2007-5169

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROSE ACRE FARMS, INC.,
Plaintiff-Appellee,

v.

UNITED STATES
Defendant-Appellant.

Appeal from the United States Court of Federal Claims in 92-CV-710,
Senior Judge Bohdan A. Futey

BRIEF OF AMICI CURIAE HOOSIER ENVIRONMENTAL COUNCIL AND SIERRA CLUB IN SUPPORT OF THE UNITED STATES

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No. 2007-5169

Certificate of Interest

Counsel for amici curiae certifies the following:

1. The full name of every party or amicus represented by me is:
   Hoosier Environmental Council
   Sierra Club

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:
   N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:
   N/A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in court:
   John D. Echeverria

_____
John D. Echeverria
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The Hoosier Environmental Council and the Sierra Club ("amici") respectfully submit this brief amicus curiae in support of the United States and urge the Court to reverse the decision below and order that judgment be entered for the United States.

INTERESTS OF AMICI

The Hoosier Environmental Council, Indiana's largest state-wide environmental organization, is dedicated to protecting and restoring Indiana's environment. The Council and its 8,900 family members are concerned about the public health and environmental impacts of industrial livestock and poultry operations, including the safety of food produced at these facilities.

The Sierra Club is a national nonprofit environmental organization with 1.3 million members nationwide. The Club's Safe and Healthy Communities Campaign addresses the public health and environmental problems associated with industrial farming operations. The Club's Hoosier Chapter, which has about 7095 members, has been an active participant in the campaign.

STATEMENT OF FACTS

The amici adopt the statement of the facts of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief focuses on two issues. First, the brief explains that the Court should reaffirm the conclusion in its prior opinion that the "character" factor weighs against Rose Acre's taking claim under Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), because the regulation at issue is designed to addresses a serious threat to human life and public health. Considering the harm-preventing purpose of a regulation as part of the Penn Central analysis comports with the goals and functions of regulatory takings doctrine and is supported by relevant precedents of this Court and the Supreme Court. The character factor also weighs in favor of the government because, contrary to Rose Acre's position, the regulation did not impose a disproportionate burden and, in any event, Rose Acre received important offsetting benefits from the regulation.

Second, the brief explains why the claims court erred in evaluating the economic impact factor. The claims court disregarded this Court's instructions directing the court on remand to assess the economic burden imposed by the regulation in accord with the "parcel as a whole" rule. In addition, the claims court decision is inconsistent with the recent decision in Cienega Gardens v. United States, 503 F.3d 1266 (Fed. Cir. 2007), in which the Court, addressing a similar taking claim, reversed a claims court finding

of a taking based on the same erroneous approach that was followed in this case.

ARGUMENT

I. THE COURT SHOULD REAFFIRM ITS CONCLUSION THAT THE "CHARACTER" FACTOR WEIGHS AGAINST THE TAKING CLAIM.

Amici submit that this Court should reaffirm its earlier conclusion that the "character" factor weighs against Rose Acre's Penn Central claim. However, with the benefit of 20-20 hindsight, it is apparent that the Court's earlier reasoning was largely -- but not completely -- correct. The Court was correct insofar as it ruled that the character factor weighs in favor of the government because the regulation addresses a serious risk to human life and public health. But the Court also ruled that the character factor weighs in favor of the government because the regulation was an effective response to the problem of salmonella poisoning. Amici believe that, given the facts of this case, the Court's conclusion about the effectiveness of the regulation was undeniably correct. See also Rose Acre Farms, Inc. v. Madigan, 956 F.2d 670 (7th Cir. 1992) (rejecting Rose Acre's claim that the regulation was arbitrary and capricious). However, in light of the intervening Supreme Court decision in Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), it is now apparent that the Court's analysis was mistaken insofar as it was based

on the legal premise that the issue of whether a regulation is effective is relevant in a regulatory takings case. Lingle makes clear that an inquiry into the effectiveness of government action, which raises a due process issue, has no place in a takings case, whether the outcome of the analysis favors the claimant or, as in this case, the government. Accordingly, the Court should affirm its prior conclusion on the character factor, but based on slightly modified reasoning.

This section of the brief first discusses the significance of Lingle. It then discusses why the Court should reaffirm the conclusion that the harm-preventing character of the regulation weighs against the claim. Finally, anticipating that Rose Acre will reprise its argument before the claims court that the character factor tilts in its favor because the regulation allegedly imposed a disproportionate burden, it explains why that argument is mistaken and why, in any event, the alleged burden created by the regulation does not outweigh its harm-preventing objective and its offsetting benefits.

