No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of Agriculture's marketing order stabilizing the market for California raisins—under which a percentage of the raisins that a producer offers for sale may be required to be sold in a manner directed by the Secretary, with the producer retaining equitable rights in the proceeds—effects a per se taking under the Just Compensation Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 750 F.3d 1128. The opinion of the district court (Pet. App. 125a-189a) is not published in the *Federal Supplement*, but is available at 2009 WL 4895362.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2014. On July 16, 2014, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 8, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, was enacted dur-

ing the Great Depression "in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system." Pet. App. 193a; see 7 U.S.C. 601. The AMAA "contemplates a cooperative venture" among the Secretary of Agriculture (Secretary), agricultural producers, and handlers of agricultural products, "the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984); see 7 U.S.C. 602 (declaration of policy); *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-462 (1997).

To achieve these goals, the Secretary is authorized to promulgate marketing orders that regulate the "handling of [certain] agricultural commodit[ies] or product[s] thereof," in interstate or foreign commerce. 7 U.S.C. 608c(1). Marketing orders do not directly regulate "producers" (*i.e.*, the farmers) who grow the agricultural commodities. Instead, marketing orders directly regulate only the "handlers" of agricultural commodities and products (*i.e.*, those who process the products for marketing). See 7 U.S.C. 608c(1); see 7 C.F.R. 989.11, 989.15 (regulatory definitions of raisin producers and handlers). The Secretary may choose among various market-regulation tools, such as limiting the total quantity of a commodity or product that can be marketed or transported, 7 U.S.C. 608c(6)(A) and (C); allotting the amount that each handler may purchase from or handle on behalf of any or all producers, 7 U.S.C. 608c(6)(B); or (as directly relevant here) establishing "reserve pools of any such commodity or product" and "providing for the equitable distribution of the net return derived from the sale

thereof among the persons beneficially interested therein," 7 U.S.C. 608c(6)(E).

In general, a marketing order proposed by the Secretary does not become effective unless approved by two-thirds of producers (by number or by volume of production). 7 U.S.C. 608c(8) and (9). Similarly, the Secretary must terminate any marketing order when termination is favored by more than 50% (by volume) of the producers. 7 U.S.C. 608c(16)(B); 7 C.F.R. 989.91(c).

2. This case concerns the marketing order that regulates the market for California raisins. See 7 C.F.R. Pt. 989. The California raisin industry accounts for 99.5% of the domestic supply, and 40% of the world's supply, of raisins. Pet. App. 196a n.7.

The domestic demand for raisins is relatively stable, averaging approximately 210,000 tons per year. See Raisin Admin. Comm., *Marketing Policy & Industry Statistics 2013* 4 (Oct. 24, 2013) (*Raisin Statistics*), http://www.raisins.org/images/marketing%20policy%202013.pdf. The annual raisin supply, however, can fluctuate dramatically depending upon the amount of planting in prior years; the presence of weather patterns that affect the sun-drying method of producing raisins; and the profitability of alternative uses for grapes, including sale as fresh grapes, wine, or juice. See 71 Fed. Reg. 29,569 (May 23, 2006). For example, the 1998-1999 crop year yielded approximately 240,000 tons of natural seedless raisins, while the 2000-2001 crop year yielded more than 430,000 tons. *Ibid.* The fluctuations in raisin supply "can result in producer price instability and disorderly market conditions." *Ibid.* Before the enactment of the AMAA, raisin growers had in some years been forced to sell their raisins "at

prices regarded by students of the industry as less than the cost of production." Pet. App. 4a (quoting *Parker* v. *Brown*, 317 U.S. 341, 364 (1943)).

Following a spike in production that caused raisin prices to decline sharply from $235 per ton to $40-$60 per ton, the Secretary in 1949 issued the marketing order for California raisins "at the request of the raisin industry." Pet. App. 4a, 44a, 196a. The raisin marketing order sought "to stabilize producer returns by limiting the quantity of raisins sold by handlers in the domestic competitive market." *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356, 1359 (Fed. Cir. 2005). The order maintains a stable market price by, under certain circumstances, controlling raisin supply through the establishment of annual "reserve pools" of raisins that will not be released immediately into the open domestic market. See 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.54(d), 989.65. The program is designed "to keep raisin supply relatively constant from year to year, smoothing the raisin supply curve and thus bringing predictability to the market for producers and consumers alike." Pet App. 2a.

The raisin marketing order establishes the Raisin Administrative Committee (RAC), consisting of 47 members, with 35 representing producers, 10 representing handlers, one representing a cooperative bargaining association, and one representing the public. See 7 C.F.R. 989.26. Producers and handlers nominate their representatives to the RAC and vote for their preferred candidates; the Secretary selects from those nominees or other eligible producers and handlers. See 7 C.F.R. 989.29, 989.30.

