No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Secretary of Agriculture's marketing order stabilizing the market for California raisins—under which a percentage of the raisins that a producer offers for sale may be required to be sold in a manner directed by the Secretary, with the producer retaining equitable rights in the proceeds—effects a per se taking under the Just Compensation Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution, statutes and regulations: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 750 F.3d 1128. The opinion of the district court (Pet. App. 125a-189a) is not published in the *Federal Supplement* but is available at 2009 WL 4895362. The decision of the judicial officer of the United States Department of Agriculture (USDA or Department) (Pet. App. 56a-100a) is reported at 67 Agric. Dec. 18. The decision of the USDA administrative law judge (Pet. App. 30a-55a) is reported at 65 Agric. Dec. 805.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2014. On July 16, 2014, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including September 8, 2014, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-31a.

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, was enacted during the Great Depression "in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system." Pet. App. 193a; see 7 U.S.C. 601. Sales of raisins during that time reflected the "market upheaval" that "pervaded the entire agricultural industry." Pet. App. 4a; see *Zuber* v. *Allen*, 396 U.S. 168, 174 (1969) (observing that "utter chaos ensued" from "[t]he drop in commodity prices"). Between 1914 and 1920, raisin prices "rose rapidly," peaking at $235 per ton in 1921. Pet. App. 4a. The "surge in prices" prompted an increase in production, which "caused prices to plummet back down to between $40 and $60 per ton." *Ibid.* Many raisin producers were thereafter "compelled to sell at less than parity prices" and even for "less than the cost of production." *Parker* v. *Brown*, 317 U.S. 341, 363-364 (1943).

Congress enacted the AMAA to respond to the market disequilibrium by "rais[ing] the price of agricultural products" and "establish[ing] an orderly system for marketing them." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984); see 7 U.S.C. 602 (declaration of policy). To achieve those goals, the AMAA authorizes the Secretary of Agriculture to promulgate "marketing orders" that regulate the sale of commodities that are vulnerable to market fluctuations. 7 U.S.C. 608c. The marketing orders create a "cooperative venture" among the Secretary, the "producers" who grow the agricultural commodity, and the "handlers" who process the commodities for marketing. *Block*, 467 U.S. at 346.

To achieve the AMAA's objectives, the Secretary may choose among market-regulation tools, such as limiting the total quantity of a commodity that can be marketed, 7 U.S.C. 608c(6)(A), or, as relevant here, establishing "reserve pools" of the commodity, 7 U.S.C. 608c(6)(E). If a reserve pool is established, the Secretary must preserve producers' "beneficial[] interest[]" in the net proceeds from sales of the reserve commodity. *Ibid.*

In general, a marketing order does not become effective unless approved by two-thirds of producers (by number or volume of production). 7 U.S.C. 608c(8)(B) and (9). The order generally must also be approved by at least 50% (by volume) of handlers. 7 U.S.C. 608c(9). Similarly, the Secretary must terminate any marketing order when termination is favored by more than 50% (by volume) of producers. 7 U.S.C. 608c(16)(B); 7 C.F.R. 989.91(c).

2. This case concerns the marketing order that regulates the sale of California raisins. See 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. 196a n.7.

The raisin industry is particularly vulnerable to "supply fluctuations [that] can result in producer price instability and disorderly market conditions." 68 Fed. Reg. 41,689 (2003). Supply can vary dramatically from year to year due to several factors, including the number of "plantings made in earlier years" and "variable weather patterns" that affect the sun-drying method of producing raisins. *Ibid.*; see 64 Fed. Reg. 43,897, 43,898 (1999) (explaining that 1998-1999 crop was "much smaller than average" because of "the weather phenomenon known as El Nino, scattered rain during the fall harvest, and a shortage of labor"). For example, growers produced 240,000 tons of natural seedless raisins in the 1998-1999 crop year, then produced more than 430,000 tons two years later in the 2000-2001 crop year. 71 Fed. Reg. 29,569 (2006).

Moreover, "[r]aisin-variety grapes are the most versatile" of California grapes; in addition to being dried into raisins, they can be sold "as fresh grapes" or crushed into "juice in the production of wine or juice concentrate." 68 Fed. Reg. at 41,689. "Annual fluctuations in the fresh grape, wine, and concentrate markets" accordingly introduce additional "variability into the raisin market" because producers may choose to sell their grape crop for those other uses. See 64 Fed. Reg. at 43,898 (observing that the 1999-2000 crop could be short due in part to "anticipated high demand for raisin-variety grapes from wineries this fall"). The versatility of raisin-variety grapes thus "makes the marketing of raisins a more difficult task." 68 Fed. Reg. at 41,689.

While raisin supply can vary substantially from year to year, the domestic demand for raisins remains relatively stable, averaging approximately 211,000 tons per year. See Raisin Admin. Comm., *Marketing Policy & Industry Statistics 2014*, at 4 (Oct. 2, 2014) (*2014 RAC Report*), http://raisins.org/images/marketing%20policy%202014a.pdf. In an unregulated market, annual supply fluctuations combined with static domestic demand creates price instability—which is precisely what occurred in the raisin industry prior to the AMAA's enactment. See Pet. App. 4a.

3. In 1949, upon the vote of the raisin industry, the Secretary issued the raisin marketing order, which sought to stabilize producer returns and create an orderly commercial market. See Pet. App. 46a. Because domestic demand for raisins is inelastic, "[i]f raisin markets are over-supplied with product, producer prices will decline." 69 Fed. Reg. 50,292 (2004). The order prevents that consequence by, under certain circumstances, controlling supply through "reserve pools" of raisins that will not be released immediately into the domestic market. See 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.54(d), 989.65. The reserve pools thus increase the price producers obtain from the sale of the rest of their crop. See Ben C. French & Carole Frank Nuckton, *An Empirical Analysis of Economic Performance Under the Marketing Order for Raisins*, Am. J. Agric. Econ. 581, 592 (1991) (analyzing data collected over 22 years to conclude that "grower net returns * * * were higher under the marketing order" in the vast majority of scenarios); Pet. App. 177a ("[T]he primary focus of the market control program is to maximize return to the grower.") (citation omitted). The reserve pool also "keep[s] raisin supply relatively constant from year to year, smoothing the raisin supply curve and thus bringing predictability to the market for producers and consumers alike." Pet App. 2a.

The reserve program and other features of the marketing order are administered by the Raisin Administrative Committee (RAC). 7 C.F.R. 989.26, 989.35. The RAC consists of 47 members appointed by the Secretary, of whom 35 represent producers, 10 represent handlers, one represents a cooperative bargaining association of growers, and one represents the public. 7 C.F.R. 989.26. Producers and handlers nominate their representatives to the RAC, who serve without compensation. 7 C.F.R. 989.26, 989.29, 989.30, 989.39.

Every year, the RAC computes a trade demand and reviews the crop yield and raisin inventories. 7 C.F.R. 989.54(a) and (e). Based on that calculation of expected supply and demand, the RAC determines whether to recommend reserve pools for any of the eight varietal types of raisins. 7 C.F.R. 989.54. The RAC generally "release[s] the full trade demand" for sale on the open market, 7 C.F.R. 989.54(d), and establishes a reserve pool only "in years when the supply exceeds the trade demand by a large enough margin that the [RAC] believes volume regulation is necessary to maintain market stability." 71 Fed. Reg. at 29,570. The reserve regulations apply only to raisins prepared for market, so they do not affect raisins grown for producers' own personal use or consumption. See 7 C.F.R. 989.15, 989.66.

Because the raisin supply fluctuates, the reserve requirement varies from year to year. In some years—including the five most recent crop years—there is no reserve requirement at all. See *2014 RAC Report* 2, 30. Other years have relatively low reserve requirements, such as the 10%, 15%, and 13% reserves in the 2006-2007, 2007-2008, and 2008-2009 crop years, respectively. *Id.* at 30.

The reserve requirement is implemented when handlers acquire raisins from producers to be prepared for market. At that point the handlers divide the raisins into two groups: "free tonnage" and "reserve tonnage." 7 C.F.R. 989.65. The handlers pay producers for the free tonnage at market prices and may resell those raisins without restriction. *Ibid.* The remaining reserve-tonnage raisins cannot immediately be sold by handlers on the open market, and producers do not receive immediate payment for those raisins. See 7 C.F.R. 989.54(d), 989.65.

Handlers hold the reserve raisins "for the account of the [RAC]," 7 C.F.R. 989.66(a), and must store them separately from other raisins and "at all times" in the handlers' "possession or under [their] control." 7 C.F.R. 989.66(b)(2) and (c). A handler who does not comply with the reserve requirement "shall compensate the [RAC] for the amount of the loss resulting from" that failure, which is added "to the earnings of the applicable reserve pool." 7 C.F.R. 989.166(c).[1]

Under the marketing order, and in accordance with the AMAA, raisin producers retain the "beneficial[] interest[]" in reserve raisins and receive "the equitable distribution of the net return derived from the sale" of those raisins. 7 U.S.C. 608c(6)(E); see 7 C.F.R. 989.66(h) (providing for distribution of net proceeds to producers on pro rata basis). Raisin producers may assign their interest in reserve raisins to third parties. *Ibid.*

[1] The marketing order imposes additional obligations on handlers, including, *inter alia*, requirements to pay assessments, file reports, and obtain inspections. See 7 C.F.R. 989.58(d), 989.59(d), 989.73, 989.77, 989.90. A handler who violates the order is subject to a civil penalty of up to $1100 per day of violation. 7 U.S.C. 608c(14)(B); 7 C.F.R. 3.91(b)(1)(vii).

The regulations authorize the RAC to direct the sale of reserve raisins in several ways, but specify that the raisins must in all instances "be sold to handlers at prices and in a manner intended to maxim[ize] producer returns and achieve maximum disposition of such raisins." 7 C.F.R. 989.67(d)(1). Reserve tonnage is sometimes sold, following an initial delay, as free tonnage that can enter the domestic market without restriction. 7 C.F.R. 989.54(g), 989.67(j). By temporarily restricting the sale of reserve raisins when production far exceeds domestic demand, and then releasing those raisins as free tonnage later, the RAC increases producer returns and stabilizes the year-to-year fluctuations in supply. See Pet. App. 5a. Reserve raisins also may be released as free tonnage through the raisin diversion program, which credits producers with raisins if they prune or remove vines to reduce supply. 7 C.F.R. 989.56, 989.156. The RAC additionally is authorized to sell reserve raisins to U.S. government agencies, foreign governments or foreign importers, to handlers for resale to exporters, and in other "outlets noncompetitive with those for free tonnage raisins." 7 C.F.R. 989.67(b).

The costs of administering the reserve program—including expenses associated with inspections, storage, and maintenance of reserve raisins, 7 C.F.R. 989.102-.115, 989.157-.159, 989.67(j), 989.82, 989.401—are deducted from the gross proceeds generated by sales of reserve raisins. The RAC also incurs expenses for market research, advertising, and promotion of the foreign market, including subsidies for export sales that bolster foreign demand for California raisins. 7 C.F.R. 989.53(a).

After deducting all expenses, the RAC distributes net reserve-pool proceeds to producers on a pro rata basis. 7 C.F.R. 989.53(a), 989.66(h). Historically, the sale of reserve raisins has resulted in tens of millions of dollars in net proceeds for producers. For example, producers earned more than $45 million in net proceeds from the sale of reserve raisins in 1997-1998; $58 million in 2000-2001; $35 million in 2001-2002; and $47 million in 2002-2003. See RAC, *Statement of Disposition and Grower Equity for 1997-98, 2000-01, 2001-02, and 2002-03 Natural Seedless Reserve Pool*. In other years, there are no net proceeds from the reserve pool to distribute to producers. This may occur when, for example, the size of the reserve balloons and raisins cannot sell at prices that produce net proceeds after program-related costs are deducted from gross receipts.

4. The raisin industry faced chronic over-supply leading up to the two crop years at issue in this case, 2002-2003 and 2003-2004. In 2000-2001, raisin production reached a record high of 432,616 tons—more than double the domestic demand. 68 Fed. Reg. at 41,689. The industry experienced high levels of inventory that could not be sold and so were carried over to the next year as surplus. *Ibid.* As a result, "[h]andlers compete[d] against each other in an attempt to sell more raisins to reduce inventories and to market their crop," which "put[] downward pressure on growers' prices and incomes." *Ibid.*

Production continued far above normal in 2001-2002 and 2002-2003, with deliveries of 377,328 tons and 388,010 tons, respectively. 69 Fed. Reg. at 50,292. "Three crop years of high production and a large" surplus inventory resulted in a "burdensome supply of raisins." *Ibid.* After assessing those market conditions, the RAC recommended a reserve percentage of 47% for natural seedless raisins in 2002-2003 to "help stabilize raisin supplies and prices, and strengthen market conditions." 68 Fed. Reg. at 41,686. The Secretary conducted an economic analysis and concluded that prices would be "$142 per ton higher than under an unregulated scenario." *Id.* at 41,690. As the Secretary's final rule explained, "[t]his price increase [would be] beneficial to all producers regardless of size and [would] enhance[] producers' total revenues in comparison to no volume control." *Ibid.* The Secretary received no comments on the establishment of a reserve pool. *Id.* at 41,691.

Supply continued to far exceed demand in the 2003-2004 crop year. 69 Fed. Reg. at 50,291 (finding volume regulation warranted because the "total available supply of 425,970 tons" was "200 percent higher than the 211,493-ton trade demand"). The RAC accordingly recommended a reserve of 30% for natural seedless raisins. *Id.* at 50,289. The Secretary's "econometric model estimate[d] prices to be $63 per ton higher than under an unregulated scenario." *Id.* at 50,292. Once again, the Secretary received no comments on the establishment of a reserve pool. *Id.* at 50,293.

