

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   MARVIN D. HORNE, ET AL.,                   :

4                   Petitioners                   :   No. 12-123

5                   v.                               :

6   DEPARTMENT OF AGRICULTURE                   :

7   - - - - - x

8                               Washington, D.C.

9                               Wednesday, March 20, 2013

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11                   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:10 a.m.

14   APPEARANCES:

15   MICHAEL W. McCONNELL, ESQ., Washington, D.C.; on behalf

16       of Petitioners.

17   JOSEPH R. PALMORE, ESQ., Assistant to the Solicitor

18       General, Department of Justice, Washington, D.C.; on

19       behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 12-123, Horne v. Department  
5 of Agriculture.

6 Mr. McConnell?

7 ORAL ARGUMENT OF MICHAEL W. McCONNELL

8 ON BEHALF OF THE PETITIONERS

9 MR. McCONNELL: Mr. Chief Justice, and may  
10 it please the Court:

11 There's a surprising number of difficult  
12 merits questions lurking in this case, mostly involving  
13 whether there was a taking, and if so, how it should be  
14 conceptualized and valued.

15 JUSTICE SOTOMAYOR: Could I -- could I just  
16 stop you on a factual matter --

17 MR. McCONNELL: Certainly.

18 JUSTICE SOTOMAYOR: -- because it has  
19 confused me. As I look at the captions of the cases,  
20 there appear to be two different partnerships: One  
21 partnership, known as Raisin -- doing business as Raisin  
22 Valley Farms, has Mr. Horne and his wife as the  
23 partners.

24 Larsen Valley, the producer -- not the  
25 producer, the handler -- has four other, the Hornes,

1 plus two other people. So who owns the raisins? Isn't  
2 that the first partnership of the husband and wife? And  
3 isn't the handler a second partnership that does the  
4 business of handling?

5 MR. McCONNELL: The other two partners in  
6 Lassen were Laura Horne's parents, now deceased.

7 JUSTICE SOTOMAYOR: But the estates have  
8 been substituted.

9 MR. McCONNELL: Substituted. That's right.

10 JUSTICE SOTOMAYOR: So isn't it two legal  
11 entities, one who owns and one who handles? One  
12 partnership produces, one partnership handles?

13 MR. McCONNELL: The Department of  
14 Agriculture did not distinguish among them.

15 JUSTICE SOTOMAYOR: Well, I don't care if  
16 they did or they didn't. I mean, we should know. Are  
17 they two separate legal entities? One who produces --

18 MR. McCONNELL: They are separate -- they  
19 are separate legal entities, all effectively controlled  
20 by the same family.

21 JUSTICE SOTOMAYOR: Well, that's -- you  
22 know, in the cat -- you get some limited liability by  
23 creating separate entities, so the creature who owns is  
24 one partnership, and the -- and the entity that  
25 produces, that handles, is a second one.

1 JUSTICE SCALIA: I assume this is one of  
2 those difficult merits questions you were alluding to,  
3 it doesn't go to whether there's jurisdiction, but to  
4 whether the claim of a taking can be asserted by the  
5 partnership in question, isn't it?

6 MR. McCONNELL: That's right,  
7 Justice Scalia.

8 JUSTICE SCALIA: I don't -- I don't see how  
9 it goes to jurisdiction, which is the only question  
10 before us.

11 JUSTICE SOTOMAYOR: Well, it does to my mind  
12 because what is the claim, assuming that the producer  
13 owns -- the producer entity owns the raisins. What  
14 exactly is being taken from the handlers? Is it the  
15 percentage -- it can't be the raisins because they don't  
16 own them.

17 MR. McCONNELL: Well, Justice Sotomayor,  
18 I'm -- I'm delighted to preview our -- our argument on  
19 the merits on that.

20 JUSTICE SOTOMAYOR: What -- what do they  
21 own?

22 MR. McCONNELL: So the -- so the --

23 JUSTICE SOTOMAYOR: What is it that's being  
24 taken from the handler entity?

25 MR. McCONNELL: The order in this case was

1 issued against the -- the Hornes in their capacity as a  
2 handler only, so the entire fine was paid by them. None  
3 of the fine is attributable to anyone in their capacity  
4 as a producer.

5 JUSTICE SOTOMAYOR: All right. So go back.  
6 What is the -- what was taken from them -- you're saying  
7 it's just the fine, that the fine is a taking or -- what  
8 was the interest that they're claiming was taken by the  
9 government? They didn't own the raisins, so they get  
10 paid a fee for handling.

11 MR. McCONNELL: So -- so this is -- this is  
12 our position, Justice Sotomayor. I think we have to  
13 look at what is it that the Department of Agriculture  
14 attempted to take. So, in the demand letter from the  
15 Department of Agriculture addressed to the Hornes,  
16 they -- they asked the Hornes to deliver California  
17 raisins, or the dollar equivalent. So that's the fact  
18 upon which all of this case is -- is built.

19 Now, what is the legal significance of that,  
20 California raisins or the dollar equivalent? It is our  
21 legal position, or it will be our legal position on the  
22 merits that when the government seeks a specific  
23 physical property, a res, or its monetary equivalent,  
24 that that is a taking of the res itself. And there's --  
25 and there's support for that in the -- for precedent

1 from this Court. The closest case is Village of  
2 Norwood v. Baker.

3 In this case, the -- the city condemned a  
4 strip of land for the purpose of building a road. They  
5 tried to get out of paying any compensation by claiming  
6 that the abutting landowner would gain value. That was  
7 rejected. They were assessed \$2,000 compensation for  
8 the taking.

9 And then the city turned around and issued a  
10 special assessment against the landowner for precisely  
11 that \$2,000. The landowner came back up to this Court,  
12 and this Court held that it was a taking -- a taking of  
13 the land.

14 And in a subsequent case just a couple of  
15 years later, the Court described this as a, quote  
16 "actual confiscation of private property to public use."

17 JUSTICE KENNEDY: But you -- you began by  
18 saying that these are merits defenses, but you wanted to  
19 focus first on -- on the jurisdictional question that's  
20 before us.

21 MR. McCONNELL: That's right. I hope it  
22 helps to inform the jurisdictional question. But the  
23 jurisdictional question is this: The Ninth Circuit held  
24 that my clients could not even raise their takings claim  
25 on the merits until they had first gone to the Court of

1     Claims.

2                   I think there are three things wrong with  
3     that.

4                   JUSTICE GINSBURG:  Am I right in thinking  
5     that there is no dispute on that point, that the -- the  
6     takings claim could have been asserted by the Hornes, as  
7     producers, in the Court of Federal Claims?

8                   MR. McCONNELL:  I think that the government  
9     no longer disputes, although you should ask them to  
10    be -- to be clear -- I think that they no longer dispute  
11    that this is not a jurisdictional client, even though  
12    they prevailed after the petition for rehearing was  
13    filed in the Court of Appeals --

14                  JUSTICE GINSBURG:  Well, jurisdictional --

15                  MR. McCONNELL:  -- on the ground that it was  
16    jurisdictional.

17                  JUSTICE GINSBURG:  -- jurisdictional or not,  
18    as a practical matter, producers who are not subject to  
19    fine as handlers, but the producers of the raisins whose  
20    raisins are being segregated, could they go to the Court  
21    of Federal Claims and say my raisins have been taken?

22                  MR. McCONNELL:  The -- whether the claim is  
23    being brought in the capacity of producer or handler I  
24    think is not relevant to one of our arguments, and it is  
25    relevant to the other argument.



1 JUSTICE GINSBURG: But I'd just like a  
2 straight answer to that question. You -- you are  
3 representing producers, and they just produce.

4 MR. McCONNELL: No, no. No, we're  
5 representing people who are both producers and handlers.

6 JUSTICE GINSBURG: I'm saying  
7 hypothetically -- hypothetically. Is the Court of  
8 Federal Claims the proper forum for a producer?

9 MR. McCONNELL: It depends upon whether the  
10 taking has been from them or not. In the ordinary case,  
11 the ordinary relationship between a producer and a  
12 handler, the producer is not paid for the reserve  
13 raisins and therefore any payment that would come, any  
14 lawsuit on behalf of those raisins would go to the  
15 producer, and that would go I think to the Court of  
16 Claims.