A. The Sea Change Brought About by Lingle

The Supreme Court decision in Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), has produced an important change in regulatory takings law that requires the Court to revise, in part, its prior approach to the character issue.

In Lingle the Court ruled that the alleged ineffectiveness of a government regulation does not provide a basis for a taking claim. The case involved a challenge under the Takings Clause to a Hawaii law designed to control consumer gasoline prices by limiting the rent oil companies could charge independent gas station operators. Chevron challenged the law as a taking by arguing that it would not be effective in achieving its consumer-protection goal, invoking the Supreme Court's statement in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), that a regulation effects a taking if it "does not substantially advance legitimate state interests." Based on a finding that the law would not be effective in achieving the legislature's goal, the federal District Court in Hawaii ruled that the law resulted in a taking, and the U.S. Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court reversed, ruling unanimously that the alleged ineffectiveness of a regulation is irrelevant in a takings case. First, the Court ruled that the "substantially advance" test prescribes an inquiry that sounds in substantive due process, not takings. Lingle, 544 U.S. at 540. Second, the Court ruled that the test does not fit in takings law because it "reveals nothing" about whether a regulation is so burdensome that it is "functionally comparable to government appropriation or invasion of private property." Id. at 529. Finally, the Court said that this ostensible takings

test "probes the regulation's underlying validity," an inquiry that "is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." Id. at 543.

That Lingle represents a significant narrowing and clarification of takings doctrine has been recognized by various courts. See e.g., Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851, 855 (9th Cir. 2007) (explaining that Lingle "pulls the rug out from under" certain Ninth Circuit precedent); Gove v. Zoning Bd. of Appeals of Chatham, 831 N.E.2d 865 (Mass. 2005) (overruling prior precedent in light of Lingle). The point also has been recognized by commentators. See, e.g., Mark Fenster, The Takings Clause, Version 2005: the Legal Process of Constitutional Property Rights, 9 U.Pa. J. Const. L. 667, 737-38 (2006) ("[d]ue both to its unanimity and its efforts to restate and justify the universe of takings tests, Lingle is the most authoritative regulatory takings decision since Penn Central"); The Supreme Court, 2004 Term, 119 Harv. L. Rev. 297, 307 (2005) ("In a body of law that has been deemed to merit the 'doctrine-in-most-desperate-need-of-a-principle prize,' Lingle represents a laudable turn to greater clarity.").

The Lingle decision is also significant because it condemned the District Court's overly intrusive approach to judicial review. The District

Court, without according any deference to the Hawaii legislature's policy judgment, concluded that Chevron should prevail because its economic evidence on the likely effectiveness of the legislation was more persuasive than that presented by the State. Lingle, 544 U.S. at 532. The Supreme Court described this approach to constitutional review as "remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation." Id. at 545. The Court continued, "The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here." Id. As a result, "Lingle actually may be more important for reemphasizing the need for federal [judicial] deference to [regulatory policy] judgments than in rejecting the Takings Clause as a textual basis for review." Peter Byrne, Due Process Land Use Claims After Lingle, 34 Ecology L.Q. 471, 475 (2007).

It is plain that Lingle eviscerated Rose Acre's initial argument for why the Department of Agriculture's regulation resulted in a taking -- that it represented an ineffective method for determining whether eggs pose a public health risk. In its initial opinion in this case the claims court accepted this argument and relied on the now superseded "substantially advance"

theory. See Rose Acre Farms, Inc. v. United States, 55 Fed. Cl. 643, 659 (2003). This Court reversed, ruling that the claims court "clearly erred," based on the facts, in concluding that the regulation was ineffective. Rose Acre Farms, Inc. v. United States, 373 F.3d 1177, 1194-95 (Fed. Cir. 2004). Yet the Court implicitly accepted the legal premise of Rose Acre's argument, that the alleged ineffectiveness of a regulation can support a taking claim. On remand, in its second opinion, the claims court appeared to recognize that Lingle represents an important development, but did not address the case in detail and summarily concluded that this Court was unlikely to change its position on the character issue. See Rose Acre Farms, Inc. v. United States, unpublished decision, No. 92-710C (July 11, 2007) (hereafter "Slip Op.")

