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 U.S. Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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

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

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.[1]

WLF has regularly appeared before this and other federal courts in cases involving claims arising under the Fifth Amendment's Takings Clause. *See, e.g., Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 525 U.S. 302 (2002); *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012).

WLF is concerned that the decision below, unless overturned by this Court, will seriously erode property rights by undermining the ability of owners to obtain just compensation when the government seizes their personal property. An unbroken line of this Court's decisions upholds the *per se* right to compensation for government acquisition of private property, regardless of the type of property at issue. The Ninth Circuit's decision called that right into question by holding that the right to compensation is reduced when the property in question is personal property, not real property.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

WLF is also concerned that the decision below seriously misapplies the unconstitutional conditions doctrine. That doctrine vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up. But rather than applying that doctrine in a straightforward manner to the federal government's efforts to coerce raisin producers and handlers to abandon their property rights in return for government "permission" to sell raisins, the Ninth Circuit evaluated the government's coercion under a standard heretofore applied only to conditional government approvals of permits for new land uses that impose costs on the public. WLF strongly believes that the approach adopted by the court below—whereby it upheld the federal government's coercive appropriation of private property on the grounds that there existed a "rough proportionality" between the government's goal of stabilizing raisin prices and its seizure of raisins—emasculates the Takings Clause.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the brief of Petitioners. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Respondent U.S. Department of Agriculture ("USDA") has ordered Petitioners ("the Hornes") to pay more than $700,000 after determining that the Hornes marketed raisins in violation of USDA's Raisin Marketing Order. *See* 7 C.F.R. Pt. 989. Before this Court, the Hornes do not continue to contest the

finding that they violated the marketing order. Rather, they contend that they were not required to comply because the government's enforcement action—an effort to seize nearly half of the Hornes' raisin crop—violated the Fifth Amendment's prohibition against seizing private property without providing just compensation.

The Raisin Marketing Order was issued in 1949 pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA). The order establishes a "reserve" program under which a specified portion of the yearly raisin crop must be set aside "for the account of" the federal government. *Evans v. United States*, 74 Fed. Cl. 554, 557 (2006). Pursuant to that program, a group created by the Raisin Marketing Order—the Raisin Administrative Committee (RAC)—each year determines what percentage of his crop a raisin producer is permitted to market. The portion that a producer may market is known as "free tonnage," and the remaining portion is known as "reserve tonnage." 7 C.F.R. §§ 989.66, 989.166.

Producers normally sell their raisins to "handlers," who process and pack the raisins. 7 C.F.R. § 989.15. Handlers pay producers only for the portion of delivered raisins designated as "free tonnage," the portion destined for sale on the open market. The Raisin Marketing Order "effects a direct transfer of title of a producer's 'reserve tonnage' to the government" and requires handlers to physically segregate reserve-tonnage raisins from free-tonnage raisins; the former are to be held by handlers "for the government's account." *Evans*, 74 Fed. Cl. at 558. In the two crop years at issue, 2002-03 and 2003-04, the

RAC determined that reserves should constitute (respectively) 47% and 30% of total raisin production, thereby ordering the seizure of that percentage of each producer's crop.

The RAC then determines how to dispose of its reserve raisins. It sells most of them (at a considerable discount to U.S. market rate) to exporters. A portion of the reserve raisins are donated to U.S. agencies (for example, for school lunches) or charitable organizations. The RAC deducts its expenses from sales proceeds, and any funds remaining after those deductions are distributed to raisin producers on a *pro rata* basis. The 2002-03 distribution to producers was at a rate well below their costs of production (and far below U.S. market prices). In 2003-04, the federal government paid *nothing* to producers, despite (by means of the reserve-raisin program) having seized and made use of 30% of the overall raisin crop.

For decades, the Hornes have been growing grapes and producing raisins. They eventually concluded that the Raisin Marketing Order was unfair to small producers who, like themselves, do not engage in exporting and thus are not in a position to benefit from the export subsidies offered by the RAC for reserve-tonnage raisins. The Hornes decided to cease selling their raisins to handlers and instead to perform their own packing and processing operations and to sell *all* of their raisins on the open market.

