No. 08-242

In the Supreme Court of the United States

ROSS L. BAIR, ET AL., PETITIONERS

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

Under 7 U.S.C. 7284(d), which was enacted in 1996, the Commodity Credit Corporation, a federal agency, receives a "super-priority" lien upon refined sugar when it makes a loan to a sugar processor. The question presented is as follows:

Whether the enforcement of a super-priority lien, pursuant to a federal statute enacted four years before the creation of petitioners' state-law liens, constituted a compensable taking of petitioners' property under the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 515 F.3d 1323. The opinion of the Court of Federal Claims (Pet. App. 20-42) is reported at 80 Fed. Cl. 287.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2008. A petition for rehearing was denied on March 31, 2008 (Pet. App. 44-47). The petition for a writ of certiorari was filed on June 30, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal government has been involved in the sugar trade since the First Congress passed a tariff on imported sugar in 1789. Act of July 4, 1789, ch. 2, 1 Stat. 25. See generally Roy A. Ballinger, *A History of Sugar Marketing Through 1974* (USDA Agric. Econ. Rep. No. 382) (Mar. 1978) <http://www.ers.usda.gov/Publications/AER382/>. Since 1977, Congress has supported the domestic sugar industry by making federal loans available to sugar processors. Food and Agriculture Act of 1977, Pub. L. No. 95-113, Tit. IX, § 902, 91 Stat. 949. As relevant here, the Commodity Credit Corporation (CCC), an agency subject to the general supervision and direction of the Secretary of Agriculture (7 U.S.C. 714), supports farm prices through its Sugar Loan Program, which provides nonrecourse loans to sugar processors, who agree to make payments to the sugar beet producers who have supplied them. See 7 U.S.C. 7272, 7281; 7 C.F.R. pt. 1435 (2000).

As part of the Sugar Loan Program, Congress passed legislation in 1996 that authorizes the CCC to secure its loans to sugar processors by obtaining a "superpriority" lien over refined sugar used as collateral. Agricultural Market Transition Act, Pub. L. No. 104-127, Tit. I, § 164, 110 Stat. 935-936. The statute provides, in pertinent part, as follows:

> A security interest obtained by Commodity Credit Corporation as a result of the execution of a security agreement by the processor of sugarcane or sugar beets shall be superior to all statutory and common law liens on raw cane sugar and refined beet sugar in favor of the producers of sugarcane and sugar beets and all prior recorded and unrecorded

> liens on the crops of sugarcane and sugar beets from which the sugar was derived.

7 U.S.C. 7284(d).

2. Petitioners grow sugar beets in the State of Washington. Pet. App. 4. By December 1, 2000, they had delivered their year 2000 crop to Pacific Northwest Sugar Company (PNSC), a local sugar processor, for processing into refined sugar. *Ibid.* As security until they were fully paid for their beets by PNSC, petitioners received state-law liens on the beets, any sugar refined from them, and any proceeds from the sale of that sugar. Wash. Rev. Code Ann. § 60.13.020 (West 2004); Pet. App. 4-5. Under Washington law, such liens are created automatically, and there are no filing requirements until 20 days after payment by a processor is due and unpaid. Wash. Rev. Code. Ann. § 60.13.050 (West 2004); Pet. App. 6.

Between October 10, 2000, and February 12, 2001, PNSC received 21 nonrecourse loans from the CCC, for a total of approximately $32 million. Pet. App. 29. Upon issuance of each loan, the CCC received a super-priority lien on the refined sugar and the proceeds for the 2000 crop. 7 U.S.C. 7284(d); Pet. App. 5-6. Each CCC loan to PNSC matured nine months after its execution. *Id.* at 25. At that point, PNSC could satisfy its obligations to the CCC either by repaying the outstanding balance or by forfeiting the refined-sugar collateral to the CCC. *Id.* at 26, 29-30. Because petitioners' deliveries of their sugar beets necessarily preceded each loan that the CCC gave PNSC for processing those beets, petitioners' state-law liens were created before the CCC's liens. *Id.* at 29-30.

After the CCC had issued its loans and petitioners had received 55% of the payments they were owed for

their 2000 crop, PNSC defaulted on its remaining obligations. Pet. App. 6, 29. On March 22, 2001, petitioners filed their liens with the State. *Id*. at 6.

