No. 14-275

In The

Supreme Court of the United States

MARVIN D. HORNE, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

JOHN D. ECHEVERRIA
VERMONT LAW SCHOOL
164 Chelsea Street
South Royalton, VT 05068
(802) 831-1386
JEcheverria@vermontlaw.edu
Counsel of Record

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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The International Municipal Lawyers Association respectfully submits this brief *amicus curiae* in support of Respondent Department of Agriculture.[1]

INTERESTS OF *AMICUS CURIAE*

The International Municipal Lawyers Association ("IMLA"), an advocate and resource for local government lawyers since 1935, serves as an international clearinghouse for legal information and cooperation on municipal legal matters for its 3,000 members. IMLA frequently appears before the Court as *amicus curiae* to represent the interests of its members in cases that may affect local governments. IMLA has a major interest in this case for two reasons. First, Petitioners' proposal that the Court create a new *per se* category to govern takings claims based on impairments of possessory interests in personal property, including commercial products sold to the public, would interfere with a variety of local government regulatory activities that are essential to maintaining public health and safety and upholding important community values. Second, Petitioners' request that the Court adopt the novel theory that property owners, in

[1] Pursuant to Supreme Court Rule 37.6, IMLA states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae*, make a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all the parties.

general, can flout any law and then raise the Takings Clause as a defense to sanctions for doing so would undermine local governments' ability to protect important features of the built and natural environments.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a novel set of facts that Petitioners and their *amici* seek to exploit to upend longstanding takings principles. IMLA urges the Court to reject this effort. There are few economic programs similar to the raisin marketing program and almost none at the local government level. Nevertheless, local governments tow illegally parked vehicles, remove unwholesome food from store shelves and prohibit its sale, and remove abused and neglected animals from their owners. Subjecting these and other similar government interferences with possessory interests in personal property to a *per se* takings rule would seriously interfere with local governments' authority to protect public health and safety. Likewise, Petitioners' proposal to revolutionize takings doctrine by allowing property owners to routinely flout laws and then raise the Takings Clause as a defense to sanctions for doing so would have serious adverse effects on local governments. Apart from the fact that Petitioners' argument lacks any foundation in the Constitution, acceptance of this argument would encourage frequent violations of zoning laws, historic

preservation ordinances, and other local rules and regulations, threatening the economic health and livability of our communities.

The simplest and most direct way to resolve this complex case is to recognize that Petitioners, in their capacity as handlers, never owned any raisins and therefore cannot assert a taking of their "private property." The text of the Takings Clause and numerous Court precedents confirm that ownership of "private property" is an essential precondition for a viable takings claim. Petitioners' case founders at the threshold because (1) they are litigating this case solely in their capacity as raisin "handlers" and (2) Petitioners, in their capacity as handlers, never owned any raisins. Petitioners seek to support their claim by pointing to property interests held by raisin producers, but a takings claimant cannot rely on an alleged taking of property belonging to somebody else.

Even if Petitioners could overcome the lack of a protected property interest (they cannot), the Court should reject Petitioners' request that it create a new *per se* rule for alleged takings based on interferences with possessory interests in personal property. The Court has previously adopted categorical *per se* rules for two narrow categories of regulatory takings cases involving infringements of rights in land: total denials of all economically viable use of land, and permanent physical occupations of real property. Both of these *per se* takings rules are rooted in the special character of private property interests in land, and do not logically support the creation of a different *per se*

rule applicable to personal property. Furthermore, the Court's justifications for the *Lucas per se* rule affirmatively argue against a new *per se* rule for government interferences with possessory rights in personal property, especially commercial products such as raisins.

The Court has generally eschewed mechanical *per se* rules because they restrict the courts' ability to consider the factors that, in "fairness and justice," ordinarily should be considered in making a reasoned judgment about whether a taking has occurred, including the adverse economic impact (if any) of the government action, the degree of interference with reasonable investment-backed expectations, and the character or purpose of the government action. In the case of personal property—particularly fungible commercial property that has been heavily regulated for many decades—application of a *per se* rule is especially likely to produce outcomes that fail the tests of fairness and justice. The purpose and effect of the Raisin Marketing Order are to confer substantial economic benefits on raisin growers, at considerable expense to the consuming public, and applying a *per se* rule in this case would risk conferring an additional unfair windfall on growers at further public expense.

Finally, IMLA urges the Court to reject the argument of Petitioners and several of their *amici* that property owners, in general, should have the option under the Takings Clause either to pursue a claim for just compensation or to refuse to comply with a law

because they think it constitutes a taking and defend against any subsequent penalties for noncompliance by invoking the Takings Clause. Petitioners make this argument despite the fact that the Court in *Horne I* already determined, based on the specific statutory scheme governing this case, that Petitioners can present any takings argument they may have in the context of this case. The much broader, novel remedies theory Petitioners are now advancing is contrary to established precedent and settled principles. The exclusive remedy for an alleged taking of private property for public use is ordinarily a suit for just compensation. In exceptional cases, like this one, when an alleged taking is for other than a "public use," or if "just compensation" is not an available remedy, property owners are not required to pursue the compensation remedy. In either of these circumstances, owners can invoke the Takings Clause as a defense to sanctions for not complying with the law (or seek to enjoin the government from acting). But, absent these circumstances, the exclusive remedy for a taking is a suit for just compensation. In sum, there is no merit to Petitioners' argument that property owners, generally speaking, can defy laws they believe constitute takings and then litigate the takings issue in response to government enforcement actions.

