No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state statute violate the Takings Clause of the United States Constitution when it provides complete immunity from nuisance and trespass liability for an industrial-scale hog facility newly sited next to long-standing family homes, even though the facility causes noxious waste substances to continuously invade those homes, making it impossible for the families to use and enjoy their properties where they have lived for decades?

PARTIES TO THE PROCEEDINGS

Petitioners Janet L. Himsel, Martin Richard Himsel, Robert J. Lannon, and Susan M. Lannon were the Plaintiffs and Appellants below. Respondents 4/9 Livestock LLC, Co-Alliance, LLP, Samuel T. Himsel, Cory M. Himsel, and Clinton S. Himsel were the Defendants and Appellees below. The State of Indiana was an Intervenor-Defendant and Appellee below.

STATEMENT OF RELATED CASES

Himsel v. Himsel, No. 32D04-1510-PL-150, Hendricks County Superior Court. Judgment entered October 24, 2017.

Himsel v. Himsel, No. 32D04-1510-PL-150, Hendricks County Superior Court. Judgment entered February 9, 2018.

Himsel v. Himsel, No. 18A-PL-645, Court of Appeals of Indiana. Judgment entered April 22, 2019.

Himsel v. Himsel, No. 18A-PL-645, Court of Appeals of Indiana. Judgment entered July 12, 2019.

Himsel v. 4/9 Livestock, LLC, No. 18A-PL-645, Indiana Supreme Court. Judgment entered Feb. 20, 2020.

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The relevant Indiana court opinions include:

The decision of the Indiana Court of Appeals, reported at *Himsel v. Himsel*, 122 N.E.3d 935 (Ind. Ct. App. 2019), reproduced in Petitioners' Appendix ("Pet. App.") at 1–28; the Indiana Court of Appeals' Order Denying the Himsel's and Lannons' Petition for Rehearing, reported at *Himsel v. Himsel*, 2019 Ind. App. LEXIS 314 (Ind. Ct. App., July 12, 2019), and reproduced in Pet. App. at 43; the Indiana Supreme Court's Order Denying the Himsel's and Lannons' Petition to Transfer, reported at *Himsel v. 4/9 Livestock, LLC*, 2020 Ind. LEXIS 111 (Ind., Feb. 20, 2020), reproduced in Pet. App. at 44.

The Hendricks County Superior Court Order Granting Defendants' Motion for Summary Judgment in Part and Denying Plaintiffs' Motion for Summary Judgment, *Himsel v. Himsel*, No. 32D04-1510-PL-150 (October 24, 2017), is reproduced in Pet. App. at 29–40. The Hendricks County Superior Court Order Granting Defendants' Motion to Correct Errors and Granting Summary Judgment, *Himsel v. Himsel*, No. 32D04-1510-PL-150 (February 9, 2018), is reproduced in Pet. App. at 41–42.

JURISDICTION

The Indiana Court of Appeals entered its judgment on April 22, 2019 upholding the trial court's

grant of summary judgment for Respondents. Pet. App at 1–28. By a 3–2 vote, on February 20, 2020 the Indiana Supreme Court denied review of that decision. Pet. App. at 44. The Himsels and Lannons now appeal the decision of the Indiana Court of Appeals and invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND INDIANA STATUTE AT ISSUE

At issue in this case are the following provisions of the United States Constitution and Indiana statute, reproduced below and in the Pet. App. at 45–48.

The Takings Clause of the Fifth Amendment to the United States Constitution provides that no "private property [shall] be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana's Right to Farm Act, IND. CODE § 32-30-6-9 (2005) provides that:

(d) An agricultural or industrial operation or any of its appurtenances is not and does not become a nuisance, private or public, by any changed conditions in the vicinity of the locality after the agricultural or industrial operation, as the case may be, has been in operation continuously on the locality for more than one (1) year if the following conditions exist:

(1) There is no significant change in the type of operation. A significant change in the type of agricultural operation does not include the following:

(A) The conversion from one type of agricultural operation to another type of agricultural operation.

(B) A change in the ownership or size of the agricultural operation.

(C) The:

(i) enrollment; or

(ii) reduction or cessation of participation;

of the agricultural operation in a government program.

(D) Adoption of new technology by the agricultural operation.

(2) The operation would not have been a nuisance at the time the agricultural or industrial operation began on that locality.

STATEMENT OF THE CASE

I. Legal Framework: Indiana Law of Nuisance, Trespass, and the Right to Farm Act

Indiana law provides a cause of action to abate conditions that are "offensive to the senses" or "an obstruction to the free use of property" "so as to essentially interfere with the comfortable enjoyment of life or property." IND. CODE § 32-30-6-6 (2002). This statute codifies the age-old common law doctrine of nuisance, which protects the property right to reasonably use and enjoy one's land. *See Indiana Motorcycle Ass'n v. Hudson*, 399 N.E.2d 775, 778 (Ind. Ct. App. 1980). Indiana's trespass law provides a cause of action for violations of the property right to exclusively possess one's land. *See Indiana Michigan Power Co. v. Runge*, 717 N.E.2d 216, 227 (Ind. Ct. App. 1999) ("trespass actions are possessory actions and . . . the right interfered with is the plaintiff's right to the exclusive possession of a chattel or land."). As in other states, nuisance and trespass claims under Indiana law are often brought at the same time when the interference with property rights is caused by the invasion of noxious substances. *See, e.g.*, *Lever Bros. Co. v. Langdoc*, 655 N.E.2d 577, 583 (Ind. Ct. App. 1995).

In 2005, the Indiana legislature amended the state's Right to Farm Act ("RTFA"), IND. CODE § 32-30-6-9 (2005), eliminating these remedies for existing landowners when large industrial farms are sited next to their property. As originally enacted in 1981, the RTFA protected only existing farms from nuisance

lawsuits by *newcomer* plaintiffs who "moved to the nuisance." Specifically, the 1981 version of the RTFA provided that "[n]o agricultural . . . operation or any of its appurtenances shall be or become a nuisance . . . by any changed conditions in the vicinity" of the operation (i.e., the arrival of new neighbors), after one year of continuous operations, as long as the nuisance is not created by a "significant change" in the hours or type of operation. IND. CODE § 34-1-52-4(f) (1981), *cited in Shatto v. McNulty*, 509 N.E.2d 897, 899–900 (Ind. Ct. App. 1987). Thus, the prior version of the statute codified the age-old "coming to the nuisance" doctrine. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *402 ("If my neighbour makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue.").

