No. 04-1149

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-35a) is reported at 373 F.3d 1177. The opinion of the Court of Federal Claims (Pet. App. 36a-88a) is reported at 55 Fed. Cl. 643.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2004. Petitions for rehearing were denied on October 22, 2004. On January 6, 2005, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 24, 2005, 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 is a food-borne bacterium found in the gastrointestinal tract of birds, reptiles, and a variety of

farm animals. Pet. App. 40a n.5; 2 C.A. App. 221. *Salmonella enteritidis* (SE), one of more than 2000 types of salmonella, can cause symptoms in humans such as nausea, vomiting, abdominal cramps, diarrhea, fever, headache, and sometimes death. Pet App. 40a n.5; 2 C.A. App. 212-213. 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 SE exposure were increasing. Pet. App. 3a, 40a-41a. Before the 1980s, SE had been found only on the outside of eggs. 2 C.A. App. 280. As a result of an investigation into a 1986 SE outbreak from which 3300 people became ill, however, the CDC concluded that SE could also be transmitted internally from hens to the inside of eggs. *Id.* at 223, 225-226, 245-249, 279-281, 287-296. Egg-associated SE incidents increased rapidly in the late 1980s and spread from the Northeast to other States. *Id.* at 209, 211, 298. The CDC ultimately determined that, between 1985 and 1989, 244 SE outbreaks within the United States had accounted for 8607 illnesses, 1094 hospitalizations, and 44 deaths. *Id.* at 237-238. "Of the 109 outbreaks" found to be food-related, "89 (82%) were associated with shell eggs." *Id.* at 237.

2. In 1990, the United States Department of Agriculture (USDA) promulgated interim regulations to address the danger that SE-contaminated eggs sold in interstate commerce might cause illness to human consumers. Pet. App. 3a-5a, 41a-45a. Under the regulations, a farm identified as the probable source of SE-contaminated eggs was designated as a "study flock" and was subject to environmental testing. *Id.* at 4a, 42a (quoting 9 C.F.R. 82.32 (1991)). If one or more environ-

mental samples tested positive, the flock was designated as a "test flock," and its eggs could be sold only for pasteurization and could not be shipped in interstate commerce for sale as table eggs. *Id.* at 4a-5a & n.2, 42a. Sale for pasteurization typically brings the vendor a lower price than sale as table eggs. See *id.* at 11a, 49a.

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 SE." Pet. App. 5a (citations omitted); see *id.* at 43a. The regulations mandated testing of a small, representative sample of the hens, see 9 C.F.R. 82.32(c)(1) and (2) (1991); see also note 3, *infra*, in order to assess the prevalence of SE contamination of the flock as a whole. An "infected flock" was subject to specified restrictions, including the ban on interstate shipment of its eggs for use as table eggs, until (1) either the premises or hens tested negative for SE, or (2) the poultry houses containing the infected hens were depopulated, thoroughly cleaned and disinfected, and inspected for SE by USDA inspectors. 9 C.F.R. 82.32(c), 82.33(a) (1991); see Pet. App. 5a, 43a.

On January 30, 1991, USDA published its final SE regulations. See 56 Fed. Reg. 3730. The agency's final rules incorporated the requirements set forth above. The final rules also made clear that restrictions on interstate transport of eggs could be imposed on a house-by-house basis, and thus could apply to some but not other henhouses on the same farm. The final regulations provided, however, that, so long as some houses on a particular farm were subject to the interstate-transport restrictions, USDA would continue to monitor other houses on the same farm, including those that had tested

negative for the presence of SE. See Pet. App. 5a, 43a-44a.

3. In 1990, three separate outbreaks of SE contamination, resulting in approximately 450 persons becoming ill, were traced back to eggs laid at henhouses on three farms owned by petitioner Rose Acre Farms, Inc. (Rose Acre). Pet. App. 6a, 45a-47a. In the course of the ensuing investigation, 6741 hens were removed from Rose Acre's henhouses for slaughter and testing. *Id.* at 47a. During the period (1990-1992) while it was subject to USDA restrictions, Rose Acre sold for pasteurization nearly 700 million eggs that could otherwise have been sold as table eggs. *Id.* at 49a.

