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No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether a party may raise the Takings Clause as a defense to enjoin a "direct transfer of funds mandated by the Government." *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998) (plurality; quotation marks omitted).

2. Whether the federal courts have jurisdiction over petitioners' takings claim, where petitioners, as "handlers" of raisins under the Raisin Marketing Order, 7 C.F.R. Part 989, are statutorily required to exhaust all claims and defenses in administrative proceedings with exclusive jurisdiction for review in federal district court.

RULE 14.1(b) STATEMENT

Petitioners are Marvin D. Horne, 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; the Estate of Don Durbahn[*] and the Estate of Rena Durbahn, d.b.a. Lassen Vineyards, a partnership, plaintiffs-appellants below.

Respondent is the United States Department of Agriculture, defendant-appellee below.

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[*] Mr. Durbahn, a party to the appeal below, died on July 15, 2012. Petitioners have therefore substituted his Estate as a party.

RULE 29.6 STATEMENT

Petitioners have no parent corporations and no publicly held corporation owns 10% or more of their stock.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 673 F.3d 1071. JA289. An earlier opinion of the court of appeals was designated for publication, but was undesignated upon the issuance of the court of appeals' second opinion. JA186. The opinion of the district court is unpublished, and electronically reported at 2009 WL 4895362. JA119.

JURISDICTION

The court of appeals rendered its original decision on July 25, 2011. The court of appeals then denied petitioners' petition for panel rehearing and rehearing *en banc* and issued a substantially revised opinion on March 12, 2012. This Court granted a timely petition for certiorari on November 20, 2012. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

The relevant provisions of the Tucker Act, 28 U.S.C. § 1491(a)(1); the Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. § 601 *et seq.*; and 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"), are set forth in the Joint Appendix ("JA").

STATEMENT OF THE CASE

Petitioners Marvin and Laura Horne have grown Thompson seedless grapes for raisins in Fresno and Madera Counties for nearly half a century, and Don and Rena Durbahn (Laura's parents), recently deceased, a generation longer. Under a New Deal-era "marketing order" program, the United States Department of Agriculture ("USDA") requires "handlers" of raisins to set aside a certain portion of the raisins they obtain from producers and transfer ownership of these raisins to the government. The government uses these raisins for school lunches, export stimulation programs, and other governmental purposes. In the two years at issue in this case, the USDA required transfer of 47 percent of each producer's crop in 2002-2003 and 30 percent in 2003-2004. The USDA paid farmers like the Hornes nothing at all for their 2003-2004 raisins, and less than the cost of production for their 2002-2003 raisins.

The Hornes reorganized their business so that they did not use packers or distributors. They purchased and operated their own equipment for drying, seeding, stemming, and fumigating raisins, and sold their raisins directly to food processing companies and bakeries without using intermediaries. They believed (erroneously, according to a part of the decision below not challenged in the petition for certiorari) that if their raisins were not handled by packers and distributors, the USDA could not expropriate portions of their crop. Accordingly, the Hornes did not set aside a portion of their crop in those two years or

turn over any raisins to the government.

Determining that the Hornes themselves were "handlers" under the Raisin Marketing Order, the USDA filed an administrative action against the Hornes. The USDA rejected the Hornes' statutory claim that their raisins did not go through the hands of "handlers," as well as their constitutional claim that the taking of their raisins without just compensation violated the Fifth Amendment. Holding them responsible not just for their own raisins, but for raisins processed on their equipment from other family farms, the Department ordered the Hornes to pay the dollar value of the raisins they allegedly should have turned over ($483,843 over the two years), plus civil penalties in excess of $200,000 — exceeding the entire value of their raisin crop.

Following statutory procedures, the Hornes appealed this order through the USDA, then to the District Court for the Eastern District of California and the Court of Appeals for the Ninth Circuit. They lost on the merits at each stage, both on their statutory claim and on their constitutional takings and excessive fines claims. Only after the Hornes filed a petition for rehearing showing that the government's appropriation of their raisin crop conflicted with this Court's precedents under the Takings Clause, did the government — for the first time, in its opposition to the rehearing petition — argue that the courts below lacked jurisdiction to entertain the Hornes' takings claim. The panel withdrew its merits opinion and adopted the government's jurisdictional arguments — though it inexplicably "affirmed" the district court's decision in its entirety, in lieu of vacating the portion of that decision over which the court supposedly had no jurisdiction.

This Court granted certiorari to determine whether raisin farmers may raise the Takings Clause as a defense in district court to a USDA order requiring them to pay the government the monetary equivalent of a portion of their crop and an accompanying civil penalty, or whether they must litigate all non-takings defenses in one action, pay the disputed sums to the government, and then travel to the Court of Federal Claims to recover their money.

A. Statutory and regulatory framework.

1. Under the AMAA, the USDA heavily regulates segments of California's agricultural economy, which produces approximately 99 percent of the United States' and 40 percent of the world's raisins. JA295 n.9. Pursuant to the Act, the USDA has promulgated "marketing orders" for raisins, as well as several other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint oil. See *Evans* v. *United States*, 74 Fed. Cl. 554, 558 (2006). In general, these orders establish food product "reserve" programs under which farmers must set aside a specified portion of their agricultural crop "for the account of" the federal government. *Id.* at 557.

The order regulating raisins was promulgated in 1949. While similar in some respects to orders regulating other agricultural segments, the Raisin Marketing Order is different in two primary ways: "it effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Id.* at 558; see also 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66. Unlike other marketing orders, which are periodically put to a vote of producers and terminated if they do

not command a specified majority or super-majority, see 7 U.S.C. § 608c(19), the Raisin Marketing Order has never been put to a revote of raisin producers since its first adoption.

The Order separately defines "handlers" and "producers" of raisins. A "handler" is:

> (a) [a]ny processor or packer; (b) any person who places, ships, or continues natural condition 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 "producer" 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." § 989.11.

Under the Order, the Raisin Administrative Committee ("RAC"), an agent of the USDA, establishes yearly raisin tonnage requirements, known as "reserve tonnage" and "free tonnage" percentages. 7 C.F.R. §§ 989.66, 989.166. The percentages are established by (and unknown until) February 15 of each crop year, long after farmers have expended substantial resources for the cultivation and harvest of their crop for the year. §§ 989.21, 989.54(d). Once the percentages are fixed, "handlers" of raisins must set aside the "reserve tonnage" requirement "for the account" of the RAC. §§ 989.65, 989.66(a), (b)(1). The RAC may require the delivery of the reserve-tonnage

raisins to anyone chosen by the RAC to receive them, § 989.66(b)(4), may sell reserve-tonnage raisins to handlers for resale in export markets, §§ 989.67(c)-(e), or may direct that the raisins be sold or disposed of by direct sale or gift to United States agencies, foreign governments, or charitable organizations, §§ 989.67(b)(2)-(4).

In the two years relevant to this case, 2002-2003 and 2003-2004, the USDA required farmers to turn over 47 percent and 30 percent of their raisin crops respectively. See RAC, *Marketing Policy and Industry Statistics, 2010*, at 27, *available at* http://www.raisins.org/files/Marketing%20Policy%202010.pdf (last visited Jan. 9, 2013). Through the reserve-tonnage set-aside, the government obtained, respectively, 22.1 million and 38.5 million pounds of raisins in those two years. See *id.* at 20. In 2002-2003, the farmers who produced those raisins were paid well below the cost of production (and considerably less than fair market value). See RAC, *Analysis Report* (Aug. 1, 2006), at 22, available at http://www.raisins.org/analysis_report/analysis_report.pdf (last visited Jan 9, 2013). In 2003-2004, the government paid nothing at all for the 38.5 million pounds of raisins that it took and used. See *id.* at 23; see also *id.* at 55.

The requirement to set aside "reserve tonnage" raisins and to turn them over to the government pertains to "handlers" as defined by the AMAA and accompanying regulations. The USDA takes the position that raisin farmers who sell their raisins directly instead of using a packer or distributor are "handlers" of their own raisins, and the set-aside applies to them in that capacity. JA74-75.

2. The AMAA provides that any "handler" who violates a marketing order may be subject to fines and penalties in a final USDA order. The AMAA further creates administrative and judicial review procedures that "handlers" of raisins must follow to appeal a USDA order. First, the handler must exhaust administrative remedies within the USDA, including constitutional as well as other challenges. See *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946). USDA orders are "reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant." 7 U.S.C. § 608c(14)(B). A "handler" may also bring a preenforcement petition with the Secretary of Agriculture arguing that a marketing order "is not in accordance with law." § 608c(15)(A). The "District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are [ ] vested with jurisdiction in equity to review such ruling." § 608c(15)(B).

The USDA has promulgated "Rules of Practice Governing Procedures on Petitions to Modify or to Be Exempted from Marketing Orders," under which "[t]he term handler means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i). As a result, all persons subject to marketing orders must bring any defenses they may have to USDA orders in District Court.

3. Enacted in 1887, the Tucker Act allows certain claims against the United States to proceed "for the breach of monetary obligations not otherwise judicially enforceable." *United States* v. *Bormes,* 133 S. Ct. 12, 17-18 (2012). Such claims typically must be brought in the Court of Federal Claims, which has

jurisdiction over claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Where it applies, the Tucker Act is a waiver of federal sovereign immunity. See *United States* v. *Mitchell*, 463 U.S. 206, 215-216 (1983); *Bormes*, 133 S. Ct. at 17-18.