In 2005, the Indiana legislature radically altered the RTFA's scope by re-defining what is meant for an agricultural operation to undergo a "significant change" that would otherwise allow a nuisance claim. IND. CODE § 32-30-6-9(d)(1) (2005). As a result of the amendment, a "significant change" in an agricultural operation no longer includes "[t]he conversion from one type of agricultural operation to another," the "[a]doption of new technology," or a "change in the . . . size of the agricultural operation." IND. CODE § 32-30-6-9 (d)(1)(A), (B), (D) (2005); Pet. App. at 12, fn. 5. In other words, no matter how large, damaging, or odious the transformed operation may be, injured landowners

who were there first no longer have any nuisance remedy. Therefore, as observed by the Indiana Court of Appeals in this case, "[i]n light of the amendment, it is difficult to imagine what would constitute a significant change in the type of operation." Pet. App at 12, fn. 5. As that Court also acknowledged, "the coming to the nuisance doctrine, as applied by the RTFA, now encompasses coming to the *potential future* nuisance." Pet. App. at 14 (emphasis added).

Such is the situation here, where Respondents built an industrial-scale concentrated animal feeding operation ("CAFO") with 8000 confined hogs and massive waste pits on former cropland next to the Himsels' and Lannons' homes, where they and their families have lived for decades. As demonstrated below, that change was "significant" enough to cause unhealthy levels of noxious gases from millions of gallons of decomposing pig waste to continuously invade these families' properties, make living conditions unbearable, and cause their property values to plummet. Were it not for the 2005 amendment to the RTFA, that gross interference with the Himsels' and Lannons' lives and property would be an actionable nuisance for which state law would provide a remedy. *Himsel*, 122 N.E.3d at 943; Pet. App. at 15. That extreme interference would also be an actionable trespass but for the RTFA. *See id.* at 945; Pet. App. at 17. Put another way, the Indiana RTFA has stripped the Himsels' and Lannons' of their treasured property rights and deprived them of any remedy for the ongoing violation of those rights.

II. The Himsel's and Lannons

Petitioners Richard and Janet Himsel are a retired couple who reside on a twenty-six-acre farm in rural Hendricks County, Indiana. Their farmhouse was built in 1926 by Richard Himsel's parents, and is where Richard Himsel was born in 1941, grew up, and has lived most of his life. Janet Himsel, Richard's second wife, joined him there when the two were married in 1994. The couple stopped farming the land in 2000, but have continued to live out their retirement years in their family home. Pet. App. at 7, 30, 51, 73–75, 80, 134, 320–21, 324. Petitioners Robert and Susan Lannon live a short distance from the Himsel's. Robert Lannon built their home in 1971 on land that he already owned; Susan Lannon moved in after they were married in 1974. Their home of nearly 50 years is where the Lannons planned to live out their retirement years. Pet. App. at 7, 30, 103, 113–14, 122, 134.

For as long as the Himsels and Lannons have resided in their Hendricks County homes, they have lived happily alongside agriculture, including traditional livestock agriculture. Until 2013, when Respondents built their 8000-hog CAFO on nearby land, the Himsel's and Lannons' properties were surrounded by traditional farms that raise row crops and livestock. In particular, the Respondents' land where the CAFO now sits had always been cropland since at least 1941. None of those farms ever created untenable living conditions or adversely impacted the Himsel's and Lannons' properties in any way. Pet. App. at 4, 80, 89, 114, 119.

Prior to construction of the CAFO in 2013, the Himsels and Lannons greatly enjoyed gardening, growing flowers, and other outdoor activities. Pet. App. at 65–66, 94–95, 106, 119. Like other homeowners, they had every reason to believe that the law protected their vested property rights from unreasonable interference. Pet. App. at 120, 127–30. Accordingly, over the years they invested in developing and improving their properties with additions and outbuildings, and they beautified their homes with gardens and flowers. Pet. App. at 53–54, 65–66, 119, 147. Both couples also had every reasonable expectation of being able to sell their homes, if they so desired, for a substantial return on their investment. Pet. App. at 82, 116, 144. These expectations of profitable sale are consistent with the value of comparable parcels in the area that do not have a CAFO contaminating the air and property. Pet. App. at 131–44. However, neither couple had any plans to move. Pet. App. at 53, 122.

III. The Industrial Nature, Scale and Impact of CAFOs

The kinds of traditional farms in the area stand in sharp contrast to CAFOs, which have been proliferating in recent decades due to the industrialization and corporate consolidation of the meat industry. *See e.g.*, William D. McBride & Nigel Key, U.S. Dep't of Agric. Econ. Res. Serv., *U.S. Hog Production from 1992 to 2009: Technology, Restructuring, and Productivity Growth*, 10–15 (2013) [hereinafter McBride & Key, *U.S. Hog Production*] (reporting that between 1992 and

2009 "hog production consolidated considerably as fewer and larger farms accounted for an increasing share of total output" due in large part to vertical integration and production contracts between growers and corporate meat packers). Indeed, as of December 31, 2017, more than 70% of all farmed hogs in the United States were raised in confinement facilities with 5000 or more animals, 1 USDA 2017 CENSUS AGRIC. pt. 51, at 24 tbl.21 (2019) (reporting 52,701,285 hogs on farms with herd sizes of 5000 or more out of 72,381,007 total hogs), as compared to less than 50% in 1998. McBride & Key, *U.S. Hog Production* at 10, fig. 4.