In the 2002-2003 crop year, producers received $272.73 per ton as their equitable share of the reserved natural seedless raisins, resulting in $47.9 million in net distributions to producers. See RAC, *Statement of Disposition and Grower Equity 2002-03 and 2003-04 Natural Seedless Reserve Pool*. No payments were made for the 2003-2004 crop year because no net proceeds remained after deducting program-related costs. See *ibid.*

5. Petitioners own and operate vineyards in California where, since 1969, they have grown grapes and produced raisins. Pet. App. 33a. For six years, petitioner Marvin D. Horne served as an alternate member of the RAC. *Id.* at 34a.

After operating as raisin producers for more than 30 years, petitioners devised a plan in an effort to exempt their raisins from any reserve requirement, granting them a competitive advantage as compared to producers who complied with that requirement. Pet. App. 32a-33a. Specifically, petitioners purchased equipment to prepare raisins for market and began conducting their own packing and handling operations. *Id.* at 36a. Petitioners adopted the view that if they packed and marketed their own raisins, they would not have to place any raisins in reserve. *Id.* at 7a. Petitioners also planned to pack raisins produced by other growers using a fee arrangement that they maintained would exclude them from the regulatory definition of a handler, eliminating their obligation to reserve other growers' raisins. *Ibid.*

Before petitioners commenced their operations, USDA repeatedly informed them that they would be handlers subject to the reserve requirement, with respect to both their own raisins and the raisins they packed for others. Pet. App. 35a-36a. USDA explained that any entity that "has or obtains physical possession of raisins at a packing or processing plant" falls within the regulatory definition of a handler. *Id.* at 35a. USDA further notified petitioners that "[m]ore than half of the recognized handlers * * * are also producers," yet comply with the reserve requirement. *Id.* at 159a (citation omitted).

Petitioners nevertheless decided to flout the marketing order by handling raisins without complying with the reserve requirement in 2002-2003 and 2003-2004. Pet. App. 36a. Petitioners' facilities processed more than three million pounds of raisins during that time, all of which were marketed at free-tonnage prices. *Id.* at 145a, 200a. While petitioners ignored the reserve requirement, in "express[] disregard[]" of USDA's guidance, *id.* at 36a, other producers and handlers complied with that requirement, giving petitioners an "unfair advantage by freeing them[] from regulations the rest of their industry observed as the best way for all raisin growers and handlers to realize optimum prices." *Id.* at 47a.

6. In 2004, the Administrator of the Agricultural Marketing Service (a division of USDA) initiated an enforcement proceeding against petitioners based on their violations of the marketing order during the 2002-2003 and 2003-2004 crop years. Pet. App. 133a-134a, 200a. In the administrative proceedings, petitioners admitted that they did not hold raisins in reserve and failed to comply with other regulatory obligations imposed on handlers. *Id.* at 36a-40a, 132a-133a.

An administrative law judge (ALJ) rejected petitioners' argument that they were not handlers subject to the marketing order's requirements. Pet. App. 46a-53a. The ALJ found that petitioners had committed 673 violations of the marketing order, including 592 violations (one per day) for failing to reserve raisins in 2002-2003 and 2003-2004. *Id.* at 43a-44a, 53a, 97a. The ALJ also found that petitioners "acted willfully and intentionally" when they declined to reserve raisins, *id.* at 51a, and that petitioners' "violations were deliberate and were designed to obtain an unfair competitive advantage over" industry participants "who were in compliance with the Raisin Order," *id.* at 33a.

The ALJ's decision was affirmed in relevant part by a USDA judicial officer. Pet. App. 56a-98a; see *id.* at 101a-123a. Petitioners were ordered to pay approximately $8783 in unpaid assessments, $202,600 in civil penalties, and $483,844 for the raisins petitioners had failed to reserve. *Id.* at 8a n.6.

7. Petitioners sought judicial review in the District Court for the Eastern District of California. Pet. App. 138a; see 7 U.S.C. 608c(14)(B). The district court granted summary judgment in favor of the government. Pet. App. 126a, 189a. As relevant here, the court rejected petitioners' contention that the marketing order could not be enforced against them because it effected a physical taking of raisins in violation of the Fifth Amendment. *Id.* at 176a-187a. The court observed that "[t]he government does not physically invade [petitioners'] land to take the raisins, nor does the government take physical possession of the raisins," which instead remain "in the possession of the handlers." *Id.* at 186a. In addition, the court emphasized that petitioners "retain an equity interest in their reserve tonnage raisins." *Ibid.*

The court of appeals affirmed. Pet. App. 192a-219a. In its initial opinion, the court held that petitioners' takings claim lacked merit. *Id.* at 204a-214a. The court subsequently issued an amended opinion concluding that it lacked jurisdiction to address the takings claim. *Id.* at 221a-241a. The court explained that petitioners presented a takings defense "not in their capacity as handlers, but in their capacity as producers," because they alleged that the marketing order "takes reserve-tonnage raisins belonging to producers, not property belonging to handlers." *Id.* at 235a. Because the Tucker Act, 28 U.S.C. 1491(a)(1), authorized producers to obtain compensation in the Court of Federal Claims (CFC) for any taking effected by the reserve requirement and petitioners had not availed themselves of that mechanism, the court held that their claim failed. Pet. App. 236a.

This Court reversed that jurisdictional holding. *Horne* v. *Department of Agriculture*, 133 S. Ct. 2053 (2013) (*Horne I*). The Court held that petitioners had raised their takings-based defense "only in their capacity as handlers." *Id.* at 2060. The Court further concluded that "the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over takings claims brought by raisin handlers," such that "[p]etitioners' taking claim * * * was properly before the court [of appeals]." *Id.* at 2056. However, the Court took "no position on the merits of petitioners' takings claim," *id.* at 2061 n.5, and further reserved judgment on whether a producer could "bring suit for just compensation in the Court of Claims" and "what impact the availability of such a claim would have on petitioners' takings-based defense," *id.* at 2062 n.7. See *ibid.* (explaining that whether a producer may seek compensation is a "question[] going to the merits of petitioners' defense, not to a court's jurisdiction to entertain it").

8. On remand, the court of appeals rejected petitioners' takings claim on the merits. Pet. App. 12a-29a. The court first observed that the relevant property alleged to have been taken was the reserve raisins themselves. *Id.* at 12a-15a. Although petitioners had "declined to comply with the reserve require-

ment" and so had not actually "physically convey[ed] raisins to the RAC," they contended that the Secretary could not lawfully fine them for failing to hold raisins in reserve if that requirement would have effected an uncompensated taking of producers' raisins. *Id.* at 12a-13a. The court agreed with petitioners that "the constitutionality of the penalty rises or falls with the constitutionality of the Marketing Order's reserve requirement." *Id.* at 13a.

The court of appeals next noted that petitioners had "intentionally declined to pursue a" regulatory takings claim under *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), instead arguing only that the marketing order "works a categorical taking." Pet. App. 16a. The court recognized that this Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)—which involved a law requiring a landlord to "permit a cable television company to install its cable facilities upon his property," *id.* at 421—"holds that permanent physical invasions of real property work a per se taking." Pet. App. 17a. But the court concluded that *Loretto* was not controlling for "[t]wo independent reasons." *Ibid.* First, the court found it significant that the marketing order operates against personal property, rather than real property. *Id.* at 18a. The court explained that "this distinction does not mean the Takings Clause is inapplicable," but that "the government's authority to regulate * * * is at its apex where, as here, the relevant governmental program operates against personal property and is motivated by economic, or 'commercial,' concerns." *Id.* at 18a-19a.

Second, the court of appeals observed that *Loretto* applies only when a regulation fully extinguishes an owner's rights in the particular property at issue. Pet. App. 20a-21a. Because the marketing order preserves producers' ownership of "the right to the proceeds from the[] sale" of reserve raisins, the court found a per se analysis unwarranted. *Id.* at 21a-22a.

Instead, the court of appeals applied a test drawn from this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), which evaluated the constitutionality of conditions on land-use permits. Pet. App. 23a-28a. The court believed that framework supplied the appropriate analysis in this case because the Secretary "did not authorize a forced seizure of [petitioners'] crops," but rather effectively imposed a "use restriction applying to [petitioners] insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." *Id.* at 25a; see *id.* at 25a-26a (observing that the reserve-pool requirement, like land-use-permit conditions, involves "a conditional exaction," the grant of "a government benefit in exchange," and "choice" about whether to use the property in a manner that could trigger the condition). The court found the reserve requirement constitutional because it had a "sufficient nexus" to the government's goal of stabilizing the raisin market and was "roughly proportional" to that goal, requiring handlers to reserve only the quantity of raisins necessary to achieve market stabilization for the benefit of all producers. *Id.* at 26a-29a.

SUMMARY OF ARGUMENT

I. In order to stabilize the raisin market and ensure parity prices for producers who voluntarily enter that market, the raisin marketing order authorizes a reserve pool, which functions to control the timing of sales and channels of trade for reserve raisins while preserving producers' right to the net proceeds from those sales. That regulation does not effect a per se physical taking.

A. No categorical taking occurs because producers retain the most important property right in reserve raisins: ownership of the net proceeds from their sale. 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.66(h). Unlike real property or unique personal property, reserve raisins are a fungible commodity, valuable to producers only insofar as they generate sales revenue. In this commercial context, the right to possess the raisins is not an essential property interest—indeed, producers voluntarily relinquish that right by delivering their crop to handlers. Because producers retain the most critical property interest in the raisins, the marketing order does not fit within the narrow category of government actions that effect a per se physical taking by extinguishing all of an owner's essential property rights. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

B. A categorical analysis is also unwarranted because producers are subject to the reserve requirement due to their voluntary choice to market raisins in commerce. Because the market for agricultural commodities has long been subject to extensive regulation and the establishment of a reserve pool is rationally related to the legitimate government interest in ensuring orderly market conditions and fair prices for producers, the government may condition participation in that market on compliance with the reserve requirement. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1007 (1984).

C. Petitioners' arguments that the marketing order nonetheless effects a per se taking are unavailing. Relying principally on *Loretto*, petitioners contend that a categorical rule applies whenever a regulation affects possessory rights, even if the property owner retains other important rights. But *Loretto* instead justified a per se rule on the contrary proposition that a permanent physical occupation "effectively destroys *each* of [the owner's] rights" in the space affected by the occupation. 458 U.S. at 435. The other decisions petitioners cite are similarly inapt, and several precedents from this Court disprove their assertion that the reserve regulations trigger a per se analysis.

Petitioners are also wrong to argue that producers' right to the net proceeds from reserve-raisin sales is not a valuable property interest. The RAC has no authority to appropriate the raisins for its own use, but rather is required to sell them "at prices and in a manner intended to maxim[ize] producer returns." 7 C.F.R. 989.67(d)(1). Because a reserve pool is established only when supply greatly exceeds demand, reserve raisins have depressed market value, but the RAC nevertheless generates proceeds for producers by channeling the raisins to secondary markets or delaying their sale until subsequent crop years when supply is short. In a chronic over-supply situation, it may not be possible to sell reserve raisins at prices that generate net proceeds after deducting program-related expenses, but even in that situation the reserve requirement benefits producers by shoring up domestic prices and so increasing their return on their crop as a whole.

D. Petitioners effectively seek a new categorical rule that a taking occurs when government regulation affects possession of an article of commerce in a highly regulated market that producers voluntarily enter, even though the regulation assures overall parity prices and producers retain ownership of the net proceeds from the sale of the commodity. Considerations of fairness and justice compel rejection of such a categorical rule.

II. Petitioners' takings claim also fails on the merits because producers may seek just compensation under the Tucker Act, 28 U.S.C. 1491(a)(1); thus, there is no taking "without just compensation" in violation of the Fifth Amendment. The AMAA's "comprehensive remedial scheme" withdraws Tucker Act jurisdiction over claims brought by handlers, see *Horne I*, 133 S. Ct. at 2063, but it does not displace a Tucker Act remedy for producers.

Although petitioners have raised a takings defense in their capacity as *handlers*, that defense improperly seeks to enforce *producers'* property rights in reserve raisins. But even under such a defense, the relevant question would be whether the reserve requirement takes producers' property without just compensation *for producers*. Because the Tucker Act supplies a mechanism for producers to obtain compensation, any taking effected by the reserve requirement is not unconstitutional.

III. If this Court nonetheless concludes that petitioners' takings defense has merit, it should remand for the lower courts to calculate what compensation, if any, is due. Petitioners are not automatically entitled to reversal of the fine imposed for their deliberate violation of the marketing order. Rather, it at least would be necessary to calculate what value all of the raisins would have had in the absence of the marketing order—which would need to account for the increase in free-tonnage prices and other benefits provided by the regulatory program. Even if a taking occurred, there is no constitutional violation—and no compensation required—if the "net loss was zero." *Brown* v. *Legal Foundation of Washington*, 538 U.S. 216, 237 (2003).

ARGUMENT

I. THE RAISIN RESERVE REGULATIONS DO NOT EFFECT A PER SE TAKING

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. The purpose of the Clause is to ensure that the government does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

Given "the nearly infinite variety of ways in which government actions or regulations can affect property interests," the Court generally has eschewed "invariable rules" in applying the Just Compensation Clause. *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012). Instead, to determine whether government regulation "goes too far" and should be "recognized as a taking," *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), the Court usually conducts an "ad hoc, factual inquir[y]" using the standards set forth in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978) (*Penn Central*). The *Penn Central* standards involve a "careful examination and weighing of all the relevant circumstances," *Palazzolo* v. *Rhode Island*, 533 U.S.

606, 636 (2001) (O'Connor, J., concurring), including "the character of the governmental action," the "economic impact of the regulation on the claimant," and the "extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124.

Although "no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking," *Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518, the Court has recognized "two relatively narrow categories" of "regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." *Lingle* v. *Chevron U.S.A. Inc.,* 544 U.S. 528, 538 (2005). The first category is "a permanent physical occupation" of property, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), such as the "'classi[c] taking' in which the government directly appropriates private property for its own use." *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion) (brackets in original; citation omitted). The Court has reasoned that a per se rule is warranted for physical appropriations because "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto*, 458 U.S. at 435. "A second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (brackets in original) (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). "[I]n the extraordinary circumstance when *no* productive or economically beneficial use of [property] is permitted," the "total deprivation * * * is, from the []owner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017.

