No. 09-342

In the Supreme Court of the United States

ROSE ACRE FARMS, INC., PETITIONER

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

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QUESTION PRESENTED

Whether, for purposes of regulatory takings analysis under the Fifth Amendment, the court of appeals correctly analyzed the "economic impact" and the "character" of regulations promulgated by the United States Department of Agriculture in 1990 and 1991 to control the spread of *Salmonella enteritidis* in eggs.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 559 F.3d 1260. An earlier opinion of the court of appeals (Pet. App. 50a-90a) is reported at 373 F.3d 1177. The opinion of the Court of Federal Claims (CFC) (Pet. App. 91a-119a) is unreported. An earlier opinion of the CFC (Pet. App. 120a-180a) is reported at 55 Fed. Cl. 643.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2009. A petition for rehearing was denied on May 20, 2009. On August 3, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 17, 2009, and

the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Salmonella enteritidis* (salmonella) is a bacterium normally found in the gastrointestinal tract of birds and farm animals. Pet. App. 125a & n.5. When ingested by humans, salmonella can cause nausea, vomiting, abdominal cramps, diarrhea, fever, headache, and sometimes death. *Id.* at 125a n.5; C.A. App. 212-213.[1] Approximately 15%-20% of those who have been diagnosed with salmonellosis, the disease caused by salmonella, require hospitalization. *Id.* at 301.

In the late 1980s, the Centers for Disease Control (CDC) determined that human health problems linked to salmonella exposure were increasing. Pet. App. 4a. With respect to transmission involving chicken eggs, before the 1980s, salmonella had been found only on the outside of eggs. C.A. App. 280. After an investigation into a 1986 salmonella outbreak during which 3300 people became ill, however, the CDC concluded that salmonella also could be transmitted from hens to the inside of eggs. *Id.* at 223, 225-226, 245-249, 279-281, 287-296.

In 1990, the United States Department of Agriculture (USDA) promulgated interim regulations to address the danger that salmonella-contaminated eggs posed to humans. Pet. App. 4a-5a. Under the interim regulations, a farm identified as a probable source of salmonella-contaminated eggs was designated as a "study flock" and subject to environmental testing. *Id.* at 5a (quoting 9 C.F.R. 82.32 (1991)). If one or more environmental samples tested positive, the farm was

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[1] All references to "C.A. App." refer to the appendix filed in the court of appeals in No. 03-5103.

designated as a "test flock" and its eggs could not be sold in interstate commerce for sale as raw "table eggs," though the eggs could still be sold for uses that entailed pasteurization. *Id.* at 5a-6a & n.2.

Under the interim regulations, "[s]pecified numbers of the hens in test flocks were also required to undergo blood and internal-organ testing. A test flock was designated an 'infected flock' if the organs of one or more hens tested positive for [salmonella]." Pet. App. 54a (citations omitted). Eggs from an "infected flock" were subject to the ban on interstate shipment for use as table eggs until either (1) the premises or hens tested negative for salmonella, or (2) the poultry houses containing the infected hens were depopulated, cleaned and disinfected, and inspected by USDA inspectors. 9 C.F.R. 82.32(c), 82.33(a) (1991); see Pet. App. 54a-55a.

On January 30, 1991, the USDA published its final salmonella regulations. See 56 Fed. Reg. 3730. The final rules incorporated the requirements set forth above. The final rules also made clear that restrictions on interstate sale could be imposed on a henhouse-by-henhouse basis, and thus could apply to some but not other henhouses on a single farm. The final regulations provided, however, that so long as some henhouses on a particular farm were subject to the sale restrictions, the USDA would continue to monitor other houses on the same farm, including those that had tested negative for the presence of salmonella. See Pet. App. 55a, 128-129a.

2. In 1990, three separate outbreaks of salmonella contamination, which sickened approximately 450 people in three States, were traced back to eggs from henhouses on three different farms owned by petitioner in Indiana. Pet. App. 130a-132a. In response, the USDA imposed sales restrictions and commenced testing. *Id.* at 131a-133a. The last restrictions were lifted in 1992. *Id.* at 8a. Over the 25 months during which houses on

one or more of its farms were subject to USDA restrictions, petitioner sold for uses involving pasteurization approximately 700 million eggs that otherwise could have been sold as table eggs. *Id.* at 135a.

