No. 03-5103

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROSE ACRE FARMS, INC.
Appellee,

v.

UNITED STATES,
Appellant.

Appeal from an order of the United States Court of Federal Claims in 92-710C, Judge Bohdan A. Futay

AMICUS BRIEF OF THE CENTER FOR SCIENCE IN THE PUBLIC INTEREST, AMERICAN PUBLIC HEALTH ASSOCIATION, CONSUMER FEDERATION OF AMERICA, NATIONAL CONSUMERS LEAGUE, AND SAFE TABLES OUR PRIORITY IN SUPPORT OF APPELLANT UNITED STATES URGING REVERSAL

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STATEMENT OF INTEREST

Amici respectfully submit this brief in support of Appellant United States. All parties have consented to its filing.

The Center for Science in the Public Interest (CSPI) is a non-profit consumer advocacy and education organization that focuses primarily on food safety and nutrition issues. It accepts no industry or government funding and is supported principally by 800,000 subscribers to its *Nutrition Action Healthletter*. CSPI has been concerned with the public health risk of *Salmonella* for many years.

The American Public Health Association (APHA) is the oldest and largest organization of public health professionals in the world, representing more than 50,000 members from over 50 occupations in the field of public health. APHA has long advocated for the safety of the food supply and for regulations to protect consumers from food-borne illnesses.

Consumer Federation of America (CFA) is an association of approximately 300 pro-consumer organizations formed in 1968 to advance the consumer interest though advocacy and education. CFA's positions are determined by its 300 member groups, who vote on them in annual meetings, and by its elected board of directors.

Founded in 1899, the National Consumers League works to protect and promote the interests of America's consumers and workers, using education, research, advocacy, and the public and private sectors to accomplish that mission. Priority issues include food and drug safety, health care, and fair labor standards.

Safe Tables Our Priority (S.T.O.P.) is a victim-founded national grassroots organization working since 1993 to make food safer from pathogenic contamination and reduce suffering, illness, and deaths from food-borne disease. S.T.O.P. was founded after the 1993 Jack-in-the-Box E. coli outbreak sickened hundreds along the West Coast, and fulfills its mission through policy advocacy, education, and victim assistance.

ARGUMENT

The central issue in this case is whether taxpayers must compensate Rose Acre Farms for food safety protections imposed after three *Salmonella* outbreaks traced back to its eggs caused nearly 500 people to become ill and more than 150 to be hospitalized. The court below ruled that a taking occurred based on a value loss of the restricted eggs ranging from roughly 10-25 percent (depending on the relevant parcel definition). As shown below, this theory contravenes decades of taking jurisprudence establishing that government action must cause a *severe* value loss—typically in excess

of 90 percent—to work a taking. If accepted by this court, the trial court's position could undermine not only myriad food safety protections, but also government protections against all manner of unsafe consumer products and other threats to public health, safety, and welfare.

Section I of this brief shows that *Salmonella* food poisoning is a serious public health threat that warrants a vigorous regulatory response. Section II demonstrates that Rose Acre's theory of liability reflects an unprecedented application of the Takings Clause that contravenes longstanding precedent.

I. *SALMONELLA* FOOD POISONING PRESENTS GRAVE PUBLIC HEALTH RISKS THAT REQUIRE A STRONG REGULATORY RESPONSE.

Each year contaminated food causes up to 75 million illnesses, 325,000 hospitalizations, and 5,000 deaths.[1] Human salmonellosis is the second most prevalent food-borne disease in the United States,[2] and 80

[1] Paul S. Mead, et al., *Food-Related Illness and Death in the United States*, EMERGING INFECTIOUS DISEASES, Sept.-Oct. 1999 at 607, 614, *at* http://www.cdc.gov/ncidod/eid/vol5no5/pdf/mead.pdf.

[2] Salmonella Enteritidis in Eggs, 63 Fed. Reg. 27502, 27503 (May 19, 1998).

percent of all *Salmonella enteritidis* (SE) food poisonings are caused by consuming contaminated raw or undercooked eggs.[3]

The symptoms of *Salmonella* food poisoning include diarrhea, abdominal pain, vomiting, and fever.[4] While the illness can attack anyone, it is more likely to strike the elderly, children, and people with impaired immune systems.[5] Its victims also can have extremely serious complications such as kidney disease, heart disease, and death.

