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*

## BRIEF OF SUN-MAID GROWERS OF CALIFORNIA AND THE RAISIN BARGAINING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI CURIAE*[1]

Sun-Maid Growers of California ("Sun-Maid") is an agricultural marketing cooperative,[2] and the largest single marketer of raisins in the world. Sun-Maid is owned by approximately 650 raisin farmers who are members, or equity owners, of the cooperative. Sun-Maid was originally founded in 1912 as the California Associated Raisin Company. The trademark "Sun-Maid," which features a young woman wearing a red bonnet and holding a tray of freshly-picked grapes, was first created in 1915, and the cooperative changed its name in 1922 to identify more closely with its highly successful brand. The "Sun-Maid" trademark remains one of the world's most identifiable food brands to this day.

On behalf of its 650 farmer members, Sun-Maid presently processes and markets about 30% of the California raisin crop; since California is responsible for 40-45% of world raisin production, Sun-Maid's share of the world crop is approximately 12-15%.

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[1] No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the brief. Petitioners and respondent consented to the filing of this brief.

[2] Sun-Maid is incorporated under the laws of California, in particular the provisions of Cal. Food & Agric. Code § 54000 *et seq.*, dealing with agricultural marketing cooperatives. Pursuant to section 7.09 of Sun-Maid's Bylaws and Raisin Marketing Agreement, the cooperative is authorized to act "on behalf of each grower member under any governmental marketing agreement, order, program or plan relating to the marketing of raisins, including the exercise of any right to vote on behalf of each member."

The Raisin Bargaining Association ("RBA") is a non-profit agricultural cooperative association that incorporated on December 9, 1966. The RBA represents and advocates for its grower members in all aspects of their business, such as by negotiating a fair price for its members' raisins and seeking policy reform to protect its members' financial and real property interests. The RBA represents approximately 1,000 raisin farmers who produce about 30% of the California raisin crop annually.

Sun-Maid and the RBA—whose farmer constituents together produce approximately 60% of the California raisin crop—compete with petitioners, and are subject to the same regulatory regime that petitioners flouted in this case. Like petitioners, Sun-Maid's and the RBA's cooperative members grow their own raisin grapes to then be handled, and hence the cooperatives' members are "producers" for purposes of 7 C.F.R. § 989.11. Further, like petitioners, Sun-Maid itself also processes raisins, and thus is a "handler" for purposes of 7 C.F.R. § 989.15. Unlike petitioners, who have attempted to evade longstanding regulatory requirements to gain a competitive advantage, Sun-Maid and the RBA have played by the regulatory rules, and have an interest in seeing that petitioners, as competitors, also comply with the same regulatory rules governing the raisin industry in California.

## STATEMENT

The California raisin industry has been subject to regulations authorized by the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. §

601 *et seq*., since 1949. The AMAA permits agriculture industry participants to collectively decide whether to regulate their respective industries. If favored by at least two-thirds of producers, the Secretary of Agriculture ("the Secretary" or "USDA") is authorized to enact a "marketing order" setting forth the framework for such industry self-regulation. *See* 7 U.S.C. § 608c(8), (9). Based upon such a supermajority vote of producers, the Secretary issued the California Raisin Marketing Order of 1949 ("marketing order"), 7 C.F.R. Part 989, which permits all California raisin industry participants to initiate, set up, and direct regulatory control over their industry. *Cf.* U.S. Dep't of Agric., PA-479, *Self-Help Stabilization Programs with Use of Marketing Agreements and Orders*, at 1 (1961), *available at*: http://archive.org/details/CAT31303082. This program is funded entirely by the industry, and administered by the Raisin Administrative Committee ("RAC")—which is composed of 46 industry representatives and one representative of the public. *See* 7 C.F.R. §§ 989.26, 989.29-30, 989.35-36.