Unlike the archetypical pig farm, a CAFO is optimized to produce thousands of animals quickly in a factory-like setting where the animals are confined indoors, densely packed in pens or crates. U.S. EPA, *Risk Assessment Evaluation for Concentrated Animal Feeding Operations* 6-9 (2004) [hereinafter EPA, *Risk Assessment*]; Carrie Hribar, Nat'l Assoc. of Local Bds. of Health, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, 1 (Mark Schultz ed., 2010) [hereinafter Hribar, *Understanding CAFOs*]. The tremendous quantities of waste the animals generate at just one CAFO are either collected in outdoor manure "lagoons" or in giant waste pits underneath the slatted-floor confinement buildings. EPA, *Risk Assessment* at 9, 13–14. As the waste decomposes in these cesspits, dangerous chemical compounds are released that would harm the animals if allowed to accumulate inside the confinement buildings. To avoid this outcome, the buildings are equipped with giant

ventilation fans that blow these hazardous emissions into surrounding lands, creating unlivable conditions and significant health risks for people living nearby. EPA, *Risk Assessment* at 63–66, 69; Hribar, *Understanding CAFOs* at 5–7; *see also* Pet. App. at 192.

Air pollutants from CAFOs are well-known to produce extremely noxious odors from a complex mixture of chemical compounds including volatile fatty acids, phenols and cresols, sulfides and mercaptans, ammonia, amines, nitrogen heterocycles and particulates. Long-term exposure to these chemical compounds can cause bronchitis, pulmonary disease, asthma, memory loss, heart disease, and even death. *See* Claudia Copeland, *Air Quality Issues and Animal Agriculture: A Primer*, Congressional Research Service 2–5 (Dec. 22, 2014); *see also* Hribar, *Understanding CAFOs* at 5–8; *see also* Dick Heederik et al., *Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations*, 115 ENVTL. HEALTH PERSP. 298, 299–300 (2007). And, unlike traditional farm smells, the noxious emissions from CAFOs greatly diminish quality of life, reduce property values, and alter the daily activities of people who live nearby. *See* Kelley J. Donham, et al., *Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations*, 115 ENVTL. HEALTH PERSP. 317–19 (2007).

IV. Respondents' CAFO and its Impact on the Himsels and Lannons

In 2013, Respondent Samuel Himsel rezoned his vacant cropland from "AGR-Agriculture Residential" to "AGI-Agriculture Intense." Pet. App. at 160, 164, 292. That rezoning allowed the land to be used for "intense agricultural uses such as CAFOs that emit intense odors, vibrations, air pollution, or other disruptions," while all surrounding properties, including the Himsel's and Lannsons' remain AGR-zoned where CAFOs are still prohibited. Pet. App. at 120, 129–30, 184, 266. Shortly after the rezoning, Samuel Himsel transferred his land to Respondent 4/9 Livestock, LLC ("4/9"), which then entered into a hog production contract with Respondent Co-Alliance, LLP ("Co-Alliance"). Pet. App. at 196–97, 255–56, 281, 298–310.

That contract required 4/9 to construct the new CAFO to Co-Alliance's specifications for the purpose of raising continuous batches of 8000 newly weaned pigs owned by Co-Alliance until they reach market weight, are shipped out, and a new batch of piglets is brought in—approximately every six months. Pet. App. at 292, 298. The CAFO has two 33,500 square-foot hog confinement buildings, each with a massive waste pit underneath for collecting the nearly four million gallons of hog feces, urine and other animal waste that is generated annually by the facility. Pet. App. at 174, 192, 292, 316. Respondents, emboldened by their understanding that they would be sheltered from liability by Indiana's RTFA, Pet. App. at 177, 193, then built their hog factory a quarter-mile upwind of the Himsels' home, and

a half-mile upwind of the Lannons' home. Pet. App. at 209–10, 286–90.

Since then, the CAFO's pig waste emissions are continuously blown by the ventilation fans and carried with the prevailing winds directly to the Himsels' and Lannons' homes and properties. Pet. App. 192, 241–42, 320. In fact, elevated levels of ammonia from the CAFO were measured by air testing at the Himsel's and Lannons' homes at 25.5–118.2 parts per billion ("ppb")—far exceeding ordinary levels of 0.2–4.0 ppb in an analogous rural area that has no CAFO fouling the air. Pet. App. at 236–38. Similarly, the concentration of volatile fatty acids on their properties has been measured to be about twenty-eight times higher than the level at which people typically begin to smell these substances. Pet. App. at 230–36. Although invisible to the naked eye, these emissions are chemical compounds that burn the Himsel's and Lannons' noses, throats and eyes. Pet. App. at 55, 67, 83–84, 88–89, 108. Indeed, as explained by Petitioners' uncontested expert, these emissions are "space-filling compounds" that "occupy a discrete portion of the Himmel's and Lannons' properties." Pet. App. at 241–42.

Even with the windows and doors shut, the putrid emissions at times permeate the *inside* of Petitioners' homes, making it difficult for them to live, eat, and sleep. Pet. App. at 60, 62, 84, 108, 119, 320. Indeed, Janet Himsel was advised by her physician to limit her contact with these emissions to avoid the adverse effects on her health. Pet. App. at 55, 83, 320. The families' ability to enjoy social and family gatherings,

including holiday traditions, has been ruined, and the Himsel's grandchildren no longer visit. Pet. App. at 83–84, 94–95, 122. Overall, the frequent invasion of the CAFO's noxious emissions has rendered the Himsel's and Lannons' homes unlivable at times; their long-owned properties are worth less than half what they were before the CAFO was built, Pet. App. at 144; and their ability to enjoy the outdoors and the rural way of life that they and their families had enjoyed for decades has been greatly diminished. Pet. App. at 320–21.

V. Procedural History of the Litigation

On October 6, 2015, the Himsels and Lannons filed suit against Respondents asserting nuisance and trespass claims for the CAFO's toxic emissions invading their property and destroying their ability to use and enjoy it. Pet. App. at 338–43, 345. Regarding their trespass claim, Petitioners specifically alleged that "[f]rom October 6, 2013 to the present date, the Defendants negligently and/or knowingly and intentionally caused or allowed animal waste, air pollutants, harmful gases, and noxious odors to regularly enter and invade properties owned and/or possessed by Plaintiffs thereby causing a continuing trespass on property owned and/or possessed by Plaintiffs." Pet. App. at 345. Petitioners also alleged that if the RTFA is held to bar their claims without just compensation, this would be an unconstitutional takings in contravention of the Takings Clauses of both the Indiana and Federal Constitutions. Pet. App. at 347–49. On December 18, 2015, the State

of Indiana was granted intervention to defend the constitutionality of the statute. *See* Pet. App. at 8.