Salmonella enteritidis is one of the most common *Salmonella* strains, and potential exposure is widespread. Unlike other strains of *Salmonella* that are found on the eggshell's outer surface, *Salmonella enteritidis* has the ability to infect a chicken's ovaries and enter an egg before the shell forms,[6]

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[3] *See* Letter from Center for Disease Control to State and Territorial Epidemiologists & Public Health Laboratory Directors, "Update on *Salmonella* Serotype Enteritidis Infections, Outbreaks, and the Importance for Traceback and Timely Reporting Outbreaks," (Jan. 13, 2003), *at* http://www.cdc.gov/ncidod/dbmd/diseaseinfo/files/2001SECSTE.pdf.

[4] Center for Disease Control, Diagnosis and Management of Foodborne Illnesses: A Primer for Physicians, Jan. 26, 2001, *at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5002a1.htm.

[5] *Id.*

[6] Michael Jacobson & Caroline Smith DeWaal, "Egg Safety: Are There Cracks in the Federal Food Safety System," Testimony before the Senate Committee on Government Affairs (July 1, 1999), *at* http://www.cspinet.org/new/egg_pr.html.

and thus consumers cannot eliminate the risk of infection by simply washing the egg before cracking it open. *Salmonella*-infected chickens lay approximately 2.3 million contaminated eggs each year.[7] An average American consumes about 234 eggs annually,[8] and the Center for Disease Control (CDC) estimates that one in 50 consumers will be exposed to a contaminated egg each year.[9] The exposure risk is exacerbated by the practice of pooling eggs in many restaurants and commercial kitchens; if 500 eggs are pooled, one batch in 20 probably will be contaminated, and every person who eats from that batch is at risk of illness.[10]

From 1990 to 2002, 277 *Salmonella* outbreaks stemmed directly from the consumption of eggs or egg dishes and resulted in 9,349 reported cases

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[7] Center for Science in the Public Interest, "Outbreak Alert: Closing the Gaps in Our Federal Food-Safety Net," (Sept. 2002), *at* http://www.cspinet.org/reports/outbreak_report.pdf.

[8] Salmonella Enteritidis in Eggs, 63 Fed. Reg. at 27502.

[9] Center for Disease Control & Prevention, *Salmonella enteritidis:* General Information, *at* http://www.cdc.gov/ncidod/dbmd/diseaseinfo/salment_g.htm (last reviewed Mar. 7, 2003).

[10] *Id.*

of illness.[11] Eighty-eight percent of these outbreaks were caused by *Salmonella enteritidis*.[12] These figures, however, represent only a small fraction of actual illnesses because the CDC estimates that up to 97 percent of *Salmonella*-related illnesses go unreported.[13] The U.S. Department of Agriculture (USDA) calculates that each year, contaminated eggs cause approximately 660,000 illnesses and 330 deaths.[14] Estimated medical costs for food-borne *Salmonella* infections are about $118 million each year, and annual costs of lost productivity plus medical care range from $0.5 billion to $2.3 billion.[15]

Salmonella enteritidis emerged as a widespread public health risk in the 1980s (JA 197, 211; 289-90, 298-300), and it has changed the way Americans eat. No longer can we take a carefree attitude while enjoying Caesar salad dressing, egg nog, sunny-side up eggs, and other everyday

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[11] Center for Science in the Public Interest, "Outbreak Alert: Closing the Gaps in Our Federal Food-Safety Net," (Sept. 2002), *at* http://www.cspinet.org/reports/outbreak_report.pdf.

[12] *Id.*

[13] Frenzen P. et al., *Salmonella Cost Estimate Update Using FoodNet Data*. 22 FOOD REV. 10, 10-15 (1999), *at* http://www.cdc.gov/foodnet/pub/publications/frenzen_p/frenzen_p.htm.

[14] Caroline Smith DeWaal, *Safe Handling Begins on the Farm, Not in the Home*, Dec. 1, 2000, *at* http://www.cspinet.org/new/egg_labeling.html.

[15] Frenzen, *supra*, 22 FOOD REV. at 10-15.

dishes. Despite public awareness regarding the dangers of undercooked or raw eggs, multiple thousands of people are infected each year by *Salmonella*-contaminated eggs. This grave public health problem will only be remedied by ensuring that federal officials have the flexibility to implement strong protections to reduce *Salmonella* risks.

II. THE TRIAL COURT'S RULING CONTRAVENES SETTLED TAKINGS PRECEDENT.

Although the trial court ruled that the USDA protections at issue worked a *per se* taking of Rose Acre's hens (*Rose Acre Farms, Inc. v. United States,* 55 Fed. Cl. 643, 661-62 (2003)), the government's brief shows conclusively that this *per se* rule applies only to alleged takings of land, not personal property. Appellant's Br. 51-53. Accordingly, Rose Acre's takings claims regarding both the hens and the eggs should be analyzed under the familiar multi-factor test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). That test evaluates the economic impact of the challenged protection, whether the protection eviscerates reasonable, investment-backed expectations, and the character of the government action. *Id*. at 124.

