No. 20-72

In the Supreme Court of the United States

JANET HIMSEL, ET AL.,

Petitioners,

v.

4/9 LIVESTOCK, LLC, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Indiana

BRIEF OF THE NON-GOVERNMENTAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Indiana, like every other State, has adopted a Right to Farm Act to "reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance." Indiana Code § 32-30-6-9(b). The Act limits the availability of state-law nuisance actions with respect to agricultural operations.

Petitioners' properties are located in rural Indiana near the land owned by one of the Respondents—in an area that has long been farmed and zoned for agricultural uses. The individual Respondents, second- and third-generation farmers, decided to establish a hog-farming operation on a portion of their land. They obtained the necessary zoning changes, construction and operation permits, and environmental permits and began operations in October 2013. Two years later, Petitioners commenced this action alleging claims in trespass and nuisance based on the odors and airborne emissions produced by the hog-farming operation. The Indiana courts held Petitioners' nuisance claims were precluded by the Right to Farm Act, ruled that Petitioners' trespass claims should be treated as nuisance claims as a matter of state law because they were a repackaged version of the nuisance claims, and determined that the application of the Act did not effect a regulatory taking of Petitioners' property.

The question presented is:

Whether the application of Indiana's Right to Farm Act, Indiana Code § 32-30-6-9, to preclude Petitioners' nuisance claims constituted a regulatory taking without compensation violative of the federal Constitution.

RULE 29.6 STATEMENT

Respondents 4/9 Livestock, LLC, and Co-Alliance, LLP, are nongovernmental entities. Neither has a parent company and neither has 10% or more of its stock owned by a publicly held company

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STATUTE INVOLVED

Indiana's Right to Farm Act, Indiana Code § 32-30-6-9, provides[1]:

(a) This section does not apply if a nuisance results from the negligent operation of an agricultural or industrial operation or its appurtenances.

(b) The general assembly declares that it is the policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. The general assembly finds that when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations, and many persons may be discouraged from making investments in farm improvements. It is the purpose of this section to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.

(c) For purposes of this section, the continuity of an agricultural or industrial operation shall be considered to have been interrupted when the operation has been discontinued for more than one (1) year.

(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

[1] The petition (Pet. 3) omits subsections (a)-(c) of the Indiana statute.

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

A. Legal Background

Right to farm laws "share the common goal of encouraging farmers to continue devoting their land to agricultural purposes" and embody "recognition of the fact that a serious effort must be made to prevent the destruction of America's agricultural base."

Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 Pitt. L. Rev. 289, 289 (1984). These laws vary in their particular provisions, but typically provide farmers with a defense against nuisance actions based on farming operations. Every State has adopted a right to farm law. See National Agricultural Law Center, *Right-To-Farm: Typical Provisions* (Jan. 2020), https://nationalaglawcenter.org/state-compilations/right-to-farm-provisions/.

The Indiana Right to Farm Act ("RTFA") declares that it is the State's policy "to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products" and finds that "when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits," which discourage "investments in farm improvements." Indiana Code § 32-30-6-9(b). The purpose of the law is "to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance." *Ibid.*[2]

To qualify for the statute's protection, an agricultural operation must (1) have operated continuously for more than a year; (2) have not undergone a "significant change" as defined by the statute—which does not include a change "from one

[2] Under Indiana law, a nuisance is "[w]hatever is (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." Indiana Code § 32-30-6-6.

type of agricultural operation to another type of agricultural operation" or a "change in the ownership or size of the agricultural operation"; and (3) not have been a nuisance at the time agricultural operations began at the locality. Indiana Code § 32-30-6-9(d).

Even when the RTFA applies, the law does not provide complete immunity for agricultural operations. An agricultural operation loses the law's protection if the complained of nuisance resulted from the negligent operation of the agricultural operation. Indiana Code § 32-30-6-9(a).

Prior to 2005, the Indiana law did not define the "significant change" in agricultural operations that would make the statutory protections unavailable. In 2005 the Indiana legislature adopted the definition of "significant change" that excludes a change in the type or size of the agricultural operation. See Indiana Code § 32-30-6-9(d)(1)(A) & (B).

