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 OF *AMICI CURIAE* CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the following constitutional law professors and legal scholars:[1]

- Samuel L. Bray, Assistant Professor of Law, UCLA School of Law;
- Erin Morrow Hawley, Associate Professor of Law, University of Missouri School of Law;
- Joshua D. Hawley, Associate Professor of Law, University of Missouri School of Law;
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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk.

Amici are concerned about this Court's holding in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), that, as a matter of constitutional ripeness, federal courts are without jurisdiction to hear Fifth Amendment takings claims unless and until property owners exhaust all potential avenues for obtaining compensation. This "ripeness" rule has introduced acute confusion in the lower federal and state courts and prevented scores of litigants from raising perfectly valid Fifth Amendment claims in federal court. It is *amici*'s position that the constitutional ripeness requirement announced in *Williamson County* is mistaken and should be abandoned.

SUMMARY OF ARGUMENT

The court of appeals wrongly concluded that it lacked jurisdiction to consider the Hornes' Takings Clause defense to the government's enforcement action.

I. There is no constitutional barrier to jurisdiction. The Hornes' Takings Clause defense is fully ripe under Article III, despite the fact they have not litigated a separate claim for just compensation. The Constitution compels no such litigation as a prerequisite to raising a Takings Clause defense. The litigation "ripeness" requirement fashioned by this Court in *Williamson County Regional Planning*

Commission v. *Hamilton Bank*, 473 U.S. 172 (1985), is mistaken.

Williamson County confused the availability of particular *remedies* with the question of constitutional *ripeness*. Black-letter remedies doctrine holds that a litigant may not win equitable relief where there is a "reasonable, certain, and adequate" remedy at law. *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U.S. 641, 659 (1890). Traditionally, this Court interpreted an "adequate" remedy at law in the Takings Clause context to be a government-provided mechanism for obtaining just compensation. In takings cases, the Court inquired as to whether this legal remedy was available, and if it was, the Court denied the property owner equitable relief.

None of this had anything to do with constitutional ripeness. Not until *Williamson County* did the Court hold that property owners must exhaust what it had previously characterized as a remedy at law—a government-provided mechanism for obtaining compensation—before a takings claim could even be heard in federal court. Tellingly, none of the cases on which *Williamson County* relied embraced this litigation requirement, because none were about ripeness. On the contrary, all the takings cases *Williamson County* cited were about remedies.

Williamson County's invented doctrine of constitutional ripeness has caused considerable confusion. See, *e.g.*, *San Remo Hotel, L.P.* v. *City & Cnty. of S.F.*, 545 U.S. 323, 351, 352 (2005) (Rehnquist, C.J., concurring) (the *Williamson County* litigation requirement's "justifications" are "suspect, while its impact on takings plaintiffs is dramatic"). It has been widely criticized. The Court should abandon it now.

II. Nor does the Tucker Act deprive the district court of jurisdiction to hear the Hornes' Takings Clause defense. The Tucker Act covers only suits for money damages against the United States—not constitutional defenses raised in enforcement proceedings. See 28 U.S.C. §1491(a)(1). But the Tucker Act does not provide the sort of "reasonable, certain, and adequate" remedy at law that eliminates the need for equitable relief. *Cherokee Nation*, 135 U.S., at 659. The usual rules of statutory interpretation indicate that the Tucker Act does not make money damages available when the statute authorizing a property invasion demonstrates no intent to provide payment for taken property. In these cases, "the presumption of Tucker Act availability is reversed." *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998) (quotation marks and citations omitted) (plurality opinion). And, in any event, the Hornes need not show that a damages remedy is unavailable, because they are entitled to defend against a government penalty by

showing that the penalty is predicated on an unconstitutional property invasion.

ARGUMENT

I. PETITIONERS' TAKINGS CLAUSE DEFENSE IS RIPE UNDER ARTICLE III, AND *WILLIAMSON COUNTY*'S LITIGATION "RIPENESS" REQUIREMENT IS MISTAKEN.

