No. 14-275

IN THE
Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Petitioners have no parent corporations and no publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

The government's Brief in Opposition scarcely attempts to defend the panel's holdings or reasoning on any of the three questions presented in the Petition. Instead, the government seeks to deflect this Court's attention by repeatedly claiming — for the first time — that the Raisin Marketing Order does not "divest[] the [raisin] producer of title to the reserve raisins, which are generally treated as the producers' 'sole and absolute property'" and supposedly never become the property of the Raisin Administrative Committee ("RAC"). BIO 6; *id.* at 17 ("[N]either the AMAA nor the marketing order provides that the RAC 'takes title' … to the reserve raisins."); *id.* at 23 ("[N]othing in the marketing order transfers title in the reserve raisins from petitioners to the government[.]") Although the government never cites authority for the significance of "title," this forms an essential premise of the government's efforts to salvage the panel decision. *See* BIO 23; *id.* at 24.

The government's "title" argument is in direct conflict with the government's own words at other junctures of this very case, irrelevant to the law, and false in any event. The government's remaining defenses of the panel opinion bear little examination, and its vehicle objections are mere mirages. Since the first panel opinion in this case, the government has shifted arguments three times, from jurisdiction to standing and now to title, all in an attempt to evade the simple conclusion that when the government takes property, sells it, and uses the proceeds for its own purposes, it is required under the Fifth Amendment to pay just compensation.

Enough is enough. This Court should grant certiorari and reverse. Alternatively, in view of the government's inability to plausibly defend the decision below, the Court might consider summary reversal.

REASONS FOR GRANTING THE WRIT

I. THE RAISIN ADMINISTRATIVE COMMITTEE TAKES OWNERSHIP OF RESERVE TONNAGE RAISINS.

The government's principal argument — that because the Order supposedly does not transfer "title" from raisin producers to the RAC, it does not work a per se taking — is misguided on every level.

At the threshold, it reverses the government's prior position in this very case. Just last year, when this case was argued in this Court on the government's jurisdictional theory, counsel for the United States stated exactly the opposite of what the government is saying now:

> If the handler is actually buying raisins from the producer, the handler never takes title to the reserve raisins. And he doesn't pay for the reserve raisins. He takes title to the free-tonnage raisins and *the title to the reserve raisins passes, as a matter of law from the producer to the Raisin Administrative Committee.*

Mar. 20, 2013 Tr. 45:17-24, *Horne v. USDA*, No. 12-123 (*Horne* Tr.).[1]

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[1] All emphasis added unless otherwise noted.

That was the position the United States maintained before every other court to hear this case. *See* U.S. Br. at 43, *Horne v. USDA*, No. 10-15270 (9th Cir. Jul. 21, 2010) (arguing that "'passing title … to the RAC'" is an "'admission ticket'" to the raisin market) (quoting *Evans v. United States*, 74 Fed. Cl. 554, 563 (2006)); U.S. Surreply in Opp. to Rehearing at 3, *Horne v. USDA*, No. 10-15270 (9th Cir. Feb. 16, 2012) (explaining that "producers … receive no direct payment when title to a portion of their crop is transferred to the RAC"). Five years ago, the district court in this case considered it "*undisputed* that … the RAC takes title to a significant portion of a California raisin producer's crop." Pet.App.180a; Pet.App.181a (similar). Having stated for *years*, in *three* different tribunals (including this one), that the RAC takes title to reserve raisins, the government cannot pivot at this late date to the opposite theory that reserve raisins remain "producers' 'sole and absolute property'" after all. BIO 6.

On the merits, the government is mistaken that transfer of title is essential to establish a categorical taking. This Court has never required such a thing; rather, the government's categorical duty of just compensation applies whenever the government "'physically takes possession of *an interest* in property[.]'" *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (itself citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951))). Actual transfer of title is unnecessary, for when the government takes "'possession and control'" of property it is treated "*as*

if the Government held full title and ownership." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 431 (1982); *United States v. United Mine Workers*, 330 U.S. 258, 284-85 (1947) (plurality) (similar).

This Court's caselaw brims with cases identifying categorical physical takings when the government seizes use and disposition of property, notwithstanding the property owner's retention of title. *See, e.g.*, *Loretto*, 458 U.S. 419; *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *Pewee Coal*, 341 U.S. 114; *United States v. Causby*, 328 U.S. 256, 266 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 383-84 (1945); *United States v. Russell*, 80 U.S. 623, 628 (1871); *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (explaining that there is a per se taking "when the government commands the relinquishment of funds linked to a specific, identifiable property"). There is no question that the Raisin Marketing Order does *that* when it grants the RAC sole authority to dispose of raisins and to use the revenue from those raisins for its own purposes. The RAC's seizure of reserve tonnage raisins is thus a categorical physical taking whether it obtains "title" to the raisins or not.