17 In this case, though, the business model is  
18 quite different from that and the producers in this case  
19 were paid everything. They received full value --  
20 market value for their raisins. The only people who are  
21 out any money in this case are the Hornes in their  
22 capacity as handler. So that's why they are the  
23 only ones --

24 JUSTICE SOTOMAYOR: But the problem is that  
25 they weren't entitled to that money. Meaning they had

1 to pay it over to the producer. The producer was going  
2 to pay them a handling fee, but that money didn't belong  
3 to them. It belonged to the producers who supplied them  
4 with the raisins and expected payment for them --

5 MR. McCONNELL: I'm not sure what --

6 JUSTICE SOTOMAYOR: -- if they were sold in  
7 the ordinary course.

8 MR. McCONNELL: I'm not sure which  
9 money you're -- they have not asserted any claim on any  
10 money. The producers have been completely paid off. It  
11 is the handlers who have been held responsible. And the  
12 reason they were held responsible was the following  
13 logic, and you see this on -- on -- on page 78 of the  
14 judicial officer's opinion.

15 They were held responsible because in  
16 their -- in their processing capacity, when they were  
17 doing the stemming, the seeding, the fumigating, the  
18 packing, that this was regarded by the Department of  
19 Agriculture as possession -- physical possession of the  
20 raisins and acquisition of the raisins, even though they  
21 never had title to the raisins.

22 It's the Department of Agriculture that has  
23 attached to them a possessory interest in the raisins  
24 and then assessed them the full monetary equivalent of  
25 those raisins, full market value, \$484,000 for the

1 market value because it's -- because under this very  
2 unusual regulatory scheme the government regards them as  
3 having possessed the raisins even though that -- that is  
4 not --

5 JUSTICE KAGAN: Mr. McConnell, I'm sorry.  
6 Could I -- along the lines of what Justice Ginsburg was  
7 saying, suppose that the Hornes had given over all the  
8 raisins, right, but that they thought that this was  
9 improper, that this marketing order was -- it was a  
10 violation of the takings clause. Could they have gone  
11 to the Court of Claims, via the Tucker Act, and said, we  
12 want our money back?

13 They gave -- they gave over the raisins,  
14 they say we're entitled to compensation. Could they  
15 have gone through the Court of Claims?

16 MR. McCONNELL: If they had -- if they had  
17 not been paid for the raisins, they had taken raisins to  
18 a handler, received no money for them, I think that they  
19 could go to the Court of Claims.

20 JUSTICE KAGAN: In other words, the Hornes  
21 did what the marketing order suggested they should do.  
22 They gave over the raisins. But they said this is just  
23 improper. You're saying they could go to the Court of  
24 Claims?

25 MR. McCONNELL: Yes.

1 JUSTICE KAGAN: Okay. So if -- if that's  
2 the case, I guess then the question is, why didn't they  
3 have to go that route?

4 MR. McCONNELL: They didn't -- they didn't  
5 go that route, and the question I think is what are the  
6 -- what are the legal consequences of that --

7 JUSTICE KAGAN: Right.

8 MR. McCONNELL: -- because what they -- what  
9 they knew was that they were not going to be compensated  
10 for the raisins, and therefore they came up with a --  
11 with a plan, a business plan that they believed made --  
12 eliminated any handler and made it unnecessary for any  
13 of the independent producers, on whose behalf they're  
14 operating, to turn over raisins to the government.

15 The plan was ultimately rejected and we  
16 haven't brought a -- a cert petition on it, but the plan  
17 actually complies with the -- with the language of  
18 the -- of the regulation because they believe that in  
19 their capacity as handler, as processor, that they never  
20 acquired the raisins. "Acquisition" is the key term for  
21 becoming a handler under the rule.

22 And they believe that since they were simply  
23 providing a service for -- for \$12 a ton to their  
24 neighbors, that they never acquired the raisins, they  
25 never possessed the raisins, and therefore no one had to

1     comply the regulation.

2                   JUSTICE SCALIA:   Well, some of the raisins  
3     were their own.   Some of the raisins were their own.

4                   MR. McCONNELL:   That's correct.

5                   JUSTICE SCALIA:   At least as to that, that  
6     wouldn't be true, right?

7                   MR. McCONNELL:   That's -- that's correct.   I  
8     think that's correct.

9                   JUSTICE KENNEDY:   Well, to get you back to  
10    the -- the jurisdiction point, let's -- let's just  
11    assume a hypothetical case where a regulated entity has  
12    to pay an exaction which it deems to be a penalty.   And  
13    let's assume it can go to the Court of Claims, but it  
14    doesn't.

15                   It waits until the penalty's assessed and  
16    then when the penalty's assessed it says, this is a  
17    taking.   That -- is that the case that you want to  
18    discuss with us today?

19                   MR. McCONNELL:   That's right.   When the  
20    underlying order would be a taking and they have been  
21    assessed money because they didn't comply with the  
22    taking, we believe they can challenge that as a taking.  
23    And both under the AMAA procedures, in which are exclusive,  
24    I think that they have to go through the -- through the  
25    Department of Agriculture and then to the district

1 court, but I also think under the principles of the --  
2 announced by this Court in of the Apfel decision that  
3 they are entitled to a remedy in the district court.

4 JUSTICE GINSBURG: Mr. McConnell, would you  
5 explain the -- if they were just handlers and weren't  
6 producing any raisins, if they were just handlers, do  
7 they have a claim and where? And if they were just  
8 producers -- I take it from the question I asked and the  
9 question Justice Kagan asked that if they were just  
10 producers, the raisins got set aside, they were paid for  
11 only the ones that went to market, they could go to the  
12 Court of Claims.

13 But now they're just handlers, as this  
14 entity is for most of the raisins that are involved,  
15 some 80 percent, right? It's only about 20 percent is  
16 their own. So could this work for someone who was just  
17 a handler, doesn't produce any raisins?

18 MR. McCONNELL: So if they are just a  
19 handler --

20 JUSTICE GINSBURG: Yes.

21 MR. McCONNELL: -- as the Department of  
22 Agriculture treated them, as far as the Department of  
23 Agriculture is concerned they are only a handler. They  
24 are required to raise -- exhaust their claims before the  
25 Department of Agriculture and then challenge the order

1 in the district court.

2 JUSTICE GINSBURG: What I'm -- I'm trying to  
3 understand is this scheme. Apparently it wasn't enough  
4 just to be a handler or just to be a producer. The  
5 claim that you're making turns on the coincidence of  
6 being both the producer and a handler.

7 MR. McCONNELL: I don't think that that's  
8 so. I think that we -- that the Hornes ought to prevail  
9 on either -- in either of their capacities.

10 JUSTICE GINSBURG: So any handler, any  
11 handler could be making the same claim?

12 MR. McCONNELL: Any handler who has a  
13 business model that is similar to this. But most  
14 handlers --

15 JUSTICE GINSBURG: But what do you mean  
16 by -- what's the business model that's similar to this?

17 MR. McCONNELL: So most handlers, if they're  
18 in compliance with the order, they take all the raisins  
19 from the producers, they only pay for -- for the free  
20 pool of raisins. They don't pay for the reserve raisins  
21 and they never have any interest in the reserve raisins.  
22 In this case, the Hornes did not operate that way.  
23 The -- the producers received full value for all of  
24 their raisins.

25 So the producers are -- are not in the case.

1 They have no standing. They have no pocketbook injury.  
2 The -- the entire pocketbook injury in this case is  
3 borne by the Hornes in their capacity as a handler.

4 JUSTICE SOTOMAYOR: I'm sorry.

5 JUSTICE ALITO: In response to --

6 JUSTICE SOTOMAYOR: In the Horne model, the  
7 handlers buy -- buy the free raisins and then pay the  
8 producers, is that what it --

9 MR. McCONNELL: That's correct.

10 JUSTICE SOTOMAYOR: Oh, so that's the  
11 difference in this model, they don't take title to the  
12 raisins is what you're saying?

