No. _____

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under federal regulations, a "handler" of raisins must turn over a percentage of his raisin crop to a federal entity in order to sell the remainder on the open market — often in exchange for no payment or payment below the cost of raisin production. For the 2003 and 2004 crop years, the federal government brought an enforcement action against petitioners, seeking to recover the monetary value of raisins they did not turn over to the government. Petitioners raised the Takings Clause as a defense. The Ninth Circuit initially rejected petitioners' takings defense on the merits, but on Petition for Rehearing vacated its prior merits opinion and replaced it with an opinion dismissing the takings defense for lack of jurisdiction. The Questions Presented are:

1. Whether the Ninth Circuit erred in holding, contrary to the decisions of five other Circuit Courts of Appeals, that a party may not raise the Takings Clause as a defense to a "direct transfer of funds mandated by the Government," *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521 (1998) (plurality), but instead must pay the money and then bring a separate, later claim requesting reimbursement of the money under the Tucker Act in the Court of Federal Claims.

2. Whether the Ninth Circuit erred in holding, contrary to a decision of the Federal Circuit, that it lacked jurisdiction over petitioners' takings defense, even though petitioners, as "handlers" of raisins under the Raisin Marketing Order, are statutorily required under 7 U.S.C. § 608c(15) to exhaust all claims and defenses in administrative proceedings before the United States Department of Agriculture, with exclusive jurisdiction for review in federal district court.

RULE 14.1(b) STATEMENT

Petitioners are Marvin D. Horne, Laura R. Horne, d.b.a. Raisin Valley Farms, a partnership, and d.b.a. Raisin Valley Farms Marketing Association, a.k.a. Raisin Valley Marketing, an unincorporated association; the Estate of Don Durbahn* and the Estate of Rena Durbahn, d.b.a. Lassen Vineyards, a partnership, plaintiffs-appellants below.

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

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

RULE 29.6 STATEMENT

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals has been designated for publication and is reported at 673 F.3d 1071. Pet. App. 1a. An earlier opinion of the court of appeals was designated for publication, but was undesignated upon the issuance of the court of appeals' second opinion. *Id.* at 26a. The opinion of the district court is unpublished, and electronically reported at 2009 WL 4895362. Pet. App. 55a.

JURISDICTION

The court of appeals rendered its original decision in this case on July 25, 2011. The court of appeals then denied petitioners' petition for panel rehearing and rehearing *en banc* and issued a substantially revised opinion on March 12, 2012. On June 1, 2012, Justice Kennedy extended the time for filing a petition for certiorari to and including July 25, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

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

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

U.S. Const. amend. V.

The relevant provisions of the Tucker Act, 28

U.S.C. § 1491(a)(1); the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 601 *et seq.*; and the *Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California*, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order") are set forth in the appendix to this petition.

STATEMENT

Under the Depression-era Agricultural Marketing Agreement Act of 1937, and accompanying regulations, the United States Department of Agriculture ("USDA") requires "handlers" of raisins to set aside a specified portion of their yearly raisin crop — known as "reserve-tonnage" raisins — "for the account" of a committee established by the Department. The committee, known as the Raisin Administrative Committee ("RAC"), then (1) disposes of the reserve-tonnage raisins as it sees fit — often to be used in federal school lunch and other nutritional programs — and (2) pays such compensation for the raisins as it sees fit. In the two years relevant to this case (2002-2003 and 2003-2004), handlers were required to set aside 47 percent and 30 percent of the crop, respectively, as reserve-tonnage raisins. For the 2003-2004 year, the RAC determined that compensation for reserve-tonnage raisins should be set at precisely zero dollars — *i.e.*, petitioners received no compensation for the USDA's appropriation of almost one-third of their crop. For the 2002-2003 year, the RAC set a compensation price that was well below the cost of producing raisins.

The result of these regulations is that the federal government — without providing the just compensation required by the Fifth Amendment — extracts

title to a hefty portion of a farmer's annual raisin crop as a condition for giving the farmer permission to sell the remainder of his crop on the market.

In 2004, the USDA initiated an enforcement action against petitioners for failing to set aside the reserve-tonnage raisins during the 2002-2003 and 2003-2004 years. In administrative proceedings, the USDA sought, and ultimately recovered, the dollar equivalent of the raisins that petitioners were supposed to have given, but did not give, to the government. As required by statute, petitioners raised all defenses — including their Takings Clause defense — before the agency. After losing before the agency, petitioners sought judicial review of the order in the United States District Court for the Eastern District of California, as required by the exclusive jurisdiction provision set forth in the AMAA. Among other things, petitioners argued that imposition of the fine would amount to a taking without just compensation under the Fifth Amendment to the U.S. Constitution. The District Court granted summary judgment for the government, and petitioners appealed.

A panel of the Ninth Circuit initially affirmed the judgment of the District Court on the merits. The panel reasoned that the regulatory scheme's requirement that petitioners forfeit a substantial portion of their raisin crop to the government was not a taking for which just compensation is due because the regulation "applies to [petitioners] only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Pet. App. 43a.

After petitioners filed a rehearing petition pointing out that the panel opinion was inconsistent with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458

U.S. 419, 439 n.17 (1982), the panel abruptly changed course and held — without ordering full briefing on the issue or oral argument — that the court lacked jurisdiction over the takings issue. The panel reasoned that petitioners' takings defense was premature and must be brought as a freestanding claim for compensation in a subsequent Tucker Act action in the Court of Federal Claims. At the same time, the panel resolved petitioners' statutory and Eighth Amendment arguments. The panel held it lacked jurisdiction even though (1) petitioners raised the Takings Clause not in an affirmative lawsuit seeking compensation from the federal government, but as a defense to a government-initiated action seeking a payment of money from *them*, and (2) petitioners, as "handlers," were statutorily required to exhaust their takings defense before the agency, and to seek judicial review of the agency's disposition of that claim in federal district court.

