No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KATE COMERFORD TODD
SHELDON GILBERT
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20063
(202) 463-5337

JOHN P. ELWOOD
Counsel of Record
JEREMY C. MARWELL
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

J. ERIC PARDUE
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, TX 77002

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Other Authorities: **Page(s)**

Other Authorities—Continued: **Page(s)**

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the county. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community, including cases defending constitutional protections for private property rights against government infringement. The Chamber filed briefs *amicus curiae* supporting property owners when this case was last before this Court as *Horne* v. *Dep't of Agriculture*, No. 12-123, leading to a unanimous reversal of the Ninth Circuit's prior judgment, and also in *Koontz* v. *St. Johns River Water Management District*, No. 11-1447, which

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing, with timely notice from *amicus* of its intent to file.

resulted in a property-rights-protective ruling that supports petitioners in this case.

On remand from its prior reversal in this Court, the Ninth Circuit again sharply departed from this Court's longstanding takings jurisprudence, adopting a dangerous new test that guts property rights protections. The decision is of grave practical concern to the Chamber and its members, which have a substantial interest in ensuring that property owners retain an adequate, efficient, and prompt remedy against government takings of real and personal property. Historically, the property rights of Chamber members have been subject to infringement in a wide range of areas, including through laws, like those at issue here, which impose monetary fines or penalties as a proxy for outright physical appropriation of private property.

The Ninth Circuit held here that a federal law requiring petitioners to transfer title to the government of a substantial portion of their annual raisin crop—or face a fine, including an amount equal to the value of the raisins which the government demanded be handed over—was not a categorical "taking," and thus was protected under the Fifth Amendment, if at all, only by the "nexus and rough proportionality" standard formerly limited to land-use exactions, or the general ad hoc regulatory takings doctrine. Adding insult to injury, the panel sought to defend its rule by suggesting that petitioners could avoid the expropriation simply by abandoning the market and their life-long vocation by producing something other than raisins. The Ninth Circuit's radical decision creates significant doctrinal confusion and substantially weakens Fifth

Amendment rights, with wide-ranging consequences for business interests and private property holders nationwide.

SUMMARY OF ARGUMENT

The panel decision improperly conflates the categorical framework long applicable to permanent physical occupations of property with the more fact-intensive analysis used for regulatory takings—including a balancing test that this Court has traditionally reserved for land-use exactions. In particular, the panel's holding that *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), is inapplicable when the government appropriates personal property represents a dangerous retreat from a bright-line rule that has long served as an important bulwark for property rights, and conflicts with the weight of this Court's and lower-court authority.

The panel decision threatens private property rights in a broad range of contexts, and creates dangerous incentives for the government to disguise traditional takings in an effort to reframe the governing legal analysis and exploit the loophole created by the panel's novel doctrinal approach. Personal property is no less at risk of government interference—and thus no less deserving of the certainty and predictability provided by a per se rule for physical takings—than real property. Case reporters are replete with examples of the government appropriating personal property, illustrating the diverse forms of interference with, and abuse of, property rights that the panel decision effectively green-lights.

The panel decision also creates numerous conflicts of authority by holding that *Loretto* is inapplicable to personal property, that just compensation is not required where a property owner retains some theoretical right to proceeds from the property or benefit from a regulatory scheme, and that a permanent physical occupation can be reframed as a mere "use restriction."

The Chamber and its members have grave concerns about the panel's "use restriction" theory, in particular, which amounts to the unprecedented and indefensible notion that the government can condition a property owner's ability to sell goods into the market on its agreement to transfer title over a significant fraction of its property to the government. That dangerous idea is anathema to bedrock principles of private property rights, and admits to no principled limitation. Even absent the conflicts of authority generated by the panel's decision, this Court's review would be urgently warranted—to reaffirm that a taking occurs whenever the government physically occupies or appropriates private property, and to avert dire effects on business interests and private property rights nationwide by inviting governments to reframe appropriations as mere "use restrictions."