The purpose of the raisin marketing order is, in essence, to help maintain orderly marketing conditions by regulating the handling of raisin supplies. That system benefits the entire raisin industry, including petitioners, by avoiding price volatility that was endemic prior to promulgation of the raisin marketing order. Such price stability "is especially important" for producers of "perishable commodities" such as raisins. E.M. Babb and Robert Bohall, *Marketing Orders and Farm Structure*, *in* U.S. Dep't of

Agric., No. AER 438, *Structure Issues of American Agriculture* 249, 251 (1979).

The marketing order can only properly function if it is mandatory; the AMAA was enacted in part because voluntary marketing associations for agricultural products authorized by the Capper-Volstead Act of 1922, 7 U.S.C. § 291, provided benefits to "free rider" producers that did not abide "by the shipping restrictions (price, quantity, or quality) incumbent on members." Steven A. Neff and Gerald E. Plato, U.S. Dep't of Agric., No. AER 707, *Federal Marketing Orders and Federal Research and Promotion Programs* 2 (1995).[3] "The AMAA eliminated the undercutting behavior of free riders by allowing the formation of marketing orders binding on all handlers if two-thirds of producers voted to approve the order." *Id*.

Petitioners challenge the marketing order's "reserve pool" provisions. Under the AMAA, a marketing order can only regulate "handlers," that is, processors and packers. 7 U.S.C. § 608c(1). The AMAA specifically exempts from regulation "any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B). Accordingly, the marketing order permits the Secretary, upon advice and recommendation of the RAC, to order *handlers* of raisins to withhold a certain

[3] In the absence of mandatory compliance with the marketing order, "an individual handler could . . . increase the quantity sold *without* seeing a fall in price. If each handler would pursue that strategy, . . . eventually less produce would be sold at a lower price." *Id*. at 4.

percentage of producers' yearly raisin crop in reserve. *See* 7 C.F.R. §§ 989.65-989.71.

This percentage, or the "reserve pool," is determined yearly by industry vote and separate regulation. During each crop year, the RAC applies the "Trade Demand" formula and considers supply, demand, estimated production, pricing, and other market conditions to arrive at a recommended reserve pool. *See* 7 C.F.R. §§ 989.54-55. The RAC must estimate the size of the reserve pool by October 5 and recommend the final reserve pool by February 15 of each crop year. The RAC arrives at its recommendation by majority vote. 7 C.F.R. § 989.38. If a reserve pool is recommended, the USDA thereafter designates it via interim and final rule. *See* 7 C.F.R. §§ 989.54-55. Once such reserve pool is set, handlers must set aside "reserve tonnage" raisins and await the RAC's direction regarding their disposition. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h). Reserve-tonnage raisins typically yield marginal, if any, profit for producers compared to raisins sold on the open market.

Petitioners are subject to such provisions due to being vertically integrated, in that they both produce and handle their own raisins. *See* Pet. App. 52a-53a. In addition, petitioners are subject to regulation because they handle the raisins of other producers that are not vertically integrated. *See* Pet. App. 36a-38a. Indeed, in this case, the bulk of petitioners' liability for violations of the marketing order stems from petitioners' failure, as handlers, to comply with the marketing order for raisins produced by other producers. During the two periods at issue here, peti-

tioners produced only 27.4% and 12.3%, respectively, of the raisins they handled. Pet. App. 248a.

Like petitioners, Sun-Maid is vertically integrated. But unlike petitioners, Sun-Maid complied with the raisin marketing order, by allocating the designated percentage of raisins to the reserve-tonnage pool, and thereby foregoing the profits potentially to be made by selling such raisins on the open market.

Petitioners, on the other hand, "deliberately" violated the raisin marketing order "to obtain an unfair competitive advantage over other California raisin handlers [such as Sun-Maid] who were in compliance with the Raisin Order." Pet. App. 32a, 33a (ALJ finding). That is to say, petitioners sought to take advantage of the higher market price for raisins that resulted from their competitors' compliance with the marketing order. Having been caught "free riding" on the marketing order at the expense of their competitors, petitioners now seek refuge in high constitutional principle. As discussed below and in the brief of the United States, that effort is unavailing.