The Tucker Act generally does not authorize declaratory or equitable relief. See*, e.g.*, *Bowen* v. *Massachusetts*, 487 U.S. 879, 905 & n.10 (1988) ("The Claims Court does not have the general equitable powers of a district court to grant prospective relief."). Instead, the primary function of the Tucker Act is to provide an avenue for an injured party to receive monetary redress from the United States. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 398 (1976) (explaining that Tucker Act jurisdiction is "limited to actual, presently due money damages from the United States"). The Court of Federal Claims is the gatekeeper for payments from Congress's indefinite appropriation to the judgment fund. See, *e.g.*, *OPM* v. *Richmond*, 496 U.S. 414, 431 (1990); *Bormes*, 133 S. Ct. at 16 n.2.

B. Proceedings below.

1. The Hornes and the Durbahns (hereinafter "the Hornes" or "petitioners") are independent farmers in Fresno and Madera Counties in California. Since 1969, the family has produced Thompson seedless grapes on a family farm called Raisin Valley Farms.

Like many raisin farmers, the Hornes became increasingly frustrated with the workings of the Raisin

Marketing Order, which they regard as "stealing [their] crop." JA123. As they explained in a letter to the Secretary of Agriculture, "[t]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude." JA124. After consulting with attorneys, university professors, and officials, the Hornes devised a new business model that they believed would comply with the law, without having to set aside reserve raisins for the RAC. By marketing their raisins directly to food processing companies and bakeries without using packers or distributors, through their own entity "Raisin Valley Marketing Association," they thought they would be deemed "producers" and not "handlers" under the Raisin Marketing Order and the AMAA. The Hornes therefore did not set aside the reserve-tonnage requirement for 2002-2003 and 2003-2004, the two years relevant to this case. JA298.

2. On April 1, 2004, the Administrator of the Agricultural Marketing Service initiated an enforcement action within the USDA, claiming that petitioners violated the AMAA. JA298. According to the Administrator, because all producers who sell any portion of their crop are effectively "handlers" subject to the Order, the Hornes became handlers by marketing their own raisins.

A USDA Administrative Law Judge ("ALJ") agreed. JA24. The ALJ reasoned that the requirement that petitioners hand over their raisins to the USDA without compensation "cannot be used as grounds for a taking claim since handlers no longer have a property right that permits them to market their crop free of regulatory control." JA39.

On appeal, a USDA Judicial Officer ("JO") af-

firmed. JA50. As to petitioners' takings claim, the JO claimed that he had "no authority to judge the constitutionality of the various statutes administered by the United States Department of Agriculture." JA73; but see *Ruzicka*, 329 U.S. at 294 (challenges under the AMAA "formulated in constitutional terms * * * in the first instance must be sought from the Secretary of Agriculture").

Of relevance here, the JO determined that, as "handlers," petitioners violated 7 C.F.R. § 989.66 and § 989.166 by failing to hold reserve raisins for the 2002-2003 and 2003-2004 crop years. JA91-92. The JO ordered petitioners to pay $438,843.53, the dollar equivalent of the withheld raisins for the 2002-2003 (632,427 pounds) and 2003-2004 (611,159 pounds) crop years, as determined by the "field price" typically paid to producers for free-tonnage raisins in those years (hereafter, the "monetary equivalent" component of the fine). 7 C.F.R. § 989.54(b). JA117. The JO also ordered petitioners to pay an additional $202,600 in civil penalties pursuant to 7 U.S.C. § 608c(14)(B), $177,600 of which was imposed for failure to comply with the reserve requirement (hereafter, the "penalty" component of the fine). JA108. Finally, the JO imposed an additional $8,783.39 in unpaid assessments pursuant to 7 C.F.R. § 989.80(a), which are not at issue here. It was only in their capacity as "handlers" that the Hornes were subject to the Order (and hence these fines and penalties).

3. Petitioners sought review of the agency decision in the United States District Court for the Eastern District of California under section 608c(14)(B). They contended that the requirement that they contribute a portion of their raisin crop to the government is an unconstitutional taking. They also argued

that (1) they are producers, not handlers, and thus are not subject to the Raisin Marketing Order; and (2) the penalties imposed upon them violate the Eighth Amendment's Excessive Fines Clause. The District Court granted summary judgment for the USDA. JA119.

Petitioners appealed. On July 25, 2011, a panel of the Ninth Circuit affirmed the judgment in its entirety. The panel held that petitioners are "'handlers' subject to the Raisin Marketing Order's provisions." JA186. With respect to petitioners' takings claim, the panel acknowledged that the Hornes' argument that the government owed just compensation for the raisins "has some understandable appeal." JA202. The panel recognized that the "raisins are personal property, personal property is protected by the Fifth Amendment, and each year the RAC 'takes' some of their raisins, at least in the colloquial sense." *Id.* And the panel conceded that "the government could [not] come onto the Hornes' farm uninvited and walk off with forty-seven percent of their crops without offering just compensation." JA202-203. Yet the panel held that no taking occurs under the regulatory scheme — and no compensation is required — when "the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." JA203.

After petitioners filed a rehearing petition pointing out that the government's expropriation of a portion of their produce in return for permission to sell the rest flatly violated this Court's cases under the Fifth Amendment, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 428-429 (1982), the government argued — for the first time —

that the court lacked jurisdiction over the takings defense, because that issue must be brought in the Court of Federal Claims under the Tucker Act. The government conceded that "this jurisdictional issue was not presented to the panel," but represented that it went to the court's subject-matter jurisdiction and hence "may be raised at any point in the litigation." JA242 (quotations omitted). The government argued that petitioners were required to litigate their other defenses through statutory channels and, if they lost, pay the fine, and then sue to get their money back from the Court of Federal Claims.

After petitioners pointed out in a reply brief that the AMAA requires all handlers to challenge orders issued under that Act in district court and thus withdraws Tucker Act jurisdiction, the government modified its position yet again. This time, it argued that ordinary AMAA procedures did not apply because petitioners brought their takings defense in their capacity as "producers" and not as "handlers" — notwithstanding that the government had successfully argued throughout this litigation that petitioners were "handlers" (and, indeed, that it was only in their capacity as "handlers" that the reserve requirement even applied to petitioners). JA276-281.

Without allowing petitioners to file a brief in response to this novel theory, JA285, the panel issued a substantially revised opinion on March 12, 2012, JA289. The panel's new opinion retained its initial holdings that petitioners satisfied the definition of "handlers" under the Raisin Marketing Order and that petitioners did not have a valid defense under the Excessive Fines Clause. JA301-302, 306-310.

The panel replaced the entirety of its disposition

of petitioners' takings defense on the merits with a jurisdictional disposition. JA289. Relying solely on a Ninth Circuit precedent expressly repudiated by the plurality in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998) — *Bay View, Inc.* v. *AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997) — the panel held that petitioners' request for an injunction was "unripe"; that the panel lacked jurisdiction to consider the takings claim; and that petitioners must pay the monetary fines imposed by the USDA and then bring that claim as a freestanding claim for compensation in a subsequent Tucker Act action in the Court of Federal Claims. JA306 ("*Bay View* makes clear that we lack jurisdiction to address the merits of [petitioners'] takings claim where Congress has provided a means for compensation.") (citing 105 F.3d at 1281, in turn citing *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985), which held that an inverse condemnation action challenging an alleged regulatory taking of real property by a municipal entity is not "ripe" until the property owner seeks and is denied compensation in a state forum). The panel neither acknowledged nor explained its reliance on a precedent repudiated by a plurality of this Court. See *Apfel*, 524 U.S. at 520-521 (disapproving of *Bay View*). The panel also held that petitioners were "producer-handlers" who, under the AMAA, must bring their takings claim "in their capacity as producers" in the Court of Federal Claims, while bringing all their other claims in district court as "handlers," in accordance with the statutory procedures. JA305.

Notwithstanding the jurisdictional disposition of petitioners' takings claim, the panel still provided that "[t]he summary judgment of the district court is

AFFIRMED," JA311 — rather than vacated and remanded with instructions to dismiss petitioners' takings claim for lack of jurisdiction. On the same day, the panel denied the rehearing petition and stated that the court would not entertain any additional petitions for rehearing, JA287, thereby denying petitioners recourse to the *en banc* court for review of the panel's jurisdictional holding.

SUMMARY OF ARGUMENT

I. The panel erred in holding that it lacked jurisdiction to consider petitioners' defense under the Takings Clause. That claim is immediately ripe for two independent reasons.

A. First, under *Apfel*, a party may challenge a governmental demand for a cash transfer without going through the repetitive steps of paying a fine and then going to the Court of Federal Claims to get the same sum back in the form of compensation for the taking.

Second, ripeness bars a lawsuit only in cases where the party seeks anticipatory relief against government action that has not yet taken place. It does not apply when a party seeks to interpose a constitutional defense to an enforcement action brought by the government at the time and in the forum of the government's own choosing.