To evaluate the first factor, economic impact, a court must identify the relevant parcel of property. With respect to the alleged taking of the eggs, we show in Section II.A that regardless of whether the court accepts the

government's parcel definition (all Rose Acre eggs produced while the protections were in effect) or Rose Acre's (only the eggs diverted to the breaker market), the resulting value loss range of 10-25 percent falls far short of the severe economic loss required to support a takings claim. Section II.B then demonstrates that the government is correct in its parcel definitions. For the eggs, the relevant parcel—defined in accordance with the well-established "parcel as a whole" standard—includes all eggs produced at the three farms in question while the restrictions were in place. For the alleged taking of the hens, the relevant parcel includes not only the 6,741 hens killed for testing, but all 5.4 million hens that could occupy the three farms.

In Section II.C, we show that given the heavily regulated nature of the egg industry and food safety generally, there was no reasonable expectation that the regulatory climate prior to the challenged protections would remain forever fixed. In Section II.D.1, we demonstrate that in considering the character of the government action, the trial court erred in second-guessing the reasonableness of the USDA protections. Finally, Section II.D.2 explains that under a proper analysis of the character of the government action, this court should consider the compelling nature of the public's interest in food safety, the nuisance-like nature of the sale of contaminated

eggs, and the reciprocity of advantage enjoyed by Rose Acre from the imposition of food safety protections on itself and others in the egg industry.

A. A 10-25 Percent Value Loss Is Insufficient to Sustain a Regulatory Taking Claim under *Penn Central*.

Rose Acre's theory of liability, accepted by the trial court, embodies one of the most radical applications of the Takings Clause ever rendered. Rose Acre argues that USDA's food safety protections worked a taking of the restricted eggs even though there was only a 10-25 percent reduction in the value of the eggs.[16] The trial court concluded that this relatively small loss could support a takings claim because it affected Rose Acre "in more than just a minimal way." 55 Fed. Cl. at 650. Rose Acre also argues that it suffered a taking of its hens even though under a properly defined parcel (as explained in Section II.B), it lost only one-tenth of one percent of the 5.4 million hens that can occupy the three farms at issue.

[16] We arrive at this 10-25 percent range as follows. As discussed in Section II.B, the correct formulation of the relevant parcel calculates the loss in value as a percentage of Rose Acre's total egg production while the restrictions were in effect (135,480,600 dozen eggs), which yields a loss of only 10.6 percent. *See* Appellant's Br. 42-44. On Rose Acre's erroneous view of the relevant parcel (the 57,760,000 dozen eggs diverted to the breaker market), the total value lost is roughly 25 percent, which is the weighted average of the 29.7 percent loss for eggs sold to outside breaker plants (24 million dozen eggs) and the 20.9 percent loss for breaker eggs processed on site (33.7 million dozen eggs). *Id.* at 44.

Neither Rose Acre nor the lower court cites a single case in support of the startling proposition that a value loss from 10-25 percent may give rise to a taking. To our knowledge, never before has any court found that such a relatively modest reduction in value worked a taking. Indeed, the court in *Penn Central* cited cases in which no taking was found despite value losses exceeding 75 percent. *Penn Central,* 438 U.S. at 131 (citing *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) (no taking despite a 75 percent value loss) and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no taking despite a 92.5 percent value loss)); *accord, Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (no taking despite a 46 percent value loss). Accordingly, this court repeatedly has found no taking where the value loss was significantly higher than that at issue. *E.g. Walcek v. United States*, 303 F.3d 1349, 1355 (Fed. Cir. 2002) (affirming lower court's rejection of takings claim despite 60 percent loss); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999) (no taking because the government action did not prevent substantially all use of the property); *accord, Cane Tennessee, Inc. v. United States*, 2003 WL 21525610 (Ct. Cl. June 27, 2003) (no taking despite losses of 49.6 and 28 percent); *Jentgen v. United States*, 657 F.2d 1210, 1213 (Ct. Cl. 1981) (no taking despite 50 percent loss). As the trial court held in *Walcek*: "It

stretches the concept of partial taking too far to say that a diminution on the order of 60 percent or less has the effect of a taking." *Walcek v. United States,* 49 Fed. Cl. 248, 271 (2001). *A fortiori*, a regulation that causes a mere 10-25 percent value loss should not be deemed a taking.

