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IN THE SUPREME COURT OF THE UNITED STATES

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MARVIN D. HORNE, ET AL. :

Petitioner : No. 14-275

v. :

DEPARTMENT OF AGRICULTURE. :

- - - - - x

Washington, D.C.

Wednesday, April 22, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

MICHAEL W. McCONNELL, ESQ., Washington, D.C.; on behalf of Petitioners.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 14-275, Horne v. Department of
5 Agriculture.

6 Mr. McConnell.

7 ORAL ARGUMENT OF MICHAEL W. McCONNELL

8 ON BEHALF OF THE PETITIONERS

9 MR. McCONNELL: Mr. Chief Justice, and may
10 it please the Court:

11 Thank you for being willing to hear this
12 little case a second time. It does involve some
13 important principles and the livelihoods of Marvin and
14 Laura Horne, and more indirectly, hundreds of small
15 California raisin growers will be profoundly affected.

16 This is an administrative enforcement
17 proceeding that was brought by the Department of
18 Agriculture against my clients commanding the
19 relinquishment of funds connected to specific pieces of
20 property, namely, reserve-tonnage raisins. My clients
21 appear in their capacity as handlers, but under their --
22 in the particular facts of this case, the economic
23 circumstances are somewhat different than are ordinarily
24 true in -- in this industry because as handlers, the
25 Hornes actually assumed the full financial

1 responsibility for the raisins that were not turned over
2 to the Department of Agriculture.

3 The producers in this case were fully paid
4 for their raisins. This is a factual finding to be
5 found in the judicial officer's opinion at 66a of the
6 appendix to the -- to the petition. The Hornes paid the
7 producers for their raisins. According to the judicial
8 officer, those raisins became part of the inventory of
9 the Hornes. The -- when the Raisin Administrative
10 Committee, which I'll refer to as the RAC, came after
11 the raisins, it was the Hornes and the Hornes only who
12 bore the economic burden of this taking.

13 JUSTICE GINSBURG: I thought that -- I
14 thought the growers were paid only for the volume that
15 they were permitted, that was permitted, the permitted
16 volume, and that they were not paid for what is -- goes
17 in the reserve pool.

18 MR. McCONNELL: Justice Ginsburg, that is
19 true in the ordinary course. That was not true in this
20 particular case because of the unusual business model
21 of -- of my clients. These producers were paid the --
22 for all of their raisins.

23 JUSTICE GINSBURG: Are you objecting to the
24 volume limitation, or is it just that the -- the reserve
25 pool that you find --

1 MR. McCONNELL: We --

2 JUSTICE GINSBURG: -- troublesome?

3 MR. McCONNELL: We believe that a volume
4 limitation would be a use restriction. It might
5 possibly be challengeable under the Penn Central Test,
6 but it is -- would not be a per se taking. In this
7 case, because the government, the RAC, which is an agent
8 of the Department of Agriculture, actually takes
9 possession, ownership of the raisins, it is that -- it
10 is that aspect of the case which we're challenging
11 against the taking.

12 JUSTICE GINSBURG: But that's what so -- so
13 puzzling because if -- if you're not challenging the
14 volume limit itself, you can't sell more than 60 percent
15 of your crop.

16 MR. McCONNELL: That's correct.

17 JUSTICE GINSBURG: And what happens to the
18 rest of it? You're not going to be able to feed your
19 family on the rest, the 40 percent.

20 MR. McCONNELL: Again, in the -- in the
21 ordinary case, the reserve percentage, which in one case
22 was 37 percent and -- and it was 30 percent and in the
23 other case 47 percent, is -- is handed over to the
24 Raisin Administrative Committee.

25 JUSTICE GINSBURG: But if it wasn't, if --

1 if we just had a volume, you cannot sell more than X
2 amount, then I take it that the grower would get
3 nothing, nothing at all. At least with this reserve
4 pool, there is the possibility of getting some money.

5 MR. McCONNELL: Well, it -- it all depends.
6 The way volume controls generally work is that the owner
7 of the produce is permitted -- they have to hold back a
8 certain amount in a reserve and then they're permitted
9 to sell that reserve as the market conditions continue.

10 In this case, of course, the RAC sold the
11 raisins, in some cases even above the field price.
12 There was a market for the raisins, so I would assume
13 that volume controls under these economic conditions
14 might have left the -- these particular people better
15 off than under the current circumstance.

16 JUSTICE SOTOMAYOR: So what you're
17 complaining about is the administrative expenses?

18 I don't -- I still don't understand why this
19 makes this a Penn Central case as opposed to a -- a per
20 se taking. You've -- you've given up on this being a
21 Penn Central case.

22 MR. McCONNELL: We have never claimed that
23 there was a Penn Central case.

24 JUSTICE SOTOMAYOR: And so basically, you
25 see a nexus between the regulation and its purpose.

1 MR. McCONNELL: We do. But more
2 fundamentally, this is an actual transfer of the raisins
3 themselves to the government. This is the government --

4 JUSTICE SOTOMAYOR: How is this different
5 than Leonard?

6 MR. McCONNELL: Well, Leonard involved
7 oyster shells which are owned by the State. They're
8 wild animals, they're the property of the State, and the
9 oystermen had no property interest in them other than
10 what the State chose to license them to harvest.

11 JUSTICE KAGAN: Gosh, is that really true,
12 Mr. McConnell? I mean, when these fishermen took the
13 oysters, the -- you know, including the shells from the
14 bay or other waters, you know, they could then sell the
15 oysters. Why weren't the oyster shells theirs at that
16 point?

17 MR. McCONNELL: They have whatever property
18 interest the State of Maryland provided for them. And
19 the State of Maryland withheld the 10 percent of the
20 oyster shells for the purpose of essentially fertilizing
21 the -- the oyster that --

22 JUSTICE KAGAN: I mean, I guess I -- I would
23 have thought that as soon as they bring the oysters out
24 of the bay and they haul their catch to shore, that what
25 they've hauled to shore is then theirs.

1 MR. McCONNELL: Except for the 10 percent
2 that the State reserved, yes.

3 JUSTICE KAGAN: Well, so I guess what
4 Justice Sotomayor's question is is why wouldn't the same
5 be true as to raisins?

6 MR. McCONNELL: Because raisins are not wild
7 animals, even if they're dancing --

8 (Laughter.)

9 MR. McCONNELL: -- and they did not
10 originally belong to the Federal government.

11 JUSTICE KAGAN: So you think that Leonard
12 is -- is -- is an animals case as opposed to a, you
13 know, the State can tax your property case?

14 MR. McCONNELL: Yes, I do.

15 JUSTICE SOTOMAYOR: That's not how it was
16 applied by the court. They called it a tax.

17 MR. McCONNELL: They did also call it a tax.
18 And I'm perfectly happy to address whether this is a
19 tax, because under this Court's standards for criteria
20 for determining a tax, this certainly is not one.
21 Referring to the criteria in the NFIB case, this is not
22 in the Internal Revenue Code, it's not collected by the
23 Internal Revenue Service. It's not author -- there's no
24 tax authorized by -- by Congress. The proceeds of the
25 tax do not go into the general treasury. This is not a

1 tax.

2 JUSTICE SOTOMAYOR: But neither did they --
3 but it didn't happen that way in Leonard, either. What
4 the Court was basically saying is the government could
5 do this because this is a good in commerce. As long as
6 it could meet the Penn Central test, that there is some
7 nexus between the government's goal and the -- and
8 the -- and -- and the regulation, then it's okay.

9 Now, there they used it to fertilize oyster
10 ponds or to refertilize the oysters. Here they're doing
11 it to maintain prices and giving you whatever left --
12 whatever is left over on the reserve.

13 MR. McCONNELL: The fact of the matter is
14 that the oysters belong to the State of Maryland and
15 when the State of Maryland decides to allow fishermen to
16 harvest the oysters --

17 JUSTICE SOTOMAYOR: Could you tell me where
18 in Leonard that was discussed?

19 MR. McCONNELL: It's -- I'll be very happy
20 to file a supplemental brief with the Maryland citations
21 indicating that the oysters belonged to the State of
22 Maryland.

23 JUSTICE SCALIA: I thought that the -- what
24 the Constitution required for a taking was just
25 compensation, not -- not a reasonable nexus to a -- a

1 good policy. Am I -- am I wrong about that?

