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 THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

JONATHAN F. MITCHELL
Solicitor General

ANDREW S. OLDHAM
Deputy Solicitor General
Counsel of Record

RICHARD B. FARRER
MATTHEW H. FREDERICK
DOUGLAS D. GEYSER
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
andy.oldham@texasattorneygeneral.gov
(512) 936-1700

COUNSEL FOR AMICUS CURIAE

TABLE OF CONTENTS

Table of Authorities ii

Interest of Amicus Curiae 1

Summary of Argument 2

Argument 3

I. The AMAA Requires Petitioners To Pursue All Challenges To Marketing Orders Through The Administrative Review Process. 3

II. The Texas Administrative Scheme Demonstrates That Piecemeal Litigation of Takings Claims Is Unnecessary. 8

Conclusion 13

TABLE OF AUTHORITIES

Cases

Ark. Dairy Coop. Assoc. v. U.S. Dep't of Agriculture, 573 F.3d 815 (D.C. Cir. 2009)............5

Block v. Community Nutrition Institute, 467 U.S. 340 (1984) 7

City of Abeline v. Smithwick, 721 S.W.2d 949 (Tex. App.—Eastland 1986, writ ref'd n.r.e.)...10

City of Dallas v. Stewart, 361 S.W.3d 562 (Tex. 2012) 11

Combs v. City of Webster, 311 S.W.3d 85 (Tex. App.—Austin 2009, pet. denied) 11

Edaleen Dairy, LLC v. Johanns, 467 F.3d 778 (D.C. Cir. 2006) 5

Edwards Aquifer Auth. v. Chem. Lime, Ltd., 291 S.W.3d 392 (Tex. 2009) 10

Evans v. U.S., 74 Fed. Cl. 554 (2006), aff'd, 250 Fed. Appx. 321 (Fed. Cir. 2007)...6

Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591 (Tex. 2001) 9

Hearts Bluff Game Ranch, Inc. v. State, 381 S.W.3d 468 (Tex. 2012) 10

Houston Mun. Emps. Pension Sys. v. Ferrell, 248 S.W.3d 151 (Tex. 2007) 9

Koretoff v. Vilsack, 614 F.3d 532 (D.C. Cir. 2010) 6

R.R. Comm'n of Tex. v. WBD Oil & Gas Co., 104 S.W.3d 69 (Tex. 2003) 10

Reata Const. Corp. v. City of Dallas, 197 S.W.3d 371 (Tex. 2006) 11

Reg'l Rail Reorganization Act Cases, 419 U.S. 102 (1974) 12

Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546 (Tex. 2004) 10

Tex. Comm'n on Envtl. Quality v. Kelsoe, 286 S.W.3d 91 (Tex. App.—Austin 2009, pet. denied) 11

Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620 (Tex. 2004) 10

Statutes and Regulations

7 C.F.R. § 900.51(i) 4

7 C.F.R. § 906 1

7 C.F.R. § 959 1

7 C.F.R. § 981.52 1

7 C.F.R. § 989.15 4

7 C.F.R. § 993.57 1

7 U.S.C. § 608c(1) 4

7 U.S.C. § 608c(14)(A) 3

7 U.S.C. § 608c(15) 10

7 U.S.C. § 608c(15)(A) 3, 7

76 Fed. Reg. 24921 (April 29, 2011) 1

TEX. GOV'T CODE § 2001.001 8

TEX. GOV'T CODE § 2001.003(1) 9

TEX. GOV'T CODE § 2001.038 10

TEX. GOV'T CODE § 2001.171 9

TEX. GOV'T CODE § 2007.024(c)-(d) 12

TEX. INS. CODE § 31.001 8

TEX. WATER CODE § 5.001 8

Other Authorities

1 BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE § 9.3.1[c]..11

2 RONALD L. BEAL, TEXAS ADMINISTRATIVE PRACTICE & PROCEDURE, §11.2.1 (2009) 9

S. REP. NO. 1011, 74th Cong. 1st Sess., 14 (1935)......7

TCEQ, *Track Pending Enforcement Actions*, http://www.tceq.texas.gov/compliance/enforcement/penenfac/index.html 8-9

Tex. State Library & Archives Comm'n, *TRAIL List of Texas State Agencies*, https://www.tsl.state.tx.us/apps/lrs/agencies/index.html...8

Texas Department of Insurance, TDI Enforcement Actions, at http://www.tdi.texas.gov/commish/actions.html 9

INTEREST OF AMICUS CURIAE

Marketing orders issued under the Agricultural Marketing Agreement Act of 1937 (AMAA) govern the production of fruits and vegetables grown on a large scale in the State of Texas. See 7 C.F.R. § 906 (oranges and grapefruit grown in lower Rio Grande valley); 7 C.F.R. § 959 (South Texas onions). Texas ranks among the top producers of other crops that have been the subject of proposed marketing agreements under the AMAA.[1] Any agricultural product within the scope of the AMAA is potentially subject to appropriation through a marketing order similar to the Raisin Marketing Order at issue in this case. Though that order's reserve requirement does not feature in all AMAA marketing orders, it is not unique to raisins. See, e.g., 7 C.F.R. § 981.52 (almonds); 7 C.F.R. § 993.57 (prunes). Because Texas citizens currently operate under AMAA marketing orders, and because additional marketing orders may issue in the future, the State of Texas has a substantial interest in the questions presented.