Judicial insistence on a severe value loss as a predicate for a regulatory taking derives directly from the text of the Takings Clause, which provides: "nor shall private property be taken for public use, without just compensation." As noted in a landmark takings treatise, "[t]he word 'take' ordinarily refers to the act of obtaining possession or control of property * * *." FRED BOSSELMAN, ET AL., THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL 51 (1973). Although the Supreme Court extended the Takings Clause to regulation in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), physical appropriation remains an important benchmark in regulatory takings analysis. Indeed, in regulatory takings cases, a court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (1985); *accord, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 322 (2002) (a regulatory taking occurs only where "a

law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation"). Longstanding precedent (cited at pages 10-11 above) makes clear that a value loss well in excess of 50 percent, typically on the order of 90+ percent, is necessary to meet this demanding standard.

The Supreme Court of Colorado recently provided an excellent analysis of the issue in *Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners*, 38 P.3d 59 (Colo. 2001) (en banc). The *Animas* court ruled that "the level of interference must be very high" for a taking claim under *Penn Central* to succeed. *Id*. at 65. Relying on *Euclid*, *Hadacheck*, and other cases, the *Animus* court concluded that the *Penn Central* test provides "a safety valve to protect the landowner in the truly unusual case," *id*. at 66, one where the property retains "a value slightly greater than de minimis." *Id*. at 67; *accord, District Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 883 (D.C. Cir. 1999) ("a claimant must put forth striking evidence of economic effects to prevail even under the [*Penn Central*] *ad hoc* inquiry."); *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992) ("[T]he only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of his property.").

Although Rose Acre relies heavily on *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990), that case involved a 77 percent loss in the value of a disease-free turkey flock (*id*. at 1539), three times the maximum estimate of the loss in the instant case. In fact, the *Yancey* court expressly distinguished a similar case finding no taking—*Empire Kosher Poultry, Inc. v. Hallowell,* 816 F.2d 907 (3d. Cir. 1987)—precisely because "in the *Empire* case, the quarantine had less adverse economic impact on the seller than in the instant case." *Yancey,* 915 F.2d at 1541. As discussed below (Section II.C), *Yancey*'s precedential value is questionable given its failure to distinguish personal from real property, but whatever its merits, its atypical facts and far more severe value loss cannot be used to justify the lower court's extraordinary ruling here.

Rose Acre makes much of the fact that diverting eggs to the breaker market eliminated its profit margin on those eggs. So too did the trial court, which emphasized that Rose Acre did not "recoup its investment" on the diverted eggs. 55 Fed. Cl. at 658. But the Takings Clause does not guarantee profitability. Loss of future profits "provides a slender reed upon which to rest a takings claim." *Andrus v. Allard*, 444 U.S. 51, 66 (1979); *accord, Conti v. United States*, 291 F.3d 1334, 1343-44 (Fed Cir. 2002)

(citing *Andrus* and rejecting takings claim of fisherman who lost profits from prohibition on use of gillnets).

Rose Acre also stresses that it suffered losses in the millions of dollars, but loss of value in absolute terms is not enough. *Concrete Pipe*, 508 U.S. at 645 ("[O]ur cases have long established that mere diminution in the value of its eggs, however serious, is insufficient to demonstrate a taking."). The value loss must be compared to the value retained. *Id.* Rose Acre retained from 75 to 90 percent of the value of its property, and the diverted eggs retained beneficial use by earning the company $25.7 million (24 million dozen x 41.46 cents (outside breaker plants) + 33.7 million dozen x 46.64 cents (onsite breaker plants)). But "[t]he overwhelming weight of authority from the federal courts and other state courts * * * requires that a plaintiff demonstrate deprivation of all or substantially all economically beneficial uses of property to sustain a claim for a temporary taking." *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 346 (N.J. 2001). Rose Acre's theory of liability contravenes this circumscribed approach to regulatory takings in spectacular fashion.

Requiring a severe loss of value before awarding compensation not only is required as a textual and jurisprudential matter, but also promotes fairness. As discussed in Section II.D below, Rose Acre enjoyed a

reciprocity of advantage from the imposition of the challenged protections as well as food safety protections imposed on its competitors. In view of these reciprocal advantages, requiring taxpayers to compensate Rose Acre for a mere 10-25 percent loss would be patently unfair.

B. The Entire Relevant Parcel Must Be Considered.

Takings analysis generally begins with a determination of the relevant parcel. As we have just shown, this court easily can dispose of Rose Acre's takings claim regarding its eggs, irrespective of the parcel definition, because a 10-25 percent loss cannot support a claim for compensation. A thorough analysis of the parcel question further undermines Rose Acre's position.

The Supreme Court has long insisted that the relevant parcel in takings analysis is the parcel as a whole. In *Concrete Pipe*, for example, the court held: "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." 508 U.S. at 644; *accord, Tahoe-Sierra*, 535 U.S. at 327, 330-33 (comprehensively reviewing and reaffirming the court's parcel as a whole jurisprudence); *Penn Central*, 438 U.S. at 130 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a

particular segment have been entirely abrogated."); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) (same).