2 MR. McCONNELL: You are not wrong about
3 that.

4 JUSTICE SCALIA: I didn't think so.

5 JUSTICE KENNEDY: But I -- I suppose that
6 question, underlying the government's briefs in this --
7 we can ask them what its position is or you can
8 characterize their position if you choose -- is the
9 thing -- since we could do this other ways, what
10 difference does it make? Do you understand to -- that
11 to be their -- an underlying premise in their argument
12 or -- or is that unfair on my part?

13 MR. McCONNELL: Well, they certainly say
14 that from time to time and this Court two years ago in
15 Koontz rejected arguments of that -- of that sort. But
16 in fact, there is a fundamental difference between a
17 volume control, which is present for a number of
18 agricultural products, versus the taking, because in
19 this case the government literally takes possession of
20 the raisins. It can use the raisins as collateral to
21 get a loan. It can give the raisins away. It can --

22 JUSTICE GINSBURG: If that's the --

23 MR. McCONNELL: -- sell the raisins.

24 JUSTICE GINSBURG: If that's your position,
25 why didn't you ask -- you're attacking this reserve

1 arrangement and the -- the possession -- the
2 government's possession of the raisins themselves. And
3 you -- as far as I've heard so far, you are not
4 attacking volume limit; you cannot market more than X
5 amount. Why didn't you then ask the Department of
6 Agriculture for an exemption from the reserve pool?
7 Instead of -- see, what you're trying to do now is to
8 get rid of the volume limit as well.

9 MR. McCONNELL: In this particular program,
10 there's no -- there is no separate volume control in the
11 sense that there -- there's no regulation that tells
12 either producers or handlers how to use or sell raisins.
13 Instead, they're told to set aside the raisins and give
14 them to the government. So here there is a taking,
15 and --

16 JUSTICE GINSBURG: But the part that isn't
17 given to the government, suppose we just -- couldn't you
18 have asked to excise that part of it and still leave the
19 limit on the amount that could be marketed? I mean, we
20 have a division between what goes in the reserve and
21 what can be marketed.

22 MR. McCONNELL: Well, Justice Ginsburg, the
23 way this case arose is that the Department of
24 Agriculture came after my clients. We did not -- this
25 is not our lawsuit. The Department came after our

1 clients.

2 JUSTICE GINSBURG: It is your -- is it a --
3 is it counterclaim?

4 MR. McCONNELL: It's -- it's a defense.

5 JUSTICE GINSBURG: A defense.

6 MR. McCONNELL: It's a defense. The -- the
7 Department says, give us either raisins or their
8 monetary equivalent and we say that's not constitutional
9 without compensation.

10 JUSTICE SCALIA: If -- if there was a
11 taking, would there be any obligation on your part to
12 propose an alternative to the taking? The government
13 comes and takes your property. Can't you just resist
14 the taking without saying, oh, government, you can do
15 this in another way. Please do it in a different way.
16 You don't have to do that, do you?

17 MR. McCONNELL: We do not, and I'm not sure
18 that --

19 JUSTICE SCALIA: I didn't think so.

20 MR. McCONNELL: -- any alternative ways
21 would even be permitted under the regulation.

22 JUSTICE BREYER: So -- so my question is, it
23 goes on from this. I mean, maybe the answer is, well,
24 just don't decide that. But look, I assume with you for
25 the moment for argument's sake, I have some raisins in my

1 basement. I'm in this program. The government comes
2 with a shovel and some burlap sacks; it takes the
3 raisins. I would say, well, sounds like a taking to me.

4 At the next point --

5 MR. McCONNELL: Me, too.

6 JUSTICE BREYER: -- the Constitution doesn't
7 forbid takings. It says what you have to do is pay just
8 compensation. Now, it's at that point I want to know
9 what happens, because I guess the government could
10 argue, look at this program, it's a big program. This
11 program, what it does is it gives raisin farmers, at the
12 public's expense, more money. So if, in fact, you don't
13 want us to take your raisins, all right, fine. But
14 there'd be no program if everybody said that. So we
15 have a rule against free riders.

16 Now we'll give you what it cost you to take
17 your raisins. What it cost you is, in fact, the
18 difference between what you receive given the program
19 and what you would receive without the program. That
20 difference works in your favor. It gives you money. It
21 doesn't take money. So there is no compensation due.
22 In fact, if we were to have compensation, you should pay
23 us, the government.

24 So how are you going to get by that part?

25 And if you can't get by that part, how are you going to

1 avoid paying the fine?

2 See, I don't see the relation between the
3 taking argument, which is maybe all we have to decide,
4 and how eventually you either get some money or you
5 don't have to pay the fine. If you have a minute, I'd
6 appreciate just the explanation.

7 MR. McCONNELL: I -- I would love to.

8 The -- there is both -- both a conceptual
9 and a practical --

10 JUSTICE BREYER: Yes.

11 MR. McCONNELL: -- response. Let me give
12 the practical response first, which is that my clients
13 are certainly not better off. By the secretary's own
14 calculation the price of raisins was \$63 per ton higher
15 with the volume controls than it would have been in an
16 unregulated market.

17 The field price that year was \$810 per ton.
18 Taking away 30 percent of their raisins does not end up
19 with the -- with my clients better off as a result of
20 the program. Quite the contrary. They -- they lose
21 money. We have the calculation in our reply brief.

22 JUSTICE KENNEDY: I don't want to interrupt
23 you, because you're going to get to the theoretical
24 argument in a moment. But wouldn't -- isn't the
25 response to that, well, the price that you just quoted

1 is because of this program, and that's circular, or am
2 I wrong about that?

3 MR. McCONNELL: No. No, you're -- by the
4 Secretary's own calculations, \$63 of that 810 is
5 attributable to the volume controls in the program.
6 Only \$63.

7 JUSTICE SOTOMAYOR: Except weren't we told
8 that the demand for raisins is inelastic? So if you
9 glut the market, you're going to have what happened
10 before the RCA.

11 MR. McCONNELL: Well, it's --

12 JUSTICE SOTOMAYOR: You're going to have
13 prices dropping.

14 MR. McCONNELL: It is --

15 JUSTICE SOTOMAYOR: That's the -- that's
16 the purpose of free competition, isn't it?

17 MR. McCONNELL: Actually, under today's
18 conditions, the elasticity is not as enormous it would
19 -- as it would need to be for this to be a profitable
20 program.

21 JUSTICE SOTOMAYOR: Well, that's today, but
22 you haven't paid a reserve in years now.

23 MR. McCONNELL: Well, we're talking -- when
24 I say today, what I mean is the two years -- the two
25 years that are --

1 JUSTICE BREYER: So one of your
2 arguments could be -- I get your argument now.

3 MR. McCONNELL: Now, the conceptual point is
4 that this is a per se taking. And it's -- if -- if
5 there were benefits, such as I don't believe that there
6 were, if there were, that would at most go to whether
7 there was implicit in -- in-kind compensation for the
8 taking, which would go to the -- to the question of
9 compensation.

10 JUSTICE BREYER: Exactly.

11 MR. McCONNELL: Implicit in-kind -- in-kind
12 compensation is a complicated matter. It has to do with
13 whether there were special benefits, that there's a
14 split all over this -- all over the country on that. I
15 don't think we want to get into whether this would be a
16 special benefit. In this case --

17 JUSTICE BREYER: Okay. So what we should
18 say, in your view, do you have any objection to my
19 writing, if I were to write it, like this, taking.
20 Yeah, it's a taking. Okay. But the Constitution
21 forbids takings without compensation. The object of the
22 program is, at least in general, to give farmers more
23 compensation than they would have without it. Programs
24 can work badly, sometimes they're counterproductive, but
25 if this is working well, that's what happens.

1 So we send it back to the court to see, did
2 the program work well? Did it work to actually make
3 your -- your client better off? What rules do we
4 follow? That's how we should do this, in your opinion.

5 MR. McCONNELL: I think not. Now, if -- but
6 I'm close to there. If this were an eminent domain
7 proceeding, then the lower court would determine whether
8 there was implicit in-kind contribution. If it were an
9 inverse compensation proceeding, possibly the same, but
10 this is actually an enforcement action. It is
11 specifically guided by the regulations in -- in the 7
12 C.F.R.

