No. 20-72

In The
Supreme Court of the United States

JANET L. HIMSEL, MARTIN RICHARD HIMSEL, ROBERT J. LANNON, AND SUSAN M. LANNON,

Petitioners,

v.

4/9 LIVESTOCK, LLC, CO-ALLIANCE, LLP, SAMUEL T. HIMSEL, CORY M. HIMSEL, CLINTON S. HIMSEL, and STATE OF INDIANA,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Indiana

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents reframe the question presented in this case as if the Indiana Court of Appeals had construed Indiana's amended Right to Farm Act ("RTFA") to bar only the Petitioners' nuisance claim, but not their trespass claim. Similarly, Respondents insist that Petitioners *only* complain about "odors" and never argued that if the RTFA bars their trespass claim it necessarily effects a per se taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This is incorrect. Even the Indiana Court of Appeals summarized Petitioners' trespass claim as one "based on 'the *unlawful physical intrusion of the CAFO's noxious emissions into their properties and homes*,'" not mere odors. *Himsel v. Himsel*, 122 N.E.3d 935, 945 (Ind. Ct. App. 2019) (emphasis added); Petitioners' Appendix ("Pet. App.") at 17. And, contrary to the Respondents' view, the Appeals Court also squarely held that the RTFA *bars* that trespass claim—not just the nuisance claim—and disagreed with Petitioners that doing so is a taking. *Id.* at 945–48; Pet. App. at 17, 20–23. That decision is at issue here, and Respondents' attempt to ignore or mischaracterize it reveals their understanding of the serious constitutional concerns raised by the decision.

Should this Court decline to review that unconstitutional decision, Petitioners must either continue to endure untenable living conditions or sell their long-standing family homes at a substantial financial loss. And, as Petitioners and the *amici* traditional farmers demonstrated, because these kinds of RTFA

amendments are *proliferating* across the country, similar outcomes will continue to be suffered by many established homeowners who, like Petitioners, will be deemed to have *retroactively* lost the property rights they acquired decades ago when they bought their homes and somehow came "to the ***potential future nuisance,***" 122 N.E.3d at 944, (emphasis added), Pet. App. at 14, before CAFOs even existed. *See Brief of Amici Curiae Indiana Farmers Union, et al.* ("Amicus Farmers Br.") at 8. The grave constitutional implications of such an absurd, illogical, and grossly unfair result, as well as the uncertainty among the states as to when a government-sanctioned nuisance and trespass constitute a taking, warrant review by this Court. As presented below, nothing asserted by Respondents counsels otherwise.

ARGUMENT

I. PETITIONERS DID NOT WAIVE THEIR ARGUMENT THAT THE RTFA EFFECTS A PHYSICAL TAKING UNDER *LORETTO*.

The Respondents assert that Petitioners waived their argument that the RTFA constitutes a physical taking of their property under *Loretto* because Petitioners did not raise that argument below. CAFO Respondents' Opposition Brief ("CAFO Resp.") at 19; State of Indiana Opposition Brief ("State Resp.") at 7–8. Yet, even cursory review of the pleadings and briefs below demonstrate that is not so. Petitioners' Complaint raises a claim that the RTFA is a taking of

Plaintiffs' property rights of use, enjoyment, and exclusive possession. Pet. App. at 333, 347–49. At the summary judgment stage, Plaintiffs argued—citing *Loretto*—that if the "Defendants' extreme reading of [the RTFA] as barring the trespass claim is accepted, the government-authorized action . . . is clearly a taking because Plaintiffs have demonstrated that airborne emissions from the CAFO are physically invading—trespassing on—Plaintiffs' properties, and under this view [the RTFA] would foreclose even a remedy for this physical invasion." C.A. App. Vol. VI:006-007.[1] Similarly, before the Indiana Court of Appeals, Petitioners argued, again citing *Loretto*, that if their trespass claim is barred by the RTFA, this would amount to an unconstitutional taking of their property. Appellants' Brief at 57–58. Therefore, this argument was demonstrably raised below.