The raisin marketing order requires handlers to file certain reports with the RAC, such as reports

concerning the quantity of raisins they hold or acquire. 7 C.F.R. 989.73. The order additionally requires handlers to allow the RAC access to their premises, raisins, and business records to verify the accuracy of the handlers' reports. 7 C.F.R. 989.77. The order also requires handlers to obtain inspections of raisins they acquire, 7 C.F.R. 989.58(d), and to pay certain assessments, 7 C.F.R. 989.80, which help defray the RAC's administrative costs, including the costs of enforcing the marketing order, Pet. App. 128a.

Every year, the RAC reviews the crop yield, inventories, and shipments of raisins and determines whether to recommend that the Secretary establish reserve pools for any or all of the eight varietal types of raisins. 7 C.F.R. 989.54; see 7 C.F.R. 989.10. If the RAC recommends a reserve pool, it further recommends what portion of the year's production should be included in that pool (the "reserve percentage"), with the balance made available for sale on the open market (the "free percentage"). 7 C.F.R. 989.54(d), 989.55. Based on the percentages recommended by the RAC and set by the Secretary, the raisins that a handler receives from producers are then divided into two groups: "free tonnage" and "reserve tonnage." 7 C.F.R. 989.65.

The handler pays producers for the free tonnage at market prices and may resell those raisins without restriction. 7 C.F.R. 989.65; *Lion Raisins*, 416 F.3d at 1360. Producers do not receive immediate direct payment for the reserve tonnage. *Lion Raisins*, 416 F.3d at 1360. The handler holds the reserve tonnage "for the account of the [RAC]," 7 C.F.R. 989.66(a), with producers entitled to an "equitable distribution of

the net return" from such raisins, 7 U.S.C. 608c(6)(E); see 7 C.F.R. 989.66(h) ("The net proceeds from the disposition of reserve tonnage raisins * * * shall be distributed by the committee to the respective producers * * * on the basis of the volume of their respective contributions."). No provision of the marketing order divests the producer of title to the reserve raisins, which are generally treated as the producers' "sole and absolute property." See Office of Mgmt. & Budget (OMB), OMB No. 0581-0178 (Jan. 2014) (Assignment Form), http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5094721 (form for assigning interest in reserve raisins).

The regulations governing the disposal of reserve-tonnage raisins require that the raisins "shall be sold to handlers at prices and in a manner intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available." 7 C.F.R. 989.67(d)(1). The RAC can direct the disposal of the reserve raisins in a variety of ways not expected to undermine domestic market prices for free-tonnage raisins. *Lion Raisins*, 416 F.3d at 1359-1360; see 7 C.F.R. 989.67. Reserve tonnage is often sold, following an initial delay, as free tonnage that can enter the domestic raisin market without restriction. 7 C.F.R. 989.54(g), 989.56. The RAC uses the proceeds from the sale of reserve raisins to pay the costs of administering the reserve pool and to promote the sale of raisins domestically and abroad, with surplus proceeds distributed to producers on a pro rata basis. 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.53(a), 989.66(h). A producer's equitable share of the proceeds from the reserve-tonnage raisins may be assigned to third

parties in exchange for compensation. See Assignment Form.

Due to the considerable fluctuations in raisin supply, the reserve pool may vary significantly from year to year. In many years—for example in the 1998-1999, 2004-2005, 2010-2011, 2011-2012, 2012-2013, 2013-2014, and 2014-2015 crop years—there was or will be no reserve raisin pool at all for natural seedless raisins, meaning that all such raisins are free tonnage that may be sold by the handlers with no restrictions. See *Raisin Statistics* 1-2, 29; RAC, *Minutes of the Raisin Administrative Committee* 4 (Aug. 14, 2014), http://www.raisins.org/index.php/reports/rac-minutes/441-august-14-2014. In the 2002-2003 and 2003-2004 crop years at issue in this case, the Secretary, while declining to impose any reserve-pool requirements for certain types of raisins, required reserves of 47% and 30% respectively for natural seedless raisins. *Raisin Statistics* 29; see Pet. App. 111a. In the 2002-2003 crop year, producers received $272.73 per ton as their equitable share of the reserved natural seedless raisins, resulting in a total of $47.9 million in net distributions to all producers combined. See RAC, *Statement of Disposition and Grower Equity 2002-03 Natural Seedless Reserve Pool.*[*] No payments were made for the 2003-2004 crop year because no surplus from the sale of reserve raisins remained after the RAC met its expenses and funded export-promotion activities. See RAC, *Memo to All 2003-2004 Natural (sun-dried) Seedless Grow-*

[*] In a previous brief in this Court, the government incorrectly stated that producers received only $27.45 per ton. Gov't Br. 7, 133 S. Ct. 2053 (No. 12-123).

ers regarding 2003-04 Natural (sun-dried) Seedless Reserve Pool 1 (June 23, 2008).