13 MR. McCONNELL: Exactly. And the Hornes  
14 believed that this would mean that they were not  
15 handlers.

16 JUSTICE SOTOMAYOR: All right. Let me --  
17 let me --

18 MR. McCONNELL: And that -- and they were  
19 found to be handlers anyway.

20 JUSTICE SOTOMAYOR: What is -- what is the  
21 value in permitting a party who doesn't own property to  
22 raise a taking claim on behalf of other people?  
23 Meaning, doesn't the system have an interest in ensuring  
24 that people comply with their legal obligations, and to  
25 the extent that you choose to violate the law the way



1     they have here, that the fine is punitive and not  
2     compensatory.

3                   Meaning, you don't own the raisins, but you  
4     were obligated to put raisins aside for someone else.  
5     You were their agent and you failed to meet a government  
6     obligation that was independently on you.

7                   MR. McCONNELL:  No.

8                   JUSTICE SOTOMAYOR:  So I go back to my  
9     question:  What was the taking?  Since you didn't own  
10    the raisins, the taking is the fine is what you want to  
11    call the taking.

12                  MR. McCONNELL:  The taking is what the  
13    government demanded, which was either give me your house  
14    or give me your money, give me your raisins or give us  
15    the monetary equivalent.

16                  JUSTICE SOTOMAYOR:  But they're not your  
17    raisins.  They're not your raisins.

18                  MR. McCONNELL:  By the time -- by the time  
19    this order was enforced, the raisins were gone and so as  
20    a practical matter, only one of those two alternatives  
21    was left as a matter of timing.

22                  JUSTICE ALITO:  Well, but in answer to  
23    Justice Ginsburg's question that -- you said the  
24    producers could go to the -- the Court of Federal Claims  
25    to contest the taking of -- producers could go to

1 contest the taking of raisins.

2 MR. McCONNELL: If they had not been paid  
3 for the raisins.

4 JUSTICE ALITO: If they had not been paid  
5 for it.

6 MR. McCONNELL: Right.

7 JUSTICE ALITO: But are you -- does that  
8 mean you do not think that the AMAA withdraws Tucker Act  
9 jurisdiction?

10 MR. McCONNELL: It withdraws Tucker Act  
11 jurisdiction only for handlers. So if we're talking  
12 about pure producers --

13 JUSTICE ALITO: Only for handlers.

14 MR. McCONNELL: -- pure producers do not go  
15 to the -- don't have to go through the AMAA process.

16 JUSTICE SCALIA: Why? Why -- why does it  
17 withdraw for the one and not the other?

18 MR. McCONNELL: These New Deal-era programs,  
19 Justice Scalia, are somewhat -- the purpose is somewhat  
20 obscure --

21 JUSTICE SCALIA: No, I don't mean the  
22 policy. I don't mean the policy reason. What in the  
23 law leads you to that conclusion?

24 MR. McCONNELL: Oh, well, this is  
25 straightforwardly set forth in the -- in the -- in

1 Sections 14(a) and 15(a) of the AMAA. I don't think  
2 that's in dispute. So only producers are -- are  
3 regulated by this program. Only producers have a right  
4 to go through their remedies in the Department of  
5 Agriculture.

6 Only producers have to do that. It's --  
7 it's a -- it's completely a producer --

8 JUSTICE GINSBURG: You said --

9 MR. McCONNELL: I'm sorry, I'm sorry.  
10 Excuse me. Each of those was -- please substitute the  
11 word "handler" for each of those. It's only the  
12 handlers that are regulated under this -- under this  
13 program.

14 So -- and -- and my clients were treated as  
15 handlers. They believed that they were not. But it is  
16 the Department of Agriculture that has attached this --  
17 this status to them. And it's -- it's I think quite a  
18 Catch 22 for the government to come along and say,  
19 although we are fining you \$700,000 in your capacity as  
20 a handler, you're not a handler for purposes of  
21 challenging the legality of that order.

22 JUSTICE BREYER: I'm just trying to get to  
23 what you're arguing about. And I might be off base by  
24 now. I feel like handlers, purchasers, raisins, like an  
25 old Abbott and Costello movie. I just want to see if

1 I'm right. Tell me. Just say you're wrong and I don't  
2 go into it further.

3                   There -- there are some people, they've been  
4 -- they are either -- they have some raisins, all right.  
5 And these particular people, whom the Department has  
6 said have acquired the raisins, it said they acquired  
7 the raisins. And so they're there with some raisins,  
8 and then the government says, do this thing with your  
9 raisins. And they don't want to do it, so they don't.  
10 They don't do it even though the law says do it.

11                   And then they say the law is  
12 unconstitutional and, moreover, you fined us a huge  
13 amount of money and we don't want to pay it because the  
14 law is unconstitutional, and we consider that money that  
15 we paid. Call it a fine, call it what you want. We  
16 consider we shouldn't have paid it and now we want it  
17 back and we want compensation and we think it's a taking  
18 and where do we go. Can't we make that argument in the  
19 Ninth Circuit? It's something like that; isn't that  
20 what we're arguing about?

21                   MR. McCONNELL: That's almost exactly right.

22                   JUSTICE BREYER: But not quite.

23                   (Laughter.)

24                   MR. McCONNELL: With -- with one detail  
25 different --

1 JUSTICE BREYER: Yes?

2 MR. McCONNELL: -- which is that this is the  
3 proceeding here that decides whether they have to pay.  
4 They have not yet paid the fine.

5 JUSTICE BREYER: Okay, okay. So we  
6 shouldn't have to pay because this is all  
7 unconstitutional. And -- and now what's your argument?

8 MR. McCONNELL: So -- so they're raising a  
9 defense. It isn't that they are -- it isn't that  
10 they're getting -- trying to get it back.

11 JUSTICE BREYER: And then the Ninth Circuit  
12 says go to the Court of Claims. And you say no, we  
13 don't have to go to the Court of Claims.

14 MR. McCONNELL: But that detail actually is  
15 quite important because, remember, you can't even go to  
16 the Court of Claims unless you are seeking damages for  
17 an actual violation that has already taken place. We  
18 could not go to the court -- the Hornes could not go to  
19 the Court of Claims right now. What the government says  
20 is that they should pay the \$700,000 fine first and then  
21 go to the Court of Claims to get it back. And that is  
22 exactly what this Court said in Apfel, is a, quote,  
23 "pointless set of activities that Congress could not  
24 possibly have" --

25 JUSTICE KAGAN: That's true --

1 MR. McCONNELL: -- "have contemplated."

2 JUSTICE KAGAN: I think that's true, Mr.  
3 McConnell, as to part of the fine, that part of the fine  
4 falls under Apfel, but not the other part. As to the  
5 compensation part, it seems to me you have a pretty  
6 decent Apfel argument. But as to the penalty part, I  
7 don't really understand how the Apfel argument would go.

8 It seems to me that as to the penalty part,  
9 the key thing is that if they had handed over the  
10 raisins, they could have gone to the Court of Federal  
11 Claims and had the compensation done there. And the  
12 fact that the government is penalizing them for not  
13 complying with the marketing order does not fall within  
14 the rationale of Apfel.

15 MR. McCONNELL: Well, the most pertinent  
16 case for that part of the fine, for the penalty part, is  
17 Missouri Pacific Railroad v. Nebraska. So this is the  
18 case where the railroad was told by the State to do  
19 some -- some expensive work, the railroad says no, that  
20 would be a taking if we were required to do that. There  
21 is no compensation available and so they don't do it.  
22 They're fined \$500.

23 That gets up to this Court and an opinion by  
24 Mr. -- Justice Holmes, the Court holds that that is a  
25 taking and that the railroad is entitled to challenge

1 the taking in the form of the fine. So for -- for the  
2 penalty portion, the punishment portion of the fine,  
3 Missouri Pacific Railroad is actually the more pertinent  
4 decision.

