No. 2018-2014

In the
United States Court of Appeals
for the Federal Circuit

CALLAN CAMPBELL, JAMES H. CHADWICK, JUDITH STRODE CHADWICK, KEVIN C. CHADWICK, individually and through his court-appointed administrators, James H. Chadwick and Judith Strode Chadwick, KEVIN JUNSO, NIKI JUNSO, TYLER JUNSO ESTATE, through Kevin Junso, its personal representative,

Plaintiffs-Appellants,

vs.

UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
CASE NO. 1:15-CV-00717-PEC

BRIEF AMICUS CURIAE OF CENTER FOR AUTO SAFETY IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com
Counsel for Amicus Curiae

FORM 9. Certificate of Interest | Form 9 Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CALLAN CAMPBELL, et al. v. UNITED STATES

Case No. 18-2014

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ■ (amicus) ☐ (name of party)

Center for Auto Safety

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Center for Auto Safety	same	none

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

None.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None.

9/30/3019
Date

/s/ Robert H. Thomas
Signature of counsel

Please Note: All questions must be answered

Robert H. Thomas
Printed name of counsel

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IDENTITY AND INTEREST OF AMICUS

The identity and interest of the Center for Auto Safety (CAS) is set out in CAS's motion for leave to file this brief.[1]

ARGUMENT

This brief focuses on two issues.

1. A regulatory takings claim cannot accrue before a property owner should have been aware of the injury to her property rights. The panel's conclusion that the statute of limitations clock began ticking even before the plaintiffs may have realized there had been a taking of their property may be analogized to the classic Zen parable: if the government action takes property but the owner doesn't feel it, is there a takings claim?

2. Regulatory takings claims are notoriously difficult to identify. Focusing solely on when the taking occurred—and not including analysis of when the plaintiffs should reasonably know they have a claim—is not

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus certifies that no party's counsel authored the attached proposed brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than amicus, its counsel, and its members contributed money intended to fund the brief's preparation or submission.

workable in practice and will deprive accident victims of the full six years contemplated by the Tucker Act, and will in the future likely result in the filing of premature takings claims.

I. A Takings Claim Cannot Accrue Before Damage To The Property Interest Was Determinable And The Injury Felt, Regardless Of When The Taking Occurred

The panel identified what it believed was the single dispositive issue: "[t]he question is when the alleged taking occurred." Panel op. at 10. That was only partially correct, however, because it only addressed the first half of the statute of limitations question. The panel overlooked the more important second question, which is not when the *taking occurred*, but when the plaintiffs' *takings claim accrued*. *See* 28 U.S.C. § 2501 (claims must be "filed within six years after *such claim first accrues*") (emphasis added). The distinction is critical here, because whenever the alleged taking may have occurred, it could not have *accrued* until—as in every other civil claim—the affected party knew or should have known of the unlawful action and its probable effect. As this court holds, "[t]he statute begins to run on its date of accrual, which is the date the plaintiff discovers (or should discover) he has been injured. This date is often the same as—*but sometimes later than*—the date on which the wrong that injures the plaintiff occurs." *Weddel v. Sec'y of Health & Human Servs.*, 100 F.3d 929, 931 (Fed. Cir. 1996) (emphasis added). Thus, this court employs a two-part inquiry that looks both at "when the scope of what is taken is fixed," and when "the plaintiff knew or should have known of the acts that fixed the government's alleged liability." *Katzin v. United States*, 908 F.3d 1350, 1358 (Fed. Cir. 2018) (citing *Samish Indian Nation v. United States*, 419 F.3d 1355, 1369 (Fed. Cir. 2005); *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (*en banc*); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)).

But the panel opinion focused exclusively on when the alleged taking occurred, and as a consequence passed over the dispositive question of when the plaintiffs knew or should have known they were injured by the taking. The panel's fundamental error is on page 11, where it concluded the taking occurred, and consequently the statute of limitations started to run, even "*before the effect of the regulatory action [was] felt and the actual damage to the property interest [was] entirely determinable*[.]" Panel op. at 11 (emphasis added). That stunning proposition—in regulatory takings cases, the clock starts ticking even *before* the plaintiff knows she is injured—stands in stark contrast to the usual rule of claim accrual, in this court and in every other court, and for every other civil claim. The panel adopted a rule for regulatory takings claims that is unique among civil claims the CFC considers, because no other claim is subject to such a draconian rule that contravenes basic notions of fair notice and due process of law.

