No. 14-275

In The
Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

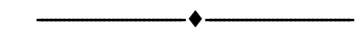
IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside, own property, and work in all 50 states. Since its creation in 1977, MSLF attorneys have defended individual liberties and been active in litigation opposing governmental actions that result in takings of private

[1] Pursuant to Supreme Court Rule 37.2(a), notice of MSLF's intent to file this amicus curiae brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this amicus curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

property without just compensation. *See, e.g.*, *Brandt v. United States*, 710 F.3d 1369 (Fed. Cir. 2013) (represented Plaintiff); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (Fed. Cl. 2001) (represented Plaintiff); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (Plaintiff); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (amicus curiae); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (amicus curiae); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008) (amicus curiae).

Moreover, MSLF has a tangible interest in this case. The right to own and use personal property is central to many MSLF members' ability to earn a livelihood. Therefore, MSLF respectfully submits this amicus curiae brief, urging that the Court grant the Petition for Writ of Certiorari.



STATEMENT OF THE CASE

This case involves a marketing order promulgated under the Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. § 601 *et seq*. In 1949, the Department of Agriculture implemented the *Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California*, 7 C.F.R. § 989 (1993) ("Raisin Marketing Order"). The Raisin Marketing Order is implemented by the Raisin Administrative Committee ("RAC"), an agent of the USDA.

Unlike other marketing orders promulgated under the AMAA, the Raisin Marketing Order requires raisin handlers – those who process, pack, and ship raisins – to transfer title to a significant portion of raisins received from producers to the RAC, referred to as "reserved tonnage raisins."[2] *See* RAC, *Marketing Policy and Industry Statistics, 2010*, at 27, *available at* http://www.raisins.org/files/Marketing%20Policy%202010.pdf (last visited Sep. 26, 2014) ("Marketing Policy"). The percentage of a crop set aside as reserved tonnage raisins is set by the RAC in February of each crop year. 7 C.F.R. §§ 989.21, 989.54(d). The RAC then has complete control over the reserved tonnage raisins. It may sell the raisins to handlers for resale in export markets, *id.* at §§ 989.67(c), (e), or may sell or donate the raisins to foreign governments, United States governmental agencies, or charitable organizations. *Id.* at §§ 989.67(b)(2)-(4). The proceeds from these sales go to fund the RAC, provide export subsidies to favored handlers, and, if anything is left

[2] The raisins that handlers are allowed to keep are referred to as "free tonnage raisins," and may be sold on the open market. 7 C.F.R. § 989.65. Although the handlers bear the obligation to transfer the reserved tonnage raisins to the RAC, handlers pay producers only for free tonnage raisins and producers are thus uncompensated for the taking. *Id.* at §§ 989.65, 989.66(a). Petitioners here produced at least some of the raisins at issue, and were also determined to be "handlers" for purposes of the Raisin Marketing Order because they processed the raisins they produced. *See Horne v. U.S. Dep't of Agric.*, 673 F.3d 1071, 1078 (9th Cir. 2011) ("*Horne I*"), *as amended on reconsideration* (Mar. 12, 2012), *rev'd sub nom*. *Horne v. Dep't of Agric.*, 133 S. Ct. 2053 (2013).

over, distributed to producers on a *pro rata* basis. 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 898.66(h).

In the crop years at issue here, 2002-2003 and 2003-2004, the RAC required farmers to turn over 47 percent and 30 percent of their raisin crops, respectively. *Marketing Policy* at 27. In 2002-2003, the RAC remitted a small portion of the proceeds to producers, well below the cost of production, and not even close to fair market value. RAC, *Analysis Report* 22 (Aug. 1, 2006), *available at* http://www.raisins.org/analysis_report/analysis_report.pdf (last visited Oct. 1, 2014). In 2003-2004, the RAC remitted no portion of the proceeds to producers. *Id.* at 23, 55.

Petitioners, life-long raisin farmers, purchased equipment to sort, process, and pack their own raisins. *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2058 (2013). They also allowed other farmers in the area to use their equipment for a per-ton fee. Petitioners did not believe they were subject to the "handler" requirements of the Raisin Marketing Order. *Id.* at 2059; Petition at 132a-133a. On April 1, 2004, the USDA initiated an enforcement action against Petitioners for their failure to set aside reserved tonnage raisins in crop years 2002-2003 and 2003-2004, and assessed significant fines and penalties. Petition at 30a-31a; *Horne*, 133 S. Ct. at 2059; 7 U.S.C. §§ 608a(5), 608c(14); 7 C.F.R. § 989.166(c). These fines and penalties consisted of both the dollar equivalent of the raisins' fair market value, $483,843.53, and

$202,600 in civil penalties.[3] Petition at 10, 98a, 122a. As this Court previously held in *Horne*, 133 S. Ct. at 2064, Petitioners properly raised a takings-based defense in the USDA's enforcement proceeding. On remand from this Court, the Ninth Circuit ruled on the merits of Petitioners' takings claim, determining that no taking had occurred. *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128 (9th Cir. 2014) ("*Horne II*").