ARGUMENT

I. Diluting The Per Se Physical Takings Doctrine Will Have Serious Negative Effects On Property Rights Nationwide

As petitioners explain, the panel erred, and departed from the approach of numerous other

courts, by holding that: (1) the government's appropriation of a portion of petitioners' raisin crop does not constitute a per se physical taking of private property under *Loretto*; (2) there was no per se taking because petitioners purportedly retained a contingent, theoretical interest in the raisins or enjoyed indirect benefits from the regulatory program as a whole; and (3) whether the regulation effects a categorical taking is governed by the "nexus and rough proportionality" balancing test for land-use exactions under *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). *Amicus* complements that analysis by illustrating how the panel decision will have wide-ranging negative practical effects on private property rights, by highlighting the ways in which the decision conflicts with established precedent and creates doctrinal confusion, and by explaining how it harms important interests that are well served by the longstanding categorical rule.

A. The Per Se Physical Takings Rule Is An Important Bulwark For Private Property Rights

The panel's basic doctrinal innovation—i.e., analyzing a physical taking of petitioners' raisins under a more fact-intensive regulatory standard than *Loretto*'s per se rule—undermines important interests of predictability and clarity reflected in this Court's development of categorical rules for particular classes of takings.

Regulatory takings have long been governed by the "essentially *ad hoc*, factual inquiry" set forth in *Penn Central Transportation Co.* v. *New York City*,

438 U.S. 104, 124 (1978); see also *E. Enters.* v. *Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion). By design and practical effect, that approach requires courts to undertake "complex factual assessments of the purposes and economic effects of government actions," *Yee* v. *City of Escondido*, 503 U.S. 519, 523 (1992), and to grapple with that "well-known, if less than self-defining" question, *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 617 (2001), of whether a particular regulation "goes too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). That approach stems from the pragmatic concern that subjecting "regulations prohibiting private uses [of property]" to a categorical takings rule "would transform government regulation into a luxury few governments could afford," given the "ubiquit[y]" of such regulations in the modern era. *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323-324 (2002). But the regulatory takings test has, in practice, become a famously "difficult problem"; "The attempt to determine when regulation goes so far that it becomes, literally or figuratively, a 'taking' has been called the 'lawyer's equivalent of the physicist's hunt for the quark.'" *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 199-200 & n.17 (1985) (quoting C. Haar, *Land-Use Planning* 766 (3d ed. 1976)).

This complex and fact-intensive approach for regulatory takings analysis imposes significant costs on property owners and litigants, and burdens the exercise of private property rights. "[A] party challenging governmental action as an unconstitutional taking bears a substantial burden,"

E. Enters., 524 U.S. at 523, in navigating the complex, ad hoc, regulatory-takings framework. In addition to requiring property owners to adduce proof on a wide range of issues (such as a regulation's "economic effect on the landowner," interference with "reasonable investment-backed expectations," and "the character of the government action," *Palazzolo*, 533 U.S. at 617), the regulatory takings doctrine necessarily deprives property owners of predictability and certainty. "Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *E. Enters.*, 524 U.S. at 541 (Kennedy, J., concurring in the judgment and dissenting in part); see also *Store Safe Redlands Assocs.* v. *United States*, 35 Fed. Cl. 726, 729 (1996) ("Since 1922, the Supreme Court has applied a test in regulatory taking cases that is seen by many as so fact specific that general predictability is made very difficult."). Governments, too, suffer costs and uncertainty from unpredictable legal rules. See *E. Enters.*, 524 U.S. at 542 (Kennedy, J.) ("boundar[ies] for application of the regulatory takings rule provid[e] some necessary predictability for governmental entities").

Similar concerns have been raised about the balancing test from *Nollan* and *Dolan*, which the Ninth Circuit extended to personal property. Although the "essential nexus" and "rough proportionality" standards have been viewed by some as "apply[ing] heightened scrutiny to challenged land use regulations," Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 622 (2004), by their terms they "are hardly beacons of

clarity," Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 Cardozo L. Rev. 93, 107 n.55, 191 (2002); see also Fenster, 92 Cal. L. Rev. at 629, 630 (*Nollan* and *Dolan* are "less clear than * * * rules defining per se regulatory takings as those that result in * * * permanent physical occupation," and "neither metric is exceptionally clear"). *Nollan* and *Dolan* require courts to grapple with a range of fact-intensive issues, including the "causal relationship between the harm of the proposed new use for the property, the regulation upon which the government relies in requiring the challenged concessions, the cost of the concessions, and the likelihood that the concessions would mitigate the harms." Fenster, 92 Cal. L. Rev. at 629-630; see also Pet. App. 26a-28a (analyzing purpose and performance of raisin marketing order for means-ends analysis).