Under the panel's reasoning, a raisin handler with both Takings Clause and other defenses to agency action must bifurcate his defenses and undertake two separate trips through the courts. First, he must bring all other claims and defenses in federal district court under the AMAA. Then, if he is unsuccessful, he must pay any fine assessed and bring a separate Tucker Act lawsuit in the Court of Federal Claims to challenge the fine as a taking without just compensation. Nothing in the text of the AMAA or principles of takings law requires such a cumbersome and counterintuitive procedural framework.

1. Under the AMAA, the USDA heavily regulates segments of California's agricultural economy. Pursuant to the Act, the USDA has promulgated "marketing orders" for raisins, as well as several other

agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint oil. *See Evans v. United States*, 74 Fed. Cl. 554, 558 (2006). In general, these orders establish food product reserve programs under which farmers must set aside a specified portion of their agricultural crop for the federal government.

The order regulating raisins was promulgated in 1949. While similar in some respects to orders regulating other agricultural segments, the Raisin Marketing Order is different in two crucial ways: "it effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Evans*, 74 Fed. Cl. at 558; *see also* 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66.

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

> (a) [a]ny processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within [California] to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. A "producer" is "any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins." § 989.11.

Under the Order, the RAC and USDA must establish certain raisin tonnage requirements, known as "reserve tonnage" and "free tonnage" percentages, which vary from year to year. 7 C.F.R. §§ 989.66, 989.166. The percentages are established by (and unknown until) February 15 of each crop year, long after farmers have expended substantial resources for the cultivation and harvest of their crop for the year. §§ 989.21, 989.54(d). Once the percentages are fixed, "handlers" of raisins must set aside the "reserve tonnage" requirement "for the account" of the RAC. §§ 989.65, 989.66(a), (b)(1). The RAC may require the delivery of the reserve-tonnage raisins to anyone chosen by the RAC to receive them. § 989.66(b)(4). Or the RAC may sell reserve-tonnage raisins to handlers for resale in export markets, §§ 989.67(c)-(e), or it may simply direct that they be sold or disposed of by direct sale or gift to United States agencies, foreign governments, or charitable organizations, §§ 989.67(b)(2)-(4).

Pursuant to these regulations, in the two years relevant to this case, 2002-2003 and 2003-2004, the USDA required farmers to turn over 47 percent and 33 percent of their raisin crop. *See* Raisin Administrative Committee, *Marketing Policy and Industry Statistics, 2010*, at 27, *available at* http://www.raisins.org/files/Marketing%20Policy%202010.pdf (last visited July 25, 2012). Through the reserve-tonnage set-aside, the government obtained, respectively, 22.1 million and 38.5 million pounds of raisins in those two years. *See id.* at 20. In 2002-2003, the farmers who produced those raisins were paid well below the cost of production (and considerably less than their fair market value). In 2003-2004, the government paid nothing at all for the 38.5 mil-

lion pounds of raisins that it took and used. Pet. App. 9a.

The AMAA creates administrative and judicial review procedures that "handlers" of raisins must follow to appeal a USDA order. Any "handler" who violates a marketing order is subject to fines and penalties in a final USDA order, which is "reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant." 7 U.S.C. §§ 608c(14)(A)-(B). A "handler" may also bring a pre-enforcement petition with the Secretary of Agriculture arguing that a marketing order "is not in accordance with law." § 608c(15)(A). The "District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are [ ] vested with jurisdiction in equity to review such ruling." § 608c(15)(B). The USDA has also promulgated "Rules of Practice Governing Proceedings on Petitions to Modify or to Be Exempted from Marketing Orders," under which "[t]he term handler means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i). As a result, all persons subject to marketing orders must bring any defenses they may have to USDA orders in District Court.

2. Petitioners are independent farmers, a very small part of the large raisin industry in California, which produces approximately 99.4 percent of the United States' and 40 percent of the world's raisin crop. Since 1969, they have produced raisins in Fresno and Madera Counties.

Because they marketed only their own raisins and did not otherwise participate in the distribution end

of the raisin business, petitioners regarded themselves as "producers" and not "handlers" under the Raisin Marketing Order and the AMAA. They therefore did not set aside the reserve-tonnage requirement for 2002-2003 and 2003-2004, the two years relevant to this case. Pet. App. 10a.

3. On April 1, 2004, the Administrator of the Agricultural Marketing Service initiated an enforcement action against petitioners within the USDA, claiming that they had violated the AMAA by failing to comply with the Raisin Marketing Order. Pet. App. 11a. According to the Administrator, petitioners became "handlers" subject to the Order upon their marketing of their own raisins. Under this argument, all producers who sell any portion of their crop are effectively handlers subject to the Order.

An Administrative Law Judge in the USDA agreed. Pet. App. 189a. On appeal from that decision, a USDA Judicial Officer ("JO") found petitioners liable for various regulatory violations. Petitioners unsuccessfully raised their Takings Clause defense in these proceedings. *Id.* at 136a, 168a.

