No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

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

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

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing protections for private property rights against infringement by the federal, state, and local governments.

The Chamber and its members have a substantial interest in ensuring that property owners retain an adequate, efficient, and prompt remedy against unconstitutional government takings of property. The property rights of Chamber members are subject to infringement in a wide range of areas, including laws under which the government may seek monetary fines or penalties. The court of appeals in this case held that petitioners could not raise the Takings Clause of the Fifth Amendment as a defense to a gov-

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

ernment-mandated transfer of funds, but rather were required to pay the sums and then bring a second lawsuit to litigate the Takings Clause question by seeking reimbursement in the Court of Federal Claims. That rule is of great concern to the Chamber and its members because, if upheld, it would substantially burden Fifth Amendment rights, with wide-ranging consequences for private property interests nationwide.

BACKGROUND

Under the Agricultural Marketing Agreement Act of 1937 ("AMAA") and its implementing regulations, "handlers" of raisins in California must turn over to "the account" of a committee appointed by the United States Department of Agriculture ("USDA") a portion of the annual raisin crop. See 7 U.S.C. § 601 *et seq.*; Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. pt. 989 ("Raisin Marketing Order" or "Order"). In this way, the federal government establishes annual "reserve" pools of raisins, title to which effectively passes from raisin producers to the government's Raisin Administrative Committee ("RAC") to dispose of as it sees fit. 7 C.F.R. § 989.66(a), (b)(1), (b)(4). For the two years at issue in this case (2002-2003 and 2003-2004), the "reserve" percentage of the raisin crop was 47 and 30 percent, respectively. J.A. 84–85. In 2003-2004, the government paid growers precisely $0 for the 30 percent of that year's raisin crop (some 38.5 million tons) that it appropriated for the "reserve" pool. Pet. Br. 6.

In this case, the Administrator of the Agricultural Marketing Service brought a federal enforcement action alleging that petitioners—independent California raisin producers—failed to comply with the Raisin Marketing Order's reserve-pool requirements in 2002-2003 and 2003-2004. Petitioners raised a number of defenses, including: (1) that on the evidence before the agency, they were producers of raisins, not "handlers" subject to the Order; (2) that they did not "acquire" raisins within the meaning of the Order; (3) that, as producers, they had acted in good faith in furtherance of the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3007, and thus were exempt from the Order; and (4) that requiring the transfer of title to a portion of their annual raisin crop constituted an unconstitutional taking of private property without just compensation under the Fifth Amendment. J.A. 72–79, 134–157, 170–181.

USDA rejected petitioners' defenses and concluded they had violated certain provisions of the Order by failing to set aside reserve raisins in 2002-2003 and 2003-2004. J.A. 96 (citing 7 C.F.R. §§ 989.66, 989.166). A USDA administrative law judge ("ALJ") held categorically that petitioners "no longer have a property right [in raisins they grew] that permits them to market their crop free of regulatory control." J.A. 39. And, while nominally disclaiming authority to address the constitutional defense, the USDA judicial officer reviewing the ALJ's decision held that it would "treat the Raisin Order as constitutional, as I believe it to be." J.A. 73.

USDA ordered petitioners to pay the dollar equivalent of the two years' reserve raisin contributions

($438,843) pursuant to 7 C.F.R. § 989.166(c), which requires a handler to "compensate the [RAC] for the amount of the loss resulting from [a] failure to so deliver" reserve raisins. And USDA assessed petitioners $202,600 in civil penalties under 7 U.S.C. § 608c(14)(B) for violations of the reserve-pool requirements.

Petitioners re-asserted the arguments identified above in seeking review of the Secretary's order pursuant to the AMAA's judicial review provision, 7 U.S.C. § 608c(15)(B), and in addition argued that a 2001 advisory letter from the USDA had informed petitioners that they would not be considered "handlers" subject to the Order under relevant circumstances. J.A. 140–144.

In granting the USDA summary judgment, the district court held that "transfer of title to the reserve tonnage does not constitute a *physical* taking," because "[t]he government does not physically invade [petitioners'] land to take the raisins" and "[t]he reserve tonnage remains in the possession of the handlers," even though the law effected a complete "transfer of title" from petitioners to the RAC. J.A. 178, 180.

Although it affirmed the grant of summary judgment, the Ninth Circuit held that it lacked jurisdiction to reach petitioners' Takings Clause defense. Relying on *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), for the proposition that the Takings Clause requires only "an adequate process for obtaining compensation," the court observed that the Tucker Act authorizes parties seeking compensation from

the United States to bring suit in the Court of Federal Claims. J.A. 303–304. The court concluded that petitioners' takings defense "must be brought [in the Court of Federal Claims] in the first instance." J.A. 304. This was so notwithstanding that petitioners did not seek *compensation*, but rather invoked the Takings Clause as a defense to enforcement, and any such action would merely involve reimbursement of the money the USDA ordered petitioners to pay.

SUMMARY OF ARGUMENT

The plurality opinion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), should provide the controlling rule of decision in this case. Where the government requires a direct transfer of funds, and where a party seeks equitable relief in resisting application of that statute in an enforcement action, that party need not seek "compensation" in a duplicative second lawsuit under the Tucker Act.

The *Apfel* plurality's rationale is consistent with this Court's longstanding rule that a party may challenge the imposition of an unconstitutional fine when it is imposed, including in the context of the Takings Clause. The Ninth Circuit's contrary rule finds no basis in this Court's ripeness doctrine, as the Takings Clause defense in this case was unquestionably fit for judicial decision, and delaying its adjudication until a second lawsuit in the Court of Federal Claims would cause significant hardship. The Ninth Circuit's convoluted approach to adjudicating a Takings Clause defense unnecessarily duplicates proceedings, disserving litigants and judicial economy.