13 And under those regulations, we know exactly
14 what takes place. And implicit in-kind contribution is
15 not provided for in those regulations. What is provided
16 in those regulations is that the -- if reserve-pool
17 raisins are not handed over to the RAC, the handler must
18 pay -- multiply the number of raisins by the field
19 price, and that is it. Now, that is also the measure of
20 the value of the raisins.

21 So that if they take that, the compensation
22 is exactly that, and the two things simply are a wash,
23 because the regulation -- and I think the broader
24 principle here is that this is actually not a program
25 which is designed to provide compensation. The

1 government almost concedes this. This is not -- this is
2 not like getting land for a post office where the
3 government intends to pay. This is more like a program
4 like -- like a Kaiser Aetna or some of the others, where
5 if it is a taking, the government has no intention of
6 paying compensation, that's not the kind of program it
7 is. And in cases --

8 JUSTICE KAGAN: Mr. --

9 MR. McCONNELL: May I just -- in cases where
10 there's a -- there's a taking, and the program does not
11 contemplate compensation, the standard judicial remedy
12 for that is to -- is to forbid the taking.

13 JUSTICE SOTOMAYOR: I'm sorry, it was --

14 JUSTICE KAGAN: Can I take you back, Mr.
15 McConnell, to the -- whether it is a taking point? And
16 I've -- I've just been trying to think about whether
17 your argument would apply to other kinds of programs and
18 how it might apply to other kinds of programs.

19 So how about just programs where the
20 government says, give us -- produce records for us. I'm
21 sure that there are a lot of programs like that in the
22 world. And there is something intuitive about your
23 saying, well, the government is asking us to turn over
24 stuff. And I'm wondering, it seems to me that the
25 government asks people to turn over stuff all the time

1 in the form of records. How would that fare under your
2 argument?

3 MR. McCONNELL: If the -- if the records --
4 if what the government is asking for is information,
5 this is not going to be a taking. If the records are
6 themselves of historical value, as they were in Nixon v.
7 General Services Administration --

8 JUSTICE KAGAN: I don't know if they're
9 historical --

10 MR. McCONNELL: -- and they want to put them
11 in the museum, then they have to pay for them.

12 JUSTICE KAGAN: I don't know if they're
13 historical value. They're just physical objects, in the
14 same way the raisins are physical objects. And the
15 government wants some records.

16 MR. McCONNELL: The government does not take
17 permanent possession of records. If I'm, say, in an IRS
18 audit, and they ask me to show records to establish my
19 tax deductions, I show them the records, they see the
20 information, it is not a taking.

21 JUSTICE KAGAN: No, but -- so you're saying
22 that the government couldn't ask you to deliver records
23 to them.

24 MR. McCONNELL: I did not say that. They
25 can ask me to do that. And it is not a taking unless

1 they've taken a permanent possessory interest. If they
2 go off and sell the records, the way they sell the
3 raisins, then I -- then there's been a taking.

4 JUSTICE KAGAN: They're just keeping the
5 records. They're keeping the records.

6 MR. McCONNELL: If they're keeping the
7 records forever, I -- I'm not sure, but I doubt very
8 much that that would be a taking. Again --

9 JUSTICE KAGAN: I guess I just don't
10 understand.

11 MR. McCONNELL: Again, the value -- if the
12 value of the records is the information, which is what I
13 assume it is in a regulatory program, we're not talking
14 about actual physical property.

15 JUSTICE KENNEDY: Well, there -- there are
16 cases on custodial -- government all the time in
17 criminal cases takes control of valuable objects for
18 evidence, and sometimes it keeps it forever and ever.
19 And in those cases, I think there is a taking if it's
20 too long, I think we've said that. Or I think other
21 courts have said that. In other words --

22 MR. McCONNELL: I think there's --

23 JUSTICE KENNEDY: -- the government can
24 keep it only so long as it's reasonably necessary
25 for the case. You have a valuable diamond ring which

1 is evidence and the government keeps it, but it keeps
2 it only for so long as it --

3 MR. McCONNELL: Well, I -- I think that
4 there are complicated sets of rules having to do with
5 contraband and having to do with property that is used
6 as an instrumentality of a crime and so forth. But this
7 is extremely far afield from raisins, which are a --
8 which are a valuable piece of property --

9 JUSTICE KENNEDY: If you --

10 JUSTICE KAGAN: Well, I'm trying to
11 understand why --

12 MR. McCONNELL: -- which the government
13 takes and sells.

14 JUSTICE KAGAN: I guess I'm trying to
15 understand why it's far afield, and what it's far afield
16 from. I mean, you even said, well, information is no
17 problem. But people have property interests in
18 information all the time, and if the government says you
19 have to give us that information, which counts as
20 property, why is that not subject to your rule?

21 MR. McCONNELL: Information can be property
22 when it's intellectual property; for example, trade
23 secrets can be property. I don't think ordinary records
24 such as the IRS demands from taxpayers is a taking.

25 JUSTICE SOTOMAYOR: So how about the

1 Monsanto case, where we said the turning over of trade
2 secrets, which is property, you've just admitted that,
3 for the privilege of selling other commodities, the
4 pesticides, was okay, wasn't a taking. How do you deal
5 with that case?

6 MR. McCONNELL: The -- there is broad
7 language in that case, which this Court cut back upon in
8 Nollan v. California Coastal Commission. In -- in -- in
9 Nollan, the Court held that Monsanto could not stand for
10 the proposition that it is an affirmative benefit to
11 someone simply to allow them to use their property in
12 an -- in an ordinary sense. There has to be an actual
13 affirmative government grant of a benefit for the
14 condition argument to work.

15 JUSTICE SOTOMAYOR: Getting 63 -- getting
16 \$63 more a pound for what you sell seems like a
17 significant benefit.

18 MR. McCONNELL: They are not given -- the
19 \$63 results from volume controls. That does not require
20 a taking. The taking itself is of absolutely no value
21 to the producers or anyone else other than those who
22 receive the export subsidies from the sale of the
23 raisins. They're the only ones who benefit from -- from
24 the actual taking.

25 JUSTICE SOTOMAYOR: But you couldn't do it.

1 You would have a product that would be valueless except
2 for that which you could eat at home, but you didn't
3 intend to eat it at home because you gave it up for
4 sale. If they -- if they gave you the raisins, would
5 you be able to export them and get the government
6 subsidy?

7 MR. McCONNELL: If they -- my -- my clients
8 are not actually in the export business. If the -- if
9 my clients were selling raisins for export, they would
10 be entitled to receive the export subsidy, but that's
11 not the business that they're in.

12 JUSTICE SOTOMAYOR: My point is just you
13 couldn't otherwise sell this commodity. If all they did
14 was put it in a house and say to the producers, sell
15 60 percent this year, what would you do with the
16 raisins?

17 MR. McCONNELL: Well, the way --

18 JUSTICE SOTOMAYOR: They'd just sit there --

19 MR. McCONNELL: -- the way --

20 JUSTICE SOTOMAYOR: -- right?

21 MR. McCONNELL: -- other programs with
22 volume controls work is that there's an initial reserve,
23 and then as market conditions develop and more
24 information is available, the owners of the product are
25 permitted to -- to release more and more into the

1 market. And -- and in these --

2 JUSTICE GINSBURG: Well, suppose --

3 MR. McCONNELL: -- particular --

4 JUSTICE GINSBURG: -- the market goes the
5 other way?

6 MR. McCONNELL: Well, that would be a
7 different -- that would certainly be a different case.
8 And -- and if it went completely the other way, it could
9 well be that the -- that the owners of the raisins
10 receive no money at all. But it's still -- it's still a
11 restriction on their use. The raisins haven't been
12 taken from them.

13 In this case, the raisins are actually taken
14 from them and the government sells them. In fact, in --
15 in one of these years, the government was able to sell
16 the raisins for more than the field price --

17 JUSTICE BREYER: Well --

18 MR. McCONNELL: -- because of that.

19 JUSTICE BREYER: -- still, the curlicue on
20 this -- I've -- you've helped a lot in my thinking. But
21 there's still what we do about this fine. And the
22 reason that I'm -- this may be just a curlicue on the
23 case. But -- but the way I'm thinking of it, imaginary
24 plan -- I don't think I'll ask it. I'll figure it out
25 myself. I'd like you to reserve your time.

1 MR. McCONNELL: Thank you.

2 If there are no further questions, I'll
3 reserve the remainder of my time for rebuttal.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Kneedler.