3. In December 1990, petitioner filed suit in the United States District Court for the Southern District of Indiana, asserting a variety of challenges to the USDA regulations. C.A. App. 92. The Seventh Circuit ultimately sustained the regulations, and this Court denied a petition for a writ of certiorari. *Rose Acre Farms, Inc.* v. *Madigan*, 956 F.2d 670, cert. denied, 506 U.S. 820 (1992). As relevant here, the court of appeals rejected petitioner's argument that the regulations were invalid because the USDA had made no provision for compensating persons who suffered pecuniary losses as a result of the regulatory restrictions, explaining that the CFC could award relief if either the Constitution or a federal statute were found to require compensation. *Id.* at 672-674.

4. Petitioner filed suit in the CFC, which held that a taking had occurred and awarded compensation. Pet. App. 120a-180a. A unanimous panel of the Court of Appeals for the Federal Circuit vacated the CFC's judgment and remanded for reconsideration under *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) (*Penn Central*). See Pet. App. 50a-90a. This Court denied petitioner's petition for a writ of certiorari (No. 04-1149), as well as the government's conditional cross-petition for a writ of certiorari (No. 04-1311). See 545 U.S. 1104. On remand, the CFC again found that a taking had occurred and awarded petitioner approximately $5.4 million in compensation plus approximately $3.3 million in fees and expenses. Pet. App. 91a-119a.

5. A unanimous panel of the court of appeals reversed. Pet. App. 1a-49a. The court explained that "[t]he common touchstone of regulatory takings prece-

dent is 'to identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain.'" *Id.* at 12a (quoting *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)). The court of appeals further explained that, outside certain narrow contexts not at issue here, "a court conducts a factual inquiry based on the well-known *Penn Central* factors to evaluate whether the government's regulation rose to the level of a taking," including "(1) the economic impact of the action on the claimant, (2) the effects of the governmental action on the reasonable investment-backed expectations of the claimant, and (3) the character of the governmental action." *Id.* at 12a-13a (citing *Penn Central*, 438 U.S. at 124).

a. The court of appeals began with "[t]he economic impact of the government's regulatory action," Pet. App. 13a, and determined that that factor favored the government, *id.* at 31a. The court concluded that the relevant property had declined in value only by approximately 10% as a result of the USDA's regulatory program, and it observed that petitioner had "point[ed] to no case in which a court has found a diminution in value of 10% as being severe or as favoring a taking." *Ibid.*

i. The court of appeals concluded that the CFC and petitioner's expert witness had erred in defining "the parcel of allegedly taken property." Pet. App. 22a; see *id.* at 22a-25a & n.5. Reiterating a conclusion from its initial opinion, the court of appeals stated that "the relevant parcel" consisted of all of the eggs produced from "the three farms as a whole rather than each individual hen house" during the relevant period. *Id.* at 15a. Although "the interstate and intrastate transport *restrictions* were applied ultimately to individual houses," the court noted in its earlier opinion that both "the tracebacks that resulted in the 'study flock' designation" and

the subsequent environmental testing that resulted in "the identification of the restricted 'test houses'[] were * * * directed to each farm as a whole," and that, under the regulations, "as long as any one house on any farm was designated as an 'infected house,' all other houses on that farm were required to undergo testing for purposes of monitoring." *Id.* at 73a. The court of appeals determined that "because the regulations at issue applied to each farm as a whole, their economic impact cannot be measured by considering the restricted houses alone." *Ibid.*

ii. The court of appeals also determined that, in assessing the impact of the USDA's regulations, the CFC erred in "looking only at the percentage decrease in profits" that petitioner experienced during the relevant period. Pet. App. 16a. The court explained that "the vast majority of [regulatory] takings jurisprudence examines, under *Penn Central*'s economic impact prong, not lost profits but the lost value of the taken property." *Ibid.*; see *id.* at 16a-17a. The court of appeals also identified a variety of problems with "sole reliance" on a lost-profits measure, including the CFC's failure to identify "some benchmark standard" against which to compare the amount of lost profits, *id.* at 17a-18a, as well as the difficulty (which the CFC had not acknowledged) "in comparing any given diminution of return calculation with another diminution in return calculation," *id.* at 18a; see *id.* at 18a-21a (providing examples of how exclusive use of a diminution in profits approach can generate "incongruent results"). The court of appeals acknowledged that "unfortunate dicta" in its previous opinion had "suggested that the diminution in return might be the more appropriate metric," but it concluded that those statements "stemmed from a framing of the issues less clear than presently before the court." *Id.* at 22a. The court of appeals observed that the "property" in

question was "now clearly defined as the diverted eggs themselves," which were "a discrete asset, the market value of which is readily ascertainable." *Id.* at 30a. Under the circumstances, the court of appeals stated that "it was clear error to place sole reliance on the diminution in return metric." *Ibid.* The court emphasized, however, that it was not holding "that, in other circumstances, a factfinder may never rely solely on diminution in return to assess the economic impact of [a] regulation," and the court stated that it "need not decide whether the [CFC] should have looked only at diminution in value without consideration of diminution of return." *Id.* at 30a n.7.

