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No. 09-342

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

REPLY BRIEF FOR PETITIONER

JOHN B. NALBANDIAN
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street
Suite 1800
Cincinnati, Ohio 45202
(513) 381-2838

ROBERT R. CLARK
Counsel of Record
GEOFFREY SLAUGHTER
MICHAEL D. CHAMBERS
TAFT STETTINIUS & HOLLISTER LLP
One Indiana Square
Suite 3500
Indianapolis, Indiana 46204
(317) 713-3500

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INTRODUCTION

The United States turns a blind eye to the deep and lingering confusion among lower courts over how to assess a regulatory taking under *Penn Central*. Even this Court has acknowledged that its regulatory takings jurisprudence "cannot be characterized as unified." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). *See also* Pet. 14-15. Thus, the resulting inconsistency among lower courts should come as no surprise. Yet the government does not come to grips with the frustration typified below by Chief Judge Michel, who expressed concern over the lack of "guidance from above" in this crucial Fifth Amendment takings area. Pet. 2-3.

In addition, the United States tries to discourage the Court from resolving the important constitutional questions presented here by trying to manufacture vehicle problems. In fact, there are no such obstacles. This case arrives in a sturdy posture and squarely presents questions that warrant authoritative resolution by this Court.

On the merits, the United States points to the USDA's public-health purpose to justify its prohibition on the sale of Rose Acre's table eggs in interstate commerce. The government's focus is misplaced. No one disputes the government's power to restrict (or even destroy) healthy, economically productive private property in an effort to protect public health. The issue is whether Rose Acre alone must bear the cost of that action.

This case is nothing like decisions such as *Miller v. Schoene*, 276 U.S. 272 (1928), *see* Opp. 17, which permit the destruction or restriction of "diseased" or otherwise harmful property. It is undisputed that the USDA restricted nearly 700 million of Rose Acre's *healthy* eggs—the property Rose Acre claims to have been taken by the government's onerous restrictions. Contrary to the government's implications, no Rose Acre egg was ever shown to contain salmonella. And during the period between the reported outbreaks and the eventual quarantine of its eggs, Rose Acre sold more than 200 million eggs in interstate commerce without a single reported incidence of salmonella illness attributed to its eggs.

When presented with these uncontested facts, Pet. 2, 6, the government had nothing to say. Instead, it tried to sidestep the issue by stating that the USDA prevented Rose Acre from selling eggs produced from its "contaminated facilities," Opp. 9, thus leaving *two*

misimpressions. One is that Rose Acre is an unclean, unhealthy operation. Opp. 9. Yet as the government's own witness acknowledged, the prevalence of salmonella in Rose Acre hens was "very low." C.A. App. 950. The other misimpression is that the "very low" presence of the ubiquitous salmonella bacteria in Rose Acre's *hens* somehow translated into salmonella-tainted *eggs*. The USDA's premise was eventually shown to be seriously flawed, but not until *after* the restrictions were applied to Rose Acre with devastating effect.

1. a. There is an urgent, compelling need for the Court to resolve how the relevant "parcel as a whole" is to be determined. The government's brief in opposition ignores the widespread confusion among state and federal courts about how to define the property against which the plaintiff's loss must be measured in assessing the severity of the economic impact of a governmental restriction.

This Court has recognized the "difficult, persisting question of what is the proper denominator in the takings fraction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). Yet the government's brief neither mentions *Palazzolo* nor addresses the Court's acknowledgment of doctrinal uncertainty on this very issue: "Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators." *Id.* (citations omitted). And in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court stated that the "uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by

the Court." *Id.* at 1016 n.7. As an example, the Court compared two of its own decisions: *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922), and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-502 (1987). *See Lucas*, 505 U.S. at 1016 n.7. In *Mahon*, a law restricting subsurface extraction of coal was held to constitute a taking, although a nearly identical law in *Keystone* was not. In both cases, a central factor was how the Court calculated the denominator of the takings fraction.

Not surprisingly, in the absence of clarification from this Court, the lower courts have failed to reach consensus on the standards for determining the relevant denominator or parcel. *See* Pet. 16-19 (describing three different methodologies for determining relevant parcel). *See also* Steven J. Eagle, Regulatory Takings 8 (4th ed. 2009) ("Discerning the proper denominator of this 'takings fraction' has been especially troublesome."). Given the frequency with which the denominator issue arises in both state and federal courts, and the differing standards currently applied by the lower courts for resolving this question, there is a clear need for further guidance from this Court.

b. The United States relies on two grounds for its argument that this case "would be an unsuitable vehicle" for review. Opp. 14. First, it contends that "the 'parcel as a whole rule' is most often applied in cases involving land-use regulation." *Id.* The gist of the government's argument is that the Court should not take a *personal* property case to address the denominator issue. But this Court has consistently applied the same legal standard to takings challenges involving personal property and real property. Pet. 15 n.6. That is why the Federal Circuit concluded *as*

a matter of law that it was obliged under *Penn Central* and *Keystone Bituminous* (both real property cases) to apply the "parcel as a whole" concept to regulations affecting only personal property. Pet. 70a-73a. Indeed, the United States itself cites these very decisions to defend the Federal Circuit. Opp. 9-10. Accordingly, there is no sound reason for avoiding review merely because this case involves personal property.