Respondents moved for summary judgement on all of the claims. Petitioners opposed summary judgment, and, in support of their opposition, submitted expert reports demonstrating that the CAFO was in fact spewing noxious odors and particles onto their land. *See*, *e.g.*, Affidavit of Mark Chernaik, Ph.D., Pet. App. at 241–42 ("[t]he evidence I gathered demonstrates that chemicals with noxious odors emitted by the CAFO have *traveled onto the Himsel's and Lannons' property*") (emphasis added); *see also id.* ("the fatty acids and ammonia found on the Himsel's and Lannons' properties at levels above their odor detection thresholds are *space-filling* compounds that were occupying a discrete portion of the Himsel's and Lannons' properties") (emphasis in original); *see also id*. (this invasion "of noxious chemicals emitted by defendants' CAFO is ongoing"). Petitioners also provided expert testimony that, as a direct result of this contamination, their property values had dropped significantly. *See* Affidavit of Nick A. Tillema, Pet. App. at 144 (assessing a 60% devaluation of the property value for the Himsels, and a 49.5% devaluation for the Lannons). Although Defendants took the position that such testimony was irrelevant as a legal matter, they did not produce any contrary evidence on either point.

The trial court initially denied the Parties' cross-motions for summary judgment, finding that genuine issues of material fact remained for both the nuisance and trespass claims, thereby rendering the

constitutional questions unripe for review. Pet. App. at 37–40. However, in response to a "Motion to Correct Error" filed by Respondents, the trial court then reversed itself and, with no further explanation, stated that "there are no genuine issues of material fact and Defendants are entitled to summary judgment as a matter of law on all of Plaintiffs' claims." Pet. App. at 41–42.

The Indiana Court of Appeals affirmed, concurring that the RTFA's 2005 amendment bars *all* of the Himsel's and Lannons' tort claims because Respondents' switch from crops to a CAFO no longer constitutes a "significant change . . . in the type of agricultural operation . . . as *strictly defined* under subsection (d)(1) of the RTFA." Pet. App. at 12–17 (emphasis added). The Indiana Court of Appeals also rejected the Himsel's and Lannons' state and federal takings claim. Pet. App. at 20–23.

Thus, notwithstanding the fact that as a direct result of the CAFO's operation, noxious chemical compounds and other noisome and toxic pig waste particles regularly invade the Himsel's and Lannons' properties, and greatly interfere with their ability to live comfortably in their own homes, the Indiana Court of Appeals held that the amended RTFA categorically bars any remedy. Underscoring how the Appellate Court's decision was governed by the plain text of the 2005 RTFA amendment, the Court explained that "[t]his is not a case where the Plaintiffs moved to the nuisance *as that expression is typically understood."* Pet. App. at 14 (emphasis added). Instead, in the wake of the statutory

amendment providing that a change "from crops to livestock" is no longer considered a "significant change in the type of operation," the court held that "no significant change has occurred . . . as strictly defined" by the RTFA. Pet. App. at 12. Indeed, the Court of Appeals acknowledged that, in light of this statutory amendment, "it is *difficult to imagine what would constitute a significant change in the type of [agricultural] operation.*" Pet. App. at 12, fn. 5 (emphasis added). Nevertheless, the Court understood that it was bound to follow the plain text of the statute.[1] Thus, in the words of the Court of Appeals, "the coming to the nuisance doctrine, as applied by the RTFA, now encompasses coming to the potential *future* nuisance." Pet. App. at 14 (emphasis added).

Based on this plain language, the Court of Appeals also held that "Plaintiffs' trespass claim is barred by the RTFA." Pet. App. at 17. In reaching that conclusion, the Court declared that "application of the RTFA does not turn on labels," and that the trespass claim was nothing more than "artful pleading." Pet. App. at 17.

The Court of Appeals also rejected the Himsel's and Lannons' claim that the RTFA effects an unconstitutional takings of their property rights. Pet. App. at 20–23. In so doing, the Court agreed that their "property rights are clearly affected by application of the

[1] For this same reason, the Court of Appeals noted that "[t]he Plaintiffs also acknowledge that no significant change has occurred in the type of the agricultural operation at the Farm, as strictly defined under subsection (d)(1) of the RTFA." Pet. App. at 14.

RTFA," but held that the Indiana statute is not a takings because the Himsels and Lannons "have not been deprived of all or substantially all economic or productive use of their properties," and because the RTFA is "reasonably related to the promotion of the common good." Pet. App. at 22–23.

The Himsels and Lannons petitioned for transfer to the Indiana Supreme Court (Indiana's equivalent of a petition for certiorari). Following oral argument, that Court denied the petition in a split 3–2 decision, thereby allowing the Appeals Court opinion to stand. Pet. App. at 44. Accordingly, the Himsels and Lannons now seek redress from this Court because their case raises important issues of federal constitutional law that are far broader than their individual claims for relief.

REASONS FOR GRANTING THE WRIT

I. The Indiana Decision Conflicts with This Court's Takings Jurisprudence.

This Court should grant certiorari because the Indiana Court of Appeals decided an important issue of federal constitutional law that should be decided by this Court—i.e., whether a state may, consistent with the Takings provisions of the Fifth and Fourteenth Amendments of the U.S. Constitution, eliminate all remedies for the invasion of noxious fumes and particles from a large industrial hog farm that is sited next to *existing* landowners and ruins the families' ability

to enjoy their homes and property where they have lived for decades. Because the Indiana Court of Appeals held that such a law is *not* a taking, contrary to this Court's jurisprudence, and the Indiana Supreme Court has allowed that erroneous decision to stand, certiorari review is warranted and necessary.

A. The RTFA has Deprived these Families of Their Vested Property Rights of Exclusive Possession and Use.

Indiana's amended RTFA interferes with a maxim more ancient and universal than even the common law—i.e., the universal understanding that the owner of property may not use it in a way that unreasonably injures his neighbor. *See generally* Melius De Villiers, *Nuisances in Roman Law*, 13 L.Q. REV. 387 (1897) (detailing the treatment of neighbors' liability for nuisances in ancient Rome as compiled in the *Digest* of Emperor Justinian). This long-held legal principle arose in agricultural societies and was developed in the earliest reported nuisance cases that often, as here, related to concentrations of hogs. *See*, *e.g.*, *William Aldred's Case*, (1611) 77 Eng. Rep. 816, 9 Co. Rep. 57a (K.B.) (holding that "an action on the case lies for erecting a hog stye so near the house of the plaintiff that the air thereof was corrupted").