In part for these reasons, ad hoc regulatory takings doctrines have engendered sharp criticism. See, *e.g.*, Bruce A. Ackerman, *Private Property and the Constitution* 8 (1977) (describing regulatory takings doctrine as "a chaos of confused argument"); Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in* Lucas v. South Carolina Coastal Council, 26 Loy. L.A. L. Rev. 955, 966 (1993) (takings test is "so amorphous as to defy description"); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, 102 (1995) (an "unworkable muddle" that "has generated a plethora of inconsistent and open-ended formulations that have failed to make sense"); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1006-1007 (2003) ("[a] jurisprudential mess"); Carol M.

Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. Cal. L. Rev. 561, 562 (1984) ("[C]ommentators propose test after test to define 'takings,' while courts continue to reach ad hoc determinations rather than principled resolutions."); Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 37 (1964) ("a welter of confusing and apparently incompatible results"); Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 Ala. C.R. & C.L. L. Rev. 25, 27-28 (2013) (describing doctrine as "famously incoherent and a mess, a muddle (or muddled), confused, incomprehensible, standardless, and unprincipled" (internal quotation marks omitted); collecting authorities).

In contrast to this fact-intensive, ad hoc approach, this Court has carved out several bright-line, categorical rules in areas where clarity is particularly important and "in-depth factual inquiry" unnecessary. *Nixon* v. *United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992). Most obviously, "[w]hen the government physically takes possession of an interest in property for some public purpose," the existence of a taking is typically self-evident and the government is categorically required to pay just compensation. *Tahoe-Sierra*, 535 U.S. at 322 (citing *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). And this Court has enforced the categorical rules that a taking occurs whenever there is a permanent physical occupation, *Loretto*, 458 U.S. at 426, or a deprivation of all economically beneficial use of private property, *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

Commentators have lauded these per se rules for providing predictability and certainty for property

owners—"a ray of light in the otherwise shadowy area of 'takings' law." Steven N. Berger, *Access for CATV Meets the Takings Clause: The Per Se Takings Rule of* Loretto *v.* Teleprompter Manhattan CATV Corp., 25 Ariz. L. Rev. 689, 703 (1983). Among its other virtues, under *Loretto*'s per se rule, "it is easy to tell when the rule has been violated—a boundary is traversed." Poirer, 24 Cardozo L. Rev. at 108. As a result, property owners face a less onerous burden in defending and litigating their rights, and governments gain predictability and certainty in the conduct of public affairs, and are subject to the full financial deterrent of the just-compensation guarantee. See *Loretto*, 458 U.S. at 437 ("[W]hether a permanent physical occupation has occurred presents relatively few problems of proof.").

The clarity of these categorical rules also promotes important interests related to private property rights—interests sharply undermined by the Ninth Circuit's diluted approach in this case. A per se rule allows property owners to make investments based on concrete expectations about the risk of government interference. See Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 St. John's L. Rev. 433, 457-458 (1988) ("Insofar as property is conceptually a set of expectations, any rule which tends to settle expectations is, in that respect at least, a good rule."); Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 577 (1988) ("hard-edged rules like these * * * are what property is all about"). Put differently, "[t]akings law should be predictable * * * so that private individuals confidently can commit resources

to capital projects." Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988). Conversely, "ad hoc balancing is impossible to reconcile with a belief in the importance of preserving 'investment-backed expectation[s].'" *Ibid.*

Doctrinal clarity does much to preserve and protect property owners' investment-backed expectations. See Rose-Ackerman, 88 Colum. L. Rev. at 1711. By creating certainty that a physical invasion of property will result in just compensation, the per se rule establishes appropriate ex ante incentives for property owners, who will be secure in the knowledge that *any* physical invasion or occupation of property by the government is a compensable taking, whatever its scope or extent. See *Loretto*, 458 U.S. at 438 n.16 ("[W]hether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox."). And "property owners and investors who believe that a rule-bound regulatory regime better protects their expectations than does an ad hoc balancing test in theory will commit more resources to capital projects, therefore enabling the highest and best use of property." Fenster, 92 Cal. L. Rev. at 620.

