No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
Petitioners,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF SUN-MAID GROWERS OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Sun-Maid Growers of California ("Sun-Maid") is an agricultural marketing cooperative,[2] and the largest single marketer of raisins in the world. Sun-Maid is owned by approximately 750 raisin farmers who are members, or equity owners, of the cooperative. Sun-Maid was originally founded in 1912 as the California Associated Raisin Company. The trademark "Sun-Maid," a young woman wearing a red bonnet and holding a tray of freshly-picked grapes, was first created in 1915, and the cooperative changed its name in 1922 to identify more closely with its highly successful brand. The "Sun-Maid" trademark remains one of the world's most identifiable food brands to this day.

On behalf of its 750 farmer members, Sun-Maid presently processes and markets about 30% of the California raisin crop; since California is responsible

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

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

for 40-45% of world raisin production, Sun-Maid's share of the world crop is approximately 12-15%.

Sun-Maid is a competitor of petitioners, and is subject to the same regulatory regime that petitioners flouted in this case. Like petitioners, Sun-Maid grows its own raisins, and hence is a "producer" for purposes of 7 C.F.R. § 989.11. Like petitioners, Sun-Maid also processes its own raisins, and thus is also a "handler" for purposes of 7 C.F.R. § 989.15. Unlike petitioners, who have attempted to evade long-standing regulatory requirements to gain a competitive advantage, Sun-Maid has played by the regulatory rules, and it has an interest in seeing that petitioners, as competitors, also comply with the same regulatory rules governing the raisin industry in California.

INTRODUCTION

The raisin industry in California has operated under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq*. ("AMAA") since 1949. Under the AMAA, the U.S. Department of Agriculture issued a "raisin marketing order," which only directly regulates raisin "handlers," that is, processors and packers. That order requires that handlers withhold a certain percentage of the raisin crop from the open market for a "reserve tonnage" pool administered by the Raisin Administrative Committee. Raisins allocated to the reserve tonnage typically yield marginal, if any, profit, for producers compared to raisins sold on the open market.

The purpose of the raisin marketing order is, in essence, to help maintain orderly marketing conditions through the regulation of the handling of raisin supplies. That system benefits the entire raisin industry, including petitioners, by avoiding price volatility that was endemic prior to promulgation of the raisin marketing order.

Petitioners are vertically integrated, in that they both produce and handle their own raisins. In addition, petitioners handle the raisins of other producers that are not vertically integrated. Indeed, in this case, the bulk of petitioners' liability for violations of the marketing order stems from petitioners' failure, as a handler, to comply with the marketing order for raisins produced by *other* producers. During the two periods at issue here, petitioners produced only 24.7% and 12.3%, respectively, of the raisins they handled. *See* United States Br. at 9.

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

Petitioners, on the other hand, "willfully and intentionally" violated the raisin marketing order "to obtain an unfair competitive advantage over other California raisin handlers [such as Sun-Maid] who were in compliance with the Raisin Order." J.A. 45,

27 (findings of ALJ). That is to say, petitioners sought to take advantage of the higher market price for raisins that resulted from their competitors' compliance with the marketing order. Having been caught red-handed in their attempts to gain an unfair and illegal market advantage, petitioners now seek refuge in high constitutional principle. As discussed below and in the brief of the United States, that effort is unavailing.

SUMMARY OF THE ARGUMENT

1. The marketing order issued pursuant to the AMAA required petitioners, solely in their capacity as *handlers* of raisins produced by both themselves and other producers, to set aside a specified percentage of those raisins as reserve tonnage. Petitioners willfully defied that order, and for that are subject to civil liability as *handlers* in this enforcement action. The AMAA has no application to petitioners in this enforcement action in their capacity as *producers*.