The ancient rights of neighbors to be free from neighborly invasion, whether the kind of invasion that interferes with exclusive possession (trespass) or the kind that interferes with use and enjoyment

(nuisance), have always been a key part of the "bundle of rights" that make up "property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). Thus, the government's power to spirit away any one of these fundamental property rights without just compensation is extremely limited. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005) (explaining that the "Takings Clause 'does not prohibit the [government] taking of private property, but instead places a condition on the exercise of that power'" by "'barring 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.'" (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987) and *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Yet, when the Indiana legislature amended the RTFA in 2005 to eliminate remedies that vindicate *already vested* property rights, it overstepped these foundational constitutional limits. Indeed, this Court has long recognized that there is "no right without a remedy." *Hawkins v. Barney's Lessee*, 30 U.S. 457, 463 (1831); *see also Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, *if the laws furnish no remedy for the violation of a vested legal right*.") (emphasis added). Yet, that is precisely what the RTFA has done here by depriving the Himsels and Lannons of *any* remedy for the

violation of their *long-vested legal property rights* to use, enjoy and exclusively possess their land and homes.

B. This Court's Regulatory Takings Jurisprudence

Under this Court's takings jurisprudence, a government regulation of private property that goes "too far" is a takings in violation of the Fifth and Fourteenth Amendments to the United States Constitution unless accompanied by just compensation. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). What it means for a regulation to go "too far" is not always clear, but this Court has recognized at least "two categories of regulatory action that generally will be deemed *per se* takings." *Lingle*, 544 U.S. at 538; *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–16 (1992); *Loretto*, 458 U.S. at 430; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

One *per se* takings is when a law "requires an owner to suffer a *permanent physical invasion of her property—however minor*—it must provide just compensation," because the right of exclusive possession is "perhaps the most fundamental of all property interests." *Lingle*, 544 U.S. at 538, 539 (emphasis added) (citing *Loretto*, 458 U.S. at 433; other internal citations omitted). Indeed, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), a relatively minor physical invasion allowed by a newly enacted state law—i.e., requiring the owner of an apartment

building to allow installation of small cables and metal boxes on her rooftop to facilitate tenants' access to cable television services—was found to be a takings. 458 U.S. at 421–22, 438.

Like the Indiana Appellate Court's conclusion here that the RTFA is not a takings because it serves the "common good" and has not completely obliterated all "economic or productive use" of the Himsel's and Lannons' properties, *Himsel*, 122 N.E.3d at 947–48, the lower court in *Loretto* held that the state law at issue was not a takings because it served "the legitimate public purpose" of increasing cable TV access and did not have "an excessive economic impact." *Loretto*, 458 U.S. at 425. Categorically rejecting that view, this Court held that when a government action results in any permanent physical invasion of property, a takings has occurred "*without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner*." *Id.* at 434–35 (emphasis added).

The second category of *per se* regulatory takings is when regulation "completely deprive[s] an owner of '*all* economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (second alteration in original) (quoting *Lucas*, 505 U.S. at 1019). Notably, in establishing this *per se* rule, this Court has unequivocally limited its application to those instances where the regulation goes beyond "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029.

Specifically, in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), this Court explained:

> A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise. On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, *but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles*. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.

505 U.S. at 1029–30 (emphasis added). This principle stands in stark contrast to what Indiana has done here

by enacting a statute that *encourages* the creation of harmful nuisances and trespasses that are otherwise unlawful.

Aside from these two *per se* categories, all other regulatory takings challenges—i.e., those not based on physical invasions or total economic deprivations—are analyzed under the test established in *Pennsylvania Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *Lingle*, 544 U.S. at 538. Under *Penn Central*, courts apply a balancing test that considers: (1) "the economic impact of the regulation on the claimant and, particularly"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action." *Lingle*, 544 U.S. at 538–39 (cleaned up) (citing *Penn Central*, 438 U.S. at 124). Each of these three inquiries as reflected in *Loretto*, *Lucas*, and *Penn Central*, "aims to identify regulatory actions that are functionally equivalent to the classic takings" and, "[a]ccordingly, focuses directly upon the *severity of the burden that government imposes upon private property rights*." *Lingle*, 544 U.S. at 539 (emphasis added). For this reason, "[a] permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others" and is a *per se* takings. *Id.*

Contrary to all of this settled precedent, the Indiana Court of Appeals found no takings here, even though it held that the RTFA bars the Himsel's and Lannons' trespass claim based on the ongoing *physical invasion of their property*, and also bars their nuisance

claim for the continuing and extreme interference with their ability to use and enjoy their homes. Thus, based solely on the wording of Indiana's amended RTFA, the Indiana Court of Appeals has forced the Himsels and Lannons to relinquish their fundamental property rights of exclusive possession, use and enjoyment, without any remedy whatsoever. Such a holding is contrary to what this Court has found the Takings Clause to require, and hence, particularly because as explained *infra*, such legislation is on the rise in many states throughout the country, cries out for relief from this Court.

C. The Indiana Court of Appeals Erroneously Held that the RTFA Was Not a *Per Se* Takings Under *Loretto*.

The Court of Appeals misapplied this Court's clear precedent when it summarily rejected Petitioners' trespass claim as demonstrating a *per se* takings of the Himsel's and Lannons' property under *Loretto*. As discussed above, *Loretto* draws a bright-line rule that "a permanent physical occupation authorized by government is a takings without regard to the public interests that it may serve." 458 U.S. at 426. Indeed, in that case this Court stressed that "a permanent physical occupation of another's property . . . is perhaps the most serious form of invasion of an owner's property." *Id.* at 435. This is because "property law has long protected an owner's expectation that he will *be relatively undisturbed at least in the possession of his property*." *Id.* at 436 (emphasis added). Here, however, as the

uncontested record below demonstrates, the Himsels and Lannons are *very disturbed in the possession of their property*—i.e., due to the noxious fumes and particles that regularly invade their land, they are actually forced to *vacate* their homes from time to time, and can no longer even have their grandchildren over to visit. Pet. App. 83–84.