The court of appeals erred in holding that the Hornes' Takings Clause defense is "premature" or not ripe. JA 304, 306. Article III ripeness bars adjudication of premature claims—that is, claims for injuries that have not yet come to pass and are purely speculative. See 13B C. Wright et al., Federal Practice & Procedure §3532 (3d ed. 2008). But a property invasion that has already occurred is hardly speculative. That is why this Court has said that liability under the Takings Clause arises at the time the government interferes with property rights, not at some later date when a court rules that property was taken. *First English Evangelical Lutheran Church* v. *Los Angeles Cnty.*, 482 U.S. 304, 319 (1987). More specifically, the Hornes' injury here—the imposition of a monetary fine—"is in no way hypothetical or speculative." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974).

1. The court of appeals' mistaken view, that the Hornes' takings defense is "premature" until they raise the claim in a Tucker Act lawsuit in the Court of Federal Claims, rests on the ripeness test fashioned in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985). In *Williamson County*, a land developer filed a 42 U.S.C. §1983 suit in federal district court, alleging a taking after a regional planning commission rejected the developer's preliminary plat proposal. *Id.*, at 190. The developer had not requested variances from the commission, had not appealed the commission's denial of the preliminary plat to the zoning board of appeals, and had not brought a state-law inverse condemnation suit. *Id.*, at 188.

Williamson County held that the developer's takings claim was not ripe for two reasons. First, the commission had denied only the *preliminary* plat. *Id.*, at 193-194. The developer never sought variances from the commission, so the commission's denial was "not a final, reviewable decision." *Id.*, at 194; see *id.*, at 186 (a takings claim is "not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue").

The Court might have stopped there. Instead, it gave "[a] second reason the taking claim is not yet ripe": namely, that the developer "did not seek compensation through the procedures the State has provided for doing so," including litigation. *Id.*, at 194; see *id.*, at 194-197. In the present case, it is this second interpretation of constitutional "ripeness" that was the basis of the court of appeals' erroneous conclusion that it lacked jurisdiction. This litigation ripeness requirement also has confounded numerous other federal and state courts and has badly confused the law of takings. Simply put, *Williamson County*'s second "ripeness" requirement is a mistake.

Williamson County's constitutional ripeness rule confuses the question of *ripeness* with the question of *remedies*. That is, *Williamson County* took a requirement for when equitable relief is generally available—there must be no adequate remedy at law—and converted it into a constitutional ripeness holding. Properly understood, the availability of an adequate remedy at law is a remedial question, not a jurisdictional one.

For more than a century before *Williamson County*, this Court said that when the government takes property without providing a "reasonable, certain, and adequate provision for obtaining compensation," property owners could obtain equitable relief in federal court

preventing the government from invading property. *Cherokee Nation*, 135 U.S., at 659. In practice, this meant injunctive relief was often granted when the statute or government regulation provided an insufficient mechanism for obtaining payment in the case of a Fifth Amendment violation. See *id.*, at 658-659. This was an application of black-letter remedies law. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 380-381 (1992) ("It is a basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." (quotation marks omitted)).

The Court therefore enjoined takings where the statute or government activity made inadequate provision for payment. See, *e.g.*, *Morrisdale Coal Co.* v. *United States*, 259 U.S. 188, 190 (1922) ("If the law requires a party to give up property to a third person without adequate compensation the remedy is, if necessary, to refuse to obey it, not to sue the lawmaker."); *Mo. Pac. Ry. Co.* v. *Nebraska*, 217 U.S. 196, 205 (1910) ("no provision in the statute for compensation" meant government action was subject to equitable relief); *Western Union Tel. Co.* v. *Penn. R.R. Co.*, 195 U.S. 540, 574-575 (1904) (statute not valid exercise of takings power because remedies in statute not adequate); *D.M. Osborne & Co.* v. *Mo. Pac. R.R. Co.*, 147 U.S. 248, 258-259 (1893) (injunctive

relief available in view of inadequacy of legal remedy); *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 without compensation); *Yates* v. *Milwaukee*, 77 U.S. 497, 506-507 (1870) (enjoining municipal action to remove dock and wharf upon mere legislative declaration that facilities constituted nuisance and without compensation). See generally R. Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in *Pennsylvania Coal Co.* v. *Mahon*, 106 Yale L.J. 613, 686-689 (1997).

