No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
RESPONDENT

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

BRIEF FOR THE CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a party may raise the Takings Clause as a defense to enjoin a "direct transfer of funds mandated by the Government," *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998) (plurality), or must instead pay the money and then bring a separate, later claim requesting reimbursement of the money under the Tucker Act in the Court of Federal Claims.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[*]

Amici, described more fully in the Appendix, are advocates who believe that the right to keep and control one's own property is among the most fundamental rights protected by the Constitution, and that the government should not make property owners suffer needless burdens in order to vindicate those rights.

This case involves one such burden. In the government's view, property owners who have been wrongfully ordered to pay the government money—in proceedings the government itself initiated—should not at that time be permitted to invoke the Takings Clause in their defense. Instead, the government says, after litigating all other constitutional and statutory defenses, such property owners should have to hand over their money. They should then have to go to a different forum, the Court of Federal Claims, and file a separate suit against the government under the Tucker Act just to make their takings defense "ripe." Only then, in the government's view, should a court decide whether the monies the property owners had to pay were unconstitutional takings. And if they were, only then would the property owners receive their money back.

This Rube Goldberg approach to adjudicating takings claims serves no valid purpose. And for that reason, a plurality of this Court squarely rejected it

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[*] The parties consented to the filing of this brief. The letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amici*, has contributed monetarily to the preparation or submission of this brief.

in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). The plurality—consisting of all Justices who reached the issue—rightly recognized that having to jump through such hoops to assert a takings claim "would entail an utterly pointless set of activities." *Id.* at 521 (quotation omitted). The Court should reaffirm that ruling here.

In *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), this Court held that a government taking of real or tangible personal property is not ripe for challenge until a property owner has sought monetary compensation for the property that has been taken. In federal cases, that means a suit for damages in the Court of Federal Claims under the Tucker Act. *Id.* at 195. But where the government takes a party's *money* rather than its real or tangible personal property, *Williamson County*'s ripeness rule makes no sense—the government does not take money, only to give it right back in the form of "compensation." The plurality in *Apfel* thus recognized an exception to the rule of *Williamson County* for takings of money.

As we explain in Part I, that exception is eminently sensible. Requiring a property owner to file a separate claim for compensation serves no useful purpose, and it would impose substantial burdens on individual property owners—as well as small businesses like the raisin farmers here—who are already over-burdened by the cost of litigation. And in addition to making no practical sense, the government's ripeness rule also makes no constitutional sense. As we explain in Part II, neither the text of the Takings Clause nor this Court's ripeness doctrine requires that a fine be paid before it can be challenged as an uncompensated taking.

STATEMENT

1. Since the New Deal, the federal government has heavily controlled the supply of agricultural products, ostensibly to prevent "unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4) (2006); see *Evans* v. *United States*, 74 Fed. Cl. 554, 558 (2006). Under the Agricultural Marketing Agreement Act of 1937 and its implementing regulations, the United States Department of Agriculture ("USDA") issues "marketing orders" that manipulate prices by imposing production quotas or restricting supply. 7 U.S.C. § 608c (2006).

A much-criticized relic of the New Deal, these marketing orders are effectively government-enforced cartels that fine farmers who attempt to sell more than their allotted quotas, and that "deploy the legal powers of the government to manipulate supply in an effort to increase grower profits." See generally Thomas M. Lenard & Michael P. Mazur, *Harvest of Waste: The Marketing Order Program*, Regulation, May/June 1985, at 21.[1]

2. This case involves the USDA's marketing order for raisins. 14 Fed. Reg. 5136 (Aug. 18, 1949). Under that order, "handlers" of raisins must reserve a certain portion of their crop, which they may not sell on the open market. The percentage of the crop that must be reserved each year is established by the USDA, based on the recommendations of a committee of industry representatives. 7 C.F.R. §§ 989.35, 989.36. The committee consists of 46 industry representatives and *one* representative of the public. See

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[1]Available at: www.cato.org/pubs/regulation/regv9n3/v9n3-4.pdf.

id. §§ 989.26, 989.29, 989.30. The percentage is announced annually on February 15, long after farmers have spent substantial resources to cultivate and harvest each year's crop. *Id.* §§ 989.21, 989.54(d).

Once the set-aside percentage has been set, those "reserve-tonnage" raisins must be physically segregated from the rest of the farmers' crop and held "for the account" of the Committee, which effectively takes title. *Id.* §§ 989.65, 989.66(a), (b)(1), (b)(2), (g). The Committee may then decide to sell the raisins or simply give them away to anyone it chooses. *Id.* § 989.66(h), (b)(4).