Even if formal title mattered, the government's assertion that raisin producers technically retain title is ludicrously weak. The government's sole authority is not a USDA regulation, adjudication, or rulemaking — it is not even an official explanation of agency policy, such as a guidance document or an interpretive statement. It is a single line in a one-page USDA form which raisin producers use when

they wish to assign their "interest" in any "net proceeds" that may be left after the RAC has sold the raisings and spent what it wishes. BIO 6 (citing OMB No. 0581-0178 (Jan. 2014), available at http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5094721). The form's reference to raisins as the producer's "property" simply means that no prior liens or encumbrances related to the raisins prohibit the assignment of the producer's remaining equitable rights (which, again, are often negligible or valueless). The form does not bear on whether the RAC has title when it seizes and disposes of the raisins. If anything, the form confirms that the producers no longer own raisins, but only an "interest" in the "proceeds" from their sale.

Undisputed features of the Raisin Marketing Order vest the incidents of title in the RAC.[2] Raisin producers give up physical possession of reserve tonnage raisins, and raisin handlers must store such raisins "separate and apart" from free-tonnage raisins, "for the account of" the RAC. 7 C.F.R. §§ 989.66(a), (b)(2). The RAC pays the costs of storage. § 989.66(f). The handler must deliver reserve tonnage raisins to the RAC or its designee on demand. § 989.66(b)(4). The RAC may use the raisins as collateral for loans, § 989.66(g), and it can sell or give them away at its discretion, § 989.67(b)-(e). The RAC uses the proceeds to fund its own administrative costs as well as to provide export

[2] At least one court has described title to reserve tonnage raisins — repeatedly, emphatically and in ways integral to its reasoning — as vesting in the RAC. *Evans*, 74 Fed. Cl. at 557, 558, 559, 562, 563-64. The government cites no caselaw suggesting otherwise.

subsidies to handlers. Producers retain not a claim on the raisins themselves, but a contingent interest in the pool of money left over when the RAC is finished. 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 989.66(h). No wonder courts and the government itself have always concluded that title to the raisins is in the RAC.

The government does not disagree with any of these basic facts about the program. BIO 6-7. The notion that the reserve raisins are nonetheless the raisin producers' "'sole and absolute property'" is simply not a credible description of those raisins' status under the Order.

II. THE GOVERNMENT FAILS TO RESOLVE THE CONFLICTS CREATED BY THE PANEL DECISION.

Aside from its theory that the Raisin Marketing Order does not transfer title in reserve tonnage raisins to the RAC, the government has very little to offer in defense of the panel opinion. Rather than reconcile the panel's reasoning with conflicting caselaw, the government largely rests on arguments that the panel opinion does not mean what it says. In so doing, the government's brief only confirms the need for this Court's review.

First, the government does not dispute that excluding personal property from the per se rule for physical takings would squarely conflict with this Court's precedent and the decisions of other federal courts. BIO 21-22. Instead, the government suggests that the panel opinion left open the possibility that a categorical takings rule could still apply in the event of "direct governmental acquisition of personal property." BIO 22.

That distinction merely repackages the government's baseless "title" argument discussed above. It also fails to grapple with the panel's actual language — "we see no reason to extend *Loretto* to govern controversies involving personal property," Pet.App.20a — or to resolve the resulting split between the Ninth Circuit and the other courts that have done exactly that, *see, e.g.*, *Nixon v. United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992). The government's suggestion that appropriations of property in the context of "economic or commercial regulation," are treated differently from any other such appropriation, *see* BIO 22 (quotation marks omitted), is unsupported by citation to authority, and this Court has rejected it in any event, *see, e.g.*, *Loretto*, 458 U.S. at 439. Nor does it matter that the panel's distinction between personal property and real property was "only one of [t]wo independent reasons" for refusing to apply the per se rule for physical takings — the other basis being the lack of total deprivation of the Hornes' rights in the raisins. BIO 21. The panel's "[t]wo independent reasons" *each* departed from the decisions of this Court and other courts, and the Hornes present them *both* for this Court's review. *See* Pet. 15, 26.

Second, the government does not disagree that the panel would have erred and split from other decisions if it held that "appropriation of property … is a per se taking only if it deprives the owner of 'all rights associated with the property.'" Pet. 26 (emphasis and alteration omitted). That, of course, is exactly what the panel said. Pet.App.20a (distinguishing *Loretto* on the ground that "the Hornes did not lose all economically valuable use of their personal property"). The government attempts

to reconcile the resulting split by resorting yet again to the nonexistent distinction between deprivation of "'possessory and dispositional control'" and "'transfer of title,'" BIO 23, *see also id.* ("Decisions cited by petitioners in which the government … 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.") (citation omitted). But the government *does* physically take dominion over the reserve raisins; the "economically valuable use" the farmer retains is nothing but a contingent right to manifestly *inadequate* compensation (often nothing at all). If the government and the Ninth Circuit are asserting that the mere *possibility* of *inadequate* compensation renders a seizure of property something other than a per se "taking," that is a reason to grant certiorari and correct the error before it takes hold. *See Tahoe-Sierra*, 535 U.S. at 323 (courts "do not ask whether [a physical appropriation] deprives the owner of all economically valuable use" because that would confuse the separate categories of physical and regulatory takings).