ARGUMENT

I. Petitioners' Takings Claim Fails as a Matter of Law Because Petitioners, in Their Capacity as Handlers, Never Owned Any Raisins.

The most straightforward basis for affirming the judgment of the Ninth Circuit is that Petitioners, in their capacity as handlers, never owned any raisins and therefore cannot assert viable claims that the Raisin Marketing Order threatened them with a taking of their property. *See* Br. for Resp't 51-55. The text of the Takings Clause makes clear that ownership of private property is an essential predicate for a viable takings claim: "Nor shall *private property* be taken for public use, without just compensation." U.S. Const. amend. V (emphasis added). Numerous Court precedents illustrate that a takings claimant must identify the private property allegedly taken. *See*, *e.g.*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163-71 (1998); *Webb's Fabulous Pharmacies*, *Inc. v. Beckwith*, 449 U.S. 155, 160-61 (1980). Indeed, the requirement that a takings claimant point to a protected property interest is such an essential requirement that the Court has raised *sua sponte* the lack of predicate property interest and rejected a takings claim on the merits on that basis. *See E. Enters. v. Apfel*, 524 U.S. 498, 539-45 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-56 (Breyer, J., dissenting, joined by Stevens, Souter and Ginsburg).

Petitioners' case founders for lack of a property interest because (1) Petitioners are litigating this case *solely* in their capacity as raisin "handlers" and (2) Petitioners, in their capacity as handlers, never owned any of the raisins grown by raisin producers. From the beginning of this case it was ambiguous in what capacity Petitioners were litigating their claim; after all, the United States argued in *Horne v. Department of Agriculture* (*Horne I*), 133 S. Ct. 2053 (2013), that Petitioners should have pursued a claim for just compensation in the Court of Federal Claims because they were making a takings argument in their capacity as producers. However, in *Horne I*, the Court clarified that Petitioners are litigating this case not as producers but solely in their capacity as handlers. In their capacity as handlers, Petitioners have no protected property interest in any raisins, and therefore their case fails as a matter of law. *See E. Enters. v. Apfel*, 524 U.S. at 543 (Kennedy, J., concurring in the judgment and dissenting in part) ("We have been careful not to lose sight of the importance of identifying the property allegedly taken.").

The Court's opinion in *Horne I* is replete with confirmations of the fact that Petitioners are litigating this case *solely* in their capacity as handlers, and not as producers. *See* 133 S. Ct. at 2060 ("[T]he civil penalty, assessment, and reimbursement for failure to reserve raisins were all levied on petitioners in their capacity as 'handlers.'"); *id*. ("It is undisputed that the Marketing Order imposes duties on petitioners only in their capacity as handlers."); *id.* at

2061 ("Given that fines can only be levied on handlers, petitioners' takings claim makes sense only as a defense to penalties imposed upon them in their capacity *as handlers*.") (emphasis in original); *id*. ("The relevant question, then, is whether a federal court has jurisdiction to adjudicate a takings defense raised by a handler seeking review of a final agency order."); *id*. at 2062 ("petitioners (as handlers)"); *id*. at 2063 ("[p]etitioners (as handlers)"); *id*. at 2064 ("petitioners, in their capacity as handlers").

It is also clear that Petitioners, as handlers, were at no time owners of any of the raisins allegedly threatened with a taking. Under the Agricultural Marketing Agreement Act ("AMAA"), handlers acquire custody of raisins designated as "reserve-tonnage raisins," but they do so "'for the account'" of the Raisin Administrative Committee, an agent of the United States, meaning that the United States acquires an ownership interest in the raisins. *Id*. at 2058. In addition, raisin producers retain a property interest in the raisins they produce, even after the raisins are transferred to handlers as "reserve-tonnage raisins," because they have a right to the profits from sale of the reserve raisins. *Id.* But handlers are not owners of any of the reserve raisins. As the Department of Agriculture Judicial Officer explained, handlers "acquired" the raisins within the meaning of the Marketing Order, but "acquire" is "a term of art that does not encompass an ownership interest," App. to Pet. for Cert. 122a; as Petitioners have correctly maintained from the outset of this litigation, "[T]itle to the raisins

never transferred from the grower to Mr. Horne and partners under California law." *Id*. at 121a-22a.

Because Petitioners are litigating this case solely as handlers, and handlers have no ownership interest in any raisins, Petitioners have no viable claim under the Takings Clause. *See E. Enters. v. Apfel*, *supra*; *see also Bowen v. Gilliard*, 483 U.S. 587, 605 (1987) (rejecting takings claim because plaintiffs had no property right for takings purposes to continued welfare benefits at same level); *Danforth v. United States*, 308 U.S. 271, 284 (1939) (the property owner "at the time of the taking" is the only party entitled to assert a claim under the Takings Clause); *cf. Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (stating that a takings claim fails at the threshold if "background principles" of property or nuisance law preclude a takings claimant from establishing a protected property entitlement).

