No. 19-1252

In the Supreme Court of the United States

CALLAN CAMPBELL, 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

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
MICHAEL GRANSTON
Deputy Assistant Attorney General
FRANKLIN E. WHITE, JR.
JOHN J. TODOR
Attorneys

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

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners' regulatory-takings claims should be dismissed as untimely because those claims "first accrue[d]," 28 U.S.C. 2501, more than six years before petitioners' suit was filed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 932 F.3d 1331. The opinions of the Court of Federal Claims (Pet. App. 24-63, 64-91) are reported at 134 Fed. Cl. 764 and 137 Fed. Cl. 54.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2019. A petition for rehearing was denied on November 22, 2019 (Pet. App. 92-94). On February 10, 2020, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 20, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2008, General Motors (GM) was deeply insolvent, with dwindling cash for daily operations. With government financing and bankruptcy-court approval pursuant to Section 363 of the Bankruptcy Code, 11 U.S.C. 363 (2006), the bankrupt GM entity (Old GM) sold substantially all of its assets, and transferred certain liabilities, to a new entity (New GM).

Petitioners held unsecured product-liability claims against Old GM. Petitioners allege that, as a condition of providing financial assistance, the government demanded that New GM not assume liability for their claims and that the sale order include an injunction barring their successor-liability claims against New GM. In their view, the government thus effectively coerced GM and the bankruptcy court into extinguishing their claims.

Petitioners brought this regulatory-takings suit, seeking compensation for the extinguished claims. The Court of Federal Claims (CFC) dismissed the suit as time-barred, Pet. App. 24-63, and the Federal Circuit affirmed, *id.* at 1-23.

1. In the fall of 2008, in the midst of the global financial crisis, GM faced serious financial difficulties. See *In re General Motors Corp.*, 407 B.R. 463, 476 (Bankr. S.D.N.Y. 2009) (*Sale Op.*), stay denied, No. M 47, 2009 WL 2033079 (S.D.N.Y. July 9, 2009), aff'd, 428 B.R. 43 (S.D.N.Y. 2010). Credit markets were frozen and automobile sales were plummeting. See *ibid.*; see also *A & D Auto Sales, Inc.* v. *United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014). Unable to obtain financing from private credit markets, GM requested financial assistance from the federal government. See *Sale Op.*, 407 B.R. at 477. The government agreed to provide GM with working

capital, on the condition that GM submit viability plans demonstrating that it "could achieve financial stability with the help of the government funds." *A & D Auto Sales*, 748 F.3d at 1148.

To facilitate the radical restructuring necessary to preserve its viability as a going concern, GM filed for bankruptcy on June 1, 2009. *Sale Op.*, 407 B.R. at 479. The United States and Canada agreed to provide debtor-in-possession financing for GM through the chapter 11 process. *Id.* at 480. In total, the Department of the Treasury (Treasury) advanced GM approximately $50 billion—$19.4 billion to enable the company to continue operating from December 2008 through the date it filed for bankruptcy protection, and the rest to finance the bankruptcy and New GM's ongoing operations. See *id.* at 473, 479; *A & D Auto Sales*, 748 F.3d at 1147-1148.

On July 1, 2009, GM filed a proposed sale order pursuant to Section 363 of the Bankruptcy Code. Pet. App. 13; see 11 U.S.C. 363 (2006). Section 363 "gives a bankruptcy trustee the power to use, sell, or lease the property of a debtor in bankruptcy," Pet. App. 3, and authorizes the trustee under certain conditions to sell the property "free and clear of any interest in such property of an entity other than the estate," 11 U.S.C. 363(f). GM's proposed sale order would transfer substantially all of the assets, as well as some of the liabilities, from the bankrupt entity (Old GM) to a new corporate entity (New GM). See Pet. App. 6-8; *Sale Op.*, 407 B.R. at 473. The proposed order provided, however, that New GM would not assume responsibility for petitioners' unsecured product-liability claims, and it included a provision enjoining petitioners from pursuing successor-liability

claims against New GM. 407 B.R. at 483.[1] Under the terms of the order, petitioners thus would remain unsecured creditors of Old GM. *Id.* at 481.