Of relevance here, the JO determined that, as "handlers," petitioners violated 7 C.F.R. § 989.66 and § 989.166 by failing to hold reserve raisins for the 2002-2003 and 2003-2004 crop years. Pet. App. 121a, 145a. The JO ordered forfeitures and penalties for petitioners' failure to acquiesce in the USDA's taking of their property. Specifically, the JO ordered petitioners to pay $438,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-2003 (632,427 pounds) and 2003-2004 (611,159 pounds) crop years, as determined by the "field price" typically paid to producers for free-

tonnage raisins in those years. 7 C.F.R. § 989.54(b). The JO also ordered petitioners to pay $202,600 in civil penalties pursuant to 7 U.S.C. § 608c(14)(B), and an additional $8,783.39 in unpaid assessments pursuant to 7 C.F.R. § 989.80(a). It was only in their capacity as "handlers" that petitioners were subject to the Order (and hence these fines and penalties).

4. Petitioners filed this action in District Court seeking review of the agency decision pursuant to section 608c(15)(B). Petitioners contended that the requirement that they contribute a specified percentage of their raisin crop to the government is a taking in violation of the Fifth Amendment. Petitioners also argued that (1) they are producers, not handlers, and thus are not subject to the Raisin Marketing Order; and (2) the penalties imposed upon them violate the Eighth Amendment Excessive Fines Clause. The district court granted summary judgment for the USDA. Pet. App. 55a.

Petitioners appealed. On July 25, 2011, a panel of the Ninth Circuit affirmed the judgment in its entirety. The panel held that petitioners are "'handlers' subject to the Raisin Marketing Order's provisions." Pet. App. 38a. With respect to petitioners' takings defense, the panel observed that the argument that a farmer must receive just compensation for a government appropriation of raisins "has some understandable appeal." *Id.* at 42a. The panel recognized that the "raisins are personal property, personal property is protected by the Fifth Amendment, and each year the RAC 'takes' some of their raisins, at least in the colloquial sense." *Id.* And the panel acknowledged that "the government could [not] come onto the Hornes' farm uninvited and walk off with forty-seven percent of their crops without offering just compensa-

tion." *Id.* Yet the panel held that no taking occurs under the regulatory scheme — and no compensation is required — when "the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." *Id.* at 43a.

5. In a Petition for Panel Rehearing or Rehearing *En Banc*, petitioners pointed out that this Court in *Loretto* had rejected the panel's reasoning in a passage that the panel failed to address. Pet. App. 269a. There, Justice Marshall, writing for the Court, said that:

> It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. [Defendant's] broad "use-dependency" argument proves too much. For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.

458 U.S. at 439 n.17.

The government filed an opposition to petitioners' rehearing request. In its opposition, the government argued — for the first time in the litigation — that the panel lacked subject matter jurisdiction over the takings defense, because that issue must be brought in the Court of Federal Claims under the Tucker Act. The government claimed that "[n]othing in the AMAA precludes a Tucker Act claim for an alleged taking under a marketing order." Pet. App. 257a. It drew no jurisdictional distinction between claims brought by handlers and claims brought by producers.

In reply, petitioners explained that under *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (plurality), a takings defense to a direct transfer of funds mandated by the government was immediately ripe. Petitioners also observed that the AMAA provided exclusive administrative and judicial review provision for "handlers" of raisins; that, according to the government and the panel, petitioners were "handlers"; and that the government's position was inconsistent with the Federal Circuit's holding that raisin "handlers" could not bring a takings claim in the Court of Federal Claims. *See Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1372 (Fed. Cir. 2005). Pet. App. 230a.

The panel then invited the government to file a sur-reply. In that filing, the government acknowledged that the AMAA established excusive administrative and judicial review provisions for raisin "handlers." But it claimed for the first time that petitioners were "producer-handlers" of raisins; that producer-handlers are required to follow the AMAA's administrative provisions only when they bring claims in their capacity as handlers; and that petitioners had brought their takings claim in their capacity as producers. Pet. App. 217a.

Because this novel jurisdictional theory appeared to contradict the USDA's position that petitioners were liable under the Order in their capacity as handlers, petitioners requested leave to file a supplemental brief. This motion was denied. Pet. App. 215a.

On March 12, 2012, the panel issued a substantially revised opinion. The panel's new opinion retained its initial holdings that petitioners satisfied the definition of "handlers" under the Raisin Marketing Order and that petitioners did not have a valid defense under the Excessive Fines Clause. But the panel replaced the entirety of its disposition of petitioners' takings defense on the merits with a disposition on jurisdictional grounds. Pet. App. 14a-18a.

The panel's jurisdictional analysis took two steps. First, the panel concluded that "the just-compensation requirement does not force the government to provide immediate compensation at the time of a taking; it must simply provide an adequate process for obtaining compensation." Pet. App. 15a (quotation marks and citations omitted). In this regard, the panel concluded that equitable takings challenges — including equitable takings challenges to transfers of money damages to the federal government — must be brought in the Court of Federal Claims under the Tucker Act. Second, the panel concluded that, although the AMAA establishes an exclusive judicial review provision for "handlers" of raisins (which petitioners have followed), and although petitioners are "handlers" of raisins, they are "producer-handlers" who must bring their takings claim "in their capacity as producers." *Id.* at 17a.

Notwithstanding the new disposition of petitioners' takings defense, the panel still provided that

"[t]he summary judgment of the district court is AFFIRMED," Pet. App. 23a — rather than vacated and remanded with instructions to dismiss petitioners' takings defense for lack of jurisdiction. On the same day as the revised opinion, the panel released an order providing that it would not entertain any additional petitions for rehearing in the appeal. *Id.* at 24a.

REASONS FOR GRANTING THE PETITION

The panel's jurisdictional holding rests on two fundamental and independent errors, either one of which would require reversal of the judgment below.

