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No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The issue before this Court is whether the panel was correct that it "lack[ed] jurisdiction to address the merits of the Hornes' takings claim" because that claim was "premature." JA306. After litigating this case on the merits through two rounds at the Department of Agriculture (USDA), the district court, and the Ninth Circuit, the government argued for the first time in its opposition to petitioners' rehearing petition that petitioners' "takings claim is premature until [they] have exhausted their rights" under the Tucker Act, asserting that, because this issue related to "subject matter jurisdiction," the government could raise it "at any point in the litigation." JA241-242. Accepting this argument, the panel withdrew its prior merits opinion and instead held that petitioners were required to pursue their takings claim in the Court of Federal Claims.

Petitioners contend that characterizing the Tucker Act's exhaustion requirement as jurisdictional confuses constitutional ripeness with the traditional equitable principles governing choice of remedies, under which plaintiffs are not entitled to an injunction against government action where they have an adequate remedy at law. For much the same reason the Court has recently distinguished subject-matter jurisdiction from claims-processing rules and from substantive elements of a claim, the Court should distinguish between subject-matter jurisdiction and choice-of-remedy principles. See Pet. Br. 40-42.

Far from disputing petitioners' argument, the government retreats from the position it successfully

pressed on the court below. The government now professes uncertainty about whether the issue should "be considered a matter of 'ripeness' that concerns the court's 'jurisdiction' in the Article III sense of that term" or "a substantive ingredient" of an injunctive takings claim. Resp. Br. 46-48; contrast JA241-242. The government now contends that "[w]hether conceived of as a question of jurisdiction * * * or as a question going to the merits, the outcome in this case *is the same*," Resp. Br. 47 (emphasis added), relying on a host of arguments — many never before raised in this litigation — for why petitioners' claim "would fail" *on the merits*, Resp. Br. 31.

This entire approach is misguided. An Article III court must first establish its jurisdiction. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83 (1998). If (as petitioners have explained and the government nowhere disputes) the ripeness doctrine for takings is properly viewed as a substantive principle of choice of remedies, then the courts below had jurisdiction and the panel must be reversed. On remand, the government will have the opportunity to present its merits arguments subject to ordinary rules of forfeiture. That opportunity may in practice be limited, since the USDA's *sole* justification in agency proceedings was that it could take farmers' raisins *without just compensation.* JA39, JA73, JA111; see *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943).

The courts below were the right forum for petitioners to obtain reversal of the order to pay monetary compensation for raisins the government wrongfully asserts it is entitled to take without just compensation. Petitioners *can satisfy* the traditional standard for obtaining injunctive relief under *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998), but

they *need not* satisfy that standard because they raise their takings claim as a defense. In addition, the Agricultural Marketing Agreement Act (AMAA) withdraws Tucker Act jurisdiction for "handlers" of raisins, a "capacity" in which petitioners must surely bring their defense to a fine that was imposed on them as "handlers."

The government, moreover, now acknowledges "that there is a category of cases in which a takings claim may be cognizable in a suit for equitable relief in district court, notwithstanding the Tucker Act, because the particular statutory provision involved is not properly understood to contemplate the payment of compensation by the United States if it were found to result in a taking." Resp. Br. 50. But after conceding that, based on its "language, context, and history," the AMAA may well "fall[] into that category," the government cites two reasons — both patently meritless — for requiring petitioners to raise their takings claim in the Court of Federal Claims. *Ibid.*

This Court should not allow the government to turn takings challenges into a regulatory-jurisdictional labyrinth. The Hornes grow raisins. The government believes it is entitled to appropriate a large portion of their crop, or its monetary equivalent, without compensation. Both the Constitution and the statute entitle the Hornes to assert their constitutional rights, without making costly and duplicative trips to different courts.

I. The government's jurisdictional ripeness arguments fail.

As petitioners have explained, the decision below was predicated on language in recent decisions mistakenly equating the standard for obtaining injunc-

tive relief with the subject-matter-jurisdiction standard for ripeness. See Pet. Br. 38-42; *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) (citing *Cherokee Nation* v. *S. Kansas Ry.*, 135 U.S. 641, 659 (1890)). Any "ripeness" limitation on takings claims is better understood as an application of the traditional doctrine from the law of remedies limiting the availability of affirmative injunctive relief where the claimant has access to an adequate remedy at law. Pet. Br. 27-42. Contrary to the government's assertion below, the panel had Article III jurisdiction.

