No. 15-944

In the Supreme Court of the United States

DIMARE FRESH, INC., 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

Whether petitioners' complaint alleging a regulatory taking based on the Food and Drug Administration's issuance of press releases and participation in a media briefing was properly dismissed for failure to state a claim upon which relief could be granted.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is published at 808 F.3d 1301. The opinion of the United States Court of Federal Claims (Pet. App. 23-39) is reported at 118 Fed. Cl. 455 (2014).

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2015. The petition for a writ of certiorari was filed on January 19, 2016. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between April 23, 2008 and June 1, 2008, 57 cases of salmonellosis, "an infection caused by the salmonella bacteria," were reported in the United States. Pet. App. 3; see *id.* at 54. The Food and Drug Administration (FDA), in cooperation with federal and state agencies and food industry trade associations, began

investigating the source of the contamination. *Id.* at 3. On June 3, 2008, the FDA issued a press release alerting consumers in New Mexico and Texas that "a salmonellosis outbreak appears to be linked to consumption of certain types of raw red tomatoes." *Id.* at 53. The press release noted that "[t]he specific type and source of tomatoes are under investigation," but that "preliminary data suggest that raw red plum, red Roma, or round red tomatoes are the cause." *Ibid.*

On June 7, 2008, the FDA issued a second press release advising that the number of reported cases of salmonellosis had grown to 145. Pet. App. 57-58. The FDA "expand[ed] its warning to consumers nationwide," recommending that they not eat the specified categories of tomatoes unless those tomatoes had been grown and harvested in states, territories, and countries that the FDA had confirmed were not associated with the salmonella outbreak. *Ibid.* Pending further investigation, the FDA also "recommend[ed] that retailers, restaurateurs, and food service operators not offer for sale and service raw red Roma, raw red plum, and raw red round tomatoes unless they [we]re from" the states, territories, and countries identified in the press release. *Id.* at 58.

On June 13, 2008, FDA officials participated in a media briefing concerning the salmonella outbreak. Pet. App. 5; see *id.* at 61-95. In response to questions from reporters, the Associate Commissioner for Foods stated that the FDA had not initiated a recall of tomatoes because the agency had not yet been able to pinpoint the source of contamination. See *id.* at 77. Instead, the FDA was "put[ting] out consumer advice" while the investigation continued. *Ibid.*

On July 17, 2008, the FDA issued a third press release removing the warnings against raw tomatoes. Pet. App. 6. The FDA announced that "[a]fter a lengthy investigation" it had "determined that fresh tomatoes [then] available in the domestic market [we]re not associated with the" salmonella outbreak. *Id.* at 96.

2. a. Petitioners are commercial growers, packers, and shippers of fresh tomatoes. Pet. App. 6. In July 2013, they filed this suit against the United States alleging that the FDA's consumer warnings about the salmonella outbreak had effected a regulatory taking of their tomatoes necessitating payment of just compensation. *Id.* at 6-7. In their amended complaint, petitioners alleged that "all economic value was lost due to the collapse of the market for their tomatoes." *Id.* at 49.

b. The United States Court of Federal Claims (CFC) granted the government's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Pet. App. 23-39. The CFC held that petitioners had "failed to allege any plausible legal effect on their property interests occasioned by the FDA advisories." *Id.* at 37. The court further observed that petitioners' "regulatory takings claims would require 'independent actions of consumers [and retailers declining to buy plaintiffs' tomatoes] to be attributed to the Government.'" *Id.* at 39 (citation omitted; brackets in original).

c. The court of appeals affirmed. Pet. App. 1-22. Petitioners could not maintain a takings claim, the court held, because their allegations did not show that there was any "prohibition or any coercive government action restricting [them] from selling, disposing,

or using their produce however they desire[d]." *Id.* at 18. Because petitioners did "not point to any stick in their bundle of property rights that was removed by the FDA's press releases and media briefing," they had not been subject to any regulatory restriction that could amount to a taking. *Id.* at 19.

The court of appeals rejected petitioners' argument that they could premise a takings claim on "the fact that the FDA's press releases and media briefing impacted market demand for their produce." Pet. App. 17. The court observed that "*any* government action such as a warning or report which provides information about a good or service is bound to impact consumer demand in the relevant market." *Id.* at 17-18. "The fact that the market *chooses* to incorporate all available information," the court concluded, cannot "without more, * * * form the basis of a regulatory takings claim." *Id.* at 18.

The court of appeals also explained that "in the context of the protection of public health and safety, 'the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions.'" Pet. App. 19 (quoting *Rose Acre Farms Inc.* v. *United States*, 559 F.3d 1260, 1281-1282 (Fed. Cir. 2009), cert. denied, 559 U.S. 935 (2010)). The court understood petitioners to condition their takings claim "on the fact that the FDA was incorrect in its initial determination that the tomatoes were linked to the salmonella outbreak." *Id.* at 17. But, the court observed, "[w]hether the FDA was correct or not * * * is academic to a regulatory takings analysis." *Ibid.* The court concluded that imposing takings liability for "the publicity of adverse information,"

even if it is "premature, misleading, incomplete, or simply incorrect, * * * would extend the [Just Compensation] Clause beyond any recognition or practicality." *Id.* at 21.