The amendment's guidance regarding the meaning of "significant change" was necessary to clarify that term in light of *dicta* in *Wendt v. Kerkhof,* 594 N.E.2d 795 (Ind. Ct. App. 1992). *Wendt* involved a nuisance action against a farm that had grown crops for decades and converted to raising hogs. The court determined that the challenged operation did not constitute a nuisance. But it went on to state, in *dicta*, that the RTFA's limitation of nuisance actions would not have applied because "the Farm did not begin its hog operation until approximately five years after the plaintiffs had become adjacent landowners." *Id.* at 798.

Wendt's dicta suggested that a conversion from growing crops to raising hogs constituted a significant change eliminating the RTFA's protections. The

Indiana legislature's 2005 amendment made it clear that such a conversion from one type of agricultural operation to another does not constitute a "significant change" that would otherwise interrupt the Act's protections by resetting the clock on the one-year continuous operation requirement.

B. Factual Background

1. In late 2012, Samuel Himsel and his sons, Cory and Clint (the "Individual Respondents")—lifelong second- and third-generation Hendricks County, Indiana farmers—decided to establish a hog-raising operation. In particular, they planned to construct and operate a "concentrated animal feeding operation" ("CAFO") that would include eight thousand hogs. To accomplish this, the Individual Respondents formed 4/9 Livestock, LLC ("4/9") as an Indiana limited liability company. Pet. App. 4, 6.

After consulting with experts on an appropriate site, the Individual Respondents decided to locate their hog-raising operation on a portion of existing farmland that Samuel Himsel owned at 3042 North 425 West, Danville, Indiana (the "Farm Site"). As the court below explained, the land had been owned by the Himsel family for more than two decades and "used for agricultural purposes since at least 1941. Between at least 1994 and 2013" it "had been used consistently for crops." Pet. App. 4.

The area surrounding the Farm Site has been dominated by agricultural uses for decades. Those uses have included, among other things, (1) raising livestock (including hogs) and (2) spreading manure as organic fertilizer on nearby fields. The nearest town is over five miles away from the Farm Site, and

the nearest residential subdivision is two miles away. Pet. App. 8.

2. The Individual Respondents were required to satisfy a number of local and state requirements in order to establish their hog-raising operation.

First, they petitioned the Hendricks County Area Plan Commission to rezone a portion of the Farm Site from Agriculture Residential ("AGR") to Agriculture Intense ("AGI"), to allow for the development of a CAFO. Pet. App. 4. The Plan Commission's staff recommended approval of the petition, stating that the proposed use was "consistent and compatible" with "the historic agricultural and rural residential land use pattern of the area" and "the planned future agricultural and rural residential land use pattern of the area." C.A. App. IV:53.[3]

Following a public hearing at which Petitioner Richard Himsel spoke in opposition to the petition, the Plan Commission unanimously approved the rezoning petition and issued findings that the use of a portion of the Farm Site for a CAFO (1) complies with the recommendations of the Hendricks County Comprehensive Plan, which "expressly lists confined animal feeding operations as a recommended land use in the area under consideration"; (2) is consistent and compatible with current uses in the area and that "the area is a well-established, longstanding agricultural community"; (3) represents the most desirable use of the land and "represents a longstanding community desire to see this area remain agricultural"; (4)

[3] "C.A. App." refers to the appendix filed by Petitioners in the Indiana Court of Appeals on June 22, 2018.

conserves property values in the jurisdiction; and (5) represents responsible growth. Pet. App. 5-6.

At a subsequent public hearing, the Hendricks County Commissioners unanimously approved the rezoning petition and adopted the Plan Commission's findings. Petitioners could have—but chose not to—appeal the decisions of the Plan Commission or the County Commissioners approving the rezoning petition. Pet. App. 6.

Second, 4/9 Livestock then sought approval by the Plan Commission of its siting, design, and construction plans for the hog barns. Those public hearings addressed whether the design and construction plans were appropriate for the location—taking into account the size and location of the barns, setback requirements for the barns, manure containment pits under the barns, and landscaping. The Commission issued the requested permits. Pet. App. 6; C.A. App. X: 91–123. Members of the public are permitted to participate in the Commission's public hearings—but Petitioners chose not to- appeal the permitting decisions. Pet. App. 6.