Rose Acre produced 135,480,600 dozen eggs at the three farms at issue during the period of the USDA's restrictions. JA 240, 242-44; 364-70. Only 42.6 percent of Rose Acre's eggs were diverted to the breaker market. *Id.* Rose Acre received an average of 51.52 cents per dozen eggs versus the 57.62 cents per dozen it might have received but for the regulations, a difference of only 10.6 percent in the value of Rose Acre's total egg production. Appellant's Br. 42-44. Likewise, the necropsy of Rose Acre's 6,471 hens represents a loss of just one-tenth of one percent of the 5.4 million hens that could occupy the three farms in question.

Rose Acre understandably focuses only on the affected portion of its property, in other words the diverted eggs and tested hens. But its analysis violates the parcel-as-a-whole rule, which is designed to preclude exclusive focus on the regulated portion of the claimant's property. *E.g., Tabb Lakes*, 10 F.3d at 802 (rejecting the affected portion standard). A properly defined parcel—one that includes all of Rose Acre's eggs and hens at the three farms while the restrictions were in place—further demonstrates the invalidity of its takings claim.

C. As a Highly Regulated Food Producer, Rose Acre Had No Reasonable Expectation That Additional Protections Would Not Be Imposed.

As one of the largest egg producers in the country (55 Fed. Cl. at 647), Rose Acre Farms long has been subject to numerous health and safety regulations—including the Poultry Products Inspection Act, 21 U.S.C. §§451-70, Egg Products Inspection Act, 21 U.S.C. §§ 1031-56, and the National Poultry Improvement Plan, 9 C.F.R. § 145 et seq.—which must be adjusted as new food-borne risks emerge or are discovered. Indeed, USDA's authority over diseases in poultry extends back more than a century. Appellant's Br. at 47. The trial court expressly found that the egg industry is "highly regulated." 55 Fed. Cl. at 659.

In view of these longstanding, oft-changing protections, Rose Acre cannot credibly claim an investment-backed expectation in the regulatory status quo. As the Supreme Court held in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), "changed circumstances or new knowledge may make what was previously permissible no longer so." *Id.* at 1031. This case presents a classic example of where changed circumstances demanded a new regulatory response. First, the extent and severity of the public health threat from eggs greatly increased, with *Salmonella* contamination reaching epidemic proportions in 1987. JA 287, 299-300. Second, beginning in the

mid-1980s, public health officials concluded that eggs could become contaminated with *Salmonella* not only from outside the shell, but also while in the hen before the eggs were laid, thereby rendering previously effective disinfection strategies inadequate to address the public health threat. JA 222-26, 245-49, 279-81, 287-96. The science was changing so rapidly that USDA initially issued the challenged protections on an emergency basis. 55 Fed. Cl. at 648.

Courts long have recognized that property owners in a highly regulated environment must expect that regulations will change over time. *E.g., Concrete Pipe*, 508 U.S. at 645 ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1008-09 (1984) (no reasonable expectation that pesticide-related trade secrets would remain unregulated where the industry had "been the focus of great public concern and significant government regulation"); *Mitchell Arms, Inc. v. United States,* 7 F.3d 212 (Fed. Cir. 1993) (rejecting takings challenge to permit revocations precluding firearm sales because it was unreasonable to expect the regulatory climate to remain forever fixed); *District Intown*, 198 F.3d at 884 ("Businesses that operate in

an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established ends.").

Expectations analysis focuses not on the claimant's subjective expectations, but instead on whether the government action extinguished an objectively reasonable expectation in the regulatory status quo. *See Commonwealth Edison Co. v. United States,* 271 F.3d 1327, 1348 (Fed. Cir. 2001) (*en banc*). Thus, the inquiry involves the application of law to fact, not a purely factual finding entitled to deference on review. *Id.* (undertaking de novo expectations analysis). Rose Acre, as a sophisticated participant in the heavily regulated food industry, lacked any reasonable expectation that the regulatory environment would never change and thus cannot succeed on a takings claim with respect to either the eggs or hens.

Moreover, the Supreme Court has held that restrictions on personal property like merchandise are subject to far less significant expectations than those attending land ownership:

> It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State * * *. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless * * *.

Lucas, 505 U.S. at 1027-28 (1992). What the trial court dismissed as the government's "superficial statement of the law," 55 Fed. Cl. at 661, is actually the rule handed down by the Supreme Court. Given the huge range of commercial products permissibly affected by such protections—everything from automobiles to heart valves to children's pajamas, to name just a few—regulation of personal property like Rose Acre's eggs and hens neither interferes with the same kind of expectations and nor commands the same scrutiny as regulation of land.