6 ORAL ARGUMENT OF EDWIN S. KNEEDLER

7 ON BEHALF OF THE RESPONDENT

8 MR. KNEEDLER: Mr. Chief Justice, and may it
9 please the Court:

10 Petitioners isolate just one feature of a
11 comprehensive program regulating the commercial
12 marketing of a fungible agricultural product, a
13 regulatory program that was established with producer
14 approval and is established for their benefit. It is a
15 cooperative program among the Secretary, producers, and
16 handlers.

17 The raisins are not put into the program for
18 the benefit of the government. They are put into the
19 program for the benefit of producers, and they enter the
20 stream of -- of commerce. In fact a producer is
21 affected by this program --

22 JUSTICE SCALIA: These plaintiffs are
23 ingrates, right? You're -- you're -- you're really
24 helping them?

25 MR. KNEEDLER: That -- that's --

1 JUSTICE SCALIA: It's for their benefit,
2 and -- and -- and they wanted this, didn't they?

3 MR. KNEEDLER: The -- these Petitioners do
4 not want the program, but the program was established on
5 the premise that it is for the benefit of the producers.

6 JUSTICE SCALIA: You say it's one little
7 feature of an overall program. That little feature
8 happens to be the taking of raisins.

9 MR. KNEEDLER: We -- we --

10 JUSTICE SCALIA: I mean, you could have a
11 lot of features. There's no objection to having many
12 features, but where one of them is a taking, you -- you
13 have to justify it by just compensation.

14 MR. KNEEDLER: The -- the question is
15 whether it is a taking, and we believe it -- we believe
16 it is not.

17 JUSTICE SCALIA: You used to say -- you used
18 to say it's not a taking if it involves just personal
19 property, only real estate. Are you still --

20 MR. KNEEDLER: That -- that -- that has
21 not --

22 JUSTICE SCALIA: The government has
23 abandoned that position?

24 MR. KNEEDLER: That -- that has not been our
25 position. We have -- we have -- we have not argued that

1 personal property is not subject to the -- to the Just
2 Compensation Clause such that if there were -- if the
3 government came in and -- and -- and took someone's
4 car or someone's --

5 JUSTICE SCALIA: Took your raisins, for
6 example?

7 MR. KNEEDLER: Well, the -- the government
8 has not taken the raisins -- let me -- let me just --
9 if -- if I could set this up and explain how it
10 operates, this program operates only when the producer,
11 the grower, has voluntarily submitted -- committed the
12 raisins to the stream of commerce. They have been put
13 in -- they have been put into the stream of commerce.
14 They are turned over to the handler. The Marketing
15 Order regulates only the conduct of handlers.

16 JUSTICE SCALIA: Well, the -- the --

17 MR. KNEEDLER: But --

18 JUSTICE SCALIA: -- the government can --
19 can prevent you from putting something into the stream
20 of commerce, can charge you for putting something into
21 the stream?

22 MR. KNEEDLER: I -- I think the -- the --
23 the government can attach reasonable conditions on
24 entering a stream of commerce, and that --

25 JUSTICE SCALIA: Well, including taking,

1 including --

2 MR. KNEEDLER: No --

3 JUSTICE SCALIA: -- Including taking?

4 MR. KNEEDLER: -- no. That -- that -- that,
5 I think, that is the lesson of Monsanto --

6 JUSTICE SCALIA: Well --

7 MR. KNEEDLER: -- which I think -- which I
8 think --

9 JUSTICE SCALIA: -- it's an unconstitutional
10 condition, isn't it?

11 MR. KNEEDLER: No. That --

12 JUSTICE SCALIA: Taking without just
13 compensation would be an unconstitutional condition for
14 putting something into the stream of -- stream of
15 commerce.

16 MR. KNEEDLER: But -- but it -- it -- that
17 analysis would apply if there was a taking on the -- on
18 the Nollan/Dolan analogy, for example, if what --

19 JUSTICE ALITO: Is there any -- is there any
20 limit to that argument? There are some examples in the
21 briefs that are pretty startling. Could the government
22 say to a manufacturer of cellphones, you can sell
23 cellphones; however, every fifth one you have to give to
24 us? Or a manufacturer of cars, you can sell cars in the
25 United States, but every third car you have to give to

1 the -- to the United States.

2 MR. KNEEDLER: I -- I think that would
3 present a very different question.

4 JUSTICE ALITO: Why would it be -- why would
5 it be different?

6 MR. KNEEDLER: Because -- because this is --
7 this is part of a comprehensive regulatory program that
8 if -- that -- it -- it isn't just acquiring it. It's,
9 in fact --

10 JUSTICE ALITO: Well, sure. This would
11 be --

12 JUSTICE KENNEDY: So -- so you -- so you say
13 if the government took all GM's cars, then it would be
14 okay?

15 MR. KNEEDLER: No.

16 JUSTICE KENNEDY: But just not a third?

17 MR. KNEEDLER: No, no. We are not saying
18 that at all. And if -- if I -- if I could just --

19 CHIEF JUSTICE ROBERTS: Well, but just --
20 before you do, I mean, the -- the rationale -- I mean,
21 the government can come up with a rationale to justify
22 those examples really easily.

23 You say cellphone providers benefit greatly
24 if there's a broader cellphone market, if more people
25 are using them. So we're going to take every fifth one

1 and give it to people who might otherwise not be able to
2 afford a cellphone. And that will help cellphone
3 manufacturers , because more and more people will
4 have them. More and more people will want them.
5 Therefore, it's okay.

6 That's the same rationale you're applying
7 here. This is for the good of the people whose property
8 we're taking.

9 MR. KNEEDLER: Well, it -- the -- these
10 programs go back to the 1930s, when the agricultural
11 industry in this country was in serious trouble. And
12 particularly in California, prices were below costs
13 of -- of production, and --

14 CHIEF JUSTICE ROBERTS: And you can do what
15 you've done in most other marketing orders, which is not
16 take their raisins. Instead, say, look, you can only
17 plant, you know, 63 percent of your acreage this year,
18 or you can only produce, you know, 28 tons. That's how
19 most of them work, and most of the them thereby are, I
20 presume, analyzed under Penn Central.

21 This is different. This is different
22 because you come up with the truck and you get the
23 shovels and you take their raisins, probably in the dark
24 of night.

25 (Laughter.)

1 MR. KNEEDLER: No, that -- that is not
2 what -- that is not what the government does.

3 The -- the way -- the way the order operates
4 is that the producer submits the raisins to the handler.
5 The handler then divides them into two categories. The
6 handler is required by the order to maintain and
7 separate the reserve raisins, but they are separated for
8 later sale. They are -- they -- they don't go to the
9 government. They don't -- they are separated for later
10 sale. The proceeds are pooled --

11 JUSTICE SCALIA: They -- they -- what do you
12 mean, they don't go to the -- does not the government
13 own them? Do -- do you deny that the government owns
14 them?

15 MR. KNEEDLER: For -- for these purposes --
16 for purposes of this --

17 JUSTICE SCALIA: Do --

18 MR. KNEEDLER: -- case, we concede that the
19 government gets legal title.

20 JUSTICE SCALIA: Well --

21 MR. KNEEDLER: But that doesn't mean -- that
22 doesn't mean that the government has to entire interest
23 in the -- in the raisins.

24 They -- the government has legal title so
25 that it may -- we will assume for purposes of this case,

1 so that -- that they -- the government can -- or the --
2 the committee -- it's not the Secretary of
3 Agriculture -- the committee can then sell the raisins.
4 The proceeds of those sales are pooled and distributed
5 back to the producers.

6 JUSTICE SCALIA: How -- how many -- how
7 many -- how much from those sales did -- did these
8 Petitioners acquire in the two years at issue here?

9 MR. KNEEDLER: Well, in -- in --

10 JUSTICE SCALIA: How much -- how much money
11 was given back to them?

12 MR. KNEEDLER: In -- in one year there was
13 \$272 per ton. In the other year there was -- there were
14 no proceeds back because the --

15 JUSTICE SCALIA: Zero?

16 MR. KNEEDLER: -- because the cost of
17 administering the reserve program exceeded -- or there
18 was no net proceeds afterwards.

19 JUSTICE SCALIA: So you --

20 JUSTICE GINSBURG: Over the --

21 JUSTICE SCALIA: Sorry.

22 JUSTICE GINSBURG: Over the history of the
23 program -- it starts in 1949, right?

24 MR. KNEEDLER: Yes.

25 JUSTICE GINSBURG: And so in how many years

1 while the program is in effect was there a distribution
2 to the -- to the growers?

