No. 20-72

IN THE
Supreme Court of the United States

JANET L. HIMSEL, ET AL.,
Petitioners,
v.

4/9 LIVESTOCK, LLC, ET AL.,
Respondents.

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

RESPONDENT STATE OF INDIANA'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State may, without interference by the Takings Clause, modify the common law to provide a limited defense to a private nuisance action.

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INTRODUCTION

To conserve Indiana's rich agricultural heritage and to encourage the development of land for food production, the Indiana General Assembly enacted the Right to Farm Act to reduce the threat of nuisance lawsuits to farming operations. The Act confers immunity on farms from most nuisance suits if the farm meets the Act's requirements.

Applying the factors identified in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), the Indiana Court of Appeals held that the Act did not "take" private property when it blocked petitioners' nuisance claims against a neighboring large-scale hog farm. The Indiana Supreme Court did not think the case sufficiently worth its time and denied transfer.

Petitioners urge this Court to grant review largely on the basis of a sweeping legal theory they did not raise below—and that the decision below accordingly did not address—namely, that a state law conferring limited immunity from nuisance suits categorically violates the Takings Clause. Petitioners' only preserved argument is that the lower court erred in applying the well-established *Penn Central* factors to the evidence here. But there was no error in the lower court's decision, and no lower court conflict or serious issue of national significance—properly preserved or not—justifies this Court's review.

STATEMENT OF THE CASE

I. Indiana's Right to Farm Act

In 1981, fearing the depletion of Indiana's agricultural resources caused by nuisance suits brought against farming operations, the Indiana General Assembly enacted the Indiana Right to Farm Act "to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products." Pub. L. No. 288, § 1, 1981 Ind. Acts 2302, 2302 (codified as amended at Ind. Code § 32-30-6-9). The General Assembly found "that when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits," with the consequence that "agricultural operations are sometimes forced to cease operations, and many persons may be discouraged from making investments in farm improvements." Ind. Code § 32-30-6-9(b); *see also Shatto v. McNulty*, 509 N.E.2d 897, 900 (Ind. Ct. App. 1987) ("The policy of the legislature is clear. People may not move to an established agricultural area and then maintain an action for nuisance against farmers because their senses are offended by the ordinary smells and activities which accompany agricultural pursuits.").

The Right to Farm Act restricts the circumstances under which a neighboring landowner may maintain a private nuisance suit against a farm, thus removing a major disincentive to agricultural investment and development. But it confers immunity only in limited circumstances. Specifically, the Act provides that an agricultural operation "is not and does not become a

nuisance . . . by any changed conditions in the vicinity of the locality" if (1) the agricultural operation "has been in operation continuously on the locality for more than one . . . year," (2) there has been "no significant change in the type of operation," and (3) "[t]he operation would not have been a nuisance at the time the agricultural . . . operation began on that locality." Ind. Code § 32-30-6-9(d); *see also* Ind. Code § 32-30-6-3(1) (defining "locality"); Ind. Code § 32-30-6-9(c) (defining continuous operation); Ind. Code § 32-30-6-9(d)(1)(A)–(D) (defining what does not constitute a "significant change"); Pub. L. No. 23-2005, § 1, 2005 Ind. Acts 1389, 1389–90 (amending the Act to clarify changes that do not qualify as "significant").

Furthermore, this limited immunity does *not* apply if the "nuisance results from the negligent operation" of the farm. Ind. Code § 32-30-6-9(a).

II. Factual Background

1. Respondents Sam Himsel and his sons, Clint and Cory Himsel, are farmers in rural Hendricks County, Indiana. App. 4, 254. In 2013, they formed 4/9 Livestock, LLC, to commence a concentrated animal feeding operation (CAFO) involving hogs. App. 4, 254–56. They built their CAFO on rural property that had long been used by working farms that grow crops and raise livestock. App. 4, 80.

In early 2013, Sam Himsel asked the county to rezone the proposed CAFO location from agriculture-residential to agriculture-intense to allow construction and operation of the CAFO. App. 4, 129, 160, 292. The county commissioners approved the plan. App. 4–6, 96, 164, 280. In late 2013, 4/9 Livestock completed

construction and started raising hogs for Co-Alliance, LLP. App. 6–7, 83, 168, 196–97.