A handler who violates any provision of the marketing order or its implementing regulations is subject to a civil penalty of up to $1100 per day of violation. 7 U.S.C. 608c(14)(B); 7 C.F.R. 3.91(b)(1)(vii); see 12-123 J.A. 106-107 & n.2. In addition, a handler that does not comply with the reserve-pool requirement "shall compensate the [RAC] for the amount of the loss resulting from his failure to so deliver" reserve raisins when requested by the RAC. 7 C.F.R. 989.166(c).

3. Petitioners own and operate vineyards in California where, since 1969, they have grown grapes and produced raisins. Pet. App. 33a. For six years, petitioner Marvin D. Horne served as a member or alternate member of the RAC. *Id.* at 34a. As raisin growers, petitioner Horne and his family do business under the name "Raisin Valley Farms." Pet. 7-8; Pet. App. 33a.

After operating as raisin producers for more than 30 years, petitioners devised a plan to purchase equipment to clean, stem, sort, and package raisins, and to operate their own packing and handling operations under the name "Lassen Vineyards." Pet. App. 36a-37a. Petitioners asserted the position that if they packed and marketed their own raisins, they would be exempt from any raisin reserve-pool requirements. Pet. 7-8; Pet. App. 7a, 34a.

Under petitioners' new "Lassen Vineyards" operations, they packed raisins that they owned and produced in their Raisin Valley Farms operation, and also packed, for a fee, raisins produced and owned by more than 60 other farmers. Pet. 8; Pet. App. 7a, 36a, 38a, 65a, 200a. Petitioners' facilities processed more than

three million pounds of raisins during the 2002-2003 and 2003-2004 crop years. Pet. App. 145a, 200a. Petitioners owned only 27.4% of the raisins they processed in 2002-2003, and owned no more than 12.3% of the raisins they processed in 2003-2004. See Gov't Br. 9 nn.7 & 8, 133 S. Ct. 2053 (No. 12-123).

The Department of Agriculture repeatedly informed petitioners that they would still be subject to the reserve-pool requirement under their new arrangement. Pet. App. 35a-36a. Among other things, the Department notified petitioners that "[m]ore than half of the recognized handlers on the RAC Raisin Packer list are also producers of raisins," who have "their own production brought to their plant" but nonetheless comply with the reserve-pool requirement. C.A. Supp. E.R. 80. Petitioners "expressly disregarded" the Department's advice and proceeded to pack raisins without "hold[ing] any raisins in reserve in respect to any of the raisins * * * received from and packed for growers during the 2002-2003 and 2003-2004 crop years." Pet. App. 36a. Petitioners thus apparently sold their raisins at a price supported by the reserve-pool requirements that their competitors observed but they themselves did not. *Id.* at 33a, 51a.

4. In 2004, the Administrator of the Agricultural Marketing Service (an agency within the Department of Agriculture) initiated a proceeding against petitioners, alleging that they had violated various provisions of the raisin marketing order and implementing regulations during the 2002-2003 and 2003-2004 crop years. Pet. App. 133a-134a, 200a. An administrative law judge (ALJ) held a three-day hearing, *id.* at 134a, during which petitioners admitted that they did not

hold raisins in reserve, *id.* at 36a, 133a, and also admitted that they failed to pay required assessments, failed to have incoming inspections performed, failed to report their acquisitions of raisins, and failed accurately to file certain other forms as well, *id.* at 36a-40a, 132a-133a.

The ALJ rejected petitioners' argument that they were not handlers subject to the raisin marketing order's requirements. Pet. App. 46a-53a. The ALJ found that petitioners committed 673 violations of the raisin marketing order, including 592 violations (one per day) for failure to reserve required raisins for 294 days during the 2002-2003 crop year and failure to reserve required raisins for 298 days during the 2003-2004 crop year. *Id.* at 43a-44a, 53a, 103a. The ALJ also found that petitioners "acted willfully and intentionally when they decided to * * * not hold raisins in reserve" and that petitioners' "violations were deliberate and were designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order." *Id.* at 33a, 51a.

A Department of Agriculture judicial officer affirmed the ALJ's decision in relevant part. Pet. App. 56a-98a; see also *id.* at 101a-124a. Petitioners were ordered to pay $8,783.39 in unpaid assessments, $202,600 in civil penalties, and $483,843.53 for the raisins they had failed to reserve in the 2002-2003 and 2003-2004 crop years. *Id.* at 8a n.6.

