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NO. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit organization dedicated to advancing the interests and education of local government lawyers. IMLA has an interest in the Court affirming the principle that the Takings Clause guarantees payment of compensation in the event of a taking for public use and does not prohibit a taking for public use when an opportunity to obtain compensation is available. In addition, it has an interest in the Court affirming that the Takings Clause does not provide a defense to monetary sanctions imposed as a result of a government enforcement action initiated in response to a violation of law.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have needlessly complicated the vindication of their asserted rights under the Takings Clause of the Fifth Amendment by failing to file a straightforward claim for just compensation in the U.S. Court of Federal Claims. Petitioners have long participated in the raisin industry marketing program which they now believe results in a taking. Thus, they could easily have filed a claim for just compensation in the U.S. Court of Federal Claims based on this asserted taking. Instead, petitioners decided to disregard

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amicus* made a monetary contribution to its preparation (Rule 37.6).

federal law requiring that they participate in the program and now seek to invoke the Takings Clause to defend against the sanctions imposed as a result of their illegal action.

This effort should fail for three independent reasons. First, because the purpose of the Takings Clause is to provide compensation for takings, rather to stop takings from occurring, it would contradict the purpose and function of the Takings Clause to allow a party who has defied federal law and thereby blocked implementation of a federal program to defend his or her action by invoking the Takings Clause. Second, government seizures of private property for law enforcement purposes, such as forfeitures, are outside the scope of the Takings Clause. Third, government-imposed mandates to pay money in general, including but not limited to the kinds of monetary sanctions at issue in this case, are outside the scope of the Takings Clause.

While it is unlikely the Court will reach the merits of the takings issue in this case, *amici* submit that the takings argument is meritless. The raisin marketing program is best viewed as involving a regulatory restriction on property rather than an appropriation of property, and therefore the *Penn Central* analysis should govern this claim. Given the modest (if any) *net* economic burden imposed by the raisin marketing program, and the modest (if any) interference with petitioners' reasonable investment-backed expectations, the *Penn Central* claim should fail. Even if the alleged taking were analyzed under a *per se* test, the claim should fail because petitioners could not

carry the burden of demonstrating that the program has imposed any net compensable injury on them.

ARGUMENT

I. Petitioners Could and Should Have Presented Their Takings Claim in a Suit Seeking Just Compensation in the U.S. Court of Federal Claims.

Petitioners could have pursued – and indeed, as *amici* will explain, were required to pursue -- their takings claim based on the mandates of the raisin marketing program by filing suit seeking just compensation in the U.S. Court of Federal Claims. Prosecuting their claim in the claims court in the normal fashion would not have imposed any burden whatsoever on petitioners. For many decades, petitioners and their predecessors complied with the Agricultural Marketing Agreement Act ("AMMA") and the raisin marketing order, only recently coming to the view that the program results in a taking. In order to present their takings argument petitioners could have continued with their business as usual and filed suit in the claims court seeking compensation for the alleged taking of the portion of their raisin crop subject to the reserve requirement. While IMLA doubts that such a claim would have succeeded (*see* section III), there is no question petitioners would have had their day in court.

The claims court would have had jurisdiction over a suit seeking just compensation under the Takings Clause by virtue of the Tucker Act, which provides in relevant part: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon

any claim against the United States founded . . . upon the Constitution . . . ." 28 U.S.C. § 1491(a). The Tucker Act waives the sovereign immunity of the United States in the U.S. Court of Federal Claims with respect to claims seeking monetary relief. *See United States v. Mitchell*, 463 U.S. 206, 217-18 (1983). The waiver applies to takings claims seeking "just compensation" under the Takings Clause because such claims are "founded" upon the Constitution. *See United States v. Causby*, 328 U.S. 256, 267 (1946). *But cf*. 28 U.S.C. § 1346 (conferring concurrent jurisdiction on the U.S. Court of Federal Claims and the federal District Courts over takings claims seeking less than $10,000).

A lawsuit seeking compensation in the claims court fully protects property interests pursuant to the Takings Clause despite the fact that it only provides after-the-fact relief. The Court has repeatedly said that the remedy for a taking need not be offered "in advance of or even contemporaneous with the taking." *Preseault v. Interstate Commerce Comm.*, 494 U.S. 1, 11 (1990). "All that is required is the existence of a 'reasonable, certain and adequate provision for obtaining compensation' at the time of the taking." *Id*. (quoting *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 125 (1974) (in turn quoting *Cherokee Nation v. Southern Kansas R. Co.,* 135 U.S. 641, 659 (1890)). In addition, the Court has recognized that a successful takings claimant is *constitutionally entitled* to pre-judgment interest as part of the compensation award. *See Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 356 (1923). As a result, after-the-fact compensation fully and equitably protects property

owners from the financial effects of takings for public use.