First, contrary to the reasoning of a plurality of this Court and the holdings of five courts of appeals, the panel failed to recognize that a private party may bring an equitable Takings Clause defense to the imposition of a money-damages fine. Such a defense is ripe the moment it is initiated because, in requiring the payment of money, the government has already determined that no "just compensation" will be forthcoming in any subsequent proceedings. Accordingly, the ripeness requirement for equitable claims to enjoin a "direct transfer of funds mandated by the Government" is altogether different from the rules governing requests for money damages from the federal Government or injunctions to block the Government's taking of tangible property. *Apfel*, 524 U.S. at 521 (plurality). Under such circumstances, "the presumption of Tucker Act availability must be reversed" because a separate and subsequent "claim for compensation would entail an utterly pointless set of activities." *Id.* (quotation marks and citations omitted). Both before and after *Apfel*, courts of appeals have applied this rule of constitutional ripeness for "direct

transfers of funds."

Petitioners brought this aspect of *Apfel* to the Ninth Circuit's attention, but the panel ignored it. Instead, the panel relied on *Bay View, Inc. v. AHT-NA, Inc.*, 105 F.3d 1281 (9th Cir. 1997), a pre-*Apfel* case on the wrong side of the circuit split addressed in *Apfel*. The panel's decision thus conflicts with the law of this Court and creates a sharp circuit split with the decisions of other federal courts of appeals.

Second, the panel correctly recognized that "handlers" of raisins under the AMAA must raise their challenges in administrative proceedings, and then use the AMAA's exclusive judicial review procedures to appeal those challenges. Pet. App. 16a. And the panel correctly noted that petitioners — whom the USDA and the panel determined to be "handlers" under the AMAA and Raisin Marketing Order — have followed those exclusive review provisions in this case. Yet the panel nevertheless held that petitioners brought their takings defense "not in their capacity as handlers but in their capacity as producers," *id.* at 17a, and accordingly could not take advantage of the exclusive judicial review procedures for handlers of raisins to challenge a fine that was imposed on them solely in their capacity as handlers of raisins.

Nothing in law or logic supports this Kafkaesque result. The panel's holding is flatly contrary to the statutory text of the AMAA's exclusive review provisions. Under the AMAA, "[a]ny handler" — not just some handlers — seeking to challenge an order, including on constitutional grounds, must exhaust administrative remedies before the Secretary of Agriculture. 7 U.S.C. § 608c(15)(A); *see United States v. Ruzicka*, 329 U.S. 287, 294 (1946); *United Dairymen*

of Arizona v. Veneman, 279 F.3d 1160, 1165-166 (9th Cir. 2002). The statute makes no provision for separate treatment of "handlers" who are also deemed "producers," such that a "handler" challenging a reserve program in its "capacity as [a] producer[]" may somehow avoid the judicial review provisions. To the contrary, it provides that a marketing order shall not "be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B). The panel deprives "handler-producers" of their statutory right to obtain judicial review of agency orders before the District Court.

The panel's holding that petitioners bring their takings challenge "in their capacity as producers" contradicts the procedural history of this case. It was the agency that insisted that petitioners are "handlers," and the panel held they were "handlers" at the USDA's urging. Indeed, it was only in their capacity as "handlers" that the reserve requirements applied to petitioners or that they were fined for noncompliance. If an order is imposed on a party as a "handler," it defies logic to say his attempt to obtain judicial review of that order is undertaken in some other capacity.

These legal errors, by themselves, would warrant this Court's review. The curious procedural twists that this appeal has taken before the Ninth Circuit, however, bolster the need for this Court's intervention. After the government raised its jurisdictional argument for the first time in its opposition brief to petitioners' rehearing petition, the panel did not request full briefing or oral argument on the jurisdictional issues — as petitioners suggested it should. Instead, the panel allowed the government to raise new jurisdictional arguments in its sur-reply brief,

and then did not permit petitioners to file a supplemental brief addressing those new arguments. And then, after holding that courts other than the Court of Federal Claims lack subject-matter jurisdiction over petitioners' Takings Clause defense, the panel concluded its revised opinion with the words: "[t]he summary judgment of the district court is AFFIRMED," instead of vacating the district court's merits disposition of that issue for want of jurisdiction. After all that, the panel specifically disallowed petitioners to file a new rehearing petition from the new jurisdictional holding.

With all respect, it is intolerable for a panel of a United States Court of Appeals to treat a party in this fashion. For these reasons, and those explained in further detail below, this Court should grant the petition for certiorari.

I. The Ninth Circuit's Holding That A Party May Not Raise A Takings Clause Defense To A Government Order Mandating A "Direct Transfer Of Funds" Conflicts With *Apfel* And The Decisions Of Five Courts Of Appeals.

1. The Takings Clause of the Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. This Court has interpreted the Clause as incorporating a "ripeness" requirement that, ordinarily, requires a plaintiff seeking money damages to pursue avenues for compensation before bringing a takings claim. As the Court explained in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the Fifth Amendment proscribes not the taking of property, but takings without just compen-

sation. As a result, "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Id.* at 194-95 (citation omitted). According to *Williamson County*, the Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." *Id.* at 194 (quotation marks and citation omitted).

In the federal context, the Tucker Act gives the Court of Federal Claims exclusive jurisdiction over "any claim against the United States founded . . . upon the Constitution" (including just compensation claims) in excess of $10,000. 28 U.S.C. § 1491(a)(1). As a result, in general, "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson*, 473 U.S. at 195 (citation omitted); *see also Preseault v. ICC*, 494 U.S. 1, 11 (1990). Correspondingly, in general, "[e]quitable 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." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984).

2. This Court has, however, recognized important exceptions to the general rule and thereby recognized circumstances in which a party may enjoin a taking.