Amici respectfully submit that the Court must revisit its analysis insofar as it rested on the understanding, now superseded by Lingle, that the "substantially advance" inquiry represents a legitimate takings test. The Court should conclude that Rose Acre's contention that the regulation was ineffective, however the issue is resolved, no longer has a place in this case.

B. The Harm-Preventing Purpose of the Regulation

Nonetheless, the Court should reaffirm its prior conclusion that the character factor weighs against the taking claim, on the ground that the

regulation is designed to protect human life and public health from the threats posed by salmonella poisoning. See 373 F.3d at 1195 (describing the regulation as "protecting the public against exposure to a potentially serious, even fatal, food-borne illness").[1]

As the Court recognized in its prior opinion, the Supreme Court has long said that a critical factor in takings analysis is whether a regulation is designed to prevent harm to the public. See id. at 1991, citing e.g., Keystone Bituminous Coal Assn v. DeBenedictis, 480 U.S. 470 (1987). See also Goldblatt v. Hempstead, 369 U.S. 590 (1962). In line with this precedent, this Court has repeatedly said that the harm-preventing character of a regulation weighs against a taking claim. See, e .g., Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1350-51 (Fed. Cir. 2004) (determination that proposed mine would cause water pollution supported conclusion that

[1] Inexplicably, the claims court repeatedly asserts that Rose Acre's eggs were "healthy." At this stage of this complex litigation, particularly following the Seventh Circuit's opinion in Rose Acre Farms, Inc. v. Madigan, 956 F.2d 670 (7th Cir. 1992), it is indisputable that federal officials were responding to a serious public health emergency, they adopted a reasonable methodology for identifying sources of salmonella based on the information available to them, and several of Rose Acre's farms were identified as sources of salmonella poisoning pursuant to this methodology. So far as federal officials could determine based on their best efforts, at least some of Rose Acre's eggs were not healthy and posed a public health risk, justifying a regulatory response. More fundamentally, however, for the reasons just discussed, this type of analysis of the effectiveness of an agency's regulatory strategy has no place in a takings case.

character factor weighed against claim). See generally John D. Echeverria, Making Sense of Penn Central, 23 UCLA J. of Envtl. L. & Pol'y 171 (2005).

An inquiry into the potential harmfulness of a regulated activity is consistent with the goals and functions of regulatory takings doctrine. In Armstrong v. United States, 364 U.S. 40, 49 (1960), the Court declared, "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed 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." An activity's potential harmfulness helps answer the question whether it would be "fair" or "just" to pay a claimant not to engage in the activity. If the activity would be harmful to neighbors or the community, fairness and justice will be served by prohibiting or restricting the activity without paying compensation. By contrast, when a regulation is imposed primarily to generate broad social benefits in which the regulated individual may not necessarily share, fairness and justice may be served by requiring that restriction be accompanied by compensation.

Likewise, consideration of harm is consistent with the "common touchstone" of regulatory takings analysis, that is, the effort to identify "regulatory actions that are functionally equivalent to the classic taking in

which government directly appropriates private property or ousts the owner from his domain." Lingle, 544 U.S. at 539; see also id. (regulatory takings analysis "focuses directly upon the severity of the burden that government imposes upon private property rights"). In accord with established economic principles, the assessment of the burden imposed by a regulatory restriction should account for the externalities associated with the activity subject to regulation. When an activity causes little or no adverse harm to neighbors or the community, the regulation can be viewed as imposing an economic burden on the restricted owner, possibly justifying a finding of a taking, depending in part on such other factors as the claimant's investment expectations and the degree of reciprocity of advantage created by the regulation. On the other hand, when an activity would produce significant negative externalities absent regulation, paying compensation, far from redressing a burden, would confer an economic windfall on an owner by paying him not to impose costs on others.

The issue of whether the harmful character of an activity weighs against a Penn Central claim is related to, but distinct from, the issue of whether background principles of nuisance law may bar a taking claim. The nuisance inquiry is part and parcel of the threshold inquiry in every takings case whether the claimant can claim a protected property interest to