5. Petitioners sought judicial review of the agency's decision in district court, contending, *inter alia*, that the reserve-pool requirement results in a per se physical taking without just compensation, in violation of the Just Compensation Clause of the Fifth Amend-

ment. Pet. App. 138a, 176a-184a. The district court concluded that petitioners met the regulatory definition of raisin handlers and were subject to the requirements of the raisin marketing order. *Id.* at 140a-163a. The court also concluded that "the reserve tonnage [requirement] does not constitute a physical taking." *Id.* at 184a (emphasis omitted); see *id.* at 176a-187a.

The court of appeals affirmed. Pet. App. 191a-219a. The court's amended opinion concluded that it lacked jurisdiction to address petitioners' takings claim, because petitioners were required to seek just compensation for any taking by bringing suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491(a)(1). Pet. App. 233a-236a.

This Court reversed that jurisdictional holding. 133 S. Ct. 2053. The Court explained that "[p]etitioners' taking claim * * * was properly before the court [of appeals] because the AMAA * * * withdraws Tucker Act jurisdiction over takings claims brought by raisin handlers." *Id.* at 2056. The Court, however, took "no position on the merits of petitioners' takings claim," *id.* at 2061 n.5, and instead simply remanded the case to the court of appeals, *id.* at 2064. The Court left open, *inter alia*, the question whether a raisin *producer* could seek compensation for reserve-pool raisins under the Tucker Act and, if so, whether the availability of such a Tucker Act suit would provide an avenue for just compensation that would defeat petitioners' takings claim on the merits. *Id.* at 2062 n.7.

6. On remand, following supplemental briefing and oral argument, the court of appeals rejected petitioners' takings claim on the merits. Pet. App. 1a-29a.

The court initially concluded that petitioners had standing to challenge the reserve-pool requirement, even as to raisins that they themselves did not produce, because they had been injured by the monetary penalties imposed on them as handlers for failing to set aside raisins for the reserve pool. *Id.* at 10a-12a. And the court reasoned that the constitutionality of those penalties turned on whether the reserve-pool requirement effects a taking of raisins (regardless of whether the raisins are owned by petitioners) without just compensation (regardless of whether the just compensation would be owed to petitioners). *Id.* at 12a-15a. But the court, noting that petitioners had "intentionally declined" to argue that the reserve-pool requirement constitutes a regulatory taking under this Court's decision in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), rejected petitioners' theory that the reserve-pool requirement constitutes a "categorical" or "per se" taking. Pet. App. 16a.

The court of appeals recognized that this Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)—which involved a law requiring a landlord to "permit a cable television company to install its cable facilities upon his property," *id.* at 421—"holds that permanent physical invasions of real property work a per se taking." Pet. App. 17a. For "[t]wo independent reasons," however, it found *Loretto* not to be controlling in this case. *Ibid.* First, the court found it significant that the marketing order operates against personal property, rather than real property. *Id.* at 18a. The court noted that "this distinction does not mean the Takings Clause is inapplicable" and that the "precise contours" of the "differ-

ing levels of protection" for different types of property "are not entirely sharp." *Id.* at 18a-19a. But, the court reasoned, this Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (2002), "suggests the government's authority to regulate [personal property] without working a taking is at its apex where, as here, the relevant governmental program operates against personal property and is motivated by economic, or 'commercial,' concerns." Pet. App. 19a. The court thus "s[aw] no reason to extend *Loretto* to controversies involving personal property." *Id.* at 20a.

Second, and "[e]qually importantly," the court found this case "[u]nlike *Loretto*" because petitioners "did not lose all economically valuable use" of their property. Pet. App. 20a. The court reasoned that *Loretto* "applies only when *each* strand from the bundle of property rights" is 'chopped through . . . taking a slice of every strand,'" and that raisin producers' "rights with respect to the reserved raisins are not extinguished because [they] retain the right to the proceeds from their sale." *Id.* at 20a-21a (quoting *Loretto*, 458 U.S. at 435 (internal quotation marks omitted), and citing 7 U.S.C. 608c(6)(E)); 7 C.F.R. 989.66(h)). The court additionally noted that petitioners enjoy the market-stabilization benefits of the reserve pool. *Id.* at 21a-22a.

Against this background, the court of appeals concluded that the "appropriate framework to decide this case given the significant but not total loss of [petitioners'] possessory and dispositional control over their reserved raisins" was by analogy to this Court's approach to evaluating the constitutionality of conditions on land-use permits. Pet. App. 23a n.18. The

court observed that the Secretary "did not authorize a forced seizure of [petitioners'] crops, but rather imposed a condition on [their] *use* of their crops by regulating their sale." *Id.* at 25a. The court thus reasoned that the reserve-pool requirement was, "[a]t bottom," a "use restriction applying to [petitioners] insofar as they voluntarily choose to send their raisins into the stream of interstate commerce," and thus was analogous to a condition on a land-use permit. *Ibid.*; see *id.* at 25a-26a (noting that the reserve-pool requirement, like land-use-permit conditions, involves "a conditional exaction," the grant of "a government benefit in exchange," and "choice" about whether to use the property in a manner that could trigger the condition). The court stressed that petitioners "can avoid the reserve requirement of the Marketing Order by * * * planting different crops, including other types of raisins not subject to this Marketing Order or selling their grapes without drying them into raisins." *Id.* at 26a.