Petitioners have disavowed any reliance on the case-specific *Penn Central* inquiry. They apparently recognize that the raisin marketing order's fair and proven measures for stabilizing the market do not result in a taking under that test. The "character of the governmental action" is one of reasonable regulation of a commercial market in a fungible agricultural commodity; the "economic impact of the regulation" is to stabilize the market and ensure a sufficient price level for producers for all their raisins, both free tonnage and reserve; and petitioners, after decades of participation in the raisin market under the order, had no "distinct investment-backed expectations" in being able to sell raisins without complying with the order's reasonable requirements. *Penn Central*, 438 U.S. at 124.

Petitioners also do not argue that the reserve requirement extinguishes "all economically beneficial use" of their property under a "total regulatory taking" analysis. *Lucas*, 505 U.S. at 1019, 1026. Petitioners could not prevail under that test because the relevant "'property interest' against which the loss of value is to be measured" is a raisin producer's crop as a whole, and the reserve requirement boosts producers' total returns by stabilizing the market price of raisins and increasing revenues from the sale of free-tonnage raisins. *Id.* at 1016 n.7; see Pet. App. 213a ("relevant parcel" for total regulatory taking analysis is "the entirety of [petitioners'] annual crop, not the individual raisins destined for the reserve pool"). Moreover, even with respect to the reserve raisins themselves, producers retain the beneficial interest in the net sales proceeds, and that property right has the capacity to generate—and has historically generated—tens of millions of dollars in net economic value.

Rather than pursue those other takings theories, petitioners argue only that the reserve regulations effect a per se physical taking. But this case—involving one feature of an integrated regulatory program for the sale of a fungible commodity—is far removed from those involving a true physical appropriation. That conclusion is compelled for two principal reasons. First, producers retain the most essential property right in the reserve raisins—namely, the right to receive net proceeds from the sale of that portion of their fungible commodity, just as they receive the proceeds from the sale of the free-tonnage portion. Producers voluntarily relinquish possession and control of their entire crop to handlers for sale in accordance with the marketing order, demonstrating that their interest in the sales proceeds is the most valuable strand in the bundle of property rights. The reserve regulations simply regulate the timing of sales and channels of trade for one portion of their raisins in some years.

Second, producers become subject to the marketing order only by voluntarily entering the raisin market when they deliver their crop to handlers for sale. The reserve requirement that is then triggered for handlers constitutes a reasonable condition on producers' ability to benefit from that market, and it prevents any individual producer from obtaining an unfair advantage by selling his surplus raisins directly on the open market.

A. The Marketing Order Preserves Producers' Ownership Of The Net Proceeds From Sales Of Reserve Raisins

1. When assessing whether physical interference with property constitutes a taking under the Just Compensation Clause, this Court has long distinguished between a "permanent physical occupation," which warrants a categorical rule, and "a physical invasion short of an occupation," which is analyzed under the *Penn Central* balancing test. *Loretto*, 458 U.S. at 430, 435 & n.12. That distinction requires examination of the existence and relative importance of any property rights that remain with the owner. The Court has justified using a per se rule for permanent physical occupations because they extinguish all of the owner's property interests in practical effect; "[t]o borrow a metaphor, the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id.* at 435 (citation omitted). For example, in *Loretto*, the Court held that a per se taking had occurred because the permanent installation of a cable box "effectively destroy[ed] *each* of [the owner's] rights" in the space occupied by the box. *Ibid.*

In contrast, when government regulation impacts some strands in the bundle of property rights but the owner retains important interests in the property, the Court has applied the *Penn Central* test to evaluate whether the regulation amounts to a taking. See, *e.g.*, *Hodel* v. *Irving*, 481 U.S. 704, 713-717 (1987) (applying *Penn Central* to statute providing that title to land would escheat to an Indian tribe after the owner's death); *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S.

74, 82-83 (1980) (*PruneYard*) (applying *Penn Central* when private shopping center was required to permit citizens to exercise free expression and petition rights on its property). The justification for a categorical rule does not apply if the owner is not "absolutely dispossess[ed]" of essential rights in the property. *Loretto*, 458 U.S. at 426, 435 n.12. Instead, the Court subjects such measures to the *Penn Central* balancing process in order to "determin[e] when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979) (quoting *Penn Central*, 438 U.S. at 124).

2. To the extent those decisions are instructive in this quite different context of regulation of a commercial market, the marketing order does not effect a per se taking because raisin producers retain the most critical property interest in the reserve portion of the fungible commodity they deliver to handlers: ownership of the net proceeds from sales of reserve raisins.[2]

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[2] Petitioners argue (Br. 23-24) that the reserve requirement transfers title in reserve raisins from producers to the RAC. In *Evans* v. *United States*, 74 Fed. Cl. 554 (2006), the CFC stated without analysis that the RAC obtains title. *Id.* at 557. The government has previously cited *Evans* for the proposition that title transfers to the RAC. However, neither the AMAA nor the marketing order refers to title. To the extent that California law governs that issue, see *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984), we are unaware of any case determining who holds title when producers of a commodity retain ownership of the net sales proceeds of their product, but another entity controls the timing of sales and channels of trade. In the somewhat analogous context of trusts, California law provides that the "creation of a

The AMAA explicitly preserves that property interest, authorizing the establishment of reserve pools only if the "net return derived from the sale" of the commodity is distributed to producers. 7 U.S.C. 608c(6)(E). The raisin marketing order in turn preserves producers' right to "[t]he net proceeds from the disposition of reserve tonnage raisins" on a pro rata basis. 7 C.F.R. 989.66(h). And the order further protects that property interest by specifying that "[r]eserve tonnage raisins shall be sold * * * at prices and in a manner intended to maxim[ize] producer returns." 7 C.F.R. 989.67(d)(1).

Producers' beneficial interest in the net sales proceeds is not some insignificant interest in the reserve raisins; it is the most important property right. The marketing order does not apply to any raisins a producer chooses to retain for his own consumption or for any other reason. Because the reserve requirement thus applies only to raisins prepared and acquired by a handler for market, see generally 7 C.F.R. 989.15, 989.66, reserve raisins, like free-tonnage raisins, are "ordinary articles of commerce, desirable because convertible into money." *Leonard* v. *Earle*, 279 U.S. 392, 396 (1929). Unlike real property or unique per-

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trust divides title," with the trustee holding bare legal title and the beneficiary holding equitable title. *Allen* v. *Sutter County Bd. of Equalization*, 189 Cal. Rptr. 101, 103 (Cal. Ct. App. 1983) (citing *Gonsalves* v. *Hodgson*, 237 P.2d 656 (Cal. 1951)). Thus, title in reserve raisins may be divided between producers and the RAC.

In any event, we agree with petitioners (Br. 24-25) that title is not dispositive of whether a per se or *Penn Central* takings analysis applies here. See *Irving*, 481 U.S. at 713-717 (applying *Penn Central* where statute provided that title to land would pass to an Indian tribe upon the landowner's death); *Loretto*, 458 U.S. at 435 (finding per se taking even though owner retained title).

sonal property, raisins (including reserve raisins) prepared for market have value *only* insofar as they create revenue for producers. See Pet. App. 28a (reserve raisins "are fungible," in contrast "to land, which is unique"). Accordingly, instead of "effectively destroy[ing]" all property rights in the raisins, *Loretto*, 458 U.S. at 435, the marketing order preserves the most critical of those rights. To borrow this Court's terminology, the reserve requirement does not categorically "oust[] the owner from his domain," because the "domain" of a raisin producer who delivers raisins to a handler is raisin *sales*, and the reserve requirement preserves the producer's property interest in the net sales proceeds from his crop. *Lingle*, 544 U.S. at 539.

Because reserve raisins are a fungible commodity, useful to their owners only by generating revenue, any interests in lasting possession and control affected by the marketing order cannot reasonably be viewed as "the most treasured strands in [the] owner's bundle of property rights." *Loretto*, 458 U.S. at 435; see *PruneYard*, 447 U.S. at 84 (considering whether property right alleged to have been taken was "essential to the use or economic value of the[] property"). Indeed, the reserve requirement does not even apply until producers have voluntarily *surrendered* possession and dispositional control of their crop by delivering raisins to handlers.

Because producers retain that critical property interest in their pro rata share of the reserve raisins held by handlers, the marketing order cannot properly be characterized as a per se confiscation of that share, even if it is artificially viewed in isolation from the rest of the crop the producer has delivered to the handler. Rather, the reserve requirement functions as a regulation of the timing and permissible channels for the handler's selling of reserve raisins, intended to stabilize the market and ensure that producers receive parity prices for their product. Petitioners concede (Br. 23) that "regulatory schemes that simply restrict when agricultural products may be sold, how many, or in what markets" do "not implicate [a] categorical rule" under the Just Compensation Clause. But that is how the reserve regulations operate. They prevent immediate sale of reserve raisins to avoid flooding the domestic market and driving down prices, and they channel excess supply that otherwise could not sell on the open market to secondary outlets that do not compete with the domestic market—all in order to "maxim[ize] producer returns and achieve maximum disposition" of the raisins. 7 C.F.R. 989.67(d)(1). This Court has rejected Just Compensation Clause challenges to far more restrictive regulations that bar the sale of a product altogether. See *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979) (regulation that prohibited sale of eagle artifacts, and thus "prevent[ed] the most profitable use of [plaintiffs'] property," did not effect a taking). The raisin-reserve program does not become *less* constitutional when, instead of barring sale of reserve raisins altogether, it permits sales to occur at certain times and in certain outlets and preserves producers' ownership of the net proceeds generated by those sales.

B. The Marketing Order Affects Producers Based On Their Voluntary Choice To Enter A Commercial Market

A per se takings analysis is also inappropriate because producers become subject to the reserve requirement only by voluntarily entering the commercial market for raisins. The government may condition the benefits provided by an orderly market on handlers' compliance with the reserve requirement.

1. In *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), the Court considered a takings challenge to a statute that authorized the government to publicly disclose trade secrets it acquired from pesticide manufacturers as part of a registration process that was a prerequisite to selling pesticides. *Id.* at 990-991. The Court recognized that "the right to exclude others is central to the very definition of the property interest" in a trade secret. *Id.* at 1011. But the Court nevertheless rejected the manufacturer's plea to analyze the statute under a "hard and fast rule[]," Appellee Br. at 35-36 & n.49, *Monsanto*, *supra* (No. 83-196) (citing *Loretto*, 458 U.S. at 435), instead applying the *Penn Central* standards. *Monsanto*, 467 U.S. at 1005.

In conducting that analysis, the Court distinguished between trade secrets submitted before the statute became effective—which the Court held may have been taken in violation of the Just Compensation Clause, *Monsanto*, 467 U.S. at 1013-1014—and trade secrets submitted after the statute took effect. The critical difference was that manufacturers had "voluntarily submi[tted]" the data (which would then eventually be subject to public disclosure) after the statute was effective, "in exchange for the economic advantages of a registration" necessary to market the products. *Id.* at 1007. That voluntary action demonstrated that manufacturers were "willing to bear th[e] burden" of surrendering their rights in the trade secrets "in exchange for the ability to market pesticides in this country." *Ibid.* The Court concluded that, because the producer was "aware of the conditions under which the data [were] submitted" and those conditions were "rationally related to a legitimate Government interest," the "voluntary submission of data * * * c[ould] hardly be called a taking." *Ibid.*

This Court's decision in *Yee* v. *City of Escondido*, 503 U.S. 519 (1992), further reflects the importance of voluntary action in determining whether a taking has occurred, even with respect to real property. *Yee* declined to apply a categorical rule to a rent-control ordinance that effectively granted a tenant a "right to occupy the land indefinitely at a submarket rent." *Id.* at 527. The Court explained that the landowners had "voluntarily rented their land" and so could not establish a per se physical taking, which occurs "only where [the government] *requires* the landowner to submit to the physical occupation of his land." *Ibid.*; see *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252 (1987) ("This element of required acquiescence is at the heart of the concept of occupation."). *Yee* illustrates that when a property owner voluntarily limits his property rights—*e.g.*, giving up his right to exclude by renting real property to a tenant—the government does not commit a per se taking by regulating the terms of that bargain. See 503 U.S. at 531 (rejecting per se analysis because landowners "voluntarily open their property to occupation by others").

The Court's precedents on land-use exactions also reflect the distinction between government conditions and government commands. In *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), the Court held that impositions on property that would amount to a taking in the absence of any voluntary action by the owner should be subject to a different analysis when the restrictions are conditions on the owner's ability to obtain a land-use permit. See *Nollan*, 483 U.S. at 836-837; *Dolan*, 512 U.S. at 384. When a restriction is imposed as a permitting condition, it is permissible so long as it bears an "essential nexus" to the government's interests in land-use regulation and is roughly proportional "in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 386-387, 391.

2. Like the regulations at issue in *Monsanto* and *Yee*, the raisin-reserve regulations do not qualify as a per se taking because they are triggered only through producers' voluntary choice to market raisins in commerce. See Pet. App. 25a. That element of voluntariness distinguishes the marketing order from petitioners' unrealistic hypotheticals (Br. 20) involving "appropriat[ion]" of "the reserve-tonnage raisins at gunpoint." The marketing order does not "*require*[] [producers] to submit to [a] physical occupation" of their property, *Yee*, 503 U.S. at 527, but merely conditions their participation in the commercial market on compliance with regulations aimed to ensure the orderly operation of that market.