Third, the government does not contest that other courts have squarely held that "actual physical invasions of private property" cannot be recast as use restrictions and subjected to a balancing test. BIO 24. The government's *only* response is once again that this case does not involve a transfer of ownership or an "actual physical invasion[] of property." *Id.* That cannot be reconciled with the Order; witness RAC's right to demand physical surrender of reserve tonnage raisins at the time of its choosing. 7 C.F.R. § 989.66(b)(4); *see also* Pet. 31-33 (collecting cases).

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLUTION OF THE QUESTIONS PRESENTED.

The government questions this case's suitability for review because it has "limited importance" outside the context of the Raisin Marketing Order. BIO 25. That could hardly be more wrong. Although the government accuses Petitioners of resting their argument on a mere "misunderstanding of the raisin marketing order," *id.*, there is no real dispute about the Order's actual terms or the RAC's powers. *Compare* Pet. 5-7 *with* BIO 5-8. The government's real dispute with Petitioners concerns whether, as a matter of law, the RAC's seizure of the reserve tonnage raisins amounts to a categorical physical taking. As the brief in opposition shows, defending the Order on that ground raises profound questions of takings law, not merely of interpreting the Order.

The same can be said of the many other respects in which the panel opinion conflicts with decisions of this Court and other courts. The notions that seizure of personal property cannot be a categorical taking, or that the possibility of *inadequate* compensation vitiates the requirement of *just* compensation, or that the power to take possession of property and sell it is merely a "use restriction," have far-reaching implications, which cannot logically be confined to the Raisin Marketing Order. The Ninth Circuit's opinion contains propositions that strike at the core of the Just Compensation principle, and that call out for this Court's review.

The government next suggests that this case deserves no further review because the Order does not cause Petitioners any "pecuniary loss." BIO 26.

Petitioners strongly dispute that the Order's supposed purpose of raising the market price of raisins benefits them personally. *See* Pet. 7-8. It is well established that the government cannot seize specific property (or its monetary equivalent) and then avoid compensation by pointing to generalized benefits that property owners might receive from government action. *See, e.g.*, *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898). That is especially true when nothing in the record supports the government's self-serving claim. Does anyone seriously believe that raisin farmers are better off when the government has taken a third or more of their crop and given them nothing in return? That would require an extraordinary elasticity of demand in a global market where foreign producers can compete without quantity restrictions.

The government proudly notes that the RAC paid producers $272.73 per ton in the 2002-2003 season, citing numbers not in the record. BIO 7. We provide the full RAC reports in a Supplemental Appendix. The government's "gross" number disregards certain deductions, but more importantly, it omits the fact that the RAC sold that year's reserve tonnage raisins for an average of *$649.47* per ton — receiving gross sales totaling more than *$118 million*. It then spent most of the proceeds on its own priorities which provide no benefit to Petitioners, such as nearly $300 per ton of export subsidies paid by the RAC to handlers. *Id.*[3] We are left wondering what

[3] If the Court wonders why the Marketing Order enjoyed support from some major players in the industry, at least in the past, it need look no further than these below-market sales and

significance the government finds in this number of $272.73 per ton. Surely the government does not mean to suggest that $272.73 per ton is just compensation for raisins it sells for $649.47 per ton. And in other years, such as 2003-04, the government spent the entire proceeds from selling reserve raisins, while the producers got nothing. BIO 7.

Moreover, the government has ordered Petitioners to pay a *penalty* intended to "deter [Petitioners] from continuing to violate the Raisin Order and [to] deter others from similar future violations." Pet.App.98a. Having imposed penalties designed to make Petitioners *worse* off than they would have been if they had complied with the Order, it is not open to the government to deny that Petitioners face a "pecuniary loss." *Cf. Missouri Pac. Ry. Co. v. Nebraska*, 217 U.S. 196, 205-08 (1910) (Holmes, J.) (fines for refusal to submit to unconstitutional takings may be challenged under the Takings Clause).

Finally, the government argues that Petitioners' claims would fail because the Tucker Act provides an alternative remedy. This Court has already foreclosed that argument, holding in this very case that the Agricultural Marketing Agreement Act "provides a comprehensive remedial scheme *that withdraws Tucker Act jurisdiction over a handler's takings claim*." Pet.App.255a. Footnote 7 of this Court's opinion suggests that a Tucker Act remedy may be available to "a *producer* who turns over her reserve tonnage raisins," *id.*, but Petitioners are

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export subsidies, which benefit major packers while injuring independent farmers like the Hornes.

before this Court in their capacity as *handlers* who have *not* turned over raisins. Even if a Tucker Act remedy were theoretically available, the government's argument would eviscerate *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which holds that a party is not required to pay the United States one day and then sue to get its money back — a rule the Court unanimously reaffirmed in *Horne*. Pet.App.258a. And to the extent the government's Tucker Act argument ever had merit, the government forfeited it long ago. *Horne* Tr. 28:24-25 (Kagan, J.: "[Y]our Tucker Act argument as a substantive argument, I mean, has been waived.").

CONCLUSION

For the foregoing reasons and those set out in the Petition, the Court should grant a writ of certiorari. In view of the government's inability to provide any legally plausible defense of the decision below, the Court might consider summary reversal.

Respectfully submitted,

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