The court of appeals accordingly applied a test drawn from this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), for determining whether the reserve-pool requirement, viewed as an exaction, was consistent with the Just Compensation Clause. Under that analysis, the court found the reserve-pool requirement constitutional because it had a "sufficient nexus" to the government's goal of stabilizing the raisin market and was "roughly proportional" to that goal, in that it required handers to reserve only as many raisins as necessary each year to achieve market stabilization for the bene-

fit of all producers. Pet. App. 26a-28a; see *id.* at 23a-25a.

ARGUMENT

The raisin marketing order petitioners challenge has been in effect and stabilized the raisin market for 65 years. Petitioners participated in the program for more than 30 years before they chose to intentionally violate the order by processing raisins for themselves and other producers for sale outside the order's procedures. The court of appeals correctly concluded that this order, from which petitioners and other producers have benefited for many years, does not violate the Just Compensation Clause. That conclusion does not conflict with any decision of this Court or any other court of appeals. This case, moreover, would not be a suitable vehicle for reviewing the more general and abstract issues raised by petitioners. Further review is not warranted.

1. a. The Fifth Amendment's Just Compensation Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This Court has explained that the "paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). The Court has also "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Ibid.*

The Court's precedents "stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." *Lingle*,

544 U.S. at 538; see *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015-1016 (1992) (same). The first is when the "government requires an owner to suffer a permanent physical invasion of her property—however minor"; in such a case, the government "must provide just compensation." *Lingle*, 544 U.S. at 538; see *Lucas*, 505 U.S. at 1015. The second is when a regulation "completely deprive[s] an owner of '*all* economically beneficial use' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019) (brackets omitted). "Outside these two relatively narrow categories (and the special context of land-use exactions * * *), regulatory takings challenges are governed by the standards set forth in" *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). *Lingle*, 544 U.S. at 538. The *Penn Central* standards require a "case-specific inquiry into the public interest advanced in support of the restraint," *Lucas*, 505 U.S. at 1015, and examine, *inter alia*, the "character of the governmental action," the "economic impact of the regulation on the claimant," and "the extent to which the regulation has interfered with distinct investment-backed expectations," *Lingle*, 544 U.S. at 538-539 (quoting *Penn Central*, 438 U.S. at 124).

b. Petitioners have disavowed any reliance on the case-specific *Penn Central* inquiry. They apparently recognize that the raisin marketing order's fair and proven measures for stabilizing the raisin market plainly do not result in a taking under that test. The "character of the governmental action" is one of reasonable regulation of a commercial market in an agricultural commodity; the "economic impact of the regulation" is to stabilize the market and ensure a suffi-

cient price level for producers, including petitioners; and petitioners, after decades of participation in the raisin market under the order, had no "distinct investment-backed expectations" in being able to market their raisins without complying with the order's reasonable requirements. *Lingle*, 544 U.S. at 538-539 (quoting *Penn Central*, 438 U.S. at 124).

Petitioners nevertheless contend that the raisin marketing order effects a categorical, per se taking. Pet. App. 16a. The order's reserve-pool requirement, however, is not one of the types of per se takings recognized by this Court. As a threshold matter, the requirement that handlers reserve a certain amount of raisins is not "a direct government appropriation or physical invasion of private property." *Lingle*, 544 U.S. at 537. Petitioners' characterization of the reserve pool as the "government's acquisition of title to personal property," Pet. 22, is inaccurate. Although the Court of Federal Claims has described the reserve pool that way in dicta (see *Evans* v. *United States*, 74 Fed. Cl. 554, 558 (2006), aff'd, 250 Fed. Appx. 321 (Fed. Cir. 2007) (per curiam) (unpublished), cert. denied, 552 U.S. 1187 (2008)), see Pet. 5, nothing in the regulations cited by that court, or by petitioners (see *ibid.*), supports that description. The reserve-pool raisins are held "for the account" of the RAC, 7 C.F.R. 989.66(a), but neither the AMAA nor the marketing order provides that the RAC "takes title" (Pet. 22) to the reserve raisins. Rather, as previously discussed, pp. 5-7, *supra*, the marketing order regulates, in certain crop years, the timing and conditions under which the reserve raisins can be sold, with the producers retaining the rights to the net proceeds of any sale.

