No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners must first seek compensation in the Court of Federal Claims in connection with their Just Compensation Clause challenge to a marketing order issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Constitution, statutes and regulations:

Regulations—Continued: Page

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-23a) is reported at 673 F.3d 1071. The court of appeals' earlier decision prior to amendment (Pet. App. 26a-54a) is unreported, but is available at 2011 WL 2988902. The opinion of the district court (Pet. App. 55a-119a) is unreported, but is available at 2009 WL 4895362.

JURISDICTION

The original judgment of the court of appeals was entered on July 15, 2011. Pet. App. 27a. The court of appeals denied rehearing, and issued an amended opinion, on March 12, 2012. *Id.* at 25a. On June 1, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 25,

2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.*, was enacted during the Great Depression to help farmers obtain fair value for their products and to aid consumers by avoiding unreasonable fluctuations in prices. 7 U.S.C. 602(1)-(2); Pet. App. 4a. The AMAA "contemplates a cooperative venture" involving the Secretary of Agriculture, "producers" (who grow the agricultural goods), and "handlers" (who process the agricultural goods and bring them to market), "the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). To achieve those goals, the Secretary promulgates "marketing orders" that regulate the sale of commodities that are particularly vulnerable to market fluctuations. See 7 U.S.C. 608c; Pet. App. 4a-5a.

This case concerns an order that regulates the market for California raisins. Pet. App. 1a-2a, 6a-9a & n.7; see Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Pt. 989. The California raisin industry accounts for 99.5% of the domestic supply, and 40% of the world's supply, of raisins. Pet. App. 7a n.7. The order was first issued in 1949, following a spike in production that resulted in a price drop from $235 per ton to $40-$60 per ton. *Ibid.* The order stabilizes raisin prices by controlling raisin supply through the establishment of annual "reserve pools" of raisins that will not be released into the open domestic market. See 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.54(d), 989.65. The raisin mar-

keting order, like other marketing orders under the AMAA, directly regulates only handlers (*e.g.*, raisin processors and packers) and does not directly regulate producers (*i.e.*, raisin farmers) "in [their] capacity as * * * producer[s]." 7 U.S.C. 608c(13)(B); see 7 U.S.C. 608c(1); Pet. App. 5a-6a; see also 7 C.F.R. 989.11 (defining "producer"); 7 C.F.R. 989.15 (defining "handler" to include, *inter alia*, "[a]ny processor or packer").

The raisin marketing order, among other things, creates a committee of industry-nominated representatives appointed by the Secretary of Agriculture, known as the Raisin Administrative Committee. 7 C.F.R. 989.26, 989.29, 989.30. Every year, the committee reviews the crop yield and recommends to the Secretary what portion (if any) should be made available for sale on the open market (the "free percentage") and what portion should be withheld (the "reserve percentage"). 7 C.F.R. 989.54(d), 989.55, 989.65. Based on the percentages (if any) set by the Secretary, the raisins that a handler receives from producers are divided into two groups: the "free tonnage" and the "reserve tonnage." 7 C.F.R. 989.65. The handler pays producers (at a predetermined price) for the free tonnage and may resell those raisins without restriction. *Ibid.*; *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356, 1360 (Fed. Cir. 2005); Pet. App. 8a. The reserve tonnage, however, must be held by the handler "for the account of the committee." 7 C.F.R. 989.66(a); *Lion Raisins*, 416 F.3d at 1360; Pet. App. 8a-9a. The committee can dispose of the reserve raisins in a variety of ways, such as sale in non-competitive markets (like school-lunch programs), and the proceeds from the reserve raisins are used to pay the costs of administering the reserve pool. 7 C.F.R. 989.67; *Lion Raisins*, 416 F.3d at 1360; Pet. App. 8a-9a. As compen-

sation for the reserve tonnage they deliver to handlers, producers receive an equitable share of any remaining profits after the committee's disposition of the reserve-pool raisins. 7 C.F.R. 989.66(h); Pet. App. 8a-9a.