The government nowhere disputes this analysis. Instead, it merely states that *Williamson County*'s ripeness twist to the injunctive-relief standard "is *consistent with* the proposition that where a remedy at law is available — namely, monetary compensation under the Tucker Act — injunctive relief to prevent an alleged taking is unavailable." Resp. Br. 24 n.12 (emphasis added). But that is no response. The rule is jurisdictional or it is not. Petitioners showed that the *Williamson County* rule bears no resemblance to ordinary ripeness principles and that cases before and after *Williamson County* treated the question of ripeness in Takings Clause claims as distinct from whether there was an adequate remedy at law precluding entry of an injunctive remedy. Pet. Br. 38-42; see *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (holding that the takings claim was ripe but that injunctive relief was unavailable); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984) (reaching the merits of the takings claim and then holding that injunctive relief was not available); *Cherokee Nation*, 135 U.S. at 659 (treating the question of adequate remedy at law as one arising from

equitable choice-of-remedies doctrine not jurisdiction); see also *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2610 (2010) (treating takings clause ripeness as non-jurisdictional); *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733 n.7 (1997) (similar). The government's silence in response can be read as concession.

A. The government acknowledges that supplementing the AMAA with Tucker Act remedies would not be "consistent with the policies of the AMAA."

The government concedes that certain "features" of the AMAA indicate that "Congress would not have intended to pay funds from the federal Treasury to maintain the particular program here if it were found to result in a taking, and thus would instead have preferred it to be enjoined." Resp. Br. 50. But the government insists that petitioners' takings defense must be dismissed because the "broader structure" of the AMAA "suggests that Congress would not have preferred an injunction in district court to an action for compensation under the Tucker Act." Resp. Br. 51. The two aspects of the AMAA's purported "broader structure" that the government identifies, however, are irrelevant.

1. According to the government, "petitioners are correct" that "a takings claim may be cognizable in a suit for equitable relief in district court, notwithstanding the Tucker Act, because the particular statutory provision involved is not properly understood to contemplate the payment of compensation by the United States if it were found to result in a taking." Resp. Br. 50; see *Apfel*, 524 U.S. at 521 (explaining

that equitable relief is proper where "Congress could not have contemplated that the Treasury would compensate" for a takings claim); Resp. Br. 42-43 (citing cases where the statute did not provide for compensation, and the Court allowed a takings defense). The government points to "several features" of the AMAA's "language, context, and history" that "indicate that it falls in this category." Resp Br. 51.

Several factors make that clear. Marketing orders under the AMAA "are designed to regulate private parties" alone without "any direct expenditure of government funds." *Id.*; see also 7 U.S.C. §§ 608c(1), 608c(6)(E); 7 C.F.R. §§ 989.15, 989.53(a), 989.66(h), 989.79, 989.80 (collectively providing that Raisin Administrative Committee ("RAC") operations shall be funded from proceeds of sale of reserved raisins and surplus shall be returned to producers on pro rata basis, with remainder of funding to come from assessments on handlers); 76 Fed. Reg. 18,003, 18,004 (Apr. 1, 2011) (describing funding of RAC operations). As in *Apfel*, the AMAA "orders the affairs of private market actors without any direct burden on the public fisc." Resp. Br. 51.

Moreover, the marketing order specifies the amount of compensation Congress is willing to pay, which is the price of the raisins in non-competitive markets minus the RAC's administrative costs. Resp. Br. 6; 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 989.66(h), 989.67. That indicates the lack of any intention to pay *more*. Having allowed the RAC to set prices for reserve raisins and to fund its operations out of the raisin reserve, Congress would not have wanted to layer an additional Tucker Act remedy on top of the complex scheme of payments and transfers. It would "instead have preferred it to be enjoined ra-

ther than give rise to the payment of compensation under the Tucker Act." Resp. Br. 51. As the government acknowledges, requiring the USDA to pay farmers the market value of confiscated raisins would not be "consistent with the policies of the AMAA." Resp. Br. 53.

2. In the face of these clear indications of congressional intent, the government nevertheless contends that the AMAA envisions a supplementary Tucker Act remedy — albeit only "in the narrow circumstances presented here," Resp. Br. 50, leaving open the possibility that in some future "circumstances" a Tucker Act remedy would not be available. The government, however, identifies only two supposed countervailing "features" that supposedly indicate Congress would have wanted to supplement the AMAA's remedial scheme with Tucker Act claims. Both are meritless.

