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

## REPLY BRIEF FOR PETITIONERS


BRIAN C. LEIGHTON
*Attorney at Law*
*701 Pollasky Avenue*
*Clovis, CA 93612*
*(559) 297-6190*

MICHAEL W. MCCONNELL*
ADITYA BAMZAI
*Kirkland & Ellis LLP*
*655 Fifteenth Street, N.W.*
*Washington, DC 20005*
*(202) 879-5000*
*michael.mcconnell@kirkland.com*
**Counsel of Record*

*Counsel for Petitioners*

## TABLE OF CONTENTS

**Page(s)**


TABLE OF AUTHORITIES ..... ii

REPLY BRIEF ..... 1

I. This Court Should Resolve The Circuit Split Over Whether A Party May Raise A Takings Clause Defense To A "Direct Transfer Of Funds." ..... 2

A. The Courts Of Appeals Are Split Over The Scope Of *Williamson County*. ..... 2

B. The Government's Efforts To Manufacture A Vehicle Problem Lack Merit. ..... 4

C. The Government's Remaining Arguments Either (1) Disagree With *Apfel*, Or (2) Are Irrelevant To Ripeness. ... 5

D. The Case Presents A Recurring Question Of National Importance. ..... 8

II. This Court Should Resolve The Circuit Split Over Whether, Under The AMAA, A Producer-Handler Of Raisins Must Bring Its Takings Claim In Administrative Proceedings Or Under The Tucker Act. ..... 10

CONCLUSION ..... 12

## TABLE OF AUTHORITIES

**Page(s)**

### Cases

*Bay View, Inc. v. AHTNA, Inc.*,
105 F.3d 1281 (9th Cir. 1997) ..... 2, 3

*Block v. Community Nutrition Institute*,
467 U.S. 340 (1984) ..... 11

*Eastern Enterprises v. Apfel*,
524 U.S. 498 (1998) ..... 1, 2, 3, 5, 7

*Lion Raisins, Inc. v. United States*,
416 F.3d 1356 (Fed. Cir. 2005) ..... 11, 12

*Simon & Schuster, Inc. v. N.Y. State Crime Victims Board*,
502 U.S. 105 (1991) ..... 7

*Wilkie v. Robbins*,
551 U.S. 537 (2007) ..... 7

*Williamson County Regional Planning Commission v. Hamilton Bank*,
473 U.S. 172 (1985) ..... 1, 2, 3, 5, 8, 9

*Wisconsin v. Yoder*,
406 U.S. 205 (1972) ..... 7

### Statutes and Regulations

7 U.S.C. § 608c(15)(A) ..... 11, 12

7 C.F.R. § 900.51(i) ..... 11

## REPLY BRIEF

The Government's response provides no justification for the Ninth Circuit's incongruous jurisdictional holding: A private party cannot raise the Takings Clause as a defense against imposition of a monetary penalty, but must litigate all other statutory and constitutional defenses in one action, pay the monetary penalty, and then bring a second, subsequent action to recover the money in the Court of Federal Claims. According to the panel, the takings defense to the monetary penalty is not *ripe* — as a *constitutional* matter under this Court's precedents — until the second lawsuit has been brought.

This extension of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), to cover defenses to monetary penalties conflicts with the reasoning of a plurality of this Court and the holdings of five courts of appeals. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a plurality concluded that a private party could enjoin, under the Takings Clause, a "direct transfer of funds mandated by the Government." *Id.* at 521. Both the *Apfel* plurality and Justice Kennedy's concurrence recognized that this issue "has divided the Courts of Appeals." *Id.* at 547 (Kennedy, J., concurring in the judgment and dissenting in part); *see also id.* at 520-521 (plurality). The panel relied on Ninth Circuit precedent repudiated by the *Apfel* plurality, thereby exacerbating the existing circuit split.

The Government insists that the petition does not implicate the split because "[petitioners'] takings claim below was not based on a cash-payment requirement." Resp. 10. That characterization is wrong. Petitioners have *always* argued that they

challenge the imposition of a penalty that violates the Takings Clause because it was imposed for failure to comply with a regulation that itself violates the Clause.

Certiorari is also warranted to review a second circuit split that would independently have given the courts below jurisdiction over petitioners' takings claim. As "handlers" of raisins under the Agricultural Marketing Agreement Act ("AMAA"), petitioners must bring their claims (including takings claims) in administrative proceedings rather than the Court of Federal Claims.

The petition for a writ of certiorari should be granted.

## I. This Court Should Resolve The Circuit Split Over Whether A Party May Raise A Takings Clause Defense To A "Direct Transfer Of Funds."