In September 2001, petitioners filed suit against PNSC in Washington state court, seeking to enforce their liens and to recover $8.7 million. Pet. App. 4. The United States intervened in the suit, removed the case to the United States District Court for the Eastern District of Washington, and asserted its status as a super-priority lienholder. *Ibid*. The district court held that the CCC's liens took priority over petitioners' processor liens. *Id.* at 6, 31; *Bair* v. *Pacific Nw. Sugar Co.*, No. CS-01-0310 (E.D. Wash. Feb. 21, 2002), slip op. 24. The United States Court of Appeals for the Ninth Circuit affirmed, holding that the "plain meaning" of 7 U.S.C. 7284(d) "is dispositive in favor of the CCC." *Bair* v. *Pacific Nw. Sugar Co.*, 85 Fed. Appx. 555, 558 (9th Cir. 2004).

The CCC was able to recover from PNSC a portion of the value of its outstanding loans, but it wrote off $10.4 million. Pet. App. 7. No sugar or proceeds remained to satisfy petitioners' claims for the remaining 45% of what PNSC owed them. *Id.* at 7, 29-30.

3. Petitioners then filed this suit in the Court of Federal Claims (CFC), arguing that the CCC's super-priority liens had effected a compensable categorical taking of their state-law sugar-processor liens. Pet. App. 31. The court granted summary judgment for the government, holding that petitioners had failed to demonstrate that they possessed a compensable property interest. *Id*. at 20-42. The CFC explained that Section 7284(d), by creating a super-priority for federal liens, had modified the statutory rights that could be granted by a state-law processor lien. *Id*. at 38. Because peti-

tioners' property interest in their state-law lien had thus been limited by federal statute when the state-law liens first came into being, giving a super-priority to the CCC's liens did not constitute a compensable taking of petitioners' property under the Fifth Amendment. *Id.* at 42.[1]

4. The court of appeals affirmed. Pet. App. 1-19. The court held that petitioners did not possess a compensable property interest in any priority of their liens over the CCC's liens, because pre-existing federal law had altered the priority of liens on PNSC's sugar. *Id.* at 9-10. It rejected petitioners' argument that property interests must be defined entirely by state law and cannot be altered by a federal statute. *Id.* at 10-14. The court held that "federal law determines what constitutes 'property' for purposes of applying federal statutes," *id.* at 10, and that, in "cases of personal property, * * * [a]ny lawful regulation defining the scope of the property interest that predates the creation of that interest will 'inhere in the title' to the property," *id.* at 11.

The court of appeals concluded that Section 7284(d) "legitimately altered the priority of liens arising after [it] was enacted." Pet. App. 15. The court emphasized that this case does not involve "a situation in which a

[1] The CFC also held that petitioners had failed to demonstrate that their state-law liens had been destroyed. Pet. App. 34-38. While petitioners argued that the enforcement of the government's liens resulted in a compensable categorical taking, the court explained that a lien is not a guarantee of payment even in the absence of higher-priority liens. *Id.* at 38. Petitioners' state-law lien continued to exist after the government collected what it could, and it was rendered valueless only by circumstances arising from "management practices or market conditions." *Id.* at 37. The court held that the determination whether a categorical taking exists must depend upon the nature of the government's action, not the fortuity of market conditions. *Ibid.*

federal statute restricting the state lien was enacted after the state property interest came into existence." *Id.* at 16. Because the court of appeals determined that petitioners did not possess a compensable property interest in their asserted lien priority over the CCC, it did not decide whether the government's action would otherwise have resulted in a taking. *Id.* at 19.

ARGUMENT

Petitioners argue that the government's assertion of its super-priority lien effected a taking of their property for which they are entitled to compensation under the Fifth Amendment. Because the federal statute establishing the higher priority of the government's lien (7 U.S.C. 7284(d)) pre-dated the creation of petitioners' state-law liens, petitioners never had a vested property interest that was independent of that priority. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The Just Compensation Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. Thus, a "property" interest is an essential precondition for any takings claim. The court of appeals correctly held that petitioners' state-law liens did not include a property right to take priority over the CCC's lien.

a. As petitioners correctly explain (Pet. 8-9, 11-12), a state-law lien may constitute a property interest for purposes of the Just Compensation Clause. Contrary to petitioners' contention, however, the property rights they acquired when they obtained liens against sugar possessed by PNSC were subject to the pre-existing limitation placed upon such liens by the federal super-

priority statute. Section 7284(d) was enacted in 1996, more than four years before petitioners acquired their state-law liens, and it unambiguously declared that the CCC's security interests would "be superior to all statutory and common law liens on * * * refined beet sugar in favor of the producers of * * * sugar beets."

