No. 04-1311

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROSE ACRE FARMS, INC.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, for purposes of regulatory takings analysis under the Fifth Amendment, regulations promulgated by the United States Department of Agriculture in 1990 to control the spread of *salmonella enteritidis* (SE) in eggs, which were grounded in a new scientific understanding that SE can be transferred from hen to egg, interfered with the reasonable investment-backed expectations of a commercial egg producer.

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The Acting Solicitor General, on behalf of the United States, respectfully files this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 373 F.3d 1177.[1] The opinion of the Court of Federal Claims (Pet. App. 36a-88a) is reported at 55 Fed. Cl. 643.

[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari in *Rose Acre Farms, Inc.* v. *United States*, No. 04-1149.

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. The petition in *Rose Acre Farms, Inc.* v. *United States*, No. 04-1149, was filed on that date and was placed on this Court's docket on February 28, 2005. This conditional cross-petition is being filed pursuant to Rule 12.5 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

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. 212. *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.[2] In 1990, the United States Department of Agriculture (USDA) promulgated interim regulations that were published in final form in 1991 and were designed to address the danger that SE-contaminated eggs sold in interstate commerce would cause illness to human consumers. *Id.* at 3a-5a, 41a-45a. The regulations provided that, when a farm was identified as the probable source of SE-contaminated eggs, USDA would conduct environmental testing on the farm, which could include the slaughter and testing of hens. *Id.* at 4a-5a, 42a-43a. If that environmental testing yielded a positive result, eggs from the relevant flock 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.

2. 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 respondent Rose Acre Farms, Inc. (Rose Acre). Pet. App. 6a, 45a-47a. In the course of the ensuing investigation, 6741 hens were removed

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[2] 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 (or 82%) were associated with shell eggs." *Id.* at 237.

from Rose Acre's henhouses for slaughter and testing. *Id.* at 47a. During the period (1990-1992) that 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.

3. 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 regulations were arbitrary and capricious, finding them to be a reasonable means of protecting the human population against 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.*

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

forced 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 found that the USDA regulations had interfered with Rose Acre's legitimate investment-backed expectations. *Id.* at 63a-65a. The court acknowledged that "the poultry industry in general is highly regulated." *Id.* at 64a. The court stated, however, that "the issue of *salmonella* in eggs is not an area that experienced much regulation before 1990," and it concluded on that basis that Rose Acre could reasonably "have had an investment-backed expectation that its healthy eggs would not be restricted from sale as table eggs." *Ibid.* Finally, the CFC held that the "character" of the challenged government action 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.[3]

5. The Court of Appeals for the Federal Circuit vacated the judgment of the CFC and remanded for reconsideration of the *Penn Central* analysis. Pet. App. 1a-35a. The court of appeals disagreed with the CFC's analysis of two of the *Penn Central* factors. First, with respect to the "economic impact" factor, the court of appeals held that the CFC had erred by focusing solely on the individual henhouses whose eggs were subjected

[3] 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 court concluded 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.

to the USDA transport restrictions, rather than on the three affected farms as a whole. *Id.* at 10a-22a. Second, the court 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. *Id.* at 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 of appeals agreed with the CFC, however, 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 rejected the government's contention that, in light of longstanding and substantial federal oversight of the poultry industry, "a new regulation aimed at a specific, recently-recognized disease threat was not unforeseeable." *Id.* at 22a. The court of appeals observed that, "prior to 1990, eggs were subject only to inspection and restriction for evidence of potential environmental contamination," because "government experts previously believed that salmonella could contaminate the interior of a shell egg only via a crack or break in the shell." *Ibid.* The court concluded on that basis 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." *Ibid.* 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 supported Rose Acre's Fifth Amendment claim. *Id.* at 22a-23a.

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:

> Only 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. On remand, then, the [CFC] must reevaluate the severity of the economic impact * * * and weigh that against the other Penn Central factors, taking into account all of the * * * considerations [discussed in the court of appeals' opinion].