Although other marketing orders are periodically put to a vote of producers and terminated if they do not command sufficient support, the raisin marketing order here has never been put to a revote since it was first adopted. See 7 U.S.C. § 608c(19) (2006).

During the two crop years at issue here, 2002-2003 and 2003-2004, the Committee required farmers to turn over 47 percent and 30 percent of their raisins, respectively. In 2002-2003, in return for almost half their crop, farmers received less than their cost of production. And in 2003-2004, *farmers received no compensation at all.* Pet. App. 9a.

3. Petitioners are independent farmers in Fresno and Madera Counties. During 2002-2003 and 2003-2004, after a change in their business model (see Pet. Br. 8-9), petitioners did not set aside the requisite reserve-tonnage raisins. They believed that the Raisin Marketing Order applied only to "handlers," and did not apply to them as "producers," as the statute defines those terms. Pet. App. 10a.

The government disagreed. It initiated an administrative enforcement action against petitioners, and

ultimately found them liable for failing to give up their raisins. Pet. App. 11a, 121a, 145a. The USDA ordered petitioners to pay $438,843.53, the approximate market value of the raisins that allegedly should have been relinquished. Petitioners were also ordered to hand over $202,600 in civil penalties and $8,783.39 in unpaid assessments, for a total of nearly $650,000 in fines.

4. Invoking statutory judicial review procedures, petitioners challenged the USDA's enforcement decision in the district court. See 7 U.S.C. §§ 608c(14)(A)-(B), 608c(15)(A)-(B) (2006). They raised three claims: (1) that the requirement to give up their raisin crop, and the associated fines, violate the Takings Clause of the Fifth Amendment; (2) that the penalties imposed on them violate the Excessive Fines Clause of the Eighth Amendment; and (3) that the USDA misconstrued the Raisin Marketing Order in applying it to them. The district court granted summary judgment to the USDA. Pet. App. 55a.

5. Petitioners appealed, but the Ninth Circuit affirmed, again on the merits. In response to a petition for rehearing, however, the government argued for the first time that petitioners' takings claim would not be ripe until they complete this litigation, pay the fines, and sue for damages under the Tucker Act in the Court of Federal Claims. JA242.

The panel agreed with the government, issuing a revised opinion. Invoking *Bay View, Inc.* v. *AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997), and this Court's decision in *Williamson County*, the panel observed that "the Tucker Act allows parties seeking compensation from the United States to bring suit in the Court of Federal Claims." Pet. App. 15a. The panel

then concluded that all takings claims—even challenges to direct transfers of money—"must be brought there in the first instance" because a takings claim is not ripe until a party has unsuccessfully sought compensation. *Ibid.* Although the panel's new opinion cited *Apfel*, it did not address *Apfel*'s conclusion that a takings defense to a direct transfer of funds is immediately ripe, without need to seek damages under the Tucker Act. JA304.

SUMMARY OF ARGUMENT

The government's overbroad reading of *Williamson County* should be rejected, and the Court should confirm what the plurality recognized in *Apfel*: When the government's demand of money from a property owner allegedly violates the Takings Clause, the takings defense is ripe immediately—without the owner's having to pay the money and file a separate suit to get it back.

Simply put, a taking in the form of a fine or other monetary payment is inherently a taking "without just compensation." Whatever might be said of takings involving real or tangible personal property, when the government seizes money, there is no reasonable possibility that "compensation" will be forthcoming. Moreover, the claimant is immediately injured from the loss of use of that money. Accordingly, there is no basis for treating a takings challenge to such seizure as unripe pending some further, future development.

Williamson County is not to the contrary. The Court there concluded that a property owner has no valid takings claim "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation."

473 U.S. at 194 (quotation omitted). But in contrast to a seizure of real property—where an inverse condemnation process or Tucker Act suit may yield just compensation—there is no reasonable possibility that the government will provide compensation for a fine or other monetary sanction that the government itself has demanded. To be sure, the government can be compelled to return a fine if the court in a Tucker Act suit ultimately deems the fine unconstitutional. But that conclusion does not *ripen* a constitutional issue; it *resolves* one—the exact same one that arises in a suit for declaratory or injunctive relief, or (as here) when the Takings Clause is raised as a defense by property owners in government-initiated enforcement proceedings.