SUMMARY OF ARGUMENT

The Ninth Circuit determined that, because the government did not physically invade Petitioners' land and take their raisins, but merely required a transfer of title of those raisins under the Raisin Marketing Order, a physical takings analysis was inappropriate. *Horne II*, 750 F.3d at 1138. The Ninth Circuit then applied a regulatory takings analysis, relying on a mixture of traditional regulatory takings cases and land-use restriction cases. *Id.* at 1138-44. The panel's holding that no taking occurred was based in significant part on its *ad hoc*, factual findings that: (1) Petitioners benefit from regulation under the Raisin Marketing Order; (2) Petitioners retained a theoretical equitable stake in reserved

[3] Petitioners were fined not only for the fair market value of the raisins they produced and sold, but the fair market value of the raisins of other farmers who had utilized Petitioners' equipment. Petition at 10-11.

tonnage raisins under the Raisin Marketing Order; and (3) the Raisin Marketing Order provides important public benefits by "smoothing the raisin supply curve." *Id.* at 1132, 1140-41.

The Ninth Circuit's analysis is clearly illogical when applied to the taking complained of here – a direct, compelled transfer of title to the RAC. First, property interests such as those at issue here have been protected from governmental interference since the founding of the Republic. Second, transfer of title to the government is not a "conditional[ ] grant [of] a government benefit in exchange for an exaction," *id.* at 1143, but rather, a complete deprivation of property without just compensation. Third, any regulatory "benefits" that inure to Petitioners as a result of the Raisin Marketing Order do not obviate the physical taking. Fourth, the theoretical equitable stake retained by Petitioners does not obviate the physical taking. Finally, any generalized benefit that inures to the public as a result of the Raisin Marketing Order is merely a prerequisite to the government's exercise of its taking power, not the end of the inquiry. The Ninth Circuit's unprecedented interpretation of this Court's takings jurisprudence necessitates granting the Petition.

REASONS FOR GRANTING THE PETITION

I. THE RIGHT TO OWN PROPERTY IS ESSENTIAL TO SECURE LIBERTY.

Property rights in America can be traced to the Magna Charta (1215), which provides: "[n]o freeman shall be taken or imprisoned, or disseised of his free tenement or of his liberties or free custom . . . unless by the lawful judgment of his peers, or by the law of the land." *See United States v. Lee*, 106 U.S. 196, 228 (1882) (The Magna Charta is "the origin of the provision, embodied in the fifth amendment of the constitution of the United States, that no man shall be deprived of life, liberty, or property without due process of law.") (Gray, J., dissenting); *Hutardo v. People of State of Cal.*, 110 U.S. 516, 531-32 (1884) (as "the provisions of *Magna Charta* were incorporated into bills of rights," they became "bulwarks" to guarantee "not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.").

From the very beginning, the framers of the Constitution recognized that "property ownership [is] a buffer protecting individuals from government coercion." James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* 43 (2d ed., 1998). At its core, property ownership gives individuals freedom from government's dictation of every aspect of their lives. D. Benjamin Barros, *Property and Freedom*, 4 NYU J.L. & Liberty 36, 51-52 (2009) (explaining that, in a system without property

or markets, determinations of how various resources are allocated "must now be made by governmental authorities") (citing Charles Lindblom, *Politics and Markets* 50 (1977)). When the Fifth Amendment was incorporated into the Constitution in 1791, it incorporated two important property guarantees, along with procedural safeguards governing criminal trials:

> The amendment provides in part that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." [James] Madison's decision to place this language next to criminal justice protections, such as the prohibitions against double jeopardy and self-incrimination, underscored the close association of property rights with personal liberty. Individuals needed security against both arbitrary punishment and deprivation of property.

The Guardian of Every Other Right 54 (quoting U.S. Const. amend. V).