A producer's decision to voluntarily enter the market is similar to the "voluntary submission of data" necessary to gain the "ability to market pesticides" that this Court found dispositive in *Monsanto.* 467 U.S. at 1007.[3] As in *Monsanto*, the sale of agricultural

[3] The intangible trade secret in *Monsanto* could not be physically appropriated in the same sense as land or tangible personal property. But the Court recognized that "[o]nce the data that constitute a trade secret are disclosed to others, * * * the

commodities has long been subject to extensive regulation; raisin producers are aware that any reserve requirement in effect will apply to raisins they choose to deliver to a handler for marketing; and producers' voluntary delivery of their crop demonstrates that they are "willing to bear th[at] burden." *Ibid.* This Court observed that the regulatory scheme in *Monsanto* could "hardly be called a taking" *ibid.*—which suggests that, at the very least, the raisin marketing order cannot constitute a taking *per se*.

Two additional aspects of the marketing order fortify that conclusion. First, producers who are dissatisfied with the reserve regulations may "plant[] different crops" not subject to a reserve, or sell their raisin-variety grapes as table grapes or for use in juice or wine, thereby avoiding the reserve pool. Pet. App. 26a; see *Monsanto*, 467 U.S. at 1007 n.11 (observing that manufacturers could choose to sell pesticides "only in foreign markets" to protect their trade secrets). Second, producers exercise considerable control over the reserve requirement itself. Producers nominate 35 of the 47 members of the RAC, which has responsibility for recommending whether raisins should be held in reserve. 7 C.F.R. 989.26. In addition, the marketing order took effect only because producers approved it, 7 U.S.C. 608c(8) and (9), and the Secretary must terminate the order if a majority of producers want it to be repealed. 7 U.S.C. 608c(9) and (16)(B); 7 C.F.R. 989.91(c). The absence of any such action during the 65 years that the order has been in effect indicates that raisin farmers generally

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holder of the trade secret has lost his property interest in the data." 467 U.S. at 1011.

perceive themselves to be advantaged by the order's stabilization of prices.[4]

Monsanto further shows that petitioners are wrong to assert (Br. 56-57) that the provision for a reserve pool constitutes an unconstitutional condition on the right to participate in commerce. Monsanto raised an identical argument, contending that "the relinquishment of private property cannot be deemed a condition of engaging in interstate commerce." Appellee Br. at 29, *Monsanto*, *supra* (No. 83-196) (citing *Loretto*, 458 U.S. at 419). The Court rejected that contention, observing that the government had a wide berth to regulate the commercial market for pesticides and reasoning that the condition was "rationally related to a legitimate Government interest." 467 U.S. at 1007. So too here, the market for agricultural commodities has long been subject to extensive regulation, and the establishment of a reserve pool—which regulates the timing and channels of trade but preserves producers' property right in the net proceeds from reserve raisins—is rationally related to the legitimate interest in ensuring orderly market conditions and fair prices for producers.[5]

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[4] Petitioners observe (Br. 5) that producers have not voted on the order since 1949. But that is because producers have opted not to vote. In 1989, the Secretary proposed requiring referenda every six years for raisin producers to vote on the continued application of the order. See 54 Fed. Reg. 12,205. Producers rejected that proposal. *Id.* at 34,134-34,135.

[5] In *Loretto*, this Court stated that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. But *Loretto* involved a condition requiring an owner of real property to suffer a permanent physical occupation and so effectively give up all rights in that portion of his property. The analysis in *Loretto*

For similar reasons, the reserve requirement satisfies the nexus and rough proportionality test that the court of appeals drew from the land-use permitting context under *Nollan* and *Dolan*. See Pet. App. 23a-28a. Petitioners criticize the court of appeals' invocation of that test on the ground that the government has "an unusual need for discretion in setting land use conditions." Pet. Br. 54. But as this Court has previously recognized, the government enjoys even greater discretion when it regulates fungible commodities in a commercial market. See *Lucas*, 505 U.S. at 1027 (recognizing government's "high degree of control over commercial dealings" involving personal property); *Allard*, 444 U.S. at 66 (upholding government's power to prohibit sale of certain personal property altogether). By limiting supply in years of great overproduction and releasing reserved raisins later, the reserve regulations bear the requisite nexus to the market instability created by a fluctuating supply of raisins. And by tailoring the reserve percentage to the amount of supply that exceeds domestic demand, the reserve requirement is roughly proportional "both in nature and extent to the impact of" the overproduction that prompts its creation. *Dolan*, 512 U.S. at 391.

Petitioners contend (Br. 55-56) that an outright sales ban would equally address the negative externalities associated with the oversupply of raisins. But a sales ban, which would render surplus raisins "economically worthless," *Lucas*, 505 U.S. at 1028, is a less proportional response to the market disequilibrium

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does not apply here, where producers retain the most essential property interest in a fungible commodity transferred for sale, and the reserve requirement plays a critical role in stabilizing the market they have voluntarily entered.

than the reserve regulations, which preserve producers' ownership of the net proceeds of raisins subject to the requirement. And a sales ban also would not fully serve the AMAA's goal of bringing "predictability to the market for producers and consumers alike," Pet. App. 2a, because it would do nothing to address supply shortages. In light of petitioners' concession that the government may prohibit the sale of raisins without effecting a per se taking, "it would be strange to conclude" that the AMAA is unconstitutional because it "provid[es] the owner an alternative to that prohibition" by controlling the timing and channels of sales through a reserve pool. *Nollan*, 483 U.S. at 836-837.

C. Petitioners' Arguments That The Marketing Order Effects A Per Se Taking Are Unpersuasive

Petitioners contend (Br. 20-27, 42-45, 49-52) that this Court's decisions find a categorical taking any time "the government takes possession of property," no matter what property rights remain with the owner and no matter whether the regulation applies only as a result of the owner's voluntary choices. Petitioners further suggest (Br. 42-47) that a per se rule is warranted because their ownership of the net sales proceeds from reserve raisins is a "speculative and unsubstantiated benefit[]." Those arguments lack merit.

1. Petitioners argue (Br. 21) that producers' ownership of the sales proceeds from reserve raisins is irrelevant because producers lose possession of the raisins themselves.[6] At the outset, it again bears

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[6] Although petitioners refer at times to producers' loss of "dispositional control," Br. 21, they concede that regulatory schemes that affect the right to dispose of property, such as those restricting "when agricultural products may be sold, how many, or in what

emphasis that raisins become subject to the reserve requirement only after producers voluntarily *relinquish* possession by delivering raisins to handlers. See
7 C.F.R. 989.66(a) and (b)(1). Thus, producers do not actually exercise greater possessory rights with respect to free-tonnage raisins as compared to reserve-tonnage raisins. Moreover, the RAC does not take physical possession of reserve raisins, but rather leaves them in storage with handlers. See *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356, 1360 (Fed. Cir. 2005). From the starting gate, petitioners' reliance on possessory rights is misplaced.

In any event, petitioners are wrong to assert that a categorical rule always applies when a regulation affects possession of property, no matter what rights remain with the owner. Petitioners principally rely (Br. 44) on *Loretto*, which they read to find a categorical analysis warranted "even if some economically valuable property interests are left." But the Court instead justified a per se rule on the contrary proposition that the appropriation had "effectively destroy[ed] *each* of [the owner's] rights" in the space occupied by the cable box. *Loretto*, 458 U.S. at 435. The Court explained that the regulation left the owner with "no right to possess the occupied space himself, and also [with] no power to exclude the occupier from possession and use of the space." *Ibid.* Moreover, "even though the owner [could] retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a

markets," do "not implicate [a] categorical rule," Br. 23. Thus, petitioners' contention that a physical taking has occurred necessarily focuses on a loss of possession.

stranger * * * empt[ied] the right of any value." *Id.* at 436. Thus, the government had not "simply take[n] a single 'strand' from the 'bundle' of property rights," but had "chop[ped] through the bundle, taking a slice of every strand." *Id.* at 435.

Petitioners' rule similarly finds no support in the line of cases recognizing a categorical physical taking when the government "seize[d] the use and disposition" of real property but permitted the owner to retain title. Pet. Br. 24-25. In those cases the regulation so fully extinguished the owner's property rights that the government was treated as if it "held full title and ownership" for the duration of the occupation. *United States* v. *United Mine Workers*, 330 U.S. 258, 284-285 & n.46 (1947) (plurality opinion). For example, in *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951), the government's seizure of mining facilities was "complete," leaving the claimant with no interest in the mining business—and, in particular, no right to "receive operating profits"—during "the period of government control." *Id.* at 116, 118 (citation omitted).

Petitioners also are not aided by cases holding that just compensation is required for a physical taking no matter whether the occupied space is "an entire parcel or merely a part thereof." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (*Tahoe-Sierra*). The Court was simply making clear that when the government physically appropriates and extinguishes all rights in a discrete portion of property—for example, when it takes "one acre of a hundred-acre farm to build a post office," Pet. Br. 44—it must provide just compensation for that portion. See *Tahoe-Sierra*, 535 U.S. at 322.

Courts accordingly "do not ask whether a physical appropriation * * * deprives the owner of all economically valuable use" in the *rest* of the property. *Id.* at 323. But that observation has no bearing on what takings analysis applies when the owner retains important rights in the very portion that was alleged to have been taken, especially the portion of a fungible commodity committed to sale.

Finally, petitioners' reliance on *Kaiser Aetna*, *supra*, is misplaced. Petitioners understand (Br. 44) *Kaiser Aetna* to hold that a regulation requiring a "private marina to admit the public is a categorical taking even though the marina continued to have economic value." Contrary to petitioners' assertion, and as this Court summarized in *Loretto*, "the easement of passage" at issue in *Kaiser Aetna* "was *not* considered a taking *per se*." *Loretto*, 458 U.S. at 433 (first emphasis added). Rather, applying the *Penn Central* balancing approach, the Court held that the easement encroached on the "most essential stick[]" in the marina owner's "bundle of [property] rights" and went "so far * * * as to amount to a taking." 444 U.S. at 176, 178. *Kaiser Aetna* thus confirms that the *Penn Central* inquiry, rather than a per se analysis, is appropriate here.

In addition to *Kaiser Aetna*, other decisions of this Court refute petitioners' argument that a categorical analysis applies to any regulation that affects possessory interests. For example, in *Irving*, *supra*, the Court applied the *Penn Central* framework to a law that required title to land to escheat to an Indian tribe after the landowner's death. 481 U.S. at 713-718. Although the challengers urged the Court to apply a per se rule on the ground that the "decedents upon death completely lose their property interest," thereby suffering a "permanent physical deprivation," Appellees Br. at 31, *Irving*, *supra* (No. 85-637), the Court recognized that "the whole of [the] decedents' property interests were not taken" because the decedent retained a life estate and the right to convey the property *inter vivos*. *Irving*, 481 U.S. at 715. To provide another example, in *Bowen* v. *Gilliard*, 483 U.S. 587 (1987), the Court applied the *Penn Central* balancing test to a statute that required an applicant for federal welfare benefits to assign her right to receive child-support payments to the State. *Id.* at 591, 606-608. Although the statute required a surrender of the child-support payments, the State subsequently "remit[ted] the amount collected to the custodial parent," leading the Court to conclude that it would elevate "form over substance" to find that the forced assignment effected a taking. *Id.* at 605-606.

Similarly, in the context of the federal government's possession and management of Indian tribal lands held in trust, the Court has distinguished between takings claims based on a direct appropriation and claims challenging regulations intended "to make the tribal property productive, and secure therefrom an income for the benefit of the tribe." *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307 (1902). Thus, in *United States* v. *Creek Nation*, 295 U.S. 103 (1935), the Court found a categorical physical taking when the government sold a tribe's land to settlers, because the sale was "an act of confiscation." *Id.* at 110 (citation omitted). In contrast, the Court declined to find a per se physical taking in *Cherokee Nation* when a tribe challenged the federal government's authority to grant leases for mining on lands the tribe owned in fee simple. 187 U.S. at 307. The tribe argued that the regulation would deprive it of its "exclusive use and occupation of the lands," Appellants Br. at 18, *Cherokee Nation*, *supra* (No. 340), but the Court held there was "no question involved in this case as to the taking of property" because the income generated from the leases would be remitted to the tribe. 187 U.S. at 307.

2. Petitioners next suggest (Br. 21) that producers' right to the net proceeds from reserve-raisin sales is not a valuable property interest because the marketing order "compels transfer of the reserve raisins to the government, for the government's own use or sale," resulting in years in which no proceeds are distributed. See *id.* at 42, 47. That argument mischaracterizes how the marketing order operates and ignores the substantial benefits it confers.

Petitioners are wrong to assert (Br. 1, 21, 41) that the reserve requirement permits the government to appropriate property for its own use.[7] The marketing order directs the RAC to "efficient[ly] administ[er]" the raisin-reserve program, 7 C.F.R. 989.36(*l*), and guides the RAC's activities in accordance with the AMAA's goals of achieving "parity prices" for growers and "orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. 602(1). Although petitioners maintain (Br. 1) that the RAC

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[7] Petitioners repeatedly suggest that the RAC provides reserve raisins to the government for free. See, *e.g.* Pet. Br. 7 (asserting that RAC may give raisins "to United States agencies (for example, for school lunches)"). That is not accurate. Surplus raisins procured by the government, including raisins for the National School Lunch Program, are purchased following a competitive bidding process. See generally USDA, *Commodity Purchasing* (Mar. 2015), http://www.ams.usda.gov/AMSv1.0/commoditypurchasing.

has "absolute discretion" in disposing of reserve raisins, the regulations prescribe the permissible channels of trade, 7 C.F.R. 989.67(b), and require the RAC to sell the raisins "at prices and in a manner intended to maxim[ize] producer returns and achieve maximum disposition" of the reserve, 7 C.F.R. 989.67(d)(1).[8] Following that directive, the RAC has in many years been able to generate tens of millions of dollars in net proceeds for producers from the sale of reserve raisins—including more than $47 million in net distributions during one of the crop years at issue in this case.