The contrary rule adopted by the court below has nothing to commend it. *First*, particularly in the context of monetary seizures and defenses against direct government sanctions, the *Williamson County* rule is needlessly burdensome. There is simply no good reason to inflict on property owners the time, expense, and uncertainty of trying to recover compensation after-the-fact, in a second round of litigation in a second forum.

Second, the *Williamson County* rule is inconsistent with established principles of ripeness, the text and history of the Takings Clause, and this Court's treatment of similar deprivations under the Due Process Clause. The Court should take this opportunity to reconsider *Williamson County* and return to a much more defensible rule—dating back to Magna Carta—that government takings of private property must be accompanied by "immediate payment." Magna Carta, Cl. 28 (1215). At a minimum, the *Williamson County* rule should not be extended

from takings of real property to takings of money, much less to the situation presented here—a takings claim raised as a defense to a monetary demand made in government-initiated proceedings.

"The problem of ripeness is essentially one of prematurity." David P. Currie, Federal Jurisdiction in a Nutshell 31 (4th ed. 1999). But there is nothing premature about petitioners' claim that the government's demand for hundreds of thousands of dollars violated the Takings Clause. The decision below should be reversed.

ARGUMENT

I. The Ninth Circuit's ripeness rule imposes substantial burdens on property owners that are not justified by any legitimate purpose.

When the government "provides an adequate procedure for seeking just compensation" for the taking of *real property*, this Court reasoned in *Williamson County*, "the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure." 473 U.S. at 195. For this reason, real-property "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act," which authorizes suing the United States for damages in the Court of Federal Claims. *Ibid*.

Here, however, the Ninth Circuit took that rule to an indefensible extreme, applying it to takings of *money* as well as takings of real or tangible property. In the Ninth Circuit's view, the Tucker Act effectively divests federal district courts of *all* jurisdiction over any takings claims against the United States, however raised, and even if asserted as a *defense* in an enforcement action initiated by the government itself.

Neither law nor common sense supports that rule. Although the Tucker Act provides an exclusive remedy for damages claims against the government, it places no statutory limit on the right of individuals to seek declaratory or injunctive relief from unconstitutional government action in district court. *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978). Nor does it deprive individuals whom the government seeks to fine (such as petitioners) from arguing in their *own defense* that the fine is unconstitutional.

As the plurality recognized in *Apfel*, those ordinary remedies should be fully available where a taking, "rather than burdening real or physical property, requires a direct transfer of funds" to the government. 524 U.S. at 521 (quotation omitted). The burdensome two-lawsuit alternative, championed by the government and accepted by the court below, serves no useful purpose.

A. When the government initiates proceedings to take money, it is pointless to require a property owner to bring a separate suit for compensation.

The most obvious reason not to extend *Williamson County*'s ripeness rule to takings of money is that doing so would be pointless.

When the government takes an individual's real or tangible personal property, the Fifth Amendment requires "just compensation"—*i.e.*, an exchange of tangible property for money. In that context, a suit for damages under the Tucker Act serves as a mechanism for "obtaining compensation" for the value of the land or other piece of tangible property that the government has taken. *Williamson County*, 473 U.S.

at 194. But when the government takes *money* from an individual—by imposing a fine, penalty, or other obligation to pay—there is nothing to exchange. Rather, "'[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation.'" *Apfel*, 524 U.S. at 521 (quoting *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995)). The only "just compensation" for a taking of money is to give the money right back!

Requiring a separate suit for damages to recover money taken in a prior proceeding would thus entail not a "reasonable, certain and adequate provision for obtaining compensation" (*Williamson County*, 437 U.S. at 194 (quoting *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 124-125 (1974)), but "an utterly pointless set of activities." *Apfel*, 524 U.S. at 521 (quotation omitted). The property owner would have to pay the money to the government in one proceeding, and then file a separate suit under the Tucker Act to get the money back—all before it could argue that the money should not have been taken in the first place.

This Rube Goldberg approach[2] to adjudicating takings claims serves no useful purpose.

Moreover, bad matters are made worse where the Takings Clause is raised as a defense to a fine imposed by an agency. Here, for example, petitioners would have to litigate all of their other statutory and constitutional defenses to the agency action in district court pursuant to the usual judicial review procedures. 7 U.S.C. § 608c(15)(B) (2006). If they did not prevail, petitioners would have to pay the fine levied against them. Only after handing over their money would petitioners be able to begin a second round of litigation in the Court of Federal Claims to get the money back, this time raising their takings defense.