2. Petitioners Richard and Janet Himsel—Richard is Samuel Himsel's cousin, App. 264—and Robert and Susan Lannon have owned homes near the location of the 4/9 Livestock CAFO since 1994 and 1971, respectively. App. 7, 333–34.

According to petitioners, the 4/9 Livestock CAFO produces noxious gases that hinder their use and enjoyment of their respective lands. Pet. 8, 12; App. 340–41. They also claim that the CAFO's operation has depressed the value of their homes on the order of about 50–60%. Pet. 28; App. 22, 144.

III. Procedural Background

About two years after 4/9 Livestock began operating its CAFO, petitioners sued respondents for nuisance, negligence, and trespass arising from the smell. App. 8, 330–56. Respondents invoked the Right to Farm Act as a defense to the suit, but petitioners alleged the Act to be unconstitutional on multiple grounds, including that it effects a taking without compensation. App. 8–9, 347–49. The State intervened to defend the statute's constitutionality, App. 8, and the trial court granted summary judgment to all respondents on all claims, App. 9–10, 29–42.

The Indiana Court of Appeals affirmed, holding, with respect to the Takings claim, that petitioners "acknowledge that there has been no direct seizure of their property," App. 20–21, and had failed to demonstrate a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). App. 20–23.

Applying the *Penn Central* factors, the court determined that petitioners "have not been deprived of all or substantially all economic or productive use of their properties" because their properties "have retained significant economic value." App. 22. A "diminution in property value, standing alone, does not establish a taking" where a "land-use regulation [is] reasonably related to the promotion of the general welfare." *Id.* (citing *Penn Central*, 438 U.S. at 131); *see also* App. 22–23 (noting that the Court has rejected takings challenges even where property values have decreased by 75%, citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)). The Court also explained 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 CAFO." App. 23. With regard to the character of the government action, the court rejected petitioners' contention that the Act "has permitted a physical invasion of their property" and determined that petitioners "cannot dispute that the regulation is reasonably related to the promotion of the common good." *Id.*

Petitioners unsuccessfully sought both rehearing in the Indiana Court of Appeals and transfer to the Indiana Supreme Court. App. 43–44. Their petition for rehearing focused exclusively on statutory arguments. Appellants' Reh'g Pet. 6–17. And their petition for discretionary review to the Indiana Supreme Court relegated their takings argument to a single paragraph in which they argued that the Court of Appeals had improperly applied the *Penn Central* factors. Appellants' Trans. Pet. 17.

REASONS TO DENY THE PETITION

I. The Decision Below Does Not Contravene the Court's Precedents

Petitioners challenge the lower court's decision on two constitutional theories, neither of which merit the Court's consideration: The first they failed to raise below, and the second merely quibbles with the lower court's assessment of evidence.

The Court has long distinguished between permanent physical appropriations of property and other regulations that affect property. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942–43 (2017); *Horne v. Dep't of Agriculture*, 576 U.S. 350, 357–61 (2015). A permanent physical occupation of property is a *per se* taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 526–35 (1982). Otherwise, government regulation of property effects a taking only if it deprives the owner of "all economically beneficial or productive use," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992), or "goes too far" in light of the "complex of factors" identified in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), *Murr*, 137 S. Ct. at 1942–43 (internal quotation marks and citations omitted).

Petitioners now raise theories under both *Loretto* and *Penn Central*, but they neither raised *Loretto* below nor even now cite any precedents applying *Loretto* where *odors* are the alleged "physical occupation." And with respect to *Penn Central*, the court below expressly applied the "complex of factors" that decision identifies to the facts of this case, so on that score petitioners at best make a plea for mere error correction.

A. This case is inappropriate for considering an expansion of *Loretto*

1. Below, petitioners did not present any argument applying *Loretto,* and the Indiana Court of Appeals therefore confined its analysis to the *Penn Central* framework for regulatory takings. *Cf. Horne*, 576 U.S. at 361 (observing the "longstanding distinction" between physical takings and regulatory takings); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002) (explaining that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa").

Indeed, in the Court of Appeals, petitioners' takings argument was little more than an afterthought. The lion's share of their briefing concerned the interpretation of the Right to Farm Act and several state constitutional challenges. Across five different briefs, their takings argument consisted of a total of 9 pages out of roughly 130 pages of briefs, *see* Appellants' Br. 52–58; Appellants' Reply Br. 20–22; Appellants' Trans. Pet. 17; *see also* Appellants' Reh'g Pet. 6–17 (no takings argument); Appellants' Trans. Reply 3–6 (same). And over those nine pages, petitioners argued only that the *Penn Central* factors tipped in their favor. Appellants' Br. 55–58; Appellants' Trans. Pet. 17.

