

**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership,

*Plaintiffs-Appellants,*

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

*Defendant-Appellee.*

No. 10-15270  
D.C. No.  
1:08-cv-01549-LJO-  
SMS  
AMENDED  
OPINION

Appeal from the United States District Court  
for the Eastern District of California  
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted  
April 14, 2011—Pasadena, California

Filed July 25, 2011  
Amended March 12, 2012

Before: Stephen Reinhardt, Michael Daly Hawkins, and  
Ronald M. Gould, Circuit Judges.

Opinion by Judge Hawkins

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HORNE v. USDA

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**COUNSEL**

Brian C. Leighton, Clovis, California, for the plaintiffs-appellants.

Benjamin B. Wagner, United States Attorney, and Benjamin E. Hall, Assistant United States Attorney, Fresno, California, for the defendant-appellee.

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**OPINION**

HAWKINS, Senior Circuit Judge:

This appeal of a United States Department of Agriculture (“USDA”) administrative decision asks us to interpret and pass on the constitutionality of a food product reserve program authorized by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* (“AMAA”), and implemented by the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Part 989 (“Raisin Marketing Order” or “the Order”), first adopted in 1949. Farmers Marvin and Laura Horne (“the Hornes”<sup>1</sup>) protest the USDA Judicial Officer’s (“JO”) imposition of civil penalties and assessments for their failure to comply with the reserve requirements, among other regulatory infractions, contending: (1) they are producers not subject to the Raisin Marketing Order’s provisions; (2) even if subject to those provisions, the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool constitutes an uncompensated *per se* taking in violation of the Fifth Amendment; and (3) the penalties imposed for their “self-help” noncompliance with the Raisin Marketing Order violate the Eighth Amendment Excessive Fines Clause. We affirm.

**BACKGROUND****I. Regulatory Framework**

Raisins and other agricultural commodities are heavily reg-

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<sup>1</sup>Collectively referred to as “the Hornes,” the Plaintiffs-Appellants are Marvin and Laura Horne, d/b/a Raisin Valley Farms (a California general partnership), and d/b/a Raisin Valley Farms Marketing Association (a California unincorporated association), together with their business partners Don Durbahn and the Estate of Rena Durbahn, collectively d/b/a Lassen Vineyards (a California general partnership).

ulated under federal marketing orders adopted pursuant to the AMAA, a Depression-era statute enacted in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system. 7 U.S.C. § 601 *et seq.*; *see Zuber v. Allen*, 396 U.S. 168, 174-76 (1969); *see generally* Daniel Bensing, "The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937," 5 *San Joaquin Agric. L. Rev.* 3 (1995). The declared purposes of the AMAA are, *inter alia*, to help farmers achieve and maintain price parity for their agricultural goods and to protect producers and consumers alike from "unreasonable fluctuations in supplies and prices" by establishing orderly marketing conditions. 7 U.S.C. § 602; *see Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 138 (1963); *Pescosolido v. Block*, 765 F.2d 827, 830 (9th Cir. 1985).

To achieve these goals, the AMAA delegates authority to the Secretary of Agriculture ("Secretary") to issue marketing orders<sup>2</sup> regulating the sale and delivery of agricultural goods, 7 U.S.C. § 608c, principally by imposing production quotas or by restricting the supply of a commodity for sale on the open market, either through marketing allotments or reserve pools, *see id.* § 608c(6).<sup>3</sup> The Secretary, in turn, is authorized to del-

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<sup>2</sup>According to the specific promulgation procedures mandated by the AMAA, the Secretary may only issue a marketing order if, after providing notice and opportunity for hearing, he finds that "the issuance of such order . . . will tend to effectuate the declared policy" of the Act. 7 U.S.C. § 608c(3)-(4). Such order will not become effective until approved by both (1) the handlers of at least 50 percent of the volume of the commodity covered by the proposed order and (2) either (a) two-thirds of producers of that commodity during a representative period or (b) producers of two-thirds of the volume of that commodity during said period. *Id.* § 608c(8); *see id.* § 608b. The Secretary may terminate or suspend any marketing order upon finding it "obstructs or does not tend to effectuate the declared policy" of the Act, or upon request of a majority of active producers during a representative time period. *Id.* § 608c(16).