Id. at 31a.[4]

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

In *Rose Acre Farms, Inc.* v. *United States*, No. 04-1149, Rose Acre seeks review of the court of appeals' analysis of the "economic impact" of the pertinent USDA regulations and the "character" of the relevant government action. As our brief in opposition to the petition in No. 04-1149 will explain, those aspects of the Federal Circuit's decision do not warrant review by this Court, particularly in light of the current inter-

[4] The court of appeals also rejected the CFC's finding of a categorical taking with respect to the testing of Rose Acre's hens. Pet. App. 31a-35a.

locutory posture of the case. If the Court does grant the petition for certiorari in No. 04-1149, however, its review should encompass the entirety of the *Penn Central* analysis, including the Federal Circuit's analysis of the effect of the USDA regulations upon Rose Acre's "reasonable investment-backed expectations."[5]

1. This Court's "regulatory takings jurisprudence * * * is characterized by essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (citations and internal quotation marks omitted). The three factors identified by the Court in *Penn Central* as being of particular importance—*i.e.*, the "economic impact of the regulation on the claimant," the "extent to which the

[5] Although "[a] prevailing party may advance any ground in support of a judgment in his favor," an "argument that would modify the judgment * * * cannot be presented unless a cross-petition has been filed." *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985). It is not clear that a conditional cross-petition is actually necessary in order for this Court to review the Federal Circuit's analysis of Rose Acre's "reasonable investment-backed expectations." Rather, if the Court were inclined to grant the petition for a writ of certiorari in No. 04-1149, it might simply reframe the questions presented in that petition so as to encompass the full range of factors relevant to the *Penn Central* analysis (as would clearly be permissible if the Federal Circuit had finally resolved the case in the government's favor). On the other hand, it might be argued that, in light of the Federal Circuit's remand of the case to the CFC, a ruling by this Court that would effectively enhance the government's likelihood of ultimate success would "modify the judgment" of the court of appeals. *Thurston*, 469 U.S. at 119 n.14. In an abundance of caution, the government is therefore filing this conditional cross-petition to ensure that all aspects of the Federal Circuit's *Penn Central* analysis are properly before the Court.

regulation has interfered with distinct investment-backed expectations," and the "character of the governmental action," 438 U.S. at 124—are not independent legal tests, but simply lend structure to the ad hoc factual inquiry into all the relevant circumstances that this Court has used to determine whether "'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Ibid.*

It would therefore be artificial for the Court to address the questions presented in Rose Acre's certiorari petition in isolation from the larger takings inquiry. Cf. Pet. App. 31a (court of appeals states 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"). Nor is there any sound basis for presuming that the court of appeals correctly assessed the effect of the USDA regulations on Rose Acre's reasonable investment-backed expectations. See pp. 9-14, *infra*. Thus, if the Court grants the petition in No. 04-1149, it should grant this conditional cross-petition as well.

2. Since 1970, Congress has sought to protect the health of human consumers by mandating federal inspection of egg products moving in interstate commerce. See Egg Products Inspection Act, Pub. L. No. 91-597, § 5(a), 84 Stat. 1624 (21 U.S.C. 1034(a)) (directing Secretary of Agriculture to establish inspection program "[f]or the purpose of preventing the entry into or flow or movement in commerce of, or the burdening of commerce by, any egg product which is capable of use as human food and is misbranded or adulterated"); 21 U.S.C. 1033(a)(1) (product is "adulterated" if, *inter alia*, "it bears or contains any poisonous

or deleterious substance which may render it injurious to health"). In light of the longstanding federal regulatory presence in this area, Rose Acre could not reasonably have anticipated that it would be allowed to transport in interstate commerce eggs that posed an unacceptable risk of serious harm to human health.[6]

In concluding that the "reasonable investment-backed expectations" factor weighed in favor of Rose Acre's takings claim, the court of appeals recognized that businesses like Rose Acre have historically been

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[6] The gravamen of Rose Acre's takings claim is that only a small percentage of its eggs were SE-contaminated during the relevant time period, and that the government had no regulatory justification for restricting the sale of "healthy eggs." The court of appeals, however, rejected as clearly erroneous the CFC's finding that egg testing was a feasible means of assessing the extent of SE contamination at the time the SE regulations were in place. Pet. App. 25a-28a. In light of the inefficacy of that approach during the relevant time period, the agency was required to devise an alternative methodology for identifying those categories of eggs that were linked to SE. The consequences of human consumption of SE-contaminated eggs are severe enough, moreover, that the government could properly ban (or restrict) the interstate transportation of categories of eggs that were found to pose a heightened danger, even though the risk was not (in percentage terms) very high—*i.e.*, even though there was a relatively small probability that any particular egg within the category was contaminated. The risks posed by even small numbers of SE-contaminated eggs are particularly great in light of the fact that, when numerous eggs are pooled together for preparation of a recipe (as in a restaurant setting), "[a] single infected egg can contaminate the whole pool." 2 C.A. App. 210 (CDC memorandum). Thus, while the pertinent USDA regulations had the effect of preventing Rose Acre from marketing millions of uncontaminated eggs as table eggs, that restriction was simply an unavoidable consequence of the agency's reasonable efforts to address the health risks posed by the Rose Acre eggs that *were* contaminated. See Pet. App. 25a-29a.

