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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 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

STEVEN J. LECHNER
Counsel of Record
GINA M. CANNAN
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
gina@mountainstateslegal.com

Attorneys for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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 be 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.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

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

Pursuant to Supreme Court Rule 37.3, 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 property without just compensation. *See, e.g.*, *Brandt*

[1] Pursuant to Supreme Court Rule 37.3(a), all parties consent to the filing of this amicus curiae brief. Pursuant to Supreme Court Rule 37.6, 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.

v. United States, 710 F.3d 1369 (Fed. Cir. 2013) (represented Plaintiff); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001) (represented Plaintiff); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en banc) (represented 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 substantial 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 reverse the Court of Appeals.

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* 27 (Jan. 6, 2011), *available at* http://www.raisins.org/files/Marketing%20Policy%202010.pdf (last visited Feb. 27, 2015) ("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,

[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 reserved tonnage raisins that are transferred to the RAC. *Id.* at §§ 989.65, 989.66(a). Petitioners produced at least some of the reserved tonnage 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. Dept. of Agriculture*, 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) ("*Horne*").

provide export subsidies to favored handlers, and, if anything is left over, 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).

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. RAC, *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 Feb. 27, 2015). 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*, 133 S. Ct. at 2058. 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 Appendix ("Pet. App.") 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 penalties. Pet. App. 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 penalties consisted of both the dollar equivalent of the raisins' fair market value, $483,843.53, and $202,600 for failure to comply with

the reserve requirement.[3] Pet. App. at 98a, 122a. As this Court unanimously held in *Horne*, Petitioners properly raised a takings-based defense in the USDA's enforcement proceeding. 133 S. Ct. at 2064.

On remand from this Court's decision in *Horne*, the Ninth Circuit ruled on the merits of Petitioners' takings claim, determining that no taking had occurred. *Horne v. U.S. Dept. of Agriculture*, 750 F.3d 1128 (9th Cir. 2014) ("*Horne II*"). 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. *Id.* at 1138. The Ninth Circuit then applied a regulatory takings analysis, holding that personal property deserves less protection under the Takings Clause than real property because of "'the State's traditionally high degree of control over commercial dealings'" and "'the property owner necessarily expects the uses of his property to be restricted.'" *Id.* at 1139 (quoting *Lucas*, 505 U.S. at 1027-28). The panel then determined that no regulatory taking occurred because Petitioners received some benefit of regulation under the Raisin Marketing Order and retained a theoretical equitable stake in reserved tonnage raisins – they "did not lose

[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. Brief for Petitioners at 13.

all economically valuable use of their personal property." *Id.* at 1132, 1140-41. Using the "bundle of sticks" analogy of property rights, the panel determined that retention of any " 'strand' from the 'bundle' of property rights" bars Petitioners from recovering for the taking of other strands. *Id.* at 1140 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). Petitioners again ask this Court to reverse.

SUMMARY OF ARGUMENT

The Ninth Circuit misconstrued both the history and the text of the Takings Clause, which has never been limited to real property. Property interests such as those at issue here have been protected from governmental interference since the founding of the Republic. Moreover, the Takings Clause has never contained a "reasonableness" component – the expectations of a property owner do not define the scope of his or her property rights. Even if the Ninth Circuit were correct in holding that a transfer of title does not effectuate a physical taking, the panel erred in focusing on the value of the interest retained by Petitioners, rather than the value of the property interest taken from them. The panel also erred in ruling that Petitioners are not entitled to compensation if they retained any "strand" in the "bundle" of property rights. Because the Ninth Circuit's decision has potentially devastating implications for private property owners and is wholly inconsistent with the history

and the text of the Takings Clause, this Court should reverse the panel's decision and hold that the Raisin Marketing Order effectuated a taking of Petitioners' property.