Petitioners are further wrong (Br. 47) to characterize those payments as "*inadequate* compensation" for a categorical taking. Rather, the net proceeds from reserve-raisin sales reflect the reasonable value of that portion of the fungible commodity producers have delivered to handlers. A raisin reserve is established

[8] Petitioners state (Br. 1) that the RAC may "give away" the raisins in its "absolute discretion." That is incorrect. The regulations permit raisins to be disposed of by gift, 7 C.F.R. 989.67(b)(4), but also obligate the RAC to "maxim[ize] producer returns," 7 C.F.R. 989.67(d)(1). The regulations would allow raisins to be donated, *e.g.*, to generate good will or when the costs of maintaining them—paying for their storage, fumigation, inspection, and so forth, 7 C.F.R. 989.67(j), 989.82, 989.401—would exceed their expected future sales price, which may occur as they near the end of their shelf life. From 2002 to 2010, less than 2% of the total reserve supply was donated each year. See RAC, *Marketing Policy & Industry Statistics 2010*, at 25 (Jan. 6, 2011), http://raisins.org/files/Marketing%20Policy%202010.pdf. In these circumstances, and given the goodwill attendant to charitable contributions, such gifts raise no substantial takings claim in the context of the program as a whole.

In any event, even if donations raised concerns under the Just Compensation Clause, a takings claim would properly be limited to the small portion of raisins that were actually donated.

only when supply greatly exceeds demand. Because the RAC "release[s] the full trade demand" as free-tonnage raisins, 7 C.F.R. 989.54(d), reserve raisins by definition have depressed value because there is no domestic demand for them.[9] In response to this imbalance between supply and demand, a reserve requirement increases overall value for producers in multiple ways. First, the reserve ensures that an excess supply of raisins will not immediately glut the domestic market and drive down free-tonnage prices. Second, reserve raisins can be channeled to secondary markets—such as export markets and government contracts—that do not compete with the domestic market and so present opportunities to sell excess supply without deflating domestic prices. Third, reserve raisins can be released as free tonnage in subsequent crop years when supply is short and generate revenue through delayed sales. By stabilizing the market and cultivating non-competitive outlets for

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[9] Petitioners are therefore mistaken to suggest (Br. 26 n.7) that "the price of raisins would have to almost double" for a producer to be "better off" when the reserve is 47%. That argument erroneously assumes that producers would otherwise be able to sell reserve raisins at free-tonnage prices without affecting those prices. But producers would have considerable difficulty selling reserve raisins at those rates because domestic demand is inelastic and would already be fulfilled by the free-tonnage percentage. Even if a particular producer could sell his entire crop in an unregulated market when supply vastly exceeded demand, the collective value of the raisins would be substantially lower—which is exactly what occurred prior to the AMAA's enactment. This Court had "no doubt" that in an unregulated market raisin producers were "compelled to sell at less than parity prices" and even for "less than the cost of production." *Parker* v. *Brown*, 317 U.S. 341, 363-364 (1943).

raisins, the reserve requirement thus *increases* the value of producers' property.[10]

Market forces also explain why some crop years result in no net proceeds from reserve-raisin sales. When supply exceeds demand year after year, reserve raisins accumulate and their value falls. In a chronic over-supply situation, it becomes increasingly difficult to dispose of the raisins and the costs associated with maintaining them mount. When the increased costs of the reserve pool equals or exceeds the lower gross revenue obtained from raisin sales, no net proceeds will be distributed. But even in that situation, the reserve requirement serves the function of shoring up domestic prices and so increasing producers' return on free-tonnage raisins, and thus the overall return on their crop as a whole. Moreover, the analysis of the reserve mechanism should not be confined to one year in isolation, but should evaluate the regulatory program over the long term.

To the extent petitioners argue that a per se taking occurs because they receive the net, rather than gross, proceeds from reserve-raisin sales, their claim again

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[10] Because raisins held in reserve may be sold in non-competitive outlets or later released as free tonnage, it is inaccurate to state that volume control provides the only benefit to producers. Pet. Br. 25-26. Producers benefit from the RAC's efforts to find alternative channels of commerce for the raisins, which increase net sales proceeds. Nor do those sales in secondary markets "counteract the price effects of the volume controls," *id.* at 26 n.7, given the RAC's obligation to ensure that reserve raisins are sold only in outlets that do not compete with free-tonnage raisins. 7 C.F.R. 989.67(a). By establishing a reserve pool, rather than simply instituting volume control, the marketing order also enables producers to meet full market demand in years when supply is short due to crop failure or other factors. See 7 C.F.R. 989.67(j).

lacks merit. The RAC properly deducts its expenses from gross revenues because they are necessary costs of managing and liquidating the reserve pool. See *United States* v. *Sperry Corp.*, 493 U.S. 52, 62-63 (1989) (rejecting takings challenge to user fee imposed for government services, even though the claimant "would rather not have used" those services).

Petitioners object in particular to the subsidies provided to sell reserve raisins in export markets (Br. 7, 18, 25), asserting that they receive "no benefit" from those sales. But all producers benefit when raisins are sold for export because the proceeds are pooled together, with each producer receiving his pro rata share. To be sure, raisins sell at lower prices in export markets. Therefore, when a handler buys reserve raisins at free-tonnage prices in order to export them, 7 C.F.R. 989.54(g), the RAC must reimburse part of the free-tonnage price through an export subsidy, 7 C.F.R. 989.53(a), or else the sale would not occur. But petitioners are wrong to suggest that producers would be better off if that sale did not occur, because the sale permits producers to realize *some* value from reserve raisins, rather than having them remain in storage where they would generate no revenue at all. Importantly, the RAC has no authority to bypass a profitable domestic market in favor of a less profitable export market. See 7 C.F.R. 989.67(d)(1). Thus, export sales—and attendant export subsidies—occur only when there is no better way to "maxim[ize] producer returns." *Ibid.* In sum, the net proceeds producers receive in any given year reflect market forces and the true value of their oversupplied commodity, rather than any appropriation by the RAC.[11]

D. There Is No Basis To Recognize A New Per Se Rule In This Context

At bottom, petitioners seek a new categorical rule that any regulation that affects possessory rights triggers a per se taking, even if the owner becomes subject to the regulation by voluntarily entering a commercial market for a fungible commodity and retains the most essential property interest in the portion of her commodity that is subject to the challenged regulation. In determining whether to extend a per se analysis to a new context, this Court has recognized that "the ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by [a] categorical rule[] or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases." *Tahoe-Sierra*, 535 U.S. at 334. Considerations of fairness and justice compel rejection of a categorical rule here.

First, it is significant that the government has traditionally exercised a "high degree of control over commercial dealings" concerning "personal property." *Lucas*, 505 U.S. at 1027. Indeed, the raisin marketing order has been in effect for 65 years, and numerous other commodities have long been regulated under the

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[11] If petitioners mean to argue that the RAC's efforts to secure maximum returns for producers have fallen short, their recourse is to "file suit in federal district court, alleging that the Secretary or the RAC has violated the [AMAA], the raisin marketing order, or the associated regulations." *Evans*, 74 Fed. Cl. at 564. That claim is not properly pursued as a violation of the Fifth Amendment.

AMAA. A per se rule that takes no account of that experience and a property owner's reasonable investment-backed expectations regarding the sale of a fungible commodity could fundamentally disrupt the government's ability to adopt regulations that protect producers and consumers alike. Second, a categorical analysis would "place form over substance, and labels over reality," *Gilliard*, 483 U.S. at 606, by finding a taking based on the effect on possession even when that property interest is not a valuable strand in the owner's bundle of rights, as will typically be the case for fungible property introduced into commerce. Third, a per se rule would unjustly foreclose inquiry into the "actual impact of the [regulation] on" the value of raisins. *Tahoe-Sierra*, 535 U.S. at 338. It would be anomalous to find a categorical taking by disregarding producers' beneficial interest in the net proceeds from sales of reserve raisins and ignoring the effect of the reserve regulations in boosting revenue from their crop as a whole. See *Irving*, 481 U.S. at 715 ("average reciprocity of advantage" is an important factor in evaluating takings claim) (citation omitted). Fourth, a per se rule is not necessary to protect raisin producers' property rights. The case-specific *Penn Central* standards leave room for producers to argue that the operation of the reserve regulations has imposed such an undue economic burden and so thoroughly impeded their reasonable investment-backed expectations as to amount to a taking. See *Tahoe-Sierra*, 535 U.S. at 327 n.23 (resisting "[t]he temptation to adopt what amount to *per se* rules in either direction") (citation omitted).

In the context of this regulatory scheme, which was adopted with producers' approval and for their express benefit, a per se rule is far "too blunt an instrument" to determine whether the reserve regulations effect a taking. *Tahoe-Sierra*, 535 U.S. at 342 (quoting *Palazzolo*, 533 U.S. at 628). In the interests of "fairness and justice," the Court should reject petitioners' request for a new categorical rule. *Ibid.* (internal quotation marks omitted).

II. THE RESERVE REGULATIONS DO NOT VIOLATE THE JUST COMPENSATION CLAUSE BECAUSE PRODUCERS MAY OBTAIN COMPENSATION UNDER THE TUCKER ACT

Petitioners' argument that the marketing order takes producers' property in violation of the Just Compensation Clause fails for the independent reason that just compensation for any taking is available to producers under the Tucker Act, 28 U.S.C. 1491(a)(1); thus, the reserve requirement does not produce an *uncompensated* taking in violation of the Fifth Amendment. Petitioners concede that "[t]he constitutionality of the fine" imposed on them "rises or falls on the constitutionality of the Marketing Order's reserve requirement." Pet. Br. 31 (citation omitted). Because the reserve requirement is constitutional for this additional reason, so is the fine. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949) ("[T]he availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment.").[12]

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[12] Contrary to petitioners' suggestion (Cert. Reply Br. 12), the government did not forfeit this argument. After this Court clarified in *Horne I* that petitioners pursued a takings defense only in their capacity as handlers, 133 S. Ct. at 2060-2061, the government argued in the Ninth Circuit that the availability of compensation

A. As its plain text makes clear, the Just Compensation Clause "does not proscribe the taking of property," but instead only "proscribes taking *without just compensation*." *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) (*Williamson County*) (emphasis added). Thus, when Congress has provided a "reasonable, certain and adequate provision for obtaining compensation," *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974) (citation omitted), "an alleged taking is not unconstitutional." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 & n.40 (1981) (*Virginia Surface*).

In this case, the Tucker Act supplies the requisite reasonable, certain, and adequate provision for obtaining just compensation in the event of a taking. See *Monsanto*, 467 U.S. at 1016-1017. By authorizing a suit against the United States in the CFC, the Tucker Act generally stands as an "implied[] promise[]" to pay any compensation due for a taking. *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940); see *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990). Congress may withdraw jurisdiction under the Tucker Act when, *e.g.*, it establishes an alternative mechanism for raising a takings claim. To determine whether Congress has displaced Tucker Act jurisdiction, this Court examines "the purpose of the statute, the entirety of its text,

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under the Tucker Act defeated petitioners' claim on the merits regarding raisins they produced. Appellee Supp. Br. at 3-7, *Horne I*, *supra* (No. 10-15270). Moreover, the government has consistently maintained that the marketing order does not take property without just compensation, and it therefore "can make any argument in support of that claim" without being "limited to the precise arguments [it] made below." *Yee*, 503 U.S. at 534.

and the structure of review that it establishes." *Horne I*, 133 S. Ct. at 2062-2063 (citation and brackets omitted).

In *Horne I*, this Court concluded that the AMAA withdraws Tucker Act jurisdiction over *handlers'* takings claims because the AMAA's "comprehensive remedial scheme" provides handlers with "a ready avenue to bring takings claim[s] against the USDA" that "challenge the content, applicability, and enforcement of marketing orders." 133 S. Ct. at 2063. Because Congress intended to channel handlers' claims through administrative proceedings, the Court concluded that handlers could not bring a Tucker Act suit. *Ibid.* But the Court made clear that this ruling did not imply that a *producer* "could not bring suit for just compensation in the Court of Claims," and it reserved judgment on "what impact the availability of such a claim would have on petitioners' takings-based defense." *Id.* at 2062 n.7. Those are the questions the case now squarely presents.

B. Under the governing principles announced by this Court, the AMAA does not withdraw Tucker Act jurisdiction over a producer's claim that the marketing order results in a taking of a producer's pro rata share of raisins reserved by a handler. The statutory text contains no express repeal of Tucker Act jurisdiction for producers' claims and provides no alternative procedures by which a producer could pursue relief with respect to an alleged taking. See 7 U.S.C. 608c(13)(B) and (14)(B); *Horne I*, 133 S. Ct. at 2063 (relying on AMAA's provision of alternative avenues for handlers to raise takings claims to find no Tucker Act jurisdiction).

Even in the absence of a withdrawal of Tucker Act *jurisdiction*, however, there is a category of cases in which equitable relief may be available in another forum because Congress is not properly understood to have intended the statutory provision involved—particularly one that adjusts the economic benefits and burdens of private parties—to require the payment of money from the Federal Treasury in the event of a taking, but would have intended instead for the program to be enjoined. See *Eastern Enterprises*, 524 U.S. at 521 (plurality opinion) (citing Gov't Br. at 38 n.30, *Eastern Enterprises* (No. 97-42)); see also Gov't Br. at 13 n.5, *Babbitt* v. *Youpee*, 519 U.S. 234 (1997) (No. 95-1595); Gov't Br. at 25 n.16, *Irving*, *supra* (No. 85-637).

As explained in the government's brief (at 50-54) in *Horne I*, *supra* (No. 12-123), although there are some aspects of the AMAA that point in that direction, the broader statutory structure supports the conclusion that compensation is available for a producer. Congress designed the AMAA to increase prices for regulated commodities (by limiting supply) and thus assumed that the scheme would *benefit* producers and would remain in effect only if producers agreed. See 7 U.S.C. 602(1); *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). With respect to reserve pools, Congress expressly provided that producers would obtain their pro rata share of net proceeds from sales of the reserve commodity. 7 U.S.C. 608c(6)(E). To the extent a reserve requirement might be found to constitute a taking, Congress could have expected any compensation due to be minimal or even zero, and so represent a less costly way of ensuring orderly market conditions than other forms of regulation.