Bifurcating a Takings Clause defense into a second, subsequent lawsuit significantly burdens Fifth Amendment rights. The administrative agency and court involved in the initial enforcement proceedings may interpret the statute without considering Takings Clause issues, frustrating the goal of constitutional avoidance. Severing the Takings Clause issue prevents the agency and court from exercising discretion and applying their expertise. Litigants seeking to advance Takings Clause arguments in the Court of Federal Claims will incur needless time, expense, and uncertainty, and may face preclusion barriers based on factual or legal findings from the initial proceedings.

Finally, the Ninth Circuit's rule will adversely affect property rights nationwide, given the broad variety of contexts in which the government may impose cash fines or penalties on regulated parties. The burden on property rights is illustrated in this very case, given the significant constitutional concerns raised by the Raisin Marketing Order's physical appropriation of a substantial portion of each year's raisin crop.

ARGUMENT

As petitioners persuasively explain, the Court of Appeals erred in holding that a party may not raise the Takings Clause as a defense to a direct transfer of funds mandated by the federal government, but must instead pay the money and bring a duplicative second lawsuit seeking reimbursement in the Court of Federal Claims. This brief supplements that analysis by

presenting three additional arguments supporting that conclusion.

First, this Court can resolve this case by adopting the plurality's rule in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998): where the government "requires a direct transfer of funds," those "threatened with a taking [may] seek a declaration of the constitutionality of the disputed governmental action" in defending against its enforcement. *Apfel* is an exception to the rule of *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984), that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use * * * when a suit for compensation can be brought against the [federal government] subsequent to the taking," which applies to actions "burdening real or physical property," as distinct from the obligation to pay money. *Apfel*, 524 U.S. at 520–521 (plurality opinion).[2]

Second, in addition to the doctrinal and practical reasons identified in *Apfel*, the Ninth Circuit's rule should be rejected because it would substantially burden Fifth Amendment rights—not only in terms of the cost and delay of bringing a second lawsuit, but also by undermining the likelihood of success on a takings defense by requiring piecemeal and repetitive

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[2] Although *Monsanto* involved claims against the federal government, the Ninth Circuit cited *Williamson County*, which adopted a related "ripeness" rule that applies to takings claims against States. See 473 U.S. at 195 ("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").

litigation, which is disfavored throughout American law.

Finally, the Ninth Circuit's rule will burden property rights in a broad array of contexts, including (but by no means limited to) the agricultural marketing orders at issue here.

I. When The Government Directs The Payment Of Money In An Enforcement Action, A Party Can Raise The Takings Clause As A Defense

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Where government action burdens real or physical property, and where the government has made available a reasonable, certain and adequate mechanism for compensation, a party generally may not seek to enjoin the government action. See *Monsanto*, 467 U.S. at 1016; *Williamson County*, 473 U.S. at 194. This general rule, however, does not apply where a party seeks only *equitable* relief in resisting a government-directed transfer of funds. In such cases, deferring a Takings Clause defense to a separate suit for compensation "would entail an utterly pointless set of activities," because every dollar paid in the original proceeding would potentially "generate a dollar of * * * compensation." *Apfel*, 524 U.S. at 521 (plurality opinion).

A. The Plurality Opinion In *Apfel* Provides A Sufficient Rule Of Decision For This Case

In *Apfel*, this Court assessed the constitutionality of a federal statute requiring a private company, Eastern Enterprises, to contribute money to fund health care benefits for certain coal industry retirees. 524 U.S. at 514 (plurality opinion); *id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part). Eastern sought a declaratory judgment against enforcement of the provision, on grounds that it violated the Fifth Amendment. *Id.* at 517. Justice O'Connor, writing for a plurality of four Justices, concluded that the statute violated the Takings Clause and could be enjoined as applied to Eastern.

The plurality first addressed the threshold jurisdictional question of whether Eastern had properly asserted a claim for equitable relief in federal district court, rather than as one for compensation under the Tucker Act in the Court of Federal Claims. 524 U.S. at 519. The plurality acknowledged that the Court of Federal Claims has exclusive jurisdiction to render judgment on any claim against the United States "for money damages" in excess of $10,000 founded on the Constitution, and that "a claim for just compensation under the Takings Clause" must be brought in the Court of Federal Claims in the first instance, unless Congress has "withdrawn the Tucker Act" jurisdiction in the relevant statute. *Id.* at 520 (citing *Monsanto*, 467 U.S. at 1016–1019).

But, the plurality concluded, the requirement to proceed under the Tucker Act does not apply 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." 524 U.S. at 520. Moreover, where the challenged statute, "rather than burdening real or physical property, requires a direct transfer of funds mandated by the Government," "it cannot be said that monetary relief against the Government is an available remedy [under the Tucker Act]." *Id.* at 521. In the plurality's view, "Congress could not have contemplated that the Treasury would compensate [Eastern] for [its] liability under the Act, for '[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation.'" *Ibid.* (quoting *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995)); accord *Student Loan Mktg. Ass'n* v. *Riley*, 104 F.3d 397, 402 (D.C. Cir. 1997) ("[I]n cases involving straightforward mandates of cash payment to the government, courts may reasonably infer either that Tucker Act jurisdiction has been withdrawn or at least that any continued availability does not wipe out equitable jurisdiction."). Requiring a party to pay a fine or penalty and then seek "compensation" of the same amount in a second lawsuit under the Tucker Act "would entail an utterly pointless set of activities." *Apfel*, 524 U.S. at 521 (plurality opinion).

This conclusion was consistent, the plurality observed, with numerous prior decisions of this Court adjudicating the merits of claims for "equitable relief for Takings Clause violations" in related circumstances, without regard to the question of Tucker Act jurisdiction. 524 U.S. at 521–522 (citing *Babbitt* v. *Youpee*, 519 U.S. 234, 243–245 (1997), *Hodel* v. *Irving*, 481 U.S. 704, 716–718 (1987), *Concrete Pipe &*

Prods. of Cal., Inc. v. *Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 641–647 (1993), and *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 221–228 (1986)).