2. Petitioners own and operate vineyards in California where they grow grapes and produce raisins. Pet. 7; Pet. App. 9a. Believing that the regulatory framework for raisins was outdated and unfair to farmers, they devised a scheme that sought to avoid the marketing order's reserve-percentage requirements. Pet. App. 9a-10a. Rather than selling their raisins to a third-party handler, petitioners instead "purchased their own equipment and facilities to clean, stem, sort, and package raisins." *Id.* at 10a. They used those facilities and equipment to process their own raisins, as well as raisins from more than 60 other growers (who paid a per-pound fee for the service). *Ibid.* Petitioners also organized those growers into an association that marketed and sold raisins on the growers' behalf. *Ibid.*

All told, petitioners' facilities processed over 3 million pounds of raisins during the 2002-2003 and 2003-2004 crop years. Pet. App. 10a. Petitioners, however, assumed the posture that they were only producers, and not handlers regulated by the raisin marketing order. Pet. 7-8. They accordingly declined to reserve any of the raisins they processed during those years, and they also did not comply with a number of other requirements of the marketing order. Pet. 8; see Pet. App. 10a-11a.

The Administrator of the Agricultural Marketing Service (a division of the United States Department of Agriculture (USDA)) subsequently brought an administrative enforcement action against petitioners for violations of the raisin marketing order. Pet. App. 11a. The

USDA Judicial Officer found petitioners liable for several violations, including the failure to hold aside reserve raisins. *Ibid.* With respect to that violation, petitioners were ordered to pay $483,843.53 in civil penalties. *Ibid.*; *id.* at 186a; see 7 C.F.R. 989.166(c) (specifying that a handler who does not comply with the reserve requirements "shall compensate the Committee for the amount of the loss resulting from his failure to so deliver").

3. Petitioners sought judicial review of the agency's decision in the United States District Court for the Eastern District of California. Pet. App. 11a-12a; see 7 U.S.C. 608c(14)(B) (judicial review provision for orders assessing civil penalties). Petitioners argued, among other things, that they were not handlers subject to the marketing order, Pet. App. 72a, and that "the reserve raisin program * * * constitutes a physical taking of tangible property by the government without just compensation in violation of the Fifth Amendment," *id.* at 106a.

The district court granted summary judgment in favor of the government. Pet. App. 56a. It reasoned that petitioners met the regulatory definition of raisin handlers, 7 C.F.R. 989.15, because "substantial evidence demonstrates that [petitioners] engaged in stemming, sorting, cleaning, seeding, grading, or packaging of raisins within California," Pet. App. 74a. The court further concluded that "the transfer of title to the reserve tonnage does not constitute a physical taking." *Id.* at 114a (emphasis omitted).

4. The court of appeals affirmed. Pet. App. 26a-54a. It agreed with the district court that petitioners were handlers under the relevant regulation. *Id.* at 38a. It additionally rejected petitioners' argument that they

were "statutorily exempt from regulation because they also satisfy the regulatory definition of a 'producer.'" *Ibid.* The court observed that the AMAA only precludes the application of marketing orders "'to any producer in his capacity as producer,'" and reasoned that the AMAA thus "contemplates that an individual who performs both producer and handler functions may still be regulated in his capacity as a handler." *Ibid.* (quoting 7 U.S.C. 608c(13)(B)).

The court of appeals also agreed with the district court that petitioners' takings claim lacked merit. Pet. App. 39a-49a. The court observed that petitioners' takings argument was limited to an allegation that the "'direct appropriation' of their reserve-tonnage raisins * * * is a classic *physical* taking," *id.* at 42a, and concluded that petitioners had "suffered no compensable *physical* taking of any portion of their crops." *Id.* at 49a. The court reasoned that the reserve-pool requirement merely "impose[s] a condition on [petitioners'] *use* of their crops by regulating their sale," *id.* at 43a; that the requirement does not constitute a "direct appropriation" or "a forced seizure" of their raisins, *ibid.*; that the requirement applies only to those who (like petitioners) "voluntarily choose to send their raisins into the stream of interstate commerce," *ibid.*; that the requirement does not deprive petitioners of all economic use of their property, but only affects the narrow "right to sell their raisins," which implicates at most "one 'strand' in [petitioners'] bundle" of property rights, *id.* at 47a; that the requirement "does not deny raisin farmers all economically beneficial use of their raisins, * * * but only requires the delivery to the [committee] of a certain percentage of raisins prepared for market," *id.* at 48a; and that, rather than diminishing petitioners' economic use

of their raisins, the marketing order makes the raisin industry more profitable by depressing supply and thereby increasing raisin prices, *id.* at 49a.