For over 200 years, this Court has continued to recognize the importance of both personal and real property rights as essential to maintaining liberty. *See Monogahela Nav. Co. v. United States*, 148 U.S. 312, 344-45 (1893) (Awarding compensation to a navigation company for the government's taking of a "lock and dam" on a river and its "vested franchise to receive tolls for its use; that such franchise was as much a vested right of property as ownership of the

tangible property. . . ."); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235-36 (1897) ("The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every cit[i]zen.' ") (quoting 2 Story, Const. § 1790). Indeed, interference with property rights is "'the kind of interference with autonomy that centrally threatens people's control over their lives.' It is difficult to see how other freedoms to speech, religion, or association could be secure in a society without the institution of private property." *Property and Freedom* 69 (quoting Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* 65 (2002)); *see also Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.").

II. A TRANSFER OF TITLE TO PROPERTY EFFECTUATES A PHYSICAL TAKING.

In the proceedings below, the Ninth Circuit acknowledged that the Raisin Marketing Order requires handlers to transfer title to a significant

portion of producers' crops to "'the account of the [RAC].'" *Horne II*, 750 F.3d at 1134 (quoting 7 C.F.R. § 989.66(a)) (alteration in original). The transfer is so complete that the RAC compensates handlers for preparing reserved tonnage raisins for sale or transfer. *Id.* The RAC also has the option of selling the raisins *back to* handlers for sale on export markets. 7 C.F.R. § 989.67(c), (e). Nonetheless, the panel held that no physical taking occurred "[b]ecause the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account. . . ."[4] *Id.* at 1138.

The Ninth Circuit erred in attempting to so limit the Takings Clause. A transfer of title to property (real and personal) effectuates a physical taking. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522 (1992) ("Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation."); *R & J Holding Co. v. Redevelopment Authority of County of Montgomery*, 670 F.3d 420, 431 (3d Cir. 2011)

[4] The Ninth Circuit also charted new territory with its assertion that personal property is not entitled to the same protections as real property under the Takings Clause. *Horne II*, 750 F.3d at 1139-40. As Petitioners have demonstrated, such a distinction is nonsensical. Petition at 15-26. Furthermore, it directly conflicts with precedent in other circuits. *See, e.g., Yancey v. United States*, 915 F.2d 1534, 1541 (Fed. Cir. 1990) ("For Fifth Amendment purposes, the Yanceys' ownership of their turkey flock deserves just as much protection as if ownership of their farm had been appropriated.").

("Practice involving federal government takings confirms that transfer of title is a *watershed moment*.") (emphasis added). The fact that Petitioners were responsible for transferring title from producers to the RAC makes no difference. *See Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1364 (Fed. Cir. 1999) ("A physical taking occurs where the government . . . '*requires* the landowner to submit to physical occupation of its land,' whether by the government or a third party.") (quoting *Yee*, 503 U.S. at 527) (emphasis in original) (internal citations omitted). The fact that the Raisin Marketing Order required only a portion of each raisin crop to be transferred to the RAC does not diminish the fact that it effectuated a complete taking of 30 and 47 percent of producers' raisins in the crop years at issue. *See Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1569 (Fed. Cir. 1994) ("[I]f the Government took just 5 acres and left the property owner with 95, there would be no question that the owner was entitled to compensation for the parcel taken. . . ."); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437-38 (1982) (holding that even a relatively minor physical occupation of an owner's property constitutes a taking).

Whenever the government "physically takes possession of an interest in property" for a public purpose, it has a "categorical duty" to pay just compensation. *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (internal quotations omitted). Whether the RAC snatched raisins from

producers' hands itself or merely implemented regulations requiring transfer of title to the RAC, its action here clearly constituted a physical taking.

III. THE NINTH CIRCUIT ERRED IN APPLYING A REGULATORY TAKINGS ANALYSIS TO A CLASSICAL PHYSICAL TAKING.

The Ninth Circuit justified its holding that no taking occurred based, in part, on the rationales that the RAC secures "benefits" for producers "such as the Hornes" and "the Hornes did not lose all economically valuable use of their personal property." *Horne II*, 750 F.3d at 1140-41. The panel also held that the government demonstrated a "nexus and rough proportionality" between the Raisin Marketing Order and its public interest justification. *Id.* at 1141-42. These justifications were directly tied to the panel's attempt to apply a regulatory takings analysis to a classical physical taking.[5]

As demonstrated below, any alleged "benefits" secured to Petitioners by the Raisin Marketing Order are completely irrelevant in the context of a physical takings claim. Additionally, a physical taking occurred regardless of whether the Raisin Marketing

[5] As Petitioners aptly demonstrate, the Ninth Circuit's attempt to treat seizure of title a "use restriction" under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan*, 512 U.S. at 374, has no support in this Court's precedents. Petition at 29-36.