ARGUMENT

I. PROTECTION OF PERSONAL PROPERTY RIGHTS IS REQUIRED BY BOTH THE HISTORY AND THE TEXT OF THE TAKINGS CLAUSE.

The classes of property subject to protection under the Takings Clause of the Fifth Amendment cannot be defined without reference to the "historical compact" and legal texts underlying "our constitutional culture." *Lucas*, 505 U.S. at 1028. Long before the United States Constitution was drafted, the laws which laid the foundation for the Takings Clause protected personal property rights. Even at common law, personal property enjoyed the same protections – and sometimes greater protections – than real property. *See* Bridget C.E. Dooling, *Take It Past The Limit: Regulatory Takings Of Personal Property*, 16 Fed. Circuit B. J. 445, 453-54 (2007) ("In the feudal system . . . [a]lthough the king could make use of the land without compensation, he could not take personal property without compensating the owner . . . This deeply-rooted recognition of personal property as a protected private property interest, therefore, supports the inclusion of personal property in any definition of private property."). The Magna Carta, which

"provided roots for the U.S. Constitution[ ] and the Takings Clause in particular," *id.* at 454, protected "corn or other chattels of any man" from being taken without "pay[ment of] the purchase price within forty days." Nat'l Archives & Records Admin., Magna Carta Translation, art. 19, http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html (last visited Feb. 23, 2015). A provision of the 1641 Massachusetts Body of Liberties, one of the first colonial charters, also imposed a compensation requirement for the seizure of personal property:

> No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the general Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be suffitiently recompenced.

Massachusetts Body of Liberties § 8 (1641) (sic throughout), reprinted in *Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 148-49 (Richard L. Perry & John C. Copper eds., 1952). "Both Maryland and Pennsylvania enacted similar provisions protecting owners from the loss of property except by due process." James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property* 13 (3d ed. 2008). The first state constitution to contain a just compensation requirement was the Vermont

Constitution of 1777, which declared that "'whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money.'" William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 790 (1995) (quoting Vt. Const. of 1777, ch. 1, art. II).

While the Magna Carta and early colonies' protections of private property certainly shaped the Framers' conception of property rights, James Madison – who insisted on inclusion of the Takings Clause – understood property rights to be a function of natural law as well, originating in the "diversity in the faculties of men" for acquiring property. *Id.* at 783-84; The Federalist, No. 10, at 42 (James Madison) (Max Beloff ed., 2d ed. 1987); *see also* James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), in James Madison, Writings (Jack N. Rakove ed. 1999) ("The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right.").[4] Other founders apparently shared this understanding. *See* 1 Papers of Thomas Jefferson 132 (Julian P. Boyd ed., 1950) (Natural or traditional rights of property exist independently of the state, "in the laws of nature."). The conception of property

[4] Madison believed personal property was included in the classes of property deserving of protection. *See* The Papers of James Madison 266-68 (1983) ("Government is instituted to protect property of every sort," including "actual possessions. . . .").

ownership as a natural right is most commonly attributed to John Locke, who asserted that preservation of property was the "great and chief end" of government.[5] John Locke, *Two Treatises of Government* 368-69 (1690) (Peter Laslett ed., Cambridge Univ. Press 1967). This included, in Locke's view, personal property – an individual's right to "his labor and its fruits." Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional Law*, 29 Loy. L.A. Int'l & Comp. L. Rev. 201, 223 (2007). It is undisputed that Locke's philosophies were "critical" to the Framers' views of private property rights. *Id.* at 231; *see also* Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 Mo. L. Rev. 525, 579 (2007) (Locke "clearly influenced the founders" and his philosophies are "a legitimate part of the current debate over the relationship between government power and individual property

[5] This Court has also long recognized the natural-law origins of the Takings Clause. *See 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)); *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 178 (1871) ("it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of [the takings] power. . . .").

rights."). The Framers recognized that "principles of good government started with the protection of private property" and sought to avoid a world where "[s]tate bureaucrats could confiscate land at will" and "[g]overnment officials could harvest with impunity crops planted by ordinary citizens, and systemically disrupt all private efforts at long-term planning." Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 Cato Sup. Ct. Rev. 5 (2002).