The Court, meanwhile, denied injunctive relief where the government took property while providing an adequate mechanism to compensate the property owner. See, *e.g.*, *Dohany* v. *Rogers*, 281 U.S. 362, 365 (1930) (statute that provided for compensation constituted valid exercise of takings power not subject to injunction); *Joslin Mfg. Co.* v. *City of Providence*, 262 U.S. 668, 689 (1923) (upholding statute providing for takings subject to compensation award); *Bragg* v. *Weaver*, 251 U.S. 57, 62 (1919) (upholding statute providing for taking of earth for road construction, with compensation determined in post-taking procedure before commissions).

In sum, the availability of equitable relief turned on the availability of an adequate remedy at law. *Williamson County* obscured this long-standing remedial distinction by holding that property owners could not bring a Fifth Amendment takings claim in federal court at all unless and until the owner had availed himself of any procedures the government may have offered for obtaining compensation. 473 U.S., at 195. But none of this Court's prior jurisprudence suggested that the availability of a damages lawsuit to obtain compensation required property owners to use it *before* their takings claim could become ripe under Article III. The presence or absence of a compensation mechanism determined, instead, what sort of remedy was available should the government action be found to violate the Fifth Amendment.

Williamson County's newly invented Article III ripeness requirement not only misread the Court's cases, it also confused the law of remedies. The *Williamson County* litigation requirement suggests equitable relief may never be available as a remedy for a takings claim, at least not until the property owner has first sought money damages in the appropriate forum. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984); but see *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 520-521 (1998) (plurality opinion). None of this Court's prior cases required this result.

2. Indeed, the takings cases on which *Williamson County* explicitly relied were all about remedies, not ripeness.

In support of its constitutional ripeness holding, the *Williamson County* Court first cited the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), for the proposition that there is no takings violation when an adequate post-deprivation procedure for seeking compensation exists. *Williamson Cnty.*, 473 U.S., at 194. But the Court there simply reversed a decision enjoining enforcement of a statute, because the availability of a Tucker Act suit provided an adequate remedy at law for any takings that might occur. *Regional Rail Reorganization Act Cases*, 419 U.S., at 119, 149. It did not state that the availability of a Tucker Act suit *prevents* a Taking Clause violation from occurring or ripening, but simply that it provides a "*remedy* at law" for a violation that has already occurred. *Id.*, at 149 (emphasis added).

Ruckelshaus v. *Monsanto*, 467 U.S., at 1016-1020, another case cited by *Williamson County*, is also about remedies. *Monsanto* concerned the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which provides an administrative arbitration mechanism for one party to obtain compensation from another after the second party relies on data that the first disclosed to the EPA. *Id.*, at 994-995. *Monsanto* read this

FIFRA arbitration provision "as implementing an exhaustion requirement as a precondition to a Tucker Act claim" for takings. *Id.*, at 1018. Thus, regardless of the outcome of that arbitration, a takings claim for just compensation could still be pursued under the Tucker Act. *Id.*, at 1017-1019. Injunctive relief was therefore improper in that case given that "an adequate remedy for the taking exists under the Tucker Act." *Id.*, at 1019.

After addressing that takings remedial issue and concluding that FIFRA implemented an administrative exhaustion requirement, *Monsanto* reached the unremarkable conclusion that the data owner's "due process" and "delegation" challenges, *id.*, at 999, to the FIFRA arbitration procedure were not ripe. *Id.*, at 1019-1020. *Monsanto* found these non-takings challenges to the FIFRA procedure premature because "no arbitration ha[d] yet occurred with respect to any use of Monsanto's data," and "Monsanto did not allege or establish that it had been injured by actual arbitration under the statute." *Id.*, at 1013, 1019.