Deeming the takings defense "unripe" thus requires related claims to be adjudicated in two entirely separate proceedings. It requires courts to reach

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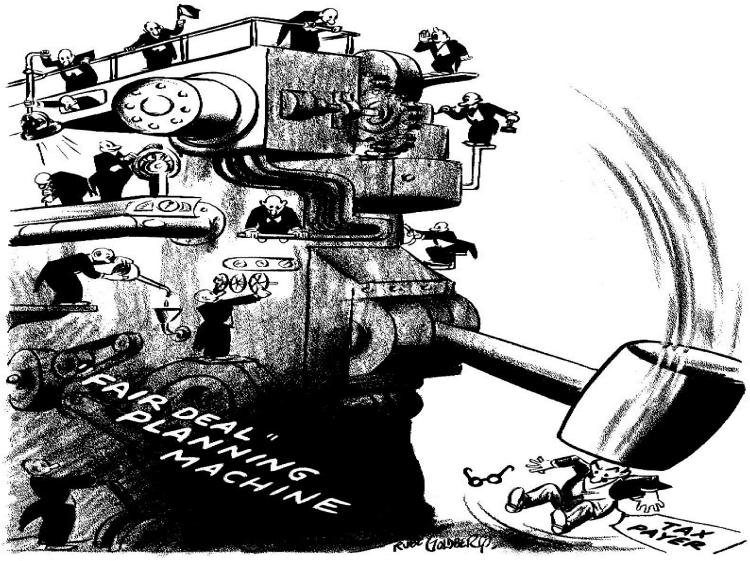

multiple potentially complex statutory and constitutional defenses in the proceeding to impose the fine, while deferring a dispositive issue that may be more easily resolved. Cf., *e.g.*, *Apfel*, 524 U.S. at 538 (holding that because "the Coal Act's allocation scheme violates the Takings Clause as applied to Eastern, we need not address Eastern's due process claim"). And it requires property owners to run a gauntlet of successive, piecemeal litigation before receiving a final determination that they are entitled to keep their own money after all.

In addition to these inefficiencies, this bifurcated approach to litigation means that related issues must be resolved in two separate forums. The chief question in takings cases involving money is not how much money the government must pay to provide just compensation, as a dollar taken is a dollar owed. Instead, the question is whether a given statutory scheme or agency action effectuates a "taking" in the first place. Making that determination often entails comprehensive analysis of a statutory scheme and its effect on property owners—the same kind of analysis district courts typically undertake in judicial review proceedings addressing a property owner's other claims. See, *e.g.*, *Apfel*, 524 U.S. at 522-537 (examining the "economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action" to determine whether a taking has occurred). This case is a perfect example, particularly given the Ninth Circuit's confused conclusion that it would have had jurisdiction over a takings claim made by petitioners "in their capacity as handlers," while only the Court of Federal Claims may hear a claim that

"the reserve program injures them in their capacity as producers." See JA305-306.

Not only is it inefficient to have two different courts, subject to the law of two different circuits, decide such overlapping issues, but it also invites confusion and further litigation over the collateral estoppel or res judicata effect of portions of a prior decision. Cf. *San Remo Hotel, L.P.* v. *City & Cnty. of S.F., Cal.*, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring) ("litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court").

Further, it increases the difficulty of harmonizing a statutory scheme with the Constitution. If statutory and constitutional issues must be decided in separate proceedings, district courts will have to interpret statutes without regard to their constitutionality and the Court of Federal Claims will have to address constitutional problems without being able to avoid them by adopting a saving construction. The Ninth's Circuit's bifurcated approach to litigation involving takings of money thus flies in the face of this Court's teaching that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper* v. *California*, 155 U.S. 648, 657 (1895).

The ripeness doctrine is supposed to ensure that disputes are resolved when they are most "fit[] * * * for judicial decision." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967). But requiring a separate suit to challenge takings of money does not serve that purpose. It requires takings claims to be raised when they are *least* fit for review. And it does so in a manner that is "utterly pointless," as there is simply no

legal or factual question to be resolved in a Tucker Act suit that cannot be resolved earlier in the district court. *Apfel*, 524 U.S. at 521. The decision below must be reversed.

B. Individuals and small business owners should not have to shoulder the burden of litigating against the government twice.

1. Requiring a separate suit for compensation is in fact worse than pointless. It forces property owners to suffer the hardship of litigating against the government twice—no light burden for small raisin farmers such as petitioners, and an even heavier burden for many other ordinary citizens and small businesses.