When, as in this case, a suit seeking just compensation is available to a claimant in the U.S. Court of Federal Claims, the Takings Clause bars the claimant from filing suit in federal District Court to enjoin the alleged taking. *Preseault*, 494 U.S. at 11-17. *See also United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 127-128 (1985) ("We have held that, in general, equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking") (internal quotations omitted); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (reversing a District Court injunction against a taking, because the Tucker Act was available to remedy any taking that the plaintiff might suffer). In *Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528, 544 (2005), a unanimous Court repudiated the "substantially-advances" takings test in part because it implied, contrary to these precedents, that a successful takings claim *could* lead to injunctive relief. A parallel principle applies to takings claims brought against state and local governments, so long as "a State provides an adequate procedure for seeking just compensation." *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985).[2]

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[2] *Williamson County* also rests on principles of comity and federalism not at issue in this case. As petitioners acknowledge, this case does not involve application of *Williamson County* because it does not involve a claim against a state or a unit of local government.

Three reasons support the conclusion that the Takings Clause does not authorize a suit in federal District Court to enjoin an alleged taking for public use. First, it reflects the fact that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power . . . ." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 314 (1987). As the Court stated, "[t]his basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se,* but rather to secure *compensation* in the event of . . . a taking." *Id.* (emphasis in original). Because the purpose and function of the Takings Clause are to provide compensation for a taking – rather than to prevent a taking – the appropriate remedy for a taking is a suit seeking just compensation, not a suit to block the taking from occurring.

Second, the Takings Clause generally bars a suit seeking equitable relief because a takings claim *presupposes* the government action serves a "public use," that is, a legitimate public purpose, which a federal District Court has no proper reason to block. The Takings Clause states that "private property [shall not] be taken *for public use*, without just compensation." If a government action is invalid, for example because it is arbitrary and capricious, then a court can properly prevent it from going forward. "But such an inquiry [into the validity of the government action] is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government acted in pursuit of a valid public purpose." *Lingle*, 544 U.S.

at 543. In other words, the Takings Clause cannot provide the basis for an injunction against a taking because "[i]t does not bar government from interfering with property rights, but rather requires compensation 'in the event of an *otherwise proper interference* amounting to a taking.'" *Id.* (quoting *First English*, 482 U.S. at 315) (emphasis supplied by the Court in *Lingle*).

In this respect, the Takings Clause is different from, for example, the First Amendment or the Due Process Clause, the purposes of which include preventing government incursions upon the constitutional interests protected by those provisions. The Takings Clause, far from prohibiting takings, implicitly authorizes government to take private property, provided that the action serves a legitimate public purpose and the government is able and willing to pay just compensation (with interest).

Third, no suit seeking to block a taking will lie in federal District Court, at least so long as a Tucker Act remedy is available, because there is no unconstitutional action to enjoin. The Fifth Amendment only makes it unconstitutional to take property without paying just compensation. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 n. 40 (1981) ("an alleged taking is not unconstitutional unless just compensation is unavailable"); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n. 39 (1978) ("if the Tucker Act remedy would be available in the event of a nuclear disaster, then [the] constitutional challenge to the Price-Andersen Act under the Just Compensation Clause must fail").

Thus, if the government has provided compensation for a taking, or even if it has merely established a "reasonable, certain and adequate" process for obtaining compensation, the property owner cannot claim a violation of the Takings Clause.

The understanding that takings claims are essentially compensatory in nature is explained by the fact that inverse condemnation doctrine derives from and is a subset of eminent domain doctrine. *See First English,* 482 U.S. at 316 ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."). The Takings Clause implicitly recognizes the existence of the eminent domain power, one of the most venerable and important powers of government. *See Kelo v. City of New London*, 545 U.S. 469, 484-85 (2005) (cataloguing the wide variety of public purposes for which the eminent domain power can properly be deployed). Under the Takings Clause, government can exercise eminent domain so long as the taking serves a "public use" and it pays "just compensation." Given the essential equivalence of the power of eminent domain and inverse condemnation, if the government can condemn private property so long as these two conditions are satisfied, the government necessarily also can, without judicial interference, inversely condemn private property so long as these same two conditions are satisfied.

This understanding of the Takings Clause explains why the Court has rejected the idea that it should

apply a canon of constitutional avoidance in addressing takings claims. The Court has said "the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property" provides "no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred." *Riverside Bay View*, 474 U.S. at 121. "Under such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty, [but instead] frustrates permissible applications of a statute or regulation." *Id*. at 128 (citing *Ashwander v. TVA*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring)); *accord Clark v. Martinez*, 543 U.S. 371, 382 (2005) (stating that the constitutional avoidance canon is "a means of giving effect to congressional intent, not of subverting it").[3]

A logical corollary of the principle that the remedy for a taking is a suit for just compensation when the Tucker Act remedy *is* available is that the Takings Clause authorizes courts to enjoin takings when the compensation remedy is *not* available. *See Larson v.*

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[3] Given these principles, the suggestion by the United States that the Court can and should decline to enforce a federal statute based on the Takings Clause whenever it concludes that a particular law "is not properly understood to contemplate" payment of compensation "if it were found to result in a taking ," U.S. Br., at 50, misapprehends the purpose and function of the Takings Clause and the Court's responsibility to enforce congressional commands; if a statute results in a taking, and Congress does not wish to pay compensation in order to maintain the statute, it is up to Congress to amend the statute.