B. Recent cases applying a specialized "ripeness" doctrine to takings claims confuse ripeness with equitable principles regarding the propriety of issuing an injunction. A review of the text, structure, and historical interpretation of the Takings Clause confirms that a party can obtain affirmative injunctive relief under the Clause or raise the Clause as a defense. The historical record shows that, from the earliest cases, a party could raise the Takings Clause

as a defense to government enforcement action. During the Nineteenth Century, courts (including this Court) held that affirmative injunctive relief was also available under the Clause where a party lacked a "reasonable, certain, and adequate" monetary remedy. This rule paralleled the standard for obtaining affirmative injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). The availability of affirmative injunctive relief did not limit the ability of parties to raise the Takings Clause as a defense. Nor was this rule ever characterized as an aspect of "ripeness" or "subject-matter jurisdiction" doctrine. It was viewed as the standard for obtaining injunctive relief under the Clause — what would now be described as "choice of remedies." Once the background legal rule is properly viewed (as an equitable principle regarding the availability of affirmative injunctive relief), it becomes clear that the panel's decision that it lacked jurisdiction because petitioners' takings claim is "unripe" was erroneous.

II. The review procedures of the AMAA withdraw the Tucker Act. The panel's holding that those procedures were inapplicable because petitioners challenged the USDA order in their "capacity as producers" rather than "handlers" misunderstands the statutory scheme and contradicts the litigating posture of the government in this very case.

The decision below should be reversed and the case remanded for consideration of petitioners' takings defense on the merits.

ARGUMENT

I. The federal courts have jurisdiction to address petitioners' defense under the Takings Clause to a "direct transfer of funds mandated by the Government."

The panel's holding incorrectly applied the doctrine of remedies for Takings Clause violations in two independent ways. First, as the plurality concluded in *Apfel*, ripeness does not bar district court adjudication of cases involving a direct transfer of funds to the government because Congress never intended to require property owners to jump pointlessly through two hoops. See 524 U.S. at 521. Second, ripeness does not prevent a party from raising a defense against a governmental enforcement action. Ripeness bars premature injunctive suits against government action when contingencies exist that might prevent that action from ever taking place. When the government itself brings the action at a time and in a forum of its own choosing, and the relief it seeks assertedly violates the private party's constitutional rights, the private party may bring any and all available constitutional defenses against the government's action. See *Missouri Pac. Ry.* v. *Nebraska*, 217 U.S. 196, 205-208 (1910).

More broadly, this case gives the Court the opportunity to clarify a confusion that has crept into the law of jurisdiction over takings claims. Recent cases have erroneously applied the label of "ripeness" to preexisting caselaw regarding equitable principles governing when an injunction would issue. Such mislabeling conflicts with centuries of precedent and disserves the purposes of the Takings Clause. A review of the historical practice shows that a property own-

er's ability to invoke the Takings Clause in opposition to government action is not a matter of jurisdiction, but of equitable principles. See *Cherokee Nation* v. *S. Kansas Ry.*, 135 U.S. 641, 659 (1890) (party may obtain injunction under Takings Clause when it lacks a "reasonable, certain, and adequate" money damages remedy). A proper understanding of those principles shows why both problematical aspects of the decision below — application of "ripeness" to a direct cash transfer and application of "ripeness" to defenses brought against government-initiated actions — violate deep and long-held principles of equity. Clarification of these points would not require this Court to overrule any of its holdings, but would reduce the confusion now prevailing among lower courts.

A. Petitioners' takings claim is ripe.

1. An injunctive claim against a "direct transfer of funds mandated by the government" is immediately ripe.

In *Apfel*, a four-Justice plurality concluded that parties may obtain injunctive relief to enjoin the "direct transfer of funds mandated by the Government" in violation of the Takings Clause. 524 U.S. at 521 (quotation marks and citation omitted). A fifth Justice would have decided the case under the Due Process Clause, and thus did not reach the Takings Clause ripeness issue. *Id.* at 547 (Kennedy, J., concurring). The dissenters did not contest the plurality's analysis of jurisdiction. *Id.* at 550-551 (Stevens, J., dissenting); *id.* at 556 (Breyer, J., dissenting).

Although technically only a plurality opinion, *Apfel*'s jurisdictional rule has been applied to takings challenges to direct cash transfers by every court of appeals to have considered the issue other than the

one below. See *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio* v. *Flores Galarza*, 484 F.3d 1, 19-20 (1st Cir. 2007); *Wash. Legal Found.* v. *Tex. Equal Access to Justice Found.*, 270 F.3d 180, 192-193 (5th Cir. 2001), *vacated on other grounds sub nom. Phillips* v. *Wash. Legal Found.*, 538 U.S. 942 (2003); *Washlefske* v. *Winston*, 234 F.3d 179 (4th Cir. 2000); *Student Loan Mktg. Ass'n* v. *Riley*, 104 F.3d 397, 401-402 (D.C. Cir. 1997); *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995). In addition, following *Apfel*, this Court twice addressed the merits of takings claims to direct money transfers without questioning jurisdiction. See *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216 (2003); *Phillips* v. *Wash. Legal Found.*, 524 U.S. 156 (1998).

1. As this Court has recognized, it would be unreasonable to require a property owner "to resort to piecemeal litigation or otherwise unfair procedures" to pursue a takings claim. *MacDonald, Sommer, & Frates* v. *Yolo Cnty.*, 477 U.S. 340, 350 n.7 (1986); see also *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 626 (2001). A takings claim may be brought immediately where further procedural steps would be "repetitive and unfair." *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999). Applying these principles, the plurality in *Apfel* determined that a party may obtain equitable relief, prior to the initiation of a Tucker Act lawsuit, to enjoin a "direct transfer of funds mandated by the Government." 524 U.S. at 521 (quotation marks and citation omitted).

In *Apfel*, a company ("Eastern") no longer involved in the coal industry challenged the constitutionality of a statute requiring it to pay money into a fund for health-care benefits for coal-industry retirees. The plurality ultimately concluded that the Act violated

the Takings Clause and that the challenged provisions should be enjoined as applied to Eastern. The opinion first addressed the Court's "jurisdiction," because Eastern raised the Takings Clause seeking "a declaratory judgment that the [statute] violates the Constitution and a corresponding injunction against the * * * enforcement of the Act as to Eastern." 524 U.S. at 520. The plurality determined that the injunctive takings claim was "ripe." It noted that this Court had many times addressed takings claims on the merits in a comparable posture. See *Babbitt* v. *Youpee*, 519 U.S. 234 (1997); *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986); *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993); *Hodel* v. *Irving*, 481 U.S. 704 (1987); see also *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155 (1980) (same).

The *Apfel* plurality reasoned that requiring a party to pay the monetary amount and then bring a later claim for money damages in the Court of Federal Claims would mean that "'[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation,'" something that "Congress could not have contemplated." 524 U.S. at 521 (citation omitted). Because "a claim for compensation would entail an utterly pointless set of activities," a federal court could issue a "declaratory judgment and injunction" under the Takings Clause. *Id.* at 521-522 (quotation marks and citation omitted). "Accordingly, the presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds mandated by the

Government." *Id.* (quotation marks and citation omitted).

2. Under the *Apfel* plurality's reasoning, petitioners' takings claim is ripe and they may enjoin the imposition of both the "monetary equivalent" component and the "penalty" component of the fine. As in *Apfel*, petitioners "do[] not seek compensation from the Government." 524 U.S. at 520. They oppose an unconstitutional exaction. Unlike an inverse condemnation case or other suit for compensation, a district court judgment in petitioners' favor would not require the government to pay a dime from the judgment fund. Like *Apfel*, this case does not implicate the Court of Federal Claims' function as the gatekeeper for claims against the public fisc. Injunctive relief is available where a party "does not seek compensation from the Government," but rather "requests a declaratory judgment that * * * the [statute] violates the Constitution and a corresponding injunction against * * * enforcement of the Act." *Ibid.*

Petitioners challenge the RAC's order that they pay "$483,843.53 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004." JA117. That "dollar equivalent" is calculated by determining the fair-market value of petitioners' raisins, *see* 7 C.F.R. § 989.166(c) (calculation is to be conducted by "multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton"), which not coincidentally is effectively the measure of the compensation that would be due petitioners were they to litigate successfully a claim for compensation in the Court of Federal Claims. Any successful compensation claim in the Court of Federal Claims would simply require a dollar-for-dollar return of the mon-

ey.

Similar logic applies to the civil penalty. Just as a fine for violating an unconstitutionally speech-restrictive ordinance may be challenged as a free speech violation, *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995), so also a fine for refusing to comply with a regulation that would violate the Takings Clause may be challenged as a Fifth Amendment violation. See *Missouri Pac. Ry.,* 217 U.S. at 205-208; *Wilkie* v. *Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J., dissenting) ("Correlative to the right to be compensated for a taking is the right to refuse to submit to a taking where no compensation is in the offing."). The latter is no less "ripe" than the former.

While the *reason* the cash payment demand violates the Takings Clause in this case (the demand for payment is being used to enforce a regulation that violates the Takings Clause) differs somewhat from the *reason* the cash payment demand violated the Takings Clause in *Apfel* (the demand for payment itself violated the Takings Clause), that has no bearing on the jurisdictional analysis. In both instances, payment of cash and a subsequent lawsuit would entail an "utterly pointless" Tucker Act proceeding in the Court of Federal Claims. Rather than litigating all of one's federal statutory and constitutional claims in a single case, the panel's rule would require a party to exhaust first his statutory and administrative challenges in federal court, then pay the fine before bringing another, separate action in the Court of Federal Claims to recover the exact same amount of money as the fine. That makes as little sense here as it did in *Apfel*.