Williamson County mistakenly attributed *Monsanto*'s ripeness holding to Monsanto's takings claim—rather than its due process and delegation claims. See *Williamson Cnty.*, 473 U.S., at 195 (stating that *Monsanto*'s ripeness holding applied to takings claim). But *Monsanto* held only that the *due process and delegation*

"challenges to the constitutionality of the arbitration and compensation scheme [were] not ripe," because the FIFRA arbitration or subsequent Tucker Act remedies could make Monsanto whole such that Monsanto lacked any injury from the FIFRA arbitration procedure. *Monsanto*, 467 U.S., at 1019.

The *Williamson County* Court also cited *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940), and *Hurley* v. *Kinkaid*, 285 U.S. 95, 104 (1932). Neither had anything to do with ripeness. *Yearsley* held that a property owner complaining of a taking performed by government contractors acting within the scope of their duties should sue the government for damages rather than the contractors, because the acts of the agents are the acts of the government. 309 U.S., at 22. As for *Hurley*, that case merely held that a party cannot enjoin an acknowledged taking when Congress has provided an adequate procedure for obtaining just compensation. 285 U.S., at 104.

Lastly, *Williamson County* supported its view of the Takings Clause by analogy to the due process case *Parratt* v. *Taylor*, 451 U.S. 527 (1981), *overruled in part by Daniels* v. *Williams*, 474 U.S. 327 (1986). *Parratt* held that although a prisoner's complaint that prison officials lost a hobby kit did constitute a deprivation of property under color of state law, the claim was not actionable under 42 U.S.C. §1983 as a

procedural due process violation because the state provided a postdeprivation remedy. 451 U.S., at 543-544. Reasoning by analogy, *Williamson County* applied *Parratt*'s due process holding to the takings context by stating that a "State's action is not 'complete' in the sense of causing constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" 473 U.S., at 195 (quoting *Hudson* v. *Palmer*, 468 U.S. 517, 532, n.12 (1984)).

This analogy is flawed. Liability under the Takings Clause arises at the time the government interferes with property rights, not at some later date when a court rules that property was taken. *First English*, 482 U.S., at 319. Furthermore, *Parratt*'s holding was predicated on a "random and unauthorized act by a state employee." *Parratt*, 451 U.S., at 541. Because predeprivation hearings were "impossible or impracticable," *Parratt* required the prisoner to resort to postdeprivation remedial process. *Williamson Cnty.*, 473 U.S., at 195. Even *Williamson County* acknowledged that *Parratt* was an "imperfect" analogy because it does not extend to situations "in which the deprivation of property is effected pursuant to an established state policy or procedure, and the State could provide predeprivation process." *Id.*, at 195, n.14. But takings nearly always occur because of an established policy or procedure.

The predicate for *Parratt*'s decision is absent here.

Neither *Parratt* nor any of the Takings Clause cases cited by this Court in *Williamson County* justify its characterization of the Clause as requiring compensation only at the conclusion of a post-taking claims process. See *San Remo Hotel*, 545 U.S., at 349 (Rehnquist, C.J., concurring) (noting that while "*Williamson County* purported to interpret the Fifth Amendment," its interpretation is "not obvious"); see also *Wilkie* v. *Robbins*, 551 U.S. 537, 583 (2007) (GINSBURG, J., dissenting) (concluding that a property owner validly refused to cede an easement to the government where "no compensation [was] in the offing," as the Takings Clause "confers on him the right to insist upon compensation as a condition of the taking of his property").

3. This Court's decision in *Williamson County* mistook the remedies analysis outlined above for a question of Article III ripeness. See 473 U.S., at 194-197. This error has caused much, and unnecessary, confusion in the lower courts. See *San Remo Hotel*, 545 U.S., at 351 (Rehnquist, C.J., concurring) (stating that the litigation requirement "created some real anomalies, justifying our revisiting the issue"), *quoted in Stop the Beach Renourishment, Inc.* v. *Fla. Dept. of Envtl. Prot.*, 130 S.Ct. 2592, 2618 (2010) (KENNEDY, J., concurring in part and