5. The court of appeals denied rehearing en banc, but the panel issued an amended opinion. Pet. App. 25a; see *id.* at 1a-23a. The amended opinion omitted any discussion of the merits of petitioners' takings claim, concluding instead that the court lacked jurisdiction to address that claim. *Id.* at 14a-18a.

The court of appeals reasoned that the constitutional requirement to provide just compensation for a taking is satisfied so long as the government "provide[s] an adequate process" for obtaining such compensation. Pet. App. 15a (quoting *Bay View, Inc.* v. *AHTNA, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997), which in turn quotes *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985)). The court explained that, with respect to the federal government, such process is provided by the Tucker Act, 28 U.S.C. 1491(a)(1), which permits plaintiffs to bring an action in the Court of Federal Claims against the United States seeking monetary compensation for government actions alleged to be takings. Pet. App. 15a-16a, 18a. Accordingly, "a takings claim against the government must be brought" under the Tucker Act "in the first instance, 'unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute.'" *Id.* at 16a (quoting *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion)).

The court of appeals determined that the relevant statute here—the AMAA—did not withdraw Tucker Act jurisdiction over petitioners' takings claim. Pet. App. 16a-18a. The court stated that, if petitioners were bringing a takings claim in their capacities as raisin

handlers, then the AMAA would preclude a Tucker Act action, because the AMAA itself provides the exclusive mechanism for administrative and judicial review of a challenge by a handler to a marketing order. *Id.* at 16a-17a; see 7 U.S.C. 608c(15)(A). But the court reasoned that petitioners had brought their takings claim "not in their capacity as handlers but in their capacity as producers," because they had "allege[d] that the regulatory scheme at issue takes reserve tonnage raisins belonging to producers, not to handlers." Pet. App. 17a. "[N]othing in the AMAA," the court determined, "precludes [petitioners] from alleging in the Court of Federal Claims that the reserve program injures them in their capacity as producers," and petitioners were therefore required to first seek just compensation in that forum. *Id.* at 17a-18a.

ARGUMENT

The court of appeals correctly held that the AMAA's procedures for administrative and judicial review, which apply only to handlers, do not bar petitioner from bringing an action seeking compensation under the Tucker Act in their capacity as producers. Its decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. The Fifth Amendment's Just Compensation Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. As this Court has explained, the Just Compensation Clause "does not proscribe the taking of property," but instead only "proscribes taking without just compensation." *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985). Just compensation need not "be paid in advance of, or contemporaneously with, the taking; all that is required

is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Ibid.* (quoting *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 124-125 (1974)) (nested quotation marks omitted). When the government has provided such a procedure, "the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195.

With respect to the federal government, the Tucker Act, 28 U.S.C. 1491(a)(1), provides the requisite procedure for obtaining just compensation. The Tucker Act generally permits a plaintiff who believes that the government has taken his property without just compensation to bring an action against the United States seeking compensation in the Court of Federal Claims. 28 U.S.C. 1491(a)(1); see, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1017 (1984); see also 28 U.S.C. 1346(a)(2) (conferring concurrent jurisdiction on federal district courts for claims up to $10,000). This Court has accordingly recognized that, as a general matter, "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson Cnty.*, 473 U.S. at 195; see, *e.g.*, *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion); *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990); *Monsanto Co.*, 467 U.S. at 1018 n.21.