Petitioners never argued that a government-authorized nuisance is categorically a taking because it constitutes a permanent physical invasion of property. And while they now accuse the Indiana Court of Appeals of holding that the Right to Farm Act "cate-

gorically bars their trespass claim," Pet. 26, petitioners have never asserted that any defendant actually set foot on their property. The decision below simply rejected petitioners' attempt to relabel their complaint about unpleasant odors as a trespass claim. App. 17.

Regardless what one might think of that theory under the law of trespass, petitioners never asserted below that the *Constitution* secures an inviolable right against unwanted smells. And this Court, of course, generally does not review issues that petitioners did not raise, and courts did not address, below. *McLane Co. v. E.E.O.C.*, 137 S. Ct. 1159, 1170 (2017) ("[W]e are a court of review, not of first view . . . ." (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005)); *see also Yee v. City of Escondido*, 503 U.S. 519, 533 (1992).

2. Nor is petitioners' *Loretto* argument persuasive. *Loretto* held that a state law compelling landlords to permit the installation of cable facilities on their property effected a *per se* taking. 458 U.S. at 421. Critically, the law compelled a "*permanent physical occupation* of [the] owner's property," which, unlike a temporary invasion, is *always* a taking. *Id.* (emphasis added).

This *per se* rule is grounded in the fact that a permanent physical invasion of property "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id.* at 435. When "the government permanently occupies physical property, it effectively destroys" the property owner's rights to possess, use, and dispose of the property. *Id.*

Unlike the landlords in *Loretto*, petitioners have not established a *permanent* invasion. At most, they assert only that, because of respondents' CAFO, "they are actually forced to *vacate* their homes *from time to time*." Pet. 25 (second emphasis added).

Nor have petitioners demonstrated that Indiana's Right to Farm Act compels a physical invasion in the first place. They have not cited a single case in which the Court has deemed "noxious fumes and particles," Pet. 25, to constitute a physical occupation of property. Petitioners muster only a statement from *Loretto* that physical invasions may occur "by superinduced additions of water, earth, sand, *or other material*." Pet. 25 (quoting *Loretto*, 458 U.S. at 427). Odor, however, is not "other material" that can physically occupy land. Courts have consistently rejected, for example, the notion that the movement of odors or other intangible substances constitutes trespass. *See, e.g., Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693, 701 (Minn. 2012) (holding that movement of pesticide could not constitute trespass because trespass traditionally requires "'direct and tangible entry'" (quoting Dan B. Dobbs, The Law of Torts § 50 at 95 (2000)); *Born v. Exxon Corp.*, 388 So. 2d 933, 934 (Ala. 1980) (holding that unpleasant odor and light emitted by industrial facility did not constitute "an intentional entry of any substance onto the land . . . amounting to a trespass").

After all, the Court applies a *per se* rule to permanent physical occupations because such occupations oust the owner of all use or control during the occupation. *Loretto*, 458 U.S. at 435–36. But unlike invasion by water or cable boxes, invisible particles floating in

the air do not erect a physical barrier absolutely precluding occupation and use of land.

Petitioners cannot establish a permanent physical occupation of their lands, so *Loretto*'s "very narrow" rule does not apply. *Id.* at 441. In sum, petitioners' permanent-occupation theory is neither preserved nor supported by the Court's existing precedents. There is no reason for the Court to consider it.

B. The court below did not misapply the *Penn Central* factors

The sole takings theory petitioners presented below was that the Right to Farm Act constitutes a taking under *Penn Central*, and the only argument they now make on this score is their assertion that the Indiana Court of Appeals misapplied the *Penn Central* factors by "[i]gnoring the Himsel's [sic] and Lannons' evidence entirely." Pet. 26. Petitioners thus ask the Court to correct what they view to be error by the lower court in applying well-established law. And that, of course, is hardly a justification for this Court's review. *See* Sup. Ct. R. 10.