Studies have shown that small businesses are already faced with enormous litigation costs. In 2008, for example, small businesses faced $105.4 billion in costs from tort lawsuits alone. U.S. Chamber Inst. for Legal Reform, *Tort Liability Costs for Small Business* at 1 (July 2010). More than a third of small businesses surveyed have been sued, and 73% of those sued reported that their business suffered due to the time and expense of litigation. *Id*. at 2. Further, the Small Business Administration has found that "litigation causes not just financial loss, but * * * substantial emotional hardship, and often changes the tone of the business." Klemm Analysis Group, Small Business Association Office of Advocacy, *Impact of Litigation on Small Business* at 12 (Oct. 2005). Because of the time, expense, and disruption of litigation, small business owners "go to great lengths to stay out of court"—sometimes by forgoing their own legal rights. *Ibid*. And while going to court is sometimes unavoidable, common sense and basic fairness

counsel in favor of resolving disputed claims in one suit, rather than two, whenever possible.

2. In addition to the costs of litigation in general, individuals and small businesses also face a number of special burdens in litigating takings claims in particular.

First, obtaining compensation can take a very long time. In one recent case, for example, a Tucker Act claim filed by two ranchers in 1991 took "almost twenty years of litigation," culminating in a recent decision that the claim was *still* not ripe because the ranchers had not exhausted all administrative remedies. *Estate of Hage* v. *United States*, 687 F.3d 1281, 1285-1292 (Fed. Cir. 2012). Even if more litigation eventually results in compensation, however, it will be too late: Both ranchers have since died. See Sandra Chereb, *Wayne Hage, Nevada Rancher and Sagebrush Rebel, Dies*, The Associated Press (June 6, 2006).[3] A twenty-year delay may be unusual, but substantial delay in recovering compensation is *not*. *E.g.*, *Bowles* v. *United States*, 31 Fed. Cl. 37, 52 (1994) (noting "long delay").

Second, litigating compensation can be costly. For example, when Minnesota took from David Luse five acres that he and his wife had owned for twenty years, he had to spend $100,000 in attorney and appraisal fees before eventually receiving $845,000 in compensation. Dan Browning, *MnDOT's Tactics Squeeze Landowners*, Minneapolis Star Tribune (Sept. 20, 2003).[4] Another Minnesotan had to spend

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[3] Available at: www.propertyrightsresearch.org/2006/articles06/wayne_hage.htm.

[4] Available at: www.startribune.com/local/11574556.html.

over $50,000 to secure just compensation. *Ibid.*; see also *Holman* v. *City of Warrenton*, 242 F. Supp. 2d 791, 808 (D. Or. 2002) (describing inverse condemnation process as "time-consuming and expensive"). Making matters worse, property owners often cannot recoup these litigation costs, even when they prevail. See Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 Stan. L. Rev. 871, 890 & n.108 (2007) (noting that only sixteen States have enacted statutes awarding full or partial reimbursement in eminent domain litigation).

Even if full compensation is eventually paid, it can be extremely burdensome for a cash-strapped property owner—particularly one who loses a home or business—to await that day. One small business owner who lost his shop in West Virginia, for example, "worried about being able to find a new property at the drop of a hat" because he could not afford to pay upfront a second rent, remodel a new shop, and cover the lost revenue from the 30 days his business would have to close for the move. Jillian Swords, *Eminent Domain Leaves Businesses Homeless*, The Appalachian (Feb. 12, 2008).[5] Similarly, an elderly couple in North Carolina was left homeless when their farm was taken to expand a landfill. Lynnette Taylor, *Eminent Domain Case Leaves Surry County Family Homeless*, WITN (Nov. 17, 2007).[6] They stayed on the farm, only to be ordered to pay rent on their own property to the government.

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[5] Available at: www.theappalachianonline.com/community/3251-eminent-domain-leaves-businesses-homeless.

[6] Available at: www.witn.com/home/headlines/11533181.html.

As these examples suggest, the costs imposed on property owners are not just financial: Takings accompanied by no more than a vague prospect of future compensation are extremely demoralizing. Just as "predeprivation process may serve the purpose of making an individual feel that the government has dealt with him fairly," predeprivation compensation does the same. *Williamson County*, 473 U.S. at 195 n.14. As Professor Michelman famously observed, "demoralization costs" should not be neglected in the takings calculus. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1214 (1967).