concurring in the judgment). The Court itself has not always followed it. See *Stop the Beach*, 130 S.Ct., at 2610 (unanimously ruling that the litigation requirement is not "jurisdictional"); *Apfel*, 524 U.S., at 520-521 (plurality opinion) (litigation requirement does not apply when "claim for compensation would entail an utterly pointless set of activities" (quotation marks and citations omitted)); *City of Chi.* v. *Int'l Coll. of Surgeons*, 522 U.S. 156, 166 (1997) (permitting defendants to remove regulatory takings claims to federal court before state litigation over just compensation was complete); *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997) (*Williamson County*'s litigation ripeness requirement is merely a "prudential hurdle[]").

The Court should correct this error now. The availability (or not) of injunctive relief for a takings claim does not depend on first filing a suit in another court. It depends instead on whether the government makes available "reasonable, certain, and adequate provision for obtaining compensation." *Cherokee Nation*, 135 U.S., at 641. The Hornes' Takings Clause defense is ripe.

II. THE DISTRICT COURT HAD JURISDICTION TO HEAR PETITIONERS' TAKINGS CLAUSE DEFENSE.

The Tucker Act does not deprive the district court of jurisdiction over the Hornes' Takings Clause defense. To begin with, the Tucker Act

has nothing to say about constitutional *defenses* seeking to quash penalties; it provides a forum to adjudicate suits for money damages against the United States. See 28 U.S.C. §1491(a)(1). Moreover, the Tucker Act does not provide the sort of "reasonable, certain, and adequate" remedy at law that obviates the need for equitable relief. *Cherokee Nation*, 135 U.S., at 659. The Tucker Act cannot be faithfully interpreted to make money damages available for every government action; when a statute demonstrates no intent to provide payment for taken property, the Tucker Act does not apply. See *Apfel*, 524 U.S., at 521 (plurality opinion). And, in any event, the Hornes need not show that a damages remedy is unavailable. The Hornes' defense succeeds if the marketing order is unconstitutional, and the existence of a damages remedy for an unconstitutional taking does not change the fact that the government had no authority to take raisins without just compensation in the first place.

1. The plain text of the Tucker Act makes clear that the Hornes' Takings Clause defense does not trigger the exclusive jurisdiction of the Court of Federal Claims. The Act gives that court jurisdiction over any "claim against the United States for money damages exceeding $10,000." *Apfel*, 524 U.S., at 520 (plurality opinion) (citing 28 U.S.C. §1491(a)(1)). But the Hornes' constitutional attack on the USDA raisin reserve program is not a claim for money

damages. It is a defense to the government's own enforcement action. The district court—not the Court of Federal Claims—had jurisdiction to review the USDA's enforcement order, 7 U.S.C. §608c(14)(B), and thus jurisdiction to consider any defenses to it.

In ruling to the contrary, the court of appeals misunderstood the nature of the Hornes' Takings Clause defense. The Hornes argue that the government lacks authority to impose the monetary penalty because it lacks authority to compel them to turn over their raisins under the Takings Clause, at least without appropriate compensation. The Hornes thus invoke the Takings Clause as a *limit* on government action, in the same way that defendants may raise Commerce Clause, First Amendment, or Due Process Clause challenges to dismiss civil or criminal proceedings. See, *e.g.*, *United States* v. *Comstock*, 130 S.Ct. 1949 (2010) (Commerce Clause challenge to civil commitment action); *United States* v. *Stevens*, 130 S.Ct. 1577 (2010) (First Amendment challenge to crush-video prosecution); *United States* v. *Lopez*, 514 U.S. 549 (1995) (Commerce Clause challenge to gun-possession prosecution); *Lambert* v. *California*, 355 U.S. 225 (1957) (Due Process Clause challenge to felon-registration prosecution).

Contrary to the court of appeals' perception, the Hornes are not conceding that the raisin

reserve program is valid and challenging only the USDA's authority to impose monetary liability for failing to turn over raisins. If the reserve program is lawful, the agency of course may impose a penalty for noncompliance. The Hornes' defense is that the Takings Clause denies the government authority to implement the raisin reserve program at all, precisely because it provides no mechanism for paying just compensation at the time the government takes raisins. This is not a claim for money damages, so it does not come within the jurisdiction of the Court of Federal Claims.

