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IN THE

Supreme Court of the United States

ROSE ACRE FARMS, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court resolve the prevailing confusion over what constitutes the proper denominator in the takings fraction under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)?

2. Should the severity of a regulation's economic impact on a going business concern be measured by diminution in value or diminution in return?

3. Should this Court resolve the confusion among lower courts concerning whether the *purpose* of a government regulation is still a relevant consideration under the "character" prong of *Penn Central*, in light of this Court's repudiation of the "substantially advances a legitimate state interest" test in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005)?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Rose Acre Farms, Inc. has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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INTRODUCTION

This case presents recurring and important issues in takings jurisprudence. Both state and federal courts are in substantial disarray over the legal standards governing regulatory takings challenges under this Court's watershed decision from a generation ago in *Penn Central*. The upshot is an appalling state of unpredictability for both government authorities and property owners confronting Fifth Amendment takings issues. This case presents an attractive vehicle for addressing this vital area of constitutional law.

Here, the federal government, through the United States Department of Agriculture ("USDA"), prohi-

bited Rose Acre Farms, a family-owned farming business, from selling nearly 700 million healthy eggs as table eggs for an extended two-year period. The result of this exercise of federal power was Rose Acre's forced sale of eggs below the cost of production and, as a result, a vast economic loss. The USDA's regulations were largely experimental, based not on sound science, but on the untested and unrebuttable presumption that even the slightest trace of the ubiquitous salmonella bacteria in an egg-producing hen or hen environment would translate into salmonella-contaminated eggs. The agency was profoundly wrong. The record in this case established (i) that the USDA's assumption of a connection between contaminated hens and contaminated eggs was seriously flawed and (ii) that no Rose Acre egg was ever shown to contain salmonella.

On two separate occasions, the United States Court of Federal Claims found the USDA's actions to constitute a taking of Rose Acre's property, requiring the payment of more than $5 million dollars in compensation and more than $2 million in fees and costs. And on two separate occasions, the United States Court of Appeals for the Federal Circuit reversed. In the process, the Federal Circuit reconfirmed the existence of deep confusion within the lower courts—including *that* court—about the meaning and application of this Court's *Penn Central* test, and reinforced existing conflicts on legal issues that warrant this Court's review. Indeed, during the most recent appellate oral argument in this case, Chief Judge Michel observed that lower courts struggle to decide the kinds of significant, recurring constitutional issues presented here because "the guidance from above is not always crystal clear in this Fifth Amendment taking area,

as I think probably many lawyers have observed before me." Oral Arg. 32:53-33:01, *available at* http://oralarguments.cafc.uscourts.gov [case number 2007-5169]. Chief Judge Michel's frustration is noteworthy, since he and his Federal Circuit colleagues hear virtually all takings cases (those in excess of $10,000) against the United States.

At issue in this case is whether a property owner is entitled to just compensation when the government destroys or severely restricts healthy and economically productive private property in an effort to protect the public health. The question here is not whether the government has the power to take such action. That power is undisputed. Rather, the issue is whether a private farming business *alone* must bear the cost of that action. The Court should grant the petition and clarify the contours of its *Penn Central* test—the cornerstone of its modern regulatory takings doctrine.

OPINIONS BELOW

The Federal Circuit's most recent decision is reported at 559 F.3d 1260 (Fed. Cir. 2009) and reprinted in the Appendix ("App.") at 1a-49a. The Court of Federal Claims decision is unreported and reprinted in the Appendix at 91a-119a. The Federal Circuit's initial decision is reported at 373 F.3d 1177 (Fed. Cir. 2004) and is reprinted in the Appendix at 50a-90a. The trial court's first decision is reported at 55 Fed. Cl. 643 (2003) and is reprinted in the Appendix at 120a-180a.

JURISDICTION

The Federal Circuit issued its most recent decision on March 12, 2009, and denied a timely petition for

rehearing *en banc* on May 20, 2009. Pet. App. 1a. The Chief Justice extended the time to file this petition to September 17, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation." The pertinent USDA regulations are published at 9 C.F.R. §§ 82.30-82.36 (1991) and reproduced in the Appendix at 181a-193a.

STATEMENT

A. Factual Background

1. General Background on the Egg Business

The egg business is highly competitive with razor-thin profit margins. The business consists of two principal markets: the table-egg market and the breaker-egg market. The table-egg market—through which whole eggs are sold directly to end users—is the more profitable for most egg producers. The breaker-egg market—through which eggs are sold in liquid form, often for use in secondary products such as cake mixes—is considerably less profitable and is usually reserved for lower-quality eggs not suitable for sale as table eggs. Pet. App. 98a, n.9. Table eggs typically command a considerably higher price than breaker eggs. *Id.* at 93a, n.2. At all times relevant to this case, an egg sold in the breaker market fetched a price lower than Rose Acre's average cost of producing the egg. *Id.* at 99a.

2. Rose Acre's Table-Egg Business

Rose Acre is a family-owned business in Indiana that specializes in the production of table eggs. The business began with a single farm in 1955. By 1990, Rose Acre was a highly integrated table-egg production business that operated eight farms in Indiana and Iowa with millions of hens producing billions of eggs per year. *Id.* at 3a. As of 1990, Rose Acre sold more than 97 percent of these eggs in the profitable table-egg market, and sent only eggs of inferior quality to the breaker market. *Id.* at 98a.