<sup>3</sup>Section 8c of the AMAA, 7 U.S.C. § 608c, the key statutory provision dealing with the marketing orders, originated in a 1935 amendment to the

egate to industry committees the power to administer marketing orders. 7 U.S.C. § 608c(7)(C); *see* 7 C.F.R. § 989.35 (2006). Marketing orders under the AMAA apply only to “handlers,” i.e., those who process and pack agricultural goods for distribution,<sup>4</sup> and do not apply to any producer “in his capacity as a producer.”<sup>5</sup> 7 U.S.C. §§ 608c(1), 608c(13)(B).<sup>6</sup>

Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (“AAA”). The Supreme Court invalidated parts of the AAA in 1936, *see United States v. Butler*, 297 U.S. 1, 77 (1936), but Congress quickly reenacted most of the AAA’s production-control measures in the AMAA, which the Supreme Court subsequently upheld against various constitutional challenges, *see United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939).

<sup>4</sup>A “handler” under the Raisin Marketing Order is

(a) [a]ny processor or packer; (b) any person who places, ships, or continues natural raisins in the current of commerce from within [California] to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. A “packer,” in turn, is “any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins,” but does not include a producer who sorts and cleans his own raisins in their unstemmed form. *Id.* § 989.14.

<sup>5</sup>A “producer” under the Raisin Marketing Order is “any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins.” 7 C.F.R. § 989.11.

<sup>6</sup>The regulation of handlers, as opposed to growers, appears to be a vestige of the historical context in which the AMAA was enacted, “an era when small, independent growers were frequently left to the mercy of large handlers who could benefit from their market power and position.” Bensing, *supra*, at 8. In the raisin industry, producers generally own the land on which the grapevines are located, and they typically pick the grapes and dry them on trays before selling the unstemmed raisins to packers, or “handlers.” Packers then prepare the raisins for commercial sale and distribution by cleaning, stemming, seeding, grading, sorting, and

Any handler who fails to comply with the terms of a marketing order is subject to civil forfeiture, as well as possible civil and criminal penalties. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14) (authorizing civil penalties up to \$1,000 for each violation, with each day constituting a separate violation).

The Raisin Marketing Order was originally enacted in 1949, *see* 14 Fed. Reg. 5136 (Aug. 18, 1949) (codified, as amended, at 7 C.F.R. Part 989), in an effort to stabilize raisin prices by controlling production surpluses, which since 1920 had consistently been thirty to fifty percent of each year's crop. *See Parker*, 317 U.S. at 363-64.<sup>7</sup> Like many other fruit and vegetable orders issued under the AMAA,<sup>8</sup> the Order provides for the establishment of annual reserve pools, as determined by each year's crop yield, thereby removing surplus raisins from sale on the open domestic market and indirectly controlling prices. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R.

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packaging the raisins into containers. Packers then typically sell the packed raisins to wholesalers, distributors, and other dealers for resale and distribution to the public. *Brown v. Parker*, 39 F. Supp. 895, 896-97 (S.D. Cal. 1941), *rev'd on other grounds by Parker v. Brown*, 317 U.S. 341 (1943).

<sup>7</sup>The raisin industry has long been an important one in California, where 99.5 percent of the U.S. crop and 40 percent of the world's crop are produced. *See* The California Raisin Industry, <http://www.calraisins.org/about/the-raisin-industry/> (last visited July 6, 2011). Raisin prices rose rapidly between 1914 and 1920, peaking in 1921 at \$235 per ton. This price increase spurred increased production, which in turn caused prices to plummet back down to between \$40 and \$60 per ton, even while production continued to expand. As a result of this growing disparity between increasing production and decreasing prices, the industry became "compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production," finally prompting federal government intervention with the Raisin Marketing Order in 1949. *See Parker*, 317 U.S. at 363-64 & nn.9-10.

<sup>8</sup>For a comparison of the Raisin Marketing Order and marketing orders for other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint, *see Evans v. United States*, 74 Fed. Cl. 554, 558 (2006), *aff'd*, 250 Fed. Appx. 321 (Fed. Cir. 2007).