4. In December 1990, Rose Acre filed suit in the United States District Court for the Southern District of Indiana, asserting a variety of challenges to the USDA regulations. The court of appeals ultimately sustained the regulations. *Rose Acre Farms, Inc.* v. *Madigan*, 956 F.2d 670 (7th Cir.), cert. denied, 506 U.S. 820 (1992). The court rejected Rose Acre's contention that the agency rules were arbitrary and capricious, finding them to be a reasonable means of protecting the human population against the adverse health effects associated with consumption of SE-contaminated eggs. *Id.* at 674-677. The court of appeals also rejected Rose Acre's argument that the regulations were invalid because USDA had made no provision for compensating persons who suffered pecuniary losses as a result of the regulatory restrictions. See *id.* at 672-674. The court explained that, if either the Constitution or a federal statute were found to require the payment of compensation for losses suffered as a result of the USDA regulatory program, the Court of Federal Claims (CFC) could award relief. See *ibid.*

5. Rose Acre then filed suit in the Court of Federal Claims, which held that a taking had occurred and awarded just compensation of approximately $6.2 million. Pet. App. 36a-88a.

a. Applying the regulatory takings analysis described in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978) (*Penn Central*), the CFC concluded that each of the three *Penn Central* factors weighed in favor of Rose Acre's constitutional claim, and it held that the USDA regulations had effected a taking of the "healthy eggs" that the regulations required Rose Acre to divert to the pasteurized egg market. Pet. App. 58a-66a. First, the court found that compelled diversion of the eggs to pasteurization had a severe economic impact on Rose Acre. *Id.* at 60a-63a. As to the second *Penn Central* factor, the court held that the USDA regulations had interfered with Rose Acre's legitimate investment-backed expectations. *Id.* at 63a-65a. The court based that conclusion principally on the ground that "the issue of *salmonella* in eggs is not an area that experienced much regulation before 1990." *Id.* at 64a. Finally, the CFC held that the "character" of the challenged government action also weighed in favor of Rose Acre's takings claim. *Id.* at 65a-66a. The court explained that, in its view, USDA's SE regulations "were misguided because they relied on ineffective testing methods." *Id.* at 65a.

b. The CFC also held that Rose Acre had suffered a categorical taking of the 6741 hens that were slaughtered and tested for SE. Pet. App. 69a-70a. The CFC explained that, "[b]ecause the court believes [USDA's] testing methods were misguided, and since [USDA] did appropriate 6,741 of [Rose Acre's] hens for this testing,

the court concludes that [USDA] did categorically take said hens." *Id.* at 70a.

6. The Court of Appeals for the Federal Circuit vacated the judgment of the CFC and remanded the case for reconsideration of the *Penn Central* analysis. Pet. App. 1a-35a.

a. The court of appeals held that the CFC's analysis had overstated the "economic impact" on Rose Acre of the SE regulations. Pet. App. 10a-22a. The court observed that, "while the reduction in value of each affected egg was permanent, the period during which the regulations had an impact on Rose Acre's operations was relatively brief—approximately two years—after which Rose Acre reverted to its pre-regulation table-egg sales levels." *Id.* at 12a. The court also held, based on the "parcel as a whole" rule that governs regulatory takings cases, that the relevant "denominator" in assessing the economic impact of the regulations was the three farms (Cort Acres, White Acres, and Jen Acres) designated as "study flocks," rather than the individual henhouses whose eggs were later subjected to transport restrictions. See *id.* at 12a-21a. With respect to the "economic impact" of the SE regulations, the court of appeals concluded:

> On remand, * * * using the three farms (combined) as the relevant "denominator," the [CFC] must determine whether the economic impact in this case is best measured by the value decline (a 10.6% diminution) or profitability decrease (at most, a reduction from a 4.8% profit to a 6.3% loss) caused by the restrictions.