First, according to the government, Congress "designed the AMAA to increase prices * * * and thus assumed the scheme would *benefit* producers." Resp. Br. 51; *id.* at 52 ("[E]ven if Congress thought there was a risk that a reserve requirement would constitute a taking of a producer's commodities, Congress might well have expected the just compensation for any such taking to be zero because the marketing order would result in net benefits for producers."). Putting aside that it is doubtful that the government's decision to take and to use raisins somehow benefits petitioners, these assertions merely restate the common premise that Congress did not foresee, and would not have intended, payment of compensation, because it believed erroneously that the raisin program would not be held to be a taking. That tells us nothing about what Congress would have intended "if

it were found to result in a taking." Resp. Br. 50.

Second, the government notes that "the AMAA vests the Executive Branch with significant administrative authority to modify or abandon commodity regulation under the statute as necessary," which would allow the USDA to terminate the "current marketing order on the ground that it was no longer consistent with the policies of the AMAA" if a claimant obtained a compensation award from the United States "arising out of the reserve requirement." Resp. Br. 52-53. That argument, in effect, ascribes to Congress an intention to allow one claimant to succeed on his takings claim, but not others once the USDA repealed the Raisin Marketing Order.

But the government nowhere cites any case for the novel proposition that Congress would want to establish such a "one-bite" regime. It makes no sense to have the question of which court should hear a takings claim depend on a factor as difficult to ascertain as whether the Executive Branch would abandon its enforcement of the law in response to a just compensation award. That is no doubt why cases addressing takings claims on the merits have given no weight to the fact that the Executive Branch had the authority to stop the taking. See, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 168-169 (1979) (government-initiated enforcement action for public access to property); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952) (property seizure based on unilateral executive order). In these cases, federal courts simply reached the merits of the takings claim upon concluding that the underlying regime made no provision for just compensation, rather than requiring a party to proceed to the claims court to determine whether compensation was available there.

None of the cases suggested that executive discretion made resolution of the takings claim improper. See *Reg'l Rail*, 419 U.S. at 150 n.36 ("To delay until any Court of Claims adjudication with respect to the form of consideration provided by the Act would be exceedingly irresponsible: while the fact that Congress did not contemplate a taking does not pretermit a Tucker Act remedy, it does suggest that Congress might wish to consider whether to abandon the whole Act if it turned out that the entire value of the rail properties must be paid in cash."); compare Resp. Br. 23 n.11 (quoting this passage of *Regional Rail* as holding that "'the fact that Congress did not contemplate a taking does not pretermit a Tucker Act remedy'") (alteration omitted).

3. The government suggests that "if the courts in the Tucker Act proceeding were to conclude that compensation is not available even if the particular federal action did constitute a taking," a "suit [would] then lie in district court." Resp. Br. 24. That cannot be right. It is undisputed that petitioners are entitled to proceed in district court unless they have a "reasonable, certain, and adequate remedy at law," under the Tucker Act. Resp. Br. 21-22. If the claims court cannot provide a remedy (because petitioners must return to district court), then the Tucker Act is not an adequate remedy.

Indeed, it makes sense for the district court — not the claims court — to decide whether the statute "falls into this category." That pure question of statutory interpretation may well require familiarity with the intricacies of the statutory scheme that Congress adopted. As petitioners have already explained, Congress insisted that *all* challenges to marketing orders be brought before the agency, with district

court review based on the administrative record. See *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946). A separate suit in the claims court would, contrary to Congress's intentions, be based on an independent record, with fact-finding and legal judgments made *de novo*. Where Congress did not intend compensation, it defeats the purposes of all parties to be in a court whose only remedial power is to grant compensation.

B. The *Apfel* plurality's rule should be adopted and controls the outcome here.

The government concedes that "[p]etitioners are correct" that, under *Apfel*, parties may "obtain injunctive relief against an alleged taking based on a 'direct transfer of funds mandated by the Government.'" Resp. Br. 29 (quoting 524 U.S. at 521). And the government does not dispute that the full Court should adopt the *Apfel* plurality's rule regarding the availability of injunctive relief under the Takings Clause. See Resp. Br. 50 (affirmatively relying on *Apfel*).