### A. The Courts Of Appeals Are Split Over The Scope Of *Williamson County*.

1. Both the *Apfel* plurality and Justice Kennedy's concurrence recognized a split of authority on whether federal courts have jurisdiction to enjoin "direct transfer[s] of funds mandated by the Government" under the Takings Clause. 524 U.S. at 520-521; *id.* at 547 (Kennedy, J., concurring in the judgment and dissenting in part) (noting the question "has divided the Courts of Appeals," but finding it "unnecessary to comment upon the plurality's effort to resolve [the] jurisdictional question"). The plurality specifically referred to and disapproved of *Bay View, Inc. v. AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997). Before and after *Apfel*, five circuit courts have echoed the plurality's conclusion that a takings claim to enjoin a

transfer of funds is immediately ripe. *See* Pet. 19-22.

2. Notwithstanding that body of law, the panel relied on *Bay View* to hold that petitioners' Takings Clause defense against the monetary penalty is constitutionally unripe. Seeking to minimize this reliance, the Government argues that the opinion cites "*Bay View* only twice, each time for propositions with which petitioners agree." Resp. 11 n.2. The Government is incorrect. The panel cited *Bay View* for the proposition that *Williamson County* categorically holds 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). As petitioners explained in some detail, they *do* disagree with that proposition insofar as *Apfel* requires immediate compensation when the Government seeks, as in this case, a "direct transfer of funds." Had the panel recognized *Apfel*'s rule, it could not have relied on *Bay View*.

Further proving *Bay View*'s centrality to the opinion below, the panel held that "*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. Petitioners disagree. A private party may enjoin a "direct transfer of funds" under the Takings Clause notwithstanding the availability of a separate Tucker Act claim for compensation.

In short, the panel adopted *Bay View*'s jurisdictional holding and exacerbated the acknowledged conflict within the circuits.

### B. The Government's Efforts To Manufacture A Vehicle Problem Lack Merit.

The Government primarily argues that this circuit split does not apply here because petitioners' "takings claim below was not based on a cash-payment requirement." Resp. 10. That is a mischaracterization. This entire litigation has been about a cash fine imposed on petitioners for their failure to comply with a regulation that is unconstitutional under the Takings Clause. Indeed, when the Government raised its jurisdictional theory for the first time, on petition for rehearing after the panel had decided the case on the merits, petitioners responded that their lawsuit was "not a suit seeking money damages, nor a suit to enjoin a taking; it is an administrative appeal from an agency order on the ground that it constitutes a taking." Pet. App. 236a. Given the extensive review that the Government has evidently conducted of petitioners' lower-court briefing, the Government's failure to mention this point is curious indeed. *Compare* Resp. 13 (asserting that "petitioners cannot now contend that their taking claim is actually a challenge to the administrative order").

Petitioners' takings claim is straightforward: The Raisin Marketing Order's yearly requirement that petitioners hand over raisins with little or no compensation is an unconstitutional taking without just compensation. Believing themselves not subject to that Order, petitioners did not comply with that requirement in the years relevant to this case. When they were fined the dollar equivalent of the raisins, they raised a takings defense arguing that imposing the penalty violated the Takings Clause because the regulation itself violated the Clause. Just as a fine for disobeying an improper speech-restrictive ordin-

ance violates the Speech Clause, a fine for violating an order to give the government property without compensation violates the Takings Clause. Under *Apfel*, the constitutional defense is ripe when the government seeks to impose the fine.

Nothing the Government identifies in petitioners' pleadings below is inconsistent with that straightforward argument. Indeed, petitioners' statements that "raisins are personal property" and that the government "takes title to" and "uses" that property "for government purposes" are part and parcel of petitioners' jurisdictional argument. Resp. 10. Petitioners have argued that the Order takes physical property and that a monetary penalty imposed to enforce the Order is unconstitutional because the Order is unconstitutional. The Government's attempt to obfuscate that claim should be rejected.

### C. The Government's Remaining Arguments Either (1) Disagree With *Apfel*, Or (2) Are Irrelevant To Ripeness.

1. The Government says that petitioners' argument "would simply be an end-around to . . . initial resort to the Tucker Act" under *Williamson County*. Resp. 14. But *Apfel* and five other courts of appeals create an *exception* to *Williamson County* in the case of direct transfers of money. Describing that exception as an "end-around" is not a response to the cases, but rather an ingenious way of expressing disagreement with the jurisdictional rule applied in *Apfel* and other circuits.