Id. at 21a.

b. The court of appeals agreed with the CFC that the "reasonable investment-backed expectations" prong of the *Penn Central* analysis weighed in favor of Rose Acre's takings claim. Pet. App. 22a-23a. The court stated that "the SE regulations were more than an extension of comparable regulations to a new disease. They 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 22a. In the view of the court of appeals, those differences between the SE regulations and prior public-health measures justified the CFC's conclusion that the "reasonable investment-backed expectations" factor under *Penn Cental* weighed in favor of Rose Acre. *Id.* at 22a-23a.

c. The court of appeals rejected the CFC's conclusion that the "character" of the relevant government action favored Rose Acre because (in the CFC's view) the USDA testing program represented an unreasonable means of protecting the public health. Pet. App. 23a-31a. The court of appeals held that the CFC had "clearly erred in finding that egg testing was feasible at the time the government imposed the restrictions at issue," *id.* at 28a, and it observed that Rose Acre had neither alleged nor proved that the regulatory approach chosen by USDA was "inconsistent with knowledge the government possessed at the time [the regulations] were adopted or applied against Rose Acre," *id.* at 29a. The court also stated that "the issue is not whether a less restrictive alternative to the government action existed or was 'possible.' It is whether there is a *nexus* between the regulation and its underlying public purpose." *Id.* at 28a (citing *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 837 (1987)).

d. The court of appeals remanded the case to allow the CFC to reconsider its *Penn Central* analysis in light of the Federal Circuit's discussion of the relevant factors. Pet. App. 30a-31a. The court of appeals explained that "[o]nly when all of the relevant criteria and circumstances are considered, and considered together, can a conclusion be reached as to whether compensation is required in this case." *Id.* at 31a.

e. Finally, the court of appeals rejected the CFC's finding that the compelled testing of Rose Acre's hens had effected a categorical taking of property. Pet. App. 31a-35a. The court found it "clear * * * that had the regulations required Rose Acre itself to kill and test the hens, no per se taking could be found." *Id.* at 33a. The court held that no different result was warranted simply because "government officials carried out the testing (and the prerequisite seizure and destruction of the hens)." *Id.* at 34a. The court of appeals held that the CFC on remand "must ultimately weigh all the *Penn Central* factors * * * to determine whether the Fifth Amendment requires compensation for the hens." *Id.* at 35a.

ARGUMENT

Rose Acre's challenges to the interlocutory ruling of the court of appeals lack merit and do not warrant this Court's review. Petitioner is in the ongoing business of introducing billions of eggs annually into the Nation's food supply. It is not entitled to compensation under the Fifth Amendment simply because, for a relatively brief period of time, measures reasonably calculated to safeguard the public from contaminated food increased its

business costs or reduced the market value of a portion of its overall production.[1]

1. As a threshold matter, this Court's review is unwarranted because of the interlocutory posture of the case. The court of appeals disapproved significant aspects of the CFC's legal analysis, and it vacated the CFC's judgment in Rose Acre's favor, but it did not finally resolve the question whether a taking had occurred. Rather, the court of appeals ordered a remand to allow the CFC to reconsider the application of the *Penn Central* factors to the circumstances of this case. See Pet. App. 30a-31a, 34a-35a. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court").

2. Rose Acre contends (Pet. 9-16) that the court of appeals erred in analyzing the "economic impact" of the SE regulations for purposes of the court's *Penn Central* analysis. More specifically, Rose Acre challenges the

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[1] The United States has filed a conditional cross-petition for a writ of certiorari in this case. See *United States* v. *Rose Acre Farms, Inc.*, petition for cert. pending, No. 04-1311 (filed Mar. 30, 2005). The conditional cross-petition argues that, if the Court grants Rose Acre's petition for certiorari in the instant case, the cross-petition should be granted as well, to ensure that the Court's review can encompass the Federal Circuit's analysis of the effect of the USDA regulations upon Rose Acre's "reasonable investment-backed expectations." See 04-1311 Pet. 7-9.

court of appeals' determination that the relevant "denominator" in assessing economic impact was three Rose Acre Farms (Cort Acres, White Acres, and Jen Acres) in their entirety, rather than the individual henhouses whose eggs were temporarily required to be sold for pasteurization. The court of appeals correctly rejected that contention.

"'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*, 438 U.S. at 130. 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) (quoting *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979)). "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).