Petitioners' attempt to rely on the property interests of producers to support their takings argument not only conflicts with basic takings doctrine but also with the Court's reasoning in *Horne I*. In *Horne I* the government contended that the District Court lacked jurisdiction over this case because Petitioners could present their argument that the government took producers' property by filing suit in the Court of Federal Claims. The Court rejected that argument. In so ruling the Court refused to conflate the Petitioners' status as handlers with their status as producers, insisting that "the Marketing Order imposes duties on petitioners *only* in their capacity as

handlers." 133 S. Ct. at 2060 (emphasis added). Given this logic, Petitioners, in their capacity as handlers, cannot now assert takings claims based on property interests owned, not by them as handlers, but rather by them in their capacity as producers or by other producers.

Understandably, Petitioners want to try to have their cake (present their takings argument in the District Court without regard to their ability, as producers, to sue for just compensation) and eat it too (prosecute their takings claim in the District Court by invoking the property interests they hold as producers). But *Horne I* forecloses this strategy.

Importantly, the conclusion that Petitioners lack a viable takings claim does not mean that the Raisin Marketing Order can never be challenged as a taking, or even that Petitioners, as producers, cannot present their takings argument in court. It simply means that, under the specific jurisdictional scheme created by the Agricultural Marketing Agreement Act, raisin growers such as Petitioners are required to pursue their claims in the conventional fashion—by filing a suit for just compensation in the U.S. Court of Federal Claims. That option was always open to them and it is open to them in the future. What the Court should not countenance, however, is permitting Petitioners to assert without factual foundation a property interest in raisins they do not own.

As the Department of Agriculture correctly observes, *see* Br. for Resp't 54, there is no unfairness in Petitioners having to pay fines and penalties for

violating the law. This outcome is simply the result of the risk Petitioners took in pursuing their ill-fated scheme to escape the legal rules that other members of the industry comply with. Moreover, Petitioners, as producers, gained significant economic benefits by selling their entire crop in the open market in violation of the Marketing Order, and these benefits offset the burden of the fines and other penalties being imposed on them as handlers.[2]

II. The Court Should Reject Petitioners' Invitation to Create a New *Per Se* Takings Category for Interferences with Possessory Interests in Personal Property.

Apart from the fact that Petitioners' case fails for lack of a protected property interest, the Court should

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[2] Petitioners' lack of a property interest in raisins might also be considered through the lens of standing doctrine. A litigant "generally must assert his own rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also Andrus v. Allard*, 444 U.S. 51, 64 n.21 (1979) (ruling that a plaintiff lacked standing to assert a taking of property "owned by others"). The Court has sometimes allowed litigants to represent the interests of third parties where the third party lacks the ability to sue to defend its own rights, *see*, *e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972), but that exception could not apply here, given that producers are perfectly capable of suing in the claims court. *See also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014) (observing that the Court has not resolved whether the prohibition on assertion of third-party claims is a prudential limitation on standing or a requirement of Article III of the Constitution).

reject Petitioners' proposal that the Court create a new *per se* takings rule that would govern alleged takings based on interferences with possessory interests in personal property, including goods sold to the public. The multi-factor *Penn Central* analysis represents the Court's "polestar" for determining whether a governmental action constitutes a taking, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)), and there is no sound reason to depart from that approach in evaluating takings claims based on interferences with possessory interests in personal property. Petitioners assert that precedent of this Court establishes that a *per se* rule applies in this context, but they cite no authority actually supporting that assertion and, so far as we can determine, there is no such authority.

The Court has identified two categories of regulatory takings cases in which a *per se* test applies in lieu of the fact-specific analysis of *Penn Central*.[3] First, the Court has said that *per se* "categorical treatment" is appropriate "where regulation denies all economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Second, the Court has said that regulations

[3] The Court has articulated other, special tests for cases involving development exactions. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994). We agree with Petitioners that these tests do not apply here.

resulting in "permanent physical occupations" of property will be deemed to be takings "without regard to other factors that a court might ordinarily examine." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982). *But cf. Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 522 (2012) (declining to extend this *per se* rule to *temporary* physical occupations of private property).

Both of these *per se* rules arose from cases involving land and are based on the unique character of rights in land, and therefore do not support petitioners' proposal for a quite different *per se* rule covering personal property. The *Lucas* case involved a takings claim based on a coastal regulation that deprived the owner of all economically viable use of his land. 505 U.S. at 1009. The *Lucas* Court stressed that the *per se* rule it announced in that case was explained and justified by the special character of rights in real property; "[*i*]*n the case of land*," the Court said, "we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Id.* at 1028 (emphasis added). In subsequent cases, the Court has stressed that this *per se* rule only applies to total denials of all use of real estate. *See*, *e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (ruling that there was no *Lucas* taking where owner

could build one substantial residence on an 18-acre parcel).