Even if Petitioners had not previously raised this particular takings *argument*, the fact that Petitioners raised a federal takings *claim* was all that is required to preserve their ability to raise *any argument* in support of that *claim* now. Indeed, this Court has considered and squarely rejected Respondents' contrary view in *Yee v. City of Escondido*, 503 U.S. 519 (1992), where it was unclear whether the petitioners had argued a regulatory taking or physical taking below. 503 U.S. at 534–35. Despite the ambiguity, this Court explained:

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[1] "C.A. App." refers to the Appellants' Appendix filed by Petitioners with the Indiana Court of Appeals.

> Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. . . . Petitioners' arguments that the ordinance [at issue] constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim—that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.

Id. (emphasis in original). There is no reason to hold Petitioners to a different standard.

II. THE FACT THAT THE RTFA ALLOWS A CLAIM FOR NEGLIGENT OPERATION OF A CAFO IS IRRELEVANT.

The CAFO Respondents assert that the RTFA is not a taking because it provides a remedy for the negligent operation of a CAFO. CAFO Resp. at 12–13. This argument is incorrect for several reasons. As an initial matter, a negligence claim is entirely distinct from nuisance and trespass claims that vindicate property rights. *See*, *e.g.*, *KB Home Indiana Inc. v. Rockville TBD Corp.*, 928 N.E.2d 297, 304–09 (Ind. Ct. App. 2010) (nuisance, trespass and negligence claims are distinct causes of action, and analyzed separately even when they arise from the same facts). Nuisance law protects the right to reasonably use property without

interference. *See Indiana Motorcycle Ass'n v. Hudson*, 399 N.E.2d 775, 778 (Ind. Ct. App. 1980). Trespass protects the right to exclusively possess property. *Indiana Michigan Power Co. v. Runge*, 717 N.E.2d 216, 227 (Ind. Ct. App. 1999). In contrast, liability in negligence depends not on the kind of harm caused, but whether reasonable care was used, *South E. Ind. Natural Gas Co. v. Ingram*, 617 N.E.2d 943, 953 (Ind. App. 1993), which is why Indiana courts have long recognized that a lawful business can still be held liable for causing a nuisance, *Bonewitz v. Parker*, 912 N.E.2d 378, 382 (Ind. App. 2009).

Furthermore, the notion that Petitioners have a viable "remedy" because the RTFA allows a claim for negligent operation only highlights the gravity and inequity of the taking here. Under the Indiana Court of Appeals' construction of the RTFA, the decision to locate a CAFO on vacant farmland next to long-established homes—no matter how large and odious the CAFO may be—"*cannot [as a matter of law] constitute negligent operation under the RTFA.*" *Himsel*, 122 N.E.3d at 945; Pet. App. at 16–17 (emphasis added). That means, so long as the CAFO *operates* pursuant to the standard of care that applies to a CAFO that confines 8,000 pigs, produces four million gallons of hog feces, urine, and other animal waste each year, and blows the resulting odor and waste particles onto neighboring homes, the CAFO is not, as a matter of law, being *negligently operated.*[2] It is, therefore,

[2] Indeed, Petitioners brought a claim under the RTFA's "negligent operation" exception and a distinct negligence claim for the

completely irrelevant that homeowners could bring a claim for *negligent* operation when the harm they are suffering is from the CAFO's *normal* operation.[3]

Particularly instructive on this point is this Court's analysis in *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914). That case involved state laws—not dissimilar to RTFAs—that conferred immunity from nuisance claims to private railroads that were "authorized by law and lawfully *operated*." 233 U.S. at 553