This Court has repeatedly and unambiguously reaffirmed the *Loretto* rule. *See*, *e.g.*, *Lingle*, 544 U.S. at 539; *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831–32 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Moreover, this Court has also made clear that such physical invasions are not limited to the erection of unwanted structures such as the cable boxes in *Loretto.* Rather, they also include invasions "by superinduced additions of water, earth, sand, *or other material*." *Loretto*, 458 U.S. at 427 (emphasis added) (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1871)). Here, the record unequivocally demonstrates that the CAFO blows both acrid fumes and "space-filling" noxious chemicals onto Petitioners' lands. Pet. App. at 241.

The Indiana Court of Appeals ignored *Loretto* when it held that that the RTFA may constitutionally preclude Himsel's and Lannons' trespass claim. Although acknowledging that they had alleged an "unlawful physical invasion" by substances including "animal waste" and other CAFO emissions—"chemical compounds that result in a physical, space-filling invasion into their homes,"—the Court nevertheless held

that the amended RTFA categorically bars their trespass claim. Pet. App. at 17. That is, without providing for just compensation, the state court interpreted Indiana's RTFA as barring the Himsel's and Lannons' attempt to remedy a permanent physical invasion, in direct contradiction of the bright-line rule articulated by this Court in *Loretto*, 458 U.S. at 426, and reaffirmed many times. *See*, *e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Lingle*, 544 U.S. at 539; *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010). Therefore, the Court should grant certiorari for this reason alone.

D. The Indiana Court Also Erroneously Held that the RTFA Passed Constitutional Muster Under the *Penn Central* Balancing Test.

Although this case involves a *per se* takings under *Loretto*, the Court of Appeals also misapplied this Court's takings doctrine when it held that the Himsels and Lannons also had not suffered a regulatory takings under the balancing test set forth in *Penn Central*. Again, that test requires a court to consider: (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered with the plaintiff's reasonable investment-backed expectations, and (3) the character of the government action. *Penn Central*, 438 U.S. at 124. Ignoring the Himsel's and Lannons' evidence entirely, the Indiana Court of Appeals declared that these families "have alleged no distinct, investment-backed expectations that have been

frustrated by the CAFO," *Himsel*, 122 N.E.3d at 948, and that the amended RTFA serves the important policy of "encourag[ing] the development and improvement of its agricultural land for the production of food and other agricultural products." *Id.* at 948 (quoting IND. CODE § 32-30-6-9(b) (2005) to explain the RTFA's preferential treatment of farmers). As discussed below, the Court of Appeals' statement about Petitioners' demonstrated expectations is patently wrong, and, in fact, each of the three *Penn Central* factors are met here.

a) Economic Impact

The economic impact factor addresses "the nature and extent of the interference with rights in the parcel as a whole." *Penn Central*, 438 U.S. at 130–31. At the extreme end of the spectrum, a complete deprivation of economically viable use of land is a *per se* takings. *See Lucas*, 505 U.S. at 1017–18. But takings need not be so extreme. For example, in *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23 (2012), this Court held that even the partial interference with property rights caused by "government-induced flooding of limited duration" was sufficient to require just compensation by the government. 568 U.S. at 34.

Here, the operation of Respondents' CAFO has had drastic economic consequences for the Himsels and Lannons, yet the RTFA strips them of all legal recourse. In purely monetary terms, the Lannons' and

Himsel's property values have decreased by approximately 60% and 49.5%, respectively. Pet. App. at 22. Furthermore, by restricting all legal remedies, Indiana is forcing the Himsels and Lannons to make the difficult decision of whether to continue to endure extreme nuisance conditions—including overwhelming odors of manure and ammonia; burning of the eyes, nose, and throat; and toxic fumes with adverse health effects—or to suffer significant economic loss by selling their homes and moving. Their dilemma is directly and indisputably caused by the RTFA-immunized hog factory. Moreover, in addition to suffering quantifiable economic loss, the Himsels and Lannons have been deprived of losses that are less quantifiable but no less salient, including the ordinary pleasures of life such as gardening, hosting gatherings of friends and family, and, in the Himsel's case, having their grandchildren over to visit. Therefore, the first factor of *Penn Central* weighs in favor of finding that the RTFA affects a takings here.

b) Investment-Backed Expectations

The second *Penn Central* factor is "the extent to which the regulation has interfered with [the plaintiff's] distinct investment-backed expectations." 438 U.S. at 124. A classic example is *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), where this Court found unconstitutional a Pennsylvania statute that banned mining to prevent subsidence (the gradual sinking of an area of land), because the statute interfered with the mining company's reasonable investment-backed

expectation—specifically the *right to cause subsidence*—when it sold the surface rights over its mines. 260 U.S. at 414–15, *cited in Penn Central*, 438 U.S. at 127–28.

Like the mining company in *Pennsylvania Coal*, the Himsels and Lannons purchased their homes with the reasonable expectation of a return on their investment and the ability to use the property rights they acquired. Furthermore, the Himsels and Lannons have invested in more than their *initial* property rights, which alone was sufficient to find distinct investment-backed expectations in *Pennsylvania Coal*. The record demonstrates that Petitioners also invested substantial time and money in making various home improvements. Thus, these families reasonably expected an *even higher* return on their property investment that they would have been able to realize were it not for the fact that Indiana's RTFA has allowed a feces-spewing hog factory to be situated next to their homes, depriving them of any semblance of normal life, and cutting their property values in half, with no attendant liability.