Loretto reviewed a regulation that mandated the permanent placement of cable television equipment on a private apartment building. The Court again emphasized that the case involved real property, justifying the application of a *per se* rule by observing that, "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." 458 U.S. at 426-27. The Court described a permanent physical occupation of real property as "qualitatively more intrusive than perhaps any other category of property regulation," *id.* at 441, and noted that "[e]arly commentators viewed a physical occupation of real property as the quintessential deprivation of property." *Id.* at 430 n.7. The Court has repeatedly declined to extend the *per se* rule articulated in *Loretto* beyond required, permanent physical occupations of real property. *See*, *e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 530 (1992); *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989).

In addition to not supporting Petitioners' proposed *per se* rule, the *Lucas* decision explicitly contradicts Petitioners' proposed rule as applied to the specific kind of property at issue in this case. "[I]n the case of personal property," the Court said, "by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at

least if the property's only economically productive use is sale or manufacture for sale)." 505 U.S. at 1027-28. In other words, the *Lucas* Court categorically exempted personal property from the *Lucas per se* rule, at least in the case of personal property sold in commerce or produced for sale. This exemption obviously applies to raisins grown and processed for sale to the public.

Furthermore, the *Lucas* Court justified the *per se* rule for denials of all use of land by observing that a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* at 1017. Because the *Lucas* Court justified the *per se* rule it announced by analogizing a regulation that deprives the owner of all use of land to an "appropriation," and the Court categorically excluded commercial personal property from the scope of the *per se* rule, the *Lucas* decision supports the conclusion that, whatever rule may apply to appropriations in general, a *per se* rule should not apply to "appropriations" of personal property, at least when the property is sold in commerce.

There is no debate that government interference with possession represents a serious impairment of property interests. Indeed, appropriations of personal property may commonly result in takings, as the cases cited in Petitioners' brief amply demonstrate. And physical seizures of real property are especially problematic under the Takings Clause. *See Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518

(2012) (discussing cases addressing seizures of real property interests). But the specific question presented by this case is whether the Court should create a categorical *per se* rule for alleged takings based on impairments of possessory interests in personal property, including commercial goods. Adoption of such a *per se* rule would preclude the courts, *in every case covered by the rule*, from considering the facts and circumstances of the particular case, including the character and purpose of the government action, whether claimants have suffered any economic loss, and whether there has been any interference with their reasonable investment-backed expectations. There is no warrant in the Court's precedents or the logic of its decisions for adopting this new *per se* rule. *See Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163 (1980) (holding that government appropriation of interest accruing on an interpleader fund was a taking, but observing that "[*n*]*o police power justification is offered for the deprivation*") (emphasis added); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (assuming, but only for the sake of argument, that a requirement that interest earned in bank accounts be transferred to the Washington Legal Foundation was "akin" to a *per se* taking, and then rejecting the takings claim on the merits).

Furthermore, the proposed *per se* rule would be unworkable in practice. Local governments are commonly compelled to impair possessory interests in personal property for a wide variety of important

public purposes and it is unthinkable that all such actions could be *per se* takings. Every-day examples of such "appropriations" by local governments include towing illegally parked automobiles, removing unwholesome food from store shelves and prohibiting its sale, and removing abused and mistreated pets and other animals from the care of neglectful owners. None of these actions can be takings, much less *per se* takings. *See Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 730-31 (1865) ("[A] bale of goods, . . . laden with infection, may be seized under 'health laws,' and if it cannot be purged of its poison, may be committed to the flames."). Other levels of government engage in similar kinds of interferences with possessory interests, such as seizures of adulterated and dangerous drugs or of pirated copyright materials. These types of interferences with possessory interests may raise important statutory, common law or even constitutional questions in some instances. But the mere fact that the government is physically "appropriating" property cannot, by itself, support an automatic finding of a taking. *See Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (ruling that abatement of an owner's interest in an automobile pursuant to a Michigan forfeiture law did not constitute a taking under the Fifth Amendment).

The Court's *per se* rules relating to real property are subject to exceptions based on "background principles" of nuisance and property law, *Lucas*, 505 U.S. at 1027-30, and these background principles certainly can defeat takings claims involving personal property

interests. But these background principles are too narrow in scope to exempt from takings liability the full range of government impairments of personal property interests, especially in commercial products, that have traditionally been recognized as entirely acceptable. That is almost certainly why the *Lucas* Court, in addition to recognizing that background principles will defeat "total" takings claims, independently exempted the entire universe of commercial personal property from the *Lucas* rule. *See* Brief for the United States as *Amicus Curiae* in Support of Reversal, *Lucas v. S.C. Coastal Council*, No. 91-453, 1991 WL 11004086, at *13-15 (cataloguing examples illustrating why the *per se* denial-of-all-economically-viable use rule could not sensibly be applied to many types of personal property); *cf. Lucas v. S.C. Coastal Council*, 505 U.S. at 1013 (Kennedy, J., concurring in the judgment) (observing that, in the case of coastal land, nuisance doctrine "cannot be the sole source of state authority to impose severe restrictions," given the "unique concerns" raised by "a fragile land system").