The RAC objected and demanded that the Hornes turn over the "reserve" portion of the raisins they had processed. When the Hornes refused the demand, the USDA initiated disciplinary proceedings

against them. At all stages of those proceedings, the Hornes argued that the RAC's reserve-raisin requirement violated the Fifth Amendment's prohibition against the uncompensated taking of private property and that therefore they should not be sanctioned for failing to abide by that requirement.

After an administrative hearing and appeal, the USDA concluded that the Hornes had become "handlers" by virtue of their packing and processing operations and had violated USDA regulations by failing to set aside reserve-tonnage raisins for the RAC during the 2002-03 and 2003-04 crop years. Pet. App. 97a-98a. The USDA ordered the Hornes to pay $484,000, the market value of the raisins that they sold (on behalf of themselves and a number of neighbors) instead of turning them over to the RAC's reserve program pursuant to the Raisin Marketing Order. *Id.* at 109a-110a; 123a. It also imposed a civil penalty of $178,000 for the violation. *Id.* at 98a, 122a.

On judicial review, the district court upheld the USDA's decision. *Id.* at 125a-190a. The Ninth Circuit affirmed. *Id.* at 220a-241a. The appeals court concluded that it lacked jurisdiction to hear the Hornes' Takings Clause claim; it held that the Tucker Act required that any such claim be filed in the Court of Federal Claims. *Id.* at 236a.

This Court granted review and reversed on the jurisdictional issue. *Horne v. Dep't of Agriculture*, 133 S. Ct. 2053 (2013) ("*Horne I*"). It held that raisin handlers may raise takings-based defenses in enforcement proceedings initiated by the USDA; and that the federal courts have jurisdiction to adjudicate

those defenses in connection with any subsequent appeals. *Id.* at 2063.

On remand, the Ninth Circuit rejected the Hornes' Takings Clause claim. Pet. App. 1a-29a. The court initially concluded that the Hornes had not been subjected to a "paradigmatic taking," which the court defined as occurring "when the government appropriates or occupies private property." *Id.* at 15a. It reached that conclusion "because the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account." *Ibid.* Accordingly, the court concluded, it was required to "enter the doctrinal thicket of the Supreme Court's regulatory takings jurisprudence." *Id.* at 16a.

The Ninth Circuit said that the Raisin Marketing Order fell within none of the three categories of "regulations" that "work a categorical, or per se, taking:" (1) a "permanent physical invasion of real property"; (2) regulations depriving owners of all economically beneficial use of their real property; and (3) a category limited to certain land-use exactions. *Id.* at 16a-28a. Citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court held that the *per se* taking rule for "permanent physical invasion" of property applies only to real property, not to personal property such as raisins. *Id.* at 18a-20. It held that the *per se* taking rule for "permanent physical invasion" was inapplicable for a second reason: "the Hornes did not lose all economically valuable use of their personal property" but rather were entitled to receive the net proceeds from reserve-tonnage raisin sales. *Id.* at 20a-21a.

The Ninth Circuit determined that "the most faithful way to apply the Supreme Court's precedents to the Hornes' claims" was to apply the "nexus and rough proportionality rule" established by this Court's land-use exaction case law. *Id.* at 23a. Applying that rule, the appeals court determined that the reserve-raisin requirement did not constitute a taking of private property because a "nexus" existed between the requirement and the AMAA's goal of establishing orderly agricultural markets, and because the requirement (as well as the fine the USDA imposed on the Hornes) was "roughly proportional" to that goal. *Id.* at 26a-27a.

SUMMARY OF ARGUMENT

This case is most appropriately analyzed under the unconstitutional conditions doctrine. That doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Under the unconstitutional conditions doctrine, the government may not condition its grant of a benefit to a person on that person's agreement to abandon a constitutional right.