2. Moreover, the Tucker Act is not an "adequate" remedy in this case, *Cherokee Nation*, 135 U.S., at 659—or in any case where a congressional statute makes no provision for and reflects no intent to provide just compensation for a property invasion.

By its terms, the Tucker Act applies to claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, . . . *in cases not sounding in tort*." 28 U.S.C. §1491(a)(1) (emphasis added). For seventy years, this Court interpreted that language to make the Act applicable only where the government acknowledged it was using its power of eminent domain, as opposed to its other regulatory powers. See, *e.g.*, *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."); *Tempel* v. *United States*, 248 U.S. 121, 129-130 (1918) ("[U]nder the Tucker Act, the consent of the United States to be sued is (so far as here material) limited to claims founded 'upon any contract, express or implied'; and a remedy for claims sounding in tort is expressly denied. . . . [I]n the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay."); *Herrera* v. *United States*, 222 U.S. 558, 563 (1912) ("the record does not show a 'convention between the parties' or circumstances from which a contract could be implied, and that therefore the case is one sounding in tort, and claimants have no right of recovery"); *Bigby* v. *United States*, 188 U.S. 400, 406-408 (1903) (stating that the Tucker Act requires a "meeting of the minds of the parties," i.e., "an agreement to pay for that which was used for the government").

The Court apparently abandoned that distinction in *United States* v. *Causby*, 328 U.S. 256 (1946)—although it never discussed the question, or the earlier cases, directly. But even so, ordinary tools of statutory interpretation indicate that the Tucker Act should not apply when a later-enacted statutory scheme regulates property but demonstrates no intent to provide payment. See *Apfel*, 524 U.S., at 521 (plurality opinion) (noting that the Tucker Act does not apply where claim for compensation "would entail an utterly pointless set of activities").

Statutory interpretation must proceed according to "the purpose and context of the statute." *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). The Tucker Act undoubtedly provides a means of obtaining compensation for some government actions. The text of the Act makes this much clear. But to interpret it to make compensation available for *any* and *all* government activities would defeat the operation of numerous other statutes and regulations. This would make "nonsense" rather than "sense . . . out of the *corpus juris*." *W. Va. Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 101 (1991), *superseded by statute as recognized in Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 251 (1994).

Consider, for example, the Coal Act's regulations of property owners at issue in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498. The Coal Act compelled coal companies to pay money into a healthcare fund run for the benefit of coal-industry employees. The point of the statute was to provide for coal workers' health needs *using private dollars*. See *id.*, at 514-515 (plurality opinion). Eastern Enterprises brought suit in federal district court challenging the payment mandate as a taking without compensation. See *ibid.* This Court had to decide whether the Tucker Act required Eastern first to file a reverse-condemnation claim in the Court of Federal Claims. A plurality of the Court concluded that it did not. See *id.*, at 521.

The Tucker Act did not apply, the plurality reasoned, because the availability of government compensation would render the statutory scheme pointless. See *ibid*.

The plurality's reasoning was succinct. "Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act, for every dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation." *Ibid*. (quotation marks and citations omitted). If government compensation was available to reimburse the property owners for the monies they paid in, the private healthcare fund would become a government fund instead—just the opposite of what the statute provided for. *Ibid*. Given this, "a claim for compensation would entail an utterly pointless set of activities." *Ibid*. (quotation marks and citations omitted). Likewise, Congress could not have allowed handlers to be fined under the Agricultural Marketing Agreement Act for failing to comply with a marketing order, 7 U.S.C. §608c(14), while simultaneously allowing handlers to seek compensation for those fines as takings under the Tucker Act.