This particular case also illustrates why the proposed *per se* rule for alleged takings based on interferences with possessory interests in personal property should be rejected. The purpose of the Takings Clause is to "bar Government from forcing 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). The fundamental problem with applying a *per se* rule in this case is that it would compel the courts to ignore all of the features of the raisin marketing

program which suggest that, as a matter of fairness and justice, the public should *not* be required to pay Petitioners under the Takings Clause. These features include the fact that the program has been in place for many decades and Petitioners voluntarily entered this heavily regulated industry many years ago; Petitioners cannot now assert that the continued operation of the raisin marketing program interferes in the least with their reasonable investment-backed expectations. To the contrary, Petitioners have sought to evade the rules of the raisin marketing program in an attempt to secure a new, special benefit for themselves at the expense of other, law-abiding members of the industry. The purpose of the raisin marketing program and the lack of adverse economic effect on Petitioners also weigh against the claim.

While the general goal of the raisin marketing program is to maintain an "orderly" market in raisins, the most direct and immediate beneficiaries of the program are members of the raisin industry. The Raisin Marketing Order was promulgated "at the request of the raisin industry," App. to Pet. for Cert. 44a, and it persists today only because a majority of producers have not voted to repeal it. *See* 7 U.S.C. § 608c(16)(B). Its basic purpose is to restrict the market supply of raisins in order to prop up raisin prices, largely for the benefit of raisin growers. *See Horne v. Dep't of Agric.*, 750 F.3d 1128, 1143 (9th Cir. 2014) ("[The] program does not overly burden the producer's ability to compete while reducing *to the producer's benefit* the potential instability of this particular market.") (emphasis added); *Horne v. Dep't of Agric.*, 2009

WL 4895362, at *23 (E.D. Cal. Dec. 11, 2009) ("[T]he 'primary focus' of the market control program is to 'maximize return to the grower.'") (quoting Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 6 (1995)).

In addition, the Raisin Administrative Committee ("RAC"), which oversees the implementation of the Marketing Order, is composed almost entirely of raisin producers and handlers. The industry's self-evident motivation in supporting this system of self-regulation has been to create what amounts to an industry-wide cartel to control the market supply of raisins and increase the profits of raisin growers. Absent government authorization, the program would appear to be a *per se* violation of Section 1 of the Sherman Antitrust Act. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979) (stating that a "practice [that] facially appears to be one that would always or almost always tends to restrict competition or decrease output," will be deemed a *per se* violation of Section 1 of the Sherman Antitrust Act).

The primary losers under this program, of course, are consumers, who are forced to pay more for raisins than they would under competitive market conditions. *See* Brief for the Cato Inst. et al. as *Amici Curiae* in Support of Petitioners 6 ("[T]he [RAC] does consumers no favors either: its creation of 'artificial raisin-scarcity . . . drives up prices.'") (quoting *Why Does America Regulate the Trade in Raisins?*,

The Economist (April 14, 2013)).[4] On the other hand, to the extent the program succeeds in raising prices for any raisin producer, it raises prices for all raisin producers, including those who wish it did not exist at all. If this Court were to apply a *per se* takings rule and overrule the prior precedent that the program does not result in a taking, raisin producers who already benefit from this publicly-subsidized program would reap a windfall at public expense. The litigation parade might be led by Petitioners and other industry dissidents, but it is difficult to see why many other moderately self-interested raisin growers would not also file claims for financial compensation. The upshot would be that the costly public subsidy now enjoyed by the raisin industry would be expanded at still more public expense. This outcome would cynically mock the principles of fairness and justice that are supposed to govern takings law.[5]

We recognize that Petitioners and their *amici* contest the factual accuracy of the foregoing account of how the Marketing Order benefits raisin growers

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[4] Whether the raisin marketing program continues to merit support by Congress does not, of course, affect the issue of whether the program results in a taking.

[5] Adopting Petitioners' proposed *per se* rule also would be unfair to raisin growers who both comply with the Marketing Order and decline to sue the government under the Takings Clause; their continued compliance with the Order ensures that the market supply of raisins is still constrained, making it possible for law-breakers and/or takings claimants to continue to reap windfalls.

at public expense. *See* Br. for Pet'rs 25-26; Brief of the DKT Liberty Project and Eighteen Independent Raisin Growers as *Amici Curiae* in Support of Petitioners 4-19. Setting aside the merits of that response, simply by making the argument Petitioners acknowledge the common-sense intuition that economic fairness must be a relevant consideration in this case, a concession that is inconsistent with Petitioners' argument for a *per se* rule. The ultimate bankruptcy of Petitioners' position is revealed by the fact that, according to their legal theory, their economic arguments are ultimately mere coloration under a *per se* rule. According to their position, even if it is correct that the Marketing Order significantly enriches raisin producers at great public expense, they are still entitled to invoke a *per se* rule that would enrich them still further at yet further public expense. In the interest of fairness and justice, the Court should not adopt a new *per se* rule that would support such an outlandish result.[6]

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[6] Petitioners contend that the government could achieve the same market supply outcome by restricting sales, without necessarily requiring that reserve raisins be handed over to the RAC. Br. for Pet'rs 25. It seems odd to think that a taking would be less likely if the government required surplus raisin production to rot in the sun rather than be put to productive use, including paying over the net proceeds from raisin sales to raisin growers. In any event, this argument simply reinforces why a *per se* takings test is inappropriate; it is just this kind of case-specific question about the purpose of the program that can be weighed under *Penn Central*, but not under a *per se* test.