3. The USDA Regulations and Their Application to Rose Acre

The USDA promulgated its regulations in an effort to protect the public from *salmonella enteritidis* (SE)—a strain of bacteria that is ubiquitous and impossible to eradicate. *Id.* at 4a-5a, 143a. Individuals can be exposed to SE in several ways, but the most common is through the consumption of raw or undercooked foods of animal origin, such as meat, poultry, milk, or eggs. It is undisputed that eggs are a nutritious and economical food and a low-risk source of SE.[1] Also undisputed is that the proper handling of eggs—thorough cooking, for example—eliminates even the slight risk of SE contamination.

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[1] The low incidence of SE in shell eggs was confirmed by scientific information that the USDA obtained both during and after it applied the SE regulations to Rose Acre, beginning in October 1990. For example, USDA's SE Risk Assessment—a comprehensive analysis of the public-health effects of consuming SE-infected shell eggs and egg products—predicts that only one in 20,000 eggs will contain SE. By comparison, one in ten chicken breasts purchased at the supermarket today contains salmonella. And in 1995, one in five store-bought chicken breasts contained salmonella. *See* C.A. App. 282, 527, 540, 911.

Nonetheless, in response to an increase in illnesses resulting from SE exposure, the USDA published interim regulations designed to restrict the interstate sale of potentially contaminated eggs and to limit the interstate transportation of potentially contaminated poultry. *See id.* at 181a-193a. Final regulations were published on January 30, 1991. *See id.* The final regulations imposed restrictions only on individual hen houses, rather than *all* poultry from an individual farm; otherwise, they did not differ materially from the interim regime.

Acting pursuant to these regulations in late 1990 and early 1991, the USDA designated flocks at three Rose Acre farms (known as Cort Acres, White Acres, and Jen Acres) to be "study flocks" after eggs produced at these farms were believed to be "the probable source" of an SE outbreak. 9 C.F.R. § 82.32(a); Pet. App. 185a. Under the "study flock" designation, the USDA conducted environmental tests (of manure and the egg-transport machinery in the hen houses) at the three Rose Acre farms. Because the "study flock" designation did not trigger restrictions on the sale of eggs, Rose Acre continued to sell eggs in the table-egg market while the USDA conducted environmental tests and awaited lab results. Several weeks later, after one or more hens from the study flock tested SE-positive, the USDA designated these flocks as "test flocks," which imposed severe restrictions on egg sales. These restrictions prohibited Rose Acre from selling as table eggs any eggs produced in any hen house with a positive SE test. *Id.* at 94a-95a. During the period between the reported outbreaks and the eventual quarantine of its eggs, Rose Acre sold more than 200 million eggs as table eggs without a single reported incidence of SE illness attributed to its eggs.

Further testing by the USDA revealed that at least one hen in the designated "test flocks" was SE-positive, resulting in the entire flock at that house being designated as "infected" and then quarantined. To accomplish this testing, the USDA entered Rose Acre's hen houses, physically removed 6,741 hens, slaughtered them, and transported the carcasses to a laboratory for testing by an autopsy procedure. Out of the millions of hens in the restricted houses, only 147 hens tested positive for SE. And there is no evidence even those hens would lay SE-positive eggs. *Id.* at 143a.

The USDA's restrictions proved to be economically devastating to Rose Acre. The problem is that the breaker market—the next best commercial alternative permitted under the Regulations—is a vastly inferior market for a business that specializes in the production of table eggs. Rose Acre suffered a negative return on its investment when it sold its restricted eggs. During the restricted period, the price for a dozen eggs in the breaker market was between 8 and 13 cents *lower* than Rose Acre's cost of producing them. By contrast, the price in the table-egg market was approximately 4 cents *above* its production costs.[2]

The USDA's restrictions lasted for an extended period of two years, resulting in a total economic

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[2] The average cost for Rose Acre to produce a dozen eggs during the restricted period was 54.96 cents. Pet. App. 135a, 148a. Rose Acre received, however, only between 41.46 and 46.64 cents per dozen for eggs sold to the breaker market. The average price for table eggs during this period was 59 cents per dozen. *Id.* These prices—measured in the hundredths of a single penny—underscore the razor-thin profit margins in the egg market. *Id.*

impact to Rose Acre of more than $20 million. *Id.* at 160a-161a. Rose Acre's financial losses on the sale of restricted eggs alone exceeded $5 million. *Id.* at 112a, 163a-164a. According to Rose Acre's expert, and as the trial court found, the Regulations caused a diminution in profit of 219 percent on eggs at these farms during the period of restriction. *Id.* at 108a. This is "equivalent to losing 100% of profits over 3½ years." *Id.* Such a loss is "a very substantial impact, and hard to imagine, how a business can survive, especially . . . with thin profit margins as Rose Acre had." *Id.*

It was not until October 1992 that USDA released the last of Rose Acre's houses from the restrictions. *Id.* at 133a-134a. By that time, 70 of Rose Acre's hen houses—amounting to more than 5 million hens—had been restricted by the Regulations, and Rose Acre had been forced to divert almost 700 million eggs to the breaker-egg market. After USDA lifted its restrictions, Rose Acre immediately returned to selling over 97 percent of its eggs as table eggs. *Id.* at 98a-99a.

B. Procedural History

1. Initial Proceedings in the Court of Federal Claims

Rose Acre filed this takings action in the Court of Federal Claims in 1992. Rose Acre contends that the USDA effectuated a taking under the Fifth Amendment when it restricted the sale of healthy eggs to the breaker market, forcing Rose Acre to sell hundreds of millions of its healthy eggs below the cost of production. Extensive discovery followed, and the court held a bench trial in April and May 2002. After reviewing the evidence and applying this

Court's takings jurisprudence, Judge Futey awarded Rose Acre $6.1 million in compensation and $2.4 million in fees and costs.