Order reserved to handlers a nearly-worthless equitable stake in the reserved tonnage raisins. Finally, in a physical takings case, the government's demonstration of a public interest is a prerequisite to exercising its takings power, not a rationale for finding that no taking occurred. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). The existence of a purported public interest does not eliminate the government's duty to pay just compensation.

A. The Ninth Circuit Erred In Determining That Any Purported Reciprocal Benefits Of Regulation Prevent The Raisin Marketing Order From Effectuating A Taking.

In determining that the Raisin Marketing Order does not effectuate a regulatory taking of handlers' raisins, the Ninth Circuit relied in part on the seminal regulatory takings case *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). *Horne II*, 750 F.3d at 1138-44. *Mahon* laid the foundation for what was later referred to as the "*Penn Central* factors" announced in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

Under the *Penn Central* rubric, a court determines whether a regulatory taking has occurred in the absence of a transfer of title by considering the following factors: (1) the "economic impact of the regulation on the claimant[;]" (2) "the extent to which the regulation has interfered with distinct

investment-backed expectations[;]" and (3) "the character of the governmental action." *Id.* at 124-25. Application of the *Penn Central* factors is, however, not appropriate where a regulation effects (1) a physical taking; or (2) a "'complete elimination of value'" in the property at issue. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (quoting *Lucas*, 505 U.S. at 1019-20 n.8).

In assessing the "economic impact" factor, courts sometimes analyze whether the claimant received a reciprocal benefit of being regulated – *Mahon* referred to this as the "average reciprocity of advantage." 260 U.S. at 415 (explaining that the "requirement for the safety of employees invited into the mine . . . secured an average reciprocity of advantage that has been recognized as a justification of various laws"). Reciprocity is not a factor at all in physical takings cases, such as when title is transferred. *See Tahoe-Sierra*, 535 U.S. at 323. Additionally, even in a regulatory takings case, the "average reciprocity of advantage" rationale cannot be relied on where an individual pays "a much higher price for its benefit than . . . other members of the community." *Florida Rock Industries, Inc. v. United States*, 45 Fed. Cl. 21, 37 (1999). In other words, partial compensation is required where the reciprocal benefits of regulation are less than the overall burden of regulation. *Florida Rock*, 18 F.3d at 1568-71. This is the difference between "mere diminution" in value and a "partial taking." *See Palm Beach Isles Associates, Inc. v.*

United States, 231 F.3d 1354, 1359 (Fed. Cir. 2000). Additionally, the "average reciprocity of advantage" rationale should not be applied to generalized public benefits. *See District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 890 (D.C. Cir. 1999) ("[R]esting uncompensated landmark preservation on the idea of reciprocal advantage stretches the concept into meaninglessness. . . .") (Williams, J., concurring).

In the decision below, the Ninth Circuit suggested that the Raisin Marketing Order "inures to the Hornes' benefit" and "conditionally grant[s] a government benefit in exchange for an exaction." *Horne II*, 750 F.3d at 1141, 1143. The panel's rationale was clearly premised on the purported regulatory "benefits" Petitioners received in exchange for title to a significant portion of their raisin crops:

> Here, we pause to consider the RAC's structure and purpose, as well as the benefits it secures for the producers such as the Hornes . . . [T]he Hornes' equitable stake in the reserved raisins, even in years in which they are not entitled to a cash distribution from the RAC, funds the administration of an industry committee. . . . In light of this scheme, the Hornes cannot claim they lose all rights associated with the reserve raisins. Indeed, the structure of the diversion program ensures the reserved raisins continue to work to the Hornes' benefit after they are diverted to the RAC, even in years in which producers

> receive no equitable distribution of the RAC's net profits.

Id. at 1141.

The Ninth Circuit's analysis removes the "economic impact" factor from its regulatory moorings and erroneously utilizes the "average reciprocity of advantage" rationale to justify a physical taking.[6] This confuses the straightforward physical takings inquiry. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 233 (2003) ("Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries. . . .'") (quoting *Penn Central*, 438 U.S. at 124). The *Penn Central* factors are simply irrelevant in a physical takings context. *See, e.g., Tahoe-Sierra*, 535 U.S. at 323 ("This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a

[6] Indeed, the *Penn Central* factors are not even applicable to regulatory takings cases where a regulation works a complete "wipe out" of economic value, because the regulation is a *per se* taking that is functionally equivalent to a taking caused by physical destruction or eminent domain. *Lucas*, 505 U.S. at 1016-18.