## SUMMARY OF THE ARGUMENT

1. The raisin market conditions that existed during the years in question (2002-2003 and 2003-2004) were of the kind contemplated by the AMAA, as the production surplus substantially exceeded trade demand, resulting in establishment of reserve-pool requirements. Petitioners, however, acted as free riders in defying the marketing order's reserve-pool requirements, and thereby gained a competitive advantage as *both* handlers and as producers.

2. In addition to the other remedies identified by the government, petitioners had administrative remedies available to them to challenge the marketing order's reserve-tonnage requirements. In their capacity as producers, petitioners could have petitioned the Secretary under the AMAA to amend or suspend the marketing order, and a denial of such relief would have been reviewable in district court under the Administrative Procedure Act. Indeed, because market conditions have fundamentally changed since the years at issue in this case, Sun-Maid—in its capacity as a producer—is pursuing exactly such relief at this time. Further, in their capacity as handlers, petitioners could have petitioned the Secretary to exempt them from the marketing order. Under the AMAA, petitioners would have been entitled to judicial review of the denial of such relief.

3. The Ninth Circuit below determined that petitioners are handlers for purposes of the AMAA, and petitioners do not challenge that determination. Thus, petitioners proceed in this action solely in their capacity as *handlers*.

In their capacity as handlers, petitioners have no property interest in the raisins subject to the marketing order's reserve-tonnage requirements. Instead, their defense is premised upon the taking of raisins owned by third parties, producers. Petitioners lack third-party standing to assert the interests of producers, however, because producers have no impediment to asserting their own constitutional rights. And, even if petitioners had such third-party standing to assert the interests of producers, it would be to no avail, because producers' interests are

outside of the zone of interests affected by enforcement of the marketing order against handlers.

4. Even if petitioners, as handlers, have third-party standing to assert the interests of producers as a defense, and even if those interests are within the relevant zone of interests, the marketing order's reserve-tonnage provisions do not effect a *per se* taking, because they do not "chop[] through the bundle" of property rights, "taking a slice of every strand." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Under the AMAA, owners of the raisins retain a beneficial interest in the raisins, and are entitled to an "equitable distribution of the net return derived from the sale thereof." 7 U.S.C. § 608c(6)(E).

As the marketing order does not effect a *per se* taking, petitioners' takings defense is subject to a regulatory takings analysis under the standard set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Under that standard, petitioners' takings defense fails, because the marketing order is a reasonable regulation of an agricultural commodity in an attempt to stabilize producer prices. The increased market price resulting from the marketing order mitigates the economic impact on producers from reserve-tonnage requirements. Finally, because of the long-standing nature of the marketing order's regulatory requirements, petitioners had no "reasonable investment-backed expectations" such that they could defy the marketing order with impunity.

## ARGUMENT

### I. Then-Existing Market Conditions Justified the Establishment of a Reserve Pool, Which Applied to All Producers and Which Petitioners Flouted for Their Competitive Advantage

As discussed below, the reserve-pool provisions in 2002-2003 and 2003-2004 were necessary to stabilize the price of raisins under then-existing market conditions. All producers, including *amici* Sun-Maid growers and RBA growers, were affected by the marketing order's reserve-pool requirements—but only the petitioners exploited the industry's collective restraint for personal gain.

#### A. Market Conditions Justified the Imposition of a Reserve Pool in the Two Years in Question

During and after the Second World War, world trade was struggling and U.S. producers of agricultural commodities had production capabilities that exceeded their ability to reasonably sell their crop in commercial markets. The California raisin industry was no exception. The amount of raisins grown far exceeded the amount that could be economically marketed, leading to a sharp decline in the price of raisins. *See, e.g.*, *Parker v. Brown*, 317 U.S. 341, 363-64 (1943).