Petitioners do not contest any of this. See, *e.g.*, Pet. 17.[1] They instead contend for two reasons that they need not file an action under the Tucker Act. Neither

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[1] Petitioner's amici suggest that *Williamson County* should be overruled. Cato Inst. et al. Amicus Br. 16-23. This Court ordinarily does not consider arguments not raised by the parties, see, *e.g.*, *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981), and this case presents no reason to deviate from that practice.

contention has merit, and neither warrants further review.

2. Petitioners first contend (Pet. 16-28) that the rule requiring that a claim first be filed under the Tucker Act does not apply to a claim challenging "a requirement that a private party make a cash payment to the government." Pet. 17. But any such exception has no application here, because—contrary to petitioners' assertions—their takings claim below was not based on a cash-payment requirement.

In the courts below, petitioners consistently framed their Just Compensation Clause claim as an assertion that the government takes their *physical property* (namely, raisins they produce) without providing adequate compensation (because their equitable share of the proceeds from those raisins is insufficient reimbursement). The district court explained, for example, that petitioners "assert that raisins are personal, private property and the government has paid no just compensation for the reserve tonnage raisins that the USDA takes each year." Pet. App. 107a. The court of appeals understood petitioners' claim similarly, observing that petitioners "insist we need look no further than the [committee's] annual 'direct appropriation' of their reserve-tonnage raisins to conclude this is a classic *physical* taking"—*i.e.*, one in which the committee "'takes' some of their raisins," which constitute their "personal property." *Id.* at 42a.

That is also how petitioners described their argument in their petition for rehearing en banc, in which they asserted that their "raisins are personal property," and that the government "takes title to" a percentage of that property "and uses it for government purposes, such as school lunches." Pet. App. 271a, 273a. The result, peti-

tioners argued, is "an out-and-out compelled transfer of ownership" of "a hefty portion of the producers' crop." *Id.* at 279a. In their reply supporting that petition, they again presented their claim as a challenge to the taking of "*goods* without compensation." *Id.* at 232a (emphasis added). Indeed, similar language also appears in their petition in this Court, which alleges that "raisin famers in California have been forced to turn over a hefty portion *of their crop* to the federal government" (Pet. 27 (emphasis added)), without just compensation, and describes petitioners' claim as challenging "takings of raisins" (Pet. 33).

Accordingly, at every relevant stage of this litigation below, petitioners described their claim (and the courts understood it) as challenging the taking of physical property, not money. The plurality decision in *Eastern Enterprises* v. *Apfel*, *supra*, relied upon by petitioners (Pet. 13-14, 17-18), concluded that the plaintiff was excused from filing a Tucker Act claim in a circumstance where a statute mandated a direct cash payment of over $5 million to the government, but expressly distinguished situations in which "the challenged statute * * * burden[s] real or physical property" rather than "requir[ing] a direct transfer of funds." 524 U.S. at 521; see *id.* at 517, 519-522.[2] The circuit cases relied on by petitioners (Pet. 19-22) recognize that same distinction.

[2] Petitioners assert (Pet. 14, 22-23) that the court of appeals' decision in this case erred in relying on a pre-*Apfel* circuit decision, *Bay View, Inc.* v. *AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997). But the court of appeals cited *Bay View* only twice, each time for propositions with which petitioners agree. See *id.* at 15a (citing *Bay View* for the proposition that just compensation need not be contemporaneous with the taking); *id.* at 18a (citing *Bay View* for the proposition that a Tucker Act action, when available, is the primary avenue for presenting a takings claim); compare Pet. 17, 24-25.

See *Asociacion de Subscripcion Conjunta del Seguro de Responsabilidad Obligatorio* v. *Flores Galarza*, 484 F.3d 1, 19-20 (1st Cir. 2007) (claim that government "improperly withheld money"); *Washington Legal Found.* v. *Texas Equal Access to Justice Found.*, 270 F.3d 180, 193 (5th Cir. 2001) (claim that government took "interest earned" on funds in certain accounts), vacated on other grounds *sub nom. Phillips* v. *Washington Legal Found.*, 538 U.S. 942 (2003); *Washlefske* v. *Winston*, 234 F.3d 179, 182-183 (4th Cir. 2000) (claim that government took interest earned on prisoner's account), cert. denied, 532 U.S. 983 (2001); *Student Loan Mktg. Ass'n* v. *Riley*, 104 F.3d 397, 399, 401-402 (D.C. Cir.) (claim that government took fees from certain accounts), cert. denied, 522 U.S. 913 (1997); *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir.) (claim that government took money to pay for certain benefits), cert. denied, 516 U.S. 913 (1995).