We will concede for the sake of argument that a license to engage in raisin sales or other normal commercial activity is a "benefit" that the government is entitled to grant or deny in appropriate circumstances. Even so, the unconstitutional conditions doctrine bars USDA from conditioning its grant of the right to sell raisins on the seller's acquiescence to the uncompensated seizure of a

significant portion of his raisin crop. As the Hornes have demonstrated, the demand that they set aside reserve-tonnage raisins and deliver them to the RAC is a *per se* taking in violation of the Fifth Amendment. By making that demonstration, the Hornes have also demonstrated that the USDA violated the unconstitutional conditions doctrine when it sought to condition their participation in the commercial raisin market on their acquiescence to the taking.

In seeking to demonstrate that the reserve-raisin requirement is not an unconstitutional condition on authorized marketing, the Ninth Circuit relied on land-use exaction case law, principally *Nollan* and *Dolan*.[2] That reliance is misplaced. *Nollan* and *Dolan* "involve a special application of [the unconstitutional conditions] doctrine" to cases in which real property owners seek land-use permits. *Koontz*, 133 S. Ct. at 2594. Local governments often tell property owners that their permit applications will be approved only if the property owners give some property to the government. The Court has recognized that not all such conditional permit grants are unconstitutional; that is so because the condition is often imposed to offset the harm to others likely to arise from an owner's intensified land use. The Court has upheld property exactions imposed on land-use permit applicants so long as a nexus exists between the exaction and the harm that the government is seeking to offset, and there exists a "rough proportionality" between the two.

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[2] *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Nollan and *Dolan* are inapplicable here because the USDA has not identified any similar public harm that the reserve-raisin requirement is intended to offset. For example, in 2002-03 producers were permitted to sell 53% of their raisin crop as free-tonnage raisins. There is no suggestion that the sale of free-tonnage raisins caused any harm, either to the consuming public or to the USDA's efforts to maintain "stable" (*i.e.*, high) prices. Had there been any such harm, the RAC would not have approved the free-tonnage sales. Under those circumstances, the seizure of the other 47% of producers' raisin crops cannot be deemed an effort to impose on producers the costs of the (nonexistent) harm that arises from the USDA's approval of free-tonnage raisin sales. To the extent that the alleged public harm is the sale of reserve-tonnage raisins, that harm can be eliminated by restricting or altogether banning such sales, without any need for the USDA to seize private property. Accordingly, the unconstitutional conditions doctrine should be applied with full force to this case, not the watered-down version applied by *Nollan* and *Dolan* in land-use exaction cases.

Of course, the condition imposed on the Hornes—no marketing of any raisins is permitted unless they agree to seizure of reserve-tonnage raisins—is an unconstitutional condition if and only if the proposed seizure is, in fact, an uncompensated government taking of private property within the meaning of the Fifth Amendment. The Ninth Circuit's conclusion that the reserve raisin requirement is not such a taking is based on a clear misreading of this Court's case law.

The Ninth Circuit erred in concluding that the Court's long-established *per se* taking rule—that a taking always occurs whenever the government either takes title to or physically occupies property—applies only to real property and not to personal property. Numerous decisions of this Court have held that the *per se* rule fully applies to personal property. The Ninth Circuit's holding to the contrary is based on a misreading of *Lucas* as well as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

The appeals court also erred in concluding that the seizure of reserve-tonnage raisins should not be deemed a *per se* taking because the Raisin Marketing Order reserves to producers a contingent interest in a portion of the raisins' value. The *per se* rule has never been limited to instances in which the government seizes 100% of the value of property. If it were actually limited in that manner, the government could, for example, seize the right to earn interest on a bank account while leaving the bank account holder's principal intact. But the Court has expressly held that such seizures constitute *per se* takings. *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003). A *per se* taking occurs whenever the government seizes any of the major sticks in the bundle of rights that constitute property—such as "the right to possess, use and dispose of" the property. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 170 (1998). Thus, the Court found a *per se* taking when the government interfered with a property owner's right to exclusive use of his property by requiring him to provide public access to his marina, even though the interference only slightly decreased the marina's value. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

Finally, the Ninth Circuit erred in concluding that *per se* takings analysis is inapplicable to the threatened seizure of the Hornes' raisins because no raisins or bank accounts were actually seized. That conclusion overlooks that: (1) no raisins were seized only because the Hornes resisted the RAC's demands; and (2) their resistance resulted in USDA fines totaling more than $700,000. *Horne I* explicitly held that the Hornes were entitled to raise a takings-based defense to the USDA's efforts to fine them. If, as the Hornes have demonstrated, the seizure they resisted would have amounted to a *per se* taking, then the same Takings Clause analysis ought to apply to their defense against the USDA's fines arising from that resistance.