The proposed sale order was supported by the Creditors' Committee for GM creditors, the United States, the governments of Canada and Ontario, the United Auto Workers (an affiliate of which was GM's largest creditor), the indenture trustee for GM's approximately $27 billion in unsecured bonds, and an ad hoc committee representing holders of a majority of those bonds. *Sale Op.*, 407 B.R. at 473-474. Before considering the motion to approve the Section 363 sale, the bankruptcy court conducted a three-day evidentiary hearing. See *Campbell* v. *Motors Liquidation Co.* (*In re Motors Liquidation Co.*), 428 B.R. 43, 49 (S.D.N.Y. 2010). Petitioners actively participated in this process, including by filing briefs in support of their position that the Section 363 sale would frustrate their ability to pursue successor-liability claims against New GM. See, *e.g.*, Bankr. Docs. 2041, 2050 (June 19, 2009); Bankr. Doc. 2769 (June 30, 2009).

On July 5, 2009, the bankruptcy court granted GM's motion. *Sale Op.*, 407 B.R. at 475. Noting that "[t]he continued availability of the financing provided by Treasury is expressly conditioned upon approval of this motion by July 10, and prompt closing of the 363 Transaction by August 15," the court found that, "[a]bsent prompt confirmation that the sale has been approved and that the transfer of the assets will be implemented,

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[1] Some States recognize the right of a plaintiff holding a claim against a defunct corporate entity to assert the same claim against a successor corporate entity. See *Sale Op.*, 407 B.R. at 500. A claim brought against the successor entity to enforce a liability of its predecessor is called a "successor liability claim."

GM will have to liquidate. There are no realistic alternatives available." *Id.* at 484. The court further explained that, in the event of liquidation, Old GM's unsecured creditors—including petitioners—"would receive nothing on their claims." *Id.* at 475. Petitioners objected to the Section 363 sale's injunction against their successor-liability claims, but the court rejected that challenge. *Id.* at 499-506.

To accommodate limited appellate review, the bankruptcy court delayed the effective date of the sale order until July 9, 2009. See *In re Motors Liquidation Co.*, 428 B.R. at 50. Petitioners appealed to the Southern District of New York. They did not seek a stay, however, and the Section 363 sale closed on July 10, 2009, while the appeal was still pending.[2]

On April 13, 2010, the district court affirmed the bankruptcy court's decision. See *In re Motors Liquidation Co.*, *supra*. The court concluded that, because the sale had already closed, "the issues [petitioners] seek to raise on appeal" were both "statutorily moot under Section 363(m) of the Bankruptcy Code" and equitably moot. 428 B.R. at 52. In the court's view, "rewriting the Sale Order to eliminate the application of the 'free and clear' or injunctive provisions to these claimants would * * * unravel a fundamental aspect of the integrated [Section] 363 Transaction and undermine the subsequent transactions that have occurred since the Closing." *Id.* at 63. The court observed that petitioners' "position in the bankruptcy appears to be neither better nor worse than that of any other unsecured contingent creditor," and that "the only alternative to [the Section

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[2] Certain other parties (with asbestos-related claims) did seek a stay, which the district court denied on July 9, 2009. See *In re Motors Liquidation Co.*, 428 B.R. at 50.

363 sale] was a liquidation in which they and other unsecured creditors would have received nothing." *Id.* at 63-64.

Petitioners eventually received payments from Old GM on their product-liability claims. Pet. App. 31. Petitioners assert, however, that these payments represented a fraction of the claims' true value. *Id.* at 99.

2. a. On July 9, 2015, petitioners filed a putative class action in the CFC, alleging a takings claim. Pet. App. 2, 4-5. Petitioners argued that they had held valid product-liability claims against Old GM, and that, in these circumstances, applicable state law recognized a property right in claims against a successor corporate entity like New GM. *Id.* at 5. They contended that the government had improperly coerced the participants in the bankruptcy process to extinguish their claims, thus depriving them of property, by conditioning the closing of the Section 363 sale on the inclusion in the sale order and agreement of provisions that barred New GM from assuming those claims and enjoined petitioners from asserting them in the future. *Id.* at 43.