Having consistently alleged an unconstitutional taking of raisins, petitioners cannot now contend that their taking claim is actually a challenge to the administrative order requiring them to "pay a fine" for their noncompliance with the raisin marketing order's reserve-pool requirements. *E.g.*, Pet. 22. Those two challenges are not the same thing. First, whereas the civil penalties and other monetary assessments were imposed on petitioners in their capacity as *handlers*, the disposition of reserve raisins affects petitioners only in their capacity as *producers*. See pp. 15-16, *infra* (explaining that handlers never take ownership of reserve raisins, but instead simply hold them on the committee's behalf). Second, the amount of the civil penalties and other assessments imposed on petitioners under the AMAA and the marketing order for their failure to comply with the re-

serve-pool requirements is not necessarily the same as the amount they might obtain if they were to prevail on their takings claim concerning the raisins. A monetary assessment under the order, for instance, is determined by "multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types, plus any charges already paid or credited to the handler and cost incurred by the Committee on account of the handler's failure to deliver." 7 C.F.R. 989.166(c). By contrast, one possible measure of the potential compensation on a takings claim would be the fair market value or other value of the reserve raisins on the date the committee acquired them (which might or might not be the predetermined price that handlers pay to producers for free-tonnage raisins), minus the value of the equitable interest that petitioners received in exchange for the reserve raisins, see *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 10 (1984); 7 C.F.R. 989.66(h), and then perhaps further taking into account the benefits conferred on petitioners by, and the public interest served, by the regulatory program.[3]

Even if petitioners could change their theory of the case at this late date, it would demonstrate no error in the decision of the court of appeals, which properly understood petitioners—consistent with their own representations at the time—to be basing their takings claims on allegations concerning the government's alleged physical acquisition of raisins. See pp. 10-11, *supra*; see

[3] Petitioners thus err in suggesting that an action under the Tucker Act would be a "'pointless'" action "to recover the exact same amount of money as the fine." Pet. 25-26 (quoting *Apfel*, 524 U.S. at 521 (plurality opinion)).

also Pet. App. 14a (stating that petitioners challenged "the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool"). Presenting their claim in that fashion was presumably a strategic decision, because a Just Compensation Clause challenge to the Secretary's enforcement order would be insubstantial. The order simply imposes civil penalties and other monetary assessments on petitioners for failure to comply with the marketing order, and the remedy is explicitly tied to the size, nature, and number of petitioners' violations. *Id.* at 186a; see *id.* at 178a-187a. Petitioners identify no reason why the imposition of a civil penalty and other assessments for noncompliance with a regulatory scheme constitutes a taking of property without just compensation.

To the extent petitioners might argue that the particular penalty here is unconstitutional because it was imposed for failure to comply with a regulation (the reserve-pool requirement) that itself violates the Just Compensation Clause, that argument would simply be an end-around to the principles discussed above concerning initial resort to the Tucker Act. See pp. 8-9, *supra*. No taking without just compensation could have occurred for the years to which the USDA enforcement order relates, because (1) petitioners never reserved any raisins in those years (instead selling all of them on the market), so no property could have been "taken"; and (2) even if raisins had been reserved, petitioners never sought just compensation for them under the Tucker Act, let alone received a determination from the Court of Federal Claims or the Federal Circuit that compensation was unavailable under that Act, see, *e.g.*, *Williamson Cnty.*, 473 U.S. at 195; *Monsanto Co.*, 467 U.S. at

1018 n.21. Petitioners cannot flout the raisin marketing order and then challenge the resulting monetary assessments on the ground that compensation might hypothetically be owed if they had complied.