The marketing order was intended to "stabilize" the price of raisins by introducing volume regulation, or "reserve pool" provisions, which would reduce the supply of raisins reaching the commercial market.

*See Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1359 (Fed. Cir. 2005); 14 Fed. Reg. 5136-44 (Aug. 18, 1949). Under such provisions, the Secretary could order "handlers" of raisins to hold a certain percentage of yearly raisin production received from producers in reserve, thereby preventing this surplus from reaching the commercial market. *See* 7 C.F.R. §§ 989.65-989.71.

The raisin industry faced surplus supply relative to demand in the 2002-2003 and 2003-2004 crop years, necessitating a reserve pool of raisins to ensure price stabilization. *See* 68 Fed. Reg. 41686-88 (July 15, 2003) (finding reserve pool of natural seedless raisins for 2002-2003 crop was necessary because supply exceeded trade demand by 274 percent); 69 Fed. Reg. 50289, 50291 (Aug. 16, 2004) (finding reserve pool for 2003-2004 crop of natural seedless raisins was necessary because supply exceeded trade demand by 200 percent). Such substantial oversupply mirrored conditions dating to the marketing order's inception, and the subsequent reserve pool was essential to stabilizing the price of raisins. Because all raisin industry handlers (other than petitioners) complied with marketing order's reserve-tonnage requirements, the marketing order inured to the benefit of all industry participants in the years in question.[4]

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[4] Importantly, market conditions fundamentally changed starting in the 2010-2011 crop year. Due to a permanent shift in acreage planted with raisin variety grapes, supply can no longer outstrip demand. Accordingly, no reserve pool was set for the 2010-2011, 2011-2012, 2012-2013, and 2013-2014 crop years,

### B. The Regulatory Burdens of the Reserve Pool Are Shared by All Producers and Are Not Exclusive to Petitioners

In each crop year, the RAC is permitted under the marketing order to recommend to the Secretary of Agriculture whether market conditions warrant limiting "the percentage of raisins that may be sold in the market by dividing the raisin crop into 'reserve tonnage' and 'free tonnage.'" Pet. Br. 6 (citing 7 C.F.R. §§ 989.66, 989.166). When a reserve tonnage is set, producers still physically deliver their crop to a handler, who must set aside the reserve raisins "for the account of" the RAC. Pet. Br. 6; 7 C.F.R. §§ 989.65, 989.66(a). Handlers pay producers for the free-tonnage raisins the handlers purchase, but not for the reserve-tonnage raisins that handlers hold for the RAC. *See* Pet. Br. 6-7. Producers therefore do not receive immediate payment for reserve tonnage, but must instead await the RAC's disposition of such raisins. *See* 7 C.F.R. § 989.66(h). If proceeds remain, taking into account the costs associated with the storage and disposition of the reserve raisins, such net proceeds must be remitted by the RAC to producers on a pro rata basis. *Id*. Accordingly, "it is the producer who bears the economic burden of the program." Pet. Br. 7.

These provisions applied to all California raisin producers and handlers in the 2002-2003 and 2003-2004 crop years. Yet only petitioners (who, while

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and no reserve pool will be set for the 2014-2015 crop year. Pet. Br. 8.

proceeding solely as handlers in this action, were also producers during the relevant times) exploited other industry participants' compliance with the reserve pool, including that of Sun-Maid and the RBA, for personal financial gain.

### C. Petitioners Secured a Significant Commercial Advantage Over Their Competitors by Ignoring the Reserve Pool and Free Riding on the Marketing Order

It is undisputed that, by selling both other growers' and their own reserve-tonnage raisins in the commercial market, petitioners obtained a competitive advantage *both* as handlers and producers, and thus "an unfair competitive advantage over *everyone* in the raisin industry who complied with the Raisin Order and its regulations." Pet. App. 47a (ALJ determination) (emphasis added).