The CFC granted the government's motion to dismiss, see Pet. App. 24-63, holding that petitioners' claims were jurisdictionally barred by the six-year statute of limitations that governs claims under the Tucker Act, ch. 359, 24 Stat. 505. That provision states in pertinent part that "[e]very claim of which the [CFC] has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. 2501.[3] The CFC concluded that, because petitioners' claims were based on the alleged "coercion of

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[3] Petitioners contend (Pet. 12) that the government "did not assert the statute of limitations jurisdictional defense" in its motion to

Old GM and the bankruptcy court into including the extinguishment of plaintiffs' successor liability claims" in the sale order, those claims had accrued no later than July 5, 2009, when the bankruptcy court approved the proposed sale order. Pet. App. 42. The court therefore held that petitioners' July 9, 2015, complaint was filed more than six years after the accrual date and accordingly was time-barred. *Id.* at 45. The court further held that, to the extent petitioners alleged a judicial taking by the bankruptcy court itself, the CFC lacked jurisdiction over that claim because Federal Circuit precedent "foreclose[d] the prosecution of a takings claim in [the CFC] which would require a review of the effect of a bankruptcy court's rulings on a plaintiff's property rights." *Id.* at 47.

In the alternative, the CFC concluded that petitioners had failed to state a claim on the merits because petitioners had not alleged the existence of a cognizable property right. Pet. App. 49-50. The court observed that the asserted property right—petitioners' successor-liability claims against New GM, see *id.* at 52—existed only because the government had facilitated the creation of New GM. *Id.* at 55. At the time petitioners' successor-liability claims arose, the government retained discretion to condition the sale to New GM on the extinguishment of those claims. *Id.* at 61-62. The CFC therefore concluded that, because the potential for extinguishment had inhered in petitioners' claims from their inception, the eventual sale did not effect a taking. *Ibid.*

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dismiss. That is incorrect. The government's motion to dismiss argued that "any allegations of coercion with respect to GM's decision to file bankruptcy or exclude plaintiffs' personal injury claims fail due to the Court's six-year statute of limitations." Fed. Cl. Doc. 8, at 38 (Oct. 8, 2015).

Petitioners filed a motion for reconsideration, to amend the judgment, and for leave to file a second amended complaint, which the CFC denied. See Pet. App. 64-91. Petitioners argued that their claims had accrued on either July 9, 2009 (when the sale order became effective) or July 10, 2009 (when the sale closed). The court rejected both of these arguments. *Id.* at 70-75. It also reaffirmed its prior ruling that petitioners lacked a cognizable property right, *id.* at 90, and it denied the motion to further amend the complaint as futile, *id.* at 91.

b. The court of appeals affirmed. Pet. App. 1-23. The court assumed without deciding that petitioners possessed a cognizable property interest, *id.* at 6, but it held that petitioners' claims were time-barred under the six-year statute of limitations contained in Section 2501, see *id.* at 11. The court characterized petitioners' claims as resting on the government's alleged "coercion of Old GM to secure approval from the bankruptcy court of a proposed sale order extinguishing [their] successor liability claims." *Id.* at 12. In the court's view, the alleged taking occurred—and petitioners' claim accrued—on July 1, 2009, when Old GM filed the proposed sale order with the bankruptcy court. *Id.* at 13.

The court of appeals explained that a property owner has a takings claim "'as soon as [the] government takes his property for public use without paying for it' without regard to post-taking remedies that may be available," Pet. App. 14 (quoting *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2170 (2019)) (brackets in original), and that "the claim accrues when the agency action is complete, regardless of whether damages are complete and fully calculable," *id.* at 15 (citation and internal quotation marks omitted). The court concluded that, "assuming

that [petitioners' product-liability] claims had value in the first place, despite the likelihood of no recovery if Old GM had liquidated, the filing of the proposed bankruptcy sale order clearly inflicted an injury on [petitioners] by diminishing the value of their claimed property rights." *Ibid.* The court also rejected petitioners' argument that the government's coercive conduct was not complete until the actual closing of the sale, explaining that the government's "ability to change its mind" does not render an otherwise final action non-final. *Id.* at 16.