b. Reiterating another conclusion from its previous decision, the court of appeals concluded that *Penn Central*'s "reasonable investment-backed expectations" factor favored petitioner. Pet. App. 31a-32a. In its previous opinion, the court of appeals acknowledged that "the poultry industry in general is highly regulated" and that there are "long-standing regulations aimed at preventing the spread of communicable diseases in birds and poultry." *Id.* at 74a. The court determined, however, that the salmonella "regulations were more than an extension of comparable regulations to a new disease," because "[t]hey were grounded in new scientific understanding (i.e., that salmonella could be transmitted from hen to egg) and were unprecedented in their reliance on environmental and hen testing." *Id.* at 74a-75a.

c. Finally, the court of appeals re-examined *Penn Central*'s "character" factor and concluded that it favored the government. Pet. App. 32a-45a. The court examined this Court's intervening decision in *Lingle*, and concluded that, under *Lingle*, it could "no longer ask whether the means chosen by government advance the ends or whether the regulation chosen is effective in curing the alleged ill." *Id.* at 36a. The court of appeals

also stated that, under *Lingle*, it "must consider 'the actual burden imposed on property rights, or how that burden is allocated,'" as well as "the *magnitude or character of the burden* a particular regulation imposes upon private property rights." *Id.* at 37a. The court of appeals observed that "the [salmonella] regulations did not single out [petitioner]," but rather "broadly applied to almost any egg producer in the United States." *Id.* at 38a. The court further noted that "[t]he [salmonella] regulations as enacted targeted no single egg producer unless [salmonella]-infected eggs were traced back to a particular farm and that farm tested positive." *Ibid.*

The court of appeals also concluded that *Lingle* had not modified "a substantial body of case law" that had considered the "public health and safety aspect of" a regulation in assessing a regulatory takings claim. Pet. App. 39a, 42a-43a (citing cases). The court reviewed the Nation's long history of food regulations, see *id.* at 40a-42a, and stated that restrictions on "uses of personal property * * * directed at the protection of public health and safety" are "the type of regulation in which the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions." *Id.* at 44a (citing cases). The court determined that "the government's act [of] protecting the public health by identifying diseased eggs and forcing their owner to remove them from the table market[] weigh[ed] strongly against finding a taking here," and it rejected petitioner's assertion that, after *Lingle*, it could "only consider the public health aspect of the [salmonella] regulations in a diminished and optional role." *Id.* at 43a-44a.

ARGUMENT

Petitioner's challenges to the court of appeals' unanimous decision lack merit and do not warrant further review. Petitioner is in the ongoing business of introducing billions of eggs annually into the Nation's food supply. It is uncontroverted that eggs originating from henhouses at three different farms operated by petitioner were connected to salmonella outbreaks that sickened 450 people in three States. In response, the USDA imposed temporary measures that prevented petitioner from selling eggs produced from the contaminated facilities in the interstate market for raw table eggs until it adequately remedied the contamination, while leaving petitioner free to continue selling eggs from non-contaminated facilities and to sell eggs from the contaminated facilities for uses that involved pasteurization. The court of appeals correctly held that petitioner is not entitled to compensation under the Fifth Amendment as a result of those temporary measures designed to protect public health. The court of appeals' decision also does not conflict with any decision of another court of appeals or state court of last resort. Further review is thus unwarranted.

1. Petitioner first contends (Pet. 14-21) that the court of appeals erred in determining that the relevant "denominator" for purposes of assessing *Penn Central*'s economic impact prong was the full quantity of eggs produced by the three farms that contained the contaminated henhouses rather than simply those eggs that originated from the contaminated henhouses themselves. Pet. 19-20. The contention does not merit further review.

a. The court of appeals' decision is correct. "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether

rights in a particular segment have been entirely abrogated." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 130 (1978). Rather, in "compar[ing] the value that has been taken from the property with the value that remains in the property," this Court has recognized that "the aggregate must be viewed in its entirety." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987) (*Keystone Bituminous*) (citation omitted). "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993) (*Concrete Pipe*).