ARGUMENT

I. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE BARS USDA FROM CONDITIONING ALL COMMERCIAL ACTIVITY ON PRODUCERS' ACQUIESCENCE TO RAISIN SEIZURES

The federal government has a long history of assisting farmers, both with direct subsidies and by restricting supply in an effort to support prices. Most government efforts to restrict crop supplies have taken the form of quotas that limit the permitted output of individual farmers. While WLF questions the economic rationality of such quota programs, their constitutional status is not at issue here.

The Raisin Marketing Order takes an unusual and entirely different approach to restricting supply. It makes no effort to restrict the acreage devoted to

cultivating grapes or the quantity of raisins being produced. Rather, after a growing season has begun (and farmers have already made a substantial investment in their crops) the RAC determines the likely size of that year's raisin crop. It then determines what percentage of the total crop must be designated as reserve-tonnage raisins in order to ensure that the supply of raisins available on the open market will remain relatively constant from year to year. The RAC then seizes the reserve-tonnage raisins and attempts to dispose of them in a manner that will not cause U.S. market prices to decrease. Importantly, the USDA has never argued that a quota system—which by definition does not entail any seizure of crops by the government and thus intrudes on private property rights far less than does the Raisin Marketing Order—would not be equally effective in stabilizing raisin prices at the elevated level apparently desired by the USDA.

No one is forced to engage in the business of producing or handling raisins. In that limited sense, no one is forced to acquiesce to the RAC's seizure of reserve-tonnage raisins. Anyone who wishes to avoid such seizures can simply decide to stop producing raisins for commercial sale and withdraw from the market.

Nonetheless, the Court has long made clear that the Constitution does not give the government free rein to deal with a citizen as it likes whenever the citizen could avoid the effects of the government's actions by abjuring receipt of some government benefit. Rather, a well-developed body of case law, known collectively as the unconstitutional conditions doctrine, prevents the government from coercing people into giving up rights

protected by the Constitution. *See, e.g., FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) (striking down federal statute prohibiting television and radio stations from broadcasting editorials if they voluntarily accept federal grant funds); *Pickering v. Bd. of Education*, 391 U.S. 563 (1968) (school districts may not require public school teachers, as a condition of employment, to relinquish their First Amendment rights to speak in a private capacity on matters of public concern).

In *Koontz*, the Court explained the application of the unconstitutional conditions doctrine to government efforts to bypass restrictions imposed by the Fifth Amendment's Takings Clause, which prohibits the taking of private property "without just compensation." The Court said:

> [L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than the property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the

> Fifth Amendment right to just compensation, and *the unconstitutional conditions doctrine prohibits them*.

Koontz, 133 S. Ct. at 2594-95 (emphasis added) (citations omitted).

Raisin producers are in a similarly vulnerable position. They are likely to have invested substantial capital in their raisin-production businesses, so withdrawing from the businesses would likely entail substantial losses. Accordingly, when the federal government demands that they either acquiesce to the seizure of a significant portion of their raisin crops or cease selling raisins altogether, they can legitimately claim to have been coerced into acquiescence. The unconstitutional conditions doctrine is intended to guard against just such coercion.

The Court has stated that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected [right,] even if he has no entitlement to that benefit." *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003). The key issue in every unconstitutional conditions case, accordingly, is whether the condition imposed by the government would violate the Constitution if imposed directly by the government (*i.e.*, not simply as a condition for receipt of a government benefit).[3] *See,*

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[3] As WLF explains more fully in Section II, *infra*, the RAC's confiscation of reserve-tonnage raisins would constitute a *per se* taking in violation of the Takings Clause if it were imposed on raisin producers without regard to whether they chose to market their raisins commercially.

e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 59-60 (2006) (federal statute requiring universities that accepted federal funding to permit on-campus military recruiting did not violate unconstitutional conditions doctrine, because the Constitution did not prohibit the federal government from directly requiring all universities to permit on-campus military recruiting).