In addition to arguing that the government had coerced Old GM, petitioners claimed that "the government effected a taking by pressuring the bankruptcy court and the district court to approve the proposed sale order." Pet. App. 19. The court of appeals held that it lacked jurisdiction over this claim, as "the [CFC] 'cannot entertain a taking[s] claim that requires the court to scrutinize the actions of another tribunal.'" *Ibid.* (citation omitted; second set of brackets in original). Instead, the court explained, the proper avenue for challenging the orders of the bankruptcy and district courts was through an appeal of those orders. *Id.* at 20.

Finally, the court of appeals affirmed the CFC's denial of petitioners' motion to file a second amended complaint, agreeing that such a filing would be futile. Pet. App. 21-22.

Petitioners filed a petition for rehearing and for rehearing en banc, which the court of appeals denied. Pet. App. 92-94.

ARGUMENT

Petitioners argue that Old GM's submission of the proposed sale order should not have triggered the commencement of the applicable limitations period and did not reflect any final agency action. Petitioners contend

in particular that the court of appeals departed from established takings principles by holding that petitioners' claims accrued before petitioners suffered any injury. Those arguments lack merit.

The court of appeals found that, if petitioners' product-liability claims had any value to begin with, Old GM's submission of the proposed sale order inflicted a concrete injury on petitioners. The court further held that the possibility that a government decisionmaker might later reconsider an otherwise final decision does not render that decision nonfinal. Because the court below applied the correct legal framework, petitioners can claim at most that the court misidentified the precise point at which petitioners first suffered injury as a result of the government's alleged coercive conduct. That kind of factbound request for error correction does not warrant this Court's review, and the practical significance of the decision below is further diminished by the atypical theory underlying petitioners' takings claims. Nor does the court of appeals' ruling conflict with any decision of another court. Further review is not warranted.

I. PETITIONERS' CRITICISMS OF THE DECISION BELOW LACK MERIT

A. Petitioners primarily argue (Pet. 19) that the Federal Circuit "abandoned the injury-in-fact requirement" by holding that petitioners' takings claim had accrued even before petitioners suffered concrete harm from the government's alleged coercion. In support of this contention, petitioners excerpt a sentence of the opinion below stating that a taking "may occur before the effect of the regulatory action is felt." Pet. 3 (quoting Pet. App. 14) (emphasis omitted). Petitioners con-

strue (Pet. 22-23) the Federal Circuit's decision as holding that the time for filing suit commenced to run before they suffered any concrete injury, which they assert did not occur until July 10, 2009, when the sale closed.

Petitioners' argument reflects a misunderstanding of the opinion below. The court of appeals did not find that the limitations period had begun to run before any injury had occurred. Rather, the court explained that, "assuming that [petitioners'] claims had value in the first place, despite the likelihood of no recovery if Old GM had liquidated, the filing of the proposed bankruptcy sale order clearly inflicted an injury on [petitioners] by diminishing the value of their claimed property rights." Pet. App. 15.

The quote that forms the basis for petitioners' contrary reading of the opinion below—the court of appeals' statement that a claim may accrue before the effect of a governmental action "is felt"—is taken out of context. The full sentence reads: "In the case of a regulatory taking, however, the taking may occur before the effect of the regulatory action is felt and *actual damage to the property interest is entirely determinable*." Pet. App. 14 (emphasis added). As the italicized language makes clear, the court was simply observing that, once a plaintiff has suffered concrete injury from a final agency action, damages need not be fully liquidated in order for a claim to accrue.[4]

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[4] Even if the court of appeals' statement that a "taking may occur before the effect of the regulatory action is felt" could be properly understood in isolation, it would be dicta given the court's clear holding that, assuming petitioners' product-liability claims had value, the submission of the proposed sale order inflicted concrete injury in this case. Pet. App. 14-15.