Not only does the history of the Takings Clause support inclusion of personal property in the classes of property protected by the Fifth Amendment, but the plain meaning of the text supports that interpretation as well. The text of the Takings Clause speaks generally of "private property," not specifically of real or personal property.[6] U.S. Const. amend. V. This

[6] Significantly, the Fifth Amendment does not contain any limitations on the types of property protected thereunder, as does the Fourth Amendment, which was ratified at the same time. While the Takings Clause broadly protects "private property," the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. amend. IV. These textual limitations have been used to explain that the Fourth Amendment's protections do not extend to "open fields" or other areas outside a home's "curtilage." *See Oliver v. United States*, 466 U.S. 170, 176-80 (1984). If the Framers intentionally limited the Fourth Amendment to "persons, houses, papers, and effects," it can be assumed that they could have similarly limited the Fifth Amendment to "real property" if that had been their intention. *See* Dooling, *Take it Past the Limit*, 16 Fed. Circuit B.J. at 457 ("The choice of the words *private property* suggests a

(Continued on following page)

Court has long recognized the word "property" in the Takings Clause "to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use, and dispose of it." *United States v. General Motors Corporation*, 323 U.S. 373, 378 (1945); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893) ("The language used in the [F]ifth [A]mendment . . . is happily chosen. The entire amendment is a series of negations, denials of right or power in the government. . . ."). This group of property rights is protected by the Takings Clause in order "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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Indeed, "[t]he Supreme Court has repeated this policy analysis in almost every Takings Clause case since 1960." Kenneth J. Sanney, *Balancing the Friction: How a Constitutional Challenge to Copyright Law Could Realign the Takings Clause of the Fifth Amendment*, 15 Colum. Sci. & Tech. L. Rev. 323, 342, 342 n.75 (2014) (collecting cases). The Takings Clause embodies the importance of providing legal protections to property, for without legal protections, property – unlike other rights protected by the Constitution – ceases to exist. As one commentator phrased it:

> [Property's] only substance is rights – that is, legal rights – and it does not exist, as a

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more inclusive category of property than that contemplated in the Fourth Amendment. . . .") (emphasis in original).

> coherent idea, apart from the idea of law and legal protection. Its essence is the protection of individuals' interests, and nothing more. It is the recognition and protection of individuals' rights in land; or rights in chattels; or rights in any identified source of wealth. That is all that it is. We can have speech that is not protected; we can have religion that is not protected; but we cannot have non-protected property. The only existence of or substance to the idea of property is the protection it affords; without this, the idea loses all meaning.

Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 Tex. L. Rev. 2015, 2030 (2013).

Moreover, the rationales underlying the Takings Clause apply equally to personal and real property. Without property rights, individuals have no "buffer protecting [them] from governmental coercion."[7] Ely, *The Guardian of Every Other Right* at 43 ("[I]n [the

[7] Some of this Court's earliest cases regarding property rights recognized, without distinction between real and personal property, that property rights are necessary to guarantee liberty. *See Wilkinson v. Leland*, 27 U.S. 627, 657 (1829) ("The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred."); *Monongahela Nav. Co.*, 148 U.S. at 324 ("[I]n any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.").

framers'] minds, property rights were indispensable because property ownership was closely associated with liberty. . . . Arbitrary redistributions of property destroyed liberty, and thus the framers hoped to restrain attacks on property rights."). As is the case with real property, personal property "insulates owners from dependence on State largess. The possibility that a sovereign could deprive citizens of property without compensation would lead to their demoralization and lack of independence." Steven J. Eagle, "*Economic Impact*" *in Regulatory Takings Law*, 19 Hastings W.-N.W. J. Envtl. L. & Pol'y 407, 412 (2013). Additionally, as aptly demonstrated by the facts of this case, "both tangible and intangible personalty are as subject to condemnation as realty." Steven J. Eagle, *Regulatory Takings* 88 (2d ed. 2001). If the government is permitted to take both tangible and intangible property, it naturally follows that the government should pay for the value thereof in both instances. *Id.* at 90 ("[A] distinction between real and personal property for Takings Clause purposes [is] untenable . . . [because] it raises the issue of how government might purport to control conduct deriving from the exercise of rights without respect to the constitutional regime protecting the rights themselves."); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 9 (1949) (Holding that the government may seize intangible property and "the intangible character of such value [does not] preclude[ ] compensation for it."); *see also City of Oakland v. Oakland Raiders*, 183 Cal. Rptr. 673, 677 (Cal. 1982) (Holding that football franchise was subject to condemnation while