At any rate, the lower court did not misapply *Penn Central*. That decision directs courts to consider (1) the economic impact of the regulation on the property owner, (2) the extent to which the regulation interferes with the owner's distinct investment-backed expectations, and (3) the character of the government's action. *Penn Central*, 438 U.S. at 124. The Indiana Court of Appeals considered each of these factors and properly concluded that no taking occurred here.

1. With respect to economic impact, petitioners' own designated evidence established that their "properties have retained significant economic value," for "their own expert valued the Lannons' property at $51,500 (at an estimated 60% loss in value) and the Himsel [petitioners'] property at $181,200 (at an estimated 49.5% loss in value) with the CAFO nearby."[1] App. 22.

As the court below recognized, a diminution in value standing alone is not sufficient to establish a taking. *Penn Central*, 438 U.S. at 131; App. 22. And the roughly 50% to 60% loss in value allegedly sustained by petitioners' properties comes nowhere near the proof necessary to establish a regulatory taking under this Court's cases. *See, e.g.*, *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (holding that a 46% diminution in value is not a taking); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (holding that a roughly 75% diminution in value is not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (roughly 90% diminution not a taking); *cf. Lucas*, 505 U.S. at 1019–20 n.8 (explaining that a 95%

[1] The parties dispute how much value petitioners have lost. As the materials in the state court appendix established, petitioners' property-tax assessments have actually increased since the CAFO commenced operations. III App. 192–94; VI App. 43, 118. And a similarly situated home located between the Himsels' and the Lannons' properties sold in 2017, after less than a month on the market, for $5,000 above the list price, which "was not depressed or in any way decreased" by its proximity to 4/9 Livestock's CAFO. X App. 179–80; *see also* IX App. 186–95.

diminution in value may or may not constitute a regulatory taking depending on the circumstances).

Petitioners seemingly fault the lower court for not weighing this factor heavily in their favor, but they do not explain why the court was wrong or what principle of law it transgressed.[2] *See* Pet. 27–28. Indeed, the court below relied on *Penn Central* and *Village of Euclid*. App. 22–23. Petitioners do not claim that the state court misunderstood those cases. Nor do they cite any cases analyzing a regulation's economic impact any differently. And while they urge the Court to consider other factors, such as the loss of "the ordinary pleasures of life," they have not cited any authority from *any* court for the proposition that economic impact under *Penn Central* is based on anything other than quantifiable diminution in property value. *See* Pet. 28.

2. Petitioners' claim that the court below misapplied the second *Penn Central* factor—"the extent to which the regulation has interfered with *distinct* investment-backed expectations," 438 U.S. at 124 (emphasis added)—fares no better. The state court did not err—much less "patently" so—when it determined that petitioners "have alleged no distinct, investment backed expectations that have been frustrated by the CAFO." App. 23.

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[2] Petitioners briefly mention *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), yet they do not explain how that case applies to the lower court's assessment of economic impact. Pet. 27–28. They also misstate the Court's holding in that case, which was, "simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." 568 U.S. at 38.

The court below adhered to this Court's cases in determining that petitioners failed to allege any distinct investment-backed expectations. For one thing, although petitioners argued below that they "have invested substantial time and money in their homes reasonably expecting a return on their investment," Appellants' Br. 57, they did not cite anything from the record supporting that proposition. The most their record cites established was that the Lannons no longer garden and that the Himsels replaced a bathroom after the CAFO came into existence. *See* State Intervenor's Br. 37–38. The lower court cannot be faulted for not scouring the lengthy record to find evidence to support petitioners' claims.

Even in this Court, petitioners fail to identify any *distinct* investment-backed expectations. Instead, they rely almost exclusively on the idea that they purchased their homes with a general expectation that nothing would change or that they would receive a return on their initial investment. Pet. 29. But the Court has long held that property owners cannot establish a regulatory taking "simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available." *Penn Central*, 438 U.S. at 130. And while petitioners assert that "[t]he record demonstrates that [they] also invested substantial time and money in making various home improvements," *id.*, they again fail to support that assertion with any record evidence. And the cites they include earlier in the petition establish that the Himsel petitioners have not maintained their home since the CAFO began operations, App. 53, that the only improvement they have made since that time is placing different flooring in

the bathroom, App. 54, and that the Lannons and the Himsel petitioners used to perform general yardwork, like planting flowers and mowing the lawn, App. 65–66, 94–95, 106, 119.

