their franchise agreements because of the voluntary actions of Chrysler (not because of a taking by the government), and that petitioners were in any event not entitled to recover "just compensation" for their lost franchise agreements, U.S. Const. Amend. V, because they had failed to prove that those agreements retained a positive fair-market value at the time they were allegedly taken. See Gov't C.A. Br. 32-88. Either one of those arguments provided a basis for rejecting *all* of petitioners' claims, as the court of appeals found, see Pet. App. 7a n.1. There was accordingly no need for the government to respond separately to petitioners' isolated and unsupported "direct taking" claim, and the court of appeals did not, as petitioners assert, violate "the principle of party presentation" or "interpos[e] a waived or forfeited defense." Pet. 25, 27 (emphases omitted).

rest of the crop. *Id.* at 361; see *Cedar Point*, 141 S. Ct. at 2074 ("The physical appropriation by the government of the raisins in [*Horne*] was a *per se* taking[.]"). Because the termination of petitioners' franchise agreements was not a *physical* taking, this case does not resemble the *per se* takings that the Court has recognized.

In any event, even if this case were treated like a physical taking, a showing of economic impact would still be relevant to the calculation of any just compensation due. Under the Fifth Amendment, a property owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson* v. *United States*, 292 U.S. 246, 255 (1934). The court of appeals determined that "the record supports" the trial court's finding that petitioners "did not provide a reliable proof that, in the but-for world, the franchise agreements would have had a positive value." Pet. App. 10a. That factual finding by the two lower courts does not warrant this Court's review. See *Glossip* v. *Gross*, 576 U.S. 863, 882 (2015) (noting this Court's explanation in *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996), that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error") (internal quotation marks omitted). But that finding suffices to support awarding petitioners no just compensation for their takings claims. See *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U.S. 280, 282 (1926) ("For even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from

the company; and it was not subjected by the government to pecuniary loss. Nominal damages are not recoverable in the Court of Claims.").

2. Petitioners also challenge (Pet. 28-35) the Court of Federal Claims' findings regarding what would have happened to petitioners' franchise agreements if Chrysler had not chosen the reorganization approach recommended by the government.

Petitioners contend (Pet. 28-30) that the Court of Federal Claims misapprehended the rights that petitioners would have retained if their franchise agreements were rejected in Chapter 7 bankruptcy in that but-for world. Pointing to this Court's decision in *Mission Product Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652 (2019), they argue (Pet. 28-29) that they would have retained the right to advertise themselves as Chrysler-branded dealerships even if Chrysler had rejected their claims under 11 U.S.C. 365. But petitioners identify no reason that they would have retained greater rights had their franchise agreements been rejected under Section 365 in that but-for world than they did when their franchise agreements were rejected under Section 365 in the real world—and they certainly provide no basis for concluding that the Court of Federal Claims clearly erred in assuming that the rejection of petitioners' franchise agreements would have had the same legal effects under either scenario. At most, petitioners' argument suggests that the bankruptcy court's 2010 order barring them from exercising rights under their franchise agreements, see p. 4, *supra*, was incorrect in light of this Court's decision seven years later in *Mission Product Holdings*. But petitioners' remedy for any such error would have been to appeal the bankruptcy court's order when it was entered in 2010; that

alleged error by the bankruptcy court would provide no basis for recovering from the United States under the Just Compensation Clause today.

Petitioners additionally contend that supposedly "uncontroverted evidence"—which petitioners never actually cite—established that "the dealers would have continued to profit from their franchisees' rights even after a hypothetical Chrysler bankruptcy rejection." Pet. 32 (emphasis omitted). That fact-bound disagreement with trial court's findings about the value of petitioners' franchises does not warrant this Court's review. See Sup. Ct. R. 10; see also *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (observing that the Court "do[es] not grant a [writ of] certiorari to review evidence and discuss specific facts"). And in any event, petitioners identify no error, let alone clear error, in the Court of Federal Claims' factual findings. They assert (Pet. 32-35) that if Chrysler had not adopted the government-assisted reorganization plan and instead proceeded into liquidation, their dealerships would have continued to profit from providing service to, and reselling, existing Chrysler vehicles. The evidence at trial, however, established that dealerships' income from selling used vehicles or performing service work paid for by customers was not dependent on their franchise agreements with Chrysler. See Pet. App. 38a, 110a, 162a & n.40, 182a, 213a-214a & n.46; see also *id.* at 10a. Petitioners are thus incorrect in attributing to their franchise agreements the hypothetical income from used-car sales and customer-paid repairs. Moreover, the Court of Federal Claims correctly determined that if Chrysler had liquidated in bankruptcy instead of engaging in the government-recommended reorganization, it would have left petitioners without the parts

needed to service the vehicles of their existing customers—making that "a worse outcome for not only the Chrysler brand but for all [petitioners]." *Id.* at 198a. Petitioners nowhere address that aspect of the Court of Federal Claims' findings.

3. Even if the questions presented otherwise warranted this Court's review, this case would be a poor vehicle in which to address what petitioners contend (Pet. 36) is "the Federal Circuit's determined dismantling of the guarantees of the Takings Clause." The denial of petitioners' takings claims is independently supported by an alternative ground that the government advanced below. 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 from any unanticipated or coercive regulatory act by the government. See Pet. App. 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 establish new standards 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.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
MARTIN F. HOCKEY, JR.
KENNETH M. DINTZER
ELIZABETH M. HOSFORD
CHRISTOPHER J. CARNEY
ALISON S. VICKS
Attorneys

NOVEMBER 2021