This Court should reaffirm the authority of *Apfel*

and hold that takings challenges to "direct transfers of funds mandated by the government," including fines, are ripe when those mandates are enforced, without need for a duplicative trip to the Court of Federal Claims.

2. A defense to government-initiated enforcement action is immediately ripe.

1. The ripeness doctrine bars premature declaratory or injunctive suits in disputes that involve "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." 13B Charles A. Wright *et al.*, *Federal Practice & Procedure* § 3532 (3d ed. 2008); see *Younger* v. *Harris*, 401 U.S. 37, 41-42 (1971) (holding contingent threat of prosecution under state law inadequate to create ripe controversy). Compare *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (concluding that a takings claim was ripe, even though alleged taking had not yet occurred, because it was "in no way hypothetical or speculative"). When the government itself brings the action at a time and in a forum of its choosing, however, and the relief it seeks assertedly violates the private party's constitutional rights, the private party is entitled to bring any and all constitutional defenses against the government's action. See *Younger*, 401 U.S. at 49 (refusing to enjoin pending proceeding based on asserted facial unconstitutionality of statute because a proceeding brought by the State "afford[ed] [defendant] an opportunity to raise his constitutional claims"); *Steffel* v. *Thompson*, 415 U.S. 452, 482-483 (1974) (Rehnquist, J., concurring) (where government initiates prosecution, "the defendant at that point is able to present his case for full consideration by a state court charged, as are the federal courts, to preserve the defendant's constitutional

rights"). Thus it is well-settled that defendants in government-initiated proceedings may raise constitutional rights in their defense, see *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (holding that defendant may raise First Amendment defense to government proceeding for fine), including under the Takings Clause, see *Missouri Pac. Ry.,* 217 U.S. at 205-208 (permitting property owner to bring Takings Clause defense to fine imposed for violating an unconstitutional requirement).

2. To apply "ripeness" to *defenses* turns the concept upside down. There has never been doubt that a person facing a governmental action — a criminal prosecution, a civil enforcement action, a suit for penalties or injunction — is permitted to raise any available legal defenses. There is no "ripeness" issue because the government's action itself, if successful, will produce the injury. There are no contingencies other than the outcome of the litigation. And there can be no judicial efficiencies from postponement of a matter that is already underway. "Ripeness properly should be understood as involving the question of *when a party may seek preenforcement review of a statute or regulation*," because "[c]ustomarily, a person can challenge the legality of a statute or regulation only when he or she is prosecuted for violating it." Erwin Chemerinsky, *Federal Jurisdiction* § 2.4, at 118 (5th ed. 2007). In the context of administrative actions, "ripeness" applies to preenforcement actions or adjudications. See *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967) (ripeness limits "injunctive and declaratory judgment remedies" because they "are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controver-

sy 'ripe' for judicial resolution"), *overruled on other grounds*, *Califano* v. *Sanders*, 430 U.S. 99 (1977); Stephen G. Breyer *et al.*, *Administrative Law and Regulatory Policy* 942 (7th ed. 2011) ("Before *Abbott Laboratories*, the courts typically reviewed the lawfulness of an agency's rule, not when the agency promulgated the rule, but when the agency enforced the rule."); Richard J. Pierce, Jr. *et al.*, *Administrative Law and Process* § 5.7, at 213 (5th ed. 2009) (same).

Ripeness is a shield to protect against premature litigation; it is not a sword to enable the government to violate the Constitution without having to respond to constitutional defenses. If the government elected to prosecute criminally under the AMAA — as it may, see 7 U.S.C. § 608c(14)(A) — no one would doubt the defendant could assert the unconstitutionality of the underlying order as a defense. There is no logical reason why a civil penalty makes the defense any less "ripe."

3. In accord with these general principles, this Court has heard Takings Clause defenses to government-initiated actions on the merits on numerous occasions, without ever suggesting that ripeness was a conceivable bar. See, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979) (addressing takings claim raised as defense to United States' effort to obtain navigational servitude); *Miller* v. *Schoene*, 276 U.S. 272 (1928) (considering and rejecting on the merits a takings defense to an order to fell cedar trees); *Missouri Pac. Ry.*, 217 U.S. at 208 (reversing fine imposed on railroad for failure to comply with regulatory requirement held to violate the Takings Clause); *Union Bridge Co.* v. *United States*, 204 U.S. 364 (1907) (rejecting merits of takings defense to criminal

prosecution for failure to remove obstruction from navigable waterway); *Chicago, Burlington, & Quincy Ry.* v. *Illinois*, 200 U.S. 561, 565 (1906) (adjudicating takings defense raised in mandamus action brought by municipality to compel construction activity by railroad); see also *Pruneyard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980) (considering and rejecting merits of takings defense raised to action to enjoin shopping center to permit access to its property); *St. Louis & S.F. Ry.* v. *Gill*, 156 U.S. 667 (1895) (rejecting on the merits a Takings Clause defense to a suit by a private plaintiff alleging that the railroad charged excessive rates).

The same is true, as here, where the government conducts agency enforcement proceedings in an adjudicatory context. In *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), the Court considered a takings defense in such a posture. A power company accused of excessive charges in agency adjudications invoked the Takings Clause as a defense. See *id.* at 248-249. The agency rejected the defense, and the company appealed that adverse agency adjudication through the federal courts — including this Court. Although this Court ultimately rejected the defense on the merits, it nowhere suggested that the defense was unripe.

These cases are persuasive evidence that the courts below had jurisdiction to consider petitioners' defense. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307 (1962) ("While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, neither should we disregard the implications of an exercise of judicial authority assumed to be proper [in previous cases].") (citation omitted); see

also *Apfel*, 524 U.S. at 522 (same).

4. No holding of this Court calls into question the bedrock principle that when the government files an action seeking relief that would assertedly violate a private party's constitutional rights, that party is entitled to assert its rights as a defense. Although this Court suggested in *dictum* in *United States* v. *Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985), that an enforcement "lawsuit is not the proper forum for resolving" a takings dispute, the party in that case raised only a statutory claim, not a constitutional defense to an enforcement action. *Id.* at 129 n.6. In a footnote, the Court noted that subsequent to the events giving rise to the case, the property owner had been denied a permit, thus possibly making a takings claim "ripe." *Id.* In reference to that claim, which had not been brought, the Court stated that, although the record gave the Court "no basis for evaluating the claim," if the government "has indeed effectively taken [ ] property, [the] proper course is not to resist the [government's] suit for enforcement by denying that the regulation covers the property, but to initiate a suit for compensation in the Claims Court." *Ibid.* For the reasons given above, petitioners respectfully submit that this *dictum* is contrary to the great weight of caselaw, and is not persuasive.

5. Confining ripeness to preenforcement actions brought by private parties also makes sense as a practical matter. Duplicating proceedings under these circumstances would not only be costly — no insignificant consideration for small farmers like the Hornes, cf. *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012) — but adjudicating the takings claim in the single action would, if the court finds a taking, allow the government to choose whether to pay the value or aban-

don its claim. By contrast, leaving adjudication for a monetary Tucker Act claim would mean that the government could not reverse course, but would be required to pay compensation, regardless of the intention of the legislature. The panel's approach thus both denies private parties an efficient adjudication of their takings claim and also requires the Treasury to pay compensation for government actions that Congress would not have authorized had they been known to take property. Here, for example, there is no reason to believe Congress had any intention to pay market value for reserve raisins. As this Court has said, "[t]o delay until any Court of Claims adjudication with respect to the form of consideration provided by the Act would be exceedingly irresponsible" because Congress may reconsider "whether to abandon the whole Act if it turned out that the entire value of the [ ] properties must be paid in cash." *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 150 n.36.

No comparable judicial efficiencies would be fostered by requiring parties to litigate the takings issue in a separate case in the Court of Federal Claims. It makes little sense to bifurcate proceedings and require a property owner to bring an affirmative claim for monetary relief following the government's initiation of a dispute and selection of a forum.

B. The Court should clarify that the availability of equitable relief under the Takings Clause depends on traditional principles of equity rather than ripeness.

The flaws in the panel's decision — application of "ripeness" to a direct cash transfer and to defenses brought against government-initiated enforcement actions — stem from a common source: confusion

about the difference between jurisdiction and equitable remedies. The Court should take this opportunity to clarify the misunderstanding of law that has crept into the jurisprudence of the lower courts.

1. The historical understanding of the Constitution establishes that equitable principles govern the availability of equitable relief under the Takings Clause.

1. The rights invoked by Marvin and Laura Horne in this case are among the oldest and most fundamental in our system of liberties and limited government. Magna Charta itself provided that "[n]o constable or other royal official shall take corn or other movable goods from any man without immediate payment." Magna Charta, Cl. 28 (1215). A decade before the American Revolution, William Blackstone explained that government may take property "not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained." I *Commentaries on the Laws of England* 135 (1765). This principle was adopted by the framers of the Bill of Rights without debate or dissent.