engage in the regulated activity. See Maritrans, Inc. v. United States, 342 F.3d 1344, 1352 (Fed. Cir. 2003). The nuisance defense, in practice, has proven to be quite narrow; indeed, M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995), is apparently the sole Federal Circuit decision that even arguably relies on a nuisance defense to reject a regulatory takings claim. Moreover, the nuisance defense generally involves a retrospective inquiry into whether the owner's property interest is constrained by longstanding common law precedent. See Lawrence O. Gostin, Public Health Law: Power, Duty, Restraint (University of California Press, 2nd ed. 2008) (forthcoming) (relevant excerpt available at http://www.law.georgetown.edu/gelpi/current_research/documents/RT_Pubs_Other_GostinPHCh12.pdf) (observing that the nuisance defense "forces public health agencies to define and abate public hazards according to vague and outdated common law understandings of nuisance"). By contrast, the inquiry into the harm-preventing purpose of a regulation under Penn Central is forward-looking, taking into account the legislature's judgment about what risks warrant regulation. Finally, the nuisance defense is also distinguished from an examination of the harm-preventing purpose of a regulation under Penn Central by the fact that the nuisance defense, if successful, categorically bars the claim, whereas the harm-preventing

character of the regulation merely represents one factor in the multi-factor Penn Central analysis.

Evaluating the potential harm to the public in the context of a Penn Central takings analysis is especially critical to preserving public health. If the courts could not consider how food, drugs or other consumer products could harm the public in evaluating a taking claim (unless the nuisance exception applied), takings litigation could seriously undermine our modern public health system. See Gostin, supra. Indeed, the nation's current approach to food and drug regulation is based on the premise that common law nuisance remedies are completely inadequate to protect public health in our complex society. See John P. Swann, Ph.D., History of the FDA (FDA History Office) (adapted from George Kurian, ed., A Historical Guide to the U.S. Government (New York: Oxford University Press, 1998) (available online at http://www.fda.gov/oc/history/historyoffda/default.htm) (explaining that the Food and Drug Administration was created in response to the inadequacies of common law nuisance remedies).

Although certain language in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), might suggest a contrary conclusion, that decision does not require the courts to disregard the harm-preventing purpose of a regulation in analyzing the character factor under Penn Central.

In Lucas the Court established a categorical rule that a regulation constitutes a taking if it denies an owner all economically viable use of the property, unless the claim is barred by background principles of nuisance or property law. Explaining the Court's rule, Justice Antonin Scalia wrote, "the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis." 505 U.S. at 1026. Based on that premise, he stated that "noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'-which require compensation-from regulatory deprivations that do not require compensation." Id.

It is clear, under Lucas, that unless the regulated activity amounts to a nuisance, a regulation's harm-preventing purpose generally cannot defeat a "total taking" claim. But the language in Lucas also could be interpreted to mean that the Court intended to jettison harm-prevention as a factor in other takings cases, including Penn Central cases, unless the nuisance defense applies. This expansive reading of Justice's Scalia's remarks cannot be sustained.

Most importantly, this Court has already rejected this reading of Lucas. See Bass Enterprises Production Co. v. United States, 381 F.3d 1360 (Fed. Cir. 2004). Bass Enterprises arose from the considerable regulatory

delay of a proposed oil and gas operation caused by the Bureau of Land Management's review of whether the operation would interfere with a nearby underground nuclear waste site. The claims court rejected the operator's taking claim, in part because the review process was designed to protect the public from catastrophic radioactive releases. On appeal, the claimant argued, based on Lucas, that in evaluating the "character" of the regulation the claims court erred in considering the threat to public safety. Unless the regulated activity qualifies as a "nuisance," the claimant argued, the harm-preventing character of a regulation is beside the point. The Court rejected this argument, insisting that the Penn Central analysis includes consideration of "the degree of harm created by the claimant's prohibited activity." Id. at 1370.

This Court's interpretation of Lucas is unquestionably correct. Lucas established a "narrow" rule, which does not apply in a Penn Central case, for the extraordinary circumstance when a regulation eliminates all economically viable use of property. See Lingle, 544 U.S. at 538. The Court in Lucas explicitly recognized that a Penn Central case involves a separate and distinct analysis, see 505 U.S. at 1019 n. 8, refuting the idea that Lucas implicitly altered the Penn Central test. In addition, Justice Scalia wrote that "the legislature's recitation of a noxious-use justification cannot

be the basis for departing from our categorical rule that total regulatory takings must be compensated." Lucas, 505 U.S. at 1026. This language indicates that the Court's concern about noxious use logic related to total taking claims, not Penn Central claims. Finally, to read Lucas as narrowing the scope of the Penn Central analysis would be inconsistent with the Supreme Court's repeated insistence, subsequent to Lucas, that the Penn Central analysis "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 Regional Planning Agency, 535 U.S. 302, 322 (2002) (emphasis added).