Specifically, a requirement that a private party make a cash payment to the government implies that

no Takings Clause remedy will later be available under the Tucker Act to recover those funds. Accordingly, a plurality of this Court has explained that a party may bring an equitable takings defense, prior to the initiation of a Tucker Act lawsuit, to a "direct transfer of funds mandated by the Government." *Apfel*, 524 U.S. at 521 (quotation marks and citation omitted). Ripeness is a limitation on the party invoking federal judicial authority. As the *Apfel* plurality recognized, it does not logically foreclose a takings defense to a remedy sought by the government that, if granted, would violate the Constitution.

The facts of *Apfel* are illustrative. In *Apfel*, the Court considered a takings claim by a company no longer involved in the coal industry that challenged the constitutionality of an act establishing a mechanism for funding health care benefits for coal industry retirees. Justice O'Connor, writing for a plurality of the Court, concluded that the act violated the Takings Clause and the challenged provisions should be enjoined as applied to Eastern. As a preliminary matter, however, the opinion was forced to address the Court's jurisdiction, because Eastern raised the Takings Clause in "a declaratory judgment that the [act] violates the Constitution and a corresponding injunction against the . . . enforcement of the Act as to Eastern." *Id.* at 520.

The plurality determined that the takings issue was ripe. It noted that this Court had many times addressed takings claims on the merits in comparable postures. *See Babbitt v. Youpee*, 519 U.S. 234 (1997); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1996); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S.

602 (1993); *Hodel v. Irving*, 481 U.S. 704 (1987). The plurality reasoned that "Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act for '[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation.'" 524 U.S. at 521 (citation omitted). "Accordingly, the presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds mandated by the Government." *Id.* (quotation marks and citation omitted). "In that situation, a claim for compensation would entail an utterly pointless set of activities." *Id.* (quotation marks and citation omitted). "[T]he declaratory judgment and injunction sought by [Eastern] constitute an appropriate remedy under the circumstances, and . . . it is within the district courts' power to award such equitable relief." *Id.* at 522.

3. After *Apfel*, three courts of appeals held that a Takings Clause challenge to a "direct transfer of funds" is ripe at the point at which the transfer is required, joining two other circuits that had reached the same conclusion prior to *Apfel*.

In *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 270 F.3d 180 (5th Cir. 2001), *vacated on other grounds sub nom. Phillips v. Washington Legal Foundation*, 538 U.S. 942 (2003), the Fifth Circuit addressed whether equitable relief was available to enjoin the alleged taking of interest in IOLTA accounts. The court observed that "the challenged governmental action in the case at hand does not merely burden real or personal property; instead, it involves [the State's] taking all of the interest earned on client-funds in IOLTA accounts." *Id.* at

193. The court thus held that "it is more analogous to the challenged governmental actions in [*Apfel*], which involved payment of money to, or to support, a government program, than to the challenged governmental actions in *Monsanto* and *Williamson County*, which burdened real or personal property, and in which a procedure for seeking just compensation was available." *Id.* at 193-94. The Fifth Circuit explained that, "because the purpose of IOLTA is to take the interest generated from client-funds and use it to fund legal services for the indigent, it is obvious that the program makes no provision for payment of just compensation. If the interest earned on client-funds were available as just compensation for the clients, the very purpose of the program would be thwarted; therefore, it would defy logic, to say the least, to presume the availability of a just compensation remedy." *Id.* at 194.

Similarly, in *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007), the First Circuit held that this "line of cases suggests the inapplicability of the *Williamson County* prerequisites to a taking that involves the direct appropriation of funds." *Id.* at 19.

Likewise, in *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000), the Fourth Circuit held that ripeness under the Takings Clause "is not applicable where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds to the government." *Id.* at 183 (quotation marks and citation omitted). The court thus addressed on the merits a Takings Clause challenge to a prisoner's allegation that he was deprived of private property without just compensation when the State of Virginia

expended the interest on his prison accounts for the general benefit of inmates under the State's care. *See id.* at 181-82; *see also Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 407 (4th Cir. 2007) (recognizing in *dicta* that "a challenge to a statute requiring direct transfer of funds to the government" is immediately ripe under the Takings Clause).

In addition, prior to *Apfel*, two courts of appeals had already held that a Takings Clause challenge to a "direct transfer of funds" is ripe at the point at which the transfer is required. Both cases were cited with approval in *Apfel*.

In *Student Loan Marketing Association v. Riley*, 104 F.3d 397 (D.C. Cir. 1997), Sallie Mae requested a declaratory judgment that a fee imposed by Congress was an unconstitutional taking in violation of the Fifth Amendment. The D.C. Circuit held that "in cases involving straightforward mandates of cash payment to the government, courts may reasonably infer either that Tucker Act jurisdiction has been withdrawn or at least that any continued availability does not wipe out equitable jurisdiction." *Id.* at 402. Although "[n]ormally a taking claim against the federal government must be brought as a suit for money damages . . . under the Tucker Act" and "the plaintiff is barred from suing for equitable relief in district court, or is required to seek a Tucker Act remedy first, before suing for equitable relief," *id.* at 401 (citations omitted), the rule is altered when it comes to such mandates of cash payment. In the case of "direct transfers of money to the government . . . , use of the Tucker Act remedy would entail an utterly pointless set of activities, as every dollar paid pursuant to a statute would be presumed to generate a dollar of

Tucker Act compensation." *Id.* at 401 (quotation marks, citations, and alterations omitted).

Similarly, the Second Circuit held that "where the challenged statute requires a person or entity to pay money to the government, it must be presumed that [the government] had no intention of providing compensation for the deprivation." *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995). The plurality favorably cited *Chateaugay* and *Riley* in *Apfel*. 524 U.S. at 521.