Second, the United States argues that review is unwarranted because Rose Acre "presumably experienced a profit on its sales" of unrestricted eggs, thereby reflecting the purported long-term *benefits* of the USDA's regulations. Opp. 14, 15. Even the Federal Circuit found the government to have waived its "offsetting benefits" argument here. Pet. App. 31a (noting that government "points to no economic data in the record to support its assertion of offsetting benefits"). Moreover, although not in the record, the fact that Rose Acre may have returned to profitability has no relevance to the takings question. Once again, the government tries to shift the focus away from its own conduct—the imposition of severe restrictions on healthy and economically viable private property. If such property were restricted to bolster consumer confidence writ large, then "in all fairness and justice" the costs of these onerous restrictions should "be borne by the public as a whole," and not by one private farming business. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (internal quotation omitted).

Moreover, the government's argument invites a perverse incentive structure by which claimants are discouraged from mitigating their losses if they want to state actionable takings claims. The record in this

case demonstrates that it was Rose Acre's nimble business acumen that enabled the company to stay afloat while, for more than two years, it dealt with the USDA's severe restrictions of its healthy eggs. *See* C.A. App. 896 (discussing actions Rose Acre took to avoid going out of business). Such adept business practices should have nothing to do with whether government conduct amounts to a taking and entitles the claimant to just compensation.

c. The United States tries to defend the Federal Circuit, but its defense only confirms the need for review. According to the government, the court of appeals properly included Rose Acre's three farms as a whole in the denominator, because all of the hen houses were technically covered by the USDA regulations. *See* Opp. 10-11. This argument has no bearing on the suitability of the Petition seeking this Court's review, and it also ignores what happened in this case.

The United States argues that the "relevant unit of regulation," Opp. 10, is the "entire farm as a whole" because the USDA regulations required "testing for purposes of monitoring" throughout the three farms. Opp. 11 (quoting 9 C.F.R. 82.38 (1992)). The taking at issue here, however, is not the incidental burden caused by testing elsewhere on these farms, but the actual prohibition on interstate sales that resulted in the economic destruction of nearly 700 million healthy eggs. As the government is at pains to explain, this case involves the taking of personal property, not real property. Thus, the question presented is whether, as the trial court found, the relevant parcel under a takings analysis should be the *700 million restricted eggs*; or whether, as the Federal Circuit held, it should be those restricted

eggs *plus* the billion other healthy eggs that Rose Acre happened to produce on the three farms, but which the USDA never restricted.

Under the Federal Circuit's approach, the denominator inquiry includes the *other assets* of the property owner and permits the government to self-characterize its own restrictions in a manner that avoids meaningful scrutiny. For example, the government nowhere explains why the fact that the regulations applied *generally* to "each farm as a whole" should alter the takings inquiry where the government admits that the restrictions "applied *ultimately* to individual [egg-producing] houses." Opp. 10, 11 (emphasis added). Thus, under the Federal Circuit's rule, the multi-million-dollar loss suffered by Rose Acre is diluted by whatever other assets Rose Acre happens to own.

In other words, because Rose Acre is a successful business with multiple farms and millions of egg-producing hens, its economic loss is substantially diluted, and a taking less likely to have occurred, regardless of the scope and nature of the *government conduct* that should be the focus of the constitutional inquiry. By contrast, a smaller egg producer with a single farm and fewer hens would be more likely to have suffered a compensable taking when subject to *identical* government restrictions. The Fifth Amendment neither compels nor countenances such a disparate result. The takings inquiry should focus on the property the government actually took—and not on the other property of the claimant it left alone.

2. This Court's review also is warranted to clarify when diminution in return is an appropriate metric for measuring the severity of a regulation's economic impact on the use of private property. In the first

appeal, the Federal Circuit remanded the case with instructions that the trial court re-assess economic impact under *Penn Central*, and suggested that a returns-based analysis was the preferred metric for a going business concern like Rose Acre. Pet. 69a-70a, 73a-74a. On remand, the trial court scrupulously followed the Federal Circuit's roadmap and again found that the regulations' economic impact on Rose Acre was severe. Pet. 108a-109a. On appeal, the Federal Circuit reversed this finding yet again, concluding this time that the metric to be given "primary weight" was *diminution in value*, Pet. 31a, notwithstanding the court's contrary suggestion in the first appeal. *See* Pet. 22a (characterizing initial ruling as "unfortunate dicta"). *See also* Pet. 21-22 (noting long line of cases from this Court referring to profits- or returns-based metric for going business concern).