3 MR. KNEEDLER: I -- I do not know that, how
4 many years, but a great number of years. And, in fact,
5 the -- the three years leading up to the -- to this
6 particular time, well one of the years here was \$47
7 million was returned. In the prior years it was
8 50-some million and -- and another 30-some million.
9 So in -- the experience has been that there typically
10 has been something returned.

11 JUSTICE SOTOMAYOR: Mr. Kneedler, I, too, am
12 troubled, like Justice Alito, about his every fifth
13 telephone or whatever. Every fifth car or every fifth
14 telephone you have to give to the government. You -- I
15 don't know you've answered that question. Is that a
16 taking or isn't it? And --

17 MR. KNEEDLER: I --

18 JUSTICE SOTOMAYOR: And --

19 MR. KNEEDLER: I --

20 JUSTICE SOTOMAYOR: -- what's the basis to
21 distinguish --

22 MR. KNEEDLER: It is not part of --

23 JUSTICE SOTOMAYOR: -- distinguish it -- it
24 from --

25 MR. KNEEDLER: Because this is a

1 comprehensive governmental program, and -- and it -- it
2 governs quality, it governs timing of sales, and it's
3 important to recognize that's all that is going on here.
4 The reserve raisins are set aside by the handler. After
5 the producer has voluntarily turned them over, they're
6 set aside by the handler for later sale.

7 Petitioners concede in their brief at page
8 23 that the government can regulate the when, the
9 manner, and the channel of sales. That's exactly what
10 the reserve program does. They're turned over to the
11 handler. The handler sets them aside in reserve.
12 The --

13 CHIEF JUSTICE ROBERTS: Mr. Kneedler,
14 this --

15 MR. KNEEDLER: -- committee then decides
16 when and where to sell them.

17 CHIEF JUSTICE ROBERTS: This -- this is a --
18 a historical quirk that you have to defend. You could
19 achieve your -- the government's objectives, just as you
20 do in most other cases, through volume limitations that
21 don't require a physical taking.

22 For whatever reason, in the history of the
23 New Deal, this one was set up differently. And so we're
24 here dealing with a classical, physical taking. We are
25 not going to jeopardize the marketing -- the Agriculture

1 Department's Marketing Order regime.

2 And by the way, it better be the Department
3 of Agriculture that takes these -- you said earlier it's
4 Raisin Committee -- or else you're going to have a lot
5 of trouble in your government speech cases, where you
6 always make the point that these committees are, in
7 fact, the government.

8 MR. KNEEDLER: We're not -- we're not saying
9 the committee is not the government. What I was saying
10 is that the -- that the operation of the program is not
11 for the government's benefit. It is for the producers'
12 benefit.

13 JUSTICE BREYER: Correct , correct. So --

14 MR. KNEEDLER: It was --

15 JUSTICE BREYER: -- therefore, what is --

16 MR. KNEEDLER: -- adopted by producers.

17 JUSTICE BREYER: Look -- look. This is -- I'm having
18 trouble with the same thing. I agree so far with what
19 the Chief Justice said.

20 Go back to the New Deal. You can, in fact,
21 burn raisins, the point of which was to have fewer
22 raisins, the result of which was to raise the price of
23 raisins from \$100 a pound to -- or a bushel -- to 400.
24 That was thought to make the farmer better off, which it
25 did. And it made the customers worse off.

1 Then someone had a good idea and said it's
2 sort of wasteful to burn raisins. Let's take the
3 raisins we'd otherwise burn and give them to
4 schoolchildren. And maybe we could even sell a few, and
5 if we do, we'll give that extra money to the farmer,
6 too.

7 Now we have schoolchildren with raisins. We
8 have the farmer having more money. Sounds like a pretty
9 good program. Of course, you have taken some raisins.

10 But what I don't see is how either the
11 farmer or the schoolchildren are any the worse off. And
12 if they're no worse off, what compensation are these
13 farmers entitled to?

14 Of course, free riders could become yet
15 better off. They could charge at the higher price that
16 the program creates, \$800. But, after all, that isn't
17 the issue because you have to have, as a rule, no free
18 riders. And once you admit that as a rule, everyone,
19 including perhaps these plaintiffs, are better off than
20 none at all.

21 Now, that's a very simple argument. It's
22 what I understand to be the economics of the Brannan
23 Plan, the FDR, the 1949, et cetera. And yet, we've had
24 endless cases, complexities, opinions, and fines.
25 And -- and so, therefore, I'm probably wrong with my

1 simple argument. Of course, I doubt that I'm wrong, but
2 nonetheless, I want you to explain what's wrong with it.

3 MR. KNEEDLER: We agree with much of what
4 you said, except that it is not -- I -- I just
5 reiterated -- it is not a taking of the raisins.

6 JUSTICE BREYER: If you want to say it's not
7 a taking --

8 MR. KNEEDLER: No, it -- no. It's a -- it
9 is a regulatory program classically analyzed under Penn
10 Central because there is a reciprocity of -- of
11 advantage -- one of the phrases this Court has
12 frequently used -- among producers. This does not
13 distinctly affect the Petitioners. It applies to all
14 producers. If Petitioners are correct, since 1949,
15 every year there has been a reserve requirement, every
16 producer has had a per se taking.

17 JUSTICE KAGAN: Mr. -- Mr. Kneedler, if -- I
18 largely agree with what the Chief Justice said. I mean,
19 just the way I think about this program is that this
20 does seem a weird historical anomaly.

21 And all -- am I right that all the rest of
22 these agricultural programs are done differently, such
23 that saying that this was a taking would not affect
24 other agricultural programs? And -- and also, are there
25 any other programs out there -- forget agricultural

1 programs -- but are there any other programs out there
2 that we should be concerned about if we were to think
3 about this as a taking?

4 MR. KNEEDLER: Well, I -- with respect to
5 agricultural programs, I -- I think there are eight or
6 ten other programs that have reserve provisions in them.

7 I -- I think most of those are not active in
8 the sense that there is currently reserve, just like
9 this one is not. And if -- if this one has outlived its
10 usefulness and the committee has not proposed a reserve
11 requirement, the program is working exactly like it
12 should. The committee, which is responsible, has
13 decided not to impose a reserve requirement.

14 JUSTICE KAGAN: I -- I'm sorry. But you
15 said that there were eight or ten other programs that,
16 you said, they have --

17 MR. KNEEDLER: Have -- have -- they -- they
18 have, like this one, provisions permitting the use of a
19 reserve system, but like -- like this one, they are not
20 actively utilizing it.

21 JUSTICE SCALIA: How long --

22 JUSTICE SOTOMAYOR: Any --

23 JUSTICE SCALIA: -- have they not been
24 actively utilized?

25 MR. KNEEDLER: I think it -- I think most of

1 this has been in the last decade. I don't know -- I
2 don't know precisely.

3 But -- and one of the things that's happened
4 in the -- in this industry in the last 10 years is it
5 has changed greatly. You will see from the amicus brief
6 filed by Sun-Maid and the -- and the Raisin Bargaining
7 Association, which I commend to your attention, they now
8 believe that the reserve requirement should no longer
9 be -- or at least Sun-Maid does -- should no longer be
10 instituted. But they also firmly believe that
11 Petitioners should not be permitted to be free riders on
12 this program.

13 JUSTICE KAGAN: And -- and what if --

14 MR. KNEEDLER: They weren't able to sell the
15 raisins --

16 JUSTICE KAGAN: And -- and Mr. Kneedler,
17 what of the nonagricultural programs? Are there
18 regulatory programs where the government says, produce
19 something that is characterizable as property?

20 MR. KNEEDLER: Well, the -- I think the most
21 immediately relevant one, which this Court sustained,
22 was in -- in the Monsanto case where you were asking
23 about records and information. That was a case in
24 which, as a condition for marketing pesticides, the
25 manufacturer had to submit information to EPA.

1 JUSTICE KAGAN: Right. But we -- we know
2 about that one. Anything else out there?

3 I mean, tell me what the -- the realm of
4 regulatory programs is that we ought to be concerned
5 about if we were to say something like the production of
6 something -- the production of stuff that somebody
7 claims a property interest in is a taking.