5 Which comes back -- I don't think I fully  
6 answered all the variants of Justice Sotomayor's  
7 question.

8 JUSTICE BREYER: All I was trying to do was  
9 to get you on the basic argument, which you started  
10 with, which is why is there -- why was the Ninth Circuit  
11 wrong when they said they had no jurisdiction to hear  
12 this, that rather, they had to go -- you had to go to  
13 the --

14 MR. McCONNELL: May I tick off the three  
15 reasons?

16 JUSTICE BREYER: Yes.

17 MR. McCONNELL: One is it has nothing to do  
18 with jurisdiction.

19 Second, the Tucker Act does not apply to  
20 cases where -- where there is a defense being lodged to  
21 a monetary exaction. That's Apfel, as supplemented by  
22 Missouri Pacific Railroad.

23 And third, even if that were not so, the  
24 AMAA displaces the Tucker Act and they were required to  
25 exhaust their remedies before the Department of

1     Agriculture and take their case to the district court in  
2     which they are residing.

3                   JUSTICE SCALIA:   What was the first?   I  
4     forgot the first already.   What was the first?

5                   MR. McCONNELL:   The first is that it isn't  
6     jurisdictional and therefore it should not have been  
7     raised --

8                   JUSTICE SCALIA:   What -- what isn't  
9     jurisdictional?

10                  MR. McCONNELL:   The -- the requirement to go  
11     to the Court of Claims when you -- when you need to is  
12     not jurisdictional, that that's a matter of remedy, that  
13     is, it's -- it's the equitable principle that you may  
14     not pursue your case for an injunctive relief when  
15     there's an adequate remedy at law.

16                  JUSTICE SOTOMAYOR:   Mr. McConnell, in --  
17     in -- if the producers had decided to challenge this as  
18     a Tucker Act violation, they would have had to hand over  
19     the raisins?   Or could they have just held on to the  
20     raisins and said, I'm not handing it over until I get  
21     just compensation?

22                  MR. McCONNELL:   So had they held on to their  
23     own raisins and sold them, I assume, you don't -- not  
24     just left them rot, if they had sold them, then the  
25     Department of Agriculture would have called them a



1 handler because anyone who sells raisins is called a  
2 handler, and then they would be fined in their capacity  
3 as a handler and it would be a somewhat similar case to  
4 this one.

5 JUSTICE SOTOMAYOR: All right.

6 MR. McCONNELL: Maybe an easier one than  
7 this one.

8 JUSTICE SOTOMAYOR: Well, the point is that  
9 under a normal takings claim, you have to hand over your  
10 property, you've lost the value, and you want the  
11 government to pay it back to you, correct?

12 MR. McCONNELL: Not necessarily correct.  
13 There are a whole string of cases in which property  
14 owners raise takings as a defense rather than turning  
15 over the property. Kaiser Aetna is perhaps the most --  
16 best known recent case, but out of an administrative  
17 context, there's the Florida Power & Light case. Penn  
18 Central was -- was like this. Loretto v. Teleprompter  
19 is like this.

20 There's a whole string of cases. The  
21 government themselves cite six such cases, most of them  
22 fairly old, for this proposition. So there's nothing  
23 unusual about bringing a -- a defensive takings claim.

24 Mr. Chief Justice, unless --

25 JUSTICE GINSBURG: Mr. McConnell, I don't

1 want to encroach on your rebuttal time, but one  
 2 mysterious thing. The first time around, the Ninth  
 3 Circuit decided this case on the merits. So if you're  
 4 right, I take it, we remand and then they adjudicate the  
 5 merits of the takings claim. But they already did that.

6 MR. McCONNELL: Yes, Justice Ginsburg. And  
 7 they did that on a ground that we think is manifestly  
 8 inconsistent with this Court's precedents. We were  
 9 prepared to -- we were trying to get an en banc review  
 10 and were prepared to come to this Court from the merits  
 11 determination.

12 We were blocked from that because the  
 13 government, after the petition for rehearing was filed,  
 14 came up with -- calling this a jurisdictional argument,  
 15 raised this objection for the first time; and the Ninth  
 16 Circuit panel accepted their view, issued a new opinion,  
 17 stripping out the entire merits, and substituting this  
 18 jurisdictional holding that is producing so much  
 19 enjoyment for us this morning.

20 (Laughter.)

21 MR. McCONNELL: May I reserve the remaining  
 22 time? Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,  
 24 Mr. McConnell.

25 Mr. Palmore?

1 ORAL ARGUMENT OF JOSEPH R. PALMORE

2 ON BEHALF OF THE RESPONDENT

3 MR. PALMORE: Thank you, Mr. Chief Justice,  
4 and may it please the Court:

5 I'd like to start where Justice Sotomayor  
6 started with Petitioner's counsel because any takings  
7 analysis needs to begin with a careful identification of  
8 what property was allegedly taken. Petitioners in this  
9 case have actually advanced two different theories about  
10 what property of theirs was taken. What taking is at  
11 issue here? Raisins and money.

12 We think both takings claims fail for  
13 threshold reasons, but they're different threshold  
14 reasons that call for different analysis.

15 JUSTICE KAGAN: Mr. Palmore, before you do  
16 that then, have you conceded the point that this is  
17 not jurisdictional?

18 MR. PALMORE: We agree that the failure to  
19 go to the Court of Claims is not properly viewed as a  
20 jurisdictional defect. We did invoke Ninth Circuit  
21 precedent below stating that it was jurisdictional. And  
22 some of this cases -- this Court's cases put it in  
23 ripeness terms, which is an Article III concept. So  
24 there has been confusion --

25 CHIEF JUSTICE ROBERTS: When did you first

1 raise the argument that it was jurisdictional?

2 MR. PALMORE: In our opposition to the  
3 rehearing petition.

4 CHIEF JUSTICE ROBERTS: And now you are --  
5 now you are changing back again and saying it's not?

6 MR. PALMORE: There was Ninth Circuit  
7 precedent holding that it was jurisdictional, and we  
8 relied on that and there is certainly language from this  
9 Court --

10 CHIEF JUSTICE ROBERTS: You relied on that  
11 when you got to rehearing. You didn't rely on that  
12 before you went before the Ninth Circuit, right?

13 MR. PALMORE: That's correct.

14 We think -- we think this is properly viewed  
15 as a substantive defect in the claim, so in a sense the  
16 Ninth Circuit, in its initial panel decision, ruled for  
17 the government on a substantive defect one, there's no  
18 taking. And what it did on rehearing in our view,  
19 although it attached the wrong label to it, it  
20 substantively was correct in concluding that there was  
21 substantive defect number two --

22 JUSTICE KAGAN: But Mr. Palmore, if you are  
23 conceding now that this is not jurisdictional, it seems  
24 to me that your Tucker Act argument as a substantive  
25 argument, I mean, has been waived. You didn't raise

1 that argument until the rehearing petition.

2 MR. PALMORE: That would certainly be  
3 something that -- that the Ninth Circuit could consider  
4 in the event there were a remand here. But the Ninth  
5 Circuit did decide it. The substance of its bottom line  
6 conclusion was correct and all of its analysis was  
7 correct. It simply used the wrong words, so we think it  
8 is here.

9 JUSTICE SCALIA: I'm really -- I'm really  
10 confused. You are saying there ought to be a remand  
11 here because the question is not jurisdictional, which  
12 is just what your friend says, right?

13 MR. PALMORE: Well, the Ninth Circuit --

14 JUSTICE SCALIA: So the two of you are in  
15 agreement it ought to go back to the Ninth Circuit, they  
16 should do it on the merits, and -- and if that's wrong,  
17 we can review that.

18 MR. PALMORE: Look, if that happens, of  
19 course, as Justice Ginsburg pointed out, the consequence  
20 for us is they reinstate the prior panel opinion, in  
21 which we win, also --

22 JUSTICE SCALIA: That may well be, but --

23 MR. PALMORE: I'm not going to resist too  
24 strenuously that kind of remand, but they did decide it.  
25 And moreover, they decided something separate, which is

1 at JA-305 they said something different, which is the  
2 kind of threshold defect in the takings claim turning on  
3 raisins, which is there is a capacity problem.