ARGUMENT

Petitioners contend (Pet. 8-21) that this Court should grant review to determine whether their complaint was properly dismissed. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. In their amended complaint, petitioners alleged that the FDA took their property without providing just compensation by issuing press releases and by participating in a media briefing to warn consumers to avoid certain types of raw red tomatoes pending the agency's investigation into a salmonella outbreak. Pet. App. 45-46. The court of appeals correctly concluded that those allegations failed to state a claim upon which relief could be granted.

As the court of appeals observed, the FDA's actions did not subject petitioners to any regulatory restriction that could give rise to a viable takings claim. Pet. App. 17-19. "[T]he FDA's public warnings did not restrict [petitioners] from selling their produce, nor did it place any restriction on how they [could] use or dispose [of] their tomatoes." *Id.* at 19. Because "there [wa]s not a prohibition or any coercive government action restricting [petitioners] from selling, disposing, or using their produce however they desire[d]," *id.* at 18, petitioners could not "point to any stick in their bundle of property rights that was removed by the FDA's press releases and media briefing," *id.* at 19. "Acceptance of [petitioners'] conten-

tions," the court explained, would represent a stark departure "from the primary purpose of * * * takings jurisprudence—to determine whether a 'restriction upon the use of property . . . deprives the owner of some right theretofore enjoyed.'" *Ibid.* (quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting)).

Although petitioners "acknowledged they were not mandated to quarantine their crops or prohibited from exercising their right to market or sell the tomatoes," Pet. App. 7, they contend (Pet. 10-11) that the FDA's warnings amounted to a taking by "impact[ing] market demand for their produce." Pet. App. 17. Petitioners cite no case law to support that expansive theory of takings liability, and the court of appeals correctly rejected it. The court observed that any government action that "provides information about a good or service [may] impact consumer demand in the relevant market." *Id.* at 17-18. But the dissemination of information does not control whether a particular product will be bought or sold—rather, buyers and sellers make those decisions so long as no regulation restricts or prohibits such sales.

As this Court has observed, "in the absence of an interference with an owner's legal right to dispose of his [property], even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 15 (1984) (footnote omitted). Market effects accordingly cannot establish a taking when they are not accompanied by any regulatory restriction on the use or sale of goods or services. See, *e.g.*, *Huntleigh USA Corp.* v. *United States*, 525

F.3d 1370, 1375 (Fed. Cir.) (holding that a statute that did not "expressly forb[id]" the plaintiff from selling particular services did not constitute a taking, even though it "effectively eliminated the market for [those] services"), cert. denied, 555 U.S. 1045 (2008); *A-1 Cigarette Vending, Inc.* v. *United States*, 49 Fed. Cl. 345, 356-357 (2001) (rejecting the argument that the reaction of the marketplace to "impending regulations" could establish a taking, and observing that "[t]he risks of the market prior to an actual taking are traditionally borne by the owner of the property, as 'incidents of ownership' and accordingly the reactions of third parties cannot be considered as effecting a taking"), aff'd *sub nom.*, *Brubaker Amusement Co.* v. *United States*, 304 F.3d 1349 (Fed. Cir. 2002).

Petitioners further contend (Pet. 9) that the FDA's warnings had "a prohibitory or coercive effect" because petitioners could not "take the risk of selling" tomatoes that might be contaminated. But the court of appeals rejected that claim, finding that "there [wa]s not a prohibition or any coercive government action restricting [petitioners] from selling, disposing, or using their produce however they desired." Pet. App. 18. Because "the FDA's public warnings did not restrict [petitioners] from selling their produce," the court observed that "[t]he right previously enjoyed by [petitioners]—their ability to supply their tomatoes in the relevant market—ha[d] not changed." *Id.* at 19.

In reaching that conclusion, the court of appeals distinguished cases in which the threat of regulatory action established that the regulated party effectively lacked any choice but to follow a governmental directive. See Pet. App. 14-15, 18 (acknowledging precedent finding that "coercion . . . may create takings

liability," but concluding that in this case the FDA's warnings were "devoid of coercion, legal threat, regulatory restriction, or any binding obligation" (citation omitted)). Petitioners' factbound disagreement (Pet. 10-11) with the court's conclusion that the FDA's warnings were not coercive does not warrant this Court's review. See Sup. Ct. R. 10; see also *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (observing that the Court "do[es] not grant a certiorari to review evidence and discuss specific facts").

2. Petitioners are wrong to suggest (Pet. 11-15) that the court of appeals' decision is in tension with decisions of this Court. Petitioners assert (Pet. 14) that the court of appeals granted "categorical immunity from liability for a taking based on the form of the action," which petitioners contend conflicts with this Court's reluctance to adopt bright-line rules to implement the Just Compensation Clause. But petitioners misread the court of appeals' decision. The court emphasized that it was not adopting a categorical rule that "government action must have a 'legal effect' on the property interest" to effect a taking. Pet. App. 11. Because "government action may impact property in myriad ways," the court stated that "what is important is the nature or substance of the government's action, as opposed to the precise form it may take." *Ibid.* Petitioners' argument (Pet. 14) that the court "dismissed the case based solely on the form of the government action" accordingly lacks merit.