subject to "long-standing regulations aimed at preventing the spread of communicable diseases in birds and poultry." Pet. App. 22a. The court nevertheless concluded that the pertinent USDA regulations intruded upon legitimate reliance interests, explaining that "the SE regulations were more than an extension of comparable regulations to a new disease" because "[t]hey 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." *Ibid.* That discussion reflects a fundamental misunderstanding of the significance for Just Compensation Clause analysis of a takings plaintiff's "reasonable investment-backed expectations."

In adjudicating regulatory takings claims, and specifically in assessing the presence or absence of interference with a plaintiff's reasonable investment-backed expectations, this Court has recognized that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (quoting *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 91 (1958)); see *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993). Thus, for purposes of *Penn Central* analysis, a property owner ordinarily has no *reasonable* expectation of being allowed to continue an ongoing activity in the face of new evidence that the conduct will cause significant public harm. Rather, the owner may fairly be charged with knowledge that existing regulatory safeguards can be strengthened or expanded

in light of new information concerning the likely effect upon the public welfare of particular private conduct.[7]

That approach to the assessment of "reasonable investment-backed expectations" is fully consistent with the overriding purpose of the Just Compensation Clause to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). A property owner who is forced to cease conduct harmful to the public cannot claim to have been unfairly singled out simply because the relevant activity was once viewed as innocuous. The unreasonableness of any such expectation is particularly apparent where, as here, the restriction that is claimed to effect a taking merely supplements an established regulatory scheme that has long served to prevent the same basic type of harm at which the new restriction is directed. To treat such modifications as interfering with "reasonable investment-backed expectations" would substantially hinder the efforts of federal and state governments to protect the public health and safety by revising their regulatory programs to take account of new scientific advances.

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[7] Similarly, in discussing the "nuisance" exception to the usual rule that a taking occurs when a parcel of land is totally deprived of economically viable use, the Court has made clear that "changed circumstances or new knowledge may make what was previously permissible no longer so." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992); see *id.* at 1029 (explaining that the owner of a nuclear power plant is not entitled to compensation if "it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault," even if the effect of that requirement is to "eliminat[e] the land's only economically productive use").

Thus, even if the specific danger (hen-to-egg transmission of SE) at which the 1990 USDA regulations were directed had truly been unforeseeable at any earlier time, the government would not have interfered with Rose Acre's *reasonable* investment-backed expectations by adapting its enforcement scheme in response to a "new scientific understanding" (Pet. App. 22a) that such a risk existed.[8] The court of appeals' assertion (*ibid.*) that the SE regulations "were unprecedented in their reliance on environmental and hen testing" is even further beside the point. So long as the testing methodology used by the agency was an otherwise reasonable means of determining whether Rose Acre's eggs were safe for human consumption as table eggs—and both the Seventh and Federal Circuits concluded that it was, see p. 4, *supra*; Pet. App. 29a—Rose Acre had no legitimate reliance interest in resisting its use, regardless of whether that methodology differed

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[8] In fact, neither USDA's conclusion that SE in eggs posed a serious risk to human health, nor the testing program mandated by the 1990 regulations, reflected a dramatic departure from prior understandings. "In the late 1980's, the [CDC] determined there was a growing problem with * * * [SE] in chicken eggs." Pet. App. 40a. In August 1988, the USDA stated that the SE "problem [had] become a serious human health issue." 2 C.A. App. 197, 199. In the spring of 1989, before the regulations were promulgated, SE-contaminated eggs from one of Rose Acre's farms caused 24 people to become ill, with 11 requiring hospitalization. *Id.* at 233; Pet. App. 40a. A scholarly paper published in 1988 discussed the scientific evidence suggesting transmission of SE from hen to egg, and it explained that "[l]ong-term control of [SE] infections will require study of the ecology of the organism in poultry flocks." Michael E. St. Louis et al., *The Emergence of Grade A Eggs as a Major Source of* Salmonella Enteritidis *Infections*, 259 JAMA 2103, 2106 (1988) (2 C.A. App. 248).

substantially or only incrementally from prior testing regimes.

CONCLUSION

If the petition for a writ of certiorari in No. 04-1149 is granted, this conditional cross-petition should also be granted. If the Court denies the petition in No. 04-1149, this cross-petition should be denied.

Respectfully submitted.

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MARCH 2005