Furthermore, while the Court in Lucas indicated that the harm-preventing purpose of a regulation cannot defeat a total taking claim (when the harm does not rise to the level of an actual nuisance), the Court took care to distinguish its earlier precedents, not involving total takings claims, in which the Court took the harm-preventing purpose of the regulations into account. See 505 U.S. at 1026 n.13. In the Court's words, "none" of these prior decisions that "employed the logic of 'harmful use' prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land." Id. at 1026. By citing these older cases as valid precedent, and distinguishing them because they did not

involve total takings claims, Lucas implicitly affirmed that the harm-preventing character of a regulation remains a relevant consideration outside of the total takings context.

Finally, Lucas has no bearing on regulations affecting products, such as eggs, sold to consumers. The Court said it was announcing a rule applicable primarily if not exclusively to land, and that the rule did not apply to restrictions on potentially dangerous consumer products. The Court observed that, in contrast to land, "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." Id. at 1027-28. This exception to the Lucas rule, which obviously applies to Rose Acre's eggs, reflected the Court's awareness of the potentially dangerous character of certain consumer products, the occasional need for forceful government regulatory responses to such dangers, and the inadequacy of traditional nuisance doctrine to preserve necessary regulatory authority.[2] Implicit in this exception to the Lucas categorical takings rule is

[2] The Supreme Court was undoubtedly influenced by the amicus brief filed in Lucas on behalf of the United States. See Brief of the United States as Amicus Curiae in Support of Reversal, at 14 (filed January 2, 1991)

a recognition that common law nuisance doctrine does not define the limit of government's ability to address risks associated with consumer products without triggering takings liability.[3]

The Supreme Court's most recent regulatory decision in Lingle is fully consistent with the conclusion that harm-prevention is relevant under Penn Central. See Acadia Technology, Inc. v. United States, 458 F.3d 1327 (Fed. Cir. 1327) (post-Lingle decision reaffirming that the harm-preventing character of a regulation is relevant in a Penn Central case). Lingle emphasizes the central importance in takings analysis of the economic

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("It is clear . . . that there exists some category of governmental authority that may result in the substantial diminution of property values, and yet not require payment of compensation as a condition to its lawful exercise. For example, the government may seize and destroy unwholesome foods and unsafe drugs, and may destroy goods to prevent the spread of disease.").

[3] In this regard, it is noteworthy that Justice Anthony Kennedy supported the judgment in Lucas but disagreed with Justice Scalia's view that common law nuisance doctrine provides the sole basis for defending regulations designed to forestall risks of public harm. Lucas, 505 U.S. at 1035 (Kennedy, J. concurring in the judgment). In his words, a claimant's "reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society." Id., citing Goldblatt v. Hempstead, 369 U.S. 590 (1962). If, in Justice Kennedy's view, nuisance doctrine does not define the full scope of government authority to address harms if the regulation destroys the value of land, the same conclusion applies a fortiori here, where the regulation involves a consumer product that poses a serious health risk and stops well short of destroying all value.

burden imposed by a regulation. But, for the reasons discussed above, see page 10, an analysis of the economic burden imposed by a regulation logically encompasses an assessment of the harmfulness of the regulated activity. Furthermore, the Court said only that the "primary" issue under Penn Central is the severity of the economic burden, 544 U.S. at 538-39, meaning that other factors remain relevant as well. See also id. at 540 ("The Penn Central inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests") (emphasis added); id. at 539 (emphasizing the continuing relevance of the "character factor" in Penn Central analysis).

Certainly the actual holding in Lingle does not undermine the relevance of harm prevention. The question in Lingle was whether the alleged ineffectiveness of a regulation is a basis for holding that it effects a taking. That issue is worlds apart from the issue of whether the harm-preventing character of a regulation should be considered, along with other relevant circumstances, in determining whether a government action results in a taking.

Finally, considering harmfulness as a factor under Penn Central produces a logical jurisprudential symmetry. When a regulation makes land

valueless, a taking is presumed. But when a regulation stops short of destroying all value (or affects personal property), the economic burden is considered, along with other relevant circumstances, to determine whether a taking has occurred. The same basic approach applies to the issue of harmfulness. If an activity amounts to a nuisance, a per se rule against taking liability applies. But when the regulation protects the public from harm, though not necessarily from a common law nuisance, this factor will be considered, along with other factors, in the taking analysis. This doctrinal architecture is consistent with the Supreme Court's general de-emphasis of the categorical approach to takings analysis and its preference for a nuanced consideration of all the relevant circumstances. See Tahoe-Sierra, 535 U.S. at 326.