Contrary to Rose Acre's contention, the court of appeals did not suggest that the relevant "parcel" for Just Compensation Clause analysis will invariably include "all contiguous property or all nearby property owned by the plaintiff." Pet. 11 (describing "unity of ownership" approach to definition of the relevant parcel); see Pet. 15 (asserting that "the Federal Circuit's decision * * * represented a choice to define the denominator based on the 'unitary ownership' theory"). Rather, the court explained that, although the regulatory "transport *restrictions* were applied ultimately to individual

houses, * * * the tracebacks that resulted in the 'study flock' designation at each of Cort Acres, White Acres, and Jen Acres * * * were, in accordance with the interim and final regulations, directed to each farm as a whole." Pet. App. 21a. The court also noted that, under the USDA 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." *Ibid.* (quoting 9 C.F.R. 82.38 (1992)).

The court of appeals' holding that the relevant "parcels" included the three farms in their entirety thus was not based simply on unity of ownership, or on 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 USDA's SE regulations, the farm as a whole was treated as the relevant unit of regulatory oversight because, *inter alia*, of the potential for SE to spread throughout the farm. The court's approach is further supported by the fact that, during the period of time that the three farms were subject to regulatory restrictions, individual henhouses moved in and out of "infected" status depending upon whether SE contamination spread from one house to another and whether Rose Acre depopulated and disinfected a particular henhouse. 1 C.A. App. 144-181.

During the relevant time period, the three Rose Acre farms affected by the SE restrictions continued to sell large numbers of table eggs. See 2 C.A. App. 240, 242-244 (charts reflect that approximately 933 million eggs produced on the three farms during the period of SE restrictions, comprising 57.4% of the farms' total output during that period, were sold as table eggs). Rose Acre's economic-impact analysis treats that fact as irrel-

evant, based on the contention (Pet. 15) that "the destruction of eggs in one [hen]house has no economic impact on those in surrounding houses." There is no sound basis for that assertion. By minimizing the risk that contaminated eggs will cause harm to human health, USDA's regulatory efforts can 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, SE will continue to spread and 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."). Rose Acre was and is a major participant in that national market. Pet. App. 28a-29a. In assessing the economic impact of the SE regulations on Rose Acre's business, a court should not ignore the fact that regulatory measures reasonably designed to reduce the risk of SE contamination and consequent adverse health effects on consumers could logically be expected to increase the marketability of the table eggs that the company continued to sell—both from the three particular farms at issue here and from Rose Acre's other farms—even while the three farms were subject to regulatory restrictions.

Even if questions concerning the proper conduct of economic-impact analysis in regulatory takings cases otherwise warranted this Court's review, moreover, the instant case would be an unsuitable vehicle for consideration of those issues. As the phrase suggests, the "parcel as a whole" rule is most often applied in cases involving land-use regulation. Rose Acre's complaint, however, is not with any restriction placed on the use of its land, but with limits placed upon the interstate transportation of personal property (eggs) for commercial

purposes. Cf. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027-1028 (1992) ("[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."). 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 not always be readily applicable to the other.

The temporary nature of the pertinent restrictions further underscores the idiosyncratic nature of the "economic impact" question presented here. Thus, for example, although Rose Acre experienced a loss based on a comparison of income with total costs for the eggs produced on the three farms at issue here while a portion of those eggs were subject to restrictions, Rose Acre presumably experienced a profit on its sales of eggs from those farms both before and after the restricted period. Those profits, in turn, could be expected to reflect the long-term *beneficial* effects of USDA's regulatory program, as well as the risks 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 Rose Acre operates. These and other dissimilarities between this case and the settings in which the "parcel as a whole" rule is typically applied provide additional reasons for this Court to deny certiorari.

3. There is similarly no merit to Rose Acre's contention (Pet. 16-24) that the court of appeals misappre-

hended the distinction between regulatory and categorical takings.

a. Rose Acre argues (Pet. 16-19) that the court of appeals erred in its analysis of the "character" of the SE regulations. In identifying the "character of the governmental action" as a factor of "particular significance" in the takings inquiry, the Court in *Penn Central* 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). The Court thus distinguished between cases in which the government appropriates or physically invades private property, and those in which it simply limits the uses to which property may be put. The regulatory restriction that is the principal focus of Rose Acre's takings claim—*i.e.*, the temporary prohibition on interstate commercial shipment for use as table eggs of eggs from certain of Rose Acre's henhouses—clearly falls into the latter category.