4 So there are two problems with the raisin  
5 claim, a capacity problem and a just compensation  
6 problem. The capacity problem is this: In 2002, after  
7 having been strictly raisin producers since 1969,  
8 entering into a market where there was a reserve  
9 requirement from the beginning, they knew what they were  
10 getting into, they decided to adopt a new business  
11 model, as Petitioner's counsel says. But, as was found  
12 below, they adopted a business model that was an  
13 intentional, willful attempt to evade regulatory  
14 requirements in order to secure an unfair competitive  
15 advantage.

16 But what they did was they took on the  
17 obligations of a handler. They became raisin handlers  
18 in 2002. And what came with that status were a series  
19 of regulatory obligations that apply only to handlers  
20 and under the AMAA can apply only to handlers: The  
21 requirement to have raisins inspected, the requirement  
22 to file truthful reports, the requirement to make  
23 records available, and the requirement to separate out  
24 raisins into what's called free tonnage and reserve  
25 tonnage, any raisins processed, it doesn't matter who

1 owns them.

2 Those are handler-specific regulatory  
3 obligations that were imposed upon them, and they  
4 violated every single one of them, willfully and  
5 intentionally, in order to secure an unfair competitive  
6 advantage.

7 And what the USDA did was impose penalties  
8 on them for the violation of law that -- that attached  
9 to them only as raisin handlers. And then they invoked  
10 the judicial review proceedings in Section 14 that  
11 provides a judicial review mechanism only for handlers.

12 JUSTICE SCALIA: Yes, but part of -- part of  
13 that penalty was -- you know, your raisins or your life,  
14 right? I mean, it was --

15 (Laughter.)

16 JUSTICE SCALIA: -- you don't have to pay  
17 the penalty if you give us the raisins.

18 MR. PALMORE: That's not correct,  
19 Justice Scalia. They have to give the raisins.  
20 Mr. McConnell referred to demand letters --

21 JUSTICE SCALIA: You mean they -- Is that  
22 right, they have to give the raisins?

23 MR. PALMORE: They are under a regulatory  
24 obligation to provide the raisins. If they violate that  
25 regulatory obligation, they are subject to sanctions.

1 JUSTICE SCALIA: Okay. So --

2 MR. PALMORE: One component of --

3 JUSTICE SCALIA: -- that amounts to the same  
4 thing, your raisins or the penalty, right?

5 MR. PALMORE: No, but it's not a choice.

6 And I think that's very important to point out. There  
7 were actually two different demand letters.

8 Mr. McConnell referred to a demand letter saying your  
9 raisins or your money. There was an initial demand  
10 letter saying: You are a handler; you have to comply;  
11 we're going to come get the raisins. The second demand  
12 letter said, we showed up -- literally it says, we  
13 showed up with our truck, you didn't provide the  
14 raisins, so now you have got to provide the cash  
15 equivalent.

16 And there were also going to be, as there  
17 were, separate regulatory proceedings brought against  
18 them for violating those -- those obligations. Not just  
19 the failure to reserve, but all these handler-specific  
20 obligations. They filed false reports. They didn't  
21 make raisins available for inspection.

22 There were a whole host of regulatory  
23 violations that were at issue here, and when they  
24 invoked the handler review action in the district court  
25 they could assert defenses as a handler. But, for



1 instance, another producer -- producers can't invoke  
2 these -- these judicial review schemes. Another  
3 producer couldn't have intervened in that action to  
4 assert its producer claim.

5 JUSTICE ALITO: As this case stands when --  
6 as it comes before us, is there a claim that they --  
7 that money -- the government is trying to take money  
8 from them without just compensation?

9 MR. PALMORE: That was certainly not how we  
10 understood the claim to be litigated below. That's not  
11 how the Ninth Circuit thought -- understood the claim.  
12 We have been talking about the claim involving the  
13 raisins, which fails for a to capacity reason and a just  
14 compensation reason.

15 JUSTICE ALITO: Is that an issue -- is that  
16 an issue we should decide or is that an issue that the  
17 Ninth Circuit should decide, whether there is a takings  
18 claim for money?

19 MR. PALMORE: That was certainly not decided  
20 below, so a remand -- to the extent that this was  
21 preserved, a remand would be possible outcome there. We  
22 think, though, that that claim suffers from separate --  
23 separate procedural threshold defects.

24 JUSTICE ALITO: All right. If we assume for  
25 the sake of argument that there is such a claim, why

1 does that not fall within Apfel?

2 MR. PALMORE: Well, we think that -- for  
3 several reasons. First of all, the Apfel opinion that's  
4 referred to is just a plurality. It's not been adopted  
5 by the Court. Second of all, the Apfel analysis relied  
6 on this one-for-one, dollar-for-dollar concept. That  
7 was a critical part of the plurality's discussion there,  
8 and it thought that it would simply be a pointless  
9 exercise for Eastern Enterprises to be required to pay  
10 the premium and then to go to the Court of Federal  
11 Claims and get the exact same amount of money back.

12 JUSTICE ALITO: Don't they claim that --

13 MR. PALMORE: We suggested that there are a  
14 whole host of reasons --

15 JUSTICE ALITO: Before you leave that, don't  
16 they claim that the entire amount that is assessed  
17 against them is a taking? Now, maybe they are wrong.  
18 That the entire amount assessed against them is a taking  
19 without just compensation? Maybe they are wrong, but  
20 isn't that a merits question?

21 MR. PALMORE: That's -- that's -- they are  
22 clearly wrong about that, and I -- but I think --  
23 however you characterize that defect, it defeats this  
24 dollar-for-dollar pointless exercise point that  
25 Apfel plurality --

1 JUSTICE KAGAN: Well, why is that a  
2 necessary part of Apfel? Why didn't Apfel just mean  
3 when we are dealing with cash you don't have to go to  
4 the Court of Claims? So even if -- you know, you can  
5 have a discussion in the district court about whether  
6 it's not dollar-for-dollar and it should be discounted  
7 in some way.

8 But why should the fact that its  
9 dollar-for-dollar mean -- why is that a requirement, as  
10 opposed to just it's cash and so the question of,  
11 like -- you know, handing some -- handing it all over  
12 and getting some back, that can be done in the district  
13 court rather than making somebody file a separate suit?

14 MR. PALMORE: Well, I think there were two  
15 things going on in Apfel and there were really two  
16 distinct reasons why the plurality in Apfel thought that  
17 there was no requirement to go to the Tucker Act there.  
18 One was that it thought that in a statute like that,  
19 that simply allocated benefits and burdens among private  
20 entities, Congress would not have intended there to be  
21 compensation available in the -- in the event that there  
22 were a taking.

23 And that was actually the government's  
24 position in that case and the Apfel plurality cited to  
25 that portion of the government's brief. And it cited

1 cases in its discussion that weren't dollar-for-dollar  
2 or even cash transfer cases in which the Court had gone  
3 to the merit of takings claims without consideration of  
4 a Tucker Act remedy.

5           Then there is the second idea, which is the  
6 cash transfer idea. And we think that the  
7 dollar-for-dollar aspect of that was important to the  
8 plurality's analysis because it viewed that as evidence  
9 that Congress would not have intended the Tucker Act to  
10 be deployed because it would have been a pointless  
11 exercise. So it really went to what Congress's intent  
12 was.

13           Here, of course, for myriad reasons, that  
14 dollar-for-dollar analysis breaks down.

15           JUSTICE BREYER: No, no, but there's a  
16 similar -- I mean, it seemed to me, again simplifying,  
17 that underlying this their clients think this whole  
18 raisin program is unconstitutional. What it does is it  
19 takes raisins that we grow, in effect throws them in the  
20 river. And in the thirties, that was done to raise  
21 raisin prices.

22           And they think as a matter of policy that  
23 just hurts people by raising prices, and as a matter of  
24 constitutional law it takes raisins from some people  
25 that belong to them and uses them for this bad purpose.

1     Okay, that's their view of it, something like that,  
2     isn't it?

3                     MR. PALMORE:   Yes.

4                     JUSTICE BREYER:   Fine.   So they're making  
5     that kind of constitutional claim.   Now, I would think  
6     if all you told me was that and I knew nothing about all  
7     these statutes, I would say that's the kind of claim  
8     that should be made in a Federal district court, period,  
9     not the Court of Claims.   Because their government isn't  
10    going to compensate them for anything.   That's against  
11    the whole point of the program.