The Court has, on occasion, imposed limits on the unconstitutional conditions doctrine in circumstances in which the government's grant of a discretionary benefit may impose costs on the government itself or on the public. For example, in the context of land-use permits, the Court has recognized that "many proposed land uses threaten to impose costs on the public." *Koontz*, 133 S. Ct. at 2595. The *Nollan*/*Dolan* line of cases developed as an effort to balance application of the unconstitutional conditions doctrine with the government's desire to impose exactions on land-use permit applicants to ensure that the applicants themselves bear the costs created by their new land uses. *Id.* at 2594-95.

In *Nollan*, a property owner challenged a government requirement that he give property rights to the government (an easement allowing the public to walk along his shoreline) in return for a permit to build a larger residence. In *Dolan*, a property owner challenged a similar government exaction (an easement allowing a bicycle/pedestrian path along a waterway well-distant from the commercial building he sought to expand) imposed as a condition for permission to expand his commercial business. "In each case, the Court began with the premise that, had

the government simply appropriated the easement in question, this would have been a *per se* physical taking." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546 (2005). But the Court held that the unconstitutionality of direct government appropriation of the property should not be the sole factor entering into its unconstitutional conditions determination in those two case, because it recognized that the proposed intensified land uses in the two cases imposed costs on the entire community.

For that reason, *Nollan* and *Dolan* imposed limitations on the unconstitutional conditions doctrine in the context of land-use exactions. *Nollan* held that a land-use exaction was permissible if an "essential nexus" exists between the "legitimate state interest" that the government is pursuing and the property exaction it demands as a condition for approval of the land-use permit. *Nollan*, 483 U.S. at 837.[4] *Dolan* added a refinement to that rule: there must exist a "rough proportionality" between the government's interest and the property exaction being demanded. *Dolan*, 512 U.S. at 388-391.[5]

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[4] The Court ultimately struck down the land-use exaction as a violation of the Takings Clause. The Court determined that no "essential nexus" existed between the public costs that the government was seeking to alleviate (a larger residence would obstruct views of the ocean from the roadway on the landward side of the property) and the proposed exaction (an easement that would allow the public to walk along the landowner's shoreline). *Id.*

[5] The Court in *Dolan* again struck down the land-use exaction as a violation of the Takings Clause. While recognizing that the proposed expansion of the commercial building would increase flooding concerns and traffic congestion, the Court

The Ninth Circuit's reliance on *Nollan* and *Dolan* as a basis for denying the Hornes' takings defense was misplaced. Land-use exaction cases such as *Nollan* and *Dolan* involve a "special application of [the unconstitutional conditions] doctrine"—special because the Court has recognized that public costs associated with intensified land use may on occasion justify exactions that would otherwise violate the unconstitutional conditions doctrine. *Koontz*, 133 S. Ct. at 2594-95. *Nollan* and *Dolan* are inapplicable here because the USDA has not identified any similar harm arising from the sale of free-tonnage raisins—a harm that might arguably justify the seizure of reserve-tonnage raisins as a means of imposing the costs of those harms on handlers and producers. In the absence of such harm, the unconstitutional conditions doctrine prohibits the USDA's attempted "conditional" seizure of the Hornes' raisins once it is determined that a direct seizure would violate the Takings Clause.

The Ninth Circuit stated that the Raisin Market Order's seizure mandate is constitutionally permissible because it furthers the AMAA's goal of "obtaining orderly market conditions." Pet. App. 26a. But the appeals court never addressed the critical question posed by *Nollan* and *Dolan*: is the marketing activity that the USDA is purporting to authorize—that is, authorization of the sale of 53% of the total raisin crop as free-tonnage raisins—the cause of any public harm? If not, then the government's otherwise-

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concluded that the government's goal of alleviating those concerns was not roughly proportional to the seizure of a pedestrian/bicycle "greenway" some distance from the proposed expansion. *Id.* at 394-96.

unconstitutional condition is impermissible.