claim that there has been a 'regulatory taking,' and vice versa."); *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 517 (1987) ("No one, however, would find any need to employ these analytical tools [(the *Penn Central* factors)] where the government has physically taken an identifiable segment of property." (Rehnquist, J., dissenting)); *Loretto*, 458 U.S. at 432 ("[*Penn Central*] does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors. . . ."); *Palm Beach Isles*, 231 F.3d at 1357 ("In a physical taking context, . . . [q]uestions of whether the owner had reasonable investment-backed expectations at the time the property was first acquired are simply not part of the analysis."); *Norman v. United States*, 63 Fed. Cl. 231, 246 (2004), *aff'd*, 429 F.3d 1081 (Fed. Cir. 2005) ("[I]n the instance of a physical occupation of private property, the ad hoc inquiry of *Penn Central* does not apply.").

To make matters worse, even if the Ninth Circuit were correct in applying a regulatory takings analysis, it did not even attempt to determine whether Petitioners' interest in reserved tonnage raisins was merely diminished or partially taken. *See Palm Beach Isles*, 231 F.3d at 1359. Doing so would have highlighted the ill fit between a regulatory takings analysis and this case, because producers' title to the reserved tonnage raisins was neither diminished nor partially taken, but completely transferred to the RAC. Moreover, the existence and operation of a

government agency – and whatever "benefits" that agency provides – is more similar to a generalized public benefit than a reciprocal benefit of regulation that inures directly to Petitioners. *See District Intown Properties*, 198 F.3d at 890; *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

B. The Ninth Circuit Erred In Holding That An Equitable Stake In The Reserved Tonnage Raisins Prevents The Raisin Marketing Order From Effectuating A Taking.

In concluding that the Raisin Marketing Order does not effectuate a taking, the Ninth Circuit relied in part on the fact that it provides producers with an "equitable stake" in reserved tonnage raisins transferred to the RAC. *Horne II*, 750 F.3d at 1141. The panel acknowledged that this equitable distribution "may be zero" under the Raisin Marketing Act. *Horne II*, 750 F.3d at 1140. However, it determined that "the equitable distribution is not zero in every year" and, thus, Petitioners "did not lose all economically valuable use of their personal property." *Id.* at 1140.

This conclusion was in error. It is only in the regulatory takings context that loss of "all economically valuable use" is relevant.[7] *See Lucas*, 505 U.S. at 1016 (a categorical regulatory taking occurs "where regulation denies all economically beneficial or productive use of land"). In a physical takings context, the issue is whether "just compensation" has been paid. *Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518. While the Ninth Circuit made sure to emphasize that no compensation was necessary here, it heavily relied on Petitioners' theoretical "equitable stake" and the regulatory "benefits" of the Raisin Marketing Order in finding that no taking occurred. *Compare Horne II*, 750 F.3d at 1141 n.16 *with id.* at 1140-41, 1141 n.17. In effect, the Ninth Circuit determined that no compensation was necessary because Petitioners received *some* benefit from the Raisin Marketing Order. *Id.* at 1140-41. This surprising conclusion opens the door for governmental entities to skirt the Takings Clause merely by providing some benefit – however *de minimis* – in return for seizure of a claimant's property. This negates the plain meaning

[7] Furthermore, even if the Ninth Circuit were correct in applying a regulatory takings analysis, it incorrectly found that producers' retention of an equitable interest in the reserved raisins worth far less than fair market value prevented the Raisin Marketing Order from effectuating a taking. *See Florida Rock*, 45 Fed. Cl. at 41 (where claimant's only remaining right was "sale of the property for much less than its value before regulation," claimant had suffered a taking); *Yancey*, 915 F.2d at 1543 (where farmer's turkey flocks were only valuable, at a great loss, through sale; a regulatory taking occurred).

of "just" compensation. *See Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 (1984) ("'Just compensation,' we have held, means in most cases the fair market value of the property on the date it is appropriated.") (citing *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-13 (1979)); *Olson v. United States*, 292 U.S. 246, 255 (1934) (the purpose of the just compensation requirement is to put the claimant "in as good a position pecuniarily as if his property had not been taken"). The Ninth Circuit erred in substituting a minor, uncertain benefit for the just compensation necessary to recompense a physical taking.

C. The Ninth Circuit Erred In Holding That A Generalized Public Benefit Prevents The Raisin Marketing Order From Effectuating A Taking.