4. The panel opinion conflicts with the plurality opinion in *Apfel* and the decisions of these five courts of appeals.

Petitioners do not seek monetary damages from the federal government, nor do they seek to enjoin the government's appropriation of tangible property. Instead, petitioners bring an equitable challenge to a USDA order that requires them to transfer funds to a government entity. They seek, in effect, a judicial order that they need not pay a fine and accompanying penalties because it would violate the Takings Clause. Under *Apfel*, and in any of the five circuits discussed immediately above, such an equitable challenge would be immediately ripe without the need to bring an "utterly pointless" second set of proceedings in the Court of Federal Claims.

The panel's contrary determination relied on the Ninth Circuit's own precedent in *Bay View*, to hold that "the just-compensation requirement does not force the government to provide immediate compensation at the time of a taking; 'it must simply "provide an adequate process for obtaining compensation."'" Pet. App. 15a (quoting 105 F.3d at 1285). The panel stressed *Bay View*'s centrality to its jurisdic-

tional disposition: "*Bay View* makes clear that we lack jurisdiction to address the merits of [petitioners'] takings claim where Congress has provided a means for compensation." Pet. App. 18a.

The problem is that *Bay View* was repudiated by the plurality in *Apfel*. In *Bay View* — which was decided a year before *Apfel* — the Ninth Circuit criticized this Court as "partly to blame for [the] confusion" surrounding the justiciability of equitable takings claims because "it has sometimes reached the merits of takings claims against the United States and at other times refused." 105 F.3d at 1285. *Bay View* described as "totally wrong" and "[a]dding to the confusion" the holdings of the "many courts [that] have viewed the Tucker Act as a jurisdictional hurdle against the payment of damages but not as an impediment to equitable relief." *Id.* at 1286. One of the courts listed as having conducted a "totally wrong" analysis was the Second Circuit in *Chateaugay*, which the plurality favorably cited in *Apfel*. 524 U.S. at 521.

In *Apfel*, the plurality resolved that conflict against *Bay View* and in favor of the decisions criticized in *Bay View*. Specifically, the plurality contrasted the holdings of certain courts of appeals, which "have accepted the view that the Tucker Act does not apply to suits seeking only equitable relief," with *Bay View*, which "concluded that a claim for equitable relief under the Takings Clause is hypothetical, and therefore not within the district courts' jurisdiction, until compensation has been sought and refused in the Court of Federal Claims." *Id.* at 520-521 (citing, *inter alia*, *Bay View*, 105 F.3d at 1286). The plurality went on to reject the categorical rule in *Bay View*, explaining that "in a case such as this one,

it cannot be said that monetary relief against the Government is an available remedy," and that the "presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds mandated by the Government." 524 U.S. at 521 (citing *Chateaugay*, 53 F.4d at 493, and *Riley*, 104 F.3d at 401) (quotation marks omitted).

In short, *Apfel* recognized the split between *Bay View* and other courts of appeals and repudiated the Ninth Circuit's reasoning in *Bay View*. For the court of appeals to resuscitate *Bay View*, even after that precedent was repudiated by a plurality of this Court, demands immediate review and correction.

5. The panel's error presents a significant and recurring question of wide federal importance.

First, this case raises fundamental questions regarding the nature of the right to just compensation and the applicability of *Williamson County*'s ripeness doctrine when private property owners seek to *defend* against government actions to extract money or other property. The panel's decision erases important limitations on that doctrine, widening the scope of the Takings Clause's "ripeness" requirement far beyond its constitutional boundaries.

This Court has established a *general* principle — subject to important limitations — that a takings claim cannot be *initiated* by a property owner to enjoin a governmental taking. That general principle rests on a gloss of the Takings Clause's text: Because the Clause permits takings (requiring only that they be compensated with "just compensation") and because the Clause does not "require that just compensation be paid in advance of, or contemporaneously

with, the taking," a party claiming a taking must ordinarily exhaust state (or Tucker Act) avenues of relief where the "government has provided an adequate process for obtaining compensation." *Williamson County*, 473 U.S. at 194-95. *Apfel*, however, recognizes that this general principle is inapplicable and not an appropriate gloss on the text of the Fifth Amendment where the *State* initiates proceedings to extract money or other property from the private citizen. In that case, the property owner's takings defense is made ripe by the government's action. By failing to recognize this limitation on *Williamson County*, the opinion below has converted the general principle against equitable takings claims into a categorical doctrine unmoored from constitutional text and principle.

Second, that doctrinal error has important practical consequences for Takings Clause challenges to fines, penalties, and other direct transfers of money. In determining that an equitable Takings Clause challenge to a direct transfer of funds was immediately ripe, the *Apfel* plurality recognized that requiring a second Tucker Act proceeding with a separate "claim for compensation would entail an utterly pointless set of activities." 524 U.S. at 521 (quotation marks and citation omitted). In this case (and others like it), the panel's holding requires precisely such a second and subsequent Tucker Act proceeding in the Court of Federal Claims. Rather than litigating all of one's federal statutory and constitutional claims in a single piece of litigation, as Congress provided, the panel opinion requires a party to exhaust first his statutory and administrative challenges in federal court, then pay the fine before bringing another, separate action in the Court of Federal Claims to recover the exact

same amount of money as the fine.

Such duplication of judicial proceedings is "utterly pointless." It is an inefficient use of court resources. It is unduly burdensome for small private property owners such as petitioners, who can ill afford a single proceeding against the government, let alone two. And it would allow the government to wield the stick of imposed bankruptcy upon private property owners, who would be unable to challenge transfers of money as takings until they have been paid.