3. Petitioners alternatively contend (Pet. 28-34) that they are excused from having to seek just compensation under the Tucker Act because Congress has affirmatively precluded them from pursuing a Tucker Act remedy. The court of appeals correctly concluded that the AMAA's special procedures for administrative and judicial review do not bar petitioners from bringing an action under the Tucker Act seeking just compensation for an alleged taking of raisins under the raisin marketing order. Pet. App. 16a-18a. As the court of appeals recognized, the AMAA affirmatively bars Tucker Act suits by *handlers*, at least in certain circumstances (see pp. 18-19, *infra*), because the AMAA's own procedures for administrative and judicial review of a legal challenge to a marketing order by "[a]ny handler subject to" that order, 7 U.S.C. 608c(15)(A), are exclusive. Pet. App. 16a-17a. But that provision does not, by its terms, apply to claims by *producers*. And here, petitioners' Just Compensation Clause claim is brought in their capacity as producers, not as handlers. *Id.* at 17a.

As discussed above (see pp. 10-11, *infra*), petitioners allege an unlawful taking of raisins without just compensation. They have standing to raise that claim only in their capacity as producers. Petitioners themselves have repeatedly contended that the effect of the reserve-pool requirements in the marketing order is to transfer title in the reserve raisins directly from producers to the committee. See, *e.g.*, Pet. 6 ("The USDA required *farmers* to turn over 47 percent and 33 percent of their raisin crop.") (emphasis added); Pet. 27 ("[F]or

decades, raisin *farmers* in California have been forced to turn over a hefty portion of their crop to the federal government in exchange for the 'privilege' of selling the remainder.") (emphasis added); Pet. App. 232a (arguing, in support of rehearing, that the marketing order "take[s] goods without compensation from a *producer*") (emphasis added); *id.* at 279a (arguing, in support of rehearing, that "[t]he government demands that raisin *producers* give a government committee ownership over a hefty portion of the *producers'* crop") (emphasis added). Handlers neither pay for, nor take title to, the reserve raisins, but instead are simply required to collect them from producers and hold them "for the account of the committee." 7 C.F.R. 989.66(a); see p. 3, *supra*. Handlers thus have no ownership interest that might be affected by the committee's acquisition of producers' raisins.[4]

Petitioners contend (Pet. 28-32) that because they are both producers *and* handlers, their Just Compensation Clause claim falls within the AMAA's review provision for handler claims, 7 U.S.C. 608c(15)(A). As a threshold matter, their argument on that point largely relies on

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[4] Aside from the question whether the AMAA's special procedures for administrative and judicial review affirmatively foreclose a producer from seeking compensation under the Tucker Act, there is a substantial question whether Congress intended that the United States Treasury would compensate a private producer for any property interests thought to be taken by its voluntary participation in this regulatory regime for the benefit of private producers generally. Cf. *Eastern Enters.*, 524 U.S. at 521 (plurality opinion) (citing Brief for Federal Respondent 38-39 n.30). Neither the parties nor the court of appeals addressed that issue, and there is no reason for this Court to grant certiorari to address it in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a Court of review, not of first view.").

the incorrect proposition that their takings challenge below was to the monetary assessments (imposed on them in their capacity as handlers) rather than the committee's acquisition of raisins (which affects them only in their capacity as producers). In any event, petitioners are wrong to suggest that Section 608c(15)(A) covers claims by a producer, in its capacity as a producer, whenever the producer additionally happens to perform functions as a handler. The AMAA expressly recognizes that a single entity may function in multiple capacities. See 7 U.S.C. 608c(13)(B) (providing that no marketing order "shall be applicable to any producer in his capacity as a producer").[5]

Petitioners also contend (Pet. 25-26) that requiring them to challenge the Secretary's order in district court while requiring them to raise their Just Compensation Clause claim in the Court of Federal Claims in the first instance is unduly burdensome and unnecessarily bifurcates their claims. Pet. 25-26. But those are different legal claims, brought in different legal capacities, and petitioners' position is a result of their own voluntary