§§ 989.54(d), 989.65. By February 15 of each year, the Raisin Administrative Committee (“RAC”)—an industry committee charged with administration of the Raisin Marketing Order,<sup>9</sup> *see* 7 C.F.R. §§ 989.35, 989.36—recommends the “reserve-tonnage” and “free-tonnage” percentages for that year, which the Secretary then promulgates. *See id.* §§ 989.54(d), 989.55. The reserve-tonnage requirement varies from year to year; for example, in the 2002-03 and 2003-04 crop years at issue here, the reserve percentages were set at forty-seven percent and thirty percent of a producer’s crop, respectively.

As a result of the Order’s reserve program requirements, a producer receives payment (at a pre-negotiated field market price) upon delivery of raisins to a handler only for the free-tonnage raisins, which the handler is then free to sell on the domestic market without restrictions. *See id.* § 989.65. The reserve-tonnage raisins, on the other hand, must be held by the handler in segregated bins “for the account” of the RAC until the RAC sells them to handlers for resale in export markets or directs that they be sold or disposed of in secondary, non-competitive markets, such as school lunch programs, either by direct sale or gift to U.S. agencies or foreign governments. *Id.* §§ 989.54, 989.56, 989.65, 989.67, 989.166, 989.167. The reserve pool sales are used to finance the RAC’s administration, and any remaining net proceeds must then be equitably distributed to the producers on a pro rata basis. *See* 7 U.S.C. § 608c(6)(E) (providing for “the equitable distribution of the net return derived from the sale [of reserve-pool raisins] among the persons beneficially interested therein”); 7

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<sup>9</sup>The RAC is currently comprised of forty-seven industry-nominated representatives appointed by the Secretary, of whom thirty-five represent producers, ten represent handlers, one represents the cooperative bargaining association, and one represents the public. *See* 7 C.F.R. §§ 989.26, 989.29, 989.30. The RAC is an agent of the federal government but receives no federal appropriations. Instead, it is funded by assessments levied on handlers per ton of raisins sold on the open market and by proceeds from the sale of reserve-tonnage raisins. *See* 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

C.F.R. § 989.66(h). Thus, although producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited equity interest in the net proceeds of the RAC's disposition of the reserve, to be paid at a later time.

The RAC is tasked with selling the reserve raisins in a manner "intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available," 7 C.F.R. § 989.67(d)(1), but the Hornes complain that they have not received any reserve sale proceeds since the mid-1990s. For example the RAC designated forty-seven percent of the 2002-03 crop as reserve tonnage, which it then sold for \$970 per ton, but none of the money the RAC received was paid back to the raisin producers.

In addition to the reserve pool requirement, the Raisin Marketing Order obliges handlers to, *inter alia*: file reports with the RAC, pay assessments to the RAC, and grant the RAC access to records for auditing purposes. *See id.* §§ 989.58, 989.59, 989.73, 989.77, 989.80.

## II. The Hornes' Raisin Enterprises

Marvin and Laura Horne have been producing raisins in Fresno and Madera Counties in California since 1969 and in 1999 registered as a California general partnership under the name Raisin Valley Farms. They also own and operate Lassen Vineyards, another registered California general partnership, in partnership with Laura's parents, Don and Rena Durbahn. Disillusioned with a regulatory scheme they deemed "outdated" and exploitive of farmers, the Hornes looked for ways to avoid the Raisin Marketing Order's requirements, particularly its mandatory raisin reserve program. Because those requirements apply only to handlers, the Hornes implemented a plan to bring their raisins to market without going through a traditional middle-man packer. As part of their plan, the Hornes

purchased their own equipment and facilities to clean, stem, sort, and package raisins, which they installed on Lassen Vineyards property in 2001. Not only did this facility handle the raisins from Raisin Valley Farms and Lassen Vineyards, it also contracted with more than sixty other raisin growers to clean, stem, sort, and in some cases box and stack their raisins for a per-pound fee, typically twelve cents per pound.<sup>10</sup> USDA records reflect that Lassen Vineyards packed out more than 1.2 million pounds of raisins during the 2002-03 crop year and more than 1.9 million pounds during the 2003-04 crop year.

