No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, RESPONDENT.

On Petition for a Writ Of Certiorari To The United States Courts Of Appeals For the Ninth Circuit

BRIEF OF CONSTITUTIONAL AND PROPERTY LAW SCHOLARS AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Takings Clause of the Fifth Amendment imposes a "categorical duty" on the federal government to pay just compensation when it "physically takes possession of an interest in property." *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (internal quotations omitted).

Did the United States Court of Appeals for the Ninth Circuit err when it held that this duty applies only to takings of real property, and not personal property?

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INTEREST OF AMICI CURIAE[1]

Amici curiae are scholars who teach, research, and write about constitutional and property law. They share the view that the Takings Clause of the Fifth Amendment to the U.S. Constitution has always been understood to apply equally to both real and personal property. Accordingly, amici believe that this Court should grant the petition, reverse the Ninth Circuit, and make clear that the Takings Clause applies equally to all private property.

Amici include James W. Ely Jr., the Milton R. Underwood Professor of Law Emeritus and Professor of History Emeritus at Vanderbilt University; Donald Kochan, the Associate Dean for Research & Faculty Development and Professor of Law at the Chapman University Dale E. Fowler School of Law; Adam Mossoff, Professor of Law at the George Mason University School of Law; and Ilya Somin, Professor of Law at the George Mason University School of Law.

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than amici curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for respondent and petitioner in this case has filed a letter pursuant to Supreme Court Rule 37.2(a) reflecting consent to the filing of amicus curiae briefs in support of either party. Pursuant to Supreme Court Rule 37.2, both parties received notice of amici's intent to file this brief. Amici mistakenly notified Respondent of their intention to file this brief eight days before the due date, rather than ten days before. However, Respondent acknowledged receipt of the notice, had at least ten days' notice of the filing of the other amicus briefs in this case, and has consented to the filing of this amicus brief.

SUMMARY OF THE ARGUMENT

"Property must be secured or liberty cannot exist." John Adams, *Discourses on Davila* 92 (Russell & Cutler 1805).

Protecting private property was of paramount importance to our Founders. As Alexander Hamilton explained at the Constitutional Convention of 1787, "one great obj[ect] of Gov[ernment] is [the] personal protection and security of property." 1 *Records of the Federal Convention of 1787*, at 302 (Max Ferrand ed., 1911).

The Constitution itself reflects the Founding generation's emphasis on the importance of protecting private property, containing among its enumerated rights several provisions recognizing the rights of citizens in their belongings.

Notable among those is the Takings Clause of the Fifth Amendment, which provides for just compensation in the extraordinary circumstance where the state uses its powers to confiscate a citizen's belongings, ostensibly for public use.

Yet, in this case, the Ninth Circuit jettisoned this fundamental protection, holding that the Takings Clause applies fully only when the government has confiscated *real* property, not *personal* property.

But this holding comports with neither the original understanding of the Taking Clause's scope, nor the manner in which it has been applied in the intervening centuries. Since the Founding, it has been understood that the Takings Clause protects all of a citizen's private property—both real and personal.

This Court should grant the writ of certiorari and reverse the Ninth Circuit.

ARGUMENT

The Takings Clause of the Fifth Amendment provides that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Ninth Circuit took this simple statement and somehow concluded that the "Clause affords more protection to real than to personal property." Pet. App. 18a. Accordingly, it held that the categorical requirement that just compensation be provided for property expropriated by the government does not apply when the property in question is personal property.

This holding could not be further unmoored from history. As James Madison, the driving force behind the federal Takings Clause, wrote in his famous 1792 essay *Property*, "Government is instituted to protect *property of every sort*." James Madison, *Property*, *reprinted in* 14 *The Papers of James Madison* 266-68 (William T. Hutchison et al. eds., 1977).

Thus, the Takings Clause has always been understood—by the Founders and subsequent generations—to apply equally to real and personal property.

I. The Text of the Takings Clause Draws No Distinction Between Types of Property.

The Takings Clause states plainly that that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. If the Framers wished to limit its reach to real property, they could have said just that. But they did not. There is simply nothing in the text of the Clause to support the Ninth Circuit's judicially invented limitation of the Clause to only real property.

II. The Clause Was Understood at the Founding to Apply to Personal Property.

1. The Takings Clause's historical roots stem from the laws of England. Englishmen established the basic liberties of English citizens in a series of documents ranging from the Magna Carta to the English Bill of Rights—and as English subjects, the colonists considered themselves to be vested with those same rights. *See McDonald v. City of Chi., Ill.,* 130 S. Ct. 3020, 3064 (2010) (Thomas, J. concurring).

The first of these foundational documents, the Magna Carta, contained a progenitor of the Takings Clause that required compensation for the taking of property, with no limitation to only real property.

Indeed, the Magna Carta explicitly encompassed chattel in the category of items which may not be confiscated without compensation, stating that "[n]o constable or other bailiff shall . . . take *corn or other provisions* from any one without immediately tendering money therefor." Magna Carta § 28 (emphasis added), *reprinted in* William Sharp McKechnie, *Magna Carta* 329 (2d ed. 1914).

2. This legal protection of an individual's personal property was also manifested in our nation's early history, as evidenced by early colonial documents.

For example, the Massachusetts Body of Liberties of 1641—the colony's first proto-constitution—contained a takings clause providing that "No mans *Cattel or goods of what kidne soever* shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hrie as the ordinarie rates of the Countrie do afford. And if his *Cattle or goods* shall perish or suffer damage in

such service, the owner shall be suffitiently recompenced." Massachusetts Body of Liberties § 8 (1641), *reprinted in* 13 *American Historical Documents 1000-1904*, at 70, 71-72 (2009 ed.).

Similarly, during the Yamasee War—an early eighteenth-century conflict between colonial South Carolinians and certain Native American tribes—the colony of South Carolina passed legislation authorizing the confiscation of various forms of property including horses, boats, and "any quantity of goods and other necessaries for the service of the war." An Act to Appoint A Press Master (1716), *reprinted in* 2 Thomas Cooper, *Statutes at Large of South Carolina* 680, 681 (1837 ed.). The owners of confiscated personal property were entitled to "just satisfaction for all damage which may accrue to them while made use of by the publick." An Act for Raising Forces to Prosecute the War Against Our Indian Enemies (1715), *reprinted in* 2 Thomas Cooper *Statutes at Large of South Carolina* 634, 637 (1837 ed.). *See also* James W. Ely, Jr., *"That Due Satisfaction May Be Made" The Fifth Amendment and the Origins of the Compensation Principle*, 36 Am J. Legal Hist. 1, 