In arguing that the "character" prong of *Penn Central* analysis supports its takings claim, Rose Acre does not suggest that the interstate-transport restrictions "can be characterized as a physical invasion by government." *Penn Central*, 438 U.S. at 124. Rather, Rose Acre contends (see Pet. 17-18) that USDA's program of hen and environmental testing was an inefficacious means of detecting SE contamination in eggs. It is unclear what significance such an allegation has to the "character" of the government action for purposes of *Penn Central* analysis. In any event, both the Seventh and Federal Circuits concluded that USDA's testing

methodology was a reasonable means of determining whether Rose Acre's eggs were safe for human consumption as table eggs, see p. 4, *supra*; Pet. App. 29a, and that fact-specific holding does not warrant this Court's review.

In rejecting Rose Acre's challenge to USDA's testing methodology, the court of appeals observed that "[n]owhere does Rose Acre argue (or did it show) that the regulatory means were inconsistent with knowledge the government possessed at the time they were adopted or applied against Rose Acre." Pet. App. 29a. Contrary to Rose Acre's contention (Pet. 18), the court of appeals did not thereby require proof "that the government *knew* [its] regulations to be flawed at the time of enactment." Rather, the Federal Circuit appears simply to have recognized that, to the extent Rose Acre's takings claim is premised on the alleged inefficacy of USDA's regulatory approach, the reasonableness of the pertinent regulations is properly evaluated by reference to the information before the agency at the time it promulgated the rules. See, *e.g.*, Pet. App. 28a (rejecting, as clearly erroneous, the CFC's "finding that egg testing was feasible at the time the government imposed the restrictions at issue on Rose Acre").

That approach is consistent with established administrative-law principles. Cf. *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985) (In conducting judicial review under the Administrative Procedure Act (APA), "[t]he task of the reviewing court is to apply the appropriate APA standard of review to the agency decision *based on the record the agency presents to the reviewing court*.") (citation omitted) (emphasis added). Even assuming, *arguendo*, that more precise or cost-effective methods of detecting SE contamination in eggs

became feasible after the period during which Rose Acre was subject to the interstate-transport restrictions, that fact would not render the prior regulatory scheme unreasonable or support Rose Acre's takings claim.

b. Rose Acre contends (Pet. 19-21) that this Court should grant certiorari to confirm that its prior decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), are limited to cases involving exactions of land.[2] Rose Acre is correct that the *Nollan*/*Dolan* standard applies only in the "special context of exactions." *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). Apart from one isolated citation to *Nollan* (see Pet. App. 28a), however, the court of appeals' opinion in this case contains no reference to either of those decisions. Because the parties agree that *Nollan* and *Dolan* are inapposite here, and the court of appeals placed no meaningful reliance on those decisions, this case presents no question concerning the proper application of those precedents.

In any event, there is no reason to suppose that Rose Acre would have been prejudiced if the court of appeals

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[2] In *Nollan* and *Dolan*, the Court addressed the question of what standard governs when the grant of a development permit is made contingent on the permittee's willingness to cede a public right-of-way across her land. The Court in *Nollan* held that such a permit condition is legitimate only if it serves "the same governmental purpose" as would be furthered by a ban on the proposed development. 483 U.S. at 837. The Court in *Dolan* further refined the applicable standard, stating that such an exaction may be imposed without effecting a compensable taking if "the required dedication is related both in nature and extent to the impact of the proposed development." 512 U.S. at 391; see *ibid.* (framing the relevant question as whether a "rough proportionality" exists between the required dedication of property and the likely impacts of the proposed development).

had relied substantially on *Nollan* and *Dolan* in analyzing its takings claim. Rose Acre asserts (Pet. 19) that "applying such a test in the context of a regulatory taking virtually ensures that the government will prevail," and it suggests (Pet. 19-20) that the *Nollan*/*Dolan* "nexus" requirement is an especially lenient constitutional standard. The clear thrust of *Nollan* and *Dolan*, however, is that a legal standard *more demanding* than ordinary review for reasonableness is appropriate when permission to develop real property is made contingent on a landowner's agreement to cede a permanent easement across the tract. See *Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 391.

c. Rose Acre contends (Pet. 21-24) that a per se taking occurred when USDA destroyed 6741 of Rose Acre's hens in order to test the carcasses for the presence of SE.[3] That claim lacks merit.