Petitioner errs in asserting that the court of appeals applied the sort of "extreme * * * and unsupportable * * * view of the relevant" parcel that this Court criticized in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). See Pet. 20 (citation omitted). The analysis that the Court disapproved in *Lucas* was one that focused on the "total value of the taking claimant's other holdings in the vicinity." 505 U.S. at 1017 n.7. But the court of appeals' holding that the relevant parcel included all of the eggs produced on the three farms during the restriction period was not based simply on unity of ownership or the mere physical proximity of other portions of the farms to the infected houses. Rather, the court's delineation of the parcels was based on the fact that, under the salmonella regulations, the farm as a whole was treated as the relevant unit of regulation because of the potential for salmonella to spread throughout the farm. See Pet. App. 73a (explaining that although the "*restrictions* were applied ultimately to individual houses, * * * the tracebacks that resulted in the 'study flock' designation[s] * * *

were, in accordance with the interim and final regulations, directed to each farm as a whole" and that, under the regulations, "as long as any one house on any farm was designated as an 'infected house,' all other houses on the farm were required to undergo testing for purposes of monitoring") (quoting 9 C.F.R. 82.38 (1992)). The court's approach is further supported by the fact that, during the period that the three farms were subject to regulatory restrictions, individual henhouses moved in and out of "infected" status depending on whether salmonella contamination had spread from one house to another and whether petitioner had depopulated and disinfected a particular henhouse. C.A. App. 144-181.[2]

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[2] Petitioner's assertion (at 20) that the court of appeals should have looked only to those eggs produced from the affected henhouses also overlooks the impact of the USDA's regulatory efforts on petitioner's broader business operations. By minimizing the risk that contaminated eggs will cause harm to human health, those efforts could reasonably be expected to increase consumer confidence and thus support the national market for table eggs. See 55 Fed. Reg. 5577 (1990) (USDA forecasts that, "[i]f not controlled, [salmonella] * * * will cause adverse economic impact on the table egg industry by * * * decreasing demand for eggs due to lack of consumer confidence that eggs are a safe food."). Petitioner is a major participant in that national market, Pet. App. 82a, and, even during the restriction period, petitioner's three farms affected by the salmonella restrictions continued to sell a majority of the eggs they produced on the raw table egg market. See C.A. App. 240, 242-244. In assessing the economic impact of the salmonella regulations, a court should not ignore the fact that regulatory measures reasonably designed to reduce the risk of salmonella contamination and consequent adverse health effects on consumers could logically be expected to increase the marketability of the table eggs that petitioner continued to sell, both from the three particular farms at issue here and from other farms. But cf. Pet. App. 31a (declining to consider any "offsetting benefits" of the USDA's regulations because the government "points to no economic data in the record" to quantify the precise extent of those benefits).

Petitioner also errs in suggesting (Pet. 20) that the court of appeals' decision makes "the Fifth Amendment mean[] something different depending on whether a business is large or small." The court of appeals' analysis did not turn on the size of petitioner's overall business but rather on the degree to which particular units or parcels of property had been impaired. And petitioner's further suggestion that it has been treated unfairly because (it asserts) the result of the taking analysis might have been different had it "owned only the restricted houses," *ibid.*, is simply a general attack on the principle that, "in regulatory takings cases," a court "must focus on 'the parcel as a whole.'" *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002) (*Tahoe-Sierra*) (quoting *Penn Central*, 438 U.S. at 130-131).

b. Petitioner asserts that lower courts "are divided over how to" define the relevant parcel for purposes of *Penn Central*'s economic impact factor and have "reached inconsistent results" with respect to that question. Pet. 15-16. Petitioner does not directly assert, however, that the court of appeals' decision in this case conflicts with the decision of another court of appeals or a state court of last resort, nor does it describe the facts or holdings of any of the cases that it cites (see Pet. 16-18).[3] As petitioner acknowledges, "takings questions are

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[3] Petitioner asserts (at 18) that "disagreement persists * * * *within* the Federal Circuit." But none of the judges on the unanimous panel of the court of appeals perceived any such conflict, and the court of appeals denied petitioner's petition for rehearing en banc without recorded dissent. In any event, an intracircuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Petitioner also suggests that the court of appeals' decision conflicts with a decision from a state intermediate appellate court. See Pet. 18 (citing *Twain Harte Assocs., Ltd.* v. *County of Tuolumne*, 265 Cal.