---

[1] See Proposed National Marketing Agreement Regulating Leafy Green Vegetables, 76 Fed. Reg. 24292, 24307 (April 29, 2011) (including Texas in list of "anchor States that produce the majority of leafy green vegetables in the United States").

SUMMARY OF ARGUMENT

The AMAA requires raisin "handlers," but not raisin "producers," to raise all challenges to the Raisin Marketing Order through the statute's administrative review procedures. Respondent argued successfully to the Ninth Circuit that petitioners qualify as handlers under the AMAA. Yet respondent maintains—and the Ninth Circuit held—that petitioners are not entitled to raise their takings claim as a defense to an administrative enforcement action because they bring that claim in their capacity as producers, not in their capacity as handlers. The Ninth Circuit's holding finds no support in the text of the AMAA, and it undermines the statute's purpose of channeling any handler's challenge to a marketing order through the statutory review process. Respondent's reading of the AMAA serves only to maximize the government's flexibility to avoid challenges to marketing orders. Whatever its short-term advantages in this litigation, this interpretation of the statute ultimately disserves the government's interest in finality, handlers' interest in expeditious resolution of challenges to marketing orders, and Congress' intent to maintain an efficient regulatory system.

Like the United States, the State of Texas maintains a comprehensive regulatory scheme that covers a broad spectrum of industries and individuals. Also like the federal government, Texas frequently confronts claims by regulated entities seeking just compensation when state administrative

agencies take private property for public use. The Texas regulatory scheme demonstrates that takings claims, whether raised affirmatively or defensively, do not require complex bifurcated procedures, as takings claims in Texas are resolved in a single proceeding with other challenges to administrative action. Resolving all claims in a single proceeding serves the interests of the government and of regulated entities by promoting efficient and final resolution of administrative claims.

ARGUMENT

I. THE AMAA REQUIRES PETITIONERS TO PURSUE ALL CHALLENGES TO MARKETING ORDERS THROUGH THE ADMINISTRATIVE REVIEW PROCESS.

The issue of statutory interpretation presented in question two provides an adequate nonconstitutional basis to reverse the Ninth Circuit. The logic of the petitioners' argument is straightforward and irrefutable. The AMAA grants "[a]ny handler" the unqualified right to challenge marketing orders under the terms of the Act. See 7 U.S.C. §§ 608c(14)(A), (15)(A). The Raisin Marketing Order defines "handler" to mean:

> (a) Any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area 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 . . . .

7 C.F.R. § 989.15; cf. 7 U.S.C. § 608c(1) (stating that "processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof" are referred to as "handlers" under the Act); 7 C.F.R. § 900.51(i) ("The 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 . . . ."). At the urging of respondent, the court below determined petitioners to be handlers. JA 301. It follows from that determination that petitioners are required to challenge marketing orders through the administrative procedures provided for handlers under the AMAA.

The Ninth Circuit's effort to avoid the statutory text by borrowing the concept of "producer-handlers" from milk marketing orders mistakes the significance of petitioners' dual status as raisin producers and raisin handlers. Assuming that producer-handler status has any significance outside the context of milk marketing orders, it does not support the decision below. Cases involving milk producer-handlers instruct that the availability of administrative remedies under the AMAA depends on the capacity in which the producer-handler sues. Under this test, the Ninth Circuit's decision must be reversed.

Respondent maintains (and the Ninth Circuit held) that petitioners do not raise their takings claim as handlers because "the committee's acquisition of raisins . . . affects [petitioners] only in their capacity as producers." Br. in Opp. to Cert. at 17; see also JA 305. This conclusion does not square with the cases on point, which establish that the capacity in which a party sues under the AMAA is the capacity in which it is burdened (or benefited) by the statute. See, e.g., *Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 783 (D.C. Cir. 2006) ("If a producer-handler asserts an injury in its capacity as a handler, then it is bound by the administrative exhaustion requirements of the AMAA"); cf. *Ark. Dairy Coop. Assoc. v. U.S. Dep't of Agriculture*, 573 F.3d 815, 826 (D.C. Cir. 2009) (holding that milk producers may seek judicial review of milk marketing orders under the APA); id. at 823 n.4 ("Where a single entity acts as a vertically-integrated 'producer-handler,' it must exhaust before bringing suit in its capacity as a handler, but not when bringing suit in its capacity as a producer."). The Raisin Marketing Order imposes duties on petitioners only in their capacity as handlers. When they raise a defense to those duties, they necessarily do so in the same capacity.