Third, 4/9 Livestock timely applied to the Indiana Department of Environmental Management ("IDEM") for two permits to construct and operate the hog-raising facility. Following notice to surrounding property owners, IDEM approved the application and issued the two permits. Again, Petitioners could have participated in the administrative process and sought review of the permit approvals—but they chose not to. Pet. App. 6.

3. 4/9 Livestock completed construction of the barns on September 19, 2013. The first hogs arrived on October 2, 2013. Pet. App. 7, 286.

Hog-raising operations have continued since that date, and none of the Respondents has ever received any citations or notices of violation from IDEM or Hendricks County. Pet. App. 7; C.A. App. III:125.

C. Proceedings Below

Petitioners "live in the immediate vicinity of the Farm Site." Pet. App. 7. Robert Lannon purchased his property in 1971. Richard and Janet Himsel moved into their home in 1994. Pet. App. 7.

Petitioners' properties, like the Farm Site, are located in western Hendricks County, Indiana, "in an area that the County Board of Commissioners has expressly designated for agricultural purposes since the adoption of the county's first comprehensive plan in 1983." Pet. App. 8.

The Indiana Court of Appeals explained that "[a]gricultural uses have dominated in the area surrounding the Farm [Site] and [Petitioners'] properties. In addition to row crops, those uses have included raising livestock such as cattle, hogs, chicken, goats, and sheep." Pet. App. 8. Indeed, the court stated:

> [Petitioner] Richard Himsel and his father raised livestock, including 200 head of hogs and 200 head of cattle at a time, in the area directly adjacent to their home for years. For about two years, Richard had a confinement building on his property, approximately 700 feet from his home, that held up to 400 head of hogs. This building was destroyed by fire and not rebuilt. Another farmer, John Hardin, has a hog confined feeding operation located near [Petitioners'] properties. Hardin has been operating his hog farm for many years

> and periodically applies hog manure to fields as close as twenty feet from the Himsel [Petitioners'] home.

Pet. App. 8.

On October 6, 2015—more than two years after 4/9 Livestock's hog barns began operating—Petitioners instituted this action in Indiana state court asserting claims of nuisance, negligence, and trespass against the Individual Respondents, 4/9 Livestock, and Co-Alliance LLP (which supplies the hogs raised by 4/9 Livestock). Respondents raised the Indiana RTFA as an affirmative defense, and the State of Indiana intervened to defend the constitutionality of the statute. Pet. App. 8-9. Petitioners challenged the constitutionality of the Act as applied to them on a number of grounds, including that the Act effected an uncompensated taking in violation of the federal Constitution. *Ibid*.

The trial court initially granted summary judgment in favor of the Individual Respondents, but otherwise denied the cross-motions for summary judgment. Pet. App. 29-40. All Respondents filed a motion to correct error, which the trial court granted, entering summary judgment in favor of Respondents on all claims. Pet. App. 9-10, 41-42.

The court of appeals unanimously affirmed. Pet. App. 1-28. It held that the RTFA barred Petitioners' nuisance claims and Petitioners' trespass claims, which it found to be repackaged nuisance claims, because all of the statutory pre-requisites were satisfied:

- "the agricultural operation here has been in operation continuously for more than one year. Indeed, the record establishes that the

farmland in question has been actively farmed for decades" (Pet. App. 12);

- because the property had been used for agricultural operations, establishing the hog-raising facility did not constitute a "significant change" under the definition of that term in subsection (d)(1) (Pet. App. 12); and
- hog farming "would not have been a nuisance at the time" agricultural operations began in the area (Indiana Code § 32-30-6-9(d)(2)—"[n]one of the Plaintiffs can now be heard to complain that their residential use of their property is being negatively impacted because the use of the Farm [Site] changed from crops to hogs, a use that would not have been a nuisance in or around 1941 when the agricultural operation began on the locality" (Pet. App. 15).