No party should again have to endure what has happened to Rose Acre in this case—including 18 years of litigation, governed by shifting legal standards and inconsistent application of the Constitution, with no compensation awarded for the severe restriction of its healthy and economically productive property. The Court should not tolerate the kind of erratic jurisprudence that the long history of this case reflects.

3. The Petition also established that this Court should review the Federal Circuit's application of *Penn Central*'s "character" factor, given the confusion in the state and federal courts on this issue in light of the Court's decision in *Lingle*. Contrary to the government's assertions, the panel's emphasis on the public purpose for the USDA regulations conflicts directly with the approaches taken by other courts

and is inconsistent with *Lingle*. Indeed, the government embraces the panel's approach, even to the point (as shown above) of mischaracterizing the record to show a public policy purpose. But regardless of what the government says about whether a valid public purpose existed here or whether that purpose was served by these regulations, the fact remains that the lower courts are not uniform on how to apply *Penn Central*'s character inquiry after *Lingle*. The court below concluded that consideration of the purpose behind the regulations was essential to—indeed, dispositive of—the character inquiry.

The government asserts that Petitioner's cites do not show a conflict or confusion here. Opp. 18-19. But the government cannot deny that the court in *Buhmann v. Montana*, 201 P.3d 70, 92 (Mont. 2008), *cert. denied*, 130 S. Ct. 394 (2009), explicitly "disagreed" with the trial court's analysis in that case "because [the trial court] inquired into the purposes and propriety" of the regulation—exactly what the Federal Circuit did here. And the Minnesota Supreme Court in *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007), explicitly acknowledged the change that *Lingle* has brought to the character inquiry, noted that a "focus on the purpose of the regulation" had been "called into question by *Lingle*," and focused instead on the allocation of the burden of the regulation and not its underlying purpose. *Id.* at 639-40 & n.13. The government is free to claim that no conflict exists, but its claim is belied by a simple examination of the cases.

Even more puzzling is the government's insistence that the Federal Circuit's approach here was fully consistent with *Lingle*. Opp. 17. Though stated in the context of rejecting the *Agins* test, the *Lingle*

Court was clear that the Takings Clause analysis "presupposes that the government has acted in pursuit of a valid public purpose." 544 U.S. at 543. Thus, examining the purpose behind a regulation as part of the *Penn Central* test makes no sense. And this is exactly what both the *Buhmann* and *Wensmann Realty* courts, along with a number of commentators, have concluded. *See, e.g.*, Whitman, *Deconstructing* Lingle: *Implications for Takings Doctrine*, 40 J. Marshall L. Rev. 573, 581 (2007) (no view of the character test that depends "on the government's reasons or motivations" is "legitimate today if one takes Justice O'Connor's position in *Lingle* seriously"); Goodin, *The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis*, 29 U. Haw. L. Rev. 437, 444-45 (2007) (purpose inquiry "suffers from the same doctrinal infirmities as the substantially advances test in *Agins*").

The better approach, and one consistent with *Lingle*, examines not the reasons behind the government's regulation or the relative government interest at issue but how that burden is distributed among the affected parties. *See Lingle*, 544 U.S. at 543; *Wensmann Realty*, 734 N.W.2d at 639. And the record on this point is clear: the regulations applied narrowly to egg producers alone and had a devastating impact on Rose Acre.

4. Finally, the fact that the United States disagrees with the Federal Circuit's resolution of the investment-backed-expectations factor is no reason to deny review. If anything, the government's decision to raise the Federal Circuit's alleged error on this factor now—and Petitioner's disagreement that any error was made—makes this case *more* attractive

for review, not less attractive. What the government has done is signal its intention to raise another controversy with respect to the *Penn Central* analysis—thus affording the Court the opportunity to review all three *Penn Central* factors, which the parties have vigorously disputed throughout this litigation.

Moreover, this is the one part of the *Penn Central* analysis that the Federal Circuit got right. Before 1990, the regulatory scheme governing the egg industry was limited to grading standards. Pet. 151a. Therefore, the radical departure brought about by the USDA's subsequent regulations gave Rose Acre no reason to believe its healthy eggs would be restricted from sale as table eggs. *Cf. Palazzolo*, 533 U.S. at 626-27 (rejecting argument that prospective legislation can defeat property owner's reasonable investment-backed expectations: "The State may not put so potent a Hobbesian stick into the Lockean bundle.").

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JOHN B. NALBANDIAN
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street
Suite 1800
Cincinnati, Ohio 45202
(513) 381-2838

ROBERT R. CLARK
Counsel of Record
GEOFFREY SLAUGHTER
MICHAEL D. CHAMBERS
TAFT STETTINIUS & HOLLISTER LLP
One Indiana Square
Suite 3500
Indianapolis, Indiana 46204
(317) 713-3500

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