Specifically, the trial court found that the USDA's prohibition on the sale of healthy eggs in economically viable markets effected a regulatory taking that required just compensation under the Fifth Amendment. In the process, Judge Futey determined that the financial impact of these actions on Rose Acre was severe, as demonstrated by the trial record, and by the testimony of USDA witnesses.

2. Initial Proceedings in the Federal Circuit

The Federal Circuit reversed and remanded. The court began by disagreeing with the trial court's regulatory takings analysis under *Penn Central*. According to the Federal Circuit, when assessing the economic impact of the USDA regulations, the relevant "denominator" in the takings fraction should have been Rose Acre's three farms *combined*—although the USDA applied the regulations only to *individual* hen houses and restricted the sale of *individual* eggs. *Id.* at 73a, 95a. This choice of denominator alone significantly deflated the relevant economic impact of the USDA regulations.

The court of appeals also disagreed with the methodology by which to analyze the underlying, largely uncontested economic data. The court rejected the Government's argument that diminution in value[3] was the only appropriate measure of the

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[3] Diminution in value (also known as diminution in revenue) compares the value of property *before* the taking with the value remaining *after* the taking.

regulations' economic impact on Rose Acre, and suggested that diminution in return[4] was the preferred metric:

> We reject the government's contention that a returns-based analysis is per se less suitable than one based on diminution in value in the present case. If anything, it appears that the latter [diminution in value] is less appropriate where, as here, the issue concerns the economic impact, albeit temporary, of government regulations on a going business concern.

Id. at 70a.

As a result, the Federal Circuit vacated the trial court's finding on economic impact and ordered the court to reconsider this factor. The court affirmed the trial court's conclusion that the reasonable investment-backed expectations factor favored Rose Acre, *id.* at 74a-75a; reversed the trial court's conclusion that the character of the regulatory action favored Rose Acre, *id.* at 75a-83a; and instructed the trial court to reweigh the three *Penn Central* factors on remand to determine whether a compensable taking had occurred, *id.* at 83a-85a, 89a-90a. This Court denied certiorari.[5]

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[4] Diminution in return (also referred to as diminution in profit) compares the expected return (or profit) of a firm *absent* a government-imposed restriction with the actual return the firm experienced *with* the restriction.

[5] In the first petition, the parties vigorously contested whether the interlocutory posture of this case made it a proper vehicle for certiorari in light of the Federal Circuit's remand for further proceedings. This time, the finality of the decision below leaves no doubt that the Questions Presented are squarely at issue here, given the court of appeals' outright reversal, without a

3. Retrial in the Court of Federal Claims

On remand, the trial court heard additional expert testimony relevant to the *Penn Central* factors. The court determined that legal and economic principles warranted use of the diminution-in-return approach for measuring economic impact, given the disruption of profits to Rose Acre, a going business concern. It also found that fundamental economic principles called for use of *total* costs—not hypothetically available incremental costs—in calculating diminution in return. And it found that the temporary (two-year) nature of the USDA restrictions was severe because the diminution in return was equivalent to losing *all* of Rose Acre's expected profits for more than three years.

As for the other *Penn Central* factors, based on law-of-the-case principles, the trial court felt bound to follow the Federal Circuit's determination that the character prong favored the Government, although Judge Futey believed this Court's intervening decision in *Lingle* had actually vindicated his initial determination of the character factor for Rose Acre. And the trial court had no reason to reconsider Rose Acre's reasonable investment-backed expectations. The court then weighed the three *Penn Central* factors and again held that Rose Acre had suffered a taking. Judge Futey awarded Rose Acre $5.4 million as just compensation, plus $3.2 million in fees and costs.

4. Second Appeal to Federal Circuit

The Federal Circuit again reversed. Reflecting apparent confusion within that court, the panel this

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remand, of the trial court's second determination that Rose Acre suffered a taking of its property. Pet. App. 48a-49a.

time concluded that economic impact should be measured using *diminution in value* after all, despite the Federal Circuit's own prior suggestion that *diminution in return* was the preferred metric for a going business concern like Rose Acre—a statement that the Federal Circuit now described as "unfortunate dicta." *Id.* at 22a. According to the Federal Circuit, one problem with diminution in return that the trial court failed to address is that "the vast majority of takings jurisprudence examines, under *Penn Central*'s economic impact prong, not lost profits but the lost value of the taken property," *id.* at 16a, citing an academic article and several cases from this Court and lower courts for its conclusion—all of which *predate* the Federal Circuit's initial *Rose Acre* decision in 2004. *Id.* at 16a-17a (citing authorities).

In addition, the Federal Circuit again embraced its previous definition of the relevant parcel as Rose Acre's "three farms as a whole rather than each individual hen house." *Id.* at 15a. Based on the 10.6 percent diminution in the *value* of Rose Acre's eggs, the Federal Circuit concluded that the trial court clearly erred in finding the economic impact of the Regulations to have been severe, thus ignoring the 219 percent diminution in Rose Acre's *return on its investment* in the eggs. Although the court of appeals allowed that Rose Acre's monetary loss was "not insignificant," it nevertheless held that this factor "does not strongly favor Rose Acre." *Id.* at 31a.

With respect to *Penn Central*'s "character of the government's action" factor, the Federal Circuit focused almost exclusively on what it thought were the strong public health and public policy justifications for the regulations. The court suggested that this Court's decision in *Lingle*, which rejected the

"substantially advances" formula, might have changed the landscape, as other courts have found, concerning whether public purpose was relevant in regulatory takings cases. But the Federal Circuit concluded that *Lingle* had left unchanged a court's ability to inquire into government purpose, especially the "consideration of the health and safety aspect of the regulations." *Id.* at 39a.