Under *Loretto*'s bright-line rule, a property owner can make decisions relevant to investments—*e.g.*, about acquiring property in the first instance, improving or developing existing holdings, or valuing property for future sale—based on a secure understanding that any physical occupation of property must be compensated. "By offering clear declarations of the extent of property owners' constitutional rights and limiting the discretion of

judges and administrative decision makers, clear rules ensure fair and value-neutral coherence, regularity, and predictability across disparate, individual cases." Fenster, 92 Cal. L. Rev. at 619. Moreover, doctrinal uncertainty under the ad hoc regulatory takings framework not only makes investors uncertain "whether or not damages will be paid," but also, if damages are not paid, means that "investors will be left bearing the costs of an uninsurable risk." Rose-Ackerman, 88 Colum. L. Rev. at 1700. From the perspective of optimizing the allocation of valuable resources, "[t]o the extent that investors are risk averse, the very incoherence of the doctrine produces inefficient choices." *Ibid.*

The per se rule also creates salutary incentives for the government, discouraging gamesmanship or efforts to reframe traditional "takings" to exploit doctrinal loopholes or ambiguities. Under a per se rule, the government's rationale for appropriating private property does not matter; so long as there is physical appropriation, a compensable taking has occurred. See *Tahoe-Sierra*, 535 U.S. at 323 ("we do not ask whether a physical appropriation advances a substantial government interest" under the "clear rule" governing "categorical taking[s]"). Under the panel's interpretation, by contrast, the government can physically appropriate personal property without any categorical obligation to compensate the owner, so long as the regulation satisfies the "nexus and rough proportionality" principles of *Nollan* and *Dolan*. Pet. App. 23a.

Uncertainty about how the fact-intensive and ad hoc legal standard will be applied to any given set of facts also reduces the anticipated cost of a taking for

the government, essentially discounting the rate of compensation by the possibility that the factfinder will conclude no compensation is owed. That uncertainty not only affects the government's choices, but also changes how property owners interact with the government. "By providing a doctrinal shield against the intrusive overregulation of local governments, formal takings rules smooth the 'frictions' caused by the struggles over regulatory indeterminacy and uncertainty, stabilizing and protecting property rights within the present distribution of property ownership and entitlements." Fenster, 92 Cal. L. Rev. at 620.

In short, the Ninth Circuit's decision undermines important interests critical to the protection of private property rights by replacing the safety of a categorical rule with the fact-intensive ad hoc balancing test of *Nollan* and *Dolan*.

B. The Panel's Doctrinal Error Affects Private Property Rights In A Broad Range of Contexts

The panel decision's practical consequences sweep far beyond the Depression-era agricultural regulations at issue in this case to affect property owners in many other areas. Federal and state case reporters are replete with examples of government attempts to appropriate or occupy personal property, highlighting the important and continuing role of a per se rule in protecting property rights. These cases vividly illustrate how the Ninth Circuit's approach, if applied to a range of other facts, would create incentives for strategic behavior, inviting governments to restructure regulations that effect de

facto physical appropriation of personal property in a manner that avoids paying just compensation. These cases also undercut any suggestion that the practical need for a categorical, per se rule for personal property is any less acute than in the context of real property.

One colorful example arose in *City of Oakland* v. *Oakland Raiders*, 646 P.2d 835 (Cal. 1982). In 1980, the Oakland Raiders franchise of the National Football League announced its intention to move to Los Angeles. In response, the City of Oakland initiated an eminent domain proceeding to prevent the move by "acquir[ing] by eminent domain the property rights associated with [the Raiders'] ownership of a professional football team as a franchise member of the National Football League."[2] *Id.* at 837. The California Supreme Court held that the Raiders' property interests were condemnable under California law, bringing into sharp focus the importance of constitutional takings protection.

The California Supreme Court approached the case apparently without ever questioning that assuming possession and ownership of the team

---

[2] For a more detailed history, see Leon F. Mead II, *Raiders: $72 Million, City of Oakland: 0…Was That the Final Gun – A Story of Intrigue, Suspense and Questionable Reasoning*, 9 Loy. L.A. Ent. L. Rev. 401 (1989). Oakland is not the only city tempted by this tactic. Maryland authorized the City of Baltimore to use eminent domain to prevent the NFL's Colts franchise from moving to Indianapolis. See Charles Gray, *Keeping the Home Team at Home*, 74 Cal. L. Rev. 1329, 1330-1331 & n.14 (1986).

would constitute a taking.[3] But under the Ninth Circuit's formulation, it is far from clear whether that assumption would hold true, given that the various property rights that make up a football franchise (*e.g.*, trademarks, player contracts) were personal, not real, property. Moreover, in the wake of the panel's ruling here, it is not hard to imagine how Oakland could have altered its strategy to fit the panel's loophole. For instance, the City might have demanded a fractional interest in the team in the event its owners chose to relocate, perhaps in service of a stated goal of regulating the "market" for professional football services. Or the City might have made the team less valuable by taking title to a certain fraction of the tickets offered, again in the guise of market regulation. Under the panel's approach, a court might conclude that such a regulation was a mere "use" restriction that satisfied the "nexus and rough proportionality" test of *Nollan* and *Dolan*, so long as the Raiders were theoretically entitled to any residual value after the City disposed of the tickets.