There is also good reason to think that Congress would prefer that producers obtain compensation rather than an injunction prohibiting enforcement of the marketing order. The AMAA vests the Executive Branch with significant administrative authority to modify commodity regulation under the statute. See 7 U.S.C. 608c(10)(A); 7 C.F.R. 989.91. The Secretary could use that authority to respond to a just compensation award in a particular case by prospectively altering a marketing order to eliminate future takings or reduce compensation that would be due. That regulatory flexibility suggests that Congress would not have preferred the inflexible tool of an injunction foreclosing the use of reserve pools altogether—with the attendant risk of throwing the market into immediate turmoil—over a modulated administrative response.

C. Although petitioners have raised a Just Compensation Clause defense only in their capacity as handlers and so cannot *themselves* pursue a Tucker Act remedy, see *Horne I*, 133 S. Ct. at 2063, the preceding analysis defeats their defense on the merits because they contend that the marketing order effects a taking of *producers'* raisins.[13] At the outset, it is not evident that petitioners properly may assert *producers'* rights under the Just Compensation Clause as a

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[13] Petitioners have not argued that the fine independently constitutes a taking, nor does any authority support the novel proposition that the assessment of civil penalties or entry of a remedial payment order, imposed for violations of statutory or regulatory requirements, could itself constitute a taking of private property. Instead, petitioners argue (Br. 31) only that the fine may not be imposed if the marketing order authorizes an unconstitutional categorical taking of reserve raisins.

defense to liability for violating their obligations as *handlers* under the marketing order. See *Allard*, 444 U.S. at 65 n.21 ("Of course, there is no standing to assert a takings claim by those who are merely employed in selling [commodities] owned by others."). As petitioners acknowledge (Br. 7), handlers have no property interest in reserve raisins and face no economic burden from compliance with the marketing order. To be sure, handlers who flout the reserve requirement, as petitioners did, become subject to civil sanctions, 7 C.F.R. 989.166(c)—but petitioners' asserted takings defense to those penalties rests on the novel proposition that a fine for violation of the reserve requirement cannot lawfully be imposed against handlers because that requirement effects a taking of *someone else's* property. Because "a proponent of a particular legal right" generally must "assert[] his own legal rights and interests rather than basing his claim for relief upon the rights of third parties," *Rakas* v. *Illinois*, 439 U.S. 128, 139 (1978), petitioners' takings defense fails.[14]

Even if handlers could defend against sanctions imposed for failure to comply with the reserve requirement by asserting producers' rights, that de-

[14] Petitioners produced a limited percentage of the raisins they handled, see *Horne I*, 133 S. Ct. at 2059, but *Horne I* clarified that they pursued their takings-based defense only in their capacity as handlers. *Id.* at 2060-2061. While petitioners can seek just compensation under the Tucker Act for any alleged taking of raisins they produced, they cannot circumvent that avenue by asserting a takings defense to a fine imposed on them solely in their capacity as handlers. See *Monsanto*, 467 U.S. at 1016 ("Equitable relief is not available to enjoin an alleged taking of private property * * * when a suit for compensation can be brought against the sovereign subsequent to the taking.").

fense would lack merit because the reserve requirement does not take producers' property without just compensation. As petitioners acknowledge, "[t]he constitutionality of the fine rises or falls on the constitutionality of the Marketing Order's reserve requirement." Pet. Br. 31 (citation omitted); see *Horne I*, 133 S. Ct. at 2061 n.4 ("[P]etitioners argued that they could not be compelled to pay fines for refusing to accede to an unconstitutional taking."). Because the Tucker Act supplies a procedure for producers to obtain compensation, the "alleged taking is not unconstitutional," *Virginia Surface*, 452 U.S. at 297 & n.40—and neither is the fine.[15]

Petitioners are wrong to assert (Cert. Reply Br. 11) that *Horne I* forecloses any argument that the availability of compensation under the Tucker Act for producers affects the merits of their takings defense. *Horne I* held that the Tucker Act did not create a *jurisdictional* bar to consideration of a handler's takings claim, but reserved judgment on "what impact the availability of [a producer's Tucker Act suit] would have on petitioners' takings-based defense." 133 S. Ct. at 2062 & n.7. As the Court explained, that issue

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[15] It does not matter whether producers actually *seek* compensation under the Tucker Act; rather, "all that is required is that a reasonable, certain and adequate provision for obtaining compensation *exist* at the time of the taking." *Williamson County*, 473 U.S. at 194 (emphasis added; citation omitted); see *Larson*, 337 U.S. at 697 n.18 (focusing on "the *availability* of a suit for compensation") (emphasis added). Tucker Act relief existed for producers, who "bear[] the economic burden of the program," Pet. Br. 7, even if petitioners removed any basis for filing such a suit by declining to reserve producers' raisins in defiance of the marketing order.

"go[es] to the merits of petitioners' defense, not to a court's jurisdiction to entertain it." *Id.* at 2062 n.7.

Petitioners also err in suggesting (Cert. Reply Br. 12) that the availability of compensation under the Tucker Act would "require[] [them] to pay the United States one day and then sue to get [their] money back." Because petitioners raise a takings defense in their capacity as handlers, *Horne I*, 133 S. Ct. at 2060-2061, they cannot sue for return of the money under the Tucker Act; rather, only producers may seek compensation under that Act. But because petitioners' takings defense seeks to vindicate the property rights of producers, not handlers, the availability of a Tucker Act suit for producers defeats the defense on the merits.

There is nothing inherently unfair in holding petitioners accountable for their violation of the marketing order even though the producers whose raisins they handled "received full market value for their crop and were not charged any part of the fine." Pet. Br. 13. Petitioners could have challenged the reserve requirement in several ways that would not have exposed them to monetary liability, including by filing a Tucker Act suit in their capacity as producers with respect to raisins they produced or by preemptively challenging the marketing order in their capacity as handlers under 7 U.S.C. 608c(15)(A)-(B). Instead, petitioners deliberately defied the marketing order "to obtain an unfair competitive advantage over other" industry participants "who were in compliance." Pet. App. 33a. As this Court observed in *Horne I*, "a handler who refuses to comply with a marketing order and waits for an enforcement action will be liable for significant monetary penalties if his constitutional challenge fails." 133 S. Ct. at 2063. Petitioners chose to assume that risk.

III. IF PETITIONERS' TAKINGS DEFENSE IS NOT REJECTED ON THE MERITS, THE CASE SHOULD BE REMANDED TO CALCULATE WHAT COMPENSATION, IF ANY, COULD BE DUE

Petitioners contend (Br. 27) that, if their takings defense succeeds on the merits, "[t]he proper relief" is to reverse the fine imposed for their failure to comply with the reserve requirement. That is incorrect. Even if a taking occurred, there is no constitutional violation—and no remedy required—if the "net loss was zero." *Brown* v. *Legal Foundation of Washington*, 538 U.S. 216, 237 (2003). It would accordingly be necessary to calculate what compensation would have been due if petitioners had complied with the reserve requirement. To make that determination, it would be appropriate to consider what value all of the raisins would have had *in the absence of the marketing order*. See 68 Fed. Reg. at 41,690 (concluding that prices would be "$142 per ton higher than under an unregulated scenario" for one of the relevant years). The assessment imposed on petitioners is not an accurate reflection of that calculation; rather, it requires them to disgorge the profits they reaped by selling reserve raisins at free-tonnage prices that were supported by the rest of the industry's compliance with the marketing order.

A proper calculation of the just compensation that would have been due if petitioners had complied with the reserve requirement also would need to account for other benefits they received from the regulatory program, such as higher consumer demand for raisins spurred by enforcement of quality standards and promotional activities. It is likely that when all benefits and alleged losses from the marketing order are calculated, petitioners would have a net *gain* rather than a net loss, given that a central point of the order is to benefit producers. *Block*, 467 U.S. at 346. Thus, if the Court concludes that petitioners' takings defense has merit, it would be appropriate to give the lower courts an opportunity to analyze that valuation issue and determine the proper fine on remand.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 7 U.S.C. 602(1) provides:

Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

3. 7 U.S.C. 608c(6)(E) provides:

Orders

(6) Terms—Other commodities

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

* * * * *

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

4. 7 C.F.R. 989.53(a) provides:

Research and development.

(a) *General.* The Committee, with the approval of the Secretary, may establish or provide for the establishment of projects involving marketing research and development and marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, and consumption of raisins in domestic and foreign markets. These projects may include, but need not be limited to those designed to:

(1) Improve through research the accuracy of raisin production estimates;

(2) Improve through research the preparation for market, sanitation, quality, condition, storability, processing, or packaging of raisins;

(3) Ascertain through research the factors affecting acceptance of raisins by manufacturers or consumers;

(4) Promote the marketing, distribution, or consumption of raisins in domestic and foreign markets by collecting data thereon, consulting with members of the trade, and making the information available to producers, handlers, and exporters; and

(5) Promote the marketing, distribution, or consumption of raisins in foreign markets through the use of merchandising programs.

The expense of any such project relating solely to free tonnage raisons shall be paid from funds collected pursuant to § 989.80. The expense of any such project relating solely to reserve tonnage raisins shall be paid from the sale proceeds of such raisins. If any such project encompasses both free tonnage and reserve tonnage raisins, such as one which is designed to promote the consumption in export outlets of raisins generally on a long-term basis, the expense of the project may be allocated between the assessment fund and the pool fund.

5. 7 C.F.R. 989.54 provides:

Marketing policy.

(a) *Trade demand.* On or before August 15 of each crop year, the Committee shall hold a meeting to review shipment data, inventory data, and other matters relating to the quantity of raisins of all varietal types. For any varietal type for which a free tonnage percentage may be recommended, the Committee shall compute a trade demand. The trade demand shall be 90 percent of the prior crop year's shipments (converted to a natural condition weight) of free tonnage and reserve tonnage sold for free use for that varietal type, into all market outlets, adjusted by the carryin on August 1 of the current crop year and the desirable carryout for the varietal type at the end of that crop year. If the prior year's shipments were limited because of crop conditions, the Committee may select the shipments of one of the three years preceding the prior crop year. The desirable carryout shall be increased from 45,000 to 60,000 tons for Natural (sun-dried) Seedless raisins at a rate of 5,000 tons per year for three crop years following the effective date of this amended subpart. The desirable carryout for Dipped Seedless raisins shall be 1,500 tons, and for Oleate and Related Seedless raisins, 1,500 tons. The trade demand computed by the Committee shall be announced by the Committee in accordance with paragraph (h) of this section.

(b) *Preliminary percentages.* On or before October 5 of each crop year (except that the Committee may extend this date not more than five business days if warranted by a late crop), the Committee shall estimate the production of any varietal type of raisins for which it has computed a trade demand. If the Committee determines that volume regulation is desirable during the crop year for that varietal type, it shall compute and announce preliminary free and reserve percentages for that varietal type: *Provided*, That such production estimate shall include by varietal type the raisins handlers are expected to acquire from producers and the total tonnage of raisins diverted under a raisin diversion program. The Committee shall compute a preliminary free percentage to release 85 percent of the computed trade demand, if it determines that a field price has been established for that varietal type, or 65 percent of the trade demand if no field price has been established. The preliminary free percentage shall be computed by multiplying the trade demand by either 85 percent or 65 percent (as the case may be) and dividing the product by the estimated production of that varietal type and rounding the resulting percentage to the nearest full percent. The difference between 100 percent and the preliminary free percentage shall be the preliminary reserve percentage.

(c) *Interim percentages*. Prior to February 15, the Committee may modify the preliminary free and reserve percentages to release less than the trade demand.

(d) *Final percentages*. No later than February 15, the Committee shall recommend to the Secretary, final free and reserve percentages which will tend to release the full trade demand for any varietal type for which preliminary or interim percentages have been computed and announced. The difference between any final free percentage designated by the Secretary and 100 percent shall be the final reserve percentage. With its recommendation, the committee shall report on its consideration of the factors in paragraph (e) of this section.

(e) *Factors*. When computing preliminary and interim percentages, or determining final percentages for recommendation to the Secretary, the Committee shall give consideration to the following factors:

(1) The estimated tonnage held by producers, handlers, and for the account of the Committee at the beginning of the crop year;

(2) The expected general quality and any modifications of the minimum grade standards;

(3) The estimated tonnage of standard and off-grade raisins which will be produced;

(4) If different than the computed trade demand, the estimated trade demand for raisins in free tonnage outlets;

(5) If not estimated as provided in paragraph (a) of this section, an estimated desirable carryout at the end of the crop year for free tonnage and, if applicable, for reserve tonnage;

(6) The estimated market requirements for raisins outside free tonnage outlets, considering the estimated world raisin supply and demand situation;

(7) Current prices being received and the probable general level of prices to be received for raisins by producers and handlers;

(8) The trend and level of consumer income;

(9) Any prohibition of trade practices, pursuant to § 989.62 intended for the crop year; and

(10) Any other pertinent factors bearing on the marketing of raisins including the estimated supply of and demand for other varietal types and regulations applicable thereto.

(f) *Modification.* In the event the Committee subsequently deems it advisable to modify its marketing policy on any crop, because of national emergency, crop failure, or other major change in economic conditions, it shall hold a meeting for that purpose, and file a report thereof with the Secretary within 5 days (exclusive of Saturdays, Sundays, and holidays) after the holding of such meeting, which report shall show such modification and the basis therefor.