The *Apfel* plurality's rationale and conclusion are instructive here. Petitioners "d[o] not seek compensation from the Government," but rather raised the Takings Clause as a defense to a USDA enforcement action that would "requir[e] a direct transfer of funds mandated by the Government." 524 U.S. at 520–521 (internal quotation marks omitted); accord *Duke Power Co.* v. *Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 71 n.15 (1978) (concluding that the district court had jurisdiction where a property owner sought a "declaratory judgment that since the [challenged statute] does not provide advance assurance of adequate compensation in the event of a taking, it is unconstitutional").

As in *Apfel*, it is doubtful that the "equitable relief" petitioners seek is within the jurisdiction of the Court of Federal Claims under the Tucker Act. 524 U.S. at 520 (plurality opinion); *Bowen* v. *Massachusetts*, 487 U.S. 879, 905 (1988) ("[T]he Court of Claims has no power to grant equitable relief."); *Doe* v. *United States*, 372 F.3d 1308, 1313 (Fed. Cir. 2004). Moreover, the court of appeals' decision "'would entail an utterly pointless set of activities,'" *Apfel*, 524 U.S. at 521 (quoting *Riley*, 104 F.3d at 401)—requiring petitioners to raise all their defenses *except* the Takings Clause in the USDA enforcement proceeding (with subsequent review in federal district court), pay the resulting fines and penalties, and then seek compensation under the Takings Clause in a duplicative law-

suit in a second—and distant—forum. Here, as in *Apfel*, a suit under the Tucker Act would reduce to a claim for "compensation" for "[e]very dollar paid pursuant to [the USDA enforcement order]." *Ibid.*

That the payment obligation challenged in *Apfel* was to a private entity (a mine workers' benefits fund) rather than to the government itself only strengthens the rule's application in this case. If Congress "could not have contemplated that the Treasury would compensate coal operators * * * [because] [e]very dollar paid [to a miners' benefit fund] pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation," 524 U.S. at 521 (plurality opinion) (internal quotation marks omitted), surely it could not have intended that every dollar petitioners paid to the Treasury *itself* would generate a reciprocal dollar of "compensation" from the Treasury in return.

This Court can reverse the Ninth Circuit's judgment by adopting the *Apfel* plurality's rationale to hold that where, as here, the government seeks to direct a transfer of funds through imposition of a fine or penalty, a party may raise the Takings Clause as a defense to enforcement. The *Apfel* plurality saw no necessary inconsistency between that position and *Monsanto*'s general rule favoring recourse to a suit for compensation under the Tucker Act, where "the challenged statute * * * burden[s] real or physical property" rather than requiring "a direct transfer of funds." 524 U.S. at 521; accord *In re Chateaugay Corp.*, 53 F.3d at 493 (recourse to Court of Federal Claims is appropriate "where real or tangible property was physically invaded, regulated, or otherwise

burdened by legislative action"). The Ninth Circuit's contrary holding seeks to extend *Monsanto* beyond its proper scope.

B. The *Apfel* Plurality's Rationale Accords With The Longstanding Rule That A Party May Challenge The Imposition Of A Fine At The Time It Is Imposed

The Ninth Circuit did not attempt to address the broad historical or doctrinal foundation for the *Apfel* plurality's rationale. Several lines of authority support applying the plurality's common-sense approach in deciding the appropriate forum for raising a takings defense in the context of this case.

1. A Property Owner Subject To An Unconstitutional Taking Of Property May Challenge An Enforcement Fine When It Is Imposed

This Court has long held that a party resisting an unconstitutional taking of private property may challenge a monetary enforcement fine at the time it is imposed. In *Missouri Pacific Railway Co.* v. *Nebraska*, 217 U.S. 196 (1910), this Court struck down a Nebraska statute that purported to require railroads to construct a side track to accommodate grain elevators adjacent to the railroad's right of way. Under the statute, Missouri Pacific faced statutory "fine[s]" for declining to construct a side-track upon request by a grain elevator company. *Id.* at 204. Justice Holmes, writing for the Court, upheld the railroad's Takings Clause defense to enforcement of the law and imposition of penalties, concluding that the statute was unconstitutional "because it does not provide indemnity for what it requires" of railroads. *Id.* at 208.

In so doing, the Court specifically rejected the proposition that "the owner of the property [must] ac[t] at its risk, not merely of being compelled to pay both the expense of building [the side-track] and the costs of suit, but also of incurring a fine * * * for its offense in awaiting the result of a hearing" to determine whether the railroad had justifiably refused to comply with a particular request. 217 U.S. at 208.[3] The Court's analysis bears on the circumstances of this case, as the Ninth Circuit's rule would require petitioners to "incu[r] a fine" while "awaiting the result of a hearing" to adjudicate their Takings Clause challenge to the Raisin Marketing Order.

Missouri Pacific accords with this Court's more general concern that judicial review not be chilled by penalties imposed for noncompliance with a law whose validity is challenged. Thus, this Court has expressed discomfort that "[l]iability to a penalty for violation of [an] orde[r], before [its] validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question. He must either obey what may finally be

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[3] The Court had earlier explained one basis for a railroad to refuse to comply: in the Court's view, "circumstances must be exceptional when it would be constitutional to throw the extra charge of reduplicating already physically adequate accommodations upon the [rail]road." 217 U.S. at 207. Nor could the Nebraska statute be saved by an interpretation requiring compliance only with "reasonable" demands, because the statute made no provision for "a hearing in advance to decide whether the demand is [reasonable]." *Id.* at 207–208. The Court rejected the idea that a railroad could be subject to penalties for refusing to comply with what it perceived to be an unreasonable request. *Id.* at 208.

held to be a void order, or disobey what may ultimately be held to be a lawful order." *Wadley S. Ry. Co.* v. *Georgia*, 235 U.S. 651, 662–663 (1915). This principle finds its modern foundation in the constitutional tolling doctrine, which requires tolling of a penalty or fine where a statute of uncertain validity carries a sanction that would deter challenges. *Ex parte Young*, 209 U.S. 123 (1908); *United States* v. *Louisiana-Pacific Corp.*, 967 F.2d 1372, 1378 (9th Cir. 1992) (discussing doctrine). And this Court recently rejected an interpretation of a federal statute that would "enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." *Sackett* v. *EPA*, 132 S. Ct. 1367, 1374 (2012).