Petitioners implicitly accept that proposition. Although petitioners assert that their claims accrued on July 10, 2009, their complaint recognized that their precise damages were not determinable until petitioners received partial compensation in the Old GM bankruptcy proceedings. See Pet. App. 157-158 ("At the time of the Sale, the distributions to these claimants were neither made nor capable of certain determination."); *id.* at 158-159 (alleging damages "based on the difference between the allowed amount of each member's prepetition Personal Injury Claim in the GM Bankruptcy and the actual recoveries on that claim in the GM Bankruptcy").

Nearly all of petitioners' arguments depend on their misreading of the decision below. Petitioners contend that the court of appeals' decision conflicts with *Franconia Associates* v. *United States*, 536 U.S. 129 (2002). In that case, the plaintiffs were federal borrowers who allegedly had been given an absolute right to prepay their loans at any time. Congress subsequently enacted a statute that restricted the right to prepay, and the plaintiffs later brought suit asserting takings and breach-of-contract claims. *Id.* at 133. This Court held that, although the enactment of the statute qualified as an anticipatory repudiation of the contract, no actual breach had occurred—and plaintiffs' claims for breach of contract therefore had not accrued—until the government actually failed to perform by refusing to accept prepayment or the plaintiffs elected to treat the repudiation as a breach. *Id.* at 143-144.[5] In so ruling, the Court rejected the proposition that Section 2501 "creates a special accrual rule for suits against the United States." *Id.* at 145.

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[5] The Court in *Franconia* did not separately address the proper accrual rule for plaintiffs' takings claim. See 536 U.S. at 149.

Petitioners' contention that the court below improperly created a "special accrual rule" for takings claims rests on the misreading of the court's opinion described above. Pet. 23 (citation omitted). Petitioners also assert (Pet. 22) that the submission of the proposed sale order in this case was analogous to the contract repudiation in *Franconia*. *Franconia*'s contract-law analysis, however, does not support petitioners here. To the contrary, because the *Franconia* Court held that the plaintiffs could have elected to treat the repudiation as a breach and sued immediately, see 536 U.S. at 144, any analogy between the repudiation in *Franconia* and the submission of the proposed sale order in this case would support the court of appeals' conclusion that petitioners' takings claims accrued when the proposed sale order was submitted. The *Franconia* Court's further holding that the plaintiffs could instead defer the accrual of their claims until the government actually refused to accept prepayment, see *id.* at 143-144, rested on contract-law principles that do not apply here.

The court of appeals' application of Section 2501 to the circumstances of this case is also consistent with the court's discussion of the takings claims that could and could not be asserted in a CFC action. The court explained that, under Federal Circuit precedent (which petitioners do not challenge in this Court), "the coercion that could give rise to a regulatory takings claim does not include 'coercion' of the court system by making an argument for a particular result," since the CFC "'cannot entertain a taking[s] claim that requires the court to scrutinize the actions of another tribunal.'" Pet. App. 19 (citation omitted; brackets in original). For that reason, the only cognizable coercion-based takings claim that petitioners could assert would rest on coercion of

Old GM, not of the bankruptcy court. See *id.* at 18. The court's conclusion that petitioners' claims accrued on July 1, 2009, when Old GM responded to that alleged coercion by submitting the proposed sale order, is consistent with that analysis.[6]

B. In the alternative, petitioners contend (Pet. 32) that the government did not reach a final decision as to the disposition of their claims until July 9, 2009, when the district court denied the asbestos claimants' request for a stay pending appeal. See *In re General Motors Corp.*, No. M 47, 2009 WL 2033079, at *2 (S.D.N.Y.). In petitioners' view, the government might have decided to assume petitioners' claims if the district court had stayed the sale order, since a stay would have forced the government to choose between "assum[ing] these claims or not clos[ing] on the Sale at the expense of the national economy." Pet. 32.