C. The Allegedly Disproportionate Burden Issue

On remand, after Lingle eviscerated its primary argument, Rose Acre reframed its character argument to focus on the allegedly disproportionate burden created by the regulation. Specifically, Rose Acre suggested it was singled out to bear a greater burden than other egg companies. Assuming Rose Acre will pursue this line of argument on appeal, the Court should reject this effort to bend the character factor in Rose Acre's favor.

This Court, in its prior opinion, reasoned that the alleged disproportion of the burden imposed by the regulation had nothing to do with the "rationality" of the regulation and therefore was irrelevant to character. 373 F.3d at 1194. The claims court, on remand, suggested that Lingle may have undercut this ruling, and stated that the claims court's initial analysis of the issue in its 2002 opinion that embraced Rose Acre's position was "likely the correct approach under Lingle." Slip Op., at 13. Nonetheless, invoking law of the case doctrine, the claims court said in its latest decision it "will not endeavor to resurrect its earlier conclusion." Id. Given that Lingle represents subsequent, binding authority, the claims court arguably erred in not revisiting this issue if Lingle actually undermined this Court's previous analysis.

Nevertheless, assuming it is relevant at this stage of the litigation, the argument does not sway the character factor in Rose Acre's favor. The alleged disproportion of the burden does not outweigh the fact that the character factor weighs strongly in favor of the government based on the harm-preventing purpose of the regulation. In addition, the force of this argument depends on whether the economic burden on Rose Acre was actually significant; the alleged disproportion of a burden can have little consequence if the burden itself is relatively modest. For the reasons

discussed in the next section of this brief, the burden imposed by the regulation was modest, far below the threshold of economic impact the Court has required to sustain a taking claim in other cases.

Rose Acre has also exaggerated the disproportionate effect of the regulation. The key provision of the regulation prohibited the interstate shipment of any poultry anywhere in the United States affected by salmonella enteritidis. See 55 Fed. Reg. 5576-01 (February 16, 1990) (amending 9 CFR Part 71). The government, within the limits of the Commerce Clause, could not have adopted a more comprehensive approach to the problem of salmonella poisoning from poultry. To be sure, the rule included additional provisions restricting sales from particular farms that government officials identified as actual sources of salmonella poisoning. But that does not make the effect of the rule any more disproportionate than, say, penalties against identified tax scofflaws or fines on those discovered to have violated environmental laws.

Finally, the regulation provides significant reciprocal benefits, including for Rose Acre's employees and owners. As Frank Easterbrook, Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, explained:

> Control of illness among farm animals is for the welfare of humans: to protect our health from diseases animals carry, and to protect our wallets from the costs of sacrificing additional animals should the infection spread. Salmonella spreads from animals to people; it

> spreads among animals, potentially increasing the financial cost to farmers; and fear of salmonella depresses the demand for dairy and poultry products, again injuring agriculture.

Rose Acre, 956 F.2d at 675. More generally, this salmonella regulation is one of many food regulations that create numerous benefits and corresponding responsibilities for all. See U.S. Food and Drug Administration and U.S. Department of Agriculture, United States Food Safety System, March 3, 2000 (available online at http://www.foodsafety.gov/~fsg/fssyst2.html) (describing the numerous agencies and laws governing U.S. food safety).

II. THE COURT SHOULD REVERSE THE CLAIMS COURT'S ERRONEOUS ANALYSIS OF THE ECONOMIC IMPACT FACTOR.

The claims court erred in concluding that another Penn Central factor, the economic impact factor, supported Rose Acre's claim. Because the claims court failed to follow this Court's instructions in its earlier opinion, and also disregarded relevant precedent, the Court must once again reverse.

In its initial ruling, the claims court concluded that the economic impact of the regulation was sufficiently severe to support the claim. 55 Fed. Cl. at 657-58. The court focused on the less than two year period during which, due to detection of salmonella at Rose Acre's farms, the company was required to divert eggs from the "table egg market" to the less

lucrative "breaker egg market." Id. The court calculated that Rose Acre's revenue from egg sales dropped from an average of 59 cents per dozen for the table market to 46.64 cents for the breaker market (and to 41.46 cents for eggs sold to "outside breaking plants"), and that Rose Acre was forced to divert nearly 60 million eggs while the restrictions were in place. Id. These figures yielded the conclusion that Rose Acre suffered a financial shortfall over this period of approximately $9 million. Id. at 662. The court said that "[t]he economic impact of the diversion was indeed severe," and therefore concluded that this factor supported the taking claim. Id.