recognizing that "[t]he constitutional provisions, both state and federal, make no verbal distinction between real property and personal property with respect to the requirement of 'just compensation.' ").

This Court has continued to emphasize the "interdependence" between property and liberty since the Framers first recognized the connection: "[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (citations omitted); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights."). The history, language, and rationales behind the Takings Clause support the inclusion of personal property in the Clause's protection of "private property."

II. THE NINTH CIRCUIT ERRED IN GROUNDING ITS DISTINCTION BETWEEN PERSONAL PROPERTY AND REAL PROPERTY ON THE EXPECTATIONS OF PROPERTY OWNERS, RATHER THAN THE PROTECTIONS GRANTED BY THE TAKINGS CLAUSE.

Given the inviolability of private property rights, the Ninth Circuit erred in adopting a "reasonableness" analysis to determine whether a taking occurred. The panel determined that "the Takings Clause affords

less protection to personal than to real property" based on the reasonable expectations of the property owners – "'in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless. . . .'" *Horne II*, 750 F.3d at 1139 (quoting *Lucas*, 505 U.S. at 1027-28). The panel used *Lucas* to determine that "the government's authority to regulate such property without working a taking is at its apex" where personal property is concerned. *Id.* at 1139-40.

The Ninth Circuit's holding was in error. As scholar Richard Epstein has remarked,

> The notion of reasonable expectations is unrelated to any useful inquiry about the functions of the Takings Clause. . . . The only expectation that the Framers had when they drafted the Clause was that government would conform its behavior to the requirements of the Takings Clause. . . . There is no reason to allow a fictional gloss of reasonable expectations to take on a life of its own, where it will necessarily dilute the protection to private property that the constitutional text explicitly provides.

Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1377, 1386 (1993). Basing property rights on the property owner's expectations is, as Justice Kennedy has recognized, inherently circular, "for if

the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is." *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring). In effect, the courts embark on a race to the bottom, until property owners have no reasonable expectations left.

In *Lucas*, Justice Kennedy stated that some circularity "must be tolerated" by analogizing to the reasonableness analysis of Fourth Amendment claims. *Id.* However, the Takings Clause is fundamentally different from the Fourth Amendment. "[P]rivate property [shall not] be taken for public use, without just compensation" does not contain a reasonableness component. *Compare* U.S. Const. amend. V *with* U.S. Const. amend. IV (protecting only against "*unreasonable* searches and seizures") (emphasis added). The Takings Clause "sets out what private property owners have the right to demand. The expectations of personal property owners are not a sufficient reason to deny what the Constitution grants." Dooling, *Take It Past the Limit*, 16 Fed. Circuit B.J. at 462; *see also id.* at 461-62 ("[A]lthough in Fourth Amendment analysis the right to privacy itself is subject to reasonableness, the prohibition contained in the Fifth Amendment Takings Clause is not cabined by reasonableness."); *Preseault v. United States*, 100 F.3d 1525, 1540 (Fed. Cir. 1996) ("The expectations of the individual, however well- or ill-founded, do not define for the law what are that individual's compensable property rights.").