It argues instead that *Apfel* does not apply because the fine might not be the "dollar-for-dollar equivalent of the just compensation that would have been awarded if, hypothetically, [petitioners] had *complied* with the reserve requirement." Resp. Br. 33. That "dollar-for-dollar equivalence," however, is not required by *Apfel*, and it would make no sense to base a jurisdictional rule on it.

The logic of *Apfel* does not depend on precise dollar-for-dollar equivalence. While the government is seeking to extract a cash payment from the private party, that party has no action for "damages" in the claims court, which is the only basis for jurisdiction under the Tucker Act. To require it to pay cash in

one court only to make a subsequent trip to the Court of Federal Claims to get it back is an "utterly pointless set of activities." 524 U.S. at 521.

Whether the amount paid in one court is precisely the same as that returned in the other is a question for the merits, which cannot be determined at the jurisdictional stage. Consider the government's arguments here. First, the government argues that petitioners are not entitled to sue for the entirety of the fine that was imposed against them because part of that fine pertains to raisins owned by the other members of petitioner Raisin Valley Marketing Association. Resp. Br. 34. This argument misconceives the nature of the transaction. As the USDA decision notes, the individual farmers retained ownership of their own raisins and received payment for them in the market. JA59-60. The Hornes are being required to pay the monetary equivalent of the raisins because the government's regulatory scheme makes them, as "handlers," responsible for the raisins. Having been ordered to pay the government for the raisins, the Hornes are the ones entitled to get their money back (or not to pay in the first place).

Similarly, the government claims "it is entirely likely that when all benefits and alleged losses from the reserve requirement were calculated, petitioners would have a net *gain* rather than a net loss," because "a central point of the marketing order is to benefit producers by limiting supply and thus raising prices for their commodities." Resp. Br. 37. This argument is also meritless. Even on the dubious assumption that petitioners benefit from the government's purported limiting of the size of the free-tonnage raisin market, there is no conceivable way that petitioners benefit from the government's taking

and subsequent *use* of their raisins for government purposes.

Likewise irrelevant is the government's claim that "calculating the value of the raisins is not a straightforward exercise." Resp. Br. 37. The method used for calculating value does not matter. Petitioners challenge the government's right to make farmers pay the monetary equivalent of the reserve pool raisins, whatever method the government may choose to set that value. The precise calculation by the USDA is undisputed. The relevant measure is the amount of the fine.

The ultimate point is that all these are issues for the merits that have yet to be resolved. Whether petitioners must seek relief in one court or another cannot be made to depend on disputed questions on the merits. The government never argued until its briefs before this Court that these factors had any relevance to the jurisdiction of the courts below — a failure that surely demonstrates their unsuitability to determining which court should hear petitioners' claim. Rather than collapsing the merits and jurisdictional questions, this Court should apply the straightforward rule in *Apfel* — that injunctive takings challenges to "direct transfers of funds mandated by the government" are ripe at the time the government seeks to compel the transfer.

C. Petitioners may raise the Takings Clause as a defense.

As petitioners explained in their opening brief, the doctrine that petitioners must show that they lack an "adequate remedy at law" has no application where, as here, petitioners do not seek affirmative injunctive relief, but rather seek to defeat claims the govern-

ment has initiated against them. Pet. Br. 43-47. The government's responses fall flat.

1. The government argues that the Tucker Act operates to *avoid* any constitutional violation because the Takings Clause "is not violated at all unless just compensation for any taking that may occur is unavailable through established procedures." Resp. Br. 40-41. But that confuses constitutional rights with remedies. The Tucker Act does not provide a cause of action for compensation for a taking. It waives sovereign immunity for "damages" actions "founded either upon the Constitution, or any Act of Congress * * * ." 28 U.S.C. § 1491(a)(1). It makes no sense to say that the constitutional violation does not occur until after the party seeks and is denied compensation in the claims court, because the claimant cannot sue under the Tucker Act except for a constitutional violation, which must have occurred before he can sue. See*, e.g.* *United States* v. *Mottaz*, 476 U.S. 834, 850 (1986) ("A Tucker Act-based lands suit would seek *damages* equal to just compensation for an *already completed* taking of the claimant's land."); *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983) (to fall within Tucker Act, "[t]he claim must be one for money *damages* against the United States"); *United States* v. *Testan*, 424 U.S. 392, 398 (1976) (Tucker Act jurisdiction "limited to actual, presently due money *damages* from the United States") (emphases added).