Although *Yancey* contains some language to the contrary, 915 F.2d at 1540-41, *Yancey* is a pre-*Lucas* decision that did not fully recognize the Supreme Court's clear distinction between land and personal property. *Lucas,* like *Andrus* before it, plainly contemplates situations in which personal property—especially property traded in commerce—might be subject to a total wipeout and yet not rise to the level of a taking. *A fortiori,* a 10-25 percent loss in value of commercial merchandise does not upset reasonable expectations or constitute a taking.

D. The Character of the Government's Action Weighs Heavily Against Rose Acre's Takings Claims.

1. The Trial Court Erroneously Second-Guessed the Wisdom of USDA's Public Safety Protections.

In concluding that USDA's protections against *Salmonella* constitute a taking of the eggs and hens, the trial court engaged in inappropriate judicial policymaking. The court twice characterized the protections as "misguided," 55 Fed. Cl. at 655, 660, stressing that, in its view, the public could have been adequately protected by less restrictive controls. Even though Rose Acre's eggs resulted in three separate outbreaks causing nearly 500 people to become ill, the trial court opined that the public-safety protections were not a reasonably necessary means to accomplish the legitimate end of protecting public health, and "went too far in protecting this interest * * *." *Id*. at 660. The court's means-end analysis is remarkable and disturbing for two reasons.

First, the United States Court of Appeals for the Seventh Circuit has already rejected Rose Acre's contention under the Administrative Procedure Act that these protections were an arbitrary or unreasonable means to advance the legitimate goal of promoting public health. *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670 (7th Cir. 1992). Responding to Rose Acre's argument that the regulatory scheme is "silly" because "properly cooked

eggs are safe," the Seventh Circuit held that USDA reasonably concluded that "eggs are not always stored and cooked properly," "[k]itchen workers may spread *Salmonella* to hundreds of persons by oversight," and "[t]he costs of carelessness in the preparation of food can be reduced by more care elsewhere in the food chain, with net savings * * *." *Id.* at 675. The Seventh Circuit similarly rejected Rose Acre's contention that USDA's testing procedures are irrational, concluding that "Rose Acre has not suggested [an alternative] testing regime that both achieves the Secretary's objective and costs less than the current regulations." *Id.* at 676. The appellate court ruled that "the Secretary is entitled to conclude that working backwards from an outbreak identifies the flocks that pose the greatest risk to humans." *Id.* While recognizing that "the match [between human health risk and outbreak tracebacks] is not perfect," the Seventh Circuit stressed that "[s]electivity is the essence of judgment," and that "[i]f the Secretary is right, tracing helps find and deal with the most dangerous sources of *Salmonella* at the least cost * * *." *Id.* The Seventh Circuit also dismissed Rose Acre's suggestion that USDA's testing procedures were unnecessarily redundant, colorfully asserting that Rose Acre's argument in this regard brought "a bit of mirth to our grey profession." *Id.* at 677.

The Seventh Circuit recognized the appropriate role of courts in reviewing government regulation, holding that Rose Acre's concerns about the burden of USDA's protections "are for the Secretary and not the Court." *Id.* The Seventh Circuit concluded that the administrative record "assuredly does not reveal that the regulations are muddleheaded meddlesomeness. How far, and how, to regulate poultry production to curb the risk of *Salmonella* are economic, social, and political rather than legal questions." *Id.*

The trial judge in the case at bar thought differently. Disregarding the Seventh Circuit's definitive ruling on the reasonableness of these protections, the trial court expressed its view that the protections were unwise and inefficient. In so concluding, the court improperly trumped USDA's expertise and congressionally delegated authority.

Second, and more fundamentally, judicial examination of the wisdom of government regulation has no proper place in takings analysis. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Supreme Court disavowed such a means-end test as an appropriate standard of takings liability. The court in *Eastern Enterprises* considered the constitutionality of the federal Coal Industry Retiree Health Benefit Act. A four-Justice plurality concluded that the Act worked a taking because it imposed an extreme, retroactive

financial burden on the claimant. *Id.* at 529-37. Justice Kennedy provided the fifth vote to invalidate the Act but concluded that it violated the Due Process Clause, and he wrote separately to emphasize that it did not constitute a taking. He stressed that a normative means-end inquiry into "the wisdom of government decisions * * * is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the Government's power to act." 524 U.S. at 545 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy concluded that in evaluating the reasonableness of regulations, including their means-end fit, "the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." *Id.* at 545 (discussing *Agins v. City of Tiburon*, 447 U.S. 255 (1980)).