Domestic & Foreign Commerce Corp., 337 U.S. 682, 697, n. 17 (1949) (explaining that the claimant in *United States v. Lee*, 106 U.S. 196 (1882), was entitled to seek "specific relief" for an allegedly unconstitutional taking by the United States because, "[a]t that time," there "was no remedy available by which he could have obtained compensation for the taking of his land."). The decision in *Missouri Pacific Railway Co. v. State of Nebraska,* 217 U.S. 196 (1910), upon which petitioners rely, is consistent with this understanding; in that case, the claimant was entitled to specific relief when Nebraska law provided no mechanism to seek financial compensation for the alleged taking. This exception has no application in this case because petitioners easily could have sued for just compensation in the U.S. Court of Federal Claims.

The general rule that a takings claim must proceed as a suit seeking just compensation also does not apply to government action that would produce "potentially uncompensable damages." *Duke Power Co.*, 438 U.S. at 71 n. 15. In that case the Court said that a federal District Court could resolve whether the Price-Anderson Act, which imposes a cap on liability for nuclear accidents, constituted a taking because in the event of a nuclear catastrophe plaintiffs allegedly would have no assurance of being able to obtain just compensation through the claims court. *Cf. Regional Rail Reorganization Act Cases*, 419 U.S. at 149 (rejecting argument that the Tucker Act remedy would be "inadequate" to address takings concerns raised by major federal legislation reorganizing eight major railroads). This exception does not apply here because there is no argument that the amount of just

compensation due for the alleged taking under the raisin marketing program could not be calculated.

Finally, a property owner is entitled to seek injunctive relief against a government taking on the theory that the taking does not serve a "public use." *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 241 (1984). If a planned taking is unlawful, the government is not permitted to proceed with the taking at all, whether or not the property owner can obtain compensation. Therefore, compensatory relief obviously does not constitute an appropriate remedy for a taking that allegedly does not serve a public use. *See Youngstown Sheet & Tube Co, v. Sawyer*, 343 U.S. 579, 585 (1992) (observing that injunctive relief against a taking is appropriate when the property has been "unlawfully taken"). Success on such a claim requires showing not only that the government has engaged in a "taking," but that the taking fails to serve a "public use." The latter inquiry involves a relatively deferential standard of review, akin to the rational basis test under the Due Process Clause. *See Kelo*, 545 U.S. at 483 ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.") While petitioners apparently disagree with the goals of the raisin marketing program, we do not understand them to have assumed the heavy burden of attempting to show that the program constitutes a taking that fails the public use test.

In the face of these settled principles, petitioners toss a good deal of chaff in the air in an effort to evade

the obvious conclusion that petitioners could and should have filed suit in the claims court for just compensation. First, petitioners mistakenly argue that the Court's precedents requiring takings claimants to pursue compensatory relief simply reflect the application of ordinary equitable principles. To the contrary, the established rule is based on the specific language and distinctive purpose of the Takings Clause. As the Court put it in *First English*, "*As its language indicates*, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of this power." 482 U.S. at 394 (emphasis added); *see also Williamson County*, 473 U.S. at 195 n. 13 ("*The nature of the constitutional right* . . . requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action) (emphasis added).

Contrary to petitioners' view, the *Regional Rail Reorganization Act Cases* lends no support to the idea that a takings claim can proceed as a suit for injunctive relief in federal District Court subject only to the traditional equity doctrine that legal remedies are to be preferred over equitable ones. In particular, contrary to petitioners' description, the Court did *not* say that a takings claim seeking injunctive relief would be "ripe" for adjudication in federal District Court so long as traditional ripeness tests were met. The Court did address the issue of ripeness, but only in the context of discussing whether the railroad's creditors and stockholders had "ripe" arguments that (1) federal railroad reorganization legislation rendered the Tucker Act remedy unavailable and (2) even if the Tucker Act remedy was available, it was inadequate as applied to

the government takeover of this railroad. The Court reversed the District Court's grant of an injunction against the alleged taking, concluding that the Tucker Act remedy was available and not facially inadequate, and therefore plaintiffs' sole recourse was a suit for just compensation in the claims court; "[a]s long as [plaintiffs] are assured fair value, with interest, for their properties, the Constitution requires nothing more." 419 U.S. at 156. Thus, this decision is entirely consistent with the understanding that, so long as a pathway for seeking compensation is open, a property owner has no substantive legal right, as a matter of takings doctrine, to seek injunctive relief against the alleged taking.

Nor does the *Monsanto* decision support petitioners' position that the federal District Courts can resolve takings claims. The Court did consider whether the Federal Insecticide, Fungicide and Rodenticide Act might involve a taking other than for a "public use," which the Court *could* properly have enjoined. Once the Court concluded that the statute served a public use, however, it recognized that prosecution of the claim that the statute resulted in a taking belonged in the court of claims not the District Court, and therefore reversed the District Court's injunction against the asserted taking. Again, this result and analysis are entirely consistent with the established understanding of the Takings Clause.