3. Such burdens are also likely to be felt by the most vulnerable, as eminent domain disproportionately targets "ethnic or racial minorities" and those who "have completed significantly less education, live on significantly less income, and live at or below the federal poverty line." Dick M. Carpenter II & John K. Ross, Victimizing the Vulnerable 2 (2007).[7] The costs, delays, and complications of seeking compensation are often imposed on those least equipped to bear them, and on those least able to await belated compensation. See also Ilya Shapiro & Carl G. DeNigris, *Occupy Pennsylvania Avenue: How the Government's Unconstitutional Actions Harm the 99%*, 60 Drake L. Rev. 1085 (2012) (showing how an assortment of well-meaning policies end up imposing the greatest harm on those who can least afford it).

4. There is no reason to multiply these burdens by forcing individuals and small business owners to

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[7] Available at: www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf.

suffer through *two* rounds of litigation against the government before they can vindicate their constitutional rights. One is enough.

Indeed, the burden is particularly perverse here, where the government itself initiated the underlying administrative proceedings that led petitioners to assert a taking. Ripeness is supposed to be a shield that protects the government from having to litigate hypothetical disputes. *Nat'l Park Hospitality Ass'n* v. *Dep't of the Interior*, 538 U.S. 803, 808 (2003) (deeming controversy ripe when "factual components [are] fleshed out * * * in a fashion that harms or threatens to harm" a party). But here *the government* was the instigator. It launched proceedings to seize petitioners' property—and then used "ripeness" as a sword to force petitioners to hand over that money without consideration of their Takings Clause defense. This invocation of ripeness can only be described as Kafkaesque.

In short, for many cash-strapped individuals and small businesses, being forced to give up money in advance is catastrophic. And for many more, a second lawsuit involving a further outlay of resources may not be cost-justified, if even possible. A ripeness bar may thus have the effect of insulating an unconstitutional taking from judicial review. For many property owners, justice delayed truly is justice denied.

II. The Ninth Circuit's extension of *Williamson County* has no basis in the Constitution's text and structure, or in ripeness doctrine generally.

The Ninth Circuit has rationalized these unnecessary burdens on the ground that "the government is

not prohibited from taking private property * * * so long as it pays compensation" eventually. *Bay View*, 105 F.3d at 1284-1285. Under this theory, the Fifth Amendment's textual prohibition on taking property "without just compensation" is not violated unless and until the government fails to pay compensation through the Tucker Act at some later date, and no takings claim is ripe until that occurs.

But even if this were true of takings of real or tangible personal property (and it is not), a fine or taking of money is a taking "without just compensation" at the very moment it occurs. Common sense and ripeness doctrine both confirm that this is so. So do the text and history of the Takings Clause, as well as this Court's interpretation of the similarly-worded Due Process Clause.

A. Property owners should not be required to suffer a violation of their constitutional rights before being allowed to raise those rights.

1. When the government requires a payment of money, the government obviously has "no intention of providing compensation for the deprivation through the Tucker Act." *Chateaugay*, 53 F.3d at 493. This is "[c]ommon sense," as paying compensation for a monetary taking "would tend to nullify" the very government action that effectuated it. *Ibid.*; see also *Wash. Legal Found.* v. *Tex. Equal Access to Justice Found.*, 270 F.3d 180, 194 (5th Cir. 2001) (holding that, when the government takes money, "it would defy logic, to say the least, to presume the availability of a just compensation remedy"), *vacated on other grounds*, 538 U.S. 942 (2003).

Although it may be reasonable to assume that the government will pay compensation after it takes someone's land, it is absurd to assume that the government will choose to return a fine that it has imposed. The fine itself is inherently a taking "without just compensation" under the language of the Takings Clause. And that being so, the constitutional challenge to the taking is immediately ripe.

For takings of real or physical property, the Tucker Act may avoid a constitutional injury by paying genuine *compensation*. But for takings that require the payment of money—again, an inherently uncompensated taking—the Tucker Act becomes something very different: It is just a means of recovering *damages* for a constitutional injury that has already occurred. See *Apfel*, 524 U.S. at 521 ("it cannot be said that monetary relief against the Government is an available remedy" for a monetary taking simply because the Tucker Act authorizes suits for damages against the government). In this context, the Tucker Act remedy does not *ripen* a constitutional issue; it merely *resolves* one—after the constitutional injury has already occurred.

2. In any event, ripeness principles have never required an individual to suffer a constitutional injury before bringing suit. It is enough to establish a realistic *threat* of injury.