The reserve-pool requirement also does not fit within the "relatively narrow categories," *Lingle*, 544 U.S. at 538, of per se regulatory takings. First, the requirement is not a "permanent physical invasion" of anyone's raisins. *Ibid.* This Court has identified the situation presented in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which involved a state-law requirement to allow cable equipment to be installed on the roof and side of a building, as the archetypical example of this sort of taking. See *Lingle*, 544 U.S. at 538; *Lucas*, 505 U.S. at 1015. This case presents no personal-property analogue to the taking at issue in *Loretto*. The Court in *Loretto* emphasized that the regulation there "d[id] not simply take a single 'strand' from the 'bundle' of property rights," but instead "chop[ped] through the bundle, taking a slice of every strand." 458 U.S. at 435. Among other things, it deprived the owner of "the right to use and obtain a profit from property" and "empt[ied]" the right to transfer or sell the affected property "of any value." *Id.* at 436. The same is not true here. Under both the AMAA and the implementing regulations for the raisin marketing order, the producer retains an equitable right in the proceeds of the reserve raisins. 7 U.S.C. 608c(6)(E); see 7 C.F.R. 989.66(h); see also pp. 5-7, *supra*. Those equitable rights have monetary value and can be transferred for consideration. See pp. 5-7, *supra*. Moreover, the net effect of the reserve-pool requirement is to raise the value of a producer's raisins as a whole, by stabilizing the market price of raisins and increasing revenues from the sale of the free-tonnage raisins. See pp. 3-4, *supra*.

Second, because the producer retains valuable rights in the reserve-pool raisins, the raisin marketing order does not "completely deprive an owner of '*all* economically beneficial use' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019) (brackets omitted); see Pet. App. 22a n.17 (concluding that the reserve-pool requirement is not a categorical taking under *Lucas*). The reserve-pool requirement instead functions as a restriction on the sale of raisins. Under the marketing order, reserve-pool raisins are "held * * * for the account of the" RAC, 7 C.F.R. 989.66(a), which determines how those raisins will be disposed of, bearing in mind that they "shall be sold to handlers at prices and in a manner intended to maximum producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available," 7 C.F.R. 989.67(d)(1); see *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356, 1359 (Fed. Cir. 2005); see 7 C.F.R. 989.65-989.67. Any proceeds from the disposition of the reserve raisins—minus administrative costs, which directly fund the RAC activities from which all producers benefit through higher raisin prices—go to the producers. See 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.53(a), 989.66(h).

Although the mechanics of the raisins' disposal are carried out by the RAC, rather than by the producer, the raisin marketing order is effectively indistinguishable from a scheme in which the producer itself disposes of the raisins in a manner approved by the RAC, such as controlling when certain raisins are sold or the markets in which they may be sold. Such a scheme does not violate the Just Compensation Clause. Indeed, petitioners do not meaningfully dispute that if

the marketing order "limited the amount of a crop that a farmer can sell, that would be a use restriction" and would not amount to a per se taking. Pet. 33; see *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979) (regulation that barred sale of certain items and thus "prevent[ed] the most profitable use of [plaintiffs'] property" did not effect a taking). Such a program does not become *less* constitutional when certain avenues for sale are left open and the producers have rights in the proceeds of any sale.

2. The court of appeals' rejection of petitioners' per se takings argument is consistent with the decisions of this Court and other courts. In *United States* v. *Rock Royal Co-Op Inc.*, 307 U.S. 533 (1939), this Court reversed a lower-court decision that had found an AMAA marketing order for milk (which employed an alternative to the reserve-pool requirement) to "take[] property without compensation." *Id.* at 541; see *id.* at 568-581. Since then, lower courts have consistently rejected Just Compensation Clause challenges to AMAA marketing orders, including challenges to the raisin marketing order at issue here. See *Evans*, 74 Fed. Cl. at 562-565; see also *Cal-Almond, Inc.* v. *United States*, 30 Fed. Cl. 244, 246-247 (Fed. Cl. 1994) (rejecting challenge to almond marketing order), aff'd, 73 F.3d 381 (Fed. Cir. 1995) (Tbl.), cert. denied, 519 U.S. 963 (1996); *Carruth* v. *United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980) (rejecting challenge to peanut marketing order); *Wallace* v. *Hudson-Duncan & Co.*, 98 F.2d 985, 989 (9th Cir. 1938) (rejecting challenge to walnut marketing order); *Prune Bargaining Ass'n* v. *Butz*, 444 F. Supp. 785, 793 (N.D. Cal. 1975) (rejecting challenge to prune

marketing order), aff'd, 571 F.2d 1132 (9th Cir.) (per curiam), cert. denied, 439 U.S. 833 (1978).