The record is clear that the free-tonnage raisin sales authorized by the RAC do not cause any public harm, and the government has never contended otherwise. For example, in 2002-03, producers were permitted to sell 53% of their raisin crop as free-tonnage raisins. There is no plausible argument that *consumers* were injured by those sales. Nor can USDA argue that those sales injured "orderly market conditions," because if they did, the RAC would never have approved such sales. Under those circumstances, the seizure of the other 47% of producers' raisin crops cannot be deemed an effort to impose on producers the costs of the (nonexistent) harm that arises from the USDA's approval of free-tonnage raisin sales.

Moreover, even if the *Nollan*/*Dolan* "nexus and rough proportionality" rule were deemed applicable here, the Ninth Circuit erred in determining that the USDA has satisfied that test. There is no "nexus" between the creation of "orderly market conditions" and the seizure of reserve-tonnage raisins because such seizure is totally unrelated to maintaining the high prices apparently desired by the RAC. The RAC seeks to maintain "orderly marketing conditions" by reducing supply (with the goal of driving up prices in the open market), but seizing private property plays no necessary role in restricting supply. If the RAC wishes to decrease the supply of raisins on the open market, the most direct way to do so is to limit the amount of raisins that individual handlers and producers may sell; the seizure of raisins is a totally extraneous

measure.[6]

II. THE DIRECT SEIZURE OF RAISINS IS A *PER SE* VIOLATION OF THE TAKINGS CLAUSE

The Raisin Marketing Order requires handlers to acquiesce in the RAC's seizure of a significant percentage of the raisin crop each year, grants the RAC virtually unlimited discretion in determining how to dispose of the reserve-tonnage raisins, and authorizes the RAC to pay all of its expenses out of the proceeds of the sale of those raisins. Direct physical appropriation of private property in this manner by the government has long been understood to constitute a *per se* taking for Fifth Amendment purposes. That understanding does not change simply because producers sometimes (but certainly not always) are paid a small fraction of the value of the seized raisins, out of the net proceeds of the sale of reserve-tonnage raisins. The Ninth Circuit's conclusion that the USDA's raisin seizures are not subject to the *per se* takings rule was based on a misreading of this Court's case law.

As noted above, the key issue in every unconstitutional conditions case is whether the restriction imposed by the government would violate the Constitution if imposed directly by the government

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[6] WLF does not mean to suggest that it supports imposing such limits on raisin sales. Production and sales quotas are inefficient, always harm consumers, and often harm farmers. But at least they do not raise the Fifth Amendment Takings Clause concerns implicated by the Raisin Marketing Order.

(*i.e.*, not simply as a condition for receipt of a government benefit). If so, the unconstitutional conditions doctrine in most cases (including this case) bars imposition of the government's burden as a condition for receipt of a benefit. The Fifth Amendment does, indeed, prohibit the direct seizure of raisins by the government in the absence of just compensation, and thus the unconstitutional conditions doctrine prohibits the USDA from conditioning its grant of the right to sell raisins on the seller's acquiescence to the uncompensated seizure of a significant portion of his raisin crop.

A. The *Per Se* Taking Rule Applies to Seizures of Personal Property

The Court has repeatedly held that a taking always occurs—*i.e.*, a *per se* taking—whenever the government either takes title to or possession of property. *See, e.g., United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951); *Loretto*, 458 U.S. at 426 (1982); *Brown*, 538 U.S. at 233; *Arkansas Game and Fish Comm'n*, 133 S. Ct. at 518. In none of those cases has the Court suggested that the *per se* taking rule is any less applicable when the property at issue is personal property, not real property.

The Ninth Circuit nonetheless concluded that the *per se* rule is not applicable to personal property and thus that the seizure of reserve-tonnage raisins does not constitute a *per se* taking. Pet. App. 18a. The appeals court sought support for that conclusion in *Lucas*, which held that government *regulation* of real property constitutes a *per se* taking if it deprives the property owner of *all* economically beneficial use of his

or her land. *Lucas*, 505 U.S. at 1019. *Lucas* emphasized that its new *per se* rule applied only to regulation of real property, not to regulation of personal property:

> [I]n 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 (at least if the property's only economically productive use is sale or manufacture for sale.) *See Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (prohibition on sale of eagle feathers).