That is all the more true where, as here, the government, not a private party, has initiated the proceedings to seek money damages. The *government* brought administrative proceedings against *petitioners*, not the other way around. And while petitioners then sought review of the agency's order (using the AMAA's exclusive judicial review provision), the panel's reasoning indicates that petitioners could not have raised a Tucker Act defense even if the government had initiated the proceeding in court rather than before the agency. It is one thing to tell a private party it must refrain from initiating litigation until it is ripe, and that the case must be filed in a particular court. It is quite another to tell a private party against whom the government initiates proceedings that its *defense* is not ripe until the case is over, and that the court in which the government brought its claim is unable to hear that defense. *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (addressing takings claim raised as defense to United States' effort to obtain navigational servitude). There is no evidence in the AMAA or elsewhere that Congress intended to switch the general rule established by the *Apfel* plurality for "direct transfer of funds," or to create so one-sided and unfair a procedure.

Third, the Raisin Marketing Order has been in place for decades, yet this Court has had no opportunity to review its constitutionality under the Takings Clause. As a result, for decades, raisin farmers in California have been forced to turn over a hefty portion of their crop to the federal government in exchange for the "privilege" of selling the remainder. For years, the federal government has defended this blatant appropriation of private property as a justified use of government power because the farmers (supposedly) receive higher prices for the remaining raisins as a result of the comparative scarcity that the government's appropriation creates.

That appropriation flatly violates the Takings Clause irrespective of what one thinks of the soundness of the Raisin Marketing Order's economic logic. The appropriation is all the more outrageous in light of the fact that the Order does not even serve its purported goals, because (1) the government's use of the reserved raisins for various purposes undercuts any benefit that scarcity might otherwise produce for raisin prices, and (2) in a world market where California raisin farmers grow a minority of all raisins, forcible suppression of California raisin production mostly benefits foreign competitors.

The panel's eleventh-hour replacement of its first opinion (disposing of this case on the merits) with a second (disposing of this case on jurisdictional grounds), without giving petitioners the opportunity to be fairly and fully heard, is highly unusual to say the least. The panel's decision provides this Court with an ideal opportunity to address the proper interpretation of *Apfel* and the split of authority within the courts of appeals. At the same time, the panel's jurisdictional holding should not be allowed to de-

prive this Court of an ideal vehicle in which to address the underling merits issue.

II. The Ninth Circuit's Holding That Petitioners Must Bring Their Takings Clause Defense Under The Tucker Act Conflicts With The Plain Text Of The Statute And A Decision Of The Federal Circuit.

The panel's jurisdictional holding rests on a second erroneous premise, independent of whether an equitable takings defense against a "direct transfer of funds" may be brought directly in federal court. The panel held that petitioners — against whom the USDA assessed a fine in their capacity as "handlers" under the AMAA — could not use the exclusive judicial review procedures in the AMAA for handlers. The panel recognized that the AMAA "'provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA'" and "'vests the district courts with jurisdiction to review the Secretary's decision.'" Pet. App. 16a (quoting *Lion Raisins*, 416 F.3d at 1370).

But the panel then abruptly determined that "the takings claim before us is brought by [petitioners] not in their capacity as handlers but in their capacity as producers; [petitioners] allege that the regulatory scheme at issue takes reserve-tonnage raisins belonging to producers, not property belonging to handlers. This claim is therefore not governed by holdings which address handlers' takings claim, nor is it subject to section [608c(15)'s] administrative exhaustion requirements." Pet. App. 17a. That holding has no basis in the text of the AMAA and conflicts with a decision of the Federal Circuit.

1. Because the Tucker Act is itself a creature of

congressional statute, it is well-settled that Congress may "withdraw[] the Tucker Act grant of jurisdiction" by statute. *Apfel*, 524 U.S. at 520. Such withdrawal occurs, for example, when Congress enacts a "specific and comprehensive scheme for administrative and judicial review." *Lion Raisins*, 416 F.3d at 1372.

The AMAA creates such a "specific and comprehensive scheme" for "handlers" of raisins. The statute provides that any "handler" who violates a marketing order is subject to fines and penalties in a final order of the Department of Agriculture, which is "reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant." 7 U.S.C. §§ 608c(14)(A)-(B). That judicial-review provision displaces the Tucker Act where a handler raises the Takings Clause as a defense to enforcement of a marketing order, because (under the statutory scheme) handlers must bring defenses to marketing orders and enforcement decisions in U.S. District Court, not in the Court of Federal Claims under the Tucker Act.

2. Case law supports this interpretation. This Court has held that handlers are required to bring all challenges regarding marketing orders to the USDA. "Even when [such challenges] are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the [ ] industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture." *Ruzicka*, 329 U.S. at 294.

Likewise, in *Lion Raisins*, a raisin producer brought a Tucker Act claim alleging (in relevant part) that the RAC had taken its storage bins without just

compensation. 416 F.3d at 1370. The Federal Circuit held that, because the plaintiff was a "handler" under the AMAA, the Court of Federal Claims lacked jurisdiction over the claim. The court noted that section 608c(15) "provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA" and "vests the district courts with jurisdiction to review the Secretary's decision." *Id.* The court held that "the takings claim may not be brought against the government because the statute provides for an administrative remedy and for judicial review in district court." *Id.* at 1358; *see also* Charles Alan Wright *et al.*, 14 *Federal Practice & Procedure* § 3657 & n.33 (3d ed. 2010).