With that in mind, the court recounted its version of the history of food regulation, tracing back to ancient times. The court's bottom-line conclusion was that the Government's stated goal of protecting public health "weigh[ed] strongly against finding a taking" in this case. *Id.* at 43a. In so doing, the Federal Circuit all but ignored the trial court's finding that the character of the Government's action here weighed in favor of a taking because the burden of the regulations fell disproportionately hard on Rose Acre and similarly situated egg producers.

REASONS FOR GRANTING THE WRIT

After seventeen years of litigation, Rose Acre's claim for relief has been thwarted by a pair of Federal Circuit decisions that have proved deeply hostile to the property rights protected by the Fifth Amendment's Just Compensation Clause. The decisions are characterized by shifting legal standards and inconsistent application of the Constitution, with no compensation awarded for government action that severely restricted healthy and economically productive private property in an effort to protect public health. Although takings cases are necessarily fact intensive and involve *ad hoc* inquiries, there are time-honored rules of law that should be stable, reliable, and applied consistently. The current, confused

state of this Court's takings jurisprudence does not lend itself to a clear, consistent, and predictable application of these important legal principles.

This case squarely presents legal issues on important and recurring constitutional questions that have divided the lower courts. The first issue concerns the prevailing confusion over what constitutes the relevant "parcel as a whole" against which to measure the severity of a governmental restriction on the use of private property. The second issue relates to the proper metric—diminution in value or diminution in return—for measuring a regulation's economic impact on a going business concern like Rose Acre. Finally, the third issue relates to *Penn Central*'s elusive "character" prong and, specifically, whether this Court's decision in *Lingle* forecloses consideration of the *purpose* of governmental action as part of a regulatory takings analysis. This Court should grant the petition and clarify the prevailing uncertainty in this crucial area of constitutional law.

I. LOWER COURTS REMAIN FRACTURED OVER WHAT CONSTITUTES THE PROPER DENOMINATOR FOR MEASURING THE ECONOMIC IMPACT OF A GOVERNMENT REGULATION.

This case squarely presents "the difficult, persisting question of what is the proper denominator in the takings fraction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). The proper "denominator" or "parcel" or "takings fraction," whatever the label, all refer to the total property against which the plaintiff's loss must be measured in assessing the severity of the economic impact of a governmental restriction—an inquiry that focuses not merely on what the prop-

erty owner has *lost*, but also considers what he has *retained*.

In *Palazzolo*, the Court acknowledged that since defining the denominator as the "parcel as a whole" in *Penn Central*, this Court and lower courts have struggled to define what precisely constitutes the "parcel as a whole." *Id.* Previously, the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), admitted that this uncertainty in defining the denominator of the takings fraction "has produced inconsistent pronouncements by the Court," *id.* at 1016 n.7, to say nothing of the inconsistent rulings from lower courts. In both *Palazzolo* and *Lucas,* however, the Court declined to address the question because it was either unnecessary, *id.*, or had not been argued below, *see Palazzolo*, 533 U.S. at 631.

This case is an attractive vehicle for addressing this "denominator" issue. The issue is squarely presented and extensively analyzed in a pair of published appellate decisions below. And it is precisely this question on which lower courts have reached inconsistent results: what constitutes the "parcel as a whole" when the government destroys the economic value of private property as part of a scheme designed to regulate public health.[6]

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[6] This Court has addressed takings issues most frequently in the context of real property, but the personal property interests at issue here are equally protected by the Fifth Amendment. *See, e.g.*, *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004 (1984). The question of how to define the "whole parcel" does not vary significantly depending on whether the question turns on the land, the produce of the land, or intangible property with no reference to any physical space. *E.g.*, *Ruckelshaus*, 467 U.S. at 1005 (applying *Penn Central* test to intellectual property); *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003)

A. Lower courts are divided over how to measure the takings fraction denominator.

The Court's lack of guidance on the denominator issue has led to a patchwork of conflicting approaches across jurisdictions and even sometimes within the same jurisdiction on this fundamental Fifth Amendment question. *See* John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1545 (1994) ("Instead of employing a consistent methodology, however, the courts have used a variety of fact-specific and often inconsistent methods to define the relevant parcel."). *See also* Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353, 353 (2003) (noting "the many definitions of the 'relevant parcel'"). For the most part, courts have applied three different approaches for determining the denominator, and the choice among them often dictates whether the governmental action was a taking. The three competing schools can be summarized as follows.

1. Unity of Ownership School

Some courts define the "whole" parcel by looking to unity of ownership, measuring the "parcel as a whole" based on all contiguous property or all nearby property owned by the plaintiff. *See, e.g., K&K Constr., Inc. v. Dep't of Natural Res.*, 575 N.W.2d 531, 537 (Mich. 1998); *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981); *Penn Central Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1276-77

(applying *per se* rule for physical invasions of land to taking of money). It is noteworthy that the Government has not argued for a different denominator analysis for personal property and real property.

(N.Y. 1977), *aff'd on other grounds*, 438 U.S. 104 (1978). Courts often apply this approach as an unstated assumption without fully exploring its propriety or considering other options. *See, e.g., Bevan v. Brandon Twp.*, 475 N.W.2d 37, 42 (Mich. 1991); *Jones v. Zoning Hearing Bd. of Town of McCandless*, 578 A.2d 1369, 1371-72 (Pa. 1990). Under this unity-of-ownership approach, the takings question turns not on what the government has taken, but on the *other* assets the plaintiff happens to own. This is the approach used by the court of appeals in this case.