In *Milwaukee & Suburban Transport Corp.* v. *Milwaukee County*, 263 N.W.2d 503 (Wis. 1978),

---

[3] In the cited decision, the California high court held that whether taking the team was a "public use" was a jury question; the Raiders ultimately prevailed on public use, antitrust, and Commerce Clause grounds, effectively rejecting the City's attempt to condemn the franchise. See Mead, *supra* note 2, at 406-407. But there is little reason to believe those alternate protections will be present in a typical case. Cf. *Am. Needle, Inc.* v. *Nat'l Football League*, 130 S. Ct. 2201, 2216 (2010) (noting "special characteristics" of National Football League relevant to antitrust analysis).

Milwaukee County condemned the assets of a private bus system and began operating the system under public ownership. See *id.* at 508 ("There was no interruption of service. The same buses were driven on the same routes by the same employees."). Again, it is far from clear that *Milwaukee*'s view of the transaction as a paradigmatic taking, in which the County expressly appropriated the bus system, would survive the panel's holding that *Loretto* applies only to real property. In any event, the County might have restructured its takeover to fall under the panel's balancing-test framework, potentially exempting itself from any obligation to pay compensation. For example, rather than "taking" the entire bus system, the County could have required the private owners to accept a certain number of riders who present bus fares sold by the County—in the vernacular of the raisin marketing order, setting aside for public use a "reserve" portion of all bus seats, which the County could dispose of as it sees fit, perhaps with the possibility of a contingent future benefit to the bus company. The Ninth Circuit's decision here suggests even those egregious actions would not be subject to a per se physical takings test.

Of course, appropriation of personal property can also occur when a government initially seizes property for a purpose other than eminent domain. In *Lee* v. *City of Chicago*, police impounded an innocent bystander's private vehicle for investigation because it had been struck by a stray bullet. 330 F.3d 456 (7th Cir. 2003). After the investigation, the owner discovered that the City had painted large red inventory numbers on three sides of the vehicle. *Id.* at 459. Although the case was not litigated on

takings grounds, Judge Wood concluded that the plaintiff had "suffered [a] * * * taking: governmental authorities physically took some of his personal property for a public purpose and kept it for a period of time." *Id.* at 474 (Wood, J., concurring). Notably, she cited *Loretto* in concluding that "[a]ny physical occupation is enough [for a taking], even where the owner retains at least some use." *Id.* at 475. But under the Ninth Circuit's analysis, *Loretto* would not apply, because a car is personal, not real, property, and because any takings claim would be relegated to the "nexus and rough proportionality" standard from *Nollan* and *Dolan*, or the ad hoc balancing test for regulatory takings.

To similar effect, the plaintiff in *Innovair Aviation, Ltd.* v. *United States*, 72 Fed. Cl. 415 (2006), *rev'd on other grounds*, 632 F.3d 1336 (Fed. Cir. 2011), was completing the turboprop conversion of certain airplanes that were under contract to Air Colombia when the U.S. government seized the planes, claiming that Air Colombia was a front for drug cartels that allegedly purchased the airplanes with drug proceeds. 72 Fed. Cl. at 416-418. The plaintiff sought compensation for the taking of the planes. *Id.* at 419. The court held that the seizure was a per se taking of the plaintiff's private property, analogizing to *Loretto* instead of *Penn Central* because "[h]ere we have the total destruction of the Plaintiff's property." *Id.* at 423. Citing *Nixon*, 978 F.2d 1269 (discussed below and at Pet. 18-19), the court rejected the government's contention that the per se takings analysis only applies to real property, noting that there, as in *Nixon*, "the Plaintiff's personal property was permanently and completely

appropriated by the Government." 72 Fed. Cl. at 423. *Innovair* ultimately found that the plaintiff had suffered a compensable taking when the government physically occupied its personal property. Under the panel's analysis, that clear-cut approach would be replaced with a far more uncertain, ad hoc inquiry.