3. Petitioners do not claim any conflict on the constitutionality of the raisin marketing order, or any other marketing order. They instead urge this Court to grant review to address a set of more abstract issues involving the Just Compensation Clause, asserting that each is the subject of a circuit conflict. None of those issues warrants this Court's review in this case.

a. First, petitioners seek review of what they assert was the court of appeals' "holding that government appropriation of personal property is never categorically subject to" the Just Compensation Clause. Pet. 16; see *id.* at 15-26. But even assuming *arguendo* that the court below in fact reached such a conclusion, it would have been only one of "[t]wo independent reasons" for rejecting petitioners' reliance on *Loretto*. Pet. App. 17a-18a. The court separately reasoned that even if *Loretto* applied, petitioners still would not prevail because "[u]nlike" in *Loretto*, petitioners "did not lose all economically valuable use" of their property. *Id.* at 20a.

In any event, it is far from clear that the decision below announced the broad principle that petitioners ascribe to it. The court of appeals concluded that *Loretto* did not in itself "govern controversies involving personal property"; observed that the constitutional distinctions between regulations of different types of property "are not entirely sharp"; and interpreted *Lucas* v. *South Carolina Coastal Council*, *supra*, to "suggest[] the government's authority to regulate [personal property] without working a taking is at its apex where, as here, the relevant governmen-

tal program operates against personal property and is motivated by economic, or 'commercial,' concerns." Pet. App. 19a-20a. The court did not preclude the conclusion that *other* circumstances, involving direct governmental acquisition of personal property, could be viewed as per se takings.

Decisions cited by petitioners (Pet. 18-19) address laws substantially different in nature from the "economic or 'commercial'" regulation reflected in the raisin marketing order, and thus do not suggest that other courts would have decided this case differently. See *Cerajeski* v. *Zoeller*, 735 F.3d 577, 580 (7th Cir. 2013) (application of abandoned-property statute constituted taking of interest from bank account); *Anderson* v. *Spear*, 356 F.3d 651, 668-670 (6th Cir.) (application of election-law statute requiring relinquishment of campaign funds after an election constituted per se taking), cert. denied, 543 U.S. 956 (2004); *Nixon* v. *United States*, 978 F.2d 1269, 1284-1287 (D.C. Cir. 1992) (application of records statute constituted per se taking of ex-President's papers); *Porter* v. *United States*, 473 F.2d 1329, 1336 (5th Cir. 1973) (application of ad hoc statute about Lee Harvey Oswald's effects constituted taking); see also *Rose Acre Farms, Inc.* v. *United States*, 373 F.3d 1177, 1197-1198 (Fed. Cir. 2004) (concluding that destruction of diseased hens was not a per se taking), cert. denied, 545 U.S. 1104 (2005); *United States* v. *Corbin*, 423 F.2d 821, 826 (10th Cir. 1970) (including value of fish in computation of compensation for condemnation of land containing fish farm). The absence of a square circuit conflict, in combination with the uncertainty about whether or how the decision below might be interpreted in future cases, counsels strongly against

granting certiorari on an issue that even the court of appeals did not view as crucial to the result here.

b. Second, petitioners contend that the decision below held that "appropriation of property—even of real property, evidently—is a per se taking *only* if it deprives the owner of '*all* rights associated with the property.'" Pet. 26 (citation omitted); see Pet. 26-29. Petitioners' contention, however, rests on a misunderstanding of both the raisin marketing order and the decision below. Petitioners err in contending (Pet. 27) that this case involves the government's "taking of actual ownership and possession" of producers' raisins. As explained above, see p. 17, *supra*, nothing in the marketing order transfers title in the reserve raisins from petitioners to the government, and possession of the reserve raisins remains with the handlers to whom the producers voluntarily send the raisins, see 7 C.F.R. 989.66(a). The court of appeals recognized as much, distinguishing the marketing order's effect on "possessory and dispositional control" from a "transfer of title." Pet. App. 25a-26a. Decisions cited by petitioners (Pet. 27-28), in which the government (as in *Loretto*) physically takes complete dominion over a portion of a plaintiff's property, are inapposite and do not show a circuit conflict in the circumstances of this case. See *Casitas Mun. Water Dist.* v. *United States*, 543 F.3d 1276, 1291-1292 (Fed. Cir. 2008) (government "actively caused the physical diversion of water," thereby "reducing [plaintiff's] water supply"); *Gulf Power Co.* v. *United States*, 187 F.3d 1324, 1328 (11th Cir. 1999) (government allowed by statute "to permanently occupy physical space on [a cable company's] poles, ducts, conduits, and rights-of-way").