Likewise, the Government argues that no unconstitutional taking has occurred "because (1) petitioners never reserved any raisins in those years (instead selling all of them on the market), so no property

could have been 'taken'; and (2) even if raisins had been reserved, petitioners never sought just compensation for them under the Tucker Act." Resp. 14. These arguments are non-responsive. Of course, petitioners "never reserved any raisins" — they believed the Order did not apply to them at all. And "petitioners never sought just compensation" under the Tucker Act because no such requirement exists in the five circuits in which petitioners can immediately raise a takings challenge to a "direct transfer of funds." The Government's disagreement with this jurisdictional rule is reason to grant certiorari, not to deny it.

2. The Government's other arguments are irrelevant to constitutional ripeness. The Government argues that petitioners cannot challenge the imposition of the monetary penalty because, "whereas the civil penalties and other monetary assessments were imposed on petitioners in their capacity as *handlers*, the disposition of reserve raisins affects petitioners only in their capacity as *producers*." Resp. 12. Leaving to one side the validity of this distinction (*see infra* at pp. 10-12), the Government nowhere explains its relevance to the question whether a defense to enjoin government action as a taking is *constitutionally* ripe. Constitutional ripeness does not depend on these statutory definitions.

The Government also argues that "the amount of the civil penalties . . . is not necessarily the same as the amount [petitioners] might obtain if they were to prevail on their takings claim," Resp. 12-13, in part because any compensation award may "tak[e] into account the benefits conferred on petitioners, and the public interest served, by the regulatory program," *id.* at 13. Once again, leaving to one side the Government's dubious assertions regarding calculation of

the award, the point is irrelevant to the question of constitutional ripeness. The same could have been said in *Apfel* or any of the other courts of appeals cases, yet none hinted that constitutional ripeness depends on the size of the compensation awards.

The Government's statement that "[p]etitioners cannot flout the raisin marketing order and then challenge the resulting monetary assessments" (Resp. 15) also misses the point. The question presented by the petition is whether the federal courts have jurisdiction to address petitioners' takings defense to the imposition of a fine. Whether that takings defense succeeds on the merits is a separate question.

At any rate, the Government is wrong about the viability of petitioners' takings claim on the merits. It is black-letter law that a party may challenge a monetary penalty on constitutional grounds when the fine is predicated on unconstitutional governmental action. *See, e.g.*, *Simon & Schuster, Inc. v. N.Y. State Crime Victims Board*, 502 U.S. 105 (1991); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The law is no different for takings claims. *See, e.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J., dissenting) ("Correlative to the right to be compensated for a taking is the right to refuse to submit to a taking where no compensation is in the offing."). Under the Government's contrary theory, any private individual who "flouts" the regulatory scheme — or, as in petitioners' case, structures their business in a way that they believe does not implicate the regulatory scheme — would have no takings claim on the merits when the Government later imposes a monetary penalty. Unsurprisingly, the Government cites nothing to support this novel position.

3. The Government nowhere responds to petitioners' broader point that ripeness is a jurisdictional defense to a premature claim, and cannot be used as a sword to prevent a party from asserting available defenses. *Williamson County* depends on the premise that when the government takes property, it is not yet known whether compensation is forthcoming; a proper claim under the Tucker Act is a necessary predicate to the existence of a controversy. Where the government demands payment by haling a private party into court or administrative proceedings, by contrast, the Takings Clause defense is in no way premature: the government's claim creates the case or controversy.

### D. The Case Presents A Recurring Question Of National Importance.

1. The Government's response confirms that the decision below extends *Williamson County* (a decision that has received substantial criticism, *see* Cato Inst. *et al. Amicus* Br. 16-23) beyond reason, by imposing on property owners a "two lawsuit" requirement — one lawsuit to litigate all statutory and other constitutional claims, and a second to litigate a takings claim.

That proliferation of lawsuits creates great economic hardship for parties like petitioners. The modern administrative state imposes countless requirements that a private party dispose of property in a particular way, and an equally large number of penalty provisions enforcing those requirements. Under the panel's logic, as a matter of *constitutional* law, any Takings Clause defense would be bifurcated from other statutory and constitutional defenses, with one trip through the federal courts and then

another through the Court of Federal Claims. It is hard to see anything to recommend such bifurcation, which can only dissuade injured persons from seeking redress. It remains in this Court's hands to ensure that *Williamson County* does not become a tool to suppress valid takings claims.

2. The Government's statements on the merits of petitioners' takings claim illustrate the sweeping nature of the legal theory that has kept in place — for decades — a regulatory regime that requires raisin farmers to turn over a large percentage of their crop to the federal Government for little or no compensation. In an industry that "accounts for 99.5% of the domestic supply, and 40% of the world's supply, of raisins," Resp. 2, the Government announces that it has the unchecked power to appropriate nearly fifty percent of petitioners' harvest with below-cost-of-production or even zero compensation. Absent this Court's intervention, this intrusive and unconstitutional federal regulatory regime is likely to remain in place for the foreseeable future.