It is impossible to address or reconcile all of petitioners' other authorities, some stretching back to 13th century England, and there is no reason to try because most of them are irrelevant to the present case. Many of these older cases authorizing injunctive

relief are consistent with modern doctrine because compensatory relief apparently was not an available option. Others are rooted in the antiquated and now thoroughly superseded theory that takings claims against the government are properly framed as trespass or tort actions, rather than as "claims founded upon the Constitution." *See generally* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteen-Century State Just Compensation Law*, 52 Vand. L. Rev. 57 (1999). Finally some of the discordant decisions appear to reflect the Court's longstanding confusion about the relationship between the Takings Clause and the Due Process Clause. As the Court explained in detail in *Lingle,* many of the Court's older decisions (now repudiated by *Lingle*) reflect a blending of takings and due process theories. Prior to *Lingle*, it *could* plausibly be contended that a government action that fails to "substantially advance a legitimate governmental interest" would, for that reason, constitute a taking. Since a government action that fails that test should not proceed at all (even if just compensation is paid), a party asserting a taking claim on that theory *was* entitled to seek equitable relief. But *Lingle* repudiated the idea that the alleged invalidity of a government action can provide the basis for a taking claim, definitively overthrowing the last vestige of the notion that a proper takings claim can support a request for injunctive relief. In short, petitioners' historical excursion has little or no relevance to modern takings doctrine or to this case; as Chief Justice Rehnquist aptly put it, "in the light of hindsight, but perhaps for the very reason that it *is* hindsight which we now exercise, the shifting back and forth of the Court in this area until the most recent decisions bears the sound of

'Old, unhappy, far-off things, and battles long ago.'" *Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979).

Petitioners also object to Court decisions characterizing suits seeking injunctive relief under the Takings Clause in federal District Court as not "ripe" or "premature" so long as the Tucker Act remedy is available. We agree that these labels are misleading, but for different reasons. The use of these terms incorrectly implies that a takings claim against the United States can proceed in federal District Court at some later stage once certain preconditions are satisfied. In fact, generally speaking, the prosecution of a takings claim demanding just compensation in the U.S. Court of Federal Claims brings the controversy to an end, whether the claimant wins or loses. Prosecution of a takings claim in the claims court does not ripen the taking claim, it resolves it. *Cf. San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 347-48 (2005) (state court resolution of a takings claim has preclusive effect in subsequent federal court litigation).

The only way a takings suit in federal District Court might turn out to be "premature," in the sense that the lawsuit could be renewed in federal District Court at a later time, is if the Tucker Act remedy proved unavailable or if compensation became impossible to calculate. *See Hodel*, 452 U.S. at 297 (even if a federal government action does result in a taking, "such an alleged taking is not unconstitutional unless just compensation is unavailable"). *See also San Remo Hotel,* 545 U.S. at 327 (under *Williamson County*, a taking claim against a state or local government is not "ripe" in federal court "until a State fails to provide

adequate compensation for the taking") (internal quotation omitted). Apart from these exceptional cases, the nature and purpose of the Takings Clause permanently channel takings claims against the United States away from the District Courts and into the claims court.[4]

II. Petitioners' Novel Method of Presenting their Takings Argument Fails on Multiple Grounds

Rather than pursue the standard approach of suing for just compensation in the claims court, petitioners simply disobeyed the law. Petitioners declined to hold a portion of their raisin crop (and those of other growers) in reserve, as required by the raisin industry marketing program, and instead presumably sold the entire crop in the open market. As a result of these and other violations of federal law, USDA officials filed an administrative complaint against petitioners and the USDA ultimately imposed civil penalties on them, including an assessment equivalent to the value of the raisins they failed to hold in reserve. In other words, the USDA required petitioners to disgorge their (and others') illegal profits and imposed an additional penalty as a deterrent against future illegality. Petitioners responded by arguing at each stage of the administrative and subsequent judicial enforcement process that they were threatened with a taking of

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[4] The "finality prong" of *Williamson County*'s so-called "ripeness rules," which *does* involve application of traditional ripeness doctrine, *see Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n. 7 (1997), is not at issue in this case.

their property and/or that the enforcement proceedings themselves constituted a taking.

Petitioners' taking argument has evolved over the course of the litigation. In the lower courts, petitioners' takings claim focused on the alleged (threatened) taking of a portion of their raisin crop as a result of the marketing program. *See* 2009 WL 4895362, *23 ("Plaintiffs assert that raisins are personal, private property and that the government has paid no just compensation for the reserve tonnage raisins that the USDA takes each year.") In this Court, petitioners have shifted the focus to the alleged taking of the money they are required to pay to the government as a consequence of their violations. At the same time, petitioners apparently still regard their claim that the raisin marketing program itself results in a taking of their crop as the core of their case. *See* Pet. Br. at 21 ("the *reason* the cash payment demands violate the Takings Clause in this case [is that] . . . the demand for payment is being used to enforce a regulation that violates the Takings Clause"). For numerous reasons, the Court should not permit this type of ersatz takings lawsuit to proceed.

First, insofar as petitioners can be understood to still claim a taking of raisins in this Court, that claim self-evidently fails because the government never disturbed petitioners' possession of any of their raisins during the relevant period. As the District Court explained, petitioners wrote to USDA stating, "we will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state." *See* 2009 WL 4895362, *23.