3. In light of this statutory scheme and these precedents, the panel's determination that petitioners — who, according to the USDA and the panel, are "handlers" of raisins — cannot defend against the USDA's fine is baffling. The panel reasoned that petitioners brought their takings defense "not in their capacity as handlers but in their capacity as producers," Pet. App. 17a, and accordingly could not take advantage of the judicial review procedures for raisin handlers to challenge a fine that was imposed on them only because they were held to be handlers.

That holding contradicts the plain text of the AMAA's review provision. Under that provision, "*[a]ny* handler" seeking to challenge an order, including on constitutional grounds, must exhaust administrative remedies before the Secretary of Agriculture. 7 U.S.C. § 608c(15)(A) (emphasis added). According to the panel and the USDA, petitioners are "handlers" under the Raisin Marketing Order. Indeed, it was only in their "capacity as handlers" that they could even be subject to the Order and fined in the

first place. That is the end of the matter for statutory purposes. The statute makes no provision for separate treatment of "handlers" who are also deemed "producers," such that a "producer-handler" challenging a reserve program in its "capacity as [a] producer[]" is somehow subject to different judicial review provisions. Indeed, it says that a marketing order shall not "be applicable to any producer in his capacity as a producer." § 608c(13)(B). Under such circumstances, the plain language of the statute must control. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 348 (1984) (noting that "Congress intended that judicial review of market[ing] orders issued under the [AMAA] ordinarily be confined to suits brought by handlers in accordance with 7 U.S.C. § 608c(15)").

Nor does the regulatory scheme provide for any differential treatment. Indeed, to the extent that the statute contains any ambiguity, the USDA has stated that, in interpreting section 608c(15), "[t]he term handler means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i). The USDA "sought to [make] applicable" the Raisin Marketing Order to petitioners. Petitioners must therefore use the AMAA's review provisions to raise their challenges, as well as defenses, to the USDA's order.

The panel cited two cases from the milk context to support its contrary holding, neither one of which is on point. The AMAA and its accompanying *milk* regulations expressly create a separate category for milk "producer-handlers." *See* 7 U.S.C. § 608c(5). Because the Raisin Marketing Order contains no such "producer-handler" designation, the AMAA's plain language must control. At any rate, the two cases do not

support the panel's contention that petitioners bring their claim in their capacity as producers. *Arkansas Dairy-Cooperative Association v. USDA*, 573 F.3d 815 (D.C. Cir. 2009), notes in *dicta* that a producer-handler "must exhaust before bringing suit in its capacity as a handler, but not when bringing suit in its capacity as a producer." *Id.* at 823 n.4. The case contains no reasoning to support this passing comment, nor does it suggest that fines imposed on parties in their capacity as handlers must be challenged by those same parties in their capacity as producers. Indeed, the case does not even involve producer-handlers. *Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778 (D.C. Cir. 2006), holds that "Edaleen is clearly bringing suit in its capacity as a handler." *Id.* at 783. If anything, that holding supports petitioners' view that they have brought their challenge in their capacity as handlers in this instance.

4. At any rate, even assuming that "producer-handlers" may sometimes bring claims without exhausting state remedies, this case would not be an appropriate one in which to force a handler to do so. The USDA imposed fines and penalties on petitioners in their capacity as handlers, and argued throughout the litigation that petitioners were handlers. The panel held that petitioners are handlers. It was only when petitioners sought to challenge the fine on Takings Clause grounds that the panel claimed they were doing so "in their capacity as producers." The government cannot have it both ways. If petitioners are ordered to pay money to the government in their capacity as handlers, it must be in their capacity as handlers that they challenge that order.

5. The panel's error on this issue also presents a significant and recurring question of wide federal im-

portance.

First, the opinion below creates a conflict with the Federal Circuit's reasoning in *Lion Raisins*, and presents a serious concern that raisin handlers will have no court in which they may bring their takings claim. *Lion Raisins*, like this case, involved a raisin farmer who was "both a producer and a handler" under the statute and regulations. 416 F.3d at 1360 n.2. The Federal Circuit held that, because the plaintiff was a "handler" under the AMAA, the Court of Federal Claims lacked jurisdiction over this claim. *See id.* at 1358. Indeed, *the government itself* urged the Federal Circuit to adopt this holding. *See id.* at 1371 & n.12 (observing that, "[d]uring oral argument, counsel for the United States acknowledged that [plaintiff] has an administrative remedy and may file a section 608(c)(15)(A) petition seeking redress for the RAC's alleged actions").

To be sure, *Lion Raisins* addressed a claim alleging that the RAC had taken storage bins, not raisins. *Id.* at 1370. But its logic applies equally to jurisdiction over takings of raisins. The panel's interpretation of the AMAA thus creates great confusion about whether and where petitioners — and those similarly situated — may bring their defenses under the Takings Clause.

Second, how and where handlers, producers, and producer-handlers may bring challenges to orders under the AMAA is a question with broad relevance to a wide variety of marketing orders. The panel's holding confuses the clear procedures set forth in the AMAA and the Raisin Marketing Order. It creates the prospect of a conflict between the federal courts and the Court of Federal Claims on takings prin-

ciples, by requiring certain parties to bring their takings challenges in administrative proceedings before the USDA, while requiring others to raise their claims before the Court of Federal Claims. And it undoes Congress' efforts to channel challenges to the AMAA and marketing orders through the USDA's administrative and judicial review procedures.

Third, it bears repeating that the Raisin Marketing Order has been in place for decades, yet this Court has had no opportunity to review its constitutionality under the Takings Clause. The panel should not be allowed to throw obstacles in the way of this Court's review of the merits of this case by adopting a distinction between producer-handlers and handlers *simpliciter* that has no basis in law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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