The Takings Clause provides that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V. On its face, it is not apparent that the Clause allows the government to take property on the promise to compensate a property owner for condemned property months, years, or even decades after it is taken. Similar language in the Due Process Clause of the Fifth Amendment — that property cannot be taken "without due process of law" — has been interpreted to

mean that, absent special circumstances, the Clause "requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon* v. *Burch*, 494 U.S. 113, 127 (1990) (citing cases). Given that Magna Charta called for "immediate payment" if a royal constable took a farmer's corn, it is hard to believe raisin farmers are entitled to any less in modern America.

For centuries, property owners have been able to challenge government action where just compensation was not otherwise forthcoming. In a leading case authored by Justice Blackstone, for example, a landowner sued government road commissioners for trespass on the case alleging that their actions in raising the gradient of a road had "obstructed the doors and windows" of several houses, rendering the properties nearly unusable and causing four tenants to leave. See *Leader* v. *Moxon*, 96 Eng. Rep. 546, 546 (C.P. 1773), *reported sub nom. Leader* v. *Moxton*, 95 Eng. Rep. 1156. The commissioners responded by invoking a law of Parliament authorizing them to raise the gradient of the road. See *id.* Blackstone disagreed that the law provided authorization: "[H]ad Parliament intended to demolish or render useless some houses for the benefit or ornament of the rest, it would have given express powers for that purpose, *and given an equivalent for the loss that individuals might have sustained thereby*." *Id.* at 547 (emphasis added). Accordingly, the commissioners' actions were *ultra vires* and they were required to respond in damages — even punitive damages.

2. The early historical record includes a wealth of cases in which property owners invoked the Takings Clause to disable government action. These cases typically arose as common law actions against public

officials for trespass, trespass on the case, or nuisance. A public official would then seek to interject a public law purportedly authorizing his actions as justification for those actions, at which point the private party would defend against reliance on that public law on the ground that it violated the Takings Clause. See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 67-68 (1999). If the official action had already occurred and inflicted injury, the remedy was damages; if it had not yet occurred, the remedy was an injunction. Not one of these cases — federal or state — suggested that resort to the Takings Clause was unripe, that the court lacked jurisdiction, or that the property owner was compelled to submit to the government action and seek compensation for an accomplished taking. Instead, courts adjudicated the validity of government officials' claim of right vis-à-vis the Takings Clause in a single action, and restrained the government officials' action if the legislature had not provided compensation. The general rule was that compensation had to be paid before or "simultaneously" upon the taking; otherwise, the taking would be enjoined. *San Mateo Waterworks* v. *Sharpstein*, 50 Cal. 284, 285 (1875) ("The taking in this case amounts to a taking of private property for public use in the sense in which that phrase is used in the Constitution, and can only be effected upon the conditions prescribed in the Constitution — that is, upon just compensation being simultaneously made.").

In *Bonaparte* v. *Camden & A.R. Co.*, 3 F. Cas. 821 (C.C.N.J. 1830), for example, Justice Baldwin enjoined railroad officials acting under the auspices of a

New Jersey charter authorizing them to take land for railroad construction. *Id*. at 833-834 (ruling that officials had not complied with just compensation obligation embodied in statute or constitution). Invoking the Fifth Amendment, the court rejected the contention that statutory authorization exempted the officials from an injunction forbidding their imminent trespass: "If the law is unconstitutional, it can give no authority * * * [and] the person who acts by colour of law merely is a trespasser; and wherever the court have power to take cognizance of an action of trespass * * * a court of equity may * * * prevent its commission." *Id*. at 827; see also *Baring* v. *Erdman*, 2 F. Cas. 784 (C.C.E.D. Pa. 1834) (official acting pursuant to an unconstitutional statute may be "enjoin[ed] from any future acts, however deeply it might affect the interests of the state"); *Griffing* v. *Gibb*, 67 U.S. 519, 522 (1862), *rev'g*, 11 F. Cas. 33, 36 (C.C.N.D. Cal. 1857) (officials could not successfully demur to nuisance action based on statute where application of statute was alleged to result in unconstitutional taking).

Many state courts interpreted parallel state takings provisions. The pattern in these cases was the same. Property owners could invoke the state takings provision to counter government officials' invocation of statutory authority and to obtain damages or injunctive relief as appropriate. In one such case, the Massachusetts Supreme Judicial Court explained that an act that "confer[red] a power on [a] corporation to take private property for public use, without providing for * * * the payment of an adequate indemnity" would contravene the state constitution, resulting in a declaration that "the wrongful act would stand unjustified by legislative grant." *Thacher* v. *Dartmouth Bridge Co.*, 35 Mass. (18 Pick.) 501, 502

(1836); see also *Sinnickson* v. *Johnson*, 17 N.J.L. 129 (1839) (defendants liable in nuisance and trespass on the case for flooding because statute authorized construction of dam but provided no compensation); *Bloodgood* v. *Mohawk & Hudson R.R.*, 18 Wend. 9, 78 (N.Y. 1837) (trespass action prohibiting railway that claimed authorization from corporate charter to take property with damages to be paid later from entering land "until [plaintiff's] damages were appraised and paid"); *Perry* v. *Wilson*, 7 Mass. 393, 395 (1811) (holding defendant liable in trespass because law purportedly authorizing taking of logs failed to provide just compensation and was thus void).

Reviewing these and other cases, an early treatise declared that, "as an original question, it seems to us clear that the proper interpretation of the constitution requires that the owner should receive his just compensation before entry upon his property." John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 456 (1888).

3. Over the course of the Nineteenth Century, courts, including this Court, repeatedly allowed parties to bring affirmative injunctive claims under the Takings Clause. See *Yates* v. *City of Milwaukee*, 77 U.S. 497, 506 (1870) (enjoining municipality from removing dock and wharf alleged to impede navigation upon mere legislative declaration that facilities constituted nuisance and without compensation); see also *Smyth* v. *Ames*, 169 U.S. 466, 549-550 (1898) (enjoining enforcement of rate regulation as unconstitutional taking), *overruled on other grounds*, *Fed. Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944); *Tindal* v. *Wesley*, 167 U.S. 204, 222-223 (1897) (state officers subject to ejectment where state had not acquired property by paying just compensation);

D.M. Osborne & Co. v. *Missouri Pac. Ry.*, 147 U.S. 248, 258-259 (1893) (injunctive relief available "in view of the inadequacy of legal remedy"); *United States* v. *Lee*, 106 U.S. 196, 218 (1882) (affirming order ejecting federal officials from land acquired in improper tax sale); *Pumpelly* v. *Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177 (1871) (construing Wisconsin constitutional provision "almost identical" to federal Takings Clause as invalidating statute authorizing dam that caused flooding of plaintiff's property where defendants denied obligation of compensation).

The availability of an affirmative injunctive action was limited by traditional doctrines. For example, the rise of railroads and large federal public works projects prompted Congress, in certain circumstances, to create specific procedures to determine compensation in conjunction with specific statutes authorizing condemnation of property. The question arose whether these specific procedures for obtaining compensation precluded entry of an injunction in an affirmative lawsuit. In the leading case, the Court determined that, "[w]hether a particular provision be sufficient to secure the compensation to which, under the constitution, [a property owner] is entitled, is sometimes a question of difficulty," and that a property power was barred from obtaining an injunction only if the legislature had enacted a "reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed." *Cherokee Nation*, 135 U.S. at 659. Thus, the Court determined that the Constitution "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken," if "reasonable, certain, and adequate provision" for obtaining such compensation had been created before occupan-

cy was disturbed. *Ibid.*

The rule of *Cherokee Nation* parallels this Court's decision in *Ex parte Young* that injunctive relief was available to enjoin state officials who violated the Constitution. There, too, the Court addressed whether there was "a plain and adequate remedy at law," 209 U.S. at 163, before issuing an injunction, see *id.* at 165; see also *Scott* v. *Donald*, 165 U.S. 107, 114 (1897) ("[T]he circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state when to execute it would be to violate rights and privileges of the complainant that had been guarantied by the constitution, and would do irreparable damage and injury to him * * * .") (quoting *Ex parte Tyler*, 149 U.S. 164, 191 (1893)); IV John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America* § 1363, at 3255-258 (4th ed. 1919).

Under the rule of *Cherokee Nation*, various specific compensation provisions were upheld as "reasonable, certain, and adequate," thereby precluding immediate entry of an injunction under the Takings Clause. See *Dohany* v. *Rogers*, 281 U.S. 362, 365 (1930) (upholding statute providing for direct condemnation proceedings under which highway commission would occupy property only after determination of compensation award, but during pendency of appeal regarding compensation award); *Joslin Mfg. Co.* v. *City of Providence*, 262 U.S. 668, 677-678 (1923) (upholding statute providing for taking subject to challenge to compensation award and one year delay in occupying property while challenge was resolved); *Bragg* v. *Weaver*, 251 U.S. 57, 62 (1919) (upholding statute providing for occupation of property for road construction before the compensation pro-

ceeding was completed); *Sweet* v. *Rechel*, 159 U.S. 380, 400-402 (1895) (owner of lands subject to flooding by dam need not be compensated in advance because statute provided compensation without "undue risk or unreasonable delay").