As handlers, petitioners claimed that raisins they processed were exempt from the marketing order because they did not "acquire" raisins as handlers, but instead merely "leased" their facilities and employees to other producers, and thereby sought to attract business from producers eager to avoid reserve-tonnage requirements. The ALJ found that petitioners "benefitted under these arrangements [as handlers] from the fees that [they] received from growers for the 'rental of [their] equipment.'" Pet. App. 38a.

As producers, petitioners were able to sell their own reserve-tonnage raisins at a market price supported by the marketing order, which translated to a market value of $483,843.53. Pet. App. 110a (finding

of USDA Judicial Officer). Petitioners were able to obtain this higher market price precisely because their competitors such as Sun-Maid and the RBA complied with the marketing order and withheld their reserve-tonnage raisins from the market.

Petitioners' competitors, including Sun-Maid and the RBA, recognize that collective self-governance can only succeed if industry participants work within established procedures. By fining petitioners and divesting them of their ill-gotten gains, the USDA preserved the marketing order's efficacy and the raisin industry's self-governance.

## II. Petitioners Had Multiple Lawful Avenues for Relief

Rather than undermine their competitors and leverage the marketing order in an act of commercially-motivated civil disobedience, petitioners could instead have brought a challenge to the marketing order's reserve-pool provisions in either their capacity as producers or as handlers.[5] The AMAA provided petitioners with at least two administrative remedies to challenge the marketing order in addition to the other remedies cited by the government.

[5] It is undisputed that, before developing their scheme to clean, stem, sort, and package raisins, petitioners were solely producers of raisins. Pet. App. 247a.

### A. As Producers, Petitioners Could Have Petitioned the Secretary to Modify or Suspend the Marketing Order Under AMAA Section 608c(16)

In their capacity as producers, petitioners could have sought relief under the AMAA, which states that the "Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof." 7 U.S.C. § 608c(16). Petitioners devised their handling operation to avoid application of the marketing order, which they viewed as failing to achieve its desired purpose. Pet. App. 247a n.3 (relaying the Horne's grievances). But petitioners could have expressed these grievances through a petition requesting the USDA modify or suspend the marketing order's volume restrictions under § 608c(16).

Unlike petitioners, Sun-Maid recently invoked this very process to express its concerns to the USDA in light of dramatically changed market conditions. On November 17, 2014, pursuant to § 608c(16) and 5 U.S.C. § 553(e), Sun-Maid submitted to the Secretary of Agriculture a petition to initiate rulemaking suspending and ultimately terminating the marketing order's volume restrictions. In its petition, Sun-Maid detailed why volume restrictions are no longer necessary for the raisin industry.

The Secretary denied Sun-Maid's petition on January 7, 2015. Sun-Maid thereafter sought judicial review under the Administrative Procedure Act

of this refusal to initiate rulemaking. Sun-Maid's challenge is currently pending in the District Court for the District of Columbia. *See* Complaint (Dkt. No. 1), *Sun-Maid Growers of California v. USDA*, No. 1:15-cv-00496 (D.D.C. Apr. 6, 2015).

### B. As Handlers, Petitioners Could Have Petitioned the Secretary to Exempt Them from the Marketing Order Under AMAA Section 608c(15)(A)

Alternatively, in their capacity as handlers, petitioners could have sought relief in 2002-2003 and 2003-2004 under a different provision of the AMAA, which provides that "[a]ny handler subject to a[] [marketing] order may file a written petition with the Secretary of Agriculture stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom." 7 U.S.C. § 608c(15)(A). Denials of such relief are reviewable in district court. *See* 7 U.S.C. § 608c(15)(B).