2. Reasonable Expectation School

Other courts define the "whole" parcel by considering the owner's reasonable expectations, as shaped by its property rights under state law. Courts applying this standard look to several factors, including the degree of contiguity, the dates of acquisition, the extent to which the owner has treated the parcel as a single unit, the extent to which the restricted lot benefits the unrestricted lot, the timing of transfers, the owner's reasonable investment-backed expectations, and the owner's plans for development. *See, e.g., Dist. Intown Prop. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994); *Am. Sav. & Loan Ass'n v. Marin County*, 653 F.2d 364, 372 (9th Cir. 1981); *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-19 (1991); *Machipongo Land & Coal Co. v. Pennsylvania*, 799 A.2d 751, 768-69 (Pa. 2002).

3. Government Conduct School

Other courts, finally, hold that the government regulation itself determines the relevant parcel. *See,*

e.g., *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 891 (5th Cir. 2004); *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986), *vacated on other grounds*, 18 F.3d 1560 (Fed. Cir. 1994); *Twain Harte Assocs., Ltd. v. Tuolumme County,* 265 Cal. Rptr. 737, 744-45 (Cal. Ct. App. 1990); *Dep't of Agriculture & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 104 (Fla. 1988). Under this approach, the court looks at how the regulatory action defines the relevant parcel. Thus, the regulation may "creat[e] separate parcels for 'taking' purposes" if it targets or affects only a subset of the larger property under the plaintiff's control. *Twaine Harte*, 265 Cal. Rptr. at 744. The focus here is principally on what the government has done, rather than how much property the plaintiff happens to own, or the manner in which state laws otherwise regulate affected parcels.

The prevailing disagreement among the lower courts should not continue. Indeed, this disagreement persists not only *among* courts throughout the country, but also *within* the Federal Circuit—the one court charged with exclusive jurisdiction over appeals from takings cases brought against the United States. *See* 28 U.S.C. § 1295(a)(3) (Federal Circuit has exclusive jurisdiction over final decisions of United States Court of Federal Claims). *Compare Florida Rock*, 791 F.2d at 904 (using government-conduct approach to find taking of 98-acre tract of land, even though tract was only small portion of owner's 1,560-acre purchase), *with Loveladies Harbor*, 28 F.3d at 1181 (endorsing "flexible approach" that accounts both for how government's action affects property, and for some of property owner's actions and reasonable expectations), *and Rose Acre*, Pet. App. 73a (employing unity-of-ownership approach

in holding that relevant denominator consists of all eggs produced on the "three farms (combined)," although USDA regulations targeted only certain flocks and hen houses). *See also id.* at 23a (reaffirming that correct parcel is all 135 million dozen eggs produced on Rose Acre's three affected farms during period of restriction).

Although takings questions are "essentially ad hoc, factual inquiries," *Penn Central*, 438 U.S. at 124, the pressing issue here is the lingering and continued disagreement over the *legal framework* for analyzing such facts. To paraphrase Justice Brandeis, when it comes to property rights, it is more important that the law be settled than that it be settled one way or another. *See Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

B. This case is a strong vehicle for answering the lingering denominator question.

In the decision below, the Federal Circuit's choice of the legal theory underlying the denominator effectively disposed of the appeal. In the first trial, Judge Futey determined that Rose Acre suffered a compensable taking because the USDA's order prohibited Rose Acre from selling nearly 700 million healthy eggs in the table-egg market. In so doing, the trial court considered the relevant denominator to be *all the eggs within affected houses*, thereby essentially adopting the government-conduct approach. The Federal Circuit, however, disagreed with this conclusion and measured the denominator based on *all eggs produced on Rose Acre's three affected farms.*[7] Thus,

[7] In the second appeal, the Federal Circuit reaffirmed its law-of-the-case determination that the whole "parcel" consists of the

the Federal Circuit chose the first of the competing denominator theories, thereby deflating the perceived economic impact of the USDA regulations. As this Court suggested in *Lucas*, this constituted "an extreme—and . . . unsupportable—view of the relevant calculus." 505 U.S. at 1016 n.7. Had the court employed either of the other denominator theories—either by looking at Rose Acre's reasonable expectations about its eggs or by looking at how the USDA order governed the use of eggs based on the hen house—the court would have rightly limited its purview to the affected eggs themselves.

The result of the Federal Circuit's decision is that the Fifth Amendment means something different depending on whether a business is large or small. Here, if Rose Acre had owned only the restricted houses, it would have established the taking of its property since the denominator in the takings fraction would have been essentially the same as the restricted property. But because Rose Acre owned greater holdings, with more hen houses, the denominator is misleadingly large, thus deflating the relevant economic impact and immunizing the *same government conduct* from constitutional redress. The constitutional test should not turn on the *other resources* of the affected property owner. The Federal Circuit's approach thus transforms the Takings Clause into a *de facto* "deep pockets" rule, while simultaneously insulating government regulation from meaningful scrutiny when it targets plaintiffs with more assets. This view is inconsistent with a fair construction of the Takings Clause, which protects private property owners, large and small,

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eggs produced on the three restricted farms, and not *all three farms as a business*. Pet. App. 23a.

from bearing public burdens that "in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Court should grant certiorari to resolve the question of the appropriate denominator theory.

II. THE COURT ALSO SHOULD CLARIFY THE PROPER METRIC FOR ASSESSING ECONOMIC IMPACT FOR A GOING BUSINESS CONCERN.

There also exists an untenable division in the lower courts, including within the Federal Circuit, over the proper metric for measuring economic impact.

A. Lower courts are divided over whether to use diminution in value or diminution in return to calculate economic impact for a going business concern.