Indeed, the RTFA has had an especially severe and direct impact here: the record shows that Respondents' understanding that the RTFA would protect them from all liability was a major reason they sited their CAFO near the Himsels and Lannons. On the other hand, the RTFA could not have informed any of the Himsel's and Lannons' home investment decisions because the law as amended in 2005 did not exist when they purchased their homes, and had no relevance to

them until the CAFO began operating in 2013. Thus, contrary to the Appeals Court declaration that these families "alleged no distinct, investment-backed expectations that have been frustrated by the CAFO," *Himsel*, 122 N.E.3d at 948, the Himsels and Lannons, alleged—and proved—that they had already purchased, maintained, and improved their homes with the very real and reasonable expectation that they would be able to live there in peace, and would be able to sell their homes at a fair price should they decide to move. By allowing the CAFO to cut their home values in half, and forcing them to either live with unbearable conditions or move at a substantial financial loss, the RTFA has indisputably interfered with the Himsel's and Lannons' distinct, investment-backed expectations. Accordingly, this factor also weighs in favor of finding an unconstitutional takings here.

c) Character of the Government Action

The third *Penn Central* factor involves the character of the government action. 438 U.S. at 124. Under this factor, a physical invasion of property is more likely to be a takings than a regulatory program that merely redistributes economic benefits in the public interest. *Id*. In addition, a takings may occur if the government action "interfere[s] with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property'. . . ." *Id.* at 125. Here, even if the Himsels and Lannons were not suffering a physical invasion, the government action is no mere economic regulation. Rather, the RTFA allows

direct infringement on Petitioners' property rights to an extraordinary extent—putting the Himsel's and Lannons' health at risk, and greatly degrading the value, and limiting the use and enjoyment, of their properties.

For that matter, the traditional role of government has been to regulate private property to *prevent* nuisances, not to *encourage* them. *See*, *e.g.*, *Lucas*, 505 U.S. at 1022. This is in fact the essence of the "police power" invoked in takings law, as giving the government the power "to enjoin a property owner from activities akin to public nuisances" without payment of just compensation. *Id.* In sharp contrast, the RTFA operates to *incentivize* otherwise unlawful and harmful nuisances—precisely what occurred here.

Indeed, a decision by a state legislature that homeowners who have resided lawfully in their existing homes for decades no longer have the right to live there without sacrificing their health and overall quality of life—or can no longer enforce basic property rights in court—could scarcely be anything *but* a takings. The RTFA abolishes the Himsel's and Lannons' long-vested property rights for the ostensible public good of allowing industrial-scale pork production. It is therefore precisely the kind of confiscatory legislation that the federal Takings Clause is designed to prohibit. *See Penn Central*, 438 U.S. at 123 ("[T]he 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens. . . .'" (alteration in original)). Accordingly, for this reason also, the Court should grant certiorari and

allow Petitioners to pursue their nuisance and trespass claims.

II. The Indiana Court Has Decided An Important Federal Question That Conflicts With Decisions Of Other State Courts And That This Court Should Settle.

Review by this Court is also warranted to correct divergent views among the states as to when an unconstitutional takings occurs—particularly with respect to the kind of nuisance and trespass caused by siting a massive CAFO next to long-time homeowners' properties.

In interpreting federal takings jurisprudence, state courts have evinced a lack of uniformity regarding whether or when government-sanctioned physical invasions and nuisances constitute regulatory takings. As discussed above, the Indiana Court of Appeals concluded they do not. Instead, that Court stated that "[r]egulation . . . effects a takings *only* where it 'deprives an owner of all or substantially all economic or productive use of his or her property.'" Pet. App. at 22 (quoting *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 577 (Ind. 2007)) (emphasis added). In addition to being blatantly inconsistent with this Court's takings jurisprudence,[2] Indiana's test is at odds with the standards applied by other state courts.

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[2] This Court in *Lucas* made clear that losing all economically beneficial use of one's property is just *one* sufficient condition for establishing a *per se* takings. 505 U.S. at 1015.

For example, Arkansas courts take a starkly different approach. When a government-constructed sewage pipe overflowed—subjecting landowners to the smells, health effects, and other problems associated with the resultant waste—the Arkansas Supreme Court held that "a continuing trespass or a continuing nuisance over a long period of time upon [homeowners'] lands" was a takings within the meaning of the federal Takings Clause. *City of Fayetteville v. Stanberry*, 305 Ark. 210, 213 (Ark. 1991). Thus, unlike in Indiana, governmental imposition of continuing trespasses or nuisances *is* sufficient to find a takings in Arkansas, even if the imposition is impermanent and revocable.

Georgia courts' decisions on when a government-sanctioned nuisance constitutes a takings further evince the divergent application of this important constitutional doctrine. Georgia's Supreme Court held that property "owners have clearly stated a claim of inverse condemnation in alleging that the odors and noise from [a] county's sewage plant have interfered with their right to use, enjoy, and dispose of their property." *Duffield v. DeKalb County*, 242 Ga. 432, 434 (Ga. 1978). Thus, without clearly stating the test used to reach that conclusion—and unlike the Indiana rule—the Georgia Supreme Court also held that a government-imposed nuisance without just compensation constitutes a takings.[3]

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[3] While the Georgia Supreme Court was formally analyzing takings prohibitions under its *state* constitution, those

Of course, nothing in these courts' tests is limited to the context of *human* waste. Nor should that line be drawn—livestock waste, like human waste, is *animal* waste that can cause a myriad of health concerns, devalue property, and decimate the quality of life for homeowners forced to live near it. Therefore, if the government commits a takings through the imposition of feces-spewing structures and the denial of any remedy, then, *ipso facto*, government action that creates *the same result* by allowing a feces-spewing industrial hog facility to be built near someone's home, and then denying that homeowner any remedy, must also be a takings. Holding otherwise gives a special "pass" or constitutional carve-out for one kind of industry over others, even though the harms imposed by such industries are no less consequential.

Moreover, even within the narrower context of CAFOs and RTFAs, disagreement about what constitutes a takings is widespread among the states. For example, in *Bormann v. Board of Sup'rs In & For Kossuth County*, 584 N.W.2d 309 (Iowa 1998), the Iowa Supreme Court struck down Iowa's RTFA, holding that barring nuisance suits against CAFOs effects an easement and, therefore, violated the federal Takings Clause. 584 N.W.2d at 321. Therefore, had Iowa's legislature passed a statute identical to Indiana's RTFA,

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prohibitions are "the equivalent" of those "contained in the Fifth and Fourteenth Amendments to the Federal Constitution." *Barrett v. Hamby*, 235 Ga. 262, 267 (Ga. 1975) (Gunter, J., concurring).

the Iowa Supreme Court's logic would have also deemed that statute a takings.[4]

Moreover, Iowa is not alone in that interpretation. In Minnesota, a district court found *Bormann* "persuasive," though it ruled against the homeowners on other grounds. *Overgaard v. Rock Cty. Bd. of Comm'rs*, No. 02-601, 2003 U.S. Dist. LEXIS 13001, at *21–22 (D. Minn. July 25, 2003). Indiana, on the other hand, has rejected *Bormann*, finding no support for the "seemingly unique" Iowa doctrine in Indiana law. *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1259 (Ind. Ct. App. 2009) ("expressly declin[ing] the Lindseys' invitation to adopt Iowa's proposition that the right to maintain a nuisance [as] contained in the [RTFA] creates an easement.").