Petitioners were indisputably aware of this avenue because they belatedly filed such a petition in March 2007 and, after it was denied, sought judicial review in March 2008. *See* Complaint (Dkt. No. 1), *Horne v. USDA*, No. 1:08-cv-00402 (E.D. Cal. Mar. 18, 2008).[6] But petitioners did not pursue this ave-

[6] Despite their failure to receive actual notice of the Secretary's denial of their petition, petitioners' complaint was dismissed as untimely filed, and neither the district court nor the Ninth Circuit reached the merits. *See* Mem. Decision Re: Def.'s Mtn. to Dismiss (Dkt. No. 25), *Horne v. USDA*, No. 1:08-cv-00402 (E.D.

nue until *after* the ALJ had found they violated the AMAA and the marketing order and imposed a fine. *See* Pet. App. 54a-55a (ALJ Decision and Order issued on December 8, 2006); Complaint at 3 (Dkt. No. 1), *Horne v. USDA*, No. 1:08-cv-00402 (E.D. Cal. Mar. 18, 2008 (noting petition was filed on March 5, 2007).

Rather than seek such relief in 2002-2003 and 2003-2004, after being informed they would be subject to the marketing order as "handlers," *see* Pet. App. 34a-41a (finding petitioners were notified by the Secretary in 2001 and 2002, and by the RAC twice during each of the 2002-2003 and 2003-2004 crop years, that they were considered "handlers" subject to the marketing order), petitioners opted to pursue this avenue only after they were called to account for willfully flouting the marketing order.

* * *

Rather than unilaterally leverage the marketing order's compelled collective action for financial gain, Sun-Maid continues to work within the law to bring about beneficial change on behalf of the raisin industry. Petitioners, on the other hand, have eschewed proper procedural avenues and sought to leverage the industry's collective action for their own pecuniary gain.

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Cal. Nov. 13, 2008); *Horne v. USDA*, 395 F. App'x 486 (9th Cir. 2010).

## III. Petitioners Lack Standing to Assert the Interests of Producers in This Enforcement Action Against Them in Their Capacity as Handlers

To assert a valid takings defense, petitioners must first identify the property taken from them. But petitioners, proceeding in this enforcement action solely as handlers, do not and cannot identify *any* property taken from them *in this capacity*. Instead, their defense is premised upon the taking of raisins owned by third parties, producers. Petitioners lack third-party standing to assert this defense, however, because producers have no impediment to asserting their own constitutional rights. And, even if petitioners had such third-party standing, it would be to no avail, because producers are outside of the zone of interests regulated by enforcement of the marketing order.

### A. As Handlers, Petitioners Have No Property Interests to Assert as a Defense

In their first visit to this Court, petitioners did not challenge the Ninth Circuit's original determination that "the [petitioners] . . . satisfy the regulation definition of a 'packer' and are thus 'handlers' subject to the Raisin Marketing Order's provisions." Pet. App. 202a-203a. Accordingly, this Court in *Horne I* repeatedly noted that petitioners are proceeding solely in their capacity as handlers. *See, e.g.*, Pet. App. 252a ("It is undisputed that the Marketing Order imposes duties on petitioners only in their capacity as handlers. As a result, any defense raised against those duties is necessarily raised in that

same capacity."); *id.* ("[P]etitioners' takings claim makes sense only as a defense to penalties imposed upon them in their capacity *as handlers*."); *id.* at 257a (permitting petitioners to assert takings claim solely because "petitioners (as handlers) have no alternative remedy"). It is therefore the law of this case that petitioners are proceeding *solely* in their capacity as handlers. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (noting that "law of the case" doctrine "'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" (quoting *Arizona* v. *California*, 460 U.S. 605, 618 (1983))).

Accordingly, petitioners must identify a property interest held by them *in their capacity as handlers* to assert a valid takings defense. Establishing a compensable property right is a necessary predicate to asserting a takings defense. *See, e.g.*, *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 266 (1994) ("The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights . . . .").