For over sixty years, the Court has accepted diminution in rate of return as an appropriate measure of economic impact in takings cases. Indeed, this Court in *Penn Central* rejected the takings claim there based in part on its conclusion that the plaintiff could obtain "a 'reasonable return' on its investment." 438 U.S. at 136. Similarly, in *Fed. Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 603 (1944), this Court recognized that utility regulations producing a confiscatory rate of return would themselves be takings—without even discussing whether diminution in value of the affected utility must be considered. In addition, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987), this Court held that "the Just Compensation Clause of the Fifth Amendment requires that the government pay the

landowner for the value of *the use of the land during this period.*" *Id.* at 319 (emphasis added). *Cf. Kimball Laundry Co. v. United States*, 338 U.S. 1, 8 (1949) (finding that proper measure of compensation for government's temporary use of laundry facility was rental profits likely to have been earned, rather than difference between property's market value on date of taking and date of return); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 328 (1893) (holding that when taking of tangible property deprives owner of ability to earn profit from collecting tolls on railroad franchise, just compensation requires payment to cover loss in profits); *Cienega Gardens v. United States*, 331 F.3d 1319, 1343 (Fed. Cir. 2003) (finding that plaintiffs suffered a taking when they sustained a 96 percent diminution in their expected return).

However, recent decisions from the Federal Circuit, including the decision below in *Rose Acre*, have rejected this well-established method for assessing economic impact. For example, in its latest decision in *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007), the Federal Circuit rejected the return-on-equity approach, finding instead that the regulations' economic impact must be assessed by the diminution in lifetime value of the property. *Id.* at 1280-82. The Federal Circuit continued its rejection of the return-on-equity method in the *Rose Acre* decision. Pet. App. 22a-31a.

B. This case is a strong vehicle for answering the lingering question of the proper economic metric.

The decision below in *Rose Acre* leaves the Federal Circuit itself divided over the proper yardstick for measuring economic impact. In 2004, the first *Rose*

Acre panel suggested that rate of return was the more appropriate measure for assessing the economic impact of a temporary application of a regulation to an ongoing business. *Id.* at 70a.

But in 2009, the Federal Circuit made an abrupt about-face, concluding in the decision below that "it is clear that assessing the severity of the economic impact in this case by looking only at the percentage decrease in profits does not provide a sufficiently accurate view." *Id.* at 16a. Instead, the court gave "primary weight . . . to the diminution in value," *id.* at 31a, because eggs are a "discrete asset, the market value of which is readily ascertainable." *Id.* at 30a.

Of course, eggs were just as much a "discrete asset" with a "readily ascertainable" market value in 2004 as in 2009. Thus, the costly and time-consuming remand for a second trial (and subsequent appeal) proved to be a pointless undertaking; the Federal Circuit's rejection of Rose Acre's takings claim in 2009 was premised on uncontroverted facts established in the *first trial* and well known to the first *Rose Acre* panel in 2004. Although the court's 2009 decision tried to distance itself from what it termed "unfortunate dicta" in its first decision regarding diminution in return, it left the holding in *Cienega Gardens* intact. This split over the proper metric for measuring economic impact is unlikely to be resolved unless this Court intervenes, in light of the Federal Circuit's denial of rehearing *en banc* on this very question.

The confused state of takings jurisprudence, including within the sole appellate court that hears takings claims against the Government, cries out for clarification and resolution by this Court. The Court should grant certiorari to resolve the question of the

proper metric for assessing economic impact for a going business concern like Rose Acre.

III. THIS COURT MUST CLARIFY THE CONFUSION AMONG LOWER COURTS REGARDING THE ONGOING RELEVANCE OF *PENN CENTRAL*'S "CHARACTER" PRONG AFTER *LINGLE*.

Finally, this Court's review is necessary to resolve the uncertainty among lower courts over the meaning of the "character" inquiry in light of *Lingle*. In *Lingle*, the Court explicitly rejected the idea that the "substantially advances a legitimate state interest" formula from its decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), could be a stand-alone test for regulatory takings. By rejecting the *Agins* formulation, *Lingle* called into question the ongoing role that the "character" factor from the *Penn Central* test should play. And not surprisingly, in *Lingle*'s aftermath, lower courts have grown increasingly divided over how to assess the character of governmental action challenged as a regulatory taking. In this case, despite *Lingle*'s strong statements regarding the impropriety of measuring the importance of the government's purpose in taking the property, the court of appeals not only considered but relied heavily on the government's public-health justifications.

A. Courts are divided over whether a regulation's purpose still forms a valid part of *Penn Central*'s "character" inquiry after *Lingle*.

In *Lingle*'s aftermath, lower courts have fractured over whether and to what extent the announced governmental purpose continues to factor into the

takings inquiry under *Penn Central*'s "character of government action" factor.

Some courts have renounced or rejected any consideration of governmental purpose in light of *Lingle*. For example, in *Buhmann v. Montana*, 201 P.3d 70, 92 (Mont. 2008), *petition for cert. filed sub nom. Wallace v. Montana*, 77 U.S.L.W. 3645 (U.S. May 11, 2009) (No. 08-1395), the Montana Supreme Court found that the trial court had erred in its character analysis because it had "inquired into the purposes and propriety" of the state law.[8]

Similarly, in *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 639 (Minn. 2007), the Minnesota Supreme Court, in light of *Lingle*, found that the character inquiry should no longer focus on the "merit" of the government action but on "whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners." *See also Mann v. Ga. Dep't of Corr.*, 653 S.E.2d 740, 745 (Ga. 2007) ("[E]ven assuming, arguendo, that the substantiality of the public purpose advanced by a regulation [protecting children from recidivist sex offenders] is still pertinent to a takings challenge, *but see Lingle*, we cannot overlook the significant adverse economic impact of [the regulation] on appellant.").