Petitioners thereafter refused to set aside a portion of their crop and instead retained their entire crop in the specific years at issue. Because petitioners retained possession and "ownership" of the raisins, they cannot contend that the government has "taken" any property interest in the raisins. *See Hodel,* 454 U.S. at 294 (rejecting takings claim when plaintiffs failed to "identif[y] any property in which [plaintiffs] have an interest that has allegedly been taken by operation" of a federal statute). Indeed, it borders on the absurd for petitioners to say the government took a property interest in raisins which they apparently sold in the marketplace, presumably keeping the proceeds entirely for themselves.[5]

Nor does petitioners' takings argument with respect to raisins fare any better if viewed as a request for a retrospective declaration that the government was threatening them with a taking of a portion of their raisin crop, or as a request for a prospective injunction barring future takings of raisins. As discussed above, as the Court has said many times, the Takings Clause "does not prohibit the taking of private property," *Preseault*, 494 U.S. at 11, but instead imposes conditions upon the exercise of the taking power. Because the Takings Clause authorizes rather than prohibits the taking of private property, there is no basis for sanctioning the government's past alleged takings of raisins. Nor is there any basis for a request

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[5] In this respect petitioners stand in the same position as the petitioners in the pending *Koontz* case, who cannot claim a taking under an exactions theory because no property was actually exacted from them. *See Koontz v. St. Johns River Water Mgmt. Dist.*, No. 11-1447.

under the Takings Clause for an injunction barring the government from continuing to require petitioners to set aside a portion of their raisin crop. Because there was (and is) no barrier to petitioners filing suit seeking just compensation in the U.S. Court of Federal Claims, they were (and are) required to pursue that avenue to seek to vindicate their position.

Furthermore, the argument that the financial penalties imposed on them by the USDA constitute a taking also fails. First, the argument fails because it is a transparent effort to circumvent the principle that the Takings Clause does not prohibit a taking but merely requires payment of just compensation in exchange for a taking. For the reasons discussed above, if petitioners had sued in federal District Court seeking to enjoin the implementation of the raisin marketing program on the ground that the program results in a taking, that claim would have been instantly rejected based on *Preseault* and the other pertinent precedents discussed above. Petitioners cannot achieve indirectly what they are barred from doing directly. Allowing persons who violate regulatory requirement to raise the Takings Clause as a defense would, in practical substance, allow members of the regulated community to use the Takings Clause to enjoin the implementation of federal programs. Thus, allowing this gambit to succeed would eviscerate the principle that the Takings Clause places conditions on, but does not prohibit, the taking of private property for public use. *See Riverside Bayview Homes*, 474 U.S. at 129 n. 6 (an enforcement action "is not the proper forum for resolving" whether a regulatory program effects a taking; instead a property owner's appropriate

remedy "is to institute a suit for compensation in the Claims Court").

Adoption of petitioners' novel takings theory would contradict and seriously undermine the government's authority to proceed with lawful takings in accordance with the Takings Clause. Even if the raisin marketing program results in a taking, petitioners have no legal right to oppose implementation of the program just as, say, a citizen faced with a taking of his land by eminent domain for construction of a public roadway has no legal right to resist the seizure of his land. In both instances, so long as just compensation is available for the asserted taking and the taking serves a "public use," the government has the authority to proceed under the Takings Clause. Because an owner cannot properly resist a lawful taking, an owner cannot object based on the Takings Clause to sanctions imposed for his or her improper interference with a lawful taking. IMLA recognizes that petitioners, like all American citizens, have the ability to engage in civil disobedience. But they have no right to use their civil disobedience as a platform for raising a takings argument.

Moreover, the practical impact of petitioners' position is breathtaking. If accepted, it would provide an expansive new backdoor opportunity for raising takings arguments, as well as encourage massive law-breaking, because virtually every regulatory program at every level of government is backed up by the threat of sanctions in the event of noncompliance. *See, e.g.,* 33 U.S.C. § 1232 (1996) (authorizing $25,000 penalty for violations of Federal ports and waterways safety provisions); 49 U.S.C. § 30165 (2012) (imposing $5,000

penalty for each violation of motor vehicle safety provisions); 49 U.S.C. § 46303 (2004) (imposing $10,000 penalty for each attempt to board or actually boarding a commercial aircraft carrying a concealed and accessible dangerous weapon); N.J. Stat. § 34:15-79(d) (2009) (authorizing penalty of $5,000 for failure to comply with compulsory workers compensation insurance program); VA. Code § 15.2-730 (1997) (authorizing county government to impose schedule of penalties for violations of local ordinances regulating storage of junk and car repairs).

Second, the financial sanctions imposed on petitioners do not constitute takings because a seizure of private property for the purpose of vindicating the rule of law does not constitute a taking of private property within the meaning of the Takings Clause. Authority is sparse on whether a financial penalty for law enforcement purposes can ever constitute a taking. This is hardly surprising given that, as discussed below, government mandates to citizens to pay money to the government for any purpose are properly regarded as outside the scope of the Takings Clause. But criminal and civil forfeiture proceedings often do involve tangible property interests within the scope of the Takings Clause and decisions addressing takings claims arising from these types of proceedings provide useful guidance on whether, assuming the sanctions in this case *were* within the scope of the Takings Clause, the law enforcement purpose of these assessments would preclude treating them as potential takings.