As this Court explained long ago, one "does not have to await the consummation of threatened injury to obtain preventive relief." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 288 (1936). Rather, "[i]f the injury is certainly impending, that is enough." *Ibid.* In no other context must an individual suffer a completed violation of his constitutional rights before he is per-

mitted to assert them. See, *e.g.*, *Steffel* v. *Thompson*, 415 U.S. 452, 462-463 (1974) (permitting First Amendment challenge to criminal statute before prosecution); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise Clause); *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3026-3027 (2010) (Second Amendment); *Albertson* v. *Subversive Activities Control Bd.*, 382 U.S. 70, 73-76 (1965) (Fifth Amendment right against self-incrimination); *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 536 (1925) (substantive due process); *Duke Power*, 438 U.S. at 67-68, 81-82 (procedural due process).

3. That is particularly true where an individual asserts his constitutional rights as a *defense* in an enforcement action brought by the government. This posture involves none of the usual concerns about the justiciability of pre-enforcement review; enforcement has already commenced, and the relevant statutory process has been followed. It is thus highly anomalous to forbid an individual from raising a takings defense in proceedings that seek to impose a fine. Indeed, "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quotation omitted).

When the government commences an enforcement action to impose a monetary penalty and one objects to that penalty on First Amendment grounds, for example, it would be unthinkable to require that the penalty be paid simply because one can sue for damages later. See *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001) (addressing First Amendment challenge to marketing order that imposed assessments on handlers of mushrooms, where challenge was raised as defense to enforcement action). There

is no reason to treat the Takings Clause any differently.

Indeed, the author of the Takings Clause emphasized that "[g]overnment is instituted no less for protection of the property than of the persons of the individuals." The Federalist No. 54, at 339 (James Madison) (Clinton Rossiter ed. 1961). Similarly, John Adams observed that "[p]roperty must be secured or liberty cannot exist." John Adams, *Discourses on Davila*, in 6 The Works of John Adams, Second President of the United States 221, 280 (Charles Francis Adams ed. 1851). The other Framers held similar views. See, *e.g.*, Gouverneur Morris, The Records of the Federal Convention of 1787, at 533 (Max Farrand ed. 2d ed., 1937) (protection of property is "the main object of society"). In short, nothing in the history of the Fifth Amendment suggests that, when applying principles of ripeness, the Takings Clause should be relegated to second-class constitutional status.

Not surprisingly, then, this Court has often reached the merits of Takings Clause defenses without noting any ripeness problem. See *Bennis* v. *Michigan*, 516 U.S. 442, 452-453 (1996) (takings claim raised as defense to asset forfeiture action); *FCC* v. *Fla. Power Corp.*, 480 U.S. 245, 253-254 (1987) (takings claim addressed in response to FCC rate-setting order); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 174-175 (1979) (takings claim addressed in suit by federal government over public access to marina); *Goldblatt* v. *Town of Hempstead, N.Y.*, 369 U.S. 590, 594 (1962) (takings defense raised in action to enjoin defendant from operating a sand and gravel pit without a permit).

The same ripeness rules that govern other constitutional claims should govern claims for takings, particularly where those claims are asserted as a *defense* to imminent government action. In fact, as shown below, it is questionable whether *Williamson County*'s special rule for takings claims should exist at all, even for claims based on real or physical property.

B. The text and history of the Takings Clause do not permit the government to defer compensation until after a taking has occurred.

1. At its core, *Williamson County*'s holding rests on a mistaken premise—that the Fifth Amendment does not require actual compensation at the time of a taking; instead, "all that is required" is a "process" by which an aggrieved property owner might (or might not) later obtain compensation. 473 U.S. at 194. In other words, the government may take first and ask questions later. And the onus is on the property owner to avail herself of state or federal "process" in hopes of ultimately receiving something in return.

In assuming that no compensation is required at the time of a taking, *Williamson County* purported to rely on the "nature of the constitutional right" protected by the Takings Clause. But the text of the Takings Clause suggests nothing of the sort. See *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring) (noting that, although "*Williamson County* purported to interpret the Fifth Amendment," its interpretation is "not obvious"); *Wilkie* v. *Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J. dissenting) ("Correlative to the right to be compensated for a taking is the right to refuse to submit to a taking where no compensation is in the offing.").

The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." The most natural reading of this language is that "compensation" is a prerequisite that the government must satisfy when it effects a taking —not merely a process to be made available at some future date. Far from merely establishing the right to a post-taking damages remedy requiring lengthy court proceedings, the text of the Takings Clause suggests no temporal separation between the taking and the payment of compensation. And it certainly does not compel the conclusion that compensation may always be paid at some indefinite later time.