The Ninth Circuit's application of a reasonableness analysis to a physical taking of Petitioners' personal property has significant implications for property rights generally. First, it creates uncertainty and favors an *ad hoc* approach over a useful analytic framework to interpreting the Takings Clause.[8] The panel effectively determined that no taking occurred because Petitioners' expectations that their personal property would not be taken were unreasonable, in light of the "less[er] protection" the panel deemed should be afforded to personal property and the government's "'traditionally high degree of control over commercial dealings.'" *Horne II*, 750 F.3d at 1139-40 (quoting *Lucas*, 505 U.S. at 1027-28). Such a holding provides no predictive value for other property owners, indeed; it sends the message that owners of personal property may be physically dispossessed of that property without recompense, so long as the government claims that the property owner should have expected to be so dispossessed. *Compare id. with Preseault*, 100 F.3d at 1540 (rejecting the government's contention "that an owner's subjective expectations of keeping or losing her property under various possible scenarios define for that owner the extent of her title" as "standing the law on its head") *and Palm Beach Isles Associates v. United States*, 231 F.3d 1354, 1357

[8] Until the Ninth Circuit's decision, "'ad hoc, factual inquiries'" were the province of regulatory takings cases, not takings of physical title. *Lucas*, 505 U.S. at 1015 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

(Fed. Cir. 2000) ("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.").

To make matters worse, the panel offered no justification for granting "less protection" to personal property than to real property, besides the government's desire to regulate it more intrusively. *Horne II*, 750 F.3d at 1139. As the Federal Circuit has recognized, even where personal property is highly regulated and such regulation serves a public purpose, a government's actions may still effectuate a taking of a compensable property interest. *Maritrans v. United States*, 342 F.3d 1344, 1353 (Fed. Cir. 2003); *see also* Eduardo Moisès Peñalver, *Is Land Special?* 31 Ecology L.Q. 227, 253 (2004) ("[O]wners' reasonable expectations, however conceived, [cannot] bear the weight" of a "categorical distinction between personal property and land.").

Second, a "reasonable expectations" test inappropriately transposes a regulatory takings analysis onto a physical taking. Only in the regulatory context has this Court ever referenced a property owner's expectations regarding the degree of governmental control exercised over his or her property. *See Lucas*, 505 U.S. at 1027-28. In *Lucas*, this Court explained, "our 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain

title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time. . . ." *Id*. at 1027. The regulations the Court referenced in *Lucas* included denying a landowner "the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land" or requiring the removal of "a nuclear generating plant . . . upon discovery that the plant sits astride an earthquake fault." *Id.* at 1029. The Ninth Circuit takes *Lucas* entirely out of context and applies its rationale to physical takings. *Horne II*, 750 F.3d at 1139. While "government regulation – by definition – involves the adjustment of rights for the public good[,]" *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1979), such "adjustment of rights" has never been stretched to include transfers of physical title to property.[9] 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

[9] Even in regulatory takings cases, it is inappropriate to hold, as the Ninth Circuit did, that *no* compensation is due merely because the property owner has chosen to participate in a regulated industry. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003) ("The range of expectations that is reasonable may be reduced in proportion to the amount of regulation, but this is not a blanket rule that disqualifies parties' expectations without inquiry."); *Maritrans*, 342 F.3d at 1358-59 (rejecting the government's assertion that choosing to enter into a highly regulated industry renders any investment-backed expectations unreasonable).

quotations omitted); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522 (1992) (When the government "actually takes title" to property, "the Takings Clause generally requires compensation."). The Ninth Circuit's analysis eviscerates the distinction between physical and regulatory takings by looking to Petitioners' reasonable expectations to hold that a transfer of title does not effectuate a taking.[10] Additionally, it unnecessarily introduces subjectivity to a straightforward physical takings inquiry in a manner unsupported by this Court's precedents.

III. THE NINTH CIRCUIT'S USE OF THE "BUNDLE OF STICKS" ANALOGY IS INAPPROPRIATE IN A PHYSICAL TAKINGS ANALYSIS AND ILL-FITTING TO A REGULATORY TAKINGS ANALYSIS.