Id. at 1027-28.

Lucas involved government *regulation* of property; neither *Lucas*'s language nor its rationale supports an argument that personal property is entitled to lesser protection under the Takings Clause from government *expropriation* of property. *Lucas* explained the Fifth Amendment's greater tolerance of government *regulation* of personal property by noting government's "traditionally high degree" of regulation of commercial dealings; but there is no tradition in this country of the government *seizing* property without compensation, whether the property be real or personal. Indeed, while upholding government restrictions on eagle-feather sales, the Court in *Andrus* went out of its way to note that the government had not actually *seized* any feathers. *Andrus*, 444 U.S. at 66-67.

The Ninth Circuit dubbed *Loretto* the

"representative case" for the rule that the government's permanent physical occupation of property constitutes a *per se* taking of the property. Pet. App. 16a-17a. Noting that *Loretto* involved a permanent physical occupation of real property, the appeals court said it saw "no reason to extend *Loretto* to govern controversies involving personal property." Pet. App. 20a. But nothing in *Loretto* suggests that the Court was limiting the *per se* rule to real property.

More importantly, the Ninth Circuit failed to explain the numerous cases in which the Court has applied the *per se* rule to seizures of personal property. *See, e.g., Brown*, 538 U.S. at 235 (applying "a *per se* approach" to takings claims arising from the government's confiscation of money); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (same). *Webb's* explicitly rejected the government's argument that its confiscation of money should be judged under the multi-factor balancing test set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), because the Court deemed the confiscation to be "a forced contribution to general government revenues." *Id.*

In sum, the *per se* rule that applies whenever the government takes title to or physically takes possession of property covers all types of property—both real and personal. Indeed, the USDA's brief opposing the grant of review in this case pointedly declined to support the Ninth Circuit's holding that the Fifth Amendment provides a reduced level of protection to personal property.

B. The *Per Se* Taking Rule Applies Even When the Property Owner Is Allowed to Keep a Contingent Interest in a Portion of His Property

The Ninth Circuit articulated a second ground for declining to apply the *per se* taking rule to the RAC's seizure of raisins. It concluded that "the reserved raisins are not permanently occupied" because producers are entitled to receive the net proceeds from all raisin sales conducted by the RAC (*i.e.*, the proceeds remaining, if any, after the RAC deducts all its expenses). Pet. App. 20a-22a. The appeals court concluded that the possibility of a payment (not realized in 2003-04) negated application of the *per se* taking rule. *Ibid.* That conclusion is directly contrary to this Court's case law.

The Ninth Circuit cited *Loretto* in support of its view, but it badly misquoted that decision. The appeals court said that *Loretto* "applies only when *each* 'strand from the bundle of property rights' is 'chop[ped] through . . . taking a slice of every strand.'" Pet. App. 20a-21a (quoting *Loretto*, 458 U.S. at 435). This Court never indicated that *Loretto* had such limited application. While the Court stated that a *per se* taking has occurred when the government cuts every "strand from the bundle of property rights," it did not state that the *per se* rule "only" applies in such circumstances.

Indeed, the Court later characterized government acquisition of the easements at issue in *Nollan* and *Dolan* as effecting a "*per se* physical taking"

of property. *Lingle*, 544 U.S. at 546. An easement merely cuts one of the "strands from the bundle of property rights": the right to exclude others. The property owners in *Nollan* and *Dolan* were never threatened with the loss of any other rights in their property. The Court nonetheless concluded that the government's efforts to coerce the property owners to give up a single strand in their bundle of property rights was subject to the *per se* rule. Indeed, the Court has stated explicitly that the *per se* rule applies not merely to the seizure of the entirety of an owner's property but also to seizure of "*an* interest in property." *See Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518 ("[w]hen the government physically takes possession of *an interest in property* for some public purpose, it has a categorical duty to compensate the former owner") (quoting *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 525 U.S. 302 (2002)) (emphasis added).