12                    Either this program is valid or it isn't.  
13    And if it isn't, some authoritative set of courts should  
14    tell us that.   So I have a feeling this is somehow not a  
15    right fit with the Court of Claims.

16                    Now, you explain to me why that purely  
17    instinctive feeling at this point is completely wrong.

18                    MR. PALMORE:   Sure.   Justice Breyer, we've  
19    now shifted back to the -- the first theory about the  
20    property, which is the raisins.   What they could have  
21    done in 2002, would they have been a producer of  
22    raisins, solely a producer of raisins for decades, at  
23    any point during -- between 1969 and 2002, they could  
24    have gone to the Court of Claims and said, this reserve  
25    requirement, is a taking of my raisins, I want my just

1     compensation.

2                     That is not just a remedy, as Mr. McConnell  
3     suggests, it is a constitutional condition on the taking  
4     of private property for public use. As long as there's  
5     just compensation, there simply is no violation. So  
6     that's why --

7                     JUSTICE SCALIA: That couldn't be what the  
8     statute meant. I think that's what Justice Breyer says.  
9     Did -- did Congress create a statute in which we're  
10    going to take your raisins and then you can go to the  
11    Court of Claims and get your money back. I mean,  
12    that -- that surely is not what Congress contemplated.  
13    The -- the whole notion of the program is you can't get  
14    your money back in the Court of Claims.

15                    Now, if you're raising a constitutional  
16    objection, that's something else. That should be done  
17    in district court. But to say that Congress  
18    contemplated -- you know, we'll take your raisins and  
19    then you sue in the Court of Claims, they give you your  
20    money back. That's a weird statute.

21                    MR. PALMORE: Justice Scalia, I have two --  
22    two responses to that. First of all, these claims have  
23    been litigated in the Court of Claims; the Evans case,  
24    the Cal-Almond case, both of which we cite in our brief.  
25    Raisin producers, or in the Cal-Almond case it was an

1 almond producer, went to the Court of Claims and said  
2 this reserve requirement is a taking, I want my money.  
3 And they lost; and the Court of Claims -- correctly, in  
4 our view -- held that there was no taking.

5 That said, we do agree that it is actually a  
6 close question whether Congress would have intended  
7 compensation to be provided in a situation like this  
8 one, in the event the raisin reserve program were found  
9 to be a taking. We've said -- we've said in our brief,  
10 we do view that as a close question, although on  
11 balance, we think that the proper answer is that there  
12 is a remedy -- or, sorry, there is just compensation  
13 available in the Court of Claims.

14 But there are cases, Justice --

15 JUSTICE SCALIA: And you -- you think that's  
16 a close question? You think that the way the statute is  
17 supposed to operate, once it is held that this is an  
18 unconstitutional taking, is that every year, the  
19 government takes the raisins and every year, the grower  
20 goes to the Court of Claims and gets the money back for  
21 the raisins. Is that the program that Congress  
22 anticipated?

23 MR. PALMORE: Well, we do agree that it's a  
24 close question for the --

25 JUSTICE SCALIA: I don't think it's close at

1 all. That's a crazy statute. Every year we're going to  
2 take raisins and every year we're going to pay you in  
3 the Court of Claims. What's the purpose of that?

4 MR. PALMORE: Well, of course, Congress  
5 didn't think this was a taking. And it -- and it built  
6 considerable administrative flexibility into the  
7 statute, and at the end of the day, that's what  
8 convinces us that Congress would not have intended to  
9 preclude compensation in the Court of Claims and to --  
10 to opt for an injunction instead because the Secretary  
11 of Agriculture has wide latitude to adjust.

12 So the compensation wouldn't be paid year  
13 after year, as your hypothetical suggested. The program  
14 could be adjusted. A reserve requirement is only one  
15 way of complying with the kind of supply control  
16 provisions of the statute. There are any number of  
17 options available.

18 But I'd also point out that in this Court's  
19 precedence in Monsanto and Regional Rail, those were  
20 both statutory schemes which had their own compensation  
21 mechanism, as does this one, this reserve raisins that  
22 producers do get paid sometimes for them in a smaller  
23 amount. Those were cases in which the statutes did have  
24 compensation mechanisms, and this Court held that the  
25 Tucker Act was available as kind of a supplementary



1 compensation in the event --

2 JUSTICE GINSBURG: Mr. Palmore, am I  
3 incorrect in thinking that the government is saying,  
4 handlers cannot raise the constitutionality of the  
5 Raisin Marketing Order? You've told us that the  
6 producers can go to the Court of Claims. What about the  
7 handlers? They're at least being fined for violating  
8 the Act, and it's their position that the whole thing is  
9 unconstitutional.

10 Can they raise the constitutionality of the  
11 whole arrangement defensively, or they simply can't  
12 raise the constitutionality of the Act?

13 MR. PALMORE: Justice Ginsburg, I think this  
14 goes back again to the property question. If the claim  
15 is that it's unconstitutional because it takes  
16 producers' property, they can't raise that in this  
17 proceeding. If the property is the raisins, they can't  
18 raise that in this proceeding. They need to -- to  
19 comply and go to the Court of Claims for compensation,  
20 which means there has been no -- in the event there's a  
21 taking, it's a constitutional taking because just  
22 compensation is provided.

23 JUSTICE GINSBURG: But it would be --

24 MR. PALMORE: If the claim -- if the claim  
25 is that the money that was taken from me, the fine, that

1     itself is a taking, then we think that claim can and  
2     must be brought in the context of the AMAA proceeding.  
3     That was not how the Court of Appeals understood the  
4     claim here to be, and there's no precedent for the idea  
5     that a fine for violation of law can be articulated as a  
6     taking of the lawbreaker's property without just  
7     compensation. I haven't seen any case that -- that  
8     stands for that proposition and that would be quite  
9     remarkable.

10                 JUSTICE KENNEDY: But then you just -- but  
11     then you just lose on the merits. What the Ninth  
12     Circuit says, they can't even argue this.

13                 MR. PALMORE: Well, Justice Kennedy --

14                 JUSTICE KENNEDY: I -- I thought that what  
15     we were going to decide was whether or not, assuming you  
16     can go to the Court of Claims, you must go to the Court  
17     of Claims, can you prefer to wait, have a penalty  
18     assessed against you and say this is unconstitutional,  
19     it's a taking. Your position is you can't say that. I  
20     don't understand why. Other than, if you want to talk  
21     about Williamson and so forth, we can get into that.

22                 MR. PALMORE: But, Justice Kennedy, the --  
23     the Ninth Circuit didn't understand the taking claim to  
24     be that the fine for my violation of law is a taking of  
25     my money. That's not how the Ninth Circuit understood

1 the claim, so they didn't analyze it in that way.

2 They understood the claim to be that the  
3 taking of producers' raisins is a taking, and we  
4 lawfully resisted it because it was an unconstitutional  
5 taking. The Ninth Circuit correctly rejected that  
6 because there was nothing unconstitutional about it  
7 because it was not without just compensation.

8 The Tucker Act is the just compensation.  
9 This Court has held --

10 JUSTICE BREYER: The just compensation, I  
11 take it, in the program is supposed to come from the  
12 fact that raisin prices go up. So the poor children  
13 with their noses pressed to the glass because they can't  
14 pay the raisins, their parents are the ones who are  
15 paying the compensation. And certainly not the  
16 taxpayer, he's not going to pay it, and maybe the other  
17 producers will pay, some who get gypped or something, I  
18 don't know. But I can't believe that Congress wanted  
19 the taxpayers to pay for a program that's going to mean  
20 they have to pay higher prices as consumers.

21 MR. PALMORE: Justice Breyer, and that goes  
22 to the -- to the merits of the case.

23 JUSTICE BREYER: No, no. No, it doesn't go  
24 to the merits. It goes to whether or not it makes sense  
25 to think that the Court of Claims has something to say

1 about this. And suppose we did this. Suppose we said,  
2 given the fact that you filed your thing, whatever it  
3 was -- you know, late, and the -- and the light of this  
4 very enlightening discussion which has been helpful, we  
5 think this is the kind of program and challenge to  
6 the program where there isn't going to be a remedy  
7 really in the Court of Claims and they ought to go ahead  
8 in the Ninth Circuit, and in light of all these  
9 enlightening things that we'll write, you just decide  
10 the merits of -- is that -- now, I'm sure you're going  
11 to say that's absolutely terrible, it won't work at all.  
12 So tell me why not.