Meanwhile, the Hornes also organized these sixty-some growers into the Raisin Valley Marketing Association, an unincorporated association that marketed and sold raisins to wholesale customers on its members' behalf, while the growers maintained ownership over their own raisins. Raisin Valley Marketing then held the sales funds on the growers' behalf in a trust account, from which it paid Lassen Vineyards its packing fees, paid a third-party broker fee, and distributed the net proceeds to the growers.

### **III. Proceedings Below**

The Administrator of the Agricultural Marketing Service initiated an enforcement action against the Hornes, alleging violations of the AMAA and failure to comply with the Raisin Marketing Order's various requirements. On appeal from an Administrative Law Judge's decision following an on-the-record hearing, the USDA JO found both Raisin Valley Farms and Lassen Vineyards liable for: (1) twenty violations of 7 C.F.R. § 989.73 (filing of inaccurate reports); (2) fifty-eight violations of 7 C.F.R. § 989.58(d) (failing to obtain incoming inspections); (3) 592 violations of 7 C.F.R. § 989.66 and 7

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<sup>10</sup>This type of arrangement is known as "toll packing." Toll packers do not acquire ownership of the commodity but instead provide a packing service for a fee.

C.F.R. § 989.166 (failing to hold reserve raisins for the 2002-03 and 2003-04 crop years); (4) two violations of 7 C.F.R. § 989.80 (failing to pay assessments to the RAC); and (5) one violation of 7 C.F.R. § 989.77 (failing to allow the Agricultural Marketing Service access to records). The JO accordingly ordered the Hornes to pay (1) \$8,783.39 in unpaid assessments for the 2002-03 and 2003-04 crop years, pursuant to 7 C.F.R. § 989.80(a); (2) \$483,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-03 (632,427 pounds) and 2003-04 (611,159 pounds<sup>11</sup>) crop years, pursuant to 7 C.F.R. § 989.166(c); and (3) \$202,600 in civil penalties, pursuant to 7 U.S.C. § 608c(14)(B).

The Hornes filed this action in district court seeking judicial review of a final agency decision pursuant to 7 U.S.C. § 608c(14)(B).<sup>12</sup> On cross-motions for summary judgment, the district court granted summary judgment for the USDA, and the Hornes timely appealed.

### STANDARDS OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 962 (9th Cir. 2008). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether any genuine issues of material fact remain and whether the district court correctly applied the relevant substantive law. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). We

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<sup>11</sup>The Hornes do not challenge the JO's calculation of these figures.

<sup>12</sup>In a separate action not the subject of this appeal, the Hornes filed an administrative petition before the Secretary of Agriculture in March 2007 pursuant to 7 U.S.C. § 608c(15)(A) challenging the Raisin Marketing Order and its application to them. The JO granted the USDA's motion to dismiss for lack of standing. The Hornes filed a complaint in district court, but the district court dismissed it for lack of subject matter jurisdiction because it was not timely filed, and we affirmed. *See Horne v. U.S. Dep't of Agric.*, 395 Fed. Appx. 486 (9th Cir. Sep. 27, 2010) (unpublished).

review de novo a constitutional challenge to a federal regulation. *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006) (citing *Gonzales v. Metro. Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999)). We also review de novo whether a fine is unconstitutionally excessive. *United States v. Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003) (citing *United States v. Bajakajian*, 524 U.S. 321, 337 n.10 (1998)).

## DISCUSSION

### I. Application of the Raisin Marketing Order to the Hornes

For the reasons discussed in the district court's opinion below, we conclude that the Hornes, who admit that their toll-packing business "stems, sorts, cleans," and "packages raisins for market as raisins," 7 C.F.R. § 989.14, satisfy the regulatory definition of a "packer" and are thus "handlers" subject to the Raisin Marketing Order's provisions, *see* 7 C.F.R. § 989.15. *See Horne v. U.S. Dep't of Agric.*, 2009 U.S. Dist. LEXIS 115464, at \*20-49 (E.D. Cal. Dec. 11, 2009). The USDA's interpretation of its own regulation is not "plainly erroneous or inconsistent with the regulation" and thus must be given "controlling weight." *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008). Furthermore, its findings regarding the Hornes' handler operations are supported by substantial evidence and are neither arbitrary nor capricious. *See* 5 U.S.C. § 706(2)(A), (E).