The Ninth Circuit did not acknowledge that the $700,000 in fines and penalties imposed on petitioners would likely deter both petitioners and other raisin producers from challenging the Raisin Marketing Order's validity. Small, independent raisin producers—like many small businesses nationwide in a variety of fields— frequently are of modest means, and lack the substantial financial resources it would take to pay significant fines and penalties and also to underwrite litigation in two courts. Under the circumstances, acquiescence in an unconstitutional regulation may be the only realistic option when the alternative is incurring fines and penalties in the hope of prevailing in a costly, time-consuming, and uncertain second lawsuit under the Tucker Act.

2. Treating Petitioners' Defense As "Premature" Has No Basis In This Court's Ripeness Doctrine

The Ninth Circuit's conclusion that petitioners' Takings Clause challenge to an administrative order imposing nearly $700,000 in fines and penalties was "premature" (J.A. 306) cannot be reconciled with this Court's modern ripeness doctrine. That doctrine seeks to ensure that claims are adjudicated when they are "fi[t] * * * for judicial decision," and when delaying review would cause hardship for the challenging party. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967); *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Petitioners' Takings Clause defense was plainly ripe under that standard. See, *e.g.*, Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 3 (1992) (discussing application of ripeness doctrine to property rights claims).

Petitioners' Takings Clause defense was "fi[t] * * * for judicial decision" in the district court. *Abbott Labs.*, 387 U.S. at 149. Petitioners contend that the Raisin Marketing Order's reserve requirements for 2002-2003 and 2003-2004 constituted a per se physical taking of private property in violation of the Fifth Amendment, in the context of an enforcement action seeking to impose a specific set of fines and penalties for noncompliance with that Order. That argument is not an "abstract disagreemen[t] over administrative policies" (*id.* at 148), but rather a real dispute situated in a "concrete fact situation" that will guide a court's adjudication, *Cal. Bankers Ass'n* v. *Shultz*,

416 U.S. 21, 56 (1974). The Secretary's order imposing fines and penalties on petitioners unquestionably constitutes "final agency action." *Abbott Labs.*, 387 U.S. at 149; 7 U.S.C. § 608c(14)(B) (Secretary's order assessing a penalty for violation of reserve pool requirements "shall be treated as a final order reviewable in the district courts of the United States"); accord *Sackett*, 132 S. Ct. at 1372. In short, "[n]o future uncertainty exists as to the imposition of the penalty." *Traficanti* v. *United States*, 227 F.3d 170, 176 n.2 (4th Cir. 2000).

Delaying review of the Takings Clause defense until a second lawsuit in the Court of Federal Claims would cause significant hardship for petitioners. Even in the context of *pre-enforcement* review, where a party seeks to invoke the authority of the courts before it has been subject to enforcement action, an issue is "appropriate for judicial review" where a party would face a choice between unnecessary compliance and suffering the "risk [of] serious * * * civil penalties" for actions "believe[d] in good faith" to be lawful. *Abbott Labs.*, 387 U.S. at 152–153. The USDA's order "requires [petitioners] to make significant changes in their everyday business practices," and "if they fail to observe the [Secretary's] [order] they are quite clearly exposed to the imposition of strong sanctions." *Id.* at 154; accord Erwin Chemerinsky, *Constitutional Law* 107 (3d ed. 2006) (surveying cases finding pre-enforcement claims ripe where a party "is forced to choose between forgoing possibly lawful activity and risking substantial sanctions").

Where, as here, the government has chosen to seek only cash fines and penalties, possible concerns

about "delay[ing] or imped[ing] effective enforcement" (*Abbott Labs.*, 387 U.S. at 154) by permitting challenges to go forward are greatly reduced. The Government initiated this suit to seek the specific remedy of "compensat[ion] * * * for the amount of the loss resulting from [petitioners'] failure to so deliver" raisins. 7 C.F.R. § 989.166(c). This suit is not one in which the government seeks "a mandatory injunction commanding compliance" with an order. Cf. *United States* v. *Ruzicka*, 329 U.S. 287, 289 (1946). Adjudicating petitioners' Takings Clause argument among the numerous other defenses it asserted in the enforcement action would have no material effect on the efficacy of enforcement. And to the extent petitioners' Takings Clause defense is "equitable in nature, * * * other equitable defenses may be interposed" if (unlike here) claims were raised "to delay enforcement." *Abbott Labs.*, 387 U.S. at 155 (relief may be denied if, *e.g.*, the "Government is prejudiced by a delay").

This case, therefore, does not implicate the concern identified in *Ruzicka*, where this Court held that a handler could not raise challenges to the terms of a milk marketing order as an affirmative defense in an enforcement action seeking a "mandatory injunction commanding compliance." 329 U.S. at 289. The Court's holding there was predicated on the view that handlers are "assured [the] opportunity to establish claims of grievances" through the administrative review procedure in 7 U.S.C. § 608c(15). 329 U.S. at 292. Where a Government enforcement action seeks cash fines and penalties, however, litigating affirmative defenses in the enforcement action would not be "disruptive," or threaten the " vitality of the whole

arrangement," as this Court feared in the context of a suit for a mandatory injunction in *Ruzicka*. *Id.* at 292–293. Indeed, petitioners sought to employ the administrative review procedure into which *Ruzicka* channeled claims.