c. Finally, petitioners seek review (Pet. 29-36) of the court of appeals' application to the circumstances of this case of a nexus-and-proportionality test drawn from *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). In petitioners' view (Pet. 29), *Nollan* and *Dolan* are inapplicable to a situation involving "the government's acquisition of title to the reserve raisins." See, *e.g.*, Pet. 33. Again, however, petitioners' argument rests on the erroneous premise that the raisin marketing order transfers all interests in reserve raisins. Compare, *e.g.*, *ibid.* (characterizing raisin marketing order as a transfer of title and a "physical transfer of raisins"), with p. 17, *supra* (explaining that no physical or title transfer occurs). Petitioners' assertion of a conflict between the approach taken in the decision below and the approach taken in cases involving actual physical invasions of private property is accordingly misplaced. See Pet. 31-33 (citing *Casitas Mun.Water Dist.*, *supra*; *Gulf Power Co.*, *supra*; and *GTE Nw., Inc.* v. *Public Util. Comm'n of Or.*, 900 P.2d 495, 503 (Or. 1995) (requirement to allow equipment to be installed on private property), cert. denied, 517 U.S. 1155 (1996)). Indeed, to the extent that the court of appeals did not simply deny relief based on the conclusion that no per se taking occurred under *Loretto* or *Lucas* (Pet. App. 20a-22a & n.17), but instead accepted that petitioners could prevail if the reserve-pool requirement failed the *Nollan/Dolan* nexus-and-rough proportionality test, it actually "stretched" existing doctrine (Pet. 30 n.2) in petitioners' favor. And petitioners do not contend that there was a taking here under a *Nollan/Dolan* test. Nor do they contest the court of ap-

peals' conclusion, in applying that test, that there was a close nexus and rough proportionality between the reserve-raisin requirement and the price-stabilization purposes of the marketing order, which directly benefited petitioners and other producers.

4. To the extent that the abstract questions presented in the petition might warrant this Court's review in some case, this particular case would be a poor vehicle for addressing them.

As the discussion above reflects, petitioners' arguments are based largely on a misunderstanding of the raisin marketing order, and any context-specific arguments petitioners might raise about the proper understanding of the raisin marketing order would have limited importance. We are aware of no other pending challenges to the raisin marketing order. Very few other products regulated under the AMAA are even potentially subject to reserve-pool requirements; all of those have separate regulatory schemes; and we are informed by the Department of Agriculture that for all but one of them (tart cherries) the reserve-pool programs have not been in effect for a number of years. See 7 C.F.R. Pt. 930 (tart cherries); 7 C.F.R. Pt. 981 (almonds); 7 C.F.R. Pt. 984 (walnuts); 7 C.F.R. Pt. 987 (dates); 7 C.F.R. Pt. 993 (dried prunes).

In any event, if more than 50% of raisin producers (as measured by volume of raisins) believe that the raisin marketing order is unnecessary, they can vote to repeal it. 7 U.S.C. 608c(9) and (16)(B); 7 C.F.R. 989.91(c). The absence of any such action during the 65 years that the raisin marketing order has been in effect indicates that raisin farmers generally perceive themselves to be advantaged by the order's stabiliza-

tion of raisin prices. Indeed, in 1989, producers rejected the Secretary's proposal for automatic periodic referenda on the continuance of the raisin marketing order, which would have provided more frequent opportunities for producers to weigh in on that subject. See 54 Fed. Reg. 12,206 (Mar. 24, 1989); 54 Fed. Reg. 34,135 (Aug. 18, 1989). It is also telling that only 18 of the roughly 3000 raisin growers have joined a brief in support of the petition for a writ of certiorari. See DKT Liberty Project & 18 Independent Raisin Growers Amicus Br. 1.

In addition, even assuming the raisin marketing order has the effect petitioners attribute to it, alternate grounds for affirmance could impede the Court from reaching the questions presented. First, even if producers' raisins are deemed to be "taken for public use" by the raisin marketing order, U.S. Const. Amend. V, that would not violate the Just Compensation Clause unless it resulted in "pecuniary loss" to the producers. *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 240 (2003). Petitioners have not shown, and cannot show, that the raisin marketing order—the effect of which is to *increase* the market price of raisins, thereby *benefiting* raisin producers—causes such loss.

Second, even assuming the raisin marketing order effected a taking that resulted in a pecuniary loss, it still would not violate the Just Compensation Clause, because Congress has provided a mechanism for producers to obtain "just compensation," U.S. Const. Amend. V. The Tucker Act generally permits a plaintiff—including an aggrieved raisin producer—who believes that the government has taken his property without just compensation to bring an action against

the United States for compensation in the Court of Federal Claims. 28 U.S.C. 1491(a)(1); see *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1017 (1984). The Court has previously recognized that "[t]he availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949). And the Court's previous decision in this case recognized that petitioners' claims might fail for precisely that reason. 133 S. Ct. at 2062 n.7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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