[1] The Hornes argue they are statutorily exempt from regulation because they also satisfy the regulatory definition of a "producer," and the AMAA provides that "[n]o order issued under this chapter shall be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B). However, by expressly limiting the exemption from regulation only to a producer "in his capacity as a producer," the AMAA contem-

plates that an individual who performs both producer and handler functions may still be regulated in his capacity as a handler. Even if the AMAA is considered “silent or ambiguous” on the regulation of individuals who perform both producer and handler functions, we must give *Chevron* deference to the permissible interpretation of the Secretary of Agriculture, who is charged with administering the statute. *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); see 7 U.S.C. § 608c(1); see also *Morales-Izquierdo v. Dep’t of Homeland Sec.*, 600 F.3d 1076, 1086-87 (9th Cir. 2010); *Midway Farms v. U.S. Dep’t of Agric.*, 188 F.3d 1136, 1140 n.5 (9th Cir. 1999). Other courts have similarly rejected the Hornes’ argument that a producer who handles his own product for market is statutorily exempt from regulation under the AMAA. See, e.g., *Freeman v. Vance*, 319 F.2d 841, 842 (5th Cir. 1963) (per curiam); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir. 1961), cert. denied, 372 U.S. 965 (1963); *Evans*, 74 Fed. Cl. at 557-58. Deferring to the agency’s permissible interpretation of the statute, as we must, we conclude that applying the Raisin Marketing Order to the Hornes in their capacity as handlers was not contrary to the AMAA.

## II. Takings Claim

The Hornes argue that, even if they are handlers subject to the Raisin Marketing Order’s provisions, the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool constitutes an uncompensated *per se* taking in violation of the Fifth Amendment.

[2] The Fifth Amendment Takings Clause does not prohibit the government from taking private property; instead, it imposes conditions on the government’s authority to act, providing that *when* government takes private property, pursuant to the lawful exercise of its constitutional powers, (1) it must take for public rather than private use, and (2) it must provide

owners with just compensation, as measured by the property owner's loss. See *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32, 235-36 (2003); *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 314 (1987). The former condition ensures that government does not abuse its powers by taking private property for another's private gain, see, e.g., *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); the latter ensures that even when government acts in the public interest, it does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960). As a preliminary matter, we must decide whether we have jurisdiction over the Hornes' takings claim.

[3] As we explained in *Bay View, Inc. v. AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997), the just-compensation requirement does not force the government to provide immediate compensation at the time of a taking; "it must simply 'provide an adequate process for obtaining compensation.'" *Id.* at 1285 (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985)). The Tucker Act allows parties seeking compensation from the United States to bring suit in the Court of Federal Claims. 28 U.S.C. § 1491(a)(1). Thus, a takings claim against the federal government must be brought there in the first instance, "unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion).

Here, the government contends that the takings claim before us is premature because the Hornes have yet to avail themselves of Tucker Act process available to them in the Court of Federal Claims. The Hornes, however, argue that the AMAA withdraws Tucker Act jurisdiction for takings challenges to AMAA marketing orders and enforcement actions, and that the claim is therefore properly before us.

[4] Section 8c(15) of the AMAA, 7 U.S.C. § 608c(15), “provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA; requires that the Secretary [of Agriculture] grant a hearing and make a ruling on petitions brought by handlers; and vests the district courts with jurisdiction to review the Secretary’s decision.” *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1370 (Fed. Cir. 2005). The case law the Hornes cite makes clear that when a handler, or a producer-handler in its capacity as a handler, challenges a marketing order on takings grounds, Court of Federal Claims Tucker Act jurisdiction gives way to section 8c(15)’s comprehensive procedural scheme and administrative exhaustion requirements. *See id.* at 1370-71 (holding that raisin producer-handler asserting a takings claim “only in its capacity as a handler” could effectively bring that claim in section 8c(15) proceedings and that a handler “may not seek compensation in the Court of Federal Claims under the guise of a takings claim for what is essentially a challenge to invalid agency action”); *see also United States v. Ruzicka*, 329 U.S. 287, 292-93, 295 (1946) (holding that a handler’s challenges to a marketing order could only be raised using the special statutory procedure provided by section 8c(15)); *cf. Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985 (9th Cir. 1938) (asserting jurisdiction over a handler’s claim that a walnut marketing order resulted in a taking of its private property).