This Court has held time and again that "no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (*per curiam*). Rather, "[e]very statute

proposes, not only to achieve certain ends, but also to achieve them by particular means." *Director, Office of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). Interpreters must be attentive to both ends and means, giving effect to the two together. See *Freeman* v. *Quicken Loans, Inc.*, 132 S.Ct. 2034, 2044 (2012) (statutory purpose must be understood in light of statute's "particular language"). But to interpret the Tucker Act to provide compensation for potentially every government regulation, no matter what the cost, and no matter how absurd such compensation would render the regulatory scheme, disregards these instructions.

Congress is perfectly free to craft exemptions from its own earlier statutes. See, *e.g.*, *Reichelderfer* v. *Quinn*, 287 U.S. 315, 318 (1932); *Fletcher* v. *Peck*, 6 Cranch 87, 135 (1810). It may do so "either expressly or by implication as it chooses." *Dorsey* v. *United States*, 132 S.Ct. 2321, 2331 (2012); accord *Lockhart* v. *United States*, 546 U.S. 142, 148 (2005) (SCALIA, J., concurring) ("Among the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them.").

Where a statute or regulatory scheme burdens private property but makes no provision for payment, and when government compensation would in fact defeat the very operation of the statute, Congress should be understood to have withdrawn Tucker Act jurisdiction. In these cases, Congress "could not have contemplated that the Treasury would compensate" aggrieved property owners if the statute was found unconstitutional. *Apfel*, 524 U.S., at 521 (plurality opinion). And had Congress been put to the choice, it may well have opted not to pursue the regulation at all rather than to pay potentially astronomical prices to see it carried into effect. In such instances, it "cannot be said that monetary relief against the Government is an available remedy" and "the presumption of Tucker Act availability must be reversed." *Ibid.* (quotation marks and citations omitted).

3. In all events, the Hornes do not have to show that there is no adequate damages remedy for an uncompensated taking of raisins under the marketing order. The Hornes are raising their constitutional challenge to that order as a defense to the penalty imposed for violating the order. The fact that a court might provide a damages remedy for a taking does not change the fact that the Hornes allege that the government had no authority to effect an uncompensated taking of raisins in the first

place—and therefore had no authority to punish noncompliance with the unconstitutional order.

This Court's opinion in *Ex parte Young*, 209 U.S. 123, 164 (1908), explained that injunctive relief is available to block unconstitutional government actions when no adequate remedy at law exists. Importantly, *Ex parte Young* also recognized that an aggrieved party may raise a constitutional *defense* without satisfying the standards for an injunction: "We do not say the company could not interpose [the constitutional claim as a] defense in an action to recover penalties or upon the trial of an indictment." *Id.*, at 165. A few years later, in *Missouri* v. *Chicago, Burlington & Quincy Railroad Co.*, 241 U.S. 533 (1916), the Court explained that *Ex parte Young*'s recognition of "the broader right to invoke a complete remedy to enjoin the law, and thus prevent the enforcement of the rates, did not take away the narrower right of a railroad *to stand upon the defensive*, and merely resist the attempt to enforce the rate in each particular case." *Id.*, at 539 (emphasis added). The suit for an injunction was simply a different mechanism—in its own way both more powerful and more limited—for raising the constitutional claim. It did not alter the ability of litigants to assert constitutional rights as a defense to civil or criminal punishment actions.

The Takings Clause therefore is available as a defense to establish that the underlying government property invasion is *ultra vires*, in the same way that other constitutional provisions may render government action invalid. When the Takings Clause is raised as a defense in this manner, there is no need to consider whether an adequate damages remedy would have existed if the property owner had complied with the regulation, turned over his property to the government, and suffered a violation of his constitutional rights. The only issue to be litigated is whether the disputed requirement of the property regulation is constitutional.

Hence, although a party may be unable to enjoin the government from procuring raisins if a "reasonable, certain, and adequate" damages remedy exists, *Cherokee Nation*, 135 U.S., at 659, parties may invoke their Takings Clause rights as a defense to a government penalty action after ignoring the government's attempt to procure their property.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the court of appeals and remand for resolution of petitioners' Takings Clause defense on the merits.

Respectfully submitted,

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January 16, 2013