Justice Breyer and three other Justices in dissent agreed that the reasonableness of legislative determinations is governed by the Due Process Clause, not the Takings Clause: "[T]he plurality views this case through the wrong legal lens. The Constitution's Takings Clause does not apply." *Id.* at 554 (Breyer, J., with whom Stevens, Souter, and Ginsburg, JJ., join, dissenting). Agreeing with Justice Kennedy that a means-end test has no appropriate place in takings jurisprudence, these four Justices emphasized

that "at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." *Id*.

To be sure, the five Justices who disavowed means-end analysis under the Takings Clause in *Eastern Enterprises* did not author a majority opinion. Nevertheless, this court recognized in its *en banc* decision in *Commonwealth Edison* that the five-justice vote against takings liability constitutes binding precedent. 271 F.3d at 1339 (en banc) ("we are obligated to follow the views of that [five-Justice] majority"); *accord, Simi Inv. Co. v. Harris County*, 256 F.3d 323, 324 n.3 (5th Cir. 2001) (discussing *Eastern Enterprises*'s five-vote conclusion that the rationality of regulation should be evaluated under the Due Process Clause, not the Takings Clause); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 658-59 (3d Cir. 1999) ("[t]here are five votes against the plurality's Takings Clause analysis" and lower courts "are bound to follow the five-four vote against the takings claim * * *.").[17]

[17] In *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), the court affirmed a jury award based on instructions that included a means-end standard, but every Member of court declined to embrace that theory of takings liability. *See id.* at 704 (majority opinion) (declining to clarify whether means-ends analysis is relevant to takings liability); *id.* at 732 n.2 (Scalia, J. concurring) ("express[ing] no view as to [the] propriety" of means-ends analysis under the Takings Clause); *id.* at 753 n.12 (Souter, J.

Although *Commonwealth Edison* addressed the issue of whether a government-imposed monetary obligation can work a taking, its analysis of the precedential effect of the concurrence and dissent in *Eastern Enterprises* applies with equal force to the rejection of a means-end analysis under the Takings Clause.

The trial court analyzed the wisdom of USDA's protections as part of its consideration of the "character of the government action." 55 Fed. Cl. at 659-60. But *Penn Central* used this element of takings analysis merely to distinguish physical invasions from mere land use restrictions. *Penn Central*, 438 U.S. at 124 (the character of the government action is relevant to the extent that "[a] 'taking' may be more readily found when the interference with property can be characterized as a physical invasion by government * * *.").

To be sure, *Penn Central* and *Agins* contain loose dicta suggesting that a taking might occur where a regulation does not substantially advance a legitimate purpose, but these cases pre-date *Eastern Enterprises*. Moreover, both cases support this assertion by citing a case decided under the Due Process Clause, *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). *See*

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joined by O'Connor, Ginsburg, & Breyer, JJ., dissenting) ("offer[ing] no opinion" on whether means-ends analysis is relevant to takings liability).

Agins, 447 U.S. at 261; *Penn Central*, 438 U.S. at 127. Indeed, courts repeatedly have eschewed means-end analysis as a test of takings liability. *See, e.g. Bamber v. United States*, 45 Fed. Cl. 162, 165 (1999) (means-end analysis under the Takings Clause "has not had a fruitful life" and is limited to regulations that compel dedications of property to the public); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 390 (1988) ("no court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced"); *Brunelle v. Town of South Kingston*, 700 A.2d 1075, 1083 n.5 (R.I. 1997) (reasonableness of regulation should be examined under the Due Process Clause, not the Takings Clause); *Mission Springs, Inc. v. City of Spokane*, 954 P.2d 250, 257 (Wash. 1998) (same). Scholarly commentary likewise demonstrates that a means-end evaluation of a regulation should take place only under the Due Process Clause, not the Takings Clause. *See* John Echeverria, *Does a Regulation that Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853 (1999). And while *Agins* and *Penn Central* might have created some ambiguity due to their loose citation of due process precedent, any such ambiguity has been put to bed by *Eastern Enterprises*.[18]

[18] The trial court's examination into whether the challenged protections were "misguided" ventures far beyond the constricted means-ends inquiry appropriate under the Due Process Clause since the demise of the *Lochner*

Repudiation of the trial court's conclusion that the protections were "misguided"—and of the notion that the Takings Clause authorizes such judicial policymaking—is necessary to vindicate two fundamental values. First, in our constitutional democracy courts should pay appropriate deference to our elected officials and the agencies to which those officials have delegated policymaking responsibilities. As this Circuit repeatedly has emphasized: "This court is empowered to rewrite neither statutes nor regulations, however unwise * * *." *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1558 (Fed. Cir. 1993); *accord, Saarstahl AG v. United States*, 78 F.3d 1539, 1542 (Fed. Cir. 1996) ("The duty of the reviewing court 'is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute.'" (quoting *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992))); *Compare Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984)

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era. *E.g., Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause [to invalidate government actions] because they may be unwise, improvident, or out of harmony with a particular school of thought.").