Petitioners have no standing to assert a Takings defense in this handler enforcement action because as *handlers,* petitioners never took title to the reserve tonnage raisins subject to the marketing order, which instead transferred title from the producers directly to the Raisin Administrative Committee. If petitioners in their capacity as *handlers* had complied with the marketing order and transferred the appropriate percentage of raisins to reserve tonnage, then they and the other producers whose raisins were subject to the order could have

sought relief, as *producers*, in the Court of Claims under the Tucker Act for any taking thereby effected.

2. If this Court reverses the Ninth Circuit, this Court should be clear that its holding applies to all entities with dual producer/handler capacities.

ARGUMENT

I. Petitioners Cannot Assert a Takings Defense in Their Capacity as Handlers Because as Handlers Petitioners Never Had Title to the Raisins that They Failed to Reserve In Violation of the Marketing Order

The key that unlocks this case is the statutory distinction between "producers" and "handlers." The AMAA regulates the activities of raisin handlers, not raisin producers. *See* 7 U.S.C. § 608c(1) (authorizing the Secretary to issue marketing orders applicable to "handlers"); 7 U.S.C. § 608c(14)(B) (authorizing the Secretary to impose civil penalties on handlers for failure to comply with marketing orders); 7 U.S.C. § 608c(15)(A) ("[a]ny handler subject to an order" under the AMAA may contest a marketing order). The AMAA further specifies that "[n]o order issued under this chapter shall be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B).

The raisin marketing order required petitioners, in their capacity as *handlers*, to set aside a certain percentage of the raisins they handled as reserve

tonnage for the Raisin Administrative Committee, rather than sell them on the open market. Petitioners failed to do so—for both raisins that they originally produced as well as raisins of other producers, which as noted above amounted to approximately 72% in one year and 87% in the following year of the raisins that petitioners handled—and thus exposed themselves to civil liability as handlers in this enforcement action brought by the government.

Petitioners indisputably have no standing to assert a Takings defense to avoid civil liability, as handlers, for failing to set aside as reserve tonnage *the raisins produced by other producers*, because as handlers petitioners never took title to raisins produced by other producers subject to the reserve tonnage requirement. Instead, the marketing order transferred title directly from the producers to the Raisin Administrative Committee. *See* 7 C.F.R. § 989.66. If petitioners had complied with the reserve tonnage requirement with respect to the raisins produced by other producers, those producers, to the extent that petitioners' compliance with the marketing order would have effected a compensable "taking," would have been required to bring a claim in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1).

Petitioners similarly have no standing, in their capacity as *handlers*, to assert a Takings defense in this enforcement action for failing to set aside as reserve tonnage even raisins produced by them, because as *handlers*, petitioners never had title to

even those raisins. Like other producers whose raisins handled by petitioners that were subject to the marketing order's reserve tonnage requirement, petitioners' recourse as producers for any "taking" effected by compliance with the marketing order was to bring an action in the Court of Federal Claims.

Here, however, petitioners consciously chose to defy the marketing order, and no taking, physical or otherwise, occurred—either of raisins produced by other producers or of raisins produced by petitioners in their capacity as producers. Having willfully failed to comply with the marketing order in their capacity as handlers, petitioners are now subject to civil liability as handlers and have no standing to assert a Takings defense in this action, much less bring any subsequent action as a producer in the Court of Claims for a taking that never happened.[3]

II. If This Court Reverses the Ninth Circuit, This Court Should Make Clear that Its Holding Applies to Entities With Dual Producer/Handler Capacities

If this Court reverses the Ninth Circuit and holds that petitioners may assert their Takings defense in this handler enforcement action, Sun-Maid requests that the Court make clear that its holding applies to all entities that have dual producer/handler capacities.

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[3] Because petitioners have no standing to assert their Takings defense, this Court could dismiss the writ of certiorari as improvidently granted rather than affirm the Court below.

CONCLUSION

For the reason provided above and in the brief of the United States, this Court should affirm the decision below if it does not dismiss the writ of certiorari as improvidently granted.

February 19, 2013

Respectfully submitted,

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