'essentially ad hoc, factual inquiries.'" Pet. 19 (quoting *Penn Central*, 438 U.S. at 124). It is thus impossible for petitioner to establish a conflict that would warrant this Court's review simply by citing a series of decisions without providing any description of their particular facts and circumstances.

In any event, there is no conflict with any of the decisions that petitioner associates with what it characterizes as the "[r]easonable [e]xpectation [s]chool" or the "[g]overnment [c]onduct [s]chool." Pet. 17 (emphasis deleted); see Pet. 17-18. In *District Intown Properties Ltd.* v. *District of Columbia*, 198 F.3d 874, 880 (1999), cert. denied, 531 U.S. 812 (2000), the D.C. Circuit determined that nine contiguous lots should be treated as one parcel, even though the lots had been subdivided. In *American Savings & Loan Ass'n* v. *County of Marin*, 653 F.2d 364, 371 (1981), the Ninth Circuit concluded that, until a developer submitted a development plan, it was "impossible to determine whether" two pieces of real property "ought to be treated as one parcel or as two." In *Machipongo Land & Coal Co.* v. *Commonwealth*, 799 A.2d 751, 768-769, cert. denied, 537 U. S. 1002 (2002), the Supreme Court of Pennsylvania did not identify the relevant parcel, but instead remanded to a lower court for further analysis. The only issue on appeal in *Vulcan Materials Co.* v. *City of Tehuacana*, 369 F.3d 882 (5th Cir. 2004), was the property owner's "takings claim under the *Texas* Constitution," *id.* at 884 (emphasis added), and the Fifth Circuit's limited holding was that, in defining the relevant parcel, it would con-

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Rptr. 737, 744-745 (Ct. App. 1990)). Such a conflict would not warrant this Court's review. In any event, there is no conflict, because that case involved an alleged taking of real property, and the court simply determined that, given the particular facts and circumstances of that case, a 1.7-acre plot of land constituted the relevant parcel for purposes of a takings analysis. See *id.* at 744-746.

sider only property that the relevant government entity had "authority to regulate," *id.* at 889; see *id.* at 889-891. And *Department of Agriculture & Consumer Services* v. *Mid-Florida Growers, Inc.*, 521 So. 2d 101, 104 (Fla.), cert. denied, 488 U.S. 870 (1988), did not address any questions about the definition of the relevant parcel for purposes of a regulatory takings analysis. Rather, that decision addressed a certified question about whether the State of Florida could destroy healthy, but suspect, citrus plants without paying compensation. *Id.* at 102.

c. Even if questions concerning the proper approach to a *Penn Central* economic impact analysis otherwise warranted this Court's review, this case would be an unsuitable vehicle for considering them. As the phrase suggests, the "parcel as a whole" rule (see *Tahoe-Sierra*, 535 U.S. at 331) is most often applied in cases involving land-use regulation. Petitioner's complaint, however, is not with any restriction placed on the use of its land, but with temporary limits placed upon the interstate sale of personal property (eggs) for commercial purposes in an industry that is heavily regulated to protect public health and safety. Although "parcel as a whole" principles may inform the takings inquiry in cases involving personal as well as real property in appropriate circumstances, the constitutional rules developed in one context will often not be readily applicable to the other. Cf. *Lucas*, 505 U.S. at 1027-1028 ("[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless.").

The temporary nature of the pertinent restrictions further underscores the idiosyncratic nature of the "economic impact" question presented here. Thus, although petitioner's costs exceeded its income with respect to

eggs from three of its farms during the 25-month period that those farms were subject to USDA-imposed restrictions, petitioner presumably experienced a profit on its sales of eggs from those farms both before and after the restricted period. See note 2, *supra*. Those profits, in turn, could be expected to reflect the long-term *beneficial* effects of USDA's program, as well as the risk inherent in a business of this sort that its operations might on occasion be subject to special restrictions to protect public health and safety. A narrow focus on economic impact only during the temporary period in which restrictions were in place would ignore the broader commercial context in which petitioner operates. These and other dissimilarities between this case and the setting in which the "parcel as a whole" analysis typically is applied provide additional reasons for this Court to deny the petition for a writ of certiorari.

2. Petitioner also asserts (Pet. 21-24) that the court of appeals used an "[im]proper metric for assessing economic impact for a going business concern like [petitioner]." Pet. 24. Specifically, petitioner asserts that the court of appeals erred in applying a "diminution in value" approach rather than one focusing on "the percentage [of] decrease in profits." Pet. 23 (citation omitted). That contention does not merit further review.