In contrast, several forms of monetary compensation schemes were deemed unreasonable, uncertain, or inadequate. See *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) (awarding retrospective damages for taking because Congress previously provided constitutionally inadequate means to obtain compensation in conjunction with treaty); *Western Union Tel. Co.* v. *Pa. R.R.*, 195 U.S. 540, 570-571 (1904) (applying *Cherokee Nation* in the course of statutory construction to hold that a statute favoring telegraph company did not provide for eminent domain given the plainly inadequate remedies provided); *Macfarland* v. *Poulos*, 32 App. D.C. 558, 562-563 (D.C. Cir. 1909) (holding provision for compensation inadequate under *Cherokee Nation*); see also *Conn. River R.R.* v. *Franklin Cnty. Comm'rs*, 127 Mass. 50 (1879), cited in *Sweet*, 159 U.S. at 401 (explaining that *Connecticut River* held inadequate compensation for taking when it was to be paid "out of the earnings of" private railroad).

In short, while there may have been some disagreement over whether compensation was required "*before* entry upon * * * property," Lewis, *supra*, *Law of Eminent Domain* § 456 (emphasis added), it was well-settled that the Constitution required "reasonable, certain, and adequate provision for obtaining compensation before * * * occupancy is disturbed." *Cherokee Nation*, 135 U.S. at 659; see also Lewis, *supra*, *Law of Eminent Domain* § 456 (recognizing that, by 1888, "in most states * * * compensation need not

precede an entry upon the property, provided some definite provision is made whereby the owner will certainly obtain compensation"). Without such provision, an injunction issued.

No constitutional "ripeness" doctrine required property owners to exhaust remedies before challenging a taking. It was the obligation of the government defendant to show that the availability of "reasonable, certain, and adequate provision for obtaining compensation" precluded plaintiff's claim for an injunction. This was an ordinary application of equitable principles — what would now be regarded as "choice of remedies" — and not a question of subject-matter jurisdiction. See Douglas Laycock, *Modern American Remedies* 380-381 (4th ed. 2010).

4. Following the creation of the Court of Claims (later, the Court of Federal Claims), the question arose whether the damages remedy created by Congress in those courts precluded entry of an injunction. In general, the Court distinguished between cases in which the government recognized that its action constituted a taking and that just compensation was due, and those cases in which the obligation of compensation was contested. Cases in the former category belonged in the Court of Claims under the Tucker Act; cases in the latter category belonged in district court, with injunctive remedies available. See *Mitchell* v. *United States*, 267 U.S. 341, 345 (1925) ("There can be no recovery under the Tucker Act if the intention to take is lacking.") (citation omitted); *Tempel* v. *United States*, 248 U.S. 121, 130-131 (1918) (same). Compare *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932) (holding that, because government recognized that it was taking property, plaintiff had "no basis for an injunction" because "compensation may be pro-

cured in an action at law"), with *Lee*, 106 U.S. at 218 (affirming order sought by General Robert E. Lee's heirs ejecting federal agents and providing for the return of Lee's Virginia estate); *Langford* v. *United States*, 101 U.S. 341 (1879) (affirming dismissal of takings claim by Court of Claims where the government denied there was a taking).

At first this distinction was linked to the distinction between contract and tort under the Tucker Act. See 28 U.S.C. § 1491(a)(1) (establishing Tucker Act jurisdiction over "cases not sounding in tort"). Where the legislature evinced an intention to pay compensation for the taking of property, the case was said to arise under contract and fall within the scope of the Tucker Act. See *United States* v. *Great Falls Mfg. Co.*, 112 U.S. 645, 656-657 (1884) ("The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of congress, as private property to be applied for public uses."); see also *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U.S. 1, 2 (1919); *Peabody* v. *United States*, 231 U.S. 530, 540 (1913); *Schillinger* v. *United States*, 155 U.S. 163, 168-169 (1894). Later, after the Court interpreted the Tucker Act to cover takings sounding in tort, see *United States* v. *Causby*, 328 U.S. 256, 267 (1946), the issue became one of practicality. When the action challenged as a taking was complete, as in *Causby*, the case proceeded to the Court of Claims, but when the taking had not yet occurred, duty to compensate was contested, and there was no indication of congressional intent to pay if the action were deemed to be a taking, the case proceeded in district court, enabling the government to choose between cancelling the action and paying compensation in the

event the action was deemed a taking. See *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 149 n.36; see also *Duke Power Co.* v. *Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 71 n.15 (1978). Where nothing suggested that the legislature intended to pay compensation, an injunction rather than a Tucker Act suit was the proper avenue for relief. *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 143; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-585 (1952) (entry of injunction proper because "[p]rior cases in this Court have cast doubt on the right to recover in the Court of Claims" and "seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement"); cf. *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978) (hearing, on the merits, appeal from order reversing injunction against enforcement of historic preservation law where legislature provided arguably inadequate in-kind compensation).

5. In the mid-1980s, opinions of the Court began to attach the label of "ripeness" to the idea that property owners with an adequate remedy at law could not obtain an injunction for a taking of their property, thus appearing to convert what had been a routine application of general principles of equity into a jurisdictional question. With all respect, this has been the source of great confusion and unfairness, of which the decision below is only one example.

As recently as 1974, the Court in the *Regional Rail Reorganization Act Cases* distinguished between choice of remedies and ripeness. The Court held that a takings claim seeking an injunction was ripe, because it was "in no way hypothetical or speculative."

419 U.S. at 143. Applying traditional principles of constitutional ripeness, the Court determined that "[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect. One does not have to await the consummation of threatened injury to obtain preventive relief." *Id.* (quotation marks and citations omitted) . At the same time, the Court held on the facts there that "the availability of the Tucker Act guarantees an adequate remedy at law for any taking which might occur" at some point in the future. *Id.* at 149; see also *id.* at 136.

In *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), the Court considered whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") violated the Takings Clause by appropriating certain trade secrets. The case had been brought in district court, and that court had issued an injunction against enforcement of certain aspects of the statute it deemed to be an uncompensated taking. *Id.* at 1000. In contrast to the panel's approach in the present case, this Court did not simply redirect the plaintiff to the Court of Federal Claims. On the contrary, this Court engaged in lengthy legal analysis of the merits of the Fifth Amendment issue, holding that some aspects of FIFRA would effectuate takings requiring just compensation. See *id.* at 1000-17. Having reached that conclusion on the merits, the Court reversed the grant of an injunction. See *id.* at 1019. Applying traditional equitable principles, the Court held that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use" where the plaintiffs had an adequate remedy under

the Tucker Act. See *id.* at 1016-19. The Court then found that certain claims regarding the arbitration and compensation provisions of the statute were not "ripe," because contingent future events would determine whether these provisions would actually injure the plaintiff. *Id.* at 1019-20. Despite invoking "ripeness" in passing, *Monsanto* thus does not stand for the proposition that ripeness doctrine precludes district courts from considering Takings Clause claims on the merits. It distinguished between the equitable principles governing the availability of injunctive relief and ripeness principles governing claims based on contingent future events.

In *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), however, the Court restated the traditional rules regarding the availability of injunctive relief in terms of a constitutional rule governing the Court's jurisdiction:

> [T]aking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. *Monsanto*, 467 U.S., at 1016-20. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Id. at 195.

This phrasing is the root of the panel's doctrinal error. The panel presupposed that parties may not invoke the Takings Clause even in cases that are otherwise ripe, and even when they are not seeking an injunction, unless they have first gone to the Court of

Federal Claims. No case prior to *Williamson County* had ever suggested anything of the sort. It may well be true that district courts may not issue an injunction on takings grounds against federal action if a reasonable, certain, and adequate Tucker Act remedy is available, see *Preseault* v. *Interstate Commerce Comm'n,* 494 U.S. 1, 17 (1990) — although even that is a more sweeping proposition than earlier cases support (see *supra*, pp. 36-38). But it certainly is not true that the rule is jurisdictional, that the rule applies when the Tucker Act remedy is pointless and duplicative, or that the rule applies when the property owner invokes the Takings Clause in a defensive posture rather than seeking an injunction.

This case does not call for reconsideration of the holding of *Williamson County*, because it does not involve *Williamson County*'s federalism and comity dimensions. See *San Remo Hotel, L.P.* v. *City & Cnty. of S.F.*, 545 U.S. 323, 345-347 (2005). Moreover, *Williamson County* arose in the context of an inverse condemnation action brought by the property owner, whereas in this case the property owner appears in a defensive posture and does not seek affirmative relief against the government, whether monetary or injunctive, but only reversal of an unconstitutional federal agency order.

This case does, however, provide the Court with an occasion to clarify that *Williamson County*'s prematurity rule, whatever its merits in its original context, does not turn on principles of "ripeness" and is not jurisdictional in nature. Already, in subsequent cases, this Court has seemingly backed away from the full jurisdictional categorization of the rule, calling it "prudential." *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.7 (1997); see also *Stop*

the Beach Renourishment, Inc. v. *Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2610 (2010) (stating that the rule is not "jurisdictional"). As illustrated by the proceedings below, however, the Ninth Circuit and other lower courts — as well as the United States government — continue to regard *Williamson County* as jurisdictional. See JA242 (government opposition to rehearing petition claiming that doctrine went to the court's "subject-matter jurisdiction" and hence "may be raised at any point in the litigation") (quotation omitted). For much the same reasons this Court has recently become more rigorous in distinguishing between jurisdictional and "claim-processing rules," see, *e.g.*, *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004), and between jurisdiction and the substantive ingredients of a claim, see, *e.g.*, *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), it should distinguish in this case between ripeness and the equitable rules for obtaining injunctive relief.