("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

Second, as compared to expert agencies, courts lack the institutional competence to engage in the complex data-gathering, scientific judgment, and delicate policy balancing that underlies government protections like the *Salmonella* controls at issue. As this Circuit often has stated, a federal court has neither "the information base nor expertise to do so effectively." *Newport News Shipbuilding*, 6 F.3d at 1558; *In re Sang-Su Lee*, 277 F.3d 1338, 1344 (Fed. Cir. 2002) ("The foundation of the principle of judicial deference to the rulings of agency tribunals is that the tribunal has specialized knowledge and expertise, such that when reasoned findings are made, a reviewing court may confidently defer to the agency's application of its knowledge in its area of expertise."); *Exxon Corp. v. Phillips Petroleum Co.,* 265 F.3d 1249, 1253 (Fed. Cir. 2001) ("Judicial deference to the details of agency procedures derives from recognition of the agency's familiarity with the problems associated with the agency's mission.").

As shown in Section II.A, a 10-25 percent loss in the value of merchandise or other personal property is not sufficient to support a conclusion that a taking has occurred. The trial court should not be allowed to rescue its unprecedented conclusion to the contrary through its second-

guessing of the reasonableness of USDA's actions, particularly given the Seventh Circuit's ruling that those actions were entirely appropriate.

2. A Proper Character-of-the-Government Action Analysis Should Consider the Public's Compelling Interest in Food Safety, the Nuisance-Like Nature of the Regulated Activity, and Rose Acre's Reciprocity of Advantage.

In considering the character of the government action under *Penn Central*, a court first should consider the nature of both the public interest at stake and the conduct being regulated by the government. As Appellant's brief convincingly shows (pp. 33-35), it is difficult to imagine a more compelling public interest than food safety and protection against life-threatening bacteria transmitted by the nation's food supply. And the regulated conduct—the sale of eggs contaminated by deadly bacteria—is activity akin to a nuisance. These aspects of the character of the challenged protections weigh strongly against Rose Acre's takings claim. *See Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 485 (1987) ("[T]he character of the governmental action involved here leans heavily against finding a taking [because the government] has acted to arrest what it perceives to be a significant threat to the common welfare.").

Analysis of the character of the government action should also consider the reciprocity of advantage enjoyed by Rose Acre. In *Mahon*, the Supreme Court noted that regulations secure "an average reciprocity of

advantage that has been recognized as a justification of various laws." *Mahon*, 260 U.S. at 415 (1922). More recently in *Tahoe-Sierra,* the court rejected a takings claim in part due to the "reciprocity of advantage" enjoyed by property owners subject to a common land use planning program. *Tahoe-Sierra*, 535 U.S. at 341. Although the moratorium at issue in *Tahoe-Sierra* inconvenienced the claimants, the court noted they ultimately benefited from the moratorium and other actions taken to protect Lake Tahoe, which provides much of the land value in the Tahoe Basin. *Id*.

A reciprocity of advantage can come from the challenged regulation itself or from other restrictions placed on like property. As the Supreme Court has explained: "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are 'properly treated as part of the burden of common citizenship.'" *Keystone*, 480 U.S. at 491 (citations omitted).

The Seventh Circuit recognized how the egg industry benefits from this reciprocity of advantage in food safety regulations.

> 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 Farms, 956 F.2d at 675. In the same way, Rose Acre's property derives value from the government's overall efforts to reduce incidence of *Salmonella* contamination. Hundreds of millions of eggs produced by Rose Acre's competitors were diverted under the challenged protections. 55 Fed. Cl. at 650. If the government did not take steps to protect the nation's food supply, people would consume fewer eggs and dairy products, depressing the market price for these goods. Indeed, United Egg Producers, a major egg industry trade association, urged the USDA to develop a mandatory testing program, which it believed would protect public health, reduce risk of contamination, shield producers from lawsuits and negative publicity, and improve the general economic climate of the industry. JA 355-58, 362-63.

By seeking compensation in this case, Rose Acre is asking the government to continue to regulate food-borne diseases on other farms to maintain public confidence in the safety of the food supply, but to pay compensation to Rose Acre for similar restrictions. The nation's taxpayers should not be forced to subsidize this unfair request.

CONCLUSION

This court should reverse the judgment of the U.S. Court of Federal Claims.

Respectfully submitted,

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August 4, 2003