The court further concluded that Petitioners could not invoke the exception to the RTFA for negligently operated facilities because Petitioners' evidence "provides no indication that the [hog-farming facility] has been negligently operated by 4/9 Livestock or has violated [state environmental] regulations." Pet. App. 16.

The court pointed to "the significant local and administrative hurdles a farmer must overcome before being allowed to build a CAFO," and observed that Petitioners had not challenged the rezoning of the Farm Site, the approval of the siting, design and construction plans for the two hog-farming buildings, or the issuance of state environmental permits. Petitioners "were provided ample due process to challenge the size and/or placement of the CAFO

buildings on the Farm [Site], yet they decided instead to wait and file a nuisance action more than two years later," the court stated. Pet. App. 16. "In light of the RTFA, they put their eggs in the wrong basket. Their general nuisance claim fails as a matter of law." *Ibid*.[4]

The court of appeals rejected Petitioners' contention that the application of the RTFA effected an unconstitutional taking—addressing together the takings claims under the state and federal Constitutions based on its precedent holding that it "construe[d] and analyze[d] the 'textually indistinguishable' takings clauses identically." Pet. App. 20-23. It observed that Petitioners "assert a regulatory takings claim, as they acknowledge that there has been no direct seizure of their property." Pet. App. 21.

The court determined that Petitioners had "not been deprived of all or substantially all economic or productive use of their properties," observing that the properties "retained significant economic value"; Petitioners "continue to reside in their residences,

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[4] The court concluded that Petitioners' "repackaged" trespass claim was really just a nuisance claim. It reached this conclusion because the claim alleged "that the emissions—'animal waste, air pollutants, harmful gases, and noxious odors'—are chemical compounds that result in a physical, space-filling invasion into their homes." Pet. App. 17, 27. The court continued, "Despite artful pleading, we observe that application of the RTFA does not turn on labels. The trial court properly concluded that [Petitioners'] trespass claim is barred by the RTFA." *Ibid*. (citing *Ehler v. LVDVD, L.C.,* 319 S.W.3d 817, 824 (Tex. Ct. App. 2010) ("Permitting the [plaintiffs] to avoid the application of [the Texas RTFA] by pleading a nuisance action as a trespass would eviscerate the statute and deny [the defendants] the protection intended by the Legislature when it passed the Right to Farm Act.")).

making valuable use of their properties, and have alleged no distinct, investment-backed expectations that have been frustrated by the [hog-farming operation]"; that there has been no physical intrusion into Petitioners' property, and that "the regulation is reasonably related to the promotion of the common good." Pet. App. 22-23.

The court of appeals denied Petitioners' request for rehearing; one judge dissented. Pet. App. 43. Petitioners then sought transfer of the case to the Indiana Supreme Court and—following briefing and oral argument—that Court denied the petition for transfer with two Justices dissenting. Pet. App. 44.

REASONS FOR DENYING THE PETITION

Petitioners argue that review by this Court is warranted for multiple reasons: they assert that the RTFA imposes a blanket ban on nuisance and trespass claims; they contend that there is a conflict among the lower courts regarding the question presented; and they argue that the Indiana court reached the wrong conclusion on the takings claim.

The question presented does not implicate any legal issue warranting this Court's attention, there is no conflict among the lower courts, and there is no warrant for this Court to review the Indiana court's fact-bound conclusion that Petitioners failed to establish a takings claim here.

A. The Indiana Right To Farm Act Does Not Provide Respondents—Or Anyone Else—With Complete Immunity From Nuisance Or Trespass Liability.

Petitioners engage in unsupportable hyperbole when they assert that the RTFA "provides complete

immunity from nuisance and trespass liability." Pet. i.; see also Pet. 15 ("the Indiana Court of Appeals held that the amended RTFA categorically bars any remedy.")

The court below applied the RTFA to bar Petitioners' nuisance claims only after it first determined that Respondents satisfied the pre-requisites for application of the RTFA—that agricultural operations had been in place continuously for a year at the relevant location, and that agricultural operations would not have constituted a nuisance when they first began at that location. See Pet. App. 12-15.