Petitioners have never cited any case supporting the notion that such generalized expectations of a property owner are the sorts of "distinct, investment-backed expectations" about which this Court's regulatory-takings cases are concerned. The only case they cite is *Mahon*, Pet. 28–29, but the company in *Mahon* specifically purchased the right to mine coal *and cause subsidence*, only to have that right rendered a nullity by a subsequent bar on subsidence mining. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 412–14 (1922). In contrast to the distinct investment-backed expectation at issue in *Mahon*, petitioners baldly assert that, like all property owners, they bought their property with certain generalized expectations of how they would be able to use it. Petitioners have fallen far short of establishing that the lower court's assessment of the second *Penn Central* factor contravenes this Court's precedents.

3. The court below also did not depart from this Court's cases in analyzing the third *Penn Central* factor, the character of the government's action. State action that, as here, regulates private land use to adjust "the benefits and burdens of economic life to promote the common good" will rarely constitute a taking. *Penn Central*, 438 U.S. at 124.

The court below properly determined that the Right to Farm Act merely adjusts the benefits and burdens of economic life to promote the common good. App. 23. The law's purpose is to "conserve, protect,

and encourage the development of . . . agricultural land for the production of food and other agricultural products" by reducing the depletion of "agricultural resources." Ind. Code § 32-30-6-9(b). Like zoning schemes the Court has previously upheld, the Right to Farm Act furthers this public purpose by merely defining what activity the law considers an actionable nuisance. *See Penn Central*, 438 U.S. at 125 (collecting cases). Such run-of-the-mill land-use regulation does not violate the Takings Clause.

II. The Lower Court's Decision Does Not Create a Genuine Split with Any Other State Court

Petitioners attempt to fashion an interstate split in authority by pointing to four cases from other States. *See* Pet. 33–35 (discussing *City of Fayetteville v. Stanberry*, 807 S.W.2d 26 (Ark. 1991), *Duffield v. DeKalb County*, 249 S.E.2d 235 (Ga. 1978), *Bormann v. Board of Supervisors for Kossuth County*, 584 N.W.2d 309 (Iowa 1998), and *Overgaard v. Rock Cty. Bd. of Comm'rs*, No. 02-601, 2003 WL 21744235 (D. Minn. July 25, 2003)). None of these cases, however, embraces their expansive (and waived) *Loretto* theory or found similar circumstances to constitute a taking under *Penn Central*.

1. The decision below does not create a conflict with *Fayetteville* and *Duffield* for at least two reasons.

First, those cases did not involve a state statute modifying the common law governing private disputes among neighboring property owners. Rather, both cases involved continuing nuisances where the *government itself* was the alleged offender. In *City of Fayetteville v. Stanberry*, the City had obtained an

easement over the Stanberry property to construct a sewer line, which periodically overflowed, discharging raw sewage onto the property. 807 S.W.2d 26, 26–27 (Ark. 1991). And in *Duffield v. DeKalb County*, the County operated a water treatment plant, the noise and odor from which rendered the Duffield property "unmarketable." 249 S.E.2d 235, 236 (Ga. 1978). Neither case involved the situation presented here: A legislature's decision to promote the public good by modifying the common law rules that regulate private parties' land-use disputes. *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–88 (1926) (explaining that "the law of nuisances" does not "control[]" the legislature's power to regulate the use of land).

Second, *Fayetteville* and *Duffield* stand only for the proposition that a continuing nuisance can in some cases constitute a taking. *Fayetteville* did *not* hold that a nuisance categorically constitutes a taking. Instead, it explained that "a continuing trespass or nuisance [can] ripen into inverse condemnation, suggesting flexibility in the definition of taking." 807 S.W.2d at 28 (internal quotation marks and citation omitted). And it rejected the City's argument that temporary nuisances can never constitute takings, concluding 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." *Id.* at 28–29 (citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)). Likewise, in *Duffield*, the Georgia Supreme Court held only that the owners had "stated a claim of inverse condemnation in alleging that the odors and noise from the county's sewage plant have interfered with their right to use, enjoy, and dispose

of their property." 249 S.E.2d at 237. Moreover, *Duffield* rested exclusively on the Georgia Constitution and Georgia case law, and the Court did not remotely suggest that it was applying federal takings law. *See id.* at 236–38; *see also Rabun County v. Mountain Creek Estates, LLC*, 632 S.E.2d 140, 143 (Ga. 2006) (reiterating that *Duffield* concerned only Georgia constitutional law); *cf. Florida v. Powell*, 559 U.S. 50, 56 (2010) ("It is fundamental . . . that state courts be left free and unfettered by us in interpreting their state constitutions." (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940))).