[5] However, the takings claim before us is brought by the Hornes not in their capacity as handlers but in their capacity as producers; the Hornes allege that the regulatory scheme at issue takes reserve-tonnage raisins belonging to producers, not property belonging to handlers. This claim is therefore not governed by holdings which address handlers’ takings claims, nor is it subject to section 8c(15)’s administrative exhaustion requirements. *See Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 783 (D.C. Cir. 2006) (distinguishing suits brought in producer-handlers’ capacity as producers from suits brought in their capacity as handlers); *Ark. Dairy-Co-op Ass’n, Inc. v. U.S. Dep’t of Agric.*, 573 F.3d 815, 823 n.4 (D.C. Cir. 2009)

(“Where a single entity acts as a vertically-integrated ‘producer-handler,’ it must exhaust [section 8c(15) process] before bringing suit in its capacity as a handler, but not when bringing suit in its capacity as a producer.”) (citations omitted).

[6] Nothing in the AMAA precludes the Hornes from alleging in the Court of Federal Claims that the reserve program injures them in their capacity as producers by subjecting them to a taking requiring compensation. Thus, they may bring the takings claim there under the Tucker Act. And since they *may* bring a Tucker Act claim, they are *required* to bring it before we can properly adjudicate the takings issue. *See Bay View*, 105 F.3d at 1285 (“The Tucker Act . . . [is] an implicit promise by Congress to pay compensation for all takings of private property for public purposes. . . . Thus, appellants’ takings claim is premature until they have availed themselves of the process provided by the Tucker Act.”) (internal quotation marks and citations omitted).

[7] *Bay View* makes clear that we lack jurisdiction to address the merits of the Hornes’ takings claim where Congress has provided a means for compensation. The Hornes’ takings argument therefore fails.

### III. Excessive Fines Claim

Finally, in connection with their takings argument, the Hornes protest the JO’s imposition of nearly \$700,000 in combined assessments and fines, which they believe excessively penalizes them, in violation of the Eighth Amendment, for their justified refusal to deliver their own private property into the hands of the government. *See* U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

[8] To prevail on an excessive fines claim, a plaintiff must establish (1) the assessment is imposed, at least in part, for

punitive and not merely remedial purposes, and (2) the fine is excessive, or “grossly disproportional to the gravity of [the] offense” for which it is imposed. *Bajakajian*, 524 U.S. at 334; see *Engquist v. Or. Dep’t of Agric.*, 478 F.3d 985, 1006 (9th Cir. 2007); *Mackby*, 339 F.3d at 1016. Although an excessive punitive civil fine is not beyond the Eighth Amendment’s reach, *Hudson v. United States*, 522 U.S. 93, 103 (1997), civil forfeiture that merely “provides a reasonable form of liquidated damages” as compensation for government losses resulting from the unlawful activity is remedial, not punitive, and accordingly does not implicate the Eighth Amendment, *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972); see *United States v. \$273,969.04 U.S. Currency*, 164 F.3d 462, 466 (9th Cir.1999); *Austin v. United States*, 509 U.S. 602, 622 n.14 (1993) (“[A] fine that serves purely remedial purposes cannot be considered ‘excessive’ in any event.”).

[9] Here, the district court correctly determined that the \$8,783.39 in unpaid assessments imposed pursuant to 7 C.F.R. § 989.80(a) and the \$483,843.53 in compensation for the withheld reserve-tonnage raisins imposed pursuant to 7 C.F.R. § 989.166(c) amounted to remedial rather than punitive forfeitures and that the Excessive Fines Clause therefore is inapplicable to those penalties. The JO’s order that the Hornes pay assessments to the RAC was calculated solely to compensate the RAC for the mandatory assessments not paid. See 7 C.F.R. § 989.80(a) (“Each handler shall, with respect to free tonnage acquired by him . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year . . .”). Similarly, the JO’s order that the Hornes compensate the RAC for the withheld reserve-tonnage raisins flowed inexorably from another remedial, non-punitive provision of the regulations. See *id.* § 989.166(c) (“A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the

Committee for the amount of the loss resulting from his failure to so deliver,” as determined by a fixed formula.). Calculation of the compensation amount is nondiscretionary and is limited by the extent of the government’s loss. *Cf.* \$273,969.04, 164 F.3d at 466 (inferring punitive nature of a sanction where it was not limited by the extent of the government’s loss and was tied to commission of a crime). The JO’s use of the “field price” to calculate the compensatory amount the Hornes owed the RAC for their withheld reserve-tonnage raisins was consistent with the regulations. *See* 7 C.F.R. § 989.166(c).