2. A party need not pursue pointless duplicative proceedings before obtaining injunctive redress under the Takings Clause.

Although the *Apfel* plurality did not explicitly invoke the equitable principles of *Cherokee Nation*, the conclusion and reasoning of *Apfel* are entirely consistent with, indeed compelled by, those principles. The text, structure, and history of the Fifth Amendment establish that a private party may obtain injunctive relief in an affirmative lawsuit under the Takings Clause where the party lacks a "reasonable, certain, and adequate" monetary remedy. *Cherokee Nation*, 135 U.S. at 659. *Apfel* implements this "reasonableness" directive by eliminating the need for "pointless" and unnecessarily duplicative and burdensome pro-

cedures. 524 U.S. at 521; see *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992); *MacDonald, Sommer, & Frates* v. *Yolo Cnty.*, 477 U.S. 340, 350 n.7 (1986); see also *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 626 (2001). The *Apfel* plurality's reasoning thus fits squarely within the pattern of the historical cases discussed above.

3. A party may invoke the Takings Clause as a defense to government-initiated enforcement action.

Petitioners also may invoke their rights under the Takings Clause as a defense to a government-initiated action. When the government initiates an action, the private party is entitled to raise its constitutional rights as a defense. Because the party does not seek an affirmative injunction, it need not establish that it satisfies the equitable criteria for injunctive relief, such as that it lacks an adequate remedy at law.

1. In *Missouri Pacific Railway*, the Court considered a suit "brought by the state to recover a fine of $500 imposed by the law for failure to obey [the State of Nebraska's statutory] command," to which the railway company raised a constitutional defense predicated on the constitutional protection for property. 217 U.S. at 204. In an opinion by Justice Holmes, the Court held that the statute "unquestionably does take [the railroad's] property." *Id.* at 205. The Court thus permitted the railroad to raise a constitutional defense to the imposition of the penalty, rather than remain subject to the "peril of a fine" that was unconstitutional because it enforced an unconstitutional statute. *Id.* at 207-208. The Court did not ask whether there was an adequate alternative remedy at

law, because that was not a necessary precondition to raising a legal defense to a fine.

This approach was utterly routine, and consistent with prior state and federal cases. Nineteenth Century cases frequently addressed defenses based on the Takings Clause. For example, in *St. Louis and San Francisco Railway* v. *Gill*, 156 U.S. 667 (1895), the Court considered a case in which a plaintiff alleged that a defendant railroad had exceeded the maximum rate permissible under a state statute, and the defendant argued that the rate law was "a taking of private property for public use without compensation, and is therefore in violation of the fifth and fourteenth amendments to the constitution of the United States." *Id.* at 653-654. The Court rejected the takings argument on the merits without ever suggesting that it could not be brought as a defense. See *id.* at 665-667; see also *Union Bridge Co.* v. *United States*, 204 U.S. 364 (1907) (rejecting merits of takings defense to criminal prosecution); *Chicago, Burlington, & Quincy Ry.* v. *Illinois*, 200 U.S. 561, 565 (1906) (adjudicating takings defense raised in mandamus action); *Sanborn* v. *Belden*, 51 Cal. 266, 268 (1876) (allowing Takings Clause to be raised by defendant because, where plaintiff corporation condemns property, "it is at least essential that an adequate fund * * * be provided, from which the owner of the property [c]an certainly obtain compensation"); *San Mateo Waterworks*, 50 Cal. at 285 (allowing defendant to raise Takings Clause as a defense); *Cal. Pac. R.R.* v. *Cent. Pac. R.R. of Cal.*, 47 Cal. 528, 530 (1874) (vacating trial court order because it allowed plaintiff to achieve taking without just compensation, stating defendant "is not bound to wait until the injury is done, but may demand relief by way of protection against

injuries contemplated by the order itself").

2. Both *Ex parte Young* and this Court's Nineteenth Century takings cases established that an injunction could be obtained in an affirmative lawsuit where an adequate remedy at law was lacking. Those decisions expanded the remedies available for constitutional violations by allowing anticipatory relief in advance of actual enforcement of the challenged law. They did not cut back, however, on the long-established right of parties to raise constitutional provisions, including the Takings Clause, as a defense to enforcement actions.

This Court's precedents interpreting *Ex parte Young* make that distinction clear. *Ex parte Young* permits an affirmative injunctive claim upon a showing of (1) a legal defense to an impending legal action and (2) an argument that waiting to assert the defense at law would not be an adequate remedy. See John Harrison, *Ex parte Young*, 60 STAN. L. REV. 989, 997-999, 1014 (2008); see also *Va. Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring) (*Ex parte Young* involves "pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law"); *Douglas* v. *Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1213 (2012) (Roberts, C.J., dissenting) (same). A party raising a defense need not establish the latter point. See, *e.g.*, John Willard, *A Treatise on Equity Jurisprudence* 348 (Platt Potter ed., 2d ed. 1875) ("[I]t is well settled that equity will not restrain an action at law by a preliminary injunction, on the application of the defendant in such action, if he has a perfect defense at law. Unless the injunction is necessary to make the defense available * * * ."). Indeed, *Ex parte*

Young took it as a given that "the company could [ ] interpose this defense in an action to recover penalties or upon the trial of an indictment * * * ." 209 U.S. at 165. The Court cited *Gill*, a takings case discussed above, for this settled and undisputed proposition. See *id.*

In a similar vein, the Court later explained that, even where a party could not "interfere by injunction with the state's collection of its revenues," if the state commences an action against a citizen who refuses to pay, "he can interpose his objections by way of defense." *Atchison, Topeka, & Santa Fe Ry.* v. *O'Connor*, 223 U.S. 280, 285-286 (1912) (citing, among other cases, *Ex parte Young*). And the Court explained that *Ex parte Young*'s "broader right to invoke a complete remedy to enjoin the law * * * did not take away the narrower right of a [party] to stand upon the defensive, and merely resist the attempt to enforce" the law. *Missouri* v. *Chicago, Burlington, & Quincy R.R.*, 241 U.S. 533, 539 (1916).

Thus, it is black-letter law that a party may raise a constitutional defense to a government enforcement action without any showing that other monetary remedies are inadequate. See *Missouri Pac. Ry.*, 217 U.S. at 205-208; see also *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Lambert* v. *California*, 355 U.S. 225 (1957). There is no reason to treat takings claims any differently. See *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."). Where the Tucker Act does create a "reasonable, certain, and adequate" remedy at law, a private party

cannot obtain affirmative injunctive relief. But even then, the Takings Clause still can be raised as a defense to government action.

3. In sum, limitations on the ability of claimants to invoke the Takings Clause in advance of a Tucker Act claim arise from traditional equitable principles governing the availability of an injunctive remedy. So understood, the *Apfel* plurality correctly determined that plaintiffs are not required to undertake duplicative proceedings to challenge requirements of direct transfers of cash mandated by the government, and Justice Holmes correctly held in *Missouri Pacific Railway* that parties can invoke the Takings Clause as a defense to unconstitutional fines.

II. Under the AMAA, petitioners have the right and obligation to bring their takings claim in administrative proceedings rather than in the Court of Federal Claims under the Tucker Act.

Even assuming that petitioners may not raise their takings claim either to challenge a "direct transfer of money" or as a defense in a government-initiated action, reversal would still be required on an *independent* basis as a matter of *statutory* law. The panel recognized that the AMAA "'provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA'" and "'vests the district courts with jurisdiction to review the Secretary's decision.'" JA257 (quoting *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356, 1370 (Fed. Cir. 2005)). The panel determined, however, that petitioners' takings claim was brought "not in their capacity as handlers but in their capacity as producers" and therefore not subject to "administrative exhaustion re-

quirements," JA304-305 — notwithstanding the fact that the set-aside and fine were applicable to petitioners *only* because the USDA classified petitioners as "handlers." The panel's holding that petitioners "may" — and therefore must — "bring the[ir] takings claim" in the Court of Federal Claims, JA306, misunderstands the scope of the AMAA's withdrawal of the Tucker Act.

In the AMAA, Congress provided that "any handler" of raisins that is subject to a marketing order must bring *all* challenges, including constitutional challenges, to any order entered against it before the USDA itself, subject to review in federal district court. See *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946). As the panel and the government agree, the AMAA's comprehensive regulatory scheme thus withdraws the Tucker Act insofar as it applies. The only point of disagreement is whether that comprehensive regulatory scheme applies to petitioners' takings claim.

1. Because the Tucker Act is a creature of Congress, Congress may freely "withdraw[] the Tucker Act grant of jurisdiction" by statute. *Apfel*, 524 U.S. at 520. As the Court explained earlier this Term in the closely related context of the Little Tucker Act, where "a statute contains its own self-executing remedial scheme," a court "look[s] *only* to that statute * * * ." *United States* v. *Bormes,* 133 S. Ct. 12, 17 (2012) (emphasis added; unanimous); see *Hinck* v. *United States*, 550 U.S. 501, 506 (2007) ("specific remedy" withdraws the Tucker Act); *Lion Raisins*, 416 F.3d at 1372 (observing that the Federal Circuit has "repeatedly held that Tucker Act review of takings claims is precluded where Congress has provided a specific and comprehensive scheme for administrative

and judicial review") (quotations omitted). That is because these statutes are "general in character and must give way to an applicable special provision in any other federal statute." 14 Charles A. Wright *et al.*, *Federal Practice & Procedure* § 3657 & n.33 (3d ed. 1998) (collecting cases).