These cases provide just a few examples of how the panel's holding encourages gamesmanship and strategic behavior, as governments will rationally seek to avoid paying compensation. As *City of Oakland* and *Milwaukee* illustrate, governments often have strong financial, practical, or other incentives to appropriate personal property, and to disguise the true costs of those choices—in a wide range of substantive areas. One recent Washington, D.C. law prohibited patented drugs from being sold in the District for an "excessive" price, requiring drug manufacturers to rebut a presumption of excessiveness if the price of a drug is more than 30% higher than in the United Kingdom, Germany, Canada, or Australia. See Prescription Drug Excessive Pricing Act of 2005, codified at D.C. Code §§ 28-4551-28-4555. That statute represented a clear attempt to disguise the true fiscal cost of providing a public benefit—shifting the cost of subsidized drugs from taxpayers (who otherwise would have to use public funds) to a drug's inventors and manufacturers. See *Biotechnology Indus. Org.* v. *District of Columbia*, 496 F.3d 1362, 1374 (Fed. Cir. 2007) ("The Act is a clear attempt to * * * diminis[h] the reward to patentees in order to provide greater benefit to District drug consumers."). Under the Ninth Circuit's reasoning, the District could have achieved the same goal by requiring pharmaceutical

companies physically to provide low-income residents with patented drugs free of charge.

If *Loretto*'s per se rule is wholly inapplicable to personal property, public officials will shift their strategy away from forthright use of eminent domain and toward regulatory regimes that achieve a similar practical outcome on the cheap. The Ninth Circuit's decision opens a back door to abusive government actions, despite this Court's efforts to bar those approaches though per se rules about physical occupation.

C. The Decision Creates Sharp Conflicts Of Authority By Analyzing A Physical Taking Of Personal Property Under A Fact-Intensive Balancing Test

As petitioners explain, the panel erred and departed from the approach of numerous other courts, by holding that *Loretto*'s categorical rule for permanent physical occupations of property does not apply to "controversies involving personal property" or where property owners retain some contingent benefit from government expropriation, and by re-characterizing a physical appropriation as a "use" restriction subject to the balancing test from *Nollan* and *Dolan*. Pet. App. 20a; Pet. 15-20. *Amicus* supplements those arguments and identifies other authorities with which the panel decision conflicts.

As the petition notes, Pet. 18, a leading case is *Nixon* v. *United States*, 978 F.2d 1269 (D.C. Cir. 1992), in which the former President challenged regulations promulgated under the Presidential Records and Materials Preservation Act of 1974 effectively "authoriz[ing] the Administrator of

General Services to retain complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials that constitute the presidential historical records of Richard M. Nixon." *Id.* at 1271 (internal quotation marks omitted). The government advanced precisely the same theory adopted by the panel here—only to have the D.C. Circuit squarely reject that approach. Pet. 18-19. The *Nixon* court's reasoning merits close attention, as it continues to be relevant today. Among other things, the court explained that "[t]he rationale for the per se rule is that actual occupation of property obviates an in-depth factual inquiry to determine whether one's economic interests have been sufficiently damaged as to warrant compensation." *Nixon*, 978 F.2d at 1284. And the D.C. Circuit emphasized that this Court's "actual holding [in] *Loretto* makes no mention of a distinction between real and personal property, nor was any rationale given in the opinion that may justify such a distinction." *Id.*

Underscoring the systematic incentives governments have to push the limits of takings law, the court in *Rose Acre Farms, Inc.* v. *United States*, 373 F.3d 1177, 1196 (Fed. Cir. 2004), felt compelled to emphasize that "[t]he trial court correctly rejected the government's contention that a 'per se' takings analysis is never applicable when personal property is at issue." That case involved a complex set of health and food-safety testing requirements for poultry farmers, which included the seizure and destruction of certain chickens by government agents. The Federal Circuit noted that when this Court had been "presented, recently, with the opportunity" to

hold that "categorical takings are limited to the taking of real property," it specifically declined to do so in a case involving other personal property (i.e., interest on lawyers trust accounts). *Id.* at 1196 n.17 (citing *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216 (2003)). The Federal Circuit drew particular significance from this Court's "agree[ment]," in *Brown*, "that a per se approach is more consistent" with prior precedent than an ad hoc standard, and that "the transfer of the interest [on the trust accounts] seems more akin to the occupation of a small amount of rooftop space in *Loretto*." *Brown*, 539 U.S. at 235; see generally *Rose Acre Farms*, 373 F.3d at 1196 n.17.[4]