A. The Ninth Circuit Erred In Holding That No Physical Taking Occurred Based On The "Bundle Of Sticks" Analogy.

In determining that Petitioners' personal property had not been taken by the Raisin Marketing Order, the Ninth Circuit used the age-old bundle of sticks analogy to hold that not *all* of Petitioners'

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[10] This Court has consistently recognized the importance of maintaining the "longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other. . . ." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002).

property rights in the reserved raisins were terminated. *Horne II*, 750 F.3d at 1140 ("Unlike *Loretto*, which applies only when *each* 'strand from the bundle of property rights' is 'chop[ped] through . . . taking a slice of every strand,' the Hornes' rights with respect to the reserved raisins are not extinguished because the Hornes retain the right to the proceeds from their sale.") (quoting *Loretto*, 458 U.S. at 435) (internal citations and quotations omitted) (alterations and emphasis in original). The Ninth Circuit's analogy echoes the rationale of this Court's regulatory takings analysis in *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("*Allard*"): "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." (quoting *Penn Central*, 438 U.S. at 130-31).

Loretto stands for the proposition that even a minor "permanent physical occupation" by the government constitutes a taking. 458 U.S. at 426. It is *not* restricted to "a total, permanent physical invasion of real property," as the Ninth Circuit claims. *Horne II*, 750 F.3d at 1139. A physical invasion of real property was the factual scenario before the Court in *Loretto*, but nowhere in the decision does this Court limit its holding to real property. In fact, the Court cited several decisions applying the physical takings test more broadly, including to regulations more attenuated from the strict real property context. *Loretto*, 458 U.S. at 430-33 (citing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (regulation requiring

property owner to allow public access was a taking) *and United States v. Causby*, 328 U.S. 256 (1946) (government's frequent flights over plaintiff's land at low altitudes constituted a taking)).

Here, the Raisin Marketing Order required Petitioners to transfer title of a percentage of their raisin crop to the RAC, an agent of the USDA. 7 C.F.R. §§ 989.21, 989.54(d). For crop years 2002-2003 and 2003-2004, the Raisin Marketing Order required transfers of 47 percent and 30 percent of Petitioners' raisin crops, respectively. RAC, *Marketing Policy* at 27. The "right to proceeds" relied on by the panel is not a right to the fair market value of the raisins transferred, as required by this Court's takings cases. *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))). Instead, any "equitable right" retained by Petitioners to the reserved raisins was an amount well below the cost of production in crop year 2002-2003 (much less the fair market value), and was zero in crop year 2003-2004. RAC, *Analysis Report* at 23, 55. As in *Loretto*, the Raisin Marketing Order "chops through the bundle" of Petitioners' property rights in their crops, taking 47 percent of the 2002-2003 crop and 30 percent of the 2003-2004 crop. *See Loretto*, 458 U.S. at 435.

B. Even If The Ninth Circuit Were Correct In Applying A Regulatory Takings Analysis, The Taking Of One "Stick" In The Bundle Of Property Rights Still Results In The Taking Of A Compensable Property Interest.

As discussed above, the Ninth Circuit erred in holding that the entirety of Petitioners' rights in the reserved raisins were not taken. But even if the panel were correct in applying a regulatory takings analysis, it failed to explain how retention of a nearly worthless "equitable stake" in the reserved raisins prevented the Raisin Marketing Order from effectuating a taking.[11]

As an initial matter, this Court has "expressed discomfort with the logic" of applying the bundle of sticks analogy to justify taking one stick at a time, even in regulatory takings cases. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (citing *Lucas*, 505 U.S. at 1016 n.7). In both *Palazzolo* and *Lucas*, this Court "avoid[ed] this difficulty" and declined to address the continued viability of a rule that a taking occurs only when a property owner is denied *all* reasonable use on his property. *Palazzolo*, 533 U.S. at 632; *Lucas*, 505 U.S. at 1016 n.7; *see also Penn Central*,

[11] The Ninth Circuit also partially relied on the possible benefits of regulation to Petitioners. *Horne II*, 750 F.3d at 1141. Yet, generalized public benefits have no bearing on a property owner's right to just compensation. *See* Brief for Petitioners at 46-47.