(g) *Reserve tonnage to sell as free tonnage.* On or before November 15 of the crop year, the Committee shall make two simultaneous offers of reserve tonnage to handlers to sell as free tonnage for each varietal type for which preliminary percentages have been computed and announced. One offer shall consist of a quantity equal to 10 percent of the prior year's (or the alternative year selected by the Committee pursuant to paragraph (a) of this section) shipments of free tonnage and reserve tonnage sold for free use into all market outlets to equate the current year's supply with the prior year's shipments. This offer shall be allocated to handlers on the basis of their prior year's acquisitions. The second offer, to provide for market expansion, shall consist of a quantity equal to 10 percent of the prior year's (or the alternative year selected by the Committee pursuant to paragraph (a) of this section) shipments of free tonnage and reserve tonnage sold for free use. This offer shall be allocated to handlers on the basis of their prior year's shipments of free tonnage and reserve tonnage sold for free use. Each offer shall be open to handlers not more than five business days, and subsequently, two offers of any tonnage unsold in the original offers open not more than two business days each, may be made. The reoffer tonnage shall be allocated to handlers who purchase 100 percent of their allocation in preceding offers, and shall be on the basis of the quantity each handler purchased, as a percentage of the total quantity purchased by all handlers eligible to participate. At the close of the second reoffer, any remaining tonnage may be offered to handlers who purchased all of their allocations from previous offers on a first-come first-served basis and such offer shall be open to handlers for one business day. Any handler who had no shipments or acquisitions of raisins during the prior crop year will be allocated raisins under these offers on the basis of his acquisition (up to the time the original offer is made) of raisins in the current crop year. If field prices are not established, the offer shall be made not more than fifteen days following such establishment. The price of reserve tonnage raisins offered to handlers to sell as free tonnage, pursuant to this paragraph, shall be the established field price for free tonnage raisins of that varietal type, plus 3 percent of the established field price, plus the estimated costs incurred by the Committee for equity holders.

(h) *Publicity*. The Committee shall promptly give reasonable publicity to producers, dehydrators, handlers, and the cooperative bargaining association(s) of each meeting to consider a marketing policy or any modification thereof, and each such meeting shall be open to them. Similar publicity shall be given to producers, dehydrators, handlers, and the cooperative bargaining association(s) of each marketing policy report or modification thereof, filed with the Secretary and of the Secretary's action thereon. Copies of all marketing policy reports shall be maintained in the office of the Committee, where they shall be made available for examination by any producer, dehydrator, handler, or cooperative bargaining association representative. The Committee shall notify handlers, dehydrators and the cooperative bargaining association(s), and give reasonable publicity to producers of its computation of the trade demand, preliminary percentages, and interim percentages and shall notify handlers, dehydrators, and the cooperative bargaining association(s) of the Secretary's action on percentages by registered or certified mail.

6. 7 C.F.R. 989.65 provides:

Free and reserve tonnage.

The standard raisins acquired by handlers which are free tonnage, and any reserve tonnage purchased for free use, may be disposed of by him in any marketing channel, subject to the applicable provisions of this part. A handler's free tonnage of a varietal type of raisin shall be either the free percentage of the standard raisins of the varietal type acquired by him or all of the standard raisins of the varietal type acquired by him if no free percentage is established by the Committee or designated by the Secretary for that varietal type. A handler's reserve tonnage of a varietal type shall be the reserve percentage of the standard raisins of that varietal type acquired by him.

7. 7 C.F.R. 989.66 provides:

Reserve tonnage generally.

(a) The standard raisins acquired by a handler which are designated as reserve tonnage and reserve tonnage transferred to a handler by the committee shall be held by him for the account of the committee and subject to the applicable restrictions of this part.

(b)(1) Each handler shall hold in storage all reserve tonnage acquired by him and all reserve tonnage transferred to him by the committee until he has been relieved of such responsibility by the committee either by delivery to the committee or otherwise. Such handler shall store such reserve tonnage raisins in natural condition without addition of moisture and in such manner as will maintain the raisins in the same condition as when he acquired them, except for normal and natural deterioration and shrinkage, and except for loss through fire, acts of God or other conditions beyond the handler's control.

(2) Reserve tonnage acquired by a handler or transferred to a handler by the committee shall be stored separate and apart from other raisins to such extent and identified in such manner as the committee shall specify in its rules and procedures with the approval of the Secretary.

(3) Each handler may, under the direction and supervision of the committee, substitute for any reserve tonnage raisins a like quantity of standard raisins of the same varietal type and of the same or more recent year's production. Each such handler shall give the committee reasonable advance notice of his intention to substitute, the exact location of the raisins for which substitution is to be made, and arrange with the committee a mutually satisfactory time for the substitution.

(4) The committee may, after giving reasonable notice, require a handler to deliver to it, or to anyone designated by it, at such handler's warehouse or at such other place as the raisins may be stored, part or all of the reserve tonnage raisins held by such handler. Reserve tonnage raisins delivered by any handler to the committee, or to any person designated by it, in the form of natural condition raisins shall in the aggregate be not more than 2 percent less than the average maturity level of all raisins such handler acquired during the applicable crop year. The committee may require that such delivery consist of natural condition raisins, or it may arrange for such delivery to consist of packed raisins.

(c) Each handler shall, at all times, hold in his possession or under his control reserve tonnage referable to his acquisitions of standard raisins and reserve tonnage transferred to him by the committee, less any quantity of such reserve tonnage released to him by a change of percentages, delivered by him pursuant to instructions of the committee or sold to him by the committee.

(d) Reserve tonnage raisins delivered by any handler to the committee, or to any person designated by it, whether in the form of natural condition raisins or packed raisins shall meet the applicable minimum grade or grade and condition standards, except for normal and natural deterioration. The committee shall have the authority to require, in its discretion and at its expense, such reinspection and certification of reserve pool tonnage raisins as it may deem necessary.

(e) In the event the committee offers to handlers reserve tonnage raisins for contract packing or for sale in export, as provided in § 989.67, each handler shall be given the opportunity to pack or purchase his share of each offer.

(f) Handlers shall be compensated for receiving, storing, fumigating, handling, and inspection of that tonnage of reserve raisins determined by the reserve percentage of a crop year and held by them for the account of the committee, in accordance with a schedule of payments established by the committee and approved by the Secretary. A box rental shall be paid by the committee to producers or handlers for boxes used in storing reserve tonnage raisins beyond the crop year of acquisition in accordance with a rental schedule established by the committee and approved by the Secretary. The handler compensation shall be reviewed annually and shall be paid, as to the amount determined to be earned and unpaid, as soon as practicable after the end of the second quarter of the crop year and quarterly thereafter. Any handler may request the committee, by registered or certified mail, at any time after June 1 of a crop year to remove or relocate reserve tonnage raisins of the current crop year which remain in his possession. At any time during a crop year, a handler may request removal or relocation of reserve tonnage of a prior crop year. In each instance, he may request that the committee provide the necessary containers for any such removal or relocation. When so requested as to current crop year raisins, the committee shall make the removal or relocation, the availability of containers, storage space and time of request permitting, by September 15 of the subsequent crop year, and as to raisins of the prior crop year, within 30 days, supplying the necessary containers if so requested. If the committee removes or relocates reserve raisins of the current crop year pursuant to a handler's request, and such raisins are released to him by September 15 of the subsequent crop year, the handler shall reimburse the committee for any costs incurred by it in such removal or relocation. If any handler requests removal or relocation of reserve raisins, the committee shall immediately give notice thereof to the Secretary.

(g) The committee shall have the authority, in its discretion, to obtain loans, nonrecourse or otherwise, on any part of the reserve tonnage not subject to release as desirable free tonnage and to pledge or hypothecate the raisins on which such loans are obtained as security therefor: *Provided*, That in every such case, there shall be included in the loan agreement a provision to the effect that, in case the lender obtains possession or control of such raisins, he will dispose of them in such a manner as will not tend to defeat the objectives of this amended subpart. The net proceeds of any such loan shall be distributed by the committee pursuant to paragraph (h) of this section.

(h) The net proceeds from the disposition of reserve tonnage raisins of any varietal type shall be distributed by the committee to the respective producers, or their successor in interest thereto, on the basis of the volume of their respective contributions to the reserve tonnage of such varietal type. Distribution of the proceeds in connection with the reserve tonnage contributed by a nonprofit cooperative marketing association which has authority to market the raisins of its members and to allocate the proceeds therefrom to such members shall be made to such association. Advance or progress payments may be made by the committee, in conformity with the provisions of this paragraph, as sufficient funds become available.

8. 7 C.F.R. 989.67 provides:

Disposal of reserve raisins.

(a) At the time the committee meets to consider free and reserve percentages for a crop year, the committee shall consider the marketing of reserve tonnage raisins for the subsequent 12–month period. The committee shall dispose of all reserve tonnage in such manner as to achieve, as nearly as may be practicable, maximum disposal of such raisins by the time reserve tonnage raisins from the subsequent crop year are available. Any reserve tonnage raisins held unsold by the committee on May 1 of the subsequent crop year shall be physically disposed of promptly in any available outlet not competitive with normal market channels for free tonnage raisins or sales of new crop reserve tonnage raisins in export: *Provided*, That, whenever the Secretary finds, based upon a recommendation of the committee, or on the basis of information otherwise available to him that because of national emergency, crop failure, an insufficient supply of reserve tonnage raisins for export, or other change of economic or marketing conditions, retention of reserve tonnage raisins carried over is warranted, the foregoing requirements as to disposal shall not apply and such raisins may be disposed of in any outlet recommended by the committee and approved by the Secretary.

(b) Reserve tonnage raisins shall be disposed of by the committee:

(1) By sale to handlers for sale in specified outlets or for resale to exporters for sale in export outlets;

(2) By direct sale to any agency of the U.S. Government for noncompetitive use;

(3) By direct sale to foreign government agencies or foreign importers in any country not listed pursuant to paragraph (c) of this section or where the procurement of raisins is so regulated as to preclude purchases from domestic handlers;

(4) By gift; and

(5) By any other means consistent with the provisions of this section, and in outlets noncompetitive with those for free tonnage raisins.

(c) The committee shall sell reserve raisins to handlers for export sale to countries on a list established by the Secretary, on the basis of the recommendation of the committee or from other available information. The list of countries shall be reviewed by the committee annually when it reviews matters relating to the free tonnage, and shall recommend any changes in the list to the Secretary for approval. No country may be removed from the list for the purpose of permitting direct sale by the committee unless a finding is made by the committee and approved by the Secretary, that such removal and subsequent direct sale by the committee shall not lead to disruption of sale of reserve tonnage raisins by handlers in other countries on the list, and that although handlers have been able to offer reserve tonnage raisins at competitive prices to the country to be so removed, there remains an unfilled demand in such country which has not been supplied by handlers and which could be supplied by the committee at the same prices by means of direct sale.

(d)(1) Reserve tonnage raisins shall be sold to handlers at prices and in a manner intended to maximum producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available. The committee may pay the cost of transporting reserve tonnage from one handler to another and in the event a handler has more than one plant, the committee may pay the cost of transporting reserve tonnage to the handler's plant of its choice. In each offer or reoffer of reserve tonnage raisins for export, the committee may include a quantity of raisins not to exceed 2 percent of the total tonnage offered in such offer or reoffer, which it may sell to handlers whose regular allocation provides insufficient tonnage to fill a containerized freight shipping container: *Provided*, That such sale may be made only when the remaining portion of a handler's regular allocation will fill at least 50 percent of such container and shall be made to a handler only one time in each offer or reoffer of reserve tonnage raisins. No offer or reoffer shall be made until 5 days (exclusive of Saturdays, Sundays, and holidays) have elapsed from the time it files with the Secretary complete information as to varietal type, quantity, and price involved in such offer or reoffer, and the Secretary may disapprove the offer or reoffer or any term thereof: *Provided*, That at any time prior to the expiration of the 5-day period, the offer or reoffer may be made to handlers upon the committee receiving from the Secretary notice that he does not disapprove the making of the offer or reoffer. Subject to the same conditions as are set forth in the preceding sentence with respect to the making of such offer or reoffer, the committee may withdraw an offer or reoffer to sell reserve tonnage raisins to handlers or may extend the offer or reoffer period but not when such extension would deprive one or more handlers of an opportunity to purchase raisins.

(2) Except for the final offer of the reserve tonnage from a crop year, an offer of reserve tonnage raisins for export shall provide for a specific tonnage. Each handler's share of the reserve tonnage offered prior to November 1 of any crop year shall be determined as the same proportion of the quantity offered that the free tonnage raisins acquired by him during the preceding crop year is of the free tonnage raisins acquired by all handlers during the preceding crop

year who remain handlers. If reserve tonnage raisins have been removed by the committee from a handler's premises pursuant to § 989.66(f), such handler's allocation of reserve pool offers subsequent to such removal and prior to November 1 of the following crop year shall be reduced by the percentage such removed reserve tonnage is of the total reserve tonnage acquired by such handler in the crop year. Subsequent to October 31, each handler's share shall be determined as the same proportion of the quantity offered that the free tonnage raisins acquired by the handler during the then current crop year is of the total free tonnage raisins acquired by all handlers during the then current crop year. With respect to any offer other than the initial offer, each handler's share of the total quantity offered as of that date (the then current offer plus all prior offers of that crop year) shall first be determined by the appropriate formula. His share of the current offer shall then be determined by subtracting from his share of the total quantity offered, the total of his share of prior offers from the beginning of the crop year. If any handler did not acquire raisins during the preceding crop year, the basis for his share of any quantity of reserve tonnage raisins offered prior to November 1 shall be his acquisitions of free tonnage raisins during the then current crop year. The current free tonnage acquisitions of all such new handler shall, for the purposes of determining the shares of all handlers prior to November 1, be added to the total acquisitions of free tonnage raisins during the preceding crop year of all handlers in business at the time the offer is made.

(3) With respect to any offer of reserve tonnage for sale to handlers for resale in export, the committee may provide that any such tonnage unpurchased at the end of the share reservation period will be reoffered to handlers without regard to shares and that approval for handlers' applications for purchase may be made in the same order in which the applications are received by the committee. Such reoffer may be made by the committee at the time it makes a regular offer of reserve tonnage, at any time during the period a regular offer is in effect, or within a reasonable time after a regular offer has expired.

(4) The final offer of the reserve tonnage from a crop year may be offered to handlers without regard to shares and approval of handlers' applications for purchase may be made in the same order in which the applications are received by the committee.