The Court in *Penn Central* observed that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." 438 U.S. at 124 (citation omitted); see p. 14, *supra*. This Court's decisions, however, in no way suggest an invariable rule of the sort that petitioner advocates—*i.e.*, a rule that compelled destruction of personal property will always effect a taking, even when it is necessary to protect the public health and the safety of a business's own products. In *Penn Central* itself, for example, the Court discussed with approval its prior decision in *Miller* v. *Schoene*, 276 U.S. 272 (1928), which

[3] The 6741 hens that were tested under USDA's SE regulations were a minute percentage of the total combined capacity (5.4 million hens, see Pet. App. 45a n.9, 46a n.11, 47a n.12) of the three relevant Rose Acre farms at any given time. The CFC's just compensation award for those hens was $15,671.99. *Id.* at 75a.

held that no taking had occurred when landowners were required "to cut down a large number of ornamental red cedar trees because they produced cedar rust fatal to apple trees cultivated nearby." *Penn Central*, 438 U.S. at 126 (discussing *Miller*); see *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 508-509 (1923) ("There are many laws and governmental operations which injuriously affect the value of or destroy property—for example, * * * [the] destruction of cattle, trees, etc., to prevent contagion—but for which no remedy is afforded.").[4]

Rose Acre characterizes the testing program at issue here as involving "more than 6,000 healthy hens." Pet. 21, 23. The hens that were destroyed, however, had previously been determined through blood testing to be particularly likely to have SE within them. 5 C.A. App. 949; see Pet. App. 6a (noting that USDA selected for destruction "60 hens (whose blood had tested positive [for SE]) from each house"). In any event, the destruc-

[4] The Court in *Miller* held that, in light of the importance of the apple industry to the economic and public welfare of the State, Virginia officials could permissibly mandate the destruction of the cedar trees that threatened the functioning of that industry. See 276 U.S. at 279 ("When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public."); cf. *Mugler* v. *Kansas*, 123 U.S. 623, 664 (1887) (sustaining a prohibition on the manufacture of beer as a reasonable "exercise of [the State's] powers for the protection of the safety, health, or morals of the community," notwithstanding the substantial adverse effect of the ban on the value of property previously used as a brewery). The federal interests in protecting the public against the adverse health effects associated with consumption of SE-contaminated table eggs, and in safeguarding the national egg market by preserving public confidence in the safety of that product (see p. 12, *supra*), are manifestly of no less moment.

tion of some hens that are ultimately found to be "healthy" would be no more problematic as a constitutional matter than a variety of other government-mandated research programs that by their nature result in the use, consumption, or destruction of the personal property that is the subject of the test. Rose Acre's constitutional theory suggests, for example, that a drug manufacturer suffers a per se taking of property if it is required to test samples of a new drug in clinical trials in order to obtain federal approval to market the product. Similarly, it plainly is reasonable, and not a taking, for the government to require the testing of samples of any stream of production to ensure compliance with applicable standards (especially health and safety standards), even if the testing results in the destruction of the sampled items. The value of the overall output stream assumes that some individual items will be diverted to testing. Rose Acre cites no decision that has found a taking in such circumstances.

4. Contrary to Rose Acre's contention (Pet. 24-25), there is no need for this Court to hold the petition for a writ of certiorari pending its decision in *Lingle* v. *Chevron USA Inc.*, No. 04-163 (argued Feb. 22, 2005). *Lingle* presents the question whether economic regulation generally, or some category of regulation affecting the rental of real property in particular, may be deemed a taking if it does not "substantially advance" a legitimate governmental interest.

Rose Acre's takings claim, like that of the landowner in *Lingle*, is premised at least in part on the alleged inefficacy of government regulation that potentially affects the value of its property. It is therefore possible that the Court's decision in *Lingle* could shed light on the proper disposition of Rose Acre's suit. The court of ap-

peals' remand order contemplates, however, that Rose Acre's suit for just compensation will receive further consideration by the CFC. See Pet. App. 30a-31a, 34a-35a. To the extent that this Court's decision in *Lingle* is relevant to the disposition of claims that have been properly preserved in this case, the CFC on remand can take that decision into account, whether or not the certiorari petition is held pending the resolution of *Lingle*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2005