This Court reversed, ruling that the claims court had erred because it had not "appropriately gauge[d] the severity of the economic impact of the regulation on Rose Acre." 373 F.3d at 1185 (emphases in original). The Court observed that economic impact must be evaluated, not by focusing on the restricted portion of the property, but on the "parcel as a whole." Id. at 1185. The Court ruled that the claims court misapplied the parcel rule because it failed to consider that only "some of the eggs on some of Rose Acre's farms suffered a reduction in value." Id. In addition, the Court said the claims court misapplied the rule because it failed to consider that "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.

The Court indicated that there were two ways to measure the economic impact of the regulation. The first was to measure the negative effect of the regulation on the property, which the Court suggested would be the total combined egg production of the three farms where salmonella had been detected. Id. at 1186. The alternative was to use a "diminution-in-return (profit-based) approach" which focused on how much profit or loss the plaintiff experienced with and without the regulation. Id. at 1187. Under either approach, the Court emphasized, the calculation should provide an "appraisal of the effect of the restrictions relative to Rose Acre's relevant unaffected property interests." Id. at 1188.

The Court's subsequent decision in Cienega Gardens v. United States, supra, provides further guidance on how to apply the parcel rule. Cienega Gardens involved a claim that a temporary congressional measure took the plaintiff's housing project by limiting the rents it could charge tenants. The Court, sitting as a seven-judge panel, ruled that the claims court had erred by "compar[ing] the rate of the return that the owner would receive on its investment with and without the restriction of a single year." 503 F.3d at 1280. This approach, the Court reasoned, inappropriately treated "the

income from the property for each individual year as a separate property interest from the value of the property as a whole." Id. at 1277. When evaluating the economic impact of a regulation, the Court explained, a court cannot "disaggregate [the owner's] property into temporal segments corresponding to the regulations at issue and then analyze[] whether [the owners] were deprived of all economically viable use during each period." Id. at 1281 (internal quotation omitted).

The Court in Cienega, in accord with the Court's instructions in Rose Acre, again said there were two ways to apply the parcel rule in a temporary takings case. First, the Court said, "a comparison could be made between the market value of the property with and without the restriction on the date that the restriction began (the change in value approach)." Id. at 1282. The second approach was "to compare the lost net income due to the restriction (discounted to present value at the date the restriction was imposed) with the total net income without the restriction over the entire useful life of the property (again discounted to present value)." Id. The Court indicated that "[n]either approach appears to be inherently better than the other," and said the trial court should apply both on remand. Id. [4]

[4] The Court's statement that neither approach appears inherently superior to the other is in serious tension with the Supreme Court's statement in Andrus v. Allard, 444 U.S. 51, 66 (1979), that "[t]he loss of

In this case, the claims court failed to evaluate the economic impact of the regulation in a fashion that respects the instructions in Rose Acre and Cienega. On remand, Rose Acre proposed, and the claims court adopted, the option of using the diminution in return approach. But in applying that approach the claims court failed to apply the parcel rule in the fashion mandated by this Court. Based on a finding that Rose Acre suffered a $6,638.446.11 loss instead of making a $3,028,936.33 profit at the three farms subject to the restrictions over nearly two years, the court concluded

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future profits . . . provides a slender reed upon which to rest a takings claim." While in theory an anticipated stream of profits should equate with a property's current market value, long-term financial projections are inherently speculative. In addition, courts are unlikely to be able to perform these types of projections with great skill. As the Supreme Court explained in Andrus, "[p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." Id. In eminent domain cases, the Supreme Court has established a strong preference for valuing property based on current fair market appraisals, see United States v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pa., 441 U.S. 506, 511-512 (1979), and has reserved alternative tests, such as capitalized revenue or replacement costs, for situations where use of the traditional method is unjust or impracticable. See, e.g. United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S. 396, 401-02 (1949) (using earnings to determine appropriate compensation only because the fair market value could not be determined through comparable sales method). This time-tested precedent appears to support a general preference for fair market valuation over revenue projections in regulatory takings cases as well.