As an original matter, a taking of property triggers a right to just compensation at the time of the taking. See *Bonaparte* v. *Camden & A.R. Co.*, 3 F. Cas. 821, 831 (C.C.N.J. 1830) ("duty of legislature is to provide for compensation * * * simultaneously with * * * appropriation of [ ] property"). In light of pragmatic considerations, however, this Court long ago

held that the government may take property with compensation to follow, so long as the procedures for obtaining compensation are reasonable, certain, and adequate. *Cherokee Nation*, 135 U.S. at 659. This rule did not, however, change the nature of the claim, which still *ripens* at the time of the taking. It changed only the nature and availability of the remedy. That is still the way this Court treats the issue today. For example, in *San Remo Hotel, L.P.* v. *City & County of San Francisco*, 545 U.S. 323 (2005), the Court held that a property holder may pursue a state-court section 1983 claim that denial of just compensation would violate the Fifth Amendment simultaneously with a state-law action seeking compensation. *Id.* at 346. In rejecting the argument that this simultaneity violates the *Williamson County* ripeness principle, the Court necessarily rejected the government's claim here that there can be no Takings Clause violation until after compensation has been sought and denied.

2. The government argues that "a takings 'defense' is no different in substance from an action by a property owner seeking an injunction to restrain the government from carrying out acts that allegedly would effectuate a taking of property." Resp. Br. 41. That is incorrect. Historically, parties seeking affirmative injunctive relief, unlike defendants, had to show that they lacked an adequate remedy at law. See *United States* v. *Am. Friends Serv. Comm.*, 419 U.S. 7, 11 (1974) ("[I]nadequacy of available remedies goes only to the existence of irreparable injury * * * ."); see also *eBay Inc.* v. *MercExchange, LLC*, 547 U.S. 388, 391 (2006); *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010). Such a showing was not necessary when a party raised a defense.

The difference is practical as well as historical. When the government goes to court to obtain title to property, the action is in the nature of eminent domain. In eminent-domain proceedings, the tribunal generally determines the right of the government to the property and the amount of compensation due to the citizen in the same proceeding. See, *e.g.*, Fed. R. Civ. P. 71.1(h). That should be true whether the government seizes farmland or raisins. Things are different when the government engages in activities that incidentally effect a taking. In those cases, an injunction would delay progress on what may be a necessary project. Accordingly, the plaintiff cannot obtain an injunction unless he satisfies traditional equitable criteria, including the lack of an adequate remedy at law.

3. The government's purported distinction of cases in which this Court has addressed takings defenses on the merits (without hinting that the property owners should first go to the claims court) is little more than a truism: It points out that in these cases, the underlying statute "makes no provision" for compensation. Resp. Br. 43. But several of these cases postdate the Tucker Act. See *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987); *Kaiser Aetna*, 444 U.S. at 183 (adjudicating claim on the merits, without suggesting that defendant was required to forfeit property and seek compensation in the Court of Federal Claims); *Union Bridge Co.* v. *United States*, 204 U.S. 364, 365 (1907) (alleged unconstitutional taking enforced by criminal prosecution). The government does not explain why the Tucker Act did not constitute a provision for monetary compensation, or why this distinguishes the present case, where the AMAA likewise makes no provision for compensation. The

government purports to distinguish *Florida Power* on the ground that Congress "provided for exclusive review" of FCC orders under 47 U.S.C. § 402 "in the courts of appeals, thus displacing jurisdiction under the Tucker Act." Resp. Br. 26 n.13 (relying on two Federal Circuit cases addressing displacement under 47 U.S.C. § 402(b)) (citations omitted). *Florida Power*, however, was appealed using the general appeal provision of 47 U.S.C. § 402(a), which does not displace the Tucker Act. See *Northpoint Tech., Ltd.* v. *FCC*, 414 F.3d 61, 76 (D.C. Cir. 2005); *Bell Atl. Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445 n.2 (D.C. Cir. 1994).