For purposes of the Fifth Amendment, property rights derive from sources independent of the Constitution, and they are limited by the "rules and understandings" that "exist[]" at the time of their creation. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992) (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)). In determining the lien priorities associated with the Sugar Loan Program, there is nothing anomalous about taking federal law into account. As the court of appeals noted (see Pet. App. 10), this Court has held that "the priority of liens stemming from federal lending programs must be determined with reference to federal law." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979); see *United States* v. *Craft*, 535 U.S. 274, 278-279 (2002) ("State law determines only which sticks are in a person's bundle. Whether those sticks qualify as 'property' for purposes of the federal tax lien statute is a question of federal law.").[2]

b. Petitioners' principal argument (Pet. 12-23) grows out of this Court's discussion in *Lucas* of the "background principles" or "existing rules or understandings"

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[2] The Court in *Kimbell Foods* ultimately held that the federal rule governing lien priorities in that case incorporated state law. See 440 U.S. at 740. The Court made clear, however, that Congress could have "established a priority scheme displacing state law." *Id.* at 735; see *id.* at 740 (holding state law to be incorporated "absent a congressional directive" and "until Congress strikes a different accommodation"). That is what Congress has done in Section 7284(d).

that help define the "bundle of rights" that citizens "acquire when they obtain title to property." 505 U.S. at 1027, 1029, 1030. Petitioners contend (Pet. 14) that those background principles must come exclusively from state law because "nothing in *Lucas* suggests that federal law can be used to redefine state property interests." But while petitioners quote (Pet. 9, 13-17) several decisions that refer to state law when discussing the sources of property interests and background principles, none of those decisions holds that property interests may be defined *only* by state law. Indeed, *Lucas* itself refers to "existing rules or understandings that stem from an independent source *such as* state law," 505 U.S. at 1030 (quoting *Roth*, 408 U.S. at 577) (emphasis added), which clearly signals that state law does *not* provide the exclusive body of rules for determining the scope of constitutionally protected property interests.

In addition, because *Lucas* involved restrictions on the development of real property, the Court's description of "background principles" necessarily dealt with the sorts of restrictions that may inhere in a landowner's title. The Court expressly distinguished for takings purposes between government restrictions on land use and those placed on the use of personal property. "[I]n the case of personal property," the Court stated, "new regulation might even render [an owner's] property economically worthless" without effecting a compensable taking. 505 U.S. at 1027-1028. The Court contrasted such regulation with "the case of land," in which the government ordinarily cannot "eliminate all economically valuable use" without compensating the owner. *Id.* at 1028. The Court explained that a "regulation[] that prohibit[s] all economically beneficial *use of land* * * * cannot be newly legislated or decreed (without compensation), but

must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon *land ownership*." *Id.* at 1029 (emphases added).

Even in the case of land, the Court in *Lucas* indicated that federal law may provide background principles that affect the extent of a property interest. By citing *Scranton* v. *Wheeler*, 179 U.S. 141 (1900), the Court identified the federal government's navigational servitude as an example of a "pre-existing limitation upon [a] land-owner's title" that the government could enforce "without compensation." 505 U.S. at 1028-1029. Petitioners contend (Pet. 15-16) that *Scranton* is inapposite here because the navigational servitude at issue in that case arose pursuant to state rather than federal law. That argument reflects a misreading of *Scranton*. The Court in *Scranton* focused on *Congress's* authority over navigable waterways, see 179 U.S. at 157-160; see also *Gilman* v. *Philadelphia*, 70 U.S. (3 Wall.) 713, 725 (1866) (explaining that the navigable waters of the United States are to be deemed the "public property of the nation, and subject to all the requisite legislation by Congress"), and the *Scranton* dissenters objected that the Court had eliminated a distinction drawn in prior cases between "a servitude existing under the state law" and a "servitude created by Federal law," 179 U.S. at 182 (Shiras, J., dissenting).

2. Petitioners contend (Pet. 13) that the Court in *Lucas* "cautioned against using legislatively decreed background principles" as the basis for rejecting a takings claim. In fact, the Court in *Lucas* stated only that takings concerns may be raised when restrictions on the use of property are "*newly* legislated or decreed." 505 U.S. at 1029 (emphasis added). Because the underlying

question is what "interests were * * * part of * * * title *to begin with*," *id.* at 1027 (emphasis added), the relevant time for judging whether a limitation is "new" is when the property interest was created.

a. The time a property interest was created may not be the same as the time it was acquired by the current property owner. This Court has explained that, if all the legal rules in effect when a particular parcel is transferred were treated as "background principles" limiting the scope of the transferee's interest in the land, the government could prevent "prior owners" from "transferr[ing] their full property rights" to their successors. *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987). If "the postenactment transfer of title [c]ould absolve the State of its obligation to defend any action restricting land use," the State "would be allowed, in effect, to put an expiration date on the Takings Clause." *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 627 (2001).