A statutory scheme withdraws the Tucker Act when it "provides a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief." *Hinck*, 550 U.S. at 506; see *Bormes*, 133 S. Ct. at 19. The question is whether the statutory scheme is comprehensive, and "[t]he answer [to that question] is to be found by examining the purpose of the [statute], the entirety of its text, and the structure of review that it establishes." *United States* v. *Fausto*, 484 U.S. 439, 444 (1988). The creation of a detailed, specific scheme for administrative and judicial review is strong evidence that Congress intended to withdraw the Tucker Act's more general grant of jurisdiction. See, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (focusing on the "statute's precisely drawn provisions" for review).

2. The AMAA satisfies these standards. The AMAA splits its mechanism for administrative and judicial review between two connected provisions: Section 608c(14)(B) and Section 608c(15)(B). The primary distinction between the two is whether the agency or a private party initiates the agency action. Under both provisions, the initial forum for adjudication is within the USDA, with judicial review in the district court where the private party resides or has its principal place of business. 7 U.S.C. §§ 608c(14)(B), (15)(B); see *Block* v. *Cmty. Nutrition Inst.*, 467 U.S. 340, 346 (1984) (handler must first

avail itself of whatever "administrative remedies" are "made available by the Secretary"). Only "handlers" may challenge USDA orders under either provision. 7 U.S.C. §§ 608c(14)(B), (15)(B). A USDA order may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." JA133. Between the two sections, the AMAA provides the full panoply of remedies. If the private party challenges an order entered against it — including an order to pay money to the government — the court may reverse that order under section 608c(14)(B). If the private party seeks prospective relief against a provision of the marketing order, section 608c(15)(B) authorizes the district court to exercise "jurisdiction in equity" to award not only injunctive but "monetary relief, in the form of equitable restitution." *Lion Raisins*, 416 F.3d at 1371-372; see *Tull* v. *United States*, 481 U.S. 412, 424 (1987) ("[A] court in equity may award monetary restitution* * * ."). This comprehensive and mandatory scheme leaves no room for Tucker Act jurisdiction in the Court of Federal Claims.

That is equally true for both constitutional and statutory challenges to orders issued under the Act. As this Court has explained, "[e]ven when [challenges] are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the [ ] industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture." *Ruzicka*, 329 U.S. at 294; see also *Elgin* v. *Dep't of Treasury*, 132 S. Ct. 2126, 2130 (2012) (Congress may channel constitutional claims through "'comprehensive'" remedial schemes) (quoting *Fausto*, 484 U.S. at 455); *Lion Raisins*, 416 F.3d at 1358, 1370-371 (holding, at government's request, that rai-

sin producer-handler's "takings claim may not be brought against the government" in the Court of Federal Claims, because the AMAA "provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA").

3. Neither the government nor the panel disputed that the AMAA withdraws the Tucker Act for takings claims brought by "handlers" of raisins. Instead, the panel held and the government argues that the Hornes are not handlers of raisins for purposes of their takings claim, which according to the panel and the government, is brought "in their capacity as producers." JA305. This is sheer doubletalk. The Raisin Marketing Order applies to petitioners in the first place only in their capacity as handlers, because the USDA has no authority to impose fines against the Hornes in their capacity as producers. JA293-294 ("Marketing orders under the AMAA apply only to 'handlers' * * * and do not apply to any producer 'in his capacity as a producer.'"); JA298 (USDA's "mandatory raisin reserve program * * * requirements apply only to handlers"); 7 U.S.C. §§ 608c(14)(A)-(B) (creating liability for "handlers"); § 608c(13)(B) ("No order issued under this chapter shall be applicable to any producer in his capacity as a producer."); *Lion Raisins*, 416 F.3d at 1359 ("[P]roducers are not directly bound by the statute * * * ."). It was the Hornes who argued, unsuccessfully, that they were not subject to the set-aside because they were not handlers. They lost on that statutory argument. Having been required "in their capacity as handlers" to give raisins or their monetary equivalent to the government, the government cannot turn around and claim that the Hornes' constitutional defense against that exaction is brought in some other capacity.

Distinguishing between handlers bringing their takings claim "in their capacity as handlers" from those doing so "in their capacity as producers" conflicts not only with the litigating position of the government in this case, but also with the text and structure of the AMAA. Under the AMAA, "*[a]ny* handler" seeking to challenge an order must exhaust administrative remedies before the Secretary of Agriculture. 7 U.S.C. §§ 608c(14)(A), (15)(A) (emphasis added). The exhaustion requirement is triggered by the identity of the party as a handler, not by the nature of the issue or the "capacity" in which it is brought. If a party is a "handler," he must exhaust his claims before the agency and seek review in district court.

The term "handler" includes anyone "engaged in the handling" of raisins. § 608c(1); see also 7 C.F.R. § 989.15. Nothing in the Act provides for separate treatment of "handlers" who also happen to be "producers," such that a "producer-handler" challenging a reserve requirement for its own raisins somehow falls outside the scope of the statute. Instead, the statute says "any handler" can bring its claims before the agency. "'Read naturally, the word "any" has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997), in turn quoting *Webster's Third New Int'l Dictionary* 97 (1976)); see also *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-589 (1980) ("any" betrays no "uncertainty" and is not subject to a "limiting construction"). "[I]n any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432,

438 (1999) (citation and quotation marks omitted).

The USDA's regulations underscore this point. The agency has broadly declared that "[t]he term handler means *any* person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i) (emphasis added). The government nowhere disputes that petitioners meet that definition, nor could it. See *United States* v. *Nixon*, 418 U.S. 683, 696 (1974) ("So long as this regulation remains in force the Executive Branch is bound by it * * * .").

Likewise, the AMAA's structure compels the conclusion that handlers, including so-called producer-handlers, must raise takings claims through the administrative process and not by recourse to the Tucker Act. "Congress intended that judicial review of market[ing] orders issued under the [AMAA] ordinarily be confined to suits brought by handlers," *Block*, 467 U.S. at 348, as handlers "can [ ] be expected to challenge unlawful agency action and to ensure that the statute's objectives will not be frustrated," *id.* at 352. Channeling petitioners' challenge through administrative processes allows the USDA to apply its technical knowledge to the question in the first instance, potentially avoiding the need for a constitutional determination altogether. See, *e.g.*, *Saulsbury Orchards & Almond Processing, Inc.* v. *Yeutter*, 917 F.2d 1190, 1195 (9th Cir. 1990); see also *Block*, 467 U.S. at 347-348 (AMAA is a "complex and delicate administrative scheme" whose functioning depends on the Secretary's "technical * * * expertise").

Not only does the panel's holding have no legal basis, it makes little sense. Under the panel's ap-

proach, producer-handlers sometimes must bring takings claims to the USDA, but other times to the Court of Federal Claims. For example, although under the government's theory, petitioners' challenge to the requirement that they pay the monetary equivalent of the reserve raisins is brought in their capacity as producers, their challenge to the civil penalty for failing to do so is surely brought in their capacity as handlers, since that aspect of the fine can be imposed only on handlers. Yet the constitutional challenges to these two parts of the fine rise and fall together. If it is unconstitutional to take raisins or their monetary equivalent without just compensation, it is likewise unconstitutional to fine a party for not complying with the unconstitutional requirement. The Hornes, wearing their "handler" hat, cannot effectually challenge their civil fine without also challenging the constitutionality of the underlying order.

Similarly, if the Hornes wished to challenge the USDA's calculation of the amount it will pay for the reserve raisins, they would do so in their capacity as handlers even under the government's theory. Yet in a particular case, proper calculation of this amount could effectively provide just compensation, thus obviating the takings injury to the Hornes in their "capacity as producers." This means that the Hornes, in their "capacity as producers," cannot raise a legal defect in the calculation of the amount of compensation to which they are entitled, thus precipitating a completely unnecessary takings claim.

Because the Hornes are the same people, with the same interests, whether they are said to be producers or handlers, and since their statutory and constitutional rights are closely intertwined, it makes no sense to bifurcate their claims in this crazy-quilt fa-

shion. See *Kloeckner* v. *Solis*, 133 S. Ct. 596, 605 (2012) (rejecting government's "roundabout way of bifurcating judicial review").

Such case-by-case determination is a recipe for pointless complexity and error in an area where "administrative simplicity is a major virtue." *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1193 (2010) ("Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims."). By requiring a case-specific appraisal of the "capacity" in which an entity pursues its legal claims, the panel's approach needlessly multiplies administrative and judicial proceedings. As here, the Takings Clause is often just one defense among many that a producer-handler might advance. Under the panel's decision, although a handler would have to bring all non-takings defenses to the USDA, that exact same handler sometimes — but sometimes not, depending on the "capacity" in which the defense is brought — would have to bring its takings claim to the Court of Federal Claims. "It is unlikely — to say the least — that Congress intended to establish such a chaotic regulatory structure." *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 497 (1987).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 9, 2013