For many decades, the Court has debated the issue of whether compelled forfeitures of tangible assets (cars, yachts, and so on) used in or in connection with

illegal activities constitute compensable takings as applied to owners who themselves engaged in no illegal conduct. *See, e.g.*, *Bennis v. Michigan*, 516 U.S. 442 (1996); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974); *Van Oster v. Kansas*, 272 U.S. 465 (1926). The Court has understandably regarded these cases as presenting difficult questions, although the Court has generally rejected takings claims advanced by innocent owners subject to forfeiture orders. But apparently all of the Court's decisions addressing this thorny issue proceed on the premise that a compelled forfeiture of property of a person who *actually* engaged in illegal actions would not constitute a taking. This principle is so firmly embedded in the Court's precedents that it may properly be regarded as a "background principle" of property law that precludes a takings claimant from asserting a protected property interest to begin with. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-31(1992).

Calero-Toledo, the Court's most recent, comprehensive discussion of the historical origins of federal and state forfeiture laws, traces the forfeiture process back to the "deodand" in England, which was in turn traceable to pre-Judeo-Christian practices. 416 U.S. at 681. In early English history, "[f]orfeiture also resulted at common law from conviction for felonies and treason," and early English law "provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws - likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." *Id*. at 682. In this country, forfeiture of estates in land resulting from a conviction for treason was prescribed by the

Constitution. *See* Art. III, § 3. But prior to the adoption of the Constitution, "the common law courts in the Colonies - and later in the states during the period of Confederation - were exercising jurisdiction in rem in the enforcement of (English and local) forfeiture statutes," and "almost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law, as were vessels used to deliver slaves to foreign countries, and somewhat later those used to deliver slaves to this country." *Id*. at 683. None of these kinds of forfeitures has ever been regarded as a taking of private property of parties who actually engaged in unlawful activity.

In light of this legal tradition, given that petitioners plainly and willfully violated the law, the financial assessments imposed on them by the government based on their violations of the law cannot be regarded as takings of private property. Compliance with the law is the common obligation of all citizens. Various penalties, including in some instance seizures of private property, are imposed on law breakers. While a host of constitutional provisions and other legal rules guide and restrict this process, it would create a dangerous new impediment to law enforcement to suggest that every-day civil and criminal penalties imposed on law breakers can constitute takings.

Finally, petitioners cannot properly assert a takings claim in this case because a generalized imposition of financial liability, regardless of its underlying purpose, cannot constitute a taking of private property within the meaning of the Takings Clause (as opposed, say, to a deprivation of property within the meaning of the

Due Process Clause).[6] A five-justice majority recognized this principle in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *see id*. at 539-45 (Kennedy, J., concurring in judgment and dissenting in part); at 554-56 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg), and the Court should apply this principle in this case. *Eastern Enterprises* involved a constitutional challenge to the retroactive liability provisions of federal legislation requiring coal operators to fund the health care costs of former miners. While there was no majority opinion for the Court, five justices joined in concluding that the imposition of this kind of financial liability cannot support a takings claim. As Justice Kennedy explained, "one constant limitation" in the Court's takings jurisprudence "has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake." *Id*. at 541. Therefore, he concluded, the challenged legislation could not give rise to a viable takings claim. *Id*. at 540. The four dissenting justices in *Eastern Enterprises* agreed with Justice Kennedy that the claimant had no viable takings claim, because "[t]he 'private property'

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[6] IMLA recognizes that the federal appeals court ruled that petitioners' taking claim was not ripe because they failed to pursue available remedies in the U.S. Court of Federal Claims. In arguing against this ruling, petitioners seek, in effect, to create another exception to the general rule that the exclusive remedy against the United States for an alleged taking is a suit for just compensation in the U.S. Court of Federal Claims. Whatever the merits of that argument, the more important and fundamental issue raised by this case is whether the Takings Clause provides a defense to monetary sanctions imposed for law enforcement purposes, especially when the sanctions could easily have been avoided by presenting the takings issue to the U.S. Court of Federal Claims.

upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property. . . . This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money . . . ." *Id.* at 554 (Breyer, J., dissenting).

As Justice Kennedy indicated in *Eastern Enterprises*, the general principle that imposition of monetary liability does not implicate the Takings Clause does not alter the fact that government seizures of specific funds contained in discrete accounts can constitute takings. *See* 524 U.S. at 540; *see, e.g., Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (interest income generated by funds held in IOLTA accounts constitutes property of the owner of the principal under the Takings Clause); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980) (interest generated by funds in segregated escrow account constitutes property for takings purposes). The difference between these two types of cases is that the imposition of a generalized liability affects total wealth whereas in the case of segregated funds a government action dictating disposition of the funds affects an identifiable property interest. As the Court stated in *United States v. Sperry Corp.,* 493 U.S. 52, 66 n. 9 (1989), "[u]nlike real or personal property, money is fungible."