Although petitioners invoke those passages from *Nollan* and *Palazzolo* (Pet. 18, 20-21), they overlook a fundamental difference between those cases and this one. Those cases (like *Lucas*) involved alleged takings of real property. See *Nollan*, 483 U.S. at 827 ("The Nollans own a beachfront lot."); *Palazzolo*, 533 U.S. at 611 ("Petitioner Anthony Palazzolo owns a waterfront parcel of land."); *Lucas*, 505 U.S. at 1008 ("Lucas in 1986 purchased the two lots at issue in this litigation for his own account."). There were consequently chains of prior owners, going back generations to the original creation of title to the relevant plots of land.

In this case, by contrast, the property interests that petitioners assert did not exist before 2000. Petitioners possessed liens, which were created in 2000 and which attached to personal property—sugar beets, sugar re-

fined from them, and proceeds from the sugar's sale—that first came into being when the 2000 crop of sugar beets was grown and harvested. Because the relevant liens did not exist when Congress enacted Section 7284(d) in 1996, application of the federal statute to define the scope and relative priority of those liens did not prevent any prior owners from "transferr[ing] their full property rights." *Nollan*, 483 U.S. at 834 n.2.[3]

b. Despite petitioners' attempts (Pet. 16-20) to distinguish it, this Court's decision in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), indicates that the scope of property rights protected by the Just Compensation Clause may be defined in part by federal statutes. In *Monsanto*, a pesticide manufacturer attempted to prevent the Environmental Protection Agency (EPA) from disclosing to the public data that the manufacturer had submitted to EPA as part of the process of registering its pesticides. The Court concluded that the manufacturer had a property interest in the data, which were intangible trade secrets protected by state law. *Id.* at 1000-1004.

The Court in *Monsanto* held, however, that public disclosure would constitute a taking only with respect to data that were submitted to EPA during a period (1972

[3] Petitioners contend (Pet. 7-8) that, "[i]f Congress can preemptively eliminate a compensable property interest recognized under state law simply by enacting legislation, the protection afforded by the Fifth Amendment would be in jeopardy." The application of Section 7284(d) to this case did not "eliminate" any property interest, however, since the statute was enacted well before petitioners' liens came into being. And because the Just Compensation Clause also binds the States, the potential for new legislation to effect a taking is not unique to federal statutes. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation.").

to 1978) when federal statutes had given the manufacturer "explicit assurance that EPA was prohibited from disclosing publicly * * * any data submitted by an applicant if both the applicant and EPA determined the data to constitute trade secrets." 467 U.S. at 1011. With respect to data submitted before that date, the Court held that disclosure would *not* result in a taking because the federal statutes in effect before 1972 did not give Monsanto any "'reasonable investment-backed expectation' that EPA would maintain those data in strictest confidence and would use them exclusively for the purpose of considering the Monsanto application." *Id.* at 1010; see *id.* at 1008-1010. Similarly here, under the federal statutory scheme in effect in 2000, when petitioners delivered their beets to PNSC and their state-law lien was created, petitioners had no reasonable expectation that their lien would be superior to that of the CCC.

Petitioners contend (Pet. 18-19) that, unlike the pesticide manufacturer in *Monsanto*, which submitted data to EPA in exchange for the registration of its products, petitioners did not receive any "valuable government benefit" for which the reduction in value of their state-law lien might be regarded as a quid pro quo. That argument is misconceived. The entire point of the CCC's loan program is to guarantee a minimum price for sugar, in order to benefit both processors like PNSC and producers like petitioners. Pet. App. 14-15. Indeed, one of the statutory conditions of the CCC's loan to PNSC was that petitioners would receive "payments" from PNSC that were "proportional to the value of the [federal] loan received by [PNSC] for sugar beets," 7 U.S.C. 7272(e)(2)

(2000), and petitioners received 55% of the value of their crop before PNSC defaulted, Pet. App. 4, 29.[4]

3. This Court has recognized that the scope of state-law lien interests can be affected by a federal statute as long as the statute pre-dates the creation of the lien. In *United States* v. *Security Industrial Bank*, 459 U.S. 70 (1982), the Court held that 11 U.S.C. 522(f)(2), which permits debtors in bankruptcy proceedings to avoid liens on certain property, applied only prospectively (*i.e.*, to liens created after the statute was enacted). 459 U.S. at 78-82. The Court explained that its construction would avoid a "substantial doubt whether the retroactive destruction" of liens that preceded the statute would effect a compensable taking. *Id.* at 78.