Petitioners argue their compensable property interest derives ultimately from the compelled transfer of reserve-tonnage raisins to the RAC (or a fine in lieu thereof). *See* Pet. Br. 21 ("[T]he Marketing Order physically deprives raisin *producers* of a large portion of their raisin crop and compels transfer of those raisins to the RAC, the agent of the USDA, without just compensation." (emphasis added)). But a property interest in reserve-tonnage raisins is held only by producers. *See id*. at 22 ("*From the growers' perspec-*

*tive*, the effect of the Raisin Marketing Order is to deprive them of the right to possess, use and dispose of their raisins and to hand that right over to the United States." (internal quotation marks omitted and emphasis added)); *id*. at 25 ("The RAC's seizure of the right to possess and dispose of the raisins thus amounts to a taking no matter who has formal title."). Nowhere do petitioners argue that the possession, control, or title to reserve-tonnage raisins was ever held by them *as handlers*. To that contrary, petitioners' argument turns upon their assertion that there is a direct transfer of title to (or at least a direct transfer of possession and control of) reserve-tonnage raisins from producers to the RAC. *See id.* at 24-25. Petitioners do not argue that they, as handlers, ever obtained a property right in reserve-tonnage raisins.

Petitioners do not make this argument because they cannot. Handlers have no possessory or dispositional interest in reserve-tonnage raisins. *See* 7 C.F.R. § 989.66(a) (requiring handler to hold reserve-tonnage raisins "for the account of" the RAC); § 989.66(b)(1)-(4) (directing handler to store such reserve tonnage "separate and apart" from other raisins and to store and deliver these raisins as directed by the RAC). Handlers have no financial interest or investment in reserve-tonnage raisins. *See* Pet. Br. 6-7 ("But handlers pay producers only for the free-tonnage raisins. They pay nothing for the reserve-tonnage raisins that they transfer to the government." (citation omitted)); 7 C.F.R. § 989.66(f) (providing for payment to handlers for "receiving, storing, fumigating, handling, and inspection" of re-

serve-tonnage raisins, as well as payment for the bins holding such raisins). And handlers have no contingent interest in reserve-tonnage raisins. *See* 7 U.S.C. § 608c(6)(E) (entitling only producers to "equitable distribution of the net return" of such raisins); 7 C.F.R. § 989.66(h) (vesting contingent interest in net proceeds from disposition of reserve-tonnage raisins in producers, not handlers). Accordingly, handlers never obtain a property interest in reserve-tonnage raisins.

In short, nothing was taken from petitioners in their capacity as *handlers.* Instead, their takings defense is a thinly veiled attempt to proceed in this enforcement action as producers—a defense that failed in the Ninth Circuit below. As discussed below, petitioners have no standing to invoke the constitutional rights of producers.

### B. As Handlers, Petitioners Do Not Have Third-Party Standing to Assert the Property Rights of Producers

In general, a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). This Court, however, has recognized an exception to this rule in cases where "the party asserting the right has a 'close' relationship with the person who possesses the right," *and* where "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski,* 543 U.S. at 130.

The latter consideration is dispositive, as petitioners cannot show that producers have any "hindrance" in asserting whatever takings rights that producers may have against the marketing order. The Court of Federal Claims was open and fully available to producers to seek compensation, if any, for net losses resulting from the raisin reserve-pool requirements established by the RAC in 2002-2003 and 2003-2004. As producers had no hindrance to asserting their rights in the Court of Claims, petitioners do not have third-party standing to invoke the rights of producers as a defense to petitioners' violations of the marketing order as handlers.

### C. Even If Petitioners Have Third-Party Standing, the Interests of Producers Are Outside the Zone of Interests of the Marketing Order As It Relates to Enforcement Against Handlers

Finally, even if petitioners may otherwise invoke the rights of producers, it is to no avail if producers' interests are outside of the zone of interests of the marketing order as it relates to enforcement against handlers. "If the litigant asserts only the rights of third parties, then he may satisfy the zone of interests requirement by reference to third parties' interests if the court determines that the litigant has third party standing *and* that the third party's interests fall within the relevant zone of interests." *Haitian Refugee Center v. Gracey*, 809 F.2d 807, 812 (D.C. Cir. 1987) (Bork, J.) (emphasis added).