Notably, in response to petitioners' cases, the government fails to cite a *single* case holding that a party may not raise the Takings Clause as a defense to government-initiated action. Instead, the government relies largely on *dicta* from *Williamson County*, an inverse condemnation case that did not address whether and how the Takings Clause could be invoked as a defense; and on a footnote *dictum* from *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 n.6 (1985), that petitioners have already explained is contrary to authority. Resp. Br. 39-42. To top it off, the government cites another *dictum* (from a footnote) in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), observing that "[w]here the action against which *specific relief* is sought is a taking, * * * the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional." *Id.* at 698-699 n.18 (emphasis added). But the term "specific relief" is a synonym for "equitable" relief, meaning an injunction. See *id.* at 704 ("specific relief" would allow "court to exercise its compulsive powers to restrain the Government from acting, or to compel it to

act"). *Larson* thus supports petitioners' argument that this Court viewed the doctrine as a limitation on the availability of injunctive "specific relief" — not jurisdictional ripeness.

II. The AMAA withdraws Tucker Act jurisdiction for "handlers" of raisins.

1. The government agrees that "the AMAA withdraws Tucker Act jurisdiction" because it has its "own exclusive provisions for administrative and judicial review of a legal challenge to a marketing order * * * by '[a]ny handler subject to' that order." Resp. Br. 25 (quoting 7 U.S.C. § 608c(15)(A)). The government also agrees that the civil penalties at issue here were — and could only have been — imposed on petitioners in their "capacity as handlers." *Id.* After all, as the government admits, if petitioners were not "handlers," they could not be fined at all. Resp. Br. 3-4. And the government recognizes "petitioners' defense effectively asks the courts to prevent the USDA from imposing on petitioners any civil penalty or monetary assessment for violating the raisin marketing order's reserve requirement, on the ground that the reserve requirement amounts to an unconstitutional taking." Resp. Br. 41.

That is sufficient to show that petitioners raise their takings defense "in their capacity as handlers." Under any plausible interpretation of the AMAA, petitioners must raise their defense to a fine imposed on them as handlers in their "capacity as handlers," not some other capacity. See *Ruzicka*, 329 U.S. at 294 (holding under the AMAA that claims "formulated in constitutional terms" must be pursued through the administrative process). The government's argument that petitioners challenge only the underlying admin-

istrative scheme, rather than the fine imposed on them as "handlers," simply misunderstands the nature of petitioners' takings claim on the merits. Compare Resp. Br. 27 with *infra*, pp. 20-22.

2. At any rate, the government's asserted distinction between "claims brought by *handlers* as handlers" and those brought by handlers "in their capacity *as producers*," Resp. Br. 25, 27, lacks basis in the AMAA's text, which allows "*any* handler" seeking to challenge a civil penalty to do so through the AMAA's administrative process, subject to judicial review in district court. 7 U.S.C. §§ 608c(14)(A), 608c(15)(A). Nothing in the statute asks whether the "handler" also produces raisins, nor what type of argument the handler will raise.

The government's sole textual response relies on a provision in the AMAA providing that "no marketing order 'shall be applicable to any producer in his capacity as a producer.'" Resp. Br. 28 (quoting 7 U.S.C. § 608c(13)(B)). But that provision simply means, as a substantive limit on agency power, that producers cannot be regulated by the USDA. It says nothing about the scope of agency proceedings. Where producers also "handle" raisins, they are subject to regulation and must use administrative processes.

Indeed, as the government admits, where Congress wants to distinguish between types of handlers, it knows how to do so. See Resp. Br. 28-29 n.14. In particular, in the milk context, Congress specifically created a category of "producer-handlers." 7 U.S.C. § 608c(5). That Congress explicitly distinguished between types of handlers for specific purposes in the milk context, but not in the raisin context is powerful evidence that no comparable distinction exists for

raisins. See, *e.g.*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004).

III. The government's new merits arguments fail.

The government raises several new theories regarding why petitioners' claims "would fail" on the merits. Resp. Br. 31. These merits arguments are not properly before the Court. They were neither timely presented below, nor the basis for the agency decision under challenge. *Chenery*, 318 U.S. 80. They also have no merit.

1. The government suggests that petitioners "do not have standing in any court to contend that the government has taken the raisins owned" by other producers. Resp. Br. 27; see also Resp. Br. 25. Although couched in jurisdictional terms, the government's argument bears on the merits question whether petitioners can assert a takings defense with respect to portions of the fine imposed on them for failing to transfer the raisins of other producers. This argument was neither made below, nor addressed in the agency proceedings. There is no need for this Court to address it in the first instance. The ownership of the raisins does not matter for purposes of ripeness under the Constitution or under the AMAA. At any rate, the government's argument misunderstands the economics of petitioners' business. Unlike the usual handler, who pays the producer only for free-tonnage raisins but assumes control over the entire crop, the Hornes never assumed control over their neighbors' raisins. JA125. Rather, they allowed their neighbors to use their processing equipment for a small fee. JA148-149. Their neighbors sold their own raisins and received full market price

for them. JA125-126. The Hornes, as handlers, were ordered to pay the market equivalent value for *all* the raisins processed on their equipment. JA84-86. If the fine is reversed, they (as handlers) are entitled to the benefit.

