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IN THE SUPREME COURT OF THE UNITED STATES

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MARVIN D. HORNE, ET AL., :

Petitioners : No. 12-123

v. :

DEPARTMENT OF AGRICULTURE :

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Washington, D.C.

Wednesday, March 20, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:

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

JOSEPH R. PALMORE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:10 a.m.)

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

Mr. McConnell?

ORAL ARGUMENT OF MICHAEL W. McCONNELL
ON BEHALF OF THE PETITIONERS

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

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

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

MR. McCONNELL: Certainly.

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

Larsen Valley, the producer -- not the 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.

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The case is submitted.

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

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