III. A Property Owner Generally Cannot Defend Against Sanctions for Violating a Law on the Ground that Enforcement of the Law Would Result in a Taking of Private Property for Public Use.

In all events, the Court should reject the argument by Petitioners and several of their *amici* that property owners, in general, are entitled to violate a law they believe constitutes a taking and then raise the Takings Clause as a defense to sanctions for doing so. *See* Br. for Pet'rs 20, 27-31; Brief of the States of Texas, Arizona and North Dakota as *Amici Curiae* in Support of Petitioners 12-14; Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners 26-27. In *Horne I* the Court ruled that Petitioners, as handlers, can raise the takings issue as a defense to the sanctions being imposed on them in this case, given that the special AMAA jurisdictional provisions bar them from suing for just compensation in the Court of Federal Claims. Petitioners and their *amici* are now making a much broader argument: that property owners in general can always raise the takings issue as a defense to sanctions for violating laws alleged to be takings, even when the just compensation remedy is available. The Court should reject this broader argument.[7]

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[7] *See generally* John D. Echeverria, *Eschewing Anticipatory Remedies for Takings: A Response to Professor Merrill*, 128 Harv. L. Rev. F. (forthcoming Apr. 10, 2015).

A taking of private property involves an exercise of eminent domain, the governmental power to take private property from individual citizens to advance the common good. The power of eminent domain is an inherent attribute of sovereignty that precedes the Constitution; as the Court put it long ago: Eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty." *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). The Takings Clause—"nor shall private property be taken for public use, without just compensation"—places conditions on the exercise of the eminent domain power. Specifically, it prohibits a taking if it is for other than a "public use," or if the taking is without "just compensation." By the same token, the Takings Clause, by its terms, places *no* constraint on the eminent domain power so long as it is exercised for a public use and just compensation is available.

With respect to the just compensation requirement, the Takings Clause does not require that compensation be offered "in advance of or even contemporaneous with the taking" in order to satisfy the Takings Clause. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990). "All that is required is the existence of a reasonable, certain and adequate provision for obtaining compensation at the time of the taking." *Id*. (internal quotation and citation omitted). In addition, a successful takings claimant is constitutionally entitled to prejudgment interest as part of the compensation award. *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 306 (1923). Thus, in

practice, awards of just compensation equitably protect property owners from the economic losses occasioned by takings for public use.

In accord with this basic understanding of the eminent domain power and the Takings Clause, the Court has repeatedly affirmed that the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of . . . a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987) (emphasis in original). Thus, "[I]n general, '[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking.'" *United States v. Riverside Bayview Homes*, *Inc*., 474 U.S. 121, 127-28 (1985) (quoting *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1016 (1984)); *see also Preseault*, 494 U.S. at 11-17; *Ruckelshaus*, 467 U.S. at 1016; *cf. Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 544 (2005) (repudiating the "substantially advance" takings test in part because it implied, contrary to this long line of authority, that a successful takings claim might support a grant of injunctive relief).

For example, a farmer opposed to the Keystone pipeline cannot sue under the Takings Clause to block the taking of her property for a right of way for the pipeline, so long as just compensation is available, absent a showing the taking is unauthorized or otherwise not for a public use. Likewise, if a local government is regulating land use to protect the community

and the owner has the opportunity to seek compensation for any taking that might result, the owner cannot invoke the Takings Clause in a bid to block the regulation. The Takings Clause imposes the same basic constraints on takings regardless of whether the government is condemning private property or the owner has brought an inverse condemnation action.

The Court has said that, in exceptional cases, the courts can block government from taking private property, but only when the taking is *not* for a public use or just compensation is *not* an available remedy. Thus, invoking the public use requirement, the Court has said that a taking may be enjoined if the taking would serve an illegitimate purpose, *see Kelo v. City of New London*, 545 U.S. 469, 477-78 (2005), or is contrary to some other law. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Similarly, invoking the just compensation requirement, the Court has said that an owner can seek to enjoin a taking if no forum is available in which to sue for compensation, *see Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 & n.17 (1949) (discussing *United States v. Lee*, 106 U.S. 196 (1882)), or if the alleged taking would generate "potentially uncompensable damages." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 94 n.39 (1978). In accord with these precedents, a plurality of the Court has adopted the presumption that Congress has not provided a just compensation remedy if an alleged taking involves money, on the theory that Congress could not sensibly embrace the pointless, circular exercise of forcing a citizen to sue the government to give back money the government is simultaneously

taking from that citizen. *See E. Enters. v. Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion).