The Government argues that the regime does not violate the Takings Clause because it "functions essentially as an in-kind tax or service fee on the sale of raisins by producers." Resp. 19 n.6. If that were correct, however, there would be no constitutional limit to government power to take private property under the guise of an "in-kind tax or service fee." Such an easy reclassification of takings into taxes would render the Takings Clause a dead letter.

In a similar vein, the Government claims that "there is a substantial question whether Congress intended that the United States Treasury would compensate a private producer for any property interests

thought to be taken by its *voluntary* participation in this regulatory regime for the benefit of private producers generally." Resp. 16 n.4 (emphasis added). Petitioners' participation in the scheme, however, is "voluntary" only in the sense that they choose to produce raisins, after which the Government's regulation is mandatory in every sense of the word. If the Government could reclassify marketplace entry as a "voluntary" decision making a private person subject to massive governmental appropriations, all limits on the Takings Clause would be removed.

Because the jurisdictional questions presented in the petition are substantial, petitioners have not raised the merits of their takings claim in this petition. But the Government's full embrace of these extreme positions reinforces the need for this Court's intervention to ensure that a constitutional challenge to the Raisin Marketing Order is properly heard.

## II. This Court Should Resolve The Circuit Split Over Whether, Under The AMAA, A Producer-Handler Of Raisins Must Bring Its Takings Claim In Administrative Proceedings Or Under The Tucker Act.

Certiorari is also warranted to address a second circuit split on an issue that would *independently* establish jurisdiction over petitioners' takings claim. The Government concedes that "the AMAA affirmatively bars Tucker Act suits by *handlers*," Resp. 15, and that the "monetary assessments" at stake here were "imposed on [petitioners] in their capacity as handlers," *id.* at 17. That ought to suffice to make the Tucker Act inapplicable. Yet, like the panel, the Government insists, without citation, that petitioners must bring their takings claim under the Tucker Act

because they "bring different legal claims, brought in different legal capacities" as a result "of their own voluntary choice to assume two different roles [handler and producer] under the AMAA." *Id.* at 17-18. This *ipse dixit* conflicts with the plain terms of the statute and a decision of the Federal Circuit — and would concededly have the irrational result of "bifurcat[ing] [petitioners'] claims," *id.* at 17.

Contrary to the Government's position, petitioners do not seek a "special jurisdictional rule," Resp. 18, but application of the plain terms of the AMAA and its accompanying regulations. The AMAA provides that "*[a]ny* handler" seeking to challenge an order, including on constitutional grounds, must exhaust administrative remedies. 7 U.S.C. § 608c(15)(A) (emphasis added). The Department of Agriculture has interpreted the term "handler" in this very provision to mean "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 Government nowhere disputes that petitioners meet that definition. Indeed, "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)," *Block v. Community Nutrition Institute*, 467 U.S. 340, 348 (1984), where, as here, handlers "can be expected to challenge unlawful agency action and to ensure that the statute's objectives will not be frustrated," *id.* at 352.

Nor does the Government offer any principled basis for distinguishing *Lion Raisins, Inc. v. United States*, 416 F.3d 1356 (Fed. Cir. 2005). The Government concedes that *Lion Raisins* involved, in relevant part, a party that was "both a producer and a handler

of raisins," and a takings claim "for missing storage bins that had been used to hold reserve raisins." Resp. 18 (citation and quotation marks omitted). The Government also concedes that the Federal Circuit dismissed the claim "because Section 608c(15)(A) provided the exclusive avenue for relief on that claim and thus precluded a Tucker Act suit." Resp. 19.

Yet, apart from the conclusory assertion that the plaintiff in *Lion Raisins* brought *its* takings claim in its capacity as a handler whereas petitioners supposedly bring *their* takings claim in their capacity as producers, the Government provides no rationale why the jurisdictional rule should change from case to case and circuit to circuit. Taken together, *Lion Raisins* and the opinion below create a grave risk that petitioners will find *no* United States court with jurisdiction to adjudicate their takings claim.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRIAN C. LEIGHTON
*Attorney at Law*
*701 Pollasky Avenue*
*Clovis, CA 93612*
*(559) 297-6190*

MICHAEL W. MCCONNELL*
ADITYA BAMZAI
*Kirkland & Ellis LLP*
*655 Fifteenth Street, N.W.*
*Washington, DC 20005*
*(202) 879-5000*
*michael.mcconnell@kirkland.com*
**Counsel of Record*

*Counsel for Petitioners*

November 5, 2012