Standing in sharp contrast to these cases are courts, like the court of appeals below, that continue to inquire into whether a challenged regulation advances a legitimate public purpose. For example, the Sixth Circuit in *Tennessee Scrap Recyclers Ass'n*

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[8] The petition filed in *Wallace*—which remains pending—raises issues similar to the *Lingle* question that Rose Acre is asserting here.

v. Bredesen, 556 F.3d 442 (6th Cir. 2009), as part of the character analysis, considered the importance of the regulation's purpose and held that character favored the government because "it was passed for a legitimate public purpose, the prevention of metal theft." *Id.* at 457. Similarly, in *Cienega Gardens*, the Federal Circuit defined the character prong as consisting of "the precise action that the government has taken and *the strength of the governmental interest* in taking that action." 503 F.3d at 1279 (emphasis added).

In *Small Property Owners of San Francisco v. City & County of San Francisco*, 47 Cal. Rptr. 3d 121, 136 (Cal. App. 2006), the court held that the proper focus of the character inquiry should be on "the *nature* rather than the merit of the governmental action." But in examining the nature of the governmental action, the court focused on whether the action served the "public good." And in *City of Gaylord v. Maple Manor Investments, LLC*, 2006 WL 2270494, at *7 (Mich. Ct. App. Aug. 8, 2006) (unpublished), the court, in analyzing the character prong, noted that it had "found that the City's regulations are a legitimate exercise of its police power."

Even the courts that have rejected consideration of governmental purpose as part of *Penn Central*'s character analysis have presented different views of what is relevant to that analysis. In Montana, the *Buhmann* court rejected the trial court's consideration of purpose but affirmed the court's determination that the character factor weighed against finding a taking. In so doing, the Montana Supreme Court relied on its character prong analysis from a companion case to *Buhmann* that involved the same state laws, *Kafka v. Montana Department of Fish, Wildlife*

and Parks, 201 P.3d 8 (Mont. 2009). In *Kafka*, the court determined that the character analysis inquires into the "magnitude or character" of the burden, which the *Kafka* court (and hence *Buhmann*) determined was minimal in that case. The *Kafka* court noted that the economic burden fell "squarely" on the shoulders of the plaintiff property owners but that the magnitude of the burden's intrusiveness was what was most important. *Id.* at 30-31. By contrast, the Minnesota Supreme Court in *Wensmann Realty*, relying on language in *Lingle* regarding burden allocation, determined that the key to the character analysis was whether the burden fell "disproportionately on relatively few property owners." 734 N.W.2d at 639. And finally, the *Mann* court in Georgia suggested strongly that the character prong is simply a dead-letter. 653 S.E.2d at 745.

This confusion in the lower courts concerning the proper interpretation of the character prong after *Lingle* is untenable. Among other things, it leads to disparate outcomes for similarly situated takings plaintiffs. Courts in jurisdictions that continue to consider the *purpose* for a regulation are far more likely to find that the character of governmental action favors the government, and thus unlikely to find a compensable taking. *Compare, e.g., Rose Acre*, Pet. App. 39a (finding no taking and invoking "the public health and safety aspect of the [USDA] regulations" in support of its conclusion that character prong "do[es] not favor Rose Acre") *with Wensmann Realty*, 734 N.W.2d at 640-42 (focusing on regulation's disproportionate application, and not on purpose behind it, in concluding that *Penn Central*'s character factor favored property owner).

And there is no reason to believe that the Federal Circuit, which handles all federal takings issues, will reexamine its approach without prodding from above. That court employed the same approach in 2007 in *Cienega Gardens*, 503 F.3d at 1279, and again in 2009 in *Rose Acre*, Pet. App. 42a-45a—both times treating the *purpose* of the governmental action as a central factor in upholding the regulations against a Takings Clause challenge. In addition, the court recently rejected Rose Acre's petition asking the *full* Federal Circuit to rehear this precise question: "Is the 'public-health' purpose of a regulation a valid takings consideration after *Lingle*?" Petition of Rose Acre Farms, Inc. for Rehearing *En Banc*, 2009 WL 1368236, at *1 (Apr. 27, 2009), *reh'g en banc denied*, (Fed. Cir. May 20, 2009).

Given the importance for both the Government and private property owners alike of having clear standards for adjudicating takings cases, it is appropriate for this Court to resolve the confusion now.

B. This Court's jurisprudence on the role of the "character" inquiry has been inconsistent.

The division in the lower courts over the proper focus of the character prong can be traced to incomplete, and sometimes contradictory, guidance from this Court regarding the role of the character inquiry. In *Penn Central* itself, this Court, discussing what the "character of the governmental action" captured, explained:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, *see, e.g., United States v. Causby*, 328 U.S. 256 [ ] (1946),

> than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central, 438 U.S. at 124. Thus, from the beginning, the Court presented mixed signals regarding the "character" inquiry. The above explanatory statement first suggests a focus on the *effect* of the taking (*i.e.*, whether it is a "physical invasion"), but then moves on to the *purpose* or *reason* behind the government intervention (*i.e.*, whether it is a "public" program that serves the "common good").