In concluding that the Raisin Marketing Order does not effectuate a taking, the Ninth Circuit also placed significant emphasis on the *purpose* of the Raisin Marketing Order: "The Marketing Order ensures 'orderly' market conditions by regulating raisin supply . . . [R]eserved raisins are diverted from the market to smooth the peaks of the raisin supply curve. To smooth the supply curve's valleys, reserved raisins are released when supply is low." *Horne II*, 750 F.3d at 1133 (quoting 7 U.S.C. § 602(1)) (internal citations omitted). The panel then found that, under the *Nollan/Dolan* "nexus and rough proportionality" test, the Raisin Marketing Order was sufficiently

related to the public interest and no taking had occurred. *Horne II*, 750 F.3d at 1143-44.

The panel emphasized that Petitioners benefitted from this "smoothing" of supply and demand, but did not mention that the overall purpose of the AMAA is to promote the *public's* interest in stabilized prices. *Compare id.* at 1141 *with* 7 U.S.C. § 602(2) ("It is declared to be the policy of Congress . . . [t]o protect the interest of the consumer"). Indeed, this is how the Raisin Marketing Order operates in practice. For example, in 2003-2004, the government paid nothing to the producers for the 38.5 million pounds of raisins it took from them. *See Analysis Report* at 23. The RAC did not wait until demand was high and then return the reserved tonnage raisins to producers. Instead, the RAC sold or distributed those raisins to third parties and kept the profits for itself. 7 C.F.R. §§ 989.67(c)-(e). This is a " 'classic taking' in which the government directly appropriates private property for its own use." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998) (plurality) (quoting *United States v. Security Industrial Bank*, 459 U.S. 70, 78 (1982)).

This Court's precedent is clear that, while a public interest may *justify* a taking; just compensation must be paid: "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Mahon*, 260 U.S. at 415-16 ("The protection of private property in the Fifth Amendment *presupposes* that it is wanted for public use, but provides that it shall not be taken

for such use without compensation.") (emphasis added); *Palazzolo v. Rhode Island*, 533 U.S. 606, 637 (2001) ("It is wrong for the government to take property, *even* for public use, without tendering just compensation.") (emphasis in original) (Scalia, J., concurring); *Loretto*, 458 U.S. at 425 (This Court accepted as true that the law at issue "serves the legitimate public purpose" but explained, "[i]t is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.").

There is a significant difference between regulatory burdens that are shared by the public at large, such as the land use restrictions at issue in *Nollan* and *Dolan*, and the Raisin Marketing Act, which physically takes a significant portion of producers' raisins. *Cf., Nollan*, 483 U.S. at 856 ("[A]ppellants benefit both as private landowners and *as members of the public* from the fact that new development permit requests are conditioned on preservation of public access." (emphasis added)). Here, the Ninth Circuit determined that a physical taking is not compensable so long as the taking has some nexus to the public benefit it purports to advance. Such a holding eviscerates the Fifth Amendment. *See Florida Rock*, 18 F.3d at 1571 ("[To hold] that when Government acts in pursuit of an important public purpose, its actions are excused from liability . . . would eviscerate the plain language of the Takings Clause, and would be inconsistent with Supreme Court guidance."); *see also* Andrea L. Peterson, *The Takings Clause: In Search of*

Underlying Principles Part II Takings as Intentional Deprivations of Property Without Moral Justification, 78 Cal. L. Rev. 53, 154 (1990) (noting that a "recurrent theme [in Supreme Court decisions] is that whether a taking occurred depends on what the government did to the claimant, rather than the government's justification for its action"). If the government's only burden is to demonstrate that a physical taking is "roughly proportional" to the government's stated goals and has some "nexus" to those goals, *Horne II*, 750 F.3d at 1143-44, the "necessary prerequisite to the government's exercise of its taking power" becomes a final determination that a taking has not occurred. *See Keystone Bituminous Coal Ass'n*, 480 U.S. at 511 (the existence of a "public purpose . . . does not resolve the question whether a taking has occurred") (Rehnquist, J., dissenting); *Kelo*, 545 U.S. at 506 (Describing the Public Use Clause as "a meaningful limit on the government's eminent domain power.") (Thomas, J., dissenting).

Because an *ad hoc* regulatory takings analysis is inapplicable in a physical takings case, the Ninth Circuit's rationalization of the Raisin Marketing Order was in error. There exists here "a straightforward taking of private property for a public use for which just compensation must be paid." *Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996). The decision below sets a dangerous precedent for future physical takings cases, and must not be allowed to stand.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

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