Neither *Fayetteville* nor *Duffield* presents a conflict with this case on an important issue of *federal* law. The court below did *not* hold that a government-authorized nuisance can never constitute a taking, but instead expressly reserved this question. App. 21. Rather, it held only that petitioners had failed to establish a taking under the well-established *Penn Central* factors. App. 22–23.

2. Nor does the decision below conflict with the Iowa Supreme Court's decision in *Bormann v. Board of Supervisors for Kossuth County*, 584 N.W.2d 309 (Iowa 1998), *cert. denied sub nom. Girres v. Bormann*, 525 U.S. 1172 (1999).

Bormann held that a statute conferring immunity from nuisance suits on farms located in an "agricultural area" constituted a taking of neighboring landowners' properties. *Bormann*, 584 N.W.2d at 313–21. Critically, however, the Iowa court based its decision on the ground that, under long-standing Iowa law, "the right to maintain a nuisance is an easement." *Id.* at 315 (citing *Churchill v. Burlington Water Co.*, 62

N.W. 646, 647 (Iowa 1895)). And because easements are property interests in land, the court determined that the statute constituted a taking by transferring that interest from neighboring landowners to farmers. *Id.* at 316–21. The *Bormann* decision thus turned on a peculiarity of Iowa property law.

Indeed, petitioners have failed to identify any other State that treats the right to maintain a nuisance as an easement. On the contrary, Indiana courts, for example, have expressly rejected *Bormann*'s analysis because of the differences in state property law. In an earlier case, the Indiana Court of Appeals rejected *Bormann*'s analysis because it could not find a similar rule in Indiana property law. *See Lindsey v. DeGroot*, 898 N.E.2d 1251, 1258–59 (Ind. Ct. App. 2009) ("[W]e have found nothing to suggest that Indiana has adopted the seemingly unique Iowa holding that the right to maintain a nuisance is an easement."). The Idaho Supreme Court similarly rejected *Bormann*'s analysis when it held that a statute conferring nuisance and trespass immunity on grass farmers for crop-residue burning did not effect a taking because "Idaho has not recognized the right to maintain a nuisance as an easement." *Moon v. North Idaho Farmers Ass'n*, 96 P.3d 637, 645 (Idaho 2004), *cert. denied*, 543 U.S. 1146 (2005). And even the Iowa Supreme Court itself has acknowledged that on this point it stands alone. *See Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 232–33 (Iowa 2018) (noting that while all 50 States have right-to-farm laws granting various immunities from nuisance claims, Iowa is the only one to have deemed such an immunity "unconstitutional in any manner").

Petitioners suggest that "Iowa is not alone," but they cite only a district court decision from Minnesota that, they say, deemed *Bormann* "persuasive." Pet. 35; *see Overgaard v. Rock Cty. Bd. of Comm'rs*, No. 02-601, 2003 WL 21744235 (D. Minn. July 25, 2003). The district judge in *Overgaard*, however, said only that "[w]hile *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 WL 21744235, at *7. Far from embracing *Bormann*, the district judge in *Overgaard* concluded that the Minnesota law did not categorically bar nuisance claims in any event, and it therefore reserved judgment on the significance of *Bormann*. *Id.* *Overgaard* is thus of no help to petitioners.

Petitioners themselves acknowledge that the "divergent outcomes" in these cases are "based on [S]tates' unique property laws," Pet. 35, yet insist on national uniformity anyway, Pet. 35–36. But it is well-established that state law "define[s] the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (citation omitted); *see also Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998) ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 567, 577 (1972))). The decision below does not conflict with *Bormann* because the decisions stem from significant differences in state property law.

Nor would this be an appropriate case for resolving a conflict even if one did exist. The court below did not say anything about *Bormann*, App. 20–23, because petitioners never cited the case, Appellants' Br. 52–58. They also did not ask the court to reconsider its prior decision rejecting *Bormann*'s analysis. *Id.* In short, like their *Loretto* theory, petitioners' *Bormann* argument makes its untimely debut in this Court. There is no reason for the Court to address it.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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Dated: August 26, 2020