[10] The only sanction that implicates the Excessive Fines Clause is the \$202,600 fine imposed pursuant to 7 U.S.C. § 608c(14)(B), but we again agree with the district court that this civil penalty, less than one-third the authorized statutory amount, is not “grossly disproportional to the gravity of [the Hornes’] offense.” *Bajakajian*, 524 U.S. at 334. Although we have no set formula for determining the proportionality of a given penalty, relevant factors include the severity of the offense, the statutory maximum penalty available, and the harm caused by the offense. *Mackby*, 339 F.3d at 1016; *see also United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197-98 (9th Cir. 1999).

We have previously recognized that noncompliance with a marketing order’s reporting and reserve requirements are serious offenses that threaten the Secretary’s ability to regulate a given market and prevent price destabilization, while also unjustly enriching the offenders who profit from selling their reserve-tonnage goods on the open market. *See Balice v. U.S. Dep’t of Agric.*, 203 F.3d 684, 693, 695, 698-99 (9th Cir. 2000) (upholding a fine of \$225,500 imposed on an almond handler subject to up to \$528,000 in fines for violations of various reporting and reserve requirements). Furthermore, that Congress authorized a much steeper fine (\$1,000 for each of the Hornes’ 673 separate offenses spanning a two-year period, for a total of \$673,000) than what the JO actually imposed,

while not dispositive, weighs heavily against finding the fine grossly disproportional to the Hornes' offense, for "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336, 339 n.14; *accord Balice*, 203 F.3d at 699.<sup>13</sup> In light of these factors, we cannot say the district court erred in finding the penalties consistent with the Eighth Amendment.<sup>14</sup>

### CONCLUSION

The Hornes are clearly dissatisfied and frustrated with a regulatory scheme they believe no longer serves the interests of the farmers it was designed, in large part, to protect. That being the case, the Hornes may wish to pursue a takings claim in the Court of Federal Claims or attempt to impress upon the Secretary the need for reevaluation of the Raisin Marketing Order. *See* 7 U.S.C. § 608c(16) (prescribing mechanism for

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<sup>13</sup>Although in *Balice* it appears the JO imposed penalties under only 7 U.S.C. § 608c(14) and not under the regulation's forfeiture provisions, whereas here the JO imposed both, nothing in the statutory or regulatory language seems to preclude simultaneous imposition of remedial and punitive sanctions under the respective provisions. To the contrary, 7 C.F.R. § 989.166(c) expressly provides that compensation for failure to deliver reserve-tonnage raisins "shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act" for noncompliance with the act or regulation's requirements, and the Hornes do not challenge the legitimacy of this provision.

<sup>14</sup>We also reject the Hornes' contention that 7 U.S.C. § 608c(14)(B) exempts them from liability for their Raisin Marketing Order violations because in 2007 they filed an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). *See* 7 U.S.C. § 608c(14)(B) (immunizing from civil penalty any handler who "in good faith and not for delay" files and prosecutes a qualifying administrative petition). First, this argument was already disposed of in one of our earlier decisions, *see Horne*, 397 Fed. Appx. at 486, and is not properly before us now. Moreover, even if the matter were properly before us, it is without merit. Section 608c(14)(B) only immunizes handlers from penalties otherwise incurred during the pendency of their administrative petition; it does not apply retroactively. Therefore, an administrative petition not filed until 2007 cannot immunize the Hornes from fines relating to their conduct in 2002-04.

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termination or suspension of marketing orders). Our role, however, is limited to reviewing the constitutionality and not the wisdom of the current regulation. We find no constitutional infirmity in either the Raisin Marketing Order or the Secretary's application of it to the Hornes, and indeed lack jurisdiction to find such an infirmity on takings grounds until the Hornes avail themselves of Tucker Act process in the Court of Federal Claims. The summary judgment of the district court is **AFFIRMED**.