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[5] Petitioners note (Pet. 31) that the AMAA makes specific references to "producer-handlers" in the context of milk, but not in the context of other agricultural products. See 7 U.S.C. 608c(5)(K), (M) and (O). Nothing suggests, however, that Congress intended the concept of a combined producer-handler to be unique to milk. Congress employed the term without any special definition particular to milk, and the AMAA recognizes as a general matter that a producer may sometimes act "in his capacity as a producer" and sometimes not. 7 U.S.C. 608c(13)(B). Petitioners' apparent belief that, for statutory purposes, an entity must be either a producer or a handler, but cannot be both, would create anomalous results. For example, if petitioners were always considered handlers, irrespective of context, they would lack certain voting rights with respect to agricultural regulation. See 7 U.S.C. 608c(8)-(9).

choice to assume two different roles under the AMAA. That choice does not entitle them to a special jurisdictional rule. Although petitioners accuse (Pet. 32) the government of trying to "have it both ways," no inconsistency arises from treating them as handlers when they act as handlers and producers when they act as a producers. Rather petitioners are simply subject, in each context, to the particular benefits and burdens of the role they have assumed.

Contrary to petitioners' contention (Pet. 33), the court of appeals' decision in this case is consistent with the Federal Circuit's decision in *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356 (2005). *Lion Raisins* involved two claims, brought in the Court of Federal Claims under the Tucker Act, by an entity that was "both a producer and a handler" of raisins. *Id.* at 1361 n.2; see *id.* at 1357-1358, 1361. The plaintiff had brought the first claim, which challenged the distribution of reserve-pool proceeds, "in its capacity as a raisin producer" (and was joined in that claim by another entity that was "only a raisin producer"). *Id.* at 1361 & n.2. The Federal Circuit concluded that dismissal of that claim was proper because, although it was styled as a takings claim, it was "premised on the allegations that the [raisin committee] violated the [governing] statute and regulations," and "a claim premised on a regulatory violation does not state a claim for a taking." *Id.* at 1369-1371; see also *id.* at 1373 ("The reserve pool case is properly dismissed for failure to state a Fifth Amendment takings claim."). The plaintiff also had brought a second claim, which sought reimbursement for missing storage bins that had been used to hold reserve raisins, "only in its capacity as a handler." *Id.* at 1361, 1370. The Federal Circuit concluded that dismissal of that

claim was proper because Section 608c(15)(A) provided the exclusive avenue for relief on that claim and thus precluded a Tucker Act suit. *Id.* at 1371-1373.

Nothing in the disposition of either claim at issue in *Lion Raisins* suggests that, if a producer were to bring a Just Compensation Clause claim in its capacity *as a producer*, the Federal Circuit would conclude that the recovery of compensation under the Tucker Act would necessarily be foreclosed. Indeed, the Federal Circuit's disposition of *Lion Raisins* supports the distinction drawn in the decision below between claims in a producer capacity and claims in a handler capacity. No further review of the decision below is warranted.[6]

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[6] The petition discusses two matters outside the scope of the questions presented, neither of which provides a reason for granting certiorari. First, it criticizes the court of appeals, both for amending its opinion while denying petitioners a sur-sur-reply brief and a second rehearing petition, and for neglecting to amend the final sentence of the opinion to reflect that the district court's judgment was affirmed only in part. *E.g.*, Pet. 15-16. Petitioners' fact-bound complaints do not justify review of the questions that petitioner actually presents, see Pet. i, and the court of appeals made clear that petitioners are free to seek compensation under the Tucker Act. Second, the petition asserts (Pet. 28) that this case would be an "ideal vehicle" for addressing the merits of their Just Compensation Clause claim. But the questions presented concern jurisdiction, not the merits, see Pet. i, and in any event, largely for the reasons explained by the court of appeals in its original opinion (Pet. App. 39a-49a), the reserve-pool requirement—which functions essentially as an in-kind tax or service fee on the sale of raisins by producers—does not violate the Just Compensation Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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