Other courts and judges have reached the same conclusion. In a case involving a takings challenge to a law requiring tobacco companies to disclose trade secrets, Judge Selya explained that "[l]imiting per se takings analysis to cases involving real property is a crude boundary with no compelling basis in the law." *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring in the judgment). And, as noted, Judge Wood looked to *Loretto* in analyzing the government's "physical occupation" of a portion of a private automobile. *Lee*, 330 F.3d at 474-475.

R.J. Widen Co. v. *United States*, 357 F.2d 988 (Ct. Cl. 1966) (per curiam), is to similar effect. There, a

---

[4] *Rose Acre Farms* ultimately held that the laws at issue did not involve a per se taking. 373 F.3d at 1197. But the Federal Circuit's extensive discussion of *Brown* makes clear that the case should not be read to support the panel's sweeping approach here. The possibility that *Rose Acre Farms* might be read in that manner, cf. *id.* at 1198, only underscores the need for this Court's intervention.

property owner contended that the United States had taken its personal property by constructing a dam and depriving the property owner of a water supply necessary to operate its leather-tanning business—including not only occupation of real property, but also damage to personal property such as tanning supplies and hides damaged as a result of lack of access to water. *Id.* at 991. Although the court found that the specific damage to personal property there represented consequential damages outside the Fifth Amendment's protection, it emphasized that "[u]ndoubtedly, the United States could here have 'taken' plaintiff's personal property and business, in which case just compensation would be due." *Id.* at 993.

In *Seery* v. *United States*, 161 F. Supp. 395, 399 (Ct. Cl. 1958), an opera star sued the United States "for just compensation for the taking by the Army of her real and personal property." The plaintiff alleged damage to her residence, home furnishings, and other personal property when the U.S. Army commandeered her Austrian "castle-like villa" as an officers' rest home during and after World War II. *Id.* at 396. Without any suggestion of applying a complex regulatory takings analysis, the court undertook a straightforward assessment of what personal property the Army had stolen or destroyed, concluded that "a considerable amount of the plaintiff's personal property was lost or destroyed while in the Army's possession," and awarded damages accordingly. *Id.* at 399.

By concluding that *Loretto*'s per se physical takings rule does not apply to government appropriation of personal property, and by instead

treating a physical taking as a mere "use restriction," the panel drew all of these cases into question, and departed from the great weight of precedent, which recognizes (or applies) a categorical standard to claims that the government has physically taken personal property. This Court's intervention is necessary to resolve this conflict of authority.

II. The Panel's "Use Restriction" Theory Guts Protections For Personal Property

As petitioners explain, the panel departed from long-established precedent when it sought to immunize the government's seizure of title to a portion of petitioners' raisin crop as a mere "use restriction" (Pet. App. 23a) on personal property. The panel reasoned that the marketing order applies only "insofar as [petitioners] voluntarily choose to send their raisins into the stream of interstate commerce," and suggested petitioners could "avoid" the regulations "by planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins." *Id.* at 25a-26a.

The notion that the government may condition a business owner's participation in the free market on transferring legal title to a fraction of its goods is of the gravest concern to the Chamber and its members, and casts a cloud over business owners nationwide. That theory admits to no principled limitation, and could justify a range of confiscatory actions, from a requirement that farmers give up 50% of their acreage or other property rights as a condition of selling their crops, to a law that takes physical possession of half the cars from an automaker's

assembly line as a "use restriction" on selling them in commerce.[5] Even beyond the creation of sharp conflicts of authority, Pet. 27-33, the dire practical effects for property owners nationwide of the panel's "use restriction" theory independently demonstrate the urgent need for this Court's review. See *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320 (2002) (cert. granted on takings issue "[b]ecause of the importance of the case").

[5] Nor could petitioners avoid the marketing order by disposing of their raisins in the intrastate market. See, *e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005) ("Our case law firmly establishes Congress's power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KATE COMERFORD TODD
SHELDON GILBERT
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20063
(202) 463-5337

JOHN P. ELWOOD
Counsel of Record
JEREMY C. MARWELL
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

J. ERIC PARDUE
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, TX 77002

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

OCTOBER 2014