8 MR. KNEEDLER: I'm -- I'm not specifically
9 aware of other programs but Monsanto, and the
10 requirement to submit information to the government, for
11 example, is -- is -- is widespread in -- in our society.
12 And what the Court basically said there was that if it
13 was known when someone -- before they entered commerce
14 and -- and applied their application, if they knew that
15 the material would be disclosed to the public or used by
16 the government for approving other applications, there
17 was no taking.

18 JUSTICE KENNEDY: Or I -- I -- look --

19 JUSTICE SCALIA: Well, I guess the
20 government can prohibit the -- the introduction of
21 harmful pesticides into interstate commerce. I'm not
22 sure it can prohibit the introduction of raisins.

23 I mean, that's a -- you know, dangerous
24 raisins.

25 (Laughter.)

1 JUSTICE SCALIA: I -- I -- I can understand
2 imposing that condition on Monsanto, and that would not
3 be an unconstitutional condition.

4 MR. KNEEDLER: Well, that -- that was not --

5 JUSTICE SCALIA: It seems to me it is when
6 you impose it on raisins.

7 MR. KNEEDLER: Well, the -- the -- the
8 Court's rationale in Monsanto was not based on the fact
9 that it was -- that it was -- that the product was
10 dangerous, although, that was obviously the setting. It
11 was the fact that the -- that the manufacturer knew,
12 when submitting the information to -- to EPA, that it
13 would be subject to disclosure, and, therefore, its
14 property value, either eliminated or appropriated by the
15 government, as it were, for use in evaluating other
16 applications.

17 JUSTICE BREYER : This is not --

18 CHIEF JUSTICE ROBERTS: Well, but what you
19 take from Monsanto, and look at your brief on page 32
20 when you cite Monsanto, you say that producers who are
21 dissatisfied with the reserve regulations may plant
22 different crops.

23 That's a pretty audacious statement. If you
24 don't like our regulations, do something else.

25 MR. KNEEDLER: Well -- or that's not the

1 only option that they have. They have the option of
2 selling the grapes for other purposes. These -- the --

3 CHIEF JUSTICE ROBERTS: What, you mean --
4 you mean wine?

5 MR. KNEEDLER: Wine or -- or -- or grape
6 juice. These are -- these are -- these grapes -- the
7 overwhelming majority of them -- the Thompson seedless
8 grapes are -- have a variety of uses, and that's --
9 that's one of the things that a grower would take into
10 account, is would they be better off --

11 CHIEF JUSTICE ROBERTS: But normally --

12 MR. KNEEDLER: -- with raisins or --

13 CHIEF JUSTICE ROBERTS: -- normally what we
14 say, if you don't like regulations, you can challenge
15 them in court to see if they comply with the
16 Constitution. The answer -- I mean, if the answer is
17 always you can do something else, it would seem we
18 should -- we'll never have these kinds of cases.

19 MR. KNEEDLER: No. But -- but this is a
20 substantive point I'm making, not a preclusion of review
21 point.

22 The substantive point is that there is
23 market regulation. People who are growing crops in this
24 industry know what the regulation is, and if they
25 decide -- and then the Hornes here have operated under

1 this Marketing Order for 30 years before they -- before
2 they challenged it.

3 JUSTICE BREYER: All that's true --

4 JUSTICE KENNEDY: It seems --

5 JUSTICE BREYER: -- but they brought their
6 claim.

7 JUSTICE KENNEDY: It seems to me what your
8 argument --

9 CHIEF JUSTICE ROBERTS: I'm sorry. Justice
10 Kennedy.

11 JUSTICE KENNEDY: It seems to me what your
12 argument is saying, is even if it's a taking, it's okay.
13 It will be okay. Everything will work out. That's what
14 I get from your argument.

15 MR. KNEEDLER: No. Our -- our -- our
16 argument -- our fundamental argument is that it is not a
17 taking to begin with because the -- the grower
18 voluntarily submits the total amount of its raisins to
19 the handler. The handler then separates them into --
20 into two quarters, one to be sold now and one to be sold
21 later. But they both have to do with the timing and
22 regulation of sale, which Petitioners acknowledge the
23 government can regulate the timing and manner of sales.
24 That's exactly what happens here.

25 There are basically two markets. One is the

1 free market. The other is the tightly regulated market
2 for exports, for other outlets that do not compete with
3 the domestic market.

4 CHIEF JUSTICE ROBERTS: So if you don't
5 like -- we're going to say the Pledge of Allegiance in
6 public schools, and we're going to make everybody stand.
7 And if you don't like it, go to a different school. I
8 don't understand why that's not the same analysis here.

9 We may be taking -- you know, this may be a
10 taking of your raisins or not, but if -- and if you
11 don't like it, grow something else.

12 MR. KNEEDLER: Well, Monsanto is not the
13 only case where that was -- by the way, I -- I do not
14 believe that Nollan cut back on -- on the rationale of
15 Monsanto. What the footnote in Nollan said is, we do
16 not regard the ability to build on your property -- your
17 real property to build a house as a -- as a governmental
18 benefit. It did not say -- in fact, I think it
19 reaffirmed the idea that there was an exchange in
20 Monsanto where the government was giving a benefit of
21 clearing the product for use.

22 JUSTICE SCALIA: Where -- where -- whereas,
23 you say that introducing raisins into interstate
24 commerce is a government benefit, right?

25 MR. KNEEDLER: We -- we think the

1 regulation -- the -- the regulatory program is a
2 governmental benefit.

3 JUSTICE SCALIA: No. No, not the
4 regulatory. You're saying the activity, which is
5 subjected to this taking, is the introduction of raisins
6 in interstate commerce. And you say that is something
7 that the benign government can give or withhold.

8 MR. KNEEDLER: It is. It is --

9 JUSTICE SCALIA: Right?

10 MR. KNEEDLER: It is -- it is the permission
11 to do it, which is --

12 JUSTICE SCALIA: Really?

13 MR. KNEEDLER: -- exactly what the Court
14 said in Monsanto. But Monsanto is not the only case.
15 Yee said the same thing with respect to the -- to real
16 property. That was the case involving the mobile home
17 park. And it was claimed there was a taking there
18 because the mobile park owner was subject to rent
19 control and -- and it was argued that that was just like
20 Loretto because it was a forced physical occupation.

21 And the Court said no. The critical
22 distinction was that the -- the Yees had voluntarily
23 chosen to enter the rental market, to enter into a
24 commercial transaction, and the government could then,
25 because they had voluntarily had done it, regulate the

1 price that was being charged.

2 JUSTICE ALITO: Mr. McConnell was asked a
3 number of questions about the Leonard case. But I take
4 it that you don't think that the Leonard case has a very
5 important bearing on this case because you cite it one
6 time in your brief, it's a passing reference, on the
7 issue of fungible goods. Am I correct there?

8 MR. KNEEDLER: We -- we think it's a
9 critical point. But we are -- we are not -- we are not
10 arguing --

11 JUSTICE ALITO: You don't think -- you
12 didn't propose -- you didn't suggest to us that this
13 case is just another version of Leonard and, therefore,
14 we should affirm based on Leonard.

15 MR. KNEEDLER: To the extent Leonard was
16 about tax, this -- this was not -- this program was not
17 identified as a tax partly because the raisins don't
18 come to the government. The raisins are -- go into a
19 pool that belongs to all of the producers and then is
20 divided up among the producers. This is not -- these
21 are not things that are appropriated for the
22 government's own use. But we think Leonard is -- is
23 critically instructive for the point that with respect
24 to property like this, like the oyster shells or like
25 raisins, there -- what the Court said is that they are

1 fungible, their only value is for commercial sale.

2 This is not like the ownership of real
3 property in Loretto where -- which is unique and
4 personally identified. These raisins are valuable only
5 for sale. And, in fact, as I said, this order kicks in
6 only when the producer has committed the raisins to
7 sale.

8 JUSTICE KAGAN: So -- so put all --

9 MR. KNEEDLER: -- by handing them to a
10 handler.

11 JUSTICE KAGAN: Put all the regulatory
12 aspects of the program aside for a moment, and just say
13 this were a much simpler program, and it said -- the
14 government says to the raisin industry, you know, we
15 could tax you, and say you have to deliver 2 percent of
16 your net profits, we're not going to do that, we're just
17 going to take 2 percent of your raisins.