Moreover, petitioners are incorrect to contend (Pet. 16) that the form of government action carries "little weight" in the takings analysis. To the contrary, the "character of the governmental action" is a factor of "particular significance" in determining

whether a taking has occurred. *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 124 (1978) (*Penn Central*). As the Court explained in *Penn Central*, "[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." *Ibid.* (citation omitted); see *Horne* v. *Department of Agric.*, 135 S. Ct. 2419, 2428 (2015) (observing that the takings analysis may differ based on the form of the government action even if two different actions produce "the same economic impact," because "[t]he Constitution * * * is concerned with means as well as ends"). Petitioners accordingly err in suggesting (Pet. 11-21) that the form of the government action is irrelevant to the question whether a regulatory taking has occurred.

3. Petitioners identify no circuit conflict on the question presented. Although petitioners cite several decisions that they claim support their allegation of a taking (Pet. 14-20), those decisions are easily distinguished because each involved a regulatory act that imposed restrictions on an owner's use of his property.

Petitioners rely (Pet. 15-16) on *Yancey* v. *United States*, 915 F.2d 1534 (Fed. Cir. 1990), and *Department of Agriculture and Consumer Services* v. *Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla.) (*Mid-Florida Growers*), cert. denied, 488 U.S. 870 (1988), for the proposition that courts have found "takings where government action destroys all value of innocent property." Pet. 15. But in each of those cases, the government had restricted the plaintiff's ability to

use or sell the property. In *Yancey*, the U.S. Department of Agriculture imposed a quarantine that prevented the interstate sale of the plaintiffs' turkey stock in response to an avian flu outbreak. 915 F.2d at 1536-1537. In *Mid-Florida Growers*, a state agency physically destroyed the plaintiffs' citrus plants based on a concern that they had been exposed to a form of citrus canker. 521 So. 2d at 102. In contrast to the government actions described in *Yancey* and *Mid-Florida Growers*, "the FDA's public warnings" in this case "did not restrict [petitioners] from selling their produce, nor did it place any restriction on how they [could] use or dispose [of] their tomatoes." Pet. App. 19; see *id.* at 37 (observing that there is an "obvious distinction between an advisory announcement which affects market sales and a quarantine which prohibits sales").[1]

The other decisions on which petitioners rely (16-17) are likewise inapposite because they involved

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[1] Petitioners assert (Pet. 19-20) that the FDA is not immunized from takings liability based on the "doctrine of necessity," which permits the government to destroy private property in certain limited circumstances to prevent the spread of fire or disease. But there is no need to rely on that doctrine here, because the FDA did not physically destroy petitioners' tomatoes. Petitioners also emphasize (Pet. 20) "the character of the tomatoes as harmless" because they were ultimately determined not to be associated with the salmonella outbreak. The court of appeals correctly found, however, that "[w]hether the FDA was correct or not" in issuing the warnings "is academic to a regulatory takings analysis." Pet. App. 17. Rather than distort takings jurisprudence by extending liability in the absence of any regulatory restriction, the court recognized that "[t]he creation of standards to hold agencies accountable in this context should be left to Congress." *Id.* at 21.

government actions that regulated the plaintiff's property rights. See *A & D Auto Sales, Inc.* v. *United States*, 748 F.3d 1142, 1153-1157 (Fed. Cir. 2014) (finding that plaintiff corporations had adequately alleged that they were compelled to surrender certain property interests as a condition of governmental financial assistance necessary to the corporations' survival); *Yuba Goldfields, Inc.* v. *United States*, 723 F.2d 884, 891 (Fed. Cir. 1983) (reversing grant of summary judgment on a takings claim because the record could support the allegation that the government had "prohibited [the plaintiff's] exercise of its right to dredge and to enjoy possession of the minerals thereby unearthed"); *AAA Pharmacy, Inc.* v. *United States*, 112 Fed. Cl. 387, 388 (2013) (denying motion for summary judgment because plaintiff had adequately alleged that the government had effected a taking "by revoking and failing to timely reinstate its Medicare billing privileges"); *Resource Invests., Inc.* v. *United States*, 85 Fed. Cl. 447, 493 (2009) (finding that "extraordinary delay in the government permitting process" may constitute a taking); *Morton Thiokol, Inc.* v. *United States*, 4 Cl. Ct. 625, 629 (1984) (concluding that agency's refusal to allow plaintiff to mine in a portion of plaintiff's salt dome could effect a taking); see also Pet. App. 18 (finding petitioners' authorities distinguishable).

Because petitioners have not identified any case in which "government action devoid of coercion, legal threat, regulatory restriction, or any binding obligation" was found to "effect a regulatory taking," Pet. App. 18, there is no conflict on that issue that would warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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