These divergent outcomes based on states' unique property laws are themselves reasons for this Court to review this matter. Under the Supremacy Clause, U.S. Const. art. VI, ¶ 2, whether a government action is a takings does not depend on the peculiarities of each state's property laws. *See*, *e.g.*, *Lucas*, 505 U.S. at 1033 ("If the Takings Clause is to protect against temporary deprivations, as well as permanent ones, its enforcement must not be frustrated by a shifting background

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[4] In *Bormann*, the court considered principles of state property law under which an invasion of private property creates an easement. 584 N.W.2d at 315–16 (holding that the right to maintain a nuisance gives rise to an easement under Iowa state law, and that such easements require just compensation under the federal Takings Clause).

of state law.") (Kennedy, J., concurring). Thus, if barring nuisance or trespass suits against a CAFO violates the Constitution in one state, then it should do so in *all* states. Indeed, if it were otherwise, Iowa's state legislature could simply rewrite its state's property laws such that the *same invasion* causing the *same harm* would no longer represent a takings. Surely such end-runs around constitutional requirements should not be countenanced.

As discussed *supra*, the conclusions reached by courts in Arkansas, Georgia, Iowa, and Minnesota follow naturally from this Court's precedents. However, this Court has not yet drawn a precise line on the issue of when a government-sanctioned nuisance constitutes a takings. Therefore, courts, such as the Indiana Court of Appeals, as well as legislators, like those who adopted Indiana's updated RTFA, seem unaware that such a line even exists. Indeed, even academics have observed "uncertainty, unpredictability, and general lack of doctrinal coherence" in nuisance and takings law that prevail "even more" when the two doctrines intersect. Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U. L. REV. 819, 821–22 (2006). Therefore, settling this "seemingly ad hoc nature of nuisance and takings analysis," *id*. at 822—and doing the same for the intersection of trespass and takings—would provide these states some much-needed uniformity.

This lack of uniformity among the states has gained particular urgency in recent years, given the

pace at which states are amending their RTFAs at the behest of the CAFO industry to add provisions like the one at issue here. In 2000, Colorado became among one of the first states to enact a RTFA amendment barring nuisance suits when agricultural operations undergo certain major changes, as the Indiana legislature has now done. *See* COLO. REV. STAT. § 35-3.15-102 (2000). More recently, in 2013 North Carolina amended its RTFA, using language similar to the Indiana statute, to limit the types of "changes" in operation that qualify as "fundamental" and hence subject to nuisance claims. N.C. GEN. STAT. ANN. § 106-701(a)(1) (LexisNexis 2013) (amended 2018) (establishing safe harbor from nuisance suits for agricultural operations for "[a] change in ownership or size," "[e]mployment of new technology," or "[a] change in the type of agricultural . . . product produced").

Thus, under the amended Colorado, Indiana, and North Carolina statutes, homeowners can no longer sue an agricultural operation that implements *any* new technology for a nuisance caused by that technology, no matter how intrusive the technology may be on a homeowner's property rights. In Indiana and North Carolina, the same is true of changing the operation's size, no matter how large the operation becomes. The result is that, in these states—like in Indiana—even if a farm transitions from crops or small-scale livestock farming to a massive CAFO spraying manure and emitting noxious fumes onto neighboring land, nearby homeowners have absolutely no recourse when they lose the ability to use and enjoy their property.

Utah, Nebraska, and Oklahoma have more recently enacted RTFA legislation to include similar provisions as the one challenged here. UTAH CODE ANN. § 4-44-102(2) (LexisNexis 2019) (establishing safe harbor from nuisance suits for agricultural operations for "[a] change in ownership or size," "[e]mployment of a new technology," or "[a] change in the type of agricultural product produced"); NEB. REV. STAT. ANN. § 2-4403(2) (LexisNexis 2019) (establishing a two-year statute of limitations for nuisance actions "against a farm or farm operation" that commences "after the condition which is the subject matter of the suit reaches a level of offense sufficient to sustain a claim of nuisance," with no provisions for resetting that time for any major, significant, or fundamental changes); OKLA. STAT. ANN. tit. 50 § 1.1 (LexisNexis 2017) (amended 2019) (establishing safe harbor from nuisance suits for agricultural operations if "[t]he physical facilities of the farm or ranch are subsequently expanded or new technology adopted").

And West Virginia and Georgia currently have such legislation pending. *See* H.B. 2774, 84th Leg., 2nd Sess. (W. Va. 2020) (would establish safe harbor from nuisance suits for agricultural operations for "[i]ntroducing technology to an existing agricultural operation" or "[a]ny other change that is related and applied to an existing agricultural operation"); H.B. 545, 155th Gen. Assemb., Reg. Sess. (Ga. 2020) (would create a one-year statute of limitations for nuisance actions "against any agricultural facility, agricultural operation, any agricultural operation at an agricultural

facility, agricultural support facility, or any operation at an agricultural support facility," and establishing that such time does not reset for "[t]he addition or expansion of physical facilities," "[t]he adoption of new technology," "[a] change in or size of an operation or facility", "[a] change in type of operation," or "[a] transfer of ownership.").

Therefore, a decision from this Court clearly delineating when a statute barring claims for nuisance and trespass constitutes a takings is needed to provide uniformity for the states, courts, CAFO operators, and homeowners alike. Otherwise, such inconsistent deprivations of valuable property rights will continue to proliferate, and families such as the Himsels and Lannons who have lived peaceful rural lives for decades will be unconstitutionally deprived of those rights, as well as any ameliorative relief.

CONCLUSION

For the foregoing reasons, the Court should grant the requested writ of certiorari.

Respectfully submitted,

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