This argument rests on the possibility that the government might have changed its mind some days after the proposed sale order was submitted. As the Federal Circuit correctly held, however, the speculative possibility that the government might reconsider an otherwise final action does not render that action nonfinal. See *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2170 (2019) ("[A] property owner has a claim for a violation of the Takings Clause as soon as [the] government takes

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[6] The CFC held that, because petitioners' claims were based on the alleged "coercion of Old GM and the bankruptcy court into including the extinguishment of plaintiffs' successor liability claims" in the sale order, those claims had accrued no later than July 5, 2009, when the bankruptcy court approved the proposed sale order. Pet. App. 42. Even if the action of another court could trigger Section 2501's six-year window for filing suit in the CFC, that analysis would provide a potential alternative ground for affirmance here.

his property for public use without paying for it."); *id.* at 2171 ("The government's post-taking actions ([such as] repeal of the challenged ordinance) cannot nullify the property owner's existing Fifth Amendment right."); cf. 5 U.S.C. 704 (providing that "agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for * * * any form of reconsideration"). Petitioners have no response to this fundamental point. Nor do they explain why a stay order entered at the behest of other parties might have caused the government to reconsider its position with respect to petitioners' claims. See *Campbell* v. *Motors Liquidation Co.* (*In re Motors Liquidation Co.*), 428 B.R. 43, 50 (S.D.N.Y. 2010) (noting that asbestos claimants, but not petitioners, sought a stay).

II. THIS CASE DOES NOT WARRANT THE COURT'S REVIEW

A. Petitioners contend that the decision below worked an avulsive change in the law by holding that certain takings claims can accrue, and the applicable limitations period can begin to run, before the plaintiff has been injured. See, *e.g.*, Pet. 19. As explained above, see p. 11, *supra*, that argument reflects a misunderstanding of the court of appeals' rationale. The court of appeals' holding that petitioners' claims accrued on July 1, 2009, when Old GM submitted the proposed sale order, rested on the court's determination that, if petitioners' product-liability claims had value to begin with, then petitioners suffered an injury at that time. See Pet. App. 15; p. 11, *supra*. Any dispute as to the correctness of that case-specific determination raises no issue of broad legal or practical importance. Petitioners'

alternative argument (see Pet. 32) that the government's refusal to assume petitioners' claims was not final until July 9, 2009, when the district court denied the asbestos claimants' request for a stay pending appeal, likewise amounts to a request for mere error-correction. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

All of the harmful consequences that petitioners predict will flow from the decision below depend on their misreading of the Federal Circuit's opinion. Petitioners assert (Pet. 35) that "[t]he Federal Circuit's rule that a takings claim must be brought before the plaintiff has been injured" "promotes the filing of premature 'defensive' takings lawsuits every time the Government may have made a decision that might be later deemed 'final.'" See also Pet. 34 ("Property owners nationwide, however, now face a dilemma in light of the decision below: should they conform to the Federal Circuit's new accrual rule, or instead risk following this Court's *Franconia* analysis[?]"). These and similar arguments disregard the court of appeals' stated rationale for treating July 1, 2009, as the date when petitioners' claims accrued.

To be sure, because the precise date when a particular plaintiff first suffered a cognizable injury is sometimes subject to reasonable dispute, a prospective plaintiff will not always know exactly when a court would view the applicable limitations period as having commenced. That uncertainty at the margins, however, is an unavoidable consequence of Congress's decision to

make the "accru[al]" of the plaintiff's cause of action the event that triggers Section 2501's limitations period. 28 U.S.C. 2501.[7] And because Section 2501 establishes a six-year limitations period, plaintiffs will generally have ample time to sue even in cases where there is some uncertainty as to the precise date when that period began to run. Here, despite petitioners' hyperbolic assertion that the Federal Circuit required suit to "be brought before the plaintiff has been injured" (Pet. 35), the decision below gave petitioners five years and 356 days to sue from the date (July 10, 2009) that petitioners regard as the true accrual date.