438 U.S. at 149 n.13 (Justice Rehnquist recognizing that "[d]ifficult conceptual and legal problems are posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property") (Rehnquist, J., dissenting). In the case at bar, the Ninth Circuit suggests, in effect, "that the Constitution shields property owners when government grabs the entire 'bundle' but affords little or no protection when the government snatches one 'strand' at a time. . . ." Richard G. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 Notre Dame L. Rev. 1, 33-34 (1989). This conclusion makes little sense, because the Fifth Amendment protects not only the whole "bundle of sticks," but "embraces the component elements of the 'bundle.'" *Id.* at 34. Again, the text of the Takings Clause protects the entire "group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *General Motors Corp.*, 323 U.S. at 377-78. The Takings Clause "is addressed to every sort of interest the citizen may possess[,]" *id.* at 378, and a takings inquiry asks only whether one of these interests has been taken. *See American Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1376 (Fed. Cir. 2004) ("[O]ne of the sticks in the bundle of property rights that the owner of property acquires with his title must be proscribed in order for a taking to occur.").

Even if the Ninth Circuit were correct in concluding that the full value of Petitioners' reserved raisins was not taken by requiring a transfer of title to the

RAC, the panel was required to conduct some analysis – "to define the 'particular thing' whose value is to furnish the denominator of the fraction." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967) (describing the court's task of analyzing a regulation's economic impact on property as looking at a fraction, with the numerator being the value of the property with the regulation's restrictions and the denominator being the value absent those restrictions); *Tahoe-Sierra Preservation Council*, 535 U.S. at 332-33 (Answering "the 'denominator' question" by looking to "the metes and bounds that describe [the property's] geographic dimensions and the term of years that describes the temporal aspect of the owner's interest."). Here, the panel took no such pains. Rather than determine the value of the reserved raisins with and without the Raisin Marketing Order, the panel merely held that retaining some "equitable distribution" in the reserved raisins – even if that equitable interest "may be zero" – prevented the Raisin Marketing Order from effectuating a taking. *Horne II*, 750 F.3d at 1140.

The panel's holding suggests that a governmental entity may make an end run around the Takings Clause's just compensation requirement by providing some benefit, however *de minimis*, in return for seizure of a claimant's property. This conflicts with the basic premise of a Takings Clause inquiry. *See* Richard A. Epstein, *Takings: Private Property and the Power of*

Eminent Domain 62 (1985) ("The question to be asked is, 'What has been taken?' not 'What has been retained?'"); *General Motors Corp.*, 323 U.S. at 379 ("[T]he compensation to be paid is the value of the interest taken."). The minimal equitable interest maintained by Petitioners in exchange for the taking of a significant portion of their raisin crops hardly constitutes "compensation," much less "just compensation," because it fails to place them "in as good a position pecuniarily as if [their] property had not been taken[.]"[12] *Olson v. United States*, 292 U.S. 246, 255 (1934); *see also Monongahela Nav. Co.*, 148 U.S. at 326 (Just compensation "must be a full and perfect equivalent for the property taken. . . .").

Taken to its logical conclusion, the one-stick-at-a-time analysis can result – as it did in *Allard*, 444 U.S. at 51 – in the destruction of the entirety of a property's value without recompense. This approach is unnecessary when compared to the analysis of economic diminution in *Pennsylvania Coal*, 260 U.S. at 413-14. There, this Court considered a statute that forbade the mining of "certain coal" and determined that the regulatory burden placed upon this right was

[12] While the Ninth Circuit declined to hold that raisin handlers were entitled to the fair market value of the reserved raisins taken under the Raisin Marketing Order, it did not bat an eyelash at the USDA's assessment of penalties against Petitioners in the amount of both the dollar equivalent of the raisins' fair market value, $483,843.53, and an additional $202,600 for failure to comply with the Raisin Marketing Order. Pet. App. 109a-110a.