Petitioner does not assert that the court of appeals' holding on this point conflicts with the decision of another court of appeals or a state court of last resort. Instead, petitioner contends (Pet. 22-23) that the court of appeals' decision conflicts with its own previous decisions, including the first panel decision in this case. None of the judges on the unanimous panel that ruled against petitioner (including Judge Michel, who authored both panel decisions) perceived any such conflict, and the court of appeals denied petitioner's petition for rehearing en banc without recorded dissent. Moreover,

an intracircuit conflict would not warrant this Court's review in any event. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).[4]

The court of appeals' decision to apply a diminution in value approach in this case also was correct. As the court of appeals explained, when this Court "has assessed the economic impact of a regulatory taking, it has talked almost exclusively in terms of lost value rather than lost profits." Pet. App. 17a (citing cases).[5] Petitioner does not address any of those decisions, nor does it provide any response to the court of appeals' detailed explanation (see *id.* at 16a-31a) of why the CFC's exclusive reliance on a diminution-in-profits approach was inappropriate in this case.

The regulatory measures at issue here, moreover, did not require the destruction of the eggs in question. Rather, those measures simply required that the eggs be sold only for uses entailing pasteurization, which would remove the risk of salmonella infection, rather than for use as table eggs. That restriction reduced the overall value of eggs sold from three farms by only approximately 10%. See Pet. App. 15a, 31a, 49a. As the

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[4] Although the Federal Circuit is generally "the sole appellate court that hears takings claims against the [Federal] Government," Pet. 23, both state and other federal circuits may entertain takings claims against state and local governments and thus may be called on to apply *Penn Central* in circumstances that are analogous to this case.

[5] The decisions cited by petitioner (Pet. 21-22) are not to the contrary. This Court's statement in *Penn Central* that the plaintiff was able "to obtain a 'reasonable return' on its investment" did not focus on the profits that the plaintiff might have made in the absence of the relevant regulation. 438 U.S. at 136. Of the other four of this Court's decisions cited by petitioner, three pre-date *Penn Central* and thus do not address the proper application of *Penn Central*'s economic impact prong. The fourth decision—*First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987)—did not discuss *Penn Central*'s economic impact prong.

court of appeals pointed out, no case has found a taking based on such a relatively minor reduction in value. *Id.* at 31a.

3. Finally, petitioner argues (Pet. 24-33) that the court of appeals erred in analyzing the "character" of the salmonella regulations. That contention also does not merit further review.

a. The court of appeals' analysis of the "character" factor was correct and consistent with this Court's decisions. In *Penn Central*, this Court explained that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124 (citation omitted).

As the court of appeals explained, this Court's pre- and post-*Penn Central* decisions establish that the public health and safety character of a challenged regulation is relevant to any takings inquiry. See Pet. App. 42a-43a, 75a-76a (citing *Miller* v. *Schoene*, 276 U.S. 272, 279-280 (1928); *Mugler* v. *Kansas*, 123 U.S. 623, 668 (1887); and *Keystone Bituminous*, 480 U.S. at 488-492). "[N]o individual has a right to use his property so as to * * * harm others," *id.* at 492 n.20, and the regulations at issue in this case were designed to protect the public from serious health risks posed by a particular food product following the traceback to petitioners' farms of salmonella-contaminated eggs. Accordingly, it was reasonable to impose upon participants in the relevant industry the costs inherent in protecting the public from those dangers, especially when, as here, the source had been traced to petitioner. See *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 225-226 (1986) (rejecting takings liability when employers withdrawing from a pension fund were assessed an amount to remedy the

harms caused by their actions). Indeed, as the court of appeals explained, restrictions on "the selling of food for human consumption" are "the type of regulation in which the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions." Pet. App. 44a (citing cases).

Petitioner errs in asserting that this Court's decision in *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), "called into question the ongoing role that the 'character' factor from the *Penn Central* test should play." Pet. 24. *Lingle* raised no questions about the proper application of the *Penn Central* test for assessing regulatory takings claims. Instead, *Lingle* disavowed language in previous decisions that had "been read to announce a stand-alone regulatory takings test that [was] wholly independent of *Penn Central* or any other test." *Lingle*, 544 U.S. at 540. The Court emphasized that its decision "d[id] not require [it] to disturb any of [its] prior holdings," *id.* at 545, and *Lingle* did not purport to overrule or modify any portion of *Penn Central.* Accordingly, the court of appeals correctly determined that "*Lingle* neither addressed nor disturbed *Penn Central*'s consideration of the health and safety aspect of the regulations." Pet. App. 39a.