To reach this conclusion, the panel opinion relied on a single sentence in a recent case in which the Supreme Court opened the federal courts to property owners, to slam it shut here. In *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), the Court held "[a] property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it[.]" *See* Panel op. at 11 (citing *Knick*, 139 S. Ct. at 2170). But critically, this is not all that *Knick* held. The panel overlooked the important sentence in which the Court noted the "government violates the Takings Clause when it takes property without compensation, and that a property owner *may* bring a Fifth Amendment claim . . . at that time." *Id.* at 2177 (emphasis added). The Court's use of "may" is critical, because it demonstrates that the usual accrual rule—which examines when the plaintiff knew of the claim—remains an integral part of the statute of limitations analysis. The panel decision, however, by not examining that question glossed over *Knick*'s use of "may." Consequently, by examining only the government's conduct, the panel's statute of limitations conclusion missed the critical analysis. Focusing on claim accrual—and when the plaintiffs knew or should have known they were injured by the government action—puts the focus where it should be: on the *plaintiffs*.[2] Instead, the panel opinion focuses entirely on the wrong party: when did the *government* effect a taking?

II. The Panel Imputed To Accident Victims A Better Understanding Of Regulatory Takings Law Than The Supreme Court Admits It Possesses

The panel concluded the plaintiffs alleged a regulatory taking.

[2] Focusing on the effects of the regulation on the property owners would make statute of limitations analysis consistent with substantive takings analysis which looks only at the impact of the regulation on the property, and not on the government's reasons for the regulations. That is because takings are not themselves unconstitutional, only takings *without compensation*. Thus, the wrong which a Fifth Amendment regulatory takings claim seeks to remedy isn't the fact that property has been taken or damaged, but rather the failure to provide compensation or return that which it withheld. Consequently, to succeed on its takings claim, the plaintiffs here must concede that the government's action eliminating their claims was legitimate, because unconstitutional or otherwise illegal government actions cannot be the basis for compensation (property must be taken "for public use").

Panel op. at 4. Regulatory takings—*ad hoc* factual inquiries based on a "storied but cryptic"[3] statement by Justice Holmes nearly a century ago that property may be regulated, but when the regulation "goes too far" it will be a taking[4]—are notoriously hard to identify.[5] Regulatory takings jurisprudence is built on the principle that an exercise of governmental power that has dramatic effects on the use of private property is the functional equivalent of condemnation, giving rise to a self-executing government obligation to provide compensation. A claim to enforce the Fifth Amendment's Just Compensation Clause asserts that action by the United States has so interfered with the economically beneficial uses of an interest in property that it is the equivalent of an exercise of eminent domain. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) ("gov-

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[3] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

[4] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[5] The Supreme Court has eschewed "any 'set formula' for determining how far is too far, instead preferring to 'engag[e] in ... essentially *ad hoc*, factual inquiries." *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) ("In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula'") (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

ernment 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.").

The Supreme Court has developed multiple tests for determining whether a regulation results in a Fifth Amendment taking. That analysis focuses on categorical takings, such as when a regulation entirely deprives an owner of an essential attribute of private property ownership such as the right to exclude[6] or the right to make economically beneficial use of property.[7] The Court has also developed tests to determine when less-than-categorical regulations of property may also trigger government's obligation to provide compensation. *See Penn Cent. Transp. Co. v.*

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[6] Categorical takings include government actions that result in physical occupations. *See Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012) (purposeful government flooding). Also included are physical occupations required by government regulations. *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (government ordered owner to allow public to navigate on its marina). On both cases, the owner is deprived of their fundamental right to exclude.

[7] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (categorical taking where regulation deprives owner of "all economically beneficial us[e]" of property).

New York City, 438 U.S. 104 (1978) (Regulations alleged to be a taking are reviewed by analyzing (1) the character of the government action; (2) the owner's distinct investment-backed expectations; and (3) the severity of the economic impact of the challenged restriction on the owner's property.). In contrast to physical takings where the government or the public actually occupies property, regulatory takings where the owner has not been dispossessed are not at all obvious because it is very difficult to determine whether the circumstances add up to "too far" under *Penn Central*'s multi-factor test. *See*, *e.g.*, *Cobb v. City of Stockton*, 120 Cal. Rptr. 3d 389, 395 (Cal. Ct. App. 2011) (takings claim did not accrue upon government's physical occupation of property, but only later when occupation became adverse to owner by virtue of a court order).