sufficient to constitute a taking because it "has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414-15. It was of no consequence that the government had taken only a single strand of the mine operators' bundles; the operators had "valuable, marketable interests in the minerals that were affected by the [statute]" and "Pennsylvania could not pluck identifiable, marketable 'strands' from their 'bundles' without compensation."[13] Wilkins, *The Takings Clause*, 64 Notre Dame L. Rev. at 35. This approach appropriately focuses on compensating the property owner for "the value of the interest taken."[14] *General Motors Corp.*, 323 U.S. at

[13] This Court has repeatedly awarded compensation for deprivation of just one stick in the bundle. *See Kaiser Aetna*, 444 U.S. at 176 ("[T]he owner has . . . lost one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others."); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (Where a regulation "amounts to virtually the abrogation of the right to pass on a certain type of property – the small undivided interest – to one's heirs[,]" the property owners were deprived of " 'one of the most essential sticks in the bundle of rights. . . .' " (quoting *Kaiser Aetna*, 444 U.S. at 176)).

[14] Amicus curiae submit that in *Allard* this Court incorrectly focused on the "strands" retained by the property owners, rather than the value of the interest taken. *See* 444 U.S. at 66 ("In this case, it is crucial that appellees retain the right to possess and transport their property, and to donate or devise the protected birds."). So long as the Takings Clause protects against more than absolute appropriation, the focus of the economic diminution inquiry should be "whether the property owner has been deprived of a valuable, identifiable property interest. Loss of a single 'strand' is a real injury that raises constitutional concern." Wilkins, *The Takings Clause*, 64 Notre Dame L. Rev. at 45. The continued viability of *Allard* has been called into question by

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379; Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 18 (1987) ("So long as the use in question is part of the original bundle of property rights, then its loss is a partial taking of part of the property in question, one which presumptively requires compensation."). This approach does not "compel the government to regulate by purchase." *Allard*, 444 U.S. at 65 (emphasis omitted). Indeed, the Federal Circuit's approach has been to consider the value of the stick taken, rather than the value of the property rights retained, without dire consequences:

> The first step in our analysis then is to identify the subject of the alleged taking. In assessing whether or not a Fifth Amendment property interest exists, we look for crucial indicia of a property right, such as the ability to sell, assign, transfer or exclude. Stated differently, we determine whether the asserted

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members of this Court and by commentators. *See Hodel*, 481 U.S. at 719 ("[T]he present statute . . . is indistinguishable from the statute that was at issue in [*Allard*] . . . in finding a taking today our decision effectively limits *Allard* to its facts.") (Scalia, J., concurring); Steven I. Brody, *Rethinking Regulatory Takings: A View Toward a Comprehensive Analysis*, 8 N. Ill. U. L. Rev. 113, 131 (1987) ("Under a straight-forward reading of the fifth amendment just compensation clause, a property right cannot be effectively extinguished, as was done in [*Allard*], without making application of the amendment almost farcical."); Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 Iowa L. Rev. 595, 626 n.121 (2000) (Suggesting that *Allard* "either spoke precipitously or was wrongly decided after all.").

> property right is one of the sticks in the bundle of rights that inhered in ownership of the underlying *res*.

Hearts Bluff Game Ranch, Inc. v. United States, 669 F.3d 1326, 1330 (Fed. Cir. 2012) (internal citations and quotations omitted). To the extent that this Court's precedents have suggested straying from this fundamental principle of takings law, amicus curiae urge the Court to clarify that a takings analysis should always focus on the value of the interest taken.

CONCLUSION

For the foregoing reasons, the Court should reverse the Court of Appeals and hold that the USDA's enforcement of the Raisin Marketing Order effectuates a compensable taking of Petitioners' property.

Respectfully submitted,

STEVEN J. LECHNER
Counsel of Record
GINA M. CANNAN
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
gina@mountainstateslegal.com

Attorneys for Amicus Curiae