As a matter of first principles, the conclusion of the five-justice majority in *Eastern Enterprises* is well

supported.[7] Starting with the constitutional text, the language of the Takings Clause indicates that it does not extend to financial liabilities imposed by the government. The word "taking" in the Takings Clause is naturally read to refer to government action affecting some identifiable "thing." *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va L. Rev. 885, 976-77 (2000) ("In order to expropriate, confiscate, seize, or take property, one must identify a particular piece of property— a 'thing'—that has been expropriated, confiscated, seized, or taken."). Imposition of a generalized obligation to pay money is not within the scope of the Takings Clause because such a mandate does not affect a particular "thing." As Professor Merrill succinctly observed, "[o]ne cannot 'take' the bottom line of a balance sheet." *Id.*

If the Takings Clause were applied to monetary penalties of the kind at issue in this case, governments that levy ordinary taxes could face takings liability on the same theory. There is no clear basis for distinguishing between the types of monetary sanctions at issue in this case, the financial liability imposed in *Eastern Enterprises*, and a wide variety of public taxation programs. *See Eastern Enterprises*, 524 U.S. at 556 (Breyer, J., dissenting) (observing that the idea

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[7] Contrary to petitioners' representation, *see* Pet Br. at 18, the overwhelming majority of lower courts have followed the lead of Justice Kennedy and the rest of the majority, not the plurality, in *Eastern Enterprises*. *See, e.g., Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338-40 (Fed. Cir. 2001) (en banc); *Swisher International, Inc. v. Schafer*, 550 F.3d 1046 (11th Cir. 2008); *Empress Casino Joliet Corp. v. Giannoulias*, 896 N.E.2d 277 (Ill. 2008).

of applying the Takings Clause to financial liabilities "bristles with conceptual difficulties," not least because "If the [Takings] Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.,* when it assesses a tax?"). Converting taxes into potential takings would be a revolutionary step, for as far back as 1880, the Court explained that "taxation for a public purpose, however great, [is not] the taking of private property for public use, in the sense of the Constitution." *Mobile County v. Kimball*, 102 U.S. 691, 703 (1880). The Court has never wavered from this position. In *Penn Central* the Court stated: "Government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See also Brown v. Legal Foundation of Washington,* 538 U.S. 216, 243 (2003) (Scalia, J., dissenting) ("[t]axes and user fees . . . are not takings").

Beyond all this, there is simply no need to torture the Takings Clause in an attempt to make it fit this type of case, just as the majority recognized in *Eastern Enterprise* there was no justification for torturing the Takings Clause to address the claim in that case. As Justice Kennedy stated in *Eastern Enterprises*, in a constitutional challenge to a government mandate that a citizen pay out money, "the more appropriate constitutional analysis arises under the general due process principles rather than under the Takings Clause." *Eastern Enterprises*, 524 U.S. at 545. IMLA has little doubt that if the penalty imposed on petitioners were seriously out of proportion to the

nature of their violations of federal law, the Due Process Clause could potentially provide relief.[8]

Contrary to petitioners' argument, their novel takings theory gains no support from the fact that part of the financial sanctions imposed by USDA were calculated based on the market value of raisins petitioners were required to reserve but sold instead. This fact surely does not support a claim that petitioners suffered a taking of any property interest in their raisins, because the facts otherwise refute that claim. Moreover, as the United States emphasizes, the amount of the sanctions was based in part on the volume of raisins produced by petitioners and in part on the volume of raisins they handled for other growers in their capacity as a "handler." Nor does this argument support the theory that the sanctions themselves constitute a taking of money. All of the penalties USDA imposed on petitioners were designed for the purpose of punishing them and deterring them from engaging in further illegal actions. In this light, forcing petitioners to disgorge the dollar equivalent of the profits earned from selling raisins required to be placed in reserve was well tailored to achieve USDA's law enforcement goal. The method the USDA used to

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[8] As the United States explains, *see* U.S. Br. at 31-38, even under the reasoning of the *Eastern Enterprises* plurality, this type of monetary sanction could not support a takings claim. It would be one thing to say that a federal statute, like the Coal Act, effects a taking by directly imposing financial liabilities on certain parties. It would be quite another to say that monetary sanctions can effect a taking when they have been imposed for law enforcement purposes and only because the claimant has bypassed the opportunity to sue for a taking of a tangible property interest.

calculate part of the sanctions does not alter the fact that they were imposed for a law enforcement purpose and they represent the kind of generalized liability that has been held to fall outside of the Takings Clause.

Furthermore, this aspect of the case might well convert petitioners' case into a virtual one-off. Many, probably most statutes providing for the assessment of penalties for non-compliance with regulatory requirements call for consideration of a variety of factors that will yield penalty amounts that bear little or no direct relationship to the unrestricted value of the property at issue. For example, section 309 of the Clean Water Act states that in determining an appropriate administrative penalty the EPA "shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require," 33 U.S.C. § 1319(g)(3). Similarly, section 518 of the federal Surface Mining Control and Reclamation Act provides that penalties, which are capped at $5,000 for each violation, shall be calculated based on "the permittee's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation." 30 U.S.C. § 1268(a). Because the amounts of most civil and criminal penalties will bear little or no direct relationship to the

economic burden allegedly imposed by the underlying regulatory program, petitioners' novel method of presenting a takings argument would represent a highly unreliable way to assess whether the regulatory program itself results in a taking,

III. A Properly Presented Claim for Just Compensation Based on the AMMA and the Raisin Marketing Order Would Almost Certainly Fail.