2. This understanding of the Takings Clause, moreover, comports with how it was understood for at least a century after the Bill of Rights was enacted. As one early court explained: "[A]s an original question, it seems clear that the proper interpretation of the Constitution requires that the owner should receive his just compensation *before* entry upon his property." *Md. & Wash. Ry. Co.* v. *Hiller*, 8 App. D.C. 289, 294 (C.A.D.C. 1896) (emphasis added); see also Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 60 (1999) (concluding that "for most of the nineteenth century, just compensation clauses were generally understood not to create remedial duties, but to impose legislative disabilities"); Phillip Nichols, The Law of Eminent Domain 1038 (1917) (citing cases involving the Takings Clause and concluding that "[i]t is not * * * obligatory upon an owner of land who is being deprived of his property * * * in violation of the restriction imposed upon the states by the federal constitution, to first invoke the protection of the state

court, but * * * he may institute proceedings at once in the federal court to enjoin the threatened injury").

In fact, that understanding dates as far back as Magna Carta, which provided that "[n]o constable or other royal official shall take corn or other movable goods from any man without *immediate payment*." Magna Carta, Cl. 28 (1215) (emphasis added).

C. There is no reason to treat the Takings and Due Process Clauses differently.

Not only is belated compensation unsupported by the text and history of the Takings Clause; it is also discordant with this Court's treatment of analogous language in the Due Process Clause. Just as property may not be taken "without just compensation," it may not be taken "without due process of law." Yet, unlike the Takings Clause, "the Court usually has held that the [Due Process Clause] requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon* v. *Burch*, 494 U.S. 113, 128 (1990) (citing cases); see also *Baker* v. *McCollan*, 443 U.S. 137, 145 (1979) ("The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished 'without due process of law.'").

In candor, this Court has not justified treating due process as a prerequisite to government deprivations of property while treating compensation as something to be provided later. *Williamson County* sidestepped this question by analogizing to *Parratt* v. *Taylor*, 451 U.S. 527 (1981), a due process case holding that a deprivation of property was justified by "the provision of meaningful postdeprivation process." 473 U.S. at 195. Since *Williamson County*, however, this Court has made clear that *Parratt* applies only to situations

where the government is *unable* to provide pre-deprivation process. *Zinermon*, 494 U.S. at 132. "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Ibid.* The same rule should apply to the Takings Clause.

At a minimum, that rule should apply here, where a predeprivation hearing is not only "feasible," but actually occurs—and occurs as a result of an enforcement action *brought by the government* to impose a fine. *Williamson County* suggested that, unlike in due process cases, "the Court has [n]ever recognized any interest served by pretaking compensation that could not be equally well served by post-taking compensation." 473 U.S. at 195 n.14. As explained above, however, real-world experience in the years since *Williamson County* shows that property owners in fact suffer substantial burdens in their efforts to recover compensation. Requiring property owners to pay the fine and pursue a post-deprivation Tucker Act remedy serves no legitimate purpose, and it imposes a burden on property owners that they should not be required to bear.

* * * * *

In sum, *Williamson County* is unsupportable as a matter of constitutional text, structure, history, and purpose. Moreover, it is unworkable in practice and imposes unwarranted burdens on property owners, particularly those of limited means. Accordingly, rather than merely confirming that *Williamson County* does not apply to a "direct transfer of funds mandated by the Government" (*Apfel*, 524 U.S. at 521), the

Court should take this opportunity to overrule *Williamson County* outright. See *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) (explaining that precedents may be overruled when they "are unworkable or are badly reasoned").

At a minimum, however, the *Williamson County* ripeness rule should not be expanded from its original rationale, which is limited to real property. And it certainly ought not preclude property owners like petitioners from defending themselves where the government itself has initiated proceedings and sought to impose a monetary sanction.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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APPENDIX: LIST OF *AMICI*

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The *National Federation of Independent Business* (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

The *National Federation of Independent Business Small Business Legal Center* (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts on issues of public

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The *Center for Constitutional Jurisprudence* is the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition expressed in the Fifth Amendment that private property can be taken only for public use, and then only upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as *amicus curiae* before this Court in several cases of constitutional significance, including *Kelo* v. *City of New London, Connecticut*, 545 U.S. 469 (2005), and *Rapanos* v. *United States*, 547 U.S. 715 (2006).

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