The court also assessed whether Petitioners had adduced evidence demonstrating that 4/9 Livestock had operated the hog-raising facility negligently, because the RTFA provides that its limitations on nuisance actions do not apply "if a nuisance results from the negligent operation of an agricultural or industrial operation or its appurtenances." Indiana Code § 32-30-6-9(a). But this exclusion did not apply, the court concluded, because Petitioners failed to adduce any evidence of negligence. Pet. App. 16.

Thus, the RTFA barred Petitioners' nuisance claims because Petitioners failed to adduce the evidence that would have rendered the statute inapplicable.

In addition, the RTFA does not limit affected parties' ability to participate in state and local permitting proceedings—or to seek review of decisions granting the necessary permits. But, as the court below observed, Petitioners chose not to take advantage of those multiple opportunities. They "were provided ample due process to challenge the size

and/or placement of the CAFO buildings on the Farm [Site], yet they decided instead to wait and file a nuisance action more than two years later. In light of the RTFA, they put their eggs in the wrong basket." Pet. App. 16.

B. The Decision Below Does Not Conflict With Any Decision Of A State Supreme Court Or Federal Court Of Appeals.

Petitioners erroneously assert that review is warranted because the ruling below rejecting Petitioners' takings claim conflicts with the decisions of other courts. Pet. 32-39. There is no conflict.

Petitioners first invoke *City of Fayetteville v. Stanberry*, 807 S.W.2d 26 (Ark. 1991). See Pet. 33. The question in that case—which involved leakage from a city-constructed sewer line on to the plaintiff's property—was whether the trial court had erred in rejecting a jury instruction proffered by the City requiring the jury to find a permanent rather than temporary intrusion into the plaintiff's property. The Arkansas Supreme Court held that the court had properly rejected the instruction, stating that "[w]hile we need not provide a definitive statement of what constitutes a taking, we will say it does not require permanency nor an irrevocable injury, as urged by the City." 807 S.W.2d at 28-29.

The holding that a temporary intrusion can constitute a taking has nothing to do with the question in this case, which is whether the elimination of Petitioners' nuisance claim constitutes a taking. Indeed, *City of Fayetteville* arose in the context of the entry of a physical contaminant on to the plaintiff's property—and, as the court below made

clear, Petitioners do not allege such a physical intrusion here. See Pet. App. 23.

Next, Petitioners discuss *Duffield v. DeKalb County*, 249 S.E.2d 235 (Ga. 1978). Pet. 33. But that decision analyzes an inverse condemnation claim under the particular provisions of the Georgia Constitution based entirely on decisions of Georgia courts. 249 S.E.2d at 236. The cited constitutional provisions differ significantly from the federal Constitution's Takings Clause. See Georgia Const. art. 1, § 1, par. 1 ("[n]o person shall be deprived of life, liberty, or property except by due process of law"); *id.* art. 1, § 3, par. 1 ("[e]xcept as otherwise provided in this Paragraph, private property shall not be taken *or damaged* for public purposes without just and adequate compensation being first paid") (emphasis added). The ruling therefore is wholly irrelevant to the federal Constitution's Takings Clause.

Petitioners cite, in a footnote, a concurring opinion in a different Georgia Supreme Court case to try to create the impression that the Georgia Constitution's takings clause is interpreted in accordance with federal precedents. Pet. 33-34 n.3 (citing *Barrett v. Hamby*, 219 S.E.2d 399, 403 (Ga. 1975) (Gunter, J., concurring)). But Justice Gunter's concurrence related to "the application of the constitutional concept of 'substantive due process of law,'" and did not mention takings jurisprudence. 219 S.E.2d at 404.

Petitioners also rely on *Bormann v. Board of Supervisors In & For Kossuth County*, 584 N.W.2d 309 (Iowa 1998). But, as Petitioners acknowledge in a footnote (Pet. 35 n.4), that ruling rested on a long-established peculiarity of Iowa law—that the right to maintain a nuisance action constitutes an easement under Iowa law—in holding that the restriction of the

nuisance action constituted a taking because it eliminated that property right. See 584 N.W.2d at 315 (citing *Churchill v. Burlington Water Co.*, 62 N.W. 646, 647 (1895)).