Because petitioners have not presented a case that properly frames the issue of whether the raisin industry marketing program results in a compensable taking under the Fifth Amendment, the Court cannot proceed to address the merits of petitioners' takings claim. However, if and when such a claim is properly presented, IMLA submits that such a claim should be rejected.

First, while petitioners present the program as involving a direct appropriation of the portion of their crop they are barred from selling in the marketplace, that characterization of the program is mistaken. As the Court recently said, "[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." *Arkansas Game & Fish Commission v. United States,* 133 S.Ct. 511, 518 (2012), quoting *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302, 322 (2002). Thus, if USDA officials came onto petitioners' land and hauled the raisins away, there would be no question that there was an appropriation, regardless of whether the interest taken was the entire crop or only a portion.

But that is not, in fact, what occurs under this program. Instead, the raisins remain under the physical control of raisin handlers. The Committee subsequently decides to whom the reserved raisins shall be sold or what other provision shall be made for disposal of the raisins.

This program surely curtails raisin producers' ability to sell their property, but the program essentially regulates rather than appropriates their interest in their crops. The government is not seizing the physical raisins and deploying them to some governmental purpose. *Cf. United States v. Pewee Coal Co.*, 341 U.S. 114 (1951). Instead, it is regulating the producers' use of property by determining how the right to sell property shall be exercised. Though the regulation is in the form of an affirmative mandate about how property shall be used rather than a restriction on how it can be used, that difference does not make the government order a direct appropriation rather than a regulation of property. *See Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 440 (1982) (government order requiring property owners to install equipment on their property would not constitute a *per se* taking).

Viewed as a potential regulatory taking, the raisin marketing order surely should survive a takings challenge under the *Penn Central* framework. Because the marketing program only affects a portion of a producer's crop each year, the program, even if it were entirely negative in its effects from a producer standpoint (which it most surely is not), probably does not result in a drastic adverse economic loss. In the years at issue in this case, the order governed the sale

of less than half of the raisin crop each year, and the petitioners reaped some economic gain even from the reserved raisins in one of these years. *Cf. Palazzolo v. Rhode Island,* 533 U.S. 606 (2001) (rejecting *per se* taking claim where plaintiff retained one buildable lot in a 28-acre wetland parcel); *see also Palazzolo v. Rhode Island, 2005 WL 1645974* (R.I. Super. Ct) (rejecting *Penn Central* claim on remand). Furthermore, given the highly regulated nature of the raisin industry, as well as the fact that this USDA program has been in place for over 70 years, petitioners cannot plausibly contend that the program's operation interferes with their reasonable, investment-backed expectations. Finally, it is relevant to this analysis, as the Court observed in *Lucas, supra*, that personal property is different from real property for the purpose of takings analysis; as the Court put it, when it comes to personal property, "the state's traditionally high degree of control over commercial dealings" ought to put a property owner on notice "of the possibility that the new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." 505 U.S. at 1027-28

Even if the program is viewed as effecting a direct appropriation of raisins, the claim should still fail. The striking feature of this program is that it is not designed to serve some generalized public interest but rather is primarily designed to advance the economic interests of raisin growers, including the petitioners themselves, quite possibly *at the expense* of the general public. As the Court has stated, the primary purpose of the program is "to raise the price of agricultural products and to establish an orderly system for

marketing them." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 346 (1984). In other words, the program predictably elevates the price at which raisin producers sell raisins to the public; at the same time, the program lowers the price at which reserved raisins can be sold or, on occasion, precludes producers from reaping any economic return from this portion of their crop. The effect of this price support system on consumers (a group that is fairly co-extensive with the general taxpayers responsible for takings liabilities) is almost certainly to increase the price they have to pay for raisins. More importantly from a takings perspective, the program produces a complex mix of positive and (probably) negative effects on the value of producers' raisins crop each year.

Unless petitioners can show that the *net* effect of the program is to impose economic harm on them, their takings claim will fail. Even one asserting a *per se* physical taking can only prevail if he or she can show that the government action has produced compensable harm. *See Brown*, 538 U.S. at 216 (ruling that, even on the assumption that legal clients suffered a *per se* appropriation of their property as a result of the IOLTA program, they were barred from proceeding with a claim for just compensation under the Takings Clause in the absence of a showing that they suffered a net economic loss as a result of the program). Since the majority of raisin producers, for whose economic benefit the marketing program was created in the first place, apparently support the program's continuation, it seems unlikely that raisin producers as a whole, or even individual growers, are suffering net economic loss as a result of the program's operation. In any event, the prosecution of such a takings claim will

require an attempt to show that this intuitively correct conclusion is wrong.

CONCLUSION

For the foregoing reasons, *amicus* International Municipal Lawyers Association respectfully submits that the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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