If no one occupies the property or has actually physically appropriated it, owners need time—often a lot of time—to understand what standards apply, and whether the facts add up to "too far."[8] Courts, parties,

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[8] Amicus notes that the plaintiffs have alleged a physical taking. We are not commenting on that issue since it was not addressed by the panel opinion.

and legal scholars find application of the regulatory takings tests "inconsistent," "unprincipled," and "amorphous."[9] Economists fare no better. *See*, *e.g*., William W. Wade, *Theory and Misuse of Just Compensation for Income-Producing Property in Federal Courts: A View From Above the Forest*, 46 Tex. Envt'l L.J. 139, 142 & n.13 (2016) ("Thousands of words by hundreds of litigators, judges and scholars including the author have sought to explicate the *Penn Central* test."). These complex impacts are, very often, not immediate or apparent under the multi-factored *Penn Central* test. Thus, before filing a complaint, an owner who suspects her property may have been taken by regulation must apply these opaque

[9] *See*, *e.g*., John D. Echeverria, *Is the* Penn Central *Three Factor Test Ready For History's Dustbin?*, 52 Land Use L. & Zoning Dig. 3 (2000); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. 203, 232 (2004) ("*Penn Central* hardly serves as a blueprint for a municipality or a court seeking to conform to constitutional doctrine."); Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 93 (1986) (*Penn Central*'s "totality of the circumstances analysis masks intellectual bankruptcy"); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transp. Co. v. City of New York, 13 Wm. & Mary Bill of Rts. J. 679, 688 (2005) (the Court created a test that was of "dubious provenance and [was inconsistent] with [its] preexisting taking jurisprudence"); Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas v. South Carolina Coastal Council*: A Quarter Century Retrospective*, 28 Geo. Mason U. Civ. Rts. L.J. 1, 6 (2017) (analogizing the *Penn Central* test to Justice Stewart's nebulous, and quintessentially subjective, obscenity test in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)).

tests and ask whether the government action infringed on a fundamental aspect of ownership, whether it *eliminated entirely* her use of the property, or whether it merely *reduced* use. In the latter circumstance, the owner needs even more time to understand such things as the impact of the action on her investment-backed expectations, the nature of the government action, and whether the property has any economically beneficial uses remaining. As Fifth Amendment scholar Professor Ilya Somin wrote about the panel opinion:

> That ruling, by the court that hears most appeals of takings cases brought against the federal government, could potentially make it harder for plaintiffs in regulatory takings cases to initiate their claims in time to avoid the statute of limitations, while simultaneously also having enough evidence to demonstrate the extent of compensation necessary to offset the damage caused by the government action in question.

Ilya Somin, Knick v. Township of Scott*: Ending a Catch-22 That Barred Takings Cases From Federal Court*, 2018-2019 Cato S. Ct. Rev. 153, 186-87 (2019) (footnote omitted).

By adopting a categorical rule that focused solely on when the taking occurred and omitting analysis of when the plaintiffs should have known they were injured, the panel imputed to property owners and their lawyers a better understanding of the morass of regulatory takings doctrine than the Supreme Court admits it possesses. The opinion summarily concluded that "the bankruptcy sale order clearly inflicted an injury on the plaintiffs by diminishing the value of their claimed property rights." Panel op. at 13. But as nearly a century of U.S. Supreme Court takings cases has revealed, the takings analysis in this case is pretty far from clear or obvious. Owners should not be charged with more knowledge of when a regulatory taking occurred if the Supreme Court, the lower courts, and legal scholars cannot enunciate the tests for a taking with any clarity. Particularly in a class action such as this where thousands in the putative class realistically would only learn about the taking from media reports. "Takings law should be predictable … so that private individuals confidently can commit resources to capital projects." Susan Rose-Ackerman, *Against Ad Hockery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988). But takings law isn't. The rules about when a statute of limitations begins to run should also be clear. But the rule adopted by the panel—keyed only to the opaque takings test—is equally opaque. The panel opinion incentivizes potential plaintiffs to gin up a complaint as a preventative measure to avoid any lapse of the statute of limitations, rather than undertake careful investigation and analysis to determine whether to file. That's a recipe for more litigation in the CFC and this court, not less, and undermines the joint purposes of repose and settlement of claims that animate statutes of limitations.

CONCLUSION

This court should rehear this case to conform the panel opinion to Supreme Court and circuit precedent.

Respectfully submitted,

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amicus Curiae

San Francisco, California, October 10, 2019.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(b)(4), amicus curiae states that this brief complies with the type and volume limitations because it contains 2,538 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii), and this document has been prepared in a proportionally-spaced typeface in font Century Schoolbook, point sized 14.

Respectfully submitted,

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amicus Curiae

San Francisco, California, October 10, 2019.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing documents with the Clerk of the Court of the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system, and that participants in the case who are registered CM/ECF users will be served by the system.

Respectfully submitted,

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amicus Curiae

San Francisco, California, October 10, 2019.