b. The court of appeals' analysis of the "character" factor also did not result in a decision that conflicts with the decisions of state courts of last resort cited by petitioner. See Pet. 25. None of those decisions held that *Lingle* bars consideration of a regulation's public health and safety purpose. In *Buhmann* v. *State*, 201 P.3d 70 (2008), cert. denied, 130 S. Ct. 394 (2009), the Supreme Court of Montana rejected a regulatory takings claim after concluding that the "character" factor weighed in favor of the government and against the plaintiff. *Id.* at 94. Although the court stated without explanation or

elaboration that it "disagree[d] with" a portion of the trial court's analysis of the character factor in that case "because it inquired into the purposes and propriety of [the regulation in question] in a manner foreclosed by *Lingle*," *id.* at 92, the court had previously described the inquiry that *Lingle* "foreclose[d]" as one into whether the regulation was "*effective* in achieving any of the objectives or concerns it was designed to address," *id.* at 77 n.2 (emphasis added).

The court of appeals' decision also does not conflict with *Wensmann Realty, Inc.* v. *City of Eagan*, 734 N.W.2d 623 (Minn. 2007) (*Wensmann*). *Wensmann* made clear that "the relevant considerations [in conducting *Penn Central*'s "character" inquiry] may vary depending on the circumstances of the case," and, in that case, the Supreme Court of Minnesota considered the underlying purpose of the government-imposed restrictions on private property, observing that they "seem[ed] aimed at things that have been considered governmental functions." *Id.* at 639-640. *Wensmann* thus did not hold that a court's inquiry into the character of a government regulation may not include consideration of the regulation's purpose of protecting public health and safety. Finally, as petitioner acknowledges (Pet. 25), *Mann* v. *Georgia Department of Corrections*, 653 S.E.2d 740 (Ga. 2007), expressly assumed for purposes of its decision "that the substantiality of the public purpose advanced by a regulation *is* still pertinent to a takings challenge," *id.* at 745 (emphasis added), but found in favor of the plaintiff with respect to one particular regulation based on its assessment of the economic impact and investment-based expectations prongs of the *Penn Central* test, *ibid.*

4. Further review also is unwarranted because, contrary to the court of appeals' conclusion (see Pet. App. 74a-75a), *Penn Central*'s "reasonable investment-backed

expectations" factor also favors the government in this case.[6] As the court of appeals explained, the sale of food has long been subject to stringent laws to protect public health and safety. See *id.* at. 40a-43a. And since 1970, Congress has sought to protect the health of human consumers by mandating federal inspection of egg products moving in interstate commerce. See Egg Products Inspection Act, Pub. L. No. 91-597, § 5(a), 84 Stat. 1624 (21 U.S.C. 1034(a)); 21 U.S.C. 1033(a)(1). Given the long-standing regulatory history in this area, petitioner could not reasonably have anticipated that it would be allowed to transport in interstate commerce eggs that posed an unacceptable risk of serious harm to human health.[7]

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[6] When petitioner previously sought a writ of certiorari following the court of appeals' first decision in this case, the United States filed a conditional cross-petition for a writ of certiorari (No. 04-1311) with respect to the court of appeals' treatment of the "reasonable investment-backed expectations" factor. At that point, however, there was no final judgment, because the court of appeals had vacated the CFC's decision and remanded for further proceedings. Pet. App. 90a. Now, in contrast, the United States has a final judgment in its favor, and "[i]t is well accepted" that a respondent that does not "seek to modify the judgment below * * * may, without filing a * * * cross-petition, . . . rely upon any matter appearing in the record in support of the judgment." *Union Pac. R.R.* v. *Brotherhood of Locomotive Eng'rs Gen. Comm. of Adjustment*, No. 08-604 (Dec. 8, 2009), slip op. 10-11 (internal quotation marks and citation omitted).

[7] The gravamen of petitioner's takings claim is that only a small percentage of its eggs were salmonella-contaminated during the relevant period, and that the government had no regulatory justification for restricting the sale of "healthy eggs." Pet. 2. In its first decision, however, the court of appeals rejected as clearly erroneous the CFC's finding that egg testing was a feasible means of assessing the extent of salmonella contamination during the relevant period. Pet. App. 81a. In light of the inefficacy of that approach during the relevant time period, the agency was required to devise an alternative methodology for identifying those eggs that were linked to salmonella, namely, by testing hens. The consequences of human consumption of salmonella-contami-

In concluding that the "reasonable investment-backed expectations" factor favored petitioner, the court of appeals stated that the salmonella regulations intruded on legitimate reliance interests because "[t]hey were grounded in new scientific understanding (i.e., that salmonella could be transmitted from hen to egg) and were unprecedented in their reliance on environmental and hen testing." Pet. App. 74a-75a. That discussion reflects a fundamental misunderstanding of the significance for Just Compensation Clause analysis of a takings plaintiff's reasonable investment-backed expectations.