Furthermore, the lost-income approach has the perverse potential to reward marginal enterprises by making it easier for them to mount successful takings claims than more successful enterprises. See Amicus Brief for the Center for Science in the Public Interest, et al.

that plaintiff suffered a diminution in return of 219.2%. Slip Op., at 9-10. The Court concluded, "because the regulations had a severe, albeit temporary, economic impact on plaintiff's business, the court finds that this factor weigh heavily in favor of the plaintiff." Slip Op., at 12.

The fatal defect in this calculation is that it is limited to the period while the restriction was in place and does not take into account, as this Court's prior decision explicitly mandated, that the impact of the regulation was "relatively brief - approximately two years - after which Rose Acre reverted to its pre-regulation table-egg sales levels." 373 F.3d at 1185. See also Cienega, 503 F.3d at 1282 (stating that the diminution in return approach requires "a comparison of the lost net income due to the restriction . . . with the total net income without the restriction over the entire useful life of the property") (emphasis added). In other words, the claims court, as in its initial opinion, effectively disaggregated Rose Acre's property into temporal segments corresponding to the period when the restriction was in effect, precisely the approach the Court condemned in Rose Acre and Cienega. [5]

[5] Although the United States arguably has waived the issue, see Rose Acre, 373 F.3d at 1190 n. 8, and the point is not essential to the disposition of this appeal, the relevant parcel in this case, in a geographical sense, almost certainly should have been defined to include all of Rose Acre's eight farms, not simply the three farms that included the infected hen houses.

The claims court attempted in various ways to shore up its flawed analysis, but these efforts are unavailing. First, invoking this Court's 2003 decision in Cienega Gardens v. United States, 331 F.3d 1319 (Fed. Cir. 2003), the claims court observed that in that case the Court upheld a finding of a taking based on a 96% loss under the diminution in return approach, in comparison with the asserted 219.2% loss in this case, and that the restriction in that case lasted 6 years, in comparison with the "relatively brief" restriction in this case. Slip Op., at 11-12. This type of comparison is no substitute for the kind of rigorous calculations obviously contemplated by this Court. In addition, as this Court explained in its 2007 Cienega decision, the prior ruling in Cienega reflected a "truncated analysis" based on "a partial record and limited arguments." 503 F.3d at 1275. Both the Rose Acre decision and the 2007 Cienega decision rejected the temporal segmentation approach utilized by the Court in 2003 in Cienega, because it was inconsistent with the parcel as a whole rule. Accordingly, the 2003 Cienega decision can hardly be treated as authoritative precedent for present purposes.

Where, as in this case, an owner treats geographically distinct properties as a single unit for purposes of financing, planning, or development, it is appropriate for a court to treat all the properties as the relevant parcel. See Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1346 (Fed. Cir. 2004).

Second, the claims court opined that it was "hard to imagine, how a business can survive, especially in-with [sic] thin profit margins as Rose Acre had." Slip Op., at 12. Again, this type of analysis, untethered from an actual measure of economic impact in relation to the whole property, is no substitute for the kind of rigorous calculation mandated by this Court.

Finally, as discussed, the Court indicated that an alternative way of addressing economic impact would have been to measure the change in value of the property, which the Court defined as the total combined egg production from the three farms. Rose Acre elected not to pursue this approach, which is certainly understandable given that the reduction in value, under this approach, would have been de minimis, in the range of 10%. See Rose Acre, 373 F.3d at 1186. That type of modest economic impact is plainly insufficient to support a taking claim. See Walcek v. United States, 49 Fed. Cl. 248 (2001) ("With one possible exception, this court has . . . relied on diminutions well in excess of 85 percent before finding a regulatory taking."), aff'd, 303 F.3d 1349 (Fed. Cir. 2002). Thus, Rose Acre could not have prevailed on this alternative theory either.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in the Brief of the United States and the Brief of the Center for Science in the Public

Interest et al., the Court should reverse the decision of the claims court and order that judgment be entered for the United States.

Respectfully submitted,

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March 4, 2008

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2007-5169

ROSE ACRE FARMS, INC.,

Plaintiff-Appellee,

v.

UNITED STATES

Defendant-Appellant.

CERTIFICATE OF SERVICE

I certify that two copies of the "Brief of Amici Curiae Hoosier Environmental Council and Sierra Club in Support of the United States" has been served upon counsel by first class mail, postage prepaid, on this 4th day of March, 2008 to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B)-(C) and Fed. Cir. R. 32(b), I certify that the text of this brief, including any headings, footnotes and quotations therein, uses a proportionally spaced 14 point font and contains 6963 words.

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