These exceptional cases do not detract from the general principle that the exclusive remedy for a taking for a public use is a suit for just compensation, so long as that remedy is actually available. Indeed, because these exceptions only apply either when the taking is not for a public use or just compensation is not available, they collectively uphold and reaffirm the understanding that an injunction is *not* available if a taking is for a public use and just compensation is available. Because the eminent domain power is an inherent attribute of sovereignty, so long as the taking is for a public use and just compensation is available, a court order based on the Takings Clause blocking a taking would be an illegitimate exercise of judicial power in derogation of the authority of the other branches of government. *See Hurley v. Kincaid*, 285 U.S. 95, 104 (1932) ("[E]ven if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law.").

There are relatively few cases involving efforts by property owners to defend against monetary sanctions for violating the law by arguing that enforcement of the law would result in a taking. *See*, *e.g.*, *Mo. Pac. Ry. Co. v. Nebraska*, 217 U.S. 196 (1910), discussed below. It is self-evident, however, that

property owners can defend against sanctions by raising a takings objection only if they can properly seek to enjoin the government from proceeding with the taking. Permitting a property owner to defy the law and avoid sanctions for doing so under the Takings Clause is functionally equivalent to allowing a property owner to enjoin the government from taking private property. In either case, if the property owner's argument prevails, she can stop the government from acting.

Petitioners cite *Missouri Pacific Railway Co. v. Nebraska*, 217 U.S. 196 (1910), as support for their argument that "fines for refusal to submit to unconstitutional takings may be challenged under the Takings Clause." *See* Br. for Pet'rs 30. In that case the Court allowed a railroad to raise the Takings Clause as a defense to a sanction for violating a law requiring railroads to build side rails at the request of grain elevator operators. 217 U.S. at 208. But the Court justified this approach by observing that Nebraska law provided no procedure for claiming just compensation for a taking. *See id*. at 205 ("It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required."). This decision fits squarely within the line of exceptional cases recognizing that parties can seek to enjoin, or avoid sanctions for violating, laws that allegedly take private property when there is no opportunity to seek just compensation. *Missouri Pacific Railway Co.* does not support the argument that property owners can raise the Takings Clause as a defense to a sanction

imposed for violating a law alleged to be a taking when there *is* an opportunity to sue for just compensation.

Petitioners also cite *Village of Norwood v. Baker*, 172 U.S. 269 (1898), for the proposition that a property owner can resist a monetary sanction by invoking the Takings Clause, *see* Br. for Pet'rs 29, but that unique case does not support their theory either. In that case, the government, confronted by the high cost of condemning a parcel of property, attempted to impose a special charge on the owner in order to raise the funds necessary to finance acquisition of the property. The Court saw through this gambit and declared that the charge violated the Takings Clause. This narrow precedent serves simply to "prevent[ ] circumvention of the Takings Clause by prohibiting the government from imposing a special assessment for the full value of a property in advance of condemning it." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2608-09 (2013) (Kagan, J., dissenting). *Village of Norwood* does not support the different and much broader theory advanced by Petitioners that a property owner, at her option, can defy any law and raise the Takings Clause as a defense to sanctions for doing so.

The Court has stated, as a general proposition: "[O]ne cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Wright v. Georgia*, 373 U.S. 284, 291-92 (1963). Thus, a citizen can generally raise other provisions of the Bill of Rights as a defense to

the imposition of sanctions for disregarding a law if the law is unconstitutional. *See*, *e.g.*, *Williams-Yulee v. Fla. Bar*, U.S. Supreme Court, No. 13-1499 (addressing whether sanctions for violating a Florida law barring candidates running for office from soliciting campaign contributions violate the First Amendment). But this general proposition does not apply in cases arising under the Takings Clause; if the conditions of the Takings Clause are met, the Takings Clause provides no basis for seeking to void sanctions for violating the law.

Nor does this mean that the Takings Clause is in any sense a "poor relation" to other constitutional rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). The fact that, generally speaking, the Takings Clause cannot be raised as a defense to sanctions for breaking the law simply reflects the fact that, unlike most other provisions of the Constitution, the Takings Clause is not designed to prevent government from acting but instead creates a right to compensation when a government action amounts to a taking for public use. *See United States v. Causby*, 328 U.S. 256, 267 (1946). In addition, the Court has said that the requirement to pay compensation under the Taking Clause is "self-executing," meaning that no congressional recognition of a right to sue is required to ensure its enforcement. *United States v. Clarke*, 445 U.S. 253, 257 (1980). In sum, there is no need to make a special effort to rescue the Takings Clause from some mythical lesser status.

Allowing property owners to routinely raise a takings argument against sanctions for violating the law would have serious adverse effects on local governments' ability to advance important public goals. As the Court explained in its landmark decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), after a court rules that a regulation represents a taking requiring payment of just compensation, government officials have a range of options. They cannot avoid liability for a temporary taking from the date the taking occurred, but they can rescind or modify the regulation to eliminate liability going forward. *Id*. at 317. Alternatively, they can decide that the government objective is so important that they wish to continue to enforce the regulation, even if they have to bear the unanticipated financial burden of paying compensation under the Takings Clause. *Id*.