Recently, however, the Court in *Lingle* called into question any inquiry into government motives or purposes as part of the takings analysis. *Lingle*, instead, suggested that the sole focus in a takings case ought to be on the actual impact that the regulation might have on the landowner. *Lingle* emphasized that the Takings Clause already "presupposes that the government has acted in pursuit of a valid public purpose." 544 U.S. at 543. Thus, the purpose or motives behind a particular regulation or taking is relevant only to the public use inquiry, but once that threshold requirement is met, it makes no sense to examine purpose again.[9]

In light of how *Penn Central* explained the "character" inquiry and given *Lingle*'s rejection of an analy-

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[9] As *Lingle* held, "the Takings Clause presupposes that the government has acted in pursuit of a valid purpose. The Clause expressly requires compensation where government takes private property *'for public use.'*" 544 U.S. at 543 (emphasis in original). *See also* John D. Echeverria, *Making Sense of* Penn Central, 39 ENVTL. L. RPTR. NEWS & ANALYSIS 10471, 10473 (2009) ("[I]t makes no logical sense to excuse the government from liability on the ground that the takings power is being used to accomplish an important public purpose.").

sis of the legitimacy or effectiveness of the government's actions in serving public ends, 544 U.S. at 542, a strong argument could be made that there is simply no room for the "character" analysis as set forth in *Penn Central*—physical invasions are already takings, no matter how minor, and government motives are subsumed by public use. *See* Dale A. Whitman, *Deconstructing* Lingle*: Implications for Takings Doctrine*, 40 J. MARSHALL L. REV. 573, 574 (2007). Yet the Court specifically "emphasize[d] that [its] holding [in *Lingle*] . . . does not require [it] to disturb any of [its] prior holdings." 544 U.S. at 545.[10]

Lingle's emphasis on impact could perhaps signal a new path for the "character" portion of the *Penn Central* test. *Lingle*'s concern for the actual effect of a regulation on the property owner is largely accounted for by the economic impact analysis itself from *Penn Central*. But *Lingle* also suggests that "information about how any regulatory burden is *distributed* among property owners" is also relevant to the analysis. *Id.* at 542. It may be that the proper approach weighs the regulation's impact on the property owner compared to others that may be similarly situated. *See Wensmann Realty*, 734 N.W.2d at 639-41. *Lingle* simply is not clear on this point, which is why this Court's review of this issue is necessary.

The Court's prior mixed messages on this subject have predictably generated confusion in the lower courts that only this Court can, and should, resolve by granting the petition here.

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[10] In *Lingle*, when describing *Penn Central*, the Court noted that economic impact and interference with investment-backed expectations are the "primary" factors. 544 U.S. at 538-39.

C. The Federal Circuit erred in considering the "public health" purpose of the USDA regulations as part of the character inquiry.

For its part, the Federal Circuit panel below initially stated that *Lingle* had altered the character analysis under *Penn Central*, and the court even suggested that post-*Lingle* "instead of looking at the rationality of the regulation, [courts] must consider 'the actual burden imposed on property rights, or how that burden is allocated.'" Pet. App. 37a (quoting *Lingle*, 544 U.S. at 543). But following a cursory dismissal of Rose Acre's evidence on how the burdens were actually distributed in this case, the court reveals its true analysis: "But, before deciding this factor, we need to consider the related issue of the public health and safety aspect of the SE regulations." Pet. App. 39a.

At that point, the court proceeded to consider the very *purpose* behind the governmental regulation in a way that *Lingle* had renounced, and concluded that the character prong "do[es] not favor Rose Acre" because of the public "health and safety aspect of the . . . regulations." *Id.* at 39a. Because *Lingle* itself "had nothing to do with the safety or health of the public," the panel thought that it had left "unchanged a substantial body of case law concerning the character prong." *Id.* *See also id.* at 44a ("[W]e do not believe *Lingle* caused any diminution in the importance of the *Penn Central* character prong, at least with respect to public health and safety regulations.").[11] In so doing, the panel ignored this

[11] The Federal Circuit's suggestion that a public-health purpose is a narrow exception to *Lingle* is belied by its recent decision in *Cienega Gardens*—another post-*Lingle* case having

Court's categorical language that the "substantially advances" test there had "no proper place in our takings jurisprudence," period—regardless of whether the regulations at issue involved health and safety. Indeed, the Court in *Lingle* presumed that most regulations that are going to be at issue in these cases will involve "adjustment of rights for the public good." 544 U.S. at 538 (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

The upshot of the court's discussion was that the purpose behind the government's regulation, protecting public health, weighed against finding a taking: "But the government did argue that the character of the government's act, protecting the public health by identifying diseased eggs and forcing their owner to remove them from the table market, weighs strongly against finding a taking here. We agree." Pet. App. 43a. Thus, the purpose behind the USDA's regulation was dispositive of the character inquiry.

This is precisely the kind of judicial examination into the motives and purposes behind the government's regulation that *Lingle* rejected. Indeed, had the government's purpose been as important as the panel held, Rose Acre should have been permitted to test the fit between the means that the government chose and the purposes behind the regulation. But that would have simply been a back-door way of reinvigorating *Agins*.

What Rose Acre argued below, based on what this Court said in *Lingle*, was that the character prong in

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nothing to do with public health—in which the court likewise said it is proper to consider the "strength of the governmental interest" as part of the character inquiry. 503 F.3d at 1279.

Penn Central ought to focus on the specific impact that the USDA's regulations here have on Rose Acre and how the burden of the regulations is allocated among the relevant parties. Only by concentrating on "the actual burden imposed on property rights, or how that burden is allocated" can courts identify "when justice might require that the burden be spread among taxpayers through the payment of just compensation." *Lingle*, 544 U.S. at 543. To the extent that the court of appeals even considered this argument, it rejected uncontroverted facts establishing the regulations' devastating impact on Rose Acre and their narrow application to egg producers alone—two factors that *Lingle* says are the centerpiece of the regulatory takings inquiry.

Particularly in light of *Lingle*, the Federal Circuit wrongly disregarded the trial court's factual findings that the regulatory burden for addressing the SE problem was not distributed widely, but narrowly and devastatingly, upon egg producers generally and Rose Acre specifically. Pet. App. 154a.

The Court should grant the petition to clarify the meaning of *Penn Central*'s "character" inquiry and the role, if any, of a regulation's *purpose* in establishing a taking.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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