The suggestion that handlers who produce raisins must be treated as producers finds no support in law or fact. Respondent asserts that raisin handlers "have no ownership interest that might be affected by the committee's acquisition of producers' raisins." Br. in Opp. to Cert. at 16. But this is

plainly not the case when a handler produces its own raisins, as petitioners do. Even if handlers lacked an ownership interest in an independent producer's raisins, a handler unquestionably has an ownership interest in raisins that it produces, and that interest is directly affected by the requirement that it set aside a portion of its raisins for the committee. Indeed, when the Court of Federal Claims considered a takings claim presented by raisin producers, it explained that "if plaintiffs themselves packaged their raisins or introduced them into interstate commerce, they would be deemed handlers . . . and would then have an administrative remedy." *Evans v. U.S.*, 74 Fed. Cl. 554, 564 (2006) (citations omitted), aff'd, 250 Fed. Appx. 321 (Fed. Cir. 2007); cf. *Koretoff v. Vilsack*, 614 F.3d 532, 540 (D.C. Cir. 2010) (holding that regulatory classification of almond "producer-retailers" as handlers required them to exhaust administrative remedies under the AMAA).

To insist that "no inconsistency arises from treating [petitioners] as handlers when they act as handlers and producers when they act as . . . producers," Br. in Opp. to Cert. at 18, misapprehends the effect of the decision below and of respondent's own interpretation of the AMAA. The statute does not, as respondent maintains, merely "subject [petitioners] to the particular benefits and burdens of the role they have assumed." Id. Quite the opposite; respondent would subject petitioners to the burdens imposed on handlers by the AMAA but deny them

the benefit of administrative procedures Congress created expressly for handlers.

Erecting an extra procedural hurdle for handlers who also happen to be producers conflicts not only with the text of the statute, but also with "Congress' intent to establish an 'equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms.'" *Block v. Community Nutrition Institute*, 467 U.S. 340, 348 (1984) (quoting S. REP. NO. 1011, 74th Cong. 1st Sess., 14 (1935)). Forcing petitioners and similarly situated handlers to pursue takings claims under the Tucker Act seems especially likely to undermine the government's enforcement interest, as a separate post-deprivation remedy would leave a cloud of uncertainty over orders issued in AMAA enforcement proceedings.

The only apparent purpose served by respondent's interpretation of the Act is to perpetuate a heads-I-win-tails-you-lose procedural matrix that preserves the government's ability to frustrate challenges to marketing orders.[2] Whatever short-term tactical advantage this may provide

[2] To take just one example, the district court's opinion describes how the USDA successfully moved to dismiss an administrative petition filed by the petitioners under 7 U.S.C. § 608c(15)(A) on the ground that "since Plaintiffs did not admit that they were handlers during the time period in question, they had no jurisdiction to file an administrative petition as handlers." JA 131.

cannot justify the cost to handlers and to the integrity of the statutory enforcement scheme.

II. The Texas Administrative Scheme Demonstrates That Piecemeal Litigation of Takings Claims Is Unnecessary.

The Texas regulatory system demonstrates that takings claims need not bring an additional layer of procedural complexity to administrative proceedings. Texas has over 150 state agencies regulating state activity on topics ranging from environmental quality to insurance. See Tex. State Library & Archives Comm'n, *TRAIL List of Texas State Agencies*, https://www.tsl.state.tx.us/apps/lrs/agencie s/index.html; TEX. WATER CODE § 5.001 *et seq.* (Texas Commission on Environmental Quality); TEX. INS. CODE § 31.001 *et seq.* (Texas Department of Insurance). Accordingly, Texas has developed a thorough state administrative structure, which includes procedures for administrative and judicial review of state agency action. See Texas Administrative Procedure Act, TEX. GOV'T CODE § 2001.001, *et seq*.

Texas administrative proceedings and associated proceedings in the state court system may be initiated by state agencies or regulated entities. Agencies can, for example, institute enforcement actions to ensure regulatory compliance. E.g., TCEQ, *Track Pending Enforcement Actions*, http://www.tceq.texas.gov/compliance/enforce-

ment/penenfac/index.html; Texas Department of Insurance, TDI Enforcement Actions, at http://www.tdi.texas.gov/commish/actions.html. Typically, a contested-case proceeding before an administrative law judge follows, and "the legal rights, duties, or privileges of a party are . . . determined . . . after an opportunity for adjudicative hearing." TEX. GOV'T CODE § 2001.003(1). A party aggrieved by agency action then has "a right to judicial review of a contested case order for all agencies of statewide jurisdiction or other agencies specifically required to comply" with the Texas Administrative Procedure Act. 2 RONALD L. BEAL, TEXAS ADMINISTRATIVE PRACTICE & PROCEDURE, §11.2.1, at 11-10 (2009); see also TEX. GOV'T CODE § 2001.171. Moreover, the appropriate state court has jurisdiction to review agency orders alleged to violate a constitutional right or adversely affect a vested property right. *Houston Mun. Emps. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 157 (Tex. 2007); *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 599 (Tex. 2001).