Respondents' failure to use reasonable care and failure to follow industry standards when they decided to locate their 8,000 hog CAFO so close and upwind of Petitioners' homes. Pet. App. at 341–344. The Indiana Court of Appeals concluded that "the decision to build and operate a CAFO at a particular location[ ] cannot constitute negligent operation under the RTFA." *Himsel*, 122 N.E.3d at 945; Pet. App. 16–17. It also found "no indication that the CAFO has been negligently operated" based on the Respondents' compliance with applicable zoning and regulatory requirements. *Id.* at 944–45. Yet, Respondents' regulatory compliance does nothing to alleviate the ongoing harm and invasion of Petitioners' property rights because applicable regulations place *no restrictions whatsoever* on the dangerous and extremely noxious chemical compounds CAFOs produce. Pet. App. at 176–77, 276, 317–18, 332.

[3] Also irrelevant is Respondents' recounting of the fact that Petitioners did not administratively appeal the rezoning or IDEM permitting decisions. *See* CAFO Resp. at 13–14. Not only were there no legal grounds to do so—i.e., it would have been a futile waste of time and resources—administrative exhaustion is not required to bring a tort claim. *South E. Ind. Nat. Gas Co.*, 617 N.E.2d at 949–51. And, contrary to the Indiana Court of Appeals' conclusion that pursuing administrative appeals would have provided Petitioners with "ample due process," *Himsel*, 122 N.E.3d at 944, Pet. App. 16, such appeals cannot provide damages and are, therefore, "no remedy at all for a common law tort," *S.E. Ind. Nat. Gas Co.*, 617 N.E.2d at 950.

(emphasis added). Addressing the Fifth Amendment takings problem of states' "indiscriminately employ[ing these laws] with respect to public and to private nuisances," this Court held:

> We deem the true rule, under the 5th Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.

Id. That is precisely what Indiana's legislature has done here by passing a law that bars private nuisance and trespass claims against lawfully operated CAFOs that, nevertheless, cause tremendous harm. Allowing a theoretical claim for negligent operation of a CAFO is, therefore, no "remedy" at all in this context and it is irrelevant to whether a taking has occurred. *See Bormann v. Bd. of Sup'rs In & For Kossuth Cty.*, 584 N.W.2d 309, 314, 321 (Iowa 1998) (unconstitutional taking found even though the Iowa RTFA would have allowed a claim for negligence); *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 173 (Iowa 2004) (an exception to RTFA immunity for the failure "to use existing prudent generally accepted management practices reasonable for the operation" does not negate the taking claim).

III. PETITIONERS HAD NO OBLIGATION TO SEEK RELIEF DIRECTLY FROM THE STATE OF INDIANA.

The CAFO operators suggest that because Petitioners did not seek relief directly against the State, this case is a "poor vehicle" for this Court to decide the taking claim. CAFO Resp. at 18. Notably, the State of Indiana does not make this argument, and likely for good reason—it is also baseless.

As discussed above, Petitioners raised their federal takings claim from the outset of this case and at every stage along the way arguing that *if* the RTFA is held to bar them from obtaining any relief for the infringement of their long-vested property rights of use and enjoyment (nuisance) and exclusive possession (trespass), this would amount to an unconstitutional taking of those property rights. Nothing more was required. Indeed, this Court recently and decisively confirmed this in *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162 (2019):

> A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his

> Fifth Amendment rights when the government takes his property without just compensation.

139 S. Ct. at 2167–68 (overturning *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). Thus, the CAFO Respondents' "vehicle" argument is also entirely without merit.