2. The government also argues that "this Court has never held that *any* requirement to pay money from unidentified sources * * * can be the basis of a takings claim," Resp. Br. 31-32; and that "the assessment of civil penalties or entry of a remedial payment order" cannot "constitute a taking of private property within the meaning of the [Takings] Clause," Resp. Br. 32.

That is incorrect. While free-standing regulatory exactions of undifferentiated money potentially might not be *per se* takings (an issue the Court need not decide in this case), it is elementary under the doctrine of constitutional remedies that a party who is fined for violating an unconstitutional order may challenge the constitutionality of the underlying order as a defense to the fine. For example, if a demonstrator violates an unconstitutional speech ordinance and is fined, no one would argue that just because he spoke, his free speech rights were not violated. A fine for disobeying a law that violates the freedom of speech is a violation of the freedom of speech.

The same is true for the Takings Clause — as this Court has already held. In *Missouri Pacific Railway* v. *Nebraska*, 217 U.S. 196 (1910), the railroad violated a state order to construct a line at its own expense to serve a particular grain elevator, and was fined $500 for its refusal. After concluding that the underlying order was a taking of property for which no compensation was forthcoming, this Court reversed

imposition of the fine. *Id.* at 208. What matters is not whether the railroad would pay the fine from "unidentified sources," but whether it was imposed to enforce an unconstitutional order. There, the Court held that it was so imposed, and thus invalidated the fine. By any measure, a party has "the right to refuse to submit to a taking where no compensation is in the offing." *Wilkie* v. *Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J., dissenting).

Petitioners cited *Missouri Pacific Railway* for this proposition seven times in the opening brief (Pet. Br. 16, 21, 23, 24, 43, 46, 47) and the government's sole reference was non-responsive (Resp. Br. 43). Contrary to the government's assertion, "the assessment of civil penalties or entry of a remedial payment order," Resp. Br. 32, can indeed be challenged under the Takings Clause.

Petitioners' takings defense with respect to the "monetary equivalent" component of the fine is likewise valid under *Village of Norwood* v. *Baker*, 172 U.S. 269 (1898). There, a city took a strip of land to widen a public street, arguing that it need not pay compensation because the landowner would benefit from the street. After the city lost on that argument — which is similar to the "benefit" argument the government advances in this litigation, see Resp. Br. 36 — the city imposed a special assessment on the landowner of "an amount covering," *inter alia*, "a sum equal to that paid for the land taken for the street." *Village of Norwood*, 172 U.S. at 271. This Court did not hesitate to deem that monetary exaction a taking.

The same is true here. The government seeks to extract, in the guise of a "fine," the monetary equivalent of the raisins that it sought to expropriate. That

order is purely compensatory, and not in any respect punitive. See JA160, JA211; 7 C.F.R. § 989.166(c). This Court's opinion in *Village of Norwood* stands for the proposition that a government cannot get around the Takings Clause merely by requiring the payment of the "monetary equivalent" of an exaction and labeling that payment a "tax," "fine," or "assessment." In *Village of Norwood*, this Court saw past the mere labels and the same result should apply here.

3. Lastly, despite having raised its jurisdictional argument at the eleventh hour in the courts below (and having retreated from that argument before this Court), the government paradoxically claims that *petitioners* failed to raise their challenge to the fine in a proper and timely manner. According to the government, petitioners cannot challenge the imposition of the fine, because they "litigated this case as a challenge to the reserve requirement as a physical 'taking' of petitioners' raisins." Resp. Br. 31. That is incorrect. This entire litigation has been about a cash fine imposed on petitioners for their failure to comply with a regulation that is unconstitutional under the Takings Clause. The district court accurately summarized petitioners' position: The government could not "refuse to pay just compensation, and *then penalize, monetarily*, [petitioners] for refusing to transfer title and possession to the government." JA171 (quoting petitioners' trial memorandum) (emphasis added). The government has no basis for saying petitioners' argument is any different now.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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