3. The Ninth Circuit's Rule Undermines The General Presumption In Favor Of Resolving Claims In A Single Proceeding

Requiring a property owner subject to an enforcement action to litigate all defenses *except* the Takings Clause and then bring a separate, duplicative lawsuit runs contrary to a general presumption, pervasive in American law, in favor of resolving related claims in a single proceeding. This presumption is embodied in several distinct lines of authority.

Under the doctrine of claim preclusion, for instance, "a final judgment on the merits of an action precludes * * * relitigating issues that were or could have been raised in that action." *San Remo Hotel, L.P.* v. *City & Cnty. of S.F.*, 545 U.S. 323, 336 n.16 (2005) (quoting *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980)). The doctrine "promotes predictability in the judicial process, preserves the limited resources of the judiciary, and protects litigants from the expense and disruption" of repeated litigation. *Palka* v. *City of Chi.*, 662 F.3d 428, 437 (7th Cir. 2011); see also *ibid.* (res judicata "is meant to prevent" "claim splitting in duplicative lawsuits").

Similar principles are reflected in the related but distinct prohibition on duplicative litigation. See *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976) ("As between federal district

courts, * * * the general principle is to avoid duplicative litigation."). A court's authority to dismiss, enjoin, or consolidate a duplicative lawsuit serves judicial economy and the "comprehensive disposition of litigation." *Kerotest Mfg. Co.* v. *C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183–184 (1952); see also *Curtis* v. *Citibank, N.A.*, 226 F.3d 133 138–139 (2d Cir. 2000).

Federal courts routinely exercise supplemental jurisdiction over state-law claims to further "considerations of judicial economy, convenience and fairness to litigants." *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 726 (1966). In this manner, courts avoid "[d]uplicative and piecemeal litigation, and the resulting potential for inconsistent * * * decrees." *Fern* v. *Turman*, 736 F.2d 1367, 1370 (9th Cir. 1984). This justification extends where "discovery conducted on the federal issues might aid a gathering of facts relevant to local-law issues," such that "a single proceeding [will] enable a just disposition of the entire controversy." *Prakash* v. *Am. Univ.*, 727 F.2d 1174, 1183 (D.C. Cir. 1984).

Similar principles redound in diverse areas of American law. See, *e.g.*, Fed. R. Civ. P. 42(a) (authorizing consolidation of multiple actions that involve "common question[s] of law or fact"); *Nova Prods., Inc.* v. *Kisma Video, Inc.*, 220 F.R.D. 238, 240 (S.D.N.Y. 2004) ("The underlying principle behind impleader [under Federal Rule of Civil Procedure 14] is to promote judicial efficiency by permitting the adjudication of several claims in a single action, and thus eliminate circuitous, duplicative actions." (internal quotation marks omitted)); *Mohawk Indus., Inc.* v. *Carpenter*, 130 S. Ct. 599, 605 (2009) ("final-

judgment rule" furthers "efficient judicial administration" by avoiding "piecemeal" appeals); *Brillhart* v. *Excess Ins. Co. of Am.*, 316 U.S. 491, 495 (1942) (abstention appropriate where it is "uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit" in light of parallel suit in state court "presenting the same issues * * * between the same parties").

II. Requiring Petitioners To Pay the Fine and Pursue A Duplicative Second Lawsuit Would Substantially Burden Fifth Amendment Rights

The Ninth Circuit's jurisdictional rule would, as a practical matter, significantly burden Fifth Amendment property rights, by denying a "reasonable, certain and adequate" means of addressing a challenge to the government's conduct. Cf. *Preseault* v. *Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990) (government must provide a "reasonable, certain and adequate provision for obtaining compensation").

A. Constitutional Avoidance

The Ninth Circuit's bifurcation of cases involving Takings Clause defenses is inconsistent with fundamental principles of constitutional avoidance. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

This Court has recognized the need, in appropriate circumstances, to "adop[t] a narrowing construction of a statute to avoid a taking difficulty." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985) (discussing *United States* v. *Sec. Indus. Bank*, 459 U.S. 70 (1982), which adopted a narrowing construction because "there [was] an identifiable class of cases in which application of a [provision of the Bankruptcy Code] will necessarily constitute a taking").

Because the Ninth Circuit's rule shunts consideration of Takings Clause arguments for later proceedings in the Court of Federal Claims, the agency and court in the enforcement proceedings may interpret the statute without briefing on (or even awareness of) the potential Takings Clause concern, but in a manner that implicates the Clause. In a subsequent lawsuit, the Court of Federal Claims may be precluded from adopting a contrary or narrower interpretation that would avoid the constitutional concern. In other contexts, this Court has noted the desirability of having constitutional claims raised at the same time as statutory and regulatory claims to give relevant decisionmakers the opportunity to avoid constitutional concerns. *Aircraft & Diesel Equip. Corp.* v. *Hirsch*, 331 U.S. 752, 772 (1947); accord *Pub. Utils. Comm'n of Cal.* v. *United States*, 355 U.S. 534, 539–540 (1958).

B. Administrative Exhaustion

The Ninth Circuit's rule also turns the doctrine of exhaustion of administrative remedies on its head, leading to inefficiency and increasing the risk of error

in the adjudication of claims. Requiring a party to present its arguments in the first instance to the responsible agency ensures that the agency can "develop the necessary factual background" and can "exercise [its] discretion" and "apply [its] expertise" to the problem at hand. *McKart* v. *United States*, 395 U.S. 185, 193–194 (1969). "[J]udicial review may be hindered by the failure * * * to allow the agency" to exercise these functions. *Id.* at 194. Exhaustion also serves judicial efficiency, because a party that vindicates its rights before the agency may not need to resort to the courts. *Id.* at 195; accord *Woodford* v. *Ngo*, 548 U.S. 81, 88–89 (2006).