18 Would that be constitutional? Would that be
19 a taking?

20 MR. KNEEDLER: That would -- that would be,
21 I think, like Leonard. It would be -- it would be a --
22 an in-kind tax. I -- I don't think there's anything
23 that would prohibit that being done, but that's not -- I
24 mean -- and we think the fact that that would be okay
25 is -- is instructive here, as the Court's discussion of

1 Leonard suggests, but the Court doesn't have to get to
2 that point.

3 JUSTICE KAGAN: But you said you don't think
4 of this case in that way. And why don't you?

5 MR. KNEEDLER: Well, it's analogous in the
6 sense that -- that -- that Congress may well be able to
7 do this in a different way. My -- the reason I said it
8 was different is that the -- that the oysters -- that
9 the raisins, excuse me, are not being used for the
10 government's program, they do not go to school lunch
11 programs. If the government wants raisins, it buys
12 them. It doesn't -- it doesn't --

13 JUSTICE SCALIA: Yes. But we -- we don't
14 usually allow committees of producers who are called the
15 government to impose taxes, do we? I mean, that's
16 usually done by Congress.

17 MR. KNEEDLER: Or -- or --

18 JUSTICE SCALIA: And this essentially is
19 done by some committee.

20 MR. KNEEDLER: Right, but it's a committee
21 elected by producers, it's important to recognize.

22 JUSTICE SCALIA: It may well be. So -- so
23 they can impose taxes, you're saying. This is just like
24 a tax.

25 MR. KNEEDLER: No. What I -- what I was

1 saying is it -- there are other -- the government may
2 well be able to impose something -- some exaction as a
3 tax, but this is a regulatory program adopted by
4 producers. Again, it's important to recognize, and this
5 goes back to the New Deal. This Court has had numerous
6 cases involving these marketing orders.

7 JUSTICE SCALIA: Whatever a majority of
8 producers agree to, I have to be bound by? I mean,
9 these people disagree.

10 MR. KNEEDLER: They do -- they do disagree,
11 but the disagreement does not convert it into a taking.
12 And if -- if they believe the program is not operating
13 correctly, then there are -- there are other --

14 JUSTICE SCALIA: I'm not saying the
15 disagreement converts it into a taking. I'm just saying
16 that it doesn't -- it doesn't carry much water to say
17 that this is a program adopted by -- by producers. If
18 51 percent of the producers want to do it, there's 49
19 that don't want to do it.

20 MR. KNEEDLER: Well, I think it's a -- it's
21 a pretty good indication that -- that the premises on
22 which Congress enacted this statute in 1937 operated
23 then and operate -- operate now for the benefit of
24 producers. And it shouldn't be necessary in any one
25 particular year in which the regulatory program is in

1 place to calibrate whether the benefits outweigh the
2 burdens. I think --

3 JUSTICE SCALIA: Central planning was
4 thought to work very well in 1937, and Russia tried it
5 for a long time.

6 MR. KNEEDLER: Well, if -- again, if this
7 program is -- is not working, it can be modified. And,
8 in fact, the committee comprised of producers has
9 decided not to impose a reserve requirement in some
10 years.

11 CHIEF JUSTICE ROBERTS: Well, but what if --
12 I mean, you've -- you've made the point several times
13 that the government sells these raisins for the benefit
14 of the producers, right?

15 MR. KNEEDLER: Right.

16 CHIEF JUSTICE ROBERTS: Well, what if the
17 producers, some of them, think they can do a better job
18 of selling them? They can get a better price because
19 they're better producers, they're better marketers, they
20 have export contacts that others don't. I --

21 MR. KNEEDLER: The -- this is just standard
22 regulation. What Congress has said is you -- if you're
23 going to sell, you have to sell in the manner set up
24 under this program. And the -- the portion that they --

25 CHIEF JUSTICE ROBERTS: Well, but that's not

1 usually -- when you're talking about that type of
2 regulation, I understand that, you know, the raisins
3 have to be so big or you can't call them raisins, and
4 they've -- you've got to have safety inspections and
5 all. But you've been presenting this as the reason this
6 is a good program is because we sell the raisins, and
7 then we give some of what's left to the -- to the
8 producers. I don't think that's a very common approach
9 to market regulation.

10 MR. KNEEDLER: Well, there -- there are --
11 there are two pools of raisins, and -- and how you --
12 how you treat, or how you implement the notion that
13 there are two different pools of raisins may vary. But
14 the -- but where you have that, the -- the similarities
15 are much more fundamental. You have what -- the
16 free-tonnage raisins, which are -- which the grower is
17 immediately paid for, and the handler can immediately
18 put on the market, but there was a judgment made when
19 this -- when this -- marketing order was established and
20 Sun-Maid and -- and the Raisin Association believed it
21 was still true during these years, that if you -- if you
22 have a big surplus, as there was around the turn of the
23 century, it would make the prices plummet if those extra
24 raisins were put on the -- on the open market because
25 the demand for raisins is inelastic.

1 So what -- what this marketing order does is
2 it estimates -- where it operates, it estimates what the
3 free-tonnage requirement will be. And that is
4 completely open to the market. The reserve raisins, if
5 you -- they're -- they're essentially valueless because
6 you don't need them to satisfy the existing market. You
7 take them off the market to prop up the prices of the --
8 of the free-tonnage raisins, and then the committee will
9 sell them when they will not undermine -- or in a manner
10 that will not undermine the free-tonnage sales.

11 JUSTICE ALITO: Suppose the same sort of
12 program were carried out with respect to real property.
13 Would you -- would you provide the same answers?
14 Suppose that property owners, owners of real property in
15 a particular area, think that the value of their
16 property would be increased if they all surrendered a
17 certain amount of that property to the government for
18 the purpose of producing a -- creating a park or for
19 some other reason.

20 And so they -- they get the municipality
21 to -- to set up this program, and one of them objects to
22 surrendering this part of that person -- of his or her
23 land. Would -- would that not be a taking?

24 MR. KNEEDLER: I think real property would
25 be fundamentally different.

1 JUSTICE ALITO: Well, why -- why would it be
2 -- I thought you said you're not arguing that there's a
3 difference between real property and personal property.

4 MR. KNEEDLER: We're -- we're not saying
5 there's a categorical difference. But I think -- I
6 think the Lucas decision is very instructive there, that
7 when -- when the Court was talking about the ability to
8 regulate real property, it said that there's a big
9 difference between real property and personal property,
10 at least personal property being used for commercial
11 purposes, which might even be rendered valueless by
12 virtue of governmental regulations. So we think
13 Lucas --

14 JUSTICE SOTOMAYOR: Mr. Kneedler, what's the
15 statute of limitations on a takings claim?

16 MR. KNEEDLER: Six years, I think it would
17 be.

18 JUSTICE SOTOMAYOR: Has there been any
19 reserves created in the last six years?

20 MR. KNEEDLER: I think the last one was
21 2009, 2010. I wanted to correct one fact --

22 JUSTICE SCALIA: Mr. Kneedler, explain to me
23 why -- why -- why the market for raisins is inelastic.
24 You mean people won't buy more raisins if they're
25 cheaper?

1 MR. KNEEDLER: That's basically correct.

2 JUSTICE SCALIA: Really?

3 MR. KNEEDLER: It's just -- it's just the
4 quality of -- it's just the quality of raisins. And
5 there -- there's a limited set of outlets -- raisins now
6 are primarily used as -- as food ingredients in Raisin
7 Bran and -- and things like that. And the -- the price
8 doesn't affect demand. And -- and, therefore, if you
9 put a great surplus on the domestic market, the
10 prices -- prices will crater. And so this -- this has a
11 very sensible approach.

12 JUSTICE KAGAN: Mr. Kneedler, you don't have
13 to convince us that this is a sensible program for you
14 to prevail, do you?

15 MR. KNEEDLER: No, we do not. The
16 question --

17 JUSTICE KAGAN: I mean, we could think that
18 this is a ridiculous program; isn't that right?

19 (Laughter.)

20 MR. KNEEDLER: Pardon? I'm sorry.

21 JUSTICE KAGAN: We could think that this is
22 a ridiculous program.

23 MR. KNEEDLER: You could think this is a --
24 a ridiculous program, but it is one that has been around
25 since 1949, and Petitioner's argument again means that

1 every grower since 1949 has had a per se takings.

2 JUSTICE GINSBURG: Mr. Kneedler, I'd like to
3 get you --

4 JUSTICE SCALIA: It doesn't help your case
5 that it's ridiculous, though. You -- you acknowledge
6 that.

7 (Laughter.)