In assessing regulatory takings claims, this Court has recognized that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly*, 475 U.S. at 227 (quoting *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 91 (1958)); see *Concrete Pipe*, 508 U.S. at 645. Thus, for purposes of *Penn Central* analysis, a property owner ordinarily has no reasonable expectation of being allowed to continue an ongoing activity in the face of new evidence that the

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nated eggs are severe enough, moreover, that the government could properly ban (or restrict) the interstate transportation of categories of eggs that were found to pose a heightened danger, even though there may have been a relatively small probability that any particular egg within the category was contaminated. In addition, even small numbers of salmonella-contaminated eggs can pose particularly great risks, because, when numerous eggs are pooled together for preparation of a recipe (as in a restaurant setting), "[a] single infected egg can contaminate the whole pool." C.A. App. 210. Thus, while the pertinent USDA regulations had the effect of preventing petitioner from marketing as table eggs millions of uncontaminated eggs, that restriction was an unavoidable consequence of the agency's reasonable efforts to address the health risks posed by the eggs produced by petitioner that *were* contaminated. See Pet. App. 78a-81a.

conduct will cause significant public harm. Rather, the owner may fairly be charged with knowledge that existing regulatory safeguards can be strengthened or expanded in light of new information concerning the likely effect upon the public welfare of particular private conduct.

That approach to the assessment of reasonable investment-backed expectations is fully consistent with the overriding purpose of the Just Compensation Clause, which is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). A property owner who is forced to cease or modify commercial activity that poses a serious risk to public health cannot claim to have been unfairly singled out simply because the relevant activity may once have been viewed as posing less of a risk. The unreasonableness of any such expectation is particularly apparent where, as here, the restriction that is claimed to effect a taking merely supplements an established regulatory scheme that has long served to prevent the same basic type of harm at which the new restriction is directed. To treat such modifications as interfering with reasonable investment-backed expectations would substantially hinder the efforts of federal and state governments to protect the public health and safety by revising their regulatory programs to take account of new scientific information.

Thus, even if the specific danger (hen-to-egg transmission of salmonella) at which the 1990 USDA regulations were directed had truly been unforeseeable at an earlier time, the government would not have interfered with petitioner's reasonable investment-backed expectations by adapting its enforcement scheme in response to a "new scientific understanding" (Pet. App. 75a) that

such a risk existed.[8] The court of appeals' assertion (*ibid.*) that the salmonella regulations "were unprecedented in their reliance on environmental and hen testing" is even further beside the point. So long as the testing methodology used by the agency was an otherwise reasonable means of determining whether petitioner's eggs were safe for human consumption as table eggs—and both the Seventh and Federal Circuits concluded that it was, see pp. 4-8 & n.7, *supra*; Pet. App. 81a—petitioner had no legitimate reliance interest in resisting restrictions based on its use, regardless of whether that testing methodology differed substantially or only incrementally from prior testing regimes.

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[8] In fact, neither USDA's conclusion that salmonella in eggs posed a serious risk to human health, nor the testing program mandated by the 1990 regulations, reflected a dramatic departure from prior understandings. "In the late 1980's, the [CDC] determined there was a growing problem with [salmonella] in chicken eggs." Pet. App. 125a. In August 1988, USDA stated that the salmonella "problem [had] become a serious human health issue." C.A. App. 197, 199. A scholarly paper published in 1988 discussed the scientific evidence suggesting transmission of salmonella from hen to egg, and it explained that "[l]ong-term control of [salmonella] infections will require study of the ecology of the organism in poultry flocks." Michael E. St. Louis et al., *The Emergence of Grade A Eggs as a Major Source of Salmonella enteritidis Infections*, 259 JAMA 2103, 2106 (1988) (C.A. App. 248). Petitioner, a major participant in the national egg market, should surely have been aware of those developments. Indeed, the first restrictions were not placed on the interstate sale of eggs from petitioners' farms until October 5, 1990, almost eight months *after* the interim regulations were published on February 16, 1990. See Pet. App. 5a, 7a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2009