B. The atypical legal theory underlying petitioners' takings claims further diminishes the practical significance of the decision below, and it would make this case an unsuitable vehicle for clarifying general accrual principles. Petitioners' takings claims rest on "unusual allegations" and do "not fit neatly into a normal takings framework." *A & D Auto Sales, Inc.* v. *United States*, 748 F.3d 1142, 1149 (Fed. Cir. 2014) (citation omitted). Petitioners do not allege that the government directly took their property or engaged in regulatory action that directly impaired its value. Instead, they allege that the government offered financial incentives to a third party in a bankruptcy proceeding that induced the third party to take actions that diminished the value of petitioners' product-liability claims. In support of that theory, petitioners invoked the Federal Circuit's decision in *A & D Auto Sales*, which also arose out of the GM bankruptcy,

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[7] Indeed, petitioners have identified both July 10, 2009 (when the bankruptcy sale closed), and July 9, 2009 (when the bankruptcy court's sale order became effective and the district court denied the asbestos claimants' stay request), as potential accrual dates for their regulatory-takings claims. Pet. App. 12-13.

and in which the court held that similar allegations survived a motion to dismiss. See *id.* at 1153; see also Pet. App. 2. The *A & D Auto Sales* court noted that "[t]he facts of this case are unique and raise issues that have not been decided before." 748 F.3d at 1150.

The court of appeals' accrual analysis turned heavily on the unusual legal theory underlying petitioners' complaint, and on the precise effects of coercion against different actors in a single bankruptcy proceeding. See Pet. App. 2, 19 (identifying the point of accrual for "claims alleging coercion of Old GM," but holding that it lacked jurisdiction over claims alleging "'coercion' of the court system"); pp. 13-15, *supra*. Petitioners' arguments on appeal are similarly bound up with their substantive legal theory, focusing on whether the government's alleged coercion coincided with harm to petitioners' property interests. Particularly given the absence of any conflict among the circuits (discussed below), there is no reason to suppose that similar accrual issues will arise often. The Court's review is unwarranted for this reason as well.

C. Petitioners contend (Pet. 24) that the decision below conflicts with *Cobb* v. *City of Stockton*, 120 Cal. Rptr. 3d 389 (Cal. Ct. App. 2011). As a threshold matter, a purported conflict with the decision of an intermediate state court—as opposed to another court of appeals or a state court of last resort—is not ordinarily a sufficient basis for this Court's review. See Sup. Ct. R. 10.

In any event, there is no conflict. In *Cobb*, the city filed an eminent-domain action to acquire a portion of the plaintiff's property in order to construct a road. 120 Cal. Rptr. 3d at 390. The court granted the city pre-

judgment possession of the property, and the city constructed the proposed roadway. *Ibid.* The eminent-domain action was subsequently dismissed for failure to prosecute. *Ibid.* After the plaintiff brought an inverse-condemnation suit, the court considered whether the limitations period had commenced to run when the city took possession of the property or when the eminent-domain lawsuit was dismissed. *Id.* at 392. The California appellate court held that the limitations period had not begun to run until the latter event occurred, reasoning that the city had initially taken possession of the property "pursuant to a court order" and thus was not in "*wrongful* possession of the [p]roperty" until the lawsuit was dismissed. *Id.* at 394. That holding has no bearing on this case, where there was no court authorization of temporary possession and therefore no subsequent termination of such possession.

Petitioners also assert that "[o]ther Federal Circuit decisions recognize the separate injury requirement, and the panel's decision conflicts with these cases." Pet. 26 (citing cases). Any intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam); Sup. Ct. R. 10. And in any event, none of these decisions conflicts with the decision below, which concluded that, if petitioners' product-liability claims against GM had value to begin with, petitioners were injured when the proposed sale order was submitted on July 1, 2009. See p. 11, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
MICHAEL GRANSTON
Deputy Assistant Attorney General
FRANKLIN E. WHITE, JR.
JOHN J. TODOR
Attorneys

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