Allowing property owners to routinely raise a takings defense to sanctions based on their violations of the law would make the government's options far more limited. If a property owner violates a regulation and a court subsequently rules that enforcement of the regulation would have constituted a taking, the public purpose of the regulation is completely thwarted. This outcome contradicts the function of the Takings Clause, which is "not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of . . . a taking." *Id.* at 314 (emphasis in original).

The magnitude of the harms local governments and their citizens would suffer from this novel interpretation of the Takings Clause would vary depending on the facts and circumstances. For example, a community might seek to preserve a historic landmark. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Under the traditional understanding of the Takings Clause, the government can insist on enforcing a law protecting the landmark, while accepting the risk of incurring financial liability under the Takings Clause. Under Petitioners' approach, however, property owners would be granted a license under the Takings Clause to violate the law and destroy the historic landmark, leaving the government only the option of pursuing sanctions. The prospect of imposing sanctions would be useless in term of advancing the community's goal of protecting the landmark, contrary to the purpose and design of the Takings Clause. Many other examples can easily be imagined where authorizing property owners with takings objections to violate the law could seriously and irreparably damage valuable resources.

Petitioners attempt to assign great significance to the fact that the penalties imposed in this case were based, in part, on the market value of the raisins they and other growers declined to place in reserve. They suggest that, at least when the penalty for breaking the law is the "dollar equivalent" of what a court would award in just compensation if the law were complied with, an order blocking sanctions for violating the law is indistinguishable from a

compensation award for a taking. The economic impact of these options may be comparable from the property owner perspective, but these alternatives are hardly the same from the governmental perspective, for the reasons discussed above. In any event, the premise of the argument is mistaken, because in this case the sanctions included an assessment of several hundred thousand dollars over and above the market value of the raisins that the Hornes and other growers declined to place in reserve. In other cases the sanctions a property owner might incur for violating a law could be much greater or much less than the potential compensation award if the owner complied with the law and prosecuted a takings claim. *See*, *e.g.*, 33 U.S.C. § 1319(g)(3) (criteria for assessing penalties under the Clean Water Act); 20 U.S.C. § 1268(a) (criteria for assessing penalties under the Surface Mining Control and Reclamation Act). The merits of Petitioners' theory cannot possibly depend on the specific size of the monetary sanctions imposed for violations of the law.

Finally, the Court should reject the theory articulated by the Ninth Circuit, based on the decision in *Koontz*, that a property owner should be permitted to raise a takings argument in opposition to sanctions for violating the law. *See Horne v. Dep't of Agric.*, 750 F.3d 1128, 1137-38 (9th Cir. 2014). In *Koontz* the Court addressed the question of whether the *Nollan*/*Dolan* standards that apply to traditional development exactions should also apply to monetary exactions. To support the conclusion that they should, the Court reasoned that monetary exactions can properly be

viewed as takings for the purpose of applying the *Nollan*/*Dolan* framework because they "'operate upon . . . an identified property interest,'" that is, the property the owner is seeking to develop. 133 S. Ct. at 2599 (quoting *E. Enters. v. Apfel*, 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part)). The Ninth Circuit argued that, just as in *Koontz* the "link" between a monetary exaction and a piece of real property justifies applying the *Nollan*/*Dolan* standards to a monetary exaction, the link between the monetary sanctions in this case and property interests in raisins justifies evaluating the constitutionality of the sanctions by evaluating whether implementation of the Marketing Order would have resulted in a taking. *Horne*, 750 F.3d at 1137.

The Court should reject this extravagant and unwarranted reading of *Koontz*, which in any event was unnecessary in light of the ruling in *Horne I* that Petitioners can challenge the sanctions in this case. The *Koontz* Court focused on the question of the scope of the application of the *Nollan*/*Dolan* standards, and nothing in the Court's discussion of that issue supports the very different argument that an owner can routinely raise the Takings Clause as a defense for violating the law. The simple fact that there was a link between money and property in *Koontz* and that there is also an arguable link between monetary sanctions imposed on Petitioners and property interests in raisins (owned by somebody else) is of no analytical significance and does not support the Ninth Circuit's theory supposedly based on *Koontz*. Furthermore, the *Koontz* Court expressly reaffirmed that just compensation is the traditional remedy for a taking ("the

Fifth Amendment mandates a particular *remedy*—just compensation—only for takings," 133 S. Ct. at 2597) (emphasis in original), directly contradicting the Ninth Circuit's expansive interpretation of *Koontz*.

In sum, there is no debate that Petitioners, as handlers, in this particular case can raise the Takings Clause as a defense to the sanctions being imposed on them, given that the usual just compensation remedy is closed to them. But the Court should reject the broader argument of Petitioners and their *amici* that property owners, in general, can raise the Takings Clause as a defense to sanctions for violating laws alleged to be takings, even when the just compensation remedy is available.

CONCLUSION

For the foregoing reasons and for the reasons stated in the brief of the Respondent Department of Agriculture, the Court should affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JOHN D. ECHEVERRIA
VERMONT LAW SCHOOL
164 Chelsea Street
South Royalton, VT 05068
(802) 831-1386
JEcheverria@vermontlaw.edu
Counsel of Record

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