Indiana has rejected Iowa's characterization of nuisance actions as an easement. See *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1257–59 (Ind. Ct. App. 2009) (declining to adopt Iowa's rule that the right to maintain a nuisance creates an easement). Because property rights rest on state law, *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161 (1980), this important difference means the Iowa court's holding does not conflict with the ruling below—because it turns on the different state-law rules regarding property rights.

Finally, Petitioners point to *Overgaard v. Rock County Board of Commissioners*, No. 02-601, 2003 U.S. Dist. LEXIS 13001 (D. Minn. July 25, 2003), which they claim "found *Bormann* 'persuasive.'" (Pet. 35.) But the Minnesota district court actually stated, "While *Bormann* may seem persuasive at first glance, the Court finds that *Bormann*'s holding is not applicable to the Minnesota Right to Farm Act." 2003 U.S. Dist. LEXIS at *21. The court also concluded that "the neighboring landowners are not deprived of any property rights." *Ibid.*

In sum, there is no conflict among the lower courts.

Petitioners also assert that the States' widespread adoption of right to farm laws justifies this Court's intervention. Pet. 37-39. But that factor actually weighs against a grant of review—because the large number of states with RTFA statutes and the lack of a conflict regarding the takings issue indicate that the

question presented lacks sufficient importance to warrant review.

C. The Court Below Properly Rejected Petitioners' Takings Claim.

Petitioners' takings claim is in a peculiar posture. Although the federal Constitution prohibits takings by government entities without just compensation, Petitioners named as defendants—and sought relief against—only private parties. The State of Indiana intervened to defend the constitutionality of its Right to Farm Act, but Petitioners still did not seek relief from the State.[5]

Perhaps because of this peculiarity, Petitioners are somewhat vague about the act that constitutes the taking of their property. They focus on the construction and operation of the hog-raising facility, but that is a purely private activity. They reference the 2005 amendment of the Indiana Right to Farm Act, but that occurred long before the hog-raising operation came into existence in 2013.

To the extent the Petitioners' claim is that the "taking" is the RTFA's preclusion of the nuisance action Petitioners say they could have successfully asserted prior to the 2005 amendment of the RTFA, then they should be seeking relief from the State—not

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[5] Bizarrely, Petitioners at one point attempted to pursue an inverse condemnation claim against 4/9 Livestock, the Individual Respondents, and Co-Alliance, LLP (C.A. App. III:19-20)—even though none of those parties have the power to condemn property and even though Petitioners had not followed the procedures specified by Indiana law for pursuing such an action (see Indiana Code § 32-244-1-1). The trial court dismissed those claims, and Petitioners did not appeal that decision. C.A. App. VIII:177; C.A. Appellants' Br. 8 n.1.

from private parties. Presumably that relief would be in the form of "just compensation" damages from the State: the reduction in value of Petitioners' property that is greater than the reduction in value that would have resulted from 4/9 Livestock's operation of a hog-raising facility that would not have been ruled a nuisance under pre-2005 law. After all, the record showed that hog farms had long operated in the area, including a 400-hog facility operated by Petitioner Richard Himsel (Pet. App. 8)—so Petitioners plainly could not argue that a nuisance action could preclude all hog farming on the Farm Site.

To recover those damages, Petitioners would have had to prove the following: (1) that they could have successfully asserted a nuisance action under the pre-2005 RTFA; (2) that the incremental adverse effect upon their property from a hog-raising operation permitted under pre-2005 law, as compared to the operation precluded by pre-2005 law, satisfied the standard for a regulatory taking; and (3) the amount of just compensation to which they would be entitled as a result of that incremental effect.

Because Petitioners have not asserted a claim seeking relief from the State and have not addressed these issues—but rather focused on the claimed effect on their property of the hog-raising operation, as if they were litigating a nuisance action against 4/9 Livestock—this case is a poor vehicle for addressing any takings issue.

Moreover, the court below properly rejected Petitioners' takings claims.

1. Petitioners failed to raise a physical takings claim below and, in addition, the record provides no support for such a claim.

Citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), Petitioners assert that the court below erred by failing to find a physical taking. Pet. 24-26. But Petitioners failed to raise such a claim below and, in addition, the record does not support a physical takings claim.

The court below stated that Petitioners had asserted a "regulatory takings claim" (Pet. App. 20-21)—and for good reason: Petitioners' brief in the Indiana Court of Appeals argued only that they had been subjected to a regulatory taking under the standard set forth in this Court's opinions in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978), and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). See C.A. Appellants' Br. 55-58; C.A. Appellants' Reply Br. 20-22. Petitioners cited *Loretto* only once, in their argument with respect to"[t]he third *Penn Central* factor . . . the character of the government action," to support the assertion that "[u]nder this factor, a physical invasion of property is more likely to be a taking than a regulatory program that merely makes some activities more remunerative than others." C.A. Appellants' Br. 57.

Thus, Petitioners did not advance a takings claim premised on an asserted physical occupation of their property.

Nor could they. The court below, in applying the *Penn Central* regulatory takings test, stated that it "[did] not agree with [Petitioners] that the RTFA has permitted a physical invasion of their property." Pet.

App. 23. Rather, the court found that Petitioners' claim was "that their use and enjoyment of their homes, as well as their homes' values, were ruined by noxious odors and airborne emissions coming from the" hog-raising operation. Pet. App. 10.

However, nothing physical entered Petitioners' property—no manure, pigs, trucks, or persons. C.A. App. IV:14, 45–46, 129–30. And Petitioners never alleged that the odors caused physical damage. They simply did not assert the physical occupation that *Loretto* requires.[6]

2. The regulatory takings claim lacks merit.

This Court has made clear that regulatory takings claims are fact-specific. *Penn Central* stated that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few people." 438 U.S. at 124. "Indeed," the Court stated, "we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case." *Ibid.*

The *Penn Central* Court stated that some of the factors relevant to "these essentially ad hoc, factual inquiries" include "[t]he economic impact of the

[6] Courts routinely reject trespass claims based on odors when there is neither a physical invasion of nor physical harm to the property. *See*, *e.g.*, *Babb v. Lee Cnty. Landfill SC, LLC*, 747 S.E.2d 468, 479—80 (S.C. 2013); *John Larkin, Inc. v. Marceau*, 959 A.2d 551, 555—56 (Vt. 2008); *Borland v. Sanders Lead Co.*, 369 So.2d 523, 530 (Ala. 1979).

regulation on the claimant"; "the extent to which the regulation has interfered with distinct investment-backed expectations"; and "the character of the government action." 438 U.S. at 124.

The Indiana Court of Appeals canvassed these factors and concluded that Petitioners failed to establish a regulatory taking. See Pet. App. 21-23. There is no reason for this Court to review that fact-bound determination.

With respect to economic impact, the court below found that "[t]he designated evidence reveals that [Petitioners] properties have retained significant economic value," citing estimates that they retained 40% and 50% of their value respectively. Pet. App. 22. It pointed to *Penn Central*'s statement that the Court's precedents "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" Pet. App. 22 (citing *Penn Central*, 438 U.S. at 131).

Next, the court addressed the investment-backed expectation prong, stating that Petitioners "continue to reside in their residences, making valuable use of their properties, and have alleged no distinct, investment-backed expectations that have been frustrated by the [hog-raising operation]." Pet. App. 23.

Concerning the character of the government action, the court rejected Petitioners' argument that the RTFA permitted a physical invasion of their property. Pet. App. 23.

Petitioners' attempt to dispute that determination, relying on *Arkansas Game and Fish Commission v. United States,* 568 U.S. 23 (2012), is wholly misplaced. The Court there held that physical

invasion of property by floodwaters could constitute a taking. That provides no support for Petitioners' argument that odors should similarly characterized as a physical invasion.

In addition, it is significant that the RTFA—like traditional zoning laws—not only imposes a burden but also provides a significant reciprocal benefit to all landowners in traditional agricultural areas by protecting them against nuisance actions based on agricultural operations.

Petitioners' disagreement with the Indiana court's fundamentally factual analysis provides no warrant for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2020