Petitioners contend (Pet. 29) that the Court in *Security Industrial Bank* "did not rule on the prospective application of Section 522." The Court's invocation of constitutional-avoidance principles (see 459 U.S. at 78) would have been pointless, however, if the application of Section 522(f)(2) to later-created liens created the same constitutional difficulties that the Court perceived in the statute's retroactive application. The Court's analysis clearly presumed that no taking would occur when the statute was applied to lien "interests that came into effect after the enactment date." *Id.* at 79; see *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121,

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[4] In 2000, the General Accounting Office concluded that "domestic sugar beet and sugarcane producers" are the "primary beneficiaries" of the higher prices that result from the CCC's loan program and from tariffs on imported sugar. U.S. Gen. Accounting Office, *Sugar Program: Supporting Sugar Prices Has Increased Users' Costs While Benefiting Producers* 6 (June 2000) (estimating sugar beet growers and processors received approximately $700 million of benefits from the sugar program in 1998) <www.gao.gov/new.items/rc00126.pdf>.

128 n.5 (1985) (explaining that *Security Industrial Bank* "avoid[ed]" the "substantial argument that retroactive application of a particular provision of the Bankruptcy Code would in every case constitute a taking" by "construing the statute to apply only prospectively"). Consistent with that understanding, courts of appeals have held that Section 522(f)(2) does not effect a taking when applied to liens that were created after its enactment. See, *e.g.*, *In re Weinstein*, 164 F.3d 677, 686 (1st Cir. 1999); *In re Thompson*, 867 F.2d 416, 422 (7th Cir. 1989).

4. Contrary to petitioners' contention (Pet. 22-25), the court of appeals' decision does not create an intra-circuit conflict with *Preseault* v. *United States*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc). In *Preseault*, the plurality (*id.* at 1538-1539) and the concurring judges (*id.* at 1553) concluded that federal legislation concerning railroad rights-of-way did not establish background principles that modified state-law definitions of property. *Preseault* is distinguishable from this case, however, because all of the federal laws at issue in *Preseault* were enacted *after* the underlying state-law interests in land were created.

Preseault involved easement rights that were created under state law in 1899, see 100 F.3d at 1538 (plurality opinion); *id.* at 1553 (Rader, J., concurring), and federal statutes that were enacted in 1920, 1976, and 1983, see *id.* at 1537-1538 (plurality opinion); *id.* at 1553 (Rader, J., concurring). Because the statutes post-dated the creation of the easements, they could not have established background principles that inhered in state-law title *ab initio*—regardless of whether they were federal or state statutes. See *id.* at 1540 n.13 (plurality opinion) (explaining that even *state* statutes enacted in 1963 and 1982 "would constitute a separate ground for finding

a governmental taking" because the property owners' "interests were fixed at the time of their creation" in 1899). The *Preseault* plurality rejected the proposition that the property owners "should have anticipated that *at some time in the future* the Government might exercise its general regulatory powers" to modify the "title" they had "acquired." *Id.* at 1539 (emphasis added). That holding has no application to this case, because no aspect of petitioners' interest in the sugar that was derived from a crop of beets grown in 2000 could have predated the 1996 statute that altered the schedule of lien priorities.

Even if the decision below were inconsistent with *Preseault*, an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Petitioners suggest (Pet. 24) that an intra-circuit conflict would have heightened significance in this context because "the Federal Circuit determines most Fifth Amendment takings cases." But even assuming that petitioners' reference to the Fifth Amendment is intended to exclude cases brought against state or local governments under "the incorporated Takings Clause," *Nollan*, 483 U.S. at 835 n.4, this Court has adjudicated takings challenges to federal statutes in reviewing decisions of the regional courts of appeals. See, *e.g.*, *Eastern Enters.* v. *Apfel*, 524 U.S. 498 (1998) (reviewing First Circuit decision); *Babbitt* v. *Youpee*, 519 U.S. 234 (1997) (reviewing Ninth Circuit decision); *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (reviewing Ninth Circuit decision). There is consequently no reason for this Court to grant review in the absence of a circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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