The Ninth Circuit's rule undermines each of these important goals. Here, USDA instituted administrative proceedings that developed an extensive factual record for decision and judicial review. J.A. 54–64. The agency acquired familiarity with the facts and applied its expertise in administering the Raisin Marketing Order. For instance, the agency interpreted and applied the terms "acquires" and "handler" from the Order in adjudicating petitioners' various claims and defenses. J.A. 74–79. Yet, the Ninth Circuit would sever the Takings Clause argument from the administrative proceeding and present it, long after the agency proceedings have concluded, in a different forum with no prior familiarity with the case, the facts, or the regulatory scheme.

C. Time and Expense Of Vindicating Rights

The Ninth Circuit's convoluted procedure also imposes significant expense, difficulty, and delay on property owners' attempts to vindicate Fifth Amend-

ment rights. As other *amici* have explained, advancing a takings claim in the Court of Federal Claims can require years of litigation and substantial attorneys' fees. See Br. for the Cato Institute et al. as *Amici Curiae* in Support of the Petition for Certiorari 19–20. Small businesses and other property owners may face practical and logistical difficulties—and even bankruptcy—where, as here, they must bear the costs of duplicative litigation, in addition to substantial fines and penalties, in the uncertain hope of eventual compensation from the Court of Federal Claims. *Id.* at 21–22; *Sackett*, 132 S. Ct. at 1374. Especially for small businesses, the prospect of shouldering double legal fees plus "heavy penalties for violation of commands of [even] disputable and uncertain legality" may "inevitably" lead them to "yield to [unconstitutional] orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid." *Wadley S. Ry. Co.*, 235 U.S. at 662–663.

For these and other reasons, this Court has rejected a reading of its Takings Clause cases that would "requir[e] property owners to 'resort to piecemeal litigation or otherwise unfair procedures.'" *San Remo*, 545 U.S. at 346 (quoting *MacDonald, Sommer & Frates* v. *Yolo Cnty.*, 477 U.S. 340, 350 n.7 (1986)). This case presents no basis to depart from that well-settled principle, as the Ninth Circuit's rule would make it harder and less likely for small businesses and other property owners to vindicate their constitutional rights.

D. Preclusion

Requiring petitioners to litigate all their *other* defenses in the underlying enforcement case (which may overlap factually and legally with their Takings Clause defense) and then seek reimbursement in a second lawsuit in the Court of Federal Claims may also create preclusion barriers to the success of a takings argument.

Here, for instance, petitioners resisted the imposition of penalties by citing a 2001 advisory letter from the USDA stating that they would not be considered "handlers" subject to the Order under certain factual circumstances. J.A. 140. The district court analyzed the letter and made factual findings about whether petitioners could have reasonably relied on the letter to understand that they were not subject to the Raisin Marketing Order. See J.A. 142 (surveying "evidence [that] supports" the conclusion that petitioners performed activities that would subject them to regulation as a "handler"). USDA and the district court found that the Farmer-to-Consumer Act did not support an understanding that petitioners were exempt from regulation as "handlers" under the Order. And the Ninth Circuit and district court made findings about whether petitioners made deliberate efforts to "avoid the Raisin Marketing Order's requirements" (J.A. 298) and their "culpability" in not setting aside raisins (J.A. 168).

In a subsequent Tucker Act lawsuit, the government could invoke these factual findings to argue, for instance, that the Raisin Marketing Order did not interfere with any reasonable "investment-backed expectations" for property rights in raisins because pe-

titioners lacked a basis to believe they were not "handlers." Cf. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

Concerns about preclusion in the Court of Federal Claims are hardly hypothetical. In *Paradissiotis* v. *United States*, 49 Fed. Cl. 16 (2001), aff'd, 304 F.3d 1271 (Fed. Cir. 2002), the plaintiff challenged, in federal district court, an order freezing his personal assets. The district court concluded he could not state a viable cause of action for a taking, but the Fifth Circuit vacated that judgment, concluding that the Court of Federal Claims had exclusive jurisdiction over the takings claim. The Court of Federal Claims acknowledged that "the [vacated] portions" of the district court's decision were not preclusive, but cautioned that "the District Court and the Fifth Circuit made findings on factual issues that were necessary to the disposition of the other claims, and some of these findings of fact are pertinent to the analysis of the takings issue in this case." *Id.* at 19 n.2. The Court of Federal Claims "w[ould] not revisit such findings," and so in litigating his takings claim, the plaintiff would be limited to "other [pertinent] facts not involved in the previous proceedings"—if any. *Ibid.*

Similarly, in *Klump* v. *United States*, 38 Fed. Cl. 243 (1997), a cattle owner alleged that the impoundment of his cattle for unauthorized grazing on federal lands was an unconstitutional taking. He initially sought administrative relief at the Department of the Interior. The Court of Federal Claims later held that the plaintiff was bound by administrative determinations of facts—such as whether the government's ac-

tions were taken pursuant to and consistent with applicable regulations. *Id.* at 247.

San Remo does not render preclusion principles irrelevant here. There, this Court held that federal courts may not craft a judicial exception to the Full Faith and Credit Statute, 28 U.S.C. § 1738, to allow a federal court to adjudicate a takings claim when a party has been forced to pursue compensation in state court. 545 U.S. at 326. The Court's holding was based in part on the lack of a textual basis for an exception to Section 1738. *Id.* at 344–345. The Court also observed that the property owners had voluntarily presented their federal takings claim in state court, instead of carefully "reserv[ing] [the] right" to adjudicate it in federal court. *Id.* at 339–341. Nothing in that analysis controls whether the Court should endorse the Ninth Circuit's duplicative and wasteful two-part procedure. Petitioners do not seek two bites at the apple of their takings defense, but rather seek to assert it in the most relevant and appropriate forum: the USDA enforcement action followed by review in district court. And the Ninth Circuit's rule runs afoul of this Court's specific admonition in *San Remo* against "interpret[ing] [its] cases as requiring property owners to 'resort to piecemeal litigation or otherwise unfair procedures.'" *Id.* at 346 (quoting *Yolo Cnty.*, 477 U.S. at 350 n.7).