The *per se* rule has never been limited to instances in which the government seizes 100% of the value of property. If it were actually limited in that manner, the government could, for example, seize the right to earn interest on a bank account while leaving the bank account holder's principal intact. But the Court has expressly held that such seizures constitute *per se* takings. *Brown*, 538 U.S. at 235. A *per se* taking occurs whenever the government seizes any of the owner's "interests" in the property—such as "the right to possess, use and dispose of" the property. *Phillips*, 524 U.S. at 170. Thus, the Court found a *per se* taking when the government interfered with a property owner's right to exclusive use of his property by requiring him to provide public access to his marina,

even though the interference only slightly decreased the marina's value. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

The fact that producers whose raisins are seized may ultimately be partially compensated for their losses (at pennies on the dollar) is relevant to computing the amount of "just compensation" to which they are entitled. It does not negate the fact of the seizure, a fact that triggers application of the *per se* rule.

Finally, the Ninth Circuit suggested that the Hornes cannot establish a Fifth Amendment violation because they have actually benefitted from the Raisin Marketing Order, which allegedly has caused raisin prices to rise and thereby has increased the Hornes' profits from their raisin sales. Pet. App. 20a-21a. A Fifth Amendment claimant must demonstrate, of course, that he has been denied just compensation; and the government cannot be deemed to have denied just compensation when the amount of loss (and thus the just compensation) is zero dollars.

The Hornes have explained that there are numerous reasons to doubt that the Raisin Marketing Order has actually benefitted them. WLF will not repeat that explanation here. We note only that the Ninth Circuit made no findings on the amount of losses the Hornes would have suffered had they acquiesced to the RAC's demand that they relinquish reserve-tonnage raisins. Accordingly, the appeals court's unsupported speculation that the Hornes actually benefitted from the Raisin Marketing Order does not provide any basis for affirming its decision.

C. The Fact That No Raisins Were Ever Seized from the Hornes Does Not Prevent Them from Asserting the *Per Se* Taking Rule in Defending Against the USDA's Enforcement Proceedings

The Ninth Circuit also asserted that *per se* takings analysis is inapplicable to the threatened seizure of the Hornes' raisins because no raisins or bank accounts were actually seized. Pet. App. 15a-16a. That assertion makes little sense. *Horne I* held that the Hornes are entitled to defend against the USDA's administrative proceedings by raising a "takings-based defense." *Horne I,* 133 S. Ct. at 2063. Such a defense consists of a claim that they acted within their rights in resisting the RAC because the RAC's demands amounted to a *per se* taking for which RAC was unwilling to pay just compensation. In order to evaluate the Hornes' defense, the Court must determine whether the procedural steps demanded by the RAC would have constituted a *per se* taking had the Hornes not resisted. Accordingly, the fact that no taking actually occurred is irrelevant to the issue of whether the *per se* rule is actually applicable to the Hornes' claims.

Koontz rejected an argument similar to the one asserted by the Ninth Circuit. Like *Nollan* and *Dolan*, *Koontz* involved a constitutional challenge to a land-use exaction. In *Nollan* and *Dolan*, local governments granted the landowners' land-use applications but included as a condition that the landowners had to grant specified easements. *Koontz* differed in that the land-use permit application was not actually approved;

rather, the landowner was informed that it would be approved only if he first complied with the government's proposed exaction.

The government asserted that Koontz (the landowner) should not be permitted to raise his unconstitutional conditions claim because it had never granted the land-use application and thus had never actually pressured the landowner to accept any unconstitutional conditions. The Court rejected that assertion, explaining that "[t]he principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so." *Koontz*, 133 S. Ct. at 2595 (emphasis in original). Similarly, whether the Court applies the *per se* rule to the raisin-reserve requirements should not depend on whether a handler/producer acquiesces in the RAC's demands and then files a Takings Clause claim seeking just compensation, or whether the handler/producer resists the RAC's demands and then files a takings defense in response to disciplinary proceedings filed by the USDA.

CONCLUSION

Amicus curiae Washington Legal Foundation requests that the Court reverse the decision of the court of appeals.

Respectfully submitted,

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