Regulated entities may also challenge the validity or applicability of agency rules in a declaratory judgment suit:

> The validity or applicability of a rule . . . may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere

> with or impair, a legal right or privilege of the plaintiff.

TEX. GOV'T CODE § 2001.038; see also *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 399 (Tex. 2009) (declaratory challenge to validity of agency rule); *R.R. Comm'n of Tex. v. WBD Oil & Gas Co.*, 104 S.W.3d 69, 74-76 (Tex. 2003) (discussing review of rules and contested-case rulings); cf. 7 U.S.C. § 608c(15) (authorizing pre-enforcement petition for declaration that marketing order "is not in accordance with law" and providing jurisdiction for appeal in the appropriate federal district court). And a party aggrieved by regulatory action can also file suit alleging an unconstitutional taking. See *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477-78 (Tex. 2012); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 646 (Tex. 2004); *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex. 2004); *City of Abeline v. Smithwick*, 721 S.W.2d 949, 951 (Tex. App.—Eastland 1986, writ ref'd n.r.e.).

But once judicial review of regulatory action commences, all claims and defenses regarding that action should typically be raised in that proceeding, including constitutional takings claims or defenses. Thus, unlike the Ninth Circuit's unwieldy bifurcated scheme—where a takings claim cannot be heard in defense to an enforcement action—arguments that an administrative determination amounts to an unconstitutional taking generally should be made on appeal to the courts from the administrative review,

not in a subsequent stand-alone lawsuit for a refund. See, e.g., *City of Dallas v. Stewart*, 361 S.W.3d 562, 568 (Tex. 2012) (authorizing *de novo* judicial review of takings claim in response to board's decision that building was a nuisance and ordering its destruction); *Combs v. City of Webster*, 311 S.W.3d 85, 92 (Tex. App.—Austin 2009, pet. denied) (providing judicial review of claim that comptroller determination about tax code and recovery of tax revenue amounted to unconstitutional taking); see also *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006) (holding claims defensive to governmental entity's claim for monetary recovery properly brought and not subject to immunity). Indeed, in Texas, even though a constitutional takings "'claim may be asserted for the first time in the district court upon appeal of the agency order, a failure to comply with the appeal deadlines and/or the failure to so assert the constitutional claim at that time, precludes a party from raising the issue in a separate proceeding.'" *Stewart*, 361 S.W.3d at 580 (quoting 1 BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE § 9.3.1[c]); see also *Tex. Comm'n on Envtl. Quality v. Kelsoe*, 286 S.W.3d 91, 97 (Tex. App.—Austin 2009, pet. denied).

Adjudicating takings defenses in a single proceeding makes sense for all concerned. The State has no interest in discovering long after the fact that agency action caused a taking that now requires unanticipated retrospective compensation. Far better to know, as soon as possible, all costs for the

State associated with contemplated agency action. The same is true for the party subject to a taking, who is best served by a prompt decision, whether it results in compensation, invalidation of the underlying regulatory action, or conclusive denial of the claim.

The remedial scheme for successful takings claims involving real property in Texas reflects the sensible preference for knowing all costs associated with regulatory action as soon as possible, and certainly before the action is non-reversible. Under the Texas real-property remedial scheme, the State has the option, after a judicial finding that there is a taking of real property, either to invalidate the agency action or pay just compensation. *See* TEX. GOV'T CODE § 2007.024(c)-(d). Understandably, this option is viable only so long as there is an opportunity to reverse course on the agency action; hence, needless delay in resolving takings claims undermines the remedial scheme. Moreover, *requiring* "delay until any [subsequent] adjudication" of the question whether there has been a taking—as the Ninth Circuit would require—"would be exceedingly irresponsible" because it could eliminate any opportunity "to consider whether to abandon the whole [government action] if it turned out that the entire value of the . . . [action] must be paid in cash." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 150 n.36 (1974).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

JONATHAN F. MITCHELL
Solicitor General

ANDREW S. OLDHAM
Deputy Solicitor General
Counsel of Record

RICHARD B. FARRER
MATTHEW H. FREDERICK
DOUGLAS D. GEYSER
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
andy.oldham@
texasattorneygeneral.gov
(512) 936-1700

COUNSEL FOR AMICUS CURIAE

January 2013