III. The Ninth Circuit's Rule Would Adversely Affect Property Rights In A Wide Range of Circumstances

A. Property Owners Face Government-Directed "Transfer[s] of Funds" In A Variety of Contexts

Although this case arises in the specific statutory context of the AMAA and the Raisin Marketing Order, the Ninth Circuit's jurisdictional rule could have broad consequences for parties seeking to challenge unconstitutional monetary fines and penalties, given the "nearly infinite variety of ways in which government actions or regulations can affect property interests." *Ark. Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012). The federal government has sought to "requir[e] a direct transfer of funds," *Apfel*, 524 U.S. at 521 (plurality opinion), in a range of circumstances that affect business interests in various sectors of the economy. Takings arguments are frequently interposed in such circumstances; the mandatory bifurcation of the cases only serves to multiply proceedings and delay the ultimate resolution of disputes.

To take just a few examples, the Black Lung Benefits Act, 30 U.S.C. §§ 901–944, requires coal operators to pay money to reimburse the federal government for certain health care costs of mine workers and eligible survivors. Although in 1977 Congress amended the act to provide for automatic benefits for a miner's eligible survivor (i.e., without the need to prove that the miner's death was caused by black lung disease), Congress tightened eligibility require-

ments in 1981, effectively eliminating automatic survivors' benefits. See *W. Va. CWP Fund* v. *Stacy*, 671 F.3d 378, 381 (4th Cir. 2011).

However, in 2010, Congress retroactively revived automatic survivors' benefits by removing the limiting language added to the statute in 1981. See *W. Va. CWP Fund*, 671 F.3d at 381–382. As a result, the survivor of a deceased miner who was denied benefits under the (post-1981) tightened standards for failing to prove that pneumoconiosis caused the miner's death might later be deemed entitled to full benefits retroactively. See *id.* at 382. Under the Ninth Circuit's rule, a coal operator facing direct financial liability to the Government for these retroactive benefits would be forced to litigate any other defenses to the order in the initial proceedings, perhaps including a due process challenge closely related to a takings argument. See *Apfel*, 524 U.S. at 550 (Kennedy, J., concurring in the judgment and dissenting in part). The coal operator would then be required to pay the government the amounts in question, and file a second lawsuit in the Court of Federal Claims for reimbursement of those funds. Other federal courts have not adopted that burdensome approach. See *W. Va. CWP Fund*, 671 F.3d at 386–388 (reaching merits of coal operator's Takings Clause claim arising in petition for review of decision of Department of Labor Benefits Review Board).

The Fair and Equitable Tobacco Reform Act of 2004, 7 U.S.C. § 518 *et seq.* ("FETRA"), imposes annual monetary assessments on tobacco manufacturers and importers to finance a buyback program to support tobacco growers upon termination of govern-

ment quotas and price supports. See 7 U.S.C. § 518d; 7 C.F.R. §§ 1463.3, 1463.4. Assessments are calculated based on the manufacturer or importer's share of the gross domestic volume of tobacco products sold. 7 U.S.C. § 518d(e)(1), (2). The law's effect on tobacco manufacturers can be significant: one manufacturer who purchased less than 1% of its tobacco in the United States between 1999-2004 faced annual assessments of $11 million a year, and more than $100 million over a ten-year period. See *Swisher Int'l, Inc.* v. *Schafer*, 550 F.3d 1046, 1049–1050 (11th Cir. 2008).

Under the Ninth Circuit's holding, a tobacco manufacturer seeking to challenge the annual assessments as an unconstitutional taking must litigate all its other defenses in available administrative and judicial proceedings—and must pay any penalties associated with noncompliance—before filing a second lawsuit in the Court of Federal Claims seeking "reimbursement" for the same. The absence of cases adopting this approach suggests the unreasonableness of the rule. See, *e.g.*, *Swisher*, 550 F.3d at 1050–1057 (reaching merits of takings claim brought in federal district court to review FETRA assessments); accord *United States* v. *Native Wholesale Supply Co.*, 822 F. Supp. 2d 326 (W.D.N.Y. 2011) (similar).

A takings defense involving a "direct transfer of funds" (*Apfel*, 542 U.S. at 521) may also arise from the imposition of a penalty. In *Traficanti* v. *United States*, 227 F.3d 170 (4th Cir. 2000), the owner of a convenience store was penalized when an employee was found to have engaged in improper food stamp

transactions. The Agriculture Department issued a permanent bar from the food stamp program, and a $40,000 penalty payable if the owner ever attempted to sell his business. *Id.* at 173–174. The owner challenged the penalty as an unconstitutional taking. Although the district court treated the takings argument as unripe, the court of appeals addressed it on the merits, without suggesting that the owner was required to pay the penalty and then seek compensation. (Indeed, evidence showed that path was unavailable as a practical matter, because the owner's every "attempt[t] to sell his store * * * collapsed due to the looming transfer penalty," *id.* at 176 n.2.)

Similarly, in *Russo Development Corp.* v. *Thomas*, 735 F. Supp. 631 (D.N.J. 1989), a property developer sought declaratory and injunctive relief after EPA vetoed an after-the-fact Clean Water Act wetlands development permit authorized by the Corps of Engineers. The developer raised a takings claim, which the Government sought to dismiss on grounds of Tucker Act jurisdiction. The court rejected the Government's view, observing that the most likely relief "would be simply a lowering of the penalties and mitigation requirements for a permit rather than the payment of money damages." *Id.* at 636.

Finally, in *United States* v. *American Electric Power Service Corp.*, 218 F. Supp. 2d 931 (S.D. Ohio 2002), the government brought an enforcement action alleging that owners and operators of various electric power plants had violated the Clean Air Act. The defendants claimed that application of the provisions in question to their plants would violate the Takings Clause. They invoked *Apfel*, arguing that it would be

senseless to require them to pay penalties in the enforcement action and then seek compensation under the Tucker Act. The district court struck the Takings Clause defense, holding that the Tucker Act was available to provide compensation, including for any penalties that the defendants might be required to pay in the enforcement action.