8 MR. KNEEDLER: I do not.

9 JUSTICE GINSBURG: It isn't --

10 MR. KNEEDLER: It is not -- it is not, let
11 me be clear, a ridiculous program. This is a
12 producer --

13 JUSTICE KAGAN: But this is a serious point,
14 actually, because the ridiculousness or sensibleness of
15 a program is really not for us to decide.

16 MR. KNEEDLER: Yes, I -- I -- I agree with
17 that completely. I mean, that is our -- this is a
18 regulatory program and should be thought of under this
19 Court's regulatory jurisprudence.

20 JUSTICE GINSBURG: Mr. -- Mr. Kneedler, you
21 were asked this before, but your answer wasn't clear.
22 Marketing orders of this sort that have a reserve pool,
23 you said there were 8 or 10. Have any others been
24 operative as this one has been? It was started in '49
25 and how many years --

1 MR. KNEEDLER: They have been operative in
2 the past. Most of them are not operative -- operative
3 in the sense that the reserve -- this is my
4 understanding -- that the reserve provision has been
5 triggered.

6 JUSTICE SOTOMAYOR: Those -- is the
7 government selling the reserve?

8 MR. KNEEDLER: I -- I think it's -- I think
9 it's true of maybe several others, I'm not -- I'm not
10 sure. Some of them have to do with the handler -- the
11 difference between the handler and producer. I wanted
12 to correct the fact --

13 CHIEF JUSTICE ROBERTS: How many -- oh, go
14 ahead.

15 MR. KNEEDLER: I wanted to correct a factual
16 error on the computations. There was suggestion in the
17 one year there was -- \$810 was the field price, and
18 because of the mathematical calculations, the claim was
19 the Petitioners would have been better off without the
20 reserve. That's not correct. The mistake there is the
21 assumption that all the raisins would have been sold at
22 the field price if they were all put on the market, and
23 that's -- that's just inconsistent with the premise of
24 the order, that the only reason that there is a -- a
25 high field price for the free-tonnage raisins is that

1 the other ones are taken off the market. So they would
2 not have -- they would not have been recovered in that
3 way.

4 CHIEF JUSTICE ROBERTS: How many -- how many
5 of these programs are there?

6 MR. KNEEDLER: Of --

7 CHIEF JUSTICE ROBERTS: Marketing orders.

8 MR. KNEEDLER: I think there's scores of
9 them.

10 CHIEF JUSTICE ROBERTS: I mean, I'm trying
11 to put the 8 to 10 in -- in relation to -- to how many.

12 MR. KNEEDLER: I don't know the total
13 number, but I -- we can follow that up with a
14 supplemental letter. I think -- I think there are
15 scores of them. But this is not fundamentally different
16 from the others. And again, the government is not
17 acquiring these raisins for itself. The government
18 doesn't actually keep them in its possession. It just
19 tells the handler to keep them and sell them later,
20 rather than selling them now, and that is not an
21 appropriation of private property.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. McConnell, you have five minutes
24 remaining.

25 REBUTTAL ARGUMENT OF MICHAEL W. McCONNELL

1 ON BEHALF OF THE PETITIONERS

2 MR. McCONNELL: Thank you, Mr. Chief
3 Justice.

4 So several things have been cleared up. The
5 government now does concede that the government takes
6 legal title to the raisins. The government does abjure
7 an argument on tax.

8 JUSTICE SOTOMAYOR: Happens with trustees
9 all the time, to the extent that we've eschewed taking
10 formal titles as meaningful with respect to actual
11 control or actual benefit. We -- trustees take title
12 and -- but it's not for their benefit. It's for the
13 benefit of their beneficiary.

14 MR. McCONNELL: The -- that's true, Justice
15 Sotomayor, but the taking -- the government is not a
16 trustee here. And the --

17 JUSTICE SOTOMAYOR: Oh, but in a form, yes.
18 It's directed to sell the reserve raisins at the best
19 price it can get, given the limitations on the free
20 market.

21 MR. McCONNELL: It sells for the best price
22 and then it uses the proceeds for its own regulatory
23 purpose.

24 JUSTICE KENNEDY: You -- you have only four
25 minutes in rebuttal. You had some other points?

1 MR. McCONNELL: Just as to the factual
2 point, it is not -- our -- our calculations are not
3 based upon selling all of the raisins at the field
4 price. Our calculations are based upon being able to
5 sell all of the raisins at the price that the Secretary
6 has said would be the price in an unregulated market,
7 which is \$747 per ton. And that is -- it is certainly
8 not true that these reserve raisins are valueless. They
9 are an extremely valuable commodity, and in most of the
10 years, the producers of the raisins receive absolutely
11 nothing for them.

12 The important point here, though, is that --
13 is that it is not any less of a taking, even if there is
14 a benefit. I have no doubt, for example, that in
15 Loretto, that the value of the apartment went up because
16 there was a cable, because it became cable ready for
17 its -- for its tenants. That did not make it any less
18 of a taking, as this is a per se taking, and any
19 benefits only go to whether there might be some kind of
20 implicit in-kind compensation as a result of the
21 benefit.

22 And if this were an eminent domain
23 proceeding, I think that that might well be relevant.
24 This is, in fact, only an administrative enforcement
25 action in which the question is whether the Department

1 of Agriculture was entitled, under the Constitution, to
2 demand either the raisins or their monetary equivalent
3 without any payment of -- of -- of compensation.

4 JUSTICE BREYER: That last -- what -- why
5 isn't it for them to make that argument?

6 MR. McCONNELL: Because --

7 JUSTICE BREYER: The argument, you know,
8 that it's -- you're better off, et cetera.

9 MR. McCONNELL: If you would look at the --

10 JUSTICE BREYER: Did they waive it? I mean,
11 what's -- what's -- what's the answer?

12 MR. McCONNELL: No, it's the regulation.
13 I'm -- I'm sorry. If you look at 7 C.F.R. 989.166(c),
14 you will see that that is the provision for what happens
15 when the handler does not turn over reserve raisins to
16 the Department of Agriculture. It is -- it has very
17 specific provisions for what happens, and there is no
18 provision in that for implicit in-kind compensation.

19 JUSTICE BREYER: But -- can they argue
20 that -- the fact that all the raisin producers are
21 better off because of this program, including you, but
22 no free riders, that's what's the compensation. Can
23 they at least argue that? Or have they conceded that?

24 MR. McCONNELL: Under this regulation, I do
25 not think it is open to the Department of Agriculture to

1 argue that. I think that that would be a logical
2 argument if this were an eminent domain proceeding and
3 we were simply trying to figure out what the proper
4 value of the raisins is.

5 Reserving, of course, the point that we
6 believe that this program does not benefit the
7 producers.

8 JUSTICE BREYER: Yes, yes.

9 MR. McCONNELL: We believe that the -- we
10 believe that this program actually makes the producers
11 demonstrably worse off. The only people who benefit
12 from this program are the recipients of the subsidy --
13 of the export subsidies.

14 JUSTICE SCALIA: The exporters.

15 MR. McCONNELL: That's right.

16 JUSTICE KAGAN: Mr. McConnell, could I take
17 you back to the very first thing that you said in this
18 argument? Because you said typically, the handler
19 doesn't take the product and the handler doesn't pay for
20 the product, and you would think that the Hornes here
21 would only have a takings claim, assuming that they do
22 have a takings claim, for the raisins that they produced
23 and not for the raisins that other people produced. But
24 you said that that's not correct in this case?

25 MR. McCONNELL: It is not, because they

1 pay -- the -- a check went out from the Raisin Marketing
2 Association to the producers for every raisin, not just
3 the -- the free-tonnage raisins, but for the
4 reserve-tonnage raisins as well. So the Hornes are
5 actually the -- the only people with a financial
6 interest in the raisins in this case. That is unusual.

7 CHIEF JUSTICE ROBERTS: Mr. McConnell, this
8 is probably neither here nor there, but what has the
9 impact of the drought been on the raisin producers? Do
10 you know?

11 MR. McCONNELL: It is not good.

12 (Laughter.)

13 JUSTICE SCALIA: Very carefully guarded
14 response.

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: Thank you. I'm glad
17 I asked.

18 MR. McCONNELL: And I wonder if I'll be able
19 to take a shower when I go home.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

22 (Whereupon, at 11:07 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

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