(5) Whenever a handler's share or allocation pursuant to this paragraph is less than or exceeds his holdings of reserve tonnage by a minor quantity, the committee may adjust the handler's share or allocation so as to avoid the cost of the physical transfer. The maximum quantity by which a handler's share or allocation may be so allocated shall be prescribed in rules and procedures which the committee shall establish with the approval of the Secretary.

(e) The committee may sell reserve tonnage raisins as provided in paragraph (b)(3) of this section only when such country is not included in the list of specified countries established pursuant to paragraph (c) of this section and may sell reserve tonnage raisins to foreign government agencies of foreign importers in any country removed from such list. No agreement to sell reserve tonnage raisins shall be entered into by the committee until 5 days (exclusive of Saturdays, Sundays, and holidays) have elapsed from the time it files with the Secretary complete information as to varietal type, quantity, price and foreign country involved in any such proposed sale, and the Secretary may disapprove such sale or any term thereof: *Provided*, That, at any time prior to the expiration of the 5-day period, the sale may be made upon the committee receiving from the Secretary notice that he does not disapprove the making of the sale.

(f) Whenever the committee concludes that the orderly disposition of reserve tonnage would be promoted by the committee replacing any portion or all of handlers' export shipments of free tonnage raisins, to other than free tonnage outlets, made prior to the committee's first offer to sell reserve tonnage, it may do so and may specify such requirements and conditions as are necessary to carry out the replacement consistent with the objectives of this amended subpart. The committee may establish a price for such replacement tonnage which is higher, the same as, or lower than that for reserve tonnage in the first offer of the crop year. Any such replacement offer by the committee shall be governed by those provisions of paragraph (d)(1) of this section which prescribe prior action by the Secretary on committee offers to sell tonnage to handlers.

(g)(1) The committee may, subject to review by the Secretary, refuse to sell reserve tonnage raisins for export:

(i) To any handler who is in default on any previous purchase of reserve tonnage raisins from the committee;

(ii) To any handler currently not in compliance with the provisions of a sales agreement covering reserve tonnage raisins, executed by such handler with the committee; or

(iii) To any handler who signifies an intention to sell reserve tonnage to or through any person who has previously failed to complete a sale of reserve tonnage raisins to a foreign buyer and such raisins remain to be exported and remain unsold to any foreign buyer in an eligible export market.

(2) Handlers who are in default of timely payment under any purchase agreement are subject to an interest and late payment charge(s) recommended by the committee and approved by the Secretary on the delinquent amount that is owed the committee. The interest charge shall be the current prime rate plus 2 percent established by the bank in which the committee has its administrative assessment funds deposited, on the day the amount owed becomes delinquent; and further, that such rate of interest be added to the bill monthly until the handler's delinquent amount owed plus applicable interest has been paid: *Provided*, That the committee, with the approval of the Secretary, may recommend changes in the rate of interest to another rate of interest. When the committee determines to change the rate of interest or a late payment charge is needed, and such change is approved by the Secretary, the committee shall announce the change in

the rate of interest or the rate of late payment charge through a mailing by the committee to handlers.

(3) *Appeals*. If a determination is made by the committee that a handler has not complied with the provisions of this section and any actions allowed under this section are taken against the handler, such handler may request a hearing before an appeals subcommittee established by the committee. If the handler disagrees with the subcommittee's decisions, the handler may request the committee to review the subcommittee's decision. The committee may, subject to the approval of the Secretary, establish additional procedures concerning appeals.

(h) Each packer's share of an offer of reserve tonnage raisins for contract packing shall be determined as the same proportion that the reserve tonnage raisins acquired by him is of the reserve tonnage raisins acquired by all packers. In the event that any packer fails to contract for packing any or all of his share of any offer, the remaining portion thereof shall be reoffered by the committee to all packers who contracted for packing all of their respective shares, in proportion to their respective acquisitions: *Provided*, That, if such amount which packers fail to contract for packing does not exceed 250 tons, or if it is necessary to deviate from the foregoing in order to meet terms and conditions of shipment, the committee may, in its discretion, allocate such reserve tonnage raisins among packers as it deems appropriate, but the shares of packers in subsequent offers or reoffers shall be adjusted accordingly.

(i) In the event the committee determines that the applicable procedures as specified in paragraphs (d) and (h) of this section will not provide an allocation for handlers which is suitable for a particular situation, the committee, with the approval of the Secretary, may establish such modifications of procedures, consistent with § 989.66(e), as will facilitate the disposition of reserve tonnage through the handlers.

(j) The committee shall not sell reserve tonnage raisins of any varietal type to handlers to provide them with raisins to sell as free tonnage, other than as provided in § 989.54, unless it files with the Secretary complete information and receives from the Secretary notice that he does not disapprove of such sale and that because of: National emergency, crop failure; change of economic or marketing conditions; free tonnage shipments during the then current crop year exceeding shipments of a comparable period of the prior crop year by more than 5 percent: *Provided*, That, such sale of reserve tonnage shall be limited to the quantity exceeding 105 percent of shipments for the first 10 months of the prior crop year; and/or an inadequate carryover, the free tonnage outlets cannot be reasonably well supplied by the tonnage released to the industry as a whole by the committee's marketing policy for that varietal type. Any quantities of reserve raisins offered to handlers for free use, except as provided in § 989.54(g), may be offered to them on the basis of handler shipments or acquisitions in the same manner as in paragraph (d)(1) of this section. If offered on the basis of acquisitions, shares shall be determined pursuant to paragraph (d)(2) of this section. If offered on the basis of shipments, the same formula shall be used, except that shipments shall be used as the basis instead of acquisitions in computing handlers' shares. However, such raisins shall not be sold at a price below that which the committee concludes reflects the average price received by producers for free tonnage of the same varietal type purchased by handlers during the current crop year up to the time of any offer for sale of reserve tonnage by the committee, to which shall be added the costs to the equity holders incurred by the committee on account of receiving, inspecting, storing, fumigating, insuring, and holding of said raisins, and including costs of taxes and interest: *Provided*, That, where the outlook for the next crop year or other factors have caused a downward trend in the prices received by producers for free tonnage raisins or in the prices received by handlers for free tonnage packed raisins, reserve tonnage may be sold to handlers at the currently prevailing or the approximate computed field price for free tonnage raisins, as determined by the committee. The committee may sell reserve tonnage raisins of any varietal type to any handler to provide him with raisins to sell as free tonnage if such handler has lost all or part of his free tonnage because of fire or other disaster beyond his control subject to the applicable provisions of this paragraph and in an amount equal to such tonnage so lost.

9. 7 C.F.R. 989.82 provides:

Expenses of reserve raisin operations.

The committee is authorized to incur such expenses as are reasonable and are necessary in discharging its obligations, pursuant to this part, with respect to the receiving, fumigating, handling, holding, or disposing of any quantity of reserve pool raisins held for the account of the committee. The committee is authorized to pay any taxes assessed against raisins held by or for the account of the committee on March 1, or such assessment date as later changed and then in effect, in the reserve pool established pursuant to this subpart: *Provided*, That any equity holder may pay his taxes upon giving notice to the committee on or before May 1 of each year of his intention to do so. All pool expenses shall be deducted from the proceeds obtained by the committee from the sale or other disposal of such reserve raisins held for the account of the committee.

10. 7 C.F.R. 989.91 provides:

Suspension or termination.

(a) The Secretary may, at any time, terminate the provisions of this amended subpart by giving at least one day's notice by means of a press release or in any other manner which he may determine.

(b) The Secretary shall terminate or suspend the operation of any or all of the provisions of this amended subpart, whenever he finds that such provisions do not tend to effectuate the declared policy of the act.

(c) The Secretary shall terminate the provisions of this amended subpart at the end of any crop year whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of grapes used in the production of raisins in the State of California: *Provided*, That such majority have, during such representative period, produced for market more than 50 percent of the volume of such grapes produced for market within said State; but such termination shall be effective only if announced before July 31 of the then current crop year.

(d) The provisions of this amended subpart shall, in any event, terminate whenever the provisions of the act authorizing them cease to be in effect.

11. 7 C.F.R. 989.166(c) provides:

Reserve tonnage generally.

(c) *Remedy in the event of failure to deliver reserve tonnage raisins*. A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated (after any shrinkage allowances which may then be in effect are applied and allowances for any deterioration due to conditions beyond his control are made) shall compensate the Committee for the amount of the loss resulting from his failure to so deliver. The amount of compensation for any shortage of tonnage shall be 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. The weighted average price shall be determined from those sales made during the particular crop year up to the time such cash payment is requested by the Committee, or up to the end of the particular crop year, whichever date may be earlier. The amount which a handler shall compensate the Committee for any reserve raisins which have deteriorated so as to be off-grade in quality during storage for reasons within his control, shall be the latest weighted average price received by the Committee for the applicable varietal type of reserve pool raisins, less the amount actually received by the Committee in the disposition of the deteriorated raisins delivered by the handler (or the salvage value of such raisins as determined by the Committee). Any amounts paid to the Committee in satisfaction of such deficiencies shall accrue to the earnings of the applicable reserve pool. The remedies provided in this paragraph shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act for failure on the part of the handler to comply with the applicable provisions of the act or of this part.

12. 7 C.F.R. 989.401 provides:

Payments for services performed with respect to reserve tonnage raisins.

(a) *Payment for crop year of acquisition*—(1) *Receiving, storing, fumigating, and handling.* Each handler shall be compensated at a rate of $46 per ton (natural condition weight at the time of acquisition) for receiving, storing, fumigating, and handling the reserve tonnage raisins, as determined by the final reserve tonnage percentage, acquired during a particular crop year and held by the handler for the account of the Committee during all or any part of the same crop year.

(2) *Inspection.* Each handler shall be reimbursed by the Committee for inspection costs applicable to the reserve tonnage raisins, as determined by the final reserve tonnage percentage, received and held by him for the account of the Committee. Such payment shall be made at the currently applicable rate per ton paid by such handler to the Inspection Service and on the quantity reported by the handler. The Committee shall pay the cost of any inspection required by it of such reserve tonnage raisins while they are being held for its account: *Provided*, That the cost of inspection of any raisins substituted, pursuant to § 989.66(b)(3), by a handler for such reserve tonnage raisins, or which he received by transfer from another handler by purchasing, as permitted pursuant to § 989.166, a portion or all of such other handler's share of an offer, shall be borne by the handler and shall not be reimbursed to him by the Committee.

(b) *Additional payment for reserve tonnage raisins held beyond the crop year of acquisition.* Additional payment for reserve tonnage raisins held beyond the crop year of acquisition shall be made in accordance with this paragraph. Each handler holding such raisins for the account of the Committee on August 1 shall be compensated for storing, handling, and fumigating such raisins at the rate of $2.30 per ton per month, or any part thereof, between August 1 and October 31, and at the rate of $1.18 per ton per month, or any part thereof, between November 1 and July 31: *Provided*, That handlers holding 2002-03 Natural (sun-dried) Seedless reserve raisins on August 1, 2003, that are intended for use as cattle feed shall be compensated for storing, handling, and fumigating such raisins at the rate of $2.30 per ton per month, or any part thereof, between September 13 and October 31, 2003, and at the rate of $1.18 per ton per month, or any part thereof, between November 1, 2003, and July 31, 2004. Such services shall be completed so that the Committee is assured that the raisins are maintained in good condition.

(c) *Payment of rental on boxes and bins containing raisins held beyond the crop year of acquisition.* Payment of rental on boxes and bins containing reserve tonnage raisins held beyond the crop year of acquisition shall be made in accordance with this paragraph. Each handler, producer, dehydrator, and other person who furnishes boxes or bins in which such raisins are held for the account of the Committee on August 1, shall be compensated for the use of such boxes and bins: *Provided*, That persons holding 2002-03 Natural (sun-dried) Seedless reserve raisins on

September 13, 2003, that are intended for use as cattle feed shall be compensated for the use of such boxes and bins, and that no compensation shall be accrued for such raisins held between August 1 and September 12, 2003. The rate of compensation shall be: For boxes, two and one-half cents per day, not to exceed a total payment of $1 per box per year, per average net weight of raisins in a sweatbox, with equivalent rates for raisins in boxes other than sweatboxes; and for bins 20 cents per day per bin, not to exceed a total of $10 per bin per year. For purposes of this paragraph, *box* means any container with a capacity of less than 1,000 pounds, and *bin* means any container with a capacity of 1,000 pounds or more. The average net weight of raisins in each type of box shall be the industry average as computed by the Committee for the box in which the raisins are so held. No further compensation shall be paid unless the raisins are so held in the boxes on the succeeding August 1.

(d) *Payment for other services*—(1) *General*. In addition to the payments provided in paragraphs (a), (b), and (c) of this section, handlers shall be compensated for other services performed with respect to reserve tonnage raisins as set forth in this paragraph.

(2) *Transportation*. The Committee may arrange with any handler for transporting reserve tonnage raisins. Payment for such transportation shall be based on then prevailing haulage rates within the production area for the type of transportation required.

(3) *Packing*. A handler who accepts an offer by the Committee to pack reserve tonnage raisins for its account shall be compensated for such packing in an

amount determined by or acceptable to the Committee. In considering the amount of compensation to be paid, the Committee shall take into account, among other factors, the particular varietal type of raisins to be packed, the particular pack or package required, and the quantity and quality of the raisins to be packed.

(4) *Redelivery*. In the event the Committee removes reserve tonnage raisins of a previous crop year from a handler upon the request provided for in § 989.66(f) and such handler subsequently desires redelivery to him of reserve tonnage raisins for contract packing, or other purpose, he shall reimburse the Committee in advance of such redelivery for the net costs to it of the removal, storage, and redelivery of such raisins: *Provided*, That the Committee may waive payment by the handler of part or all of such costs if it determines that such waiver is reasonably necessary to the prompt and favorable disposition of the raisins involved.