IV. RESPONDENTS ERRONEOUSLY ASSERT THERE IS NO DIVERGENCE AMONG THE STATES.

The State Respondent insists that there is no state split because "[t]he [Indiana] court below did *not* hold that a government-authorized nuisance can *never* constitute a taking," and other state courts have not held "that [such] a nuisance *categorically* constitutes a taking." State Resp. at 16–17 (emphasis added). This is a strawman argument. Petitioners do not argue that the states are divided over whether a government-sanctioned nuisance can *ever* be a taking—clearly it can. Rather, as explained in Petitioners' opening brief, the interstate conflict is over *when, i.e. under what circumstances*, does a government-authorized nuisance rise to the level of a taking. Petition for Certiorari ("Pet. Br.") at 32. For that matter, the State Respondent's own discussion of the Arkansas and Georgia cases demonstrates this open question:

> *Fayetteville* and *Duffield* stand only for the proposition that a continuing nuisance can in some cases constitute a taking. *Fayetteville*

> . . . explained that 'a continuing trespass or nuisance can ripen into inverse condemnation,' . . . [and] it rejected the City's argument that temporary nuisances can never constitute takings, concluding that 'while we need not provide a definitive statement of what constitutes a taking, we will say it does not require permanency or an irrevocable injury.'

State Resp. at 17 (internal quotation and citation removed).

Indeed, on that important constitutional question, there is a clear lack of uniformity among the states as discussed by several legal commentators, especially within the context of state RTF laws. *See*, *e.g.*, Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U. L. Rev. 819, 820–22 (2006) (discussing a "third category of takings cases" where plaintiffs allege "that the government has effected a taking by creating (or allowing others to create) a nuisance" that have been decided in a "seemingly ad hoc nature" and do not "fit neatly" into the regulatory takings (*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)) or physical takings (*Loretto*) categories); Cordon M. Smart, *The "Right to Commit Nuisance" in North Carolina: A Historical Analysis of the Right-to-Farm Act*, 94 N.C. L. Rev. 2097, 2146 (2016) (explaining that "[i]n interpreting RTF laws under the Takings Clause, state courts have been divided as to whether the maintenance of an ongoing nuisance rises to the level of a categorical taking."); Terence J. Centner, *Governments and Unconstitutional Takings: When do Right-to-Farm*

Laws Go Too Far?, 33 B.C. Envtl. Aff. L. Rev. 87, 137–40 (2006) (detailing various state court decisions interpreting RTF laws and speculating, based on those decisions, whether other states' RTFAs "that foist significant burdens on neighboring property owners by providing a defense for new nuisance activities [such as 'major expansions or extensive changes'] *may* go too far" and "*might* produce an unconstitutional taking.").

Notably, one commentator describes the question of "when a nuisance ripens into a taking" as "doctrinally fascinating and socially important," and points to this Court's decision in *Richards v. Washington Terminal Co.*, as providing the answer. Ball, *supra* at 822–23. Specifically, in *Richards*, this Court held that when the government, or a private party acting under government authority, uses land in such a way as to create a nuisance, the action rises to the level of a taking when the burden placed on the plaintiff is "peculiar and substantial." 233 U.S. at 557. Noting that this Court has not since elaborated on this test, the legal commentator argues that it offers "a form of intermediate scrutiny" that "lies between the categorical or per se rule . . . applied in physical invasion cases and the highly deferential ad hoc analysis called for by *Penn Central*," and is warranted in nuisance/takings cases like this one because:

> [P]laintiffs in most nuisance/takings cases have property-related expectations that are worthy of a great deal of constitutional respect because they seek to *continue* their

> current land uses without the government-created interference. In contrast, most landowners in regulatory takings cases seek to *intensify* their land uses, making their expectations relatively less worthy of constitutional protection. In addition, the government's decisions in most nuisance/takings cases merit less deference than those in most regulatory takings cases because in the former, unlike in most of the latter, the government is not contending that the plaintiffs' land uses harm the public.

Ball, *supra* at 824 (emphasis in original).

Petitioners agree. Given the pace at which states are amending their RTF laws to provide blanket immunity to the CAFO industry, as Indiana has done, Pet. Br. at 36–39, Amicus Farmers Br. at 7–8, this Court should revisit, reaffirm, and expand on the "peculiar and substantial" test articulated in *Richards* so that states understand there is a clear, constitutional limit on their ability to impose harmful nuisances on their citizens without remedy.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

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