The zone of interests test requires that a litigant's asserted interests fall "'within the zone of in-

terests to be protected *or regulated* by the statute or constitutional guarantee in question.'" *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (emphasis added and quoting *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although *producers*' property interests are unquestionably within the zone of interests of the Takings Clause, those interests are not implicated by the marketing order's enforcement against handlers. *See* 7 U.S.C. § 608c(13)(B) (specifically exempting from the marketing order "any producer in his capacity as a producer"). Because Congress has expressly provided that the marketing order only regulates handlers, petitioners may not assert the property interests of producers as a defense in this enforcement action against petitioners in their capacity as handlers, as those interests are outside of the relevant zone of interests.

## IV. To the Extent that Petitioners Have Standing to Assert a Takings Defense in Their Capacity as Handlers, the Defense Should Fail Under the Applicable Regulatory Takings Analysis

Even if petitioners, as handlers, have third-party standing to assert the interests of producers as a defense in this enforcement action, and even if those interests are within the relevant zone of interests, petitioners cannot demonstrate that the marketing order effects a regulatory taking. The marketing order constitutes a use restriction justified by the resulting stabilized price of raisins, producers' contingent interest in the disposition of reserve-tonnage

raisins, and the benefits of collective industry self-governance.

Initially, the marketing order's reserve-tonnage provisions do not effect a *per se* taking. A *per se* taking arises where government regulation results in a "permanent physical occupation" of property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982), or "where regulation denies all economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). In both instances, however, the regulation "d[id] not simply take a single 'strand' from the 'bundle' of property rights," but "chop[ped] through the bundle, taking a slice of every strand." 458 U.S. at 435.

Under the marketing order, the RAC does not divest producers of *all* property rights in their reserve-tonnage raisins. To the contrary, producers retain a contingent interest in the proceeds from the disposition of the reserve raisins. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h). Accordingly, as the Ninth Circuit correctly found, neither *Loretto* nor *Lucas* governs. *See* Pet. App. 18a, 22a.

Outside of these two contexts, this Court evaluates regulatory takings challenges under the standard set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Under *Penn Central*, the Court engages in a "case-specific inquiry into the public interest advanced in support of the restraint." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). In doing so, the Court evaluates (1) the "character of the governmental action"; (2) the "economic impact of the regulation on the claimant";

and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124.

Petitioners do not even bother contesting the outcome of this analysis, which falls heavily in favor of the government.

*First*, the "character of the governmental action" is that of a reasonable regulation of the commercial market for an agricultural commodity designed to promote price stabilization and industry stability. Importantly, the regulation is imposed by the USDA only at the request of a super-majority vote of the regulated industry. This is a self-help and industry-funded regulatory program. It would be anomalous if an industry could impose regulation upon itself, and then turn around and seek compensation from the government for the costs of that regulation.

*Second*, the "economic impact of the regulation of the claimant" is an attempt to stabilize prices for raisins, which increases producer returns and ensures long-term industry stability. Any loss of value of reserve-tonnage raisins is offset by the increase in value of free-tonnage raisins.

*Third*, the marketing order cannot undercut any valid "investment-based expectations." To the contrary, petitioners pointedly informed the USDA in 2002 that they intended to violate the marketing order because, after decades of growing raisins, the marketing order "has become a tool for grower bankruptcy, poverty, and involuntary servitude." Pet. App. 247a n.3. As producers, petitioners knew that they could not market their raisins without comply-

ing with any reserve-pool requirements, and therefore could have no valid investment-backed expectations. As handlers, petitioners knew that a certain portion of the crop might be set aside as reserve tonnage. Accordingly, even if the petitioners have the capacity to assert a takings defense, that defense must fail.

## CONCLUSION

For the reasons provided above and in the respondent's brief, this Court should affirm the decision below.

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Respectfully submitted,

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