B. The Raisin Marketing Order Raises Significant Constitutional Concerns

Petitioners assert that the Raisin Marketing Order constitutes a per se, physical taking of their personal property in violation of the Fifth Amendment. Although this Court need not reach the merits of that argument in resolving the questions presented, even a brief discussion illustrates that the Ninth Circuit's Rube Goldberg–esque procedural rule would apply to hinder the vindication of substantial constitutional claims.

In *Loretto*, this Court long ago established that "a permanent physical occupation [of property] authorized by government" is a per se taking "without regard to the public interests that it may serve." 458 U.S. at 426. Thus, "'[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.'" *Ark. Game & Fish Comm'n*, 133 S. Ct. at 518 (quoting *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)). Petitioners contend that by requiring physical segregation of a portion of their raisin crop each year "for the account" of a government agent—on pain of fines calculated as the cash equivalent of

the raisins themselves—the Order effects a "permanent physical occupation" of their property.

Petitioners have a property interest in the raisins they grow and produce—"the rights 'to possess, use and dispose of [the raisins]'"—that is protected by the Takings Clause. *Loretto*, 458 U.S. at 435 (quoting *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)); *Evans* v. *United States*, 74 Fed. Cl. 554, 563 (2006) ("under California law, plaintiffs unquestionably had title to their raisins grown in their fields"). And no less than in *Loretto*, a permanent physical occupation of this personal property by the government or its agent "effectively destroys each of [the above] rights." 458 U.S. at 432–433 n.9, 435.

Although this Court has not had occasion to address *Loretto*'s application to the agricultural marketing orders at issue here, there is substantial authority for the proposition that the per se rule is not limited to physical occupation of real property. See *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (applying per se analysis to a takings claim concerning interest earned on lawyers' trust accounts); *Connolly*, 475 U.S. at 225 (questioning whether government could "physically invade or permanently appropriate [a private party's] assets for its own use"); *Nixon* v. *United States*, 978 F.2d 1269, 1285 (D.C. Cir. 1992) ("the Government's inference that the per se doctrine must be limited to real property is without basis in the law").

As in *Loretto*, the Raisin Marketing Order deprives petitioners of each of the sticks in its bundle of rights—i.e., to possess, use, and dispose of the reserved raisins—by directing handlers to segregate

the raisins physically and hold them "for the account" of the RAC. Under the Order, handlers must dispose of the reserve raisins as directed by the RAC. See *Evans*, 74 Fed. Cl. at 558 ("the raisin marketing order grants to * * * the RAC[] the power to sell or dispose of all of the reserves" and "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government") (citing 7 C.F.R. §§ 989.67(a), 989.54, 989.65, 989.66(b)(2)); *Yee* v. *City of Escondido*, 503 U.S. 519, 522 (1992) (per se taking occurs "[w]here the government authorizes a physical occupation of property (or actually takes title)").

That petitioners in fact "kept the raisins at issue" by declining to comply with the Order does not preclude a "physical occupation" defense. Cf. J.A. 243–244. USDA imposed a "compensat[ory]" fine on petitioners expressly calculated as the monetary equivalent of the reserve raisins, depriving petitioners of their property no less effectively than physical occupation. See 7 C.F.R. § 989.166(c). As this Court recently explained in surveying historical cases relevant to the per se doctrine, "takings claims * * * [are] not confined to instances in which the Government took outright physical possession of the property involved." *Ark. Game & Fish Comm'n*, 133 S. Ct. at 519. More generally, of course, the Government may not burden a constitutional right by imposing a penalty on its exercise. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (imposition of $5 fine for failure to comply with a compulsory education law violates the First Amendment). There is "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." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994).

The reserve-pool requirement cannot be dismissed as "an in-kind tax or service fee on the sale of raisins by producers." Br. in Opp. 19 n.6; *Evans*, 74 Fed. Cl. at 563–564 ("In essence, Plaintiffs are paying an admissions fee or a toll—admittedly a steep one—for marketing raisins. The government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that if they grow and market raisins, then passing title to their 'reserve tonnage' raisins to the RAC is their admission ticket."). This dangerous theory has no basis in this Court's precedents, and would render all but meaningless the Fifth Amendment's core property rights guarantee. In *Loretto*, this Court cautioned specifically that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. A "fee or toll" theory essentially conditions petitioners' right to dispose of personal property upon forfeiting compensation for a physical appropriation of a portion of that property.[4] The Government's "toll or fee" theory admits of

[4] Nor can Petitioners retain their property rights by disposing of the raisins in the intrastate market. Compare *Wallace* v. *Hudson-Duncan & Co.*, 98 F.2d 985, 989 (9th Cir. 1938) (rejecting takings challenge to walnut marketing order because grower could "choos[e] not to comply with the interstate requirements of the Order, [and] nevertheless retain all its walnuts intrastate and dispose of them to intrastate buyers"), with *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942), and *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005) ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic

no principled limitation, and could be used to justify nearly any confiscatory regulation, from a requirement that owners of farmland pay an "in-kind" tax by turning over 50% of their acreage or other property rights,[5] to an "in-kind" tax on owners of beachfront property requiring them to surrender the first 10 yards of property above the mean high-tide line,[6] to one that takes physical possession of half the cars an auto manufacturer produces under the rubric of a 50 percent "in-kind fee" on automobile sales.

CONCLUSION

The Court should reverse the judgment below and remand for further proceedings.

'class of activities' that have a substantial effect on interstate commerce.").

[5] Cf. *United States* v. *Causby*, 328 U.S. 256 (1946) (government's use of chicken farmer's airspace for overflight is a taking).

[6] Cf. *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2598 (2010) (discussing property rights in beach located above high-water line).

Respectfully submitted.

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