13 MR. PALMORE: Well, Your Honor, of course,  
14 the consequence of that is they reinstate our prior  
15 victory in the prior panel opinion --

16 JUSTICE BREYER: No, no, we'd say -- we'll  
17 say given the way that we've talked about the program,  
18 perhaps it's best to consider this matter fully.

19 MR. PALMORE: Well, they did consider the  
20 matter fully. In the initial opinion, they said there's  
21 no taking here.

22 JUSTICE BREYER: Yes.

23 MR. PALMORE: So all of the discussion we're  
24 having here is about -- is predicated on the idea that  
25 if there were a taking, would compensation be available

1 in the first place.

2 JUSTICE SOTOMAYOR: Excuse me. Can I --

3 MR. PALMORE: We agree there's no taking.

4 JUSTICE SOTOMAYOR: All right. It almost  
5 seems to me, and I'll ask Mr. McConnell when he gets up  
6 at rebuttal, that there is some sort of due process  
7 challenge going on here that's been created by the  
8 labels they did in this new situation -- in this new  
9 business venture. In the normal situation, the handler,  
10 I'm being told, would actually have title to the  
11 raisins, and they would pay the producers for the  
12 raisins. So there would be property taking.

13 In that situation, where the handlers  
14 actually own the property, would they be able to raise a  
15 taking defense?

16 MR. PALMORE: No, because of the way that  
17 the statute and the regulatory program works. If the  
18 handler is actually buying raisins from the producer,  
19 the handler never takes title to the reserve raisins.  
20 And he doesn't pay for the reserve raisins. He takes  
21 title to the free-tonnage raisins and the title to the  
22 reserve raisins passes, as a matter of law, from the  
23 producer to the Raisin Administrative Committee. The  
24 handler never owns those raisins.

25 JUSTICE SOTOMAYOR: So they are missing a

1 business opportunity because they can't take title to  
2 those raisins. And yet you're asking --

3 MR. PALMORE: They would never pay for  
4 those -- they would never pay for those raisins because  
5 they can't take title. They can't lawfully take title  
6 to those raisins. Now --

7 JUSTICE SOTOMAYOR: This really does sound  
8 to me -- and I think that both Justice Scalia and Breyer  
9 now are being more and more convinced -- there has to be  
10 a place to challenge this scheme.

11 MR. PALMORE: And there absolutely is.

12 JUSTICE SOTOMAYOR: Whether it's a taking --  
13 whether there's a takings claim for the handler because  
14 the handler is being asked to do things --

15 MR. PALMORE: But the handler's property is  
16 not being taken, and that's critical. There are  
17 separate takings claims that handlers have advanced  
18 that -- that could be asserted through this process.

19 For instance, there was a case called Lion Raisins from  
20 the Federal Circuit that we cite in our brief, in which  
21 the issue was that the handler provided bins to store  
22 the raisins, and he didn't get his bins back. Okay?

23 That was a handler takings claim, and that  
24 had to be asserted in the context of this handler review  
25 scheme. But the handler doesn't own the raisins under

1 this scheme.

2 JUSTICE SCALIA: That's -- that's a merits  
3 question again. I mean, it's not a question of whether  
4 you -- you can resist on the basis of a takings claim.  
5 It's a question of whether you are going to win.

6 MR. PALMORE: No, Justice Scalia, I think it  
7 goes to the scope, the capacity question that we were  
8 talking about before because the statute is quite clear  
9 in section 608c(13)(B) that this scheme does not  
10 regulate producers in their capacity as producers. And  
11 if someone wants to take on both roles, they will be  
12 regulated only as a handler.

13 So the regulatory obligations that applied  
14 to Petitioners when they adopted this business model  
15 were handler-only regulatory obligations, and then this  
16 is a handler judicial review proceeding. That's a very  
17 narrow means of decision here that avoids some of these  
18 kind of conceptual questions about the nature of the --  
19 the Takings Clause, which is that this claim simply  
20 doesn't belong in this proceeding.

21 But there's no unfairness or no due process  
22 issue here at all because they -- in 2002, when -- when  
23 Petitioners decided to engage in this, these regulatory  
24 violations in order to secure an unfair advantage over  
25 their competitors, as was found by the ALJ at JA41, at

1     that point they could have sought compensation for the  
2     past 6 years of raisins that they had provided. They  
3     didn't do it.

4                     I don't understand why they didn't do it.  
5     They left that claim on the table. And to the extent  
6     they wanted to claim going forward, they could have  
7     continued to use compliant handlers and sued every month  
8     for compensation in the Court of Claims.

9                     JUSTICE ALITO: Did I understand you to say  
10    a couple minutes ago that if the case were remanded, you  
11    would be entitled to win on the reasoning of the panel  
12    opinion?

13                    MR. PALMORE: The prior panel opinion,  
14    Justice. If -- if there was a remand on the basis that  
15    the Ninth Circuit misunderstood this as a jurisdictional  
16    Article III defect, and then the Ninth Circuit were to  
17    find waiver, what the Ninth Circuit presumably would do  
18    would be to reinstate its first panel decision, which we  
19    think was also correct and held that there was no taking  
20    here. There are two --

21                    JUSTICE KAGAN: Mr. Palmore, what would be  
22    wrong -- would anything be wrong -- with a -- with a  
23    disposition of this Court that went something like this:  
24    Everybody agrees that this is not a jurisdictional  
25    issue, including the government, so they got that wrong.



1                   Now, as to this whole business about the  
2     Tucker Act and whether the Tucker Act provides a remedy,  
3     the government only started talking about that in a  
4     petition for rehearing en banc, and the government can't  
5     do that. You know, it can't introduce an argument like  
6     this in a petition for rehearing en banc. So that's  
7     waived.

8                   And now, the Ninth Circuit can go and try to  
9     figure out whether this marketing order is a taking or  
10    it's just the world's most outdated law.

11                  (Laughter.)

12                  MR. PALMORE: That would certainly be an  
13    available option, or the Ninth Circuit could decide for  
14    itself whether there had been a waiver.

15                  But there's a separate issue in that there's  
16    this capacity issue, which is a separate point that the  
17    Ninth Circuit made at JA305, when it pointed out that  
18    this was a producer claim, and that's something that --  
19    that was strictly a producer claim and wasn't -- wasn't  
20    a fit for this handler review action, and that's  
21    something that could also be considered on remand.

22                  But the consequence of this -- of that would  
23    be for the -- the Court to impose its -- if it found a  
24    waiver, to rule for us for separate merits reasons.

25                  We do view the Tucker Act -- the failure to

1 seek just compensation -- as a merits defect in the  
 2 Petitioners' claim here. So even putting this capacity  
 3 problem aside, there is simply -- there's no defense.  
 4 Mr. McConnell says that this can be raised as a defense.  
 5 But there is no defense if all you show is that there has  
 6 been a taking of private property for public use, full  
 7 stop.

8 JUSTICE BREYER: What does the word  
 9 "acquire" mean. There is some opinion here which says  
 10 these handlers acquired the raisins. What is -- what's  
 11 that about?

12 MR. PALMORE: "Acquire" is a defined term,  
 13 and it includes to possess. So they took to --

14 JUSTICE BREYER: Like lessees or something,  
 15 bailees?

16 MR. PALMORE: There was no question under  
 17 the regulatory scheme here that Petitioners were  
 18 handlers. And in fact, there's a surprising --

19 JUSTICE BREYER: I -- no, no. I just wanted  
 20 to know what the word "acquire" --

21 MR. PALMORE: "Acquire" -- "acquire" is  
 22 defined to include a number of things, including to  
 23 possess. And a handler is anyone who sells raisins.  
 24 There was no mystery about this.

25 And, in fact, at pages 8 through 11 of our

1     brief, we cite communication after communication where  
2     USDA told them --

3                   JUSTICE BREYER:   Now, can an acquirer of my  
4     car, for example -- I don't know.   Forget that.

5                   JUSTICE SCALIA:   A bailee?

6                   (Laughter.)

7                   JUSTICE BREYER:   Can they -- can they  
8     assert a takings claim attaches to the car?   It sounds  
9     like a standing question.

10                  JUSTICE SCALIA:   Yes, I suppose a bailee  
11     could, a bailee of the car.

12                  MR. PALMORE:   No, I don't think a bailee  
13     could.   I think the owner would have to assert that  
14     claim, right.

15                  But "acquire" is a defined term, and as this  
16     case comes to this Court it's accepted.   The Petitioner  
17     has not sought cert on the underlying regulatory  
18     findings.   In fact, their arguments -- they were told  
19     ahead of time that they were completely wrong over and  
20     over and over again, and then they lost that claim at  
21     every level, twice within the Department of Agriculture,  
22     in the district court, in the court of appeals.   They  
23     lost on that regulatory claim.

24                  This wasn't a good faith misunderstanding.  
25     If you look at JA41, the ALJ found that this was a

1 willful and intentional, knowing violation of regulatory  
2 requirements because they were able to undercut their  
3 competitors by not playing by the rules. So this  
4 doesn't present any kind of due process --

5 JUSTICE BREYER: No, no. But still, it might  
6 if they're acquirers -- but they are acquirers, okay?  
7 They think this program is unconstitutional because it  
8 takes some other people's property, right? So those  
9 other people are in a very special relation to them.  
10 Those other people are really close.

11 And it may be they have standing to assert  
12 those other people's claims. And if they do have  
13 standing to assert those other people's claims, why  
14 can't they make the argument that way?

15 MR. PALMORE: I -- I disagree that they have  
16 standing to make those other people's claims. And also,  
17 Petitioners haven't argued, haven't made any third-party  
18 standing argument here.

19 But -- this Court's requirements are quite  
20 strict for third-party standing. You have to have a  
21 close -- a close relationship, and I don't think a mere  
22 arm's-length commercial relationship would count.

23 JUSTICE KENNEDY: Suppose they do have  
24 standing. Could they raise the claim?

25 MR. PALMORE: If --

1 JUSTICE KENNEDY: You say no.

2 MR. PALMORE: Well, they have -- they  
3 certainly have standing as producers to raise the claim.

4 JUSTICE KENNEDY: Let's assume they have  
5 standing. Could they raise the claim --

6 MR. PALMORE: Yes, that --

7 JUSTICE KENNEDY: -- that this is an  
8 unconstitutional taking?

9 MR. PALMORE: In the Court of Claims,  
10 absolutely, as producers.

11 JUSTICE KENNEDY: No, no. In the  
12 administrative proceeding where they are charged with --  
13 where a penalty is being assessed against them.

14 MR. PALMORE: I think that they would have  
15 standing, but it's still a claim that's beyond the scope  
16 of this narrow specific judicial review proceeding. I  
17 think its' a -- it's a different problem.

18 CHIEF JUSTICE ROBERTS: I have to say -- I  
19 think it comes with less than good grace for you to  
20 criticize the other side for not having raised a  
21 particular argument. But I do want to clarify that you  
22 have no objection at this point for reversing the Ninth  
23 Circuit on the ground that they erred in saying that  
24 this -- they should have dismissed on jurisdictional  
25 grounds.

1                   MR. PALMORE: Well, I'm not going to resist  
2     that too strenuously, -- but I think if they did decide  
3     the question, they decided it correctly. It was a  
4     threshold defect. Their analysis was all correct. So I  
5     think that's before the Court.

6                   But yes, we -- we frankly acknowledge and we  
7     acknowledged in our brief that we did not -- we did  
8     suggest below that this was a jurisdictional defect.  
9     Ninth Circuit authority said that it was and we relied  
10    on that.

11                  We now believe that it's best understood not  
12    as a jurisdictional defect, but as a substantive defect  
13    in the claims, not simply a choice of remedies issue, as  
14    Petitioners suggested because choice of remedy suggests  
15    that there has been a constitutional wrong and that we  
16    need to decide what remedy is going to be available, an  
17    injunction or damages.

18                  JUSTICE SOTOMAYOR: The short answer is,  
19    yes, reach the merits only if I win. That -- that's  
20    really what you want us to do.

21                  MR. PALMORE: Well, we -- we think you could  
22    reach some of the merits. We think that the narrow  
23    disposition here is actually the capacity --

24                  JUSTICE SOTOMAYOR: No, no, no. I need to  
25    ask you this question because do you want us to reach

1 the merits if we're going to have you lose? You got to  
2 want one or the other.

3 Do you want us to reach the merits, period,  
4 is really the question?

5 MR. PALMORE: Yes. Our position is that  
6 we're not acquiescing in a -- in a remand. We think you  
7 can affirm, and you should affirm. However, I do  
8 recognize --

9 JUSTICE SOTOMAYOR: Do you think we should  
10 reach the merits, which is a very different question?

11 MR. PALMORE: Well, it depends on what you  
12 mean by "merits."

13 (Laughter.)

14 JUSTICE SOTOMAYOR: Only if you win, right?

15 MR. PALMORE: There is the taking -- no.  
16 There is the underlying kind of takings claim, that  
17 there was -- was there a taking here at all? And that's  
18 not before the Court. I don't think anyone suggests  
19 that that's before the Court.

20 But we do -- we do think that there are a  
21 series of other threshold defects in the claim that this  
22 Court could -- could rely on.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 Mr. Palmore.

25 Mr. McConnell, you have 3 minutes remaining.

1 ORAL ARGUMENT OF MICHAEL W. McCONNELL

2 ON BEHALF OF THE PETITIONERS

3 MR. McCONNELL: I'd like to make two quick  
4 points. One is that I believe that the government has  
5 essentially conceded here in this argument and in their  
6 brief that the Tucker Act does not apply. They have  
7 told us that the Tucker Act does not apply on page 50  
8 and repeated here when Congress could not have  
9 contemplated a compensation. Now, in addition -- and  
10 their only answer to that is to say, first, that  
11 Congress didn't think it would be a taking, which in  
12 Regional Rail, this Court said is not the question.

13 And secondly, that if -- if there's one --  
14 we should get paid once, compensation once and then the  
15 administrator's going to cancel the program, which is no  
16 answer at all. Either the statute contemplates  
17 compensation for everybody or it contemplates it for  
18 nobody.

19 I think they have effectively conceded that  
20 the Tucker Act does not apply.

21 JUSTICE SOTOMAYOR: Well, they've conceded  
22 that it doesn't apply to handlers.

23 MR. McCONNELL: To handlers. And --

24 JUSTICE SOTOMAYOR: Yes, and so they've  
25 conceded there is no --



1                   MR. McCONNELL: And the second issue I  
2 wanted to talk about so is this capacity issue.  
3 Certainly, we have standing. When -- it's not  
4 third-party standing. All of the money comes out of our  
5 pocket, yes, we have standing. And secondly, we  
6 certainly -- and then that is in our capacity as  
7 handler.

8                   Essentially, the Department of Agriculture's  
9 view is that during those couple of days when the  
10 raisins are going through our packing plant, that we  
11 acquired them and possessed them during those couple of  
12 days and that we should have given them their -- their  
13 share. That's raisins, that's not money. But by the  
14 time they get around to enforcing that and so forth, the  
15 raisins are gone and now the money stands in -- stands  
16 in for the raisins. But that is a taking claim.

17                   We think it's a -- it's a straightforward  
18 taking claim under -- under Norwood and Missouri Pacific  
19 Railroad, that's a merits question. But in any event,  
20 it is not a problem of capacity. Whatever might be,  
21 that taking, that taking is in the capacity as a  
22 handler.

23                   Those are my two points.

24                   Thank you.

25                   CHIEF JUSTICE ROBERTS: Thank you, counsel.

1                   The case is submitted.

2                   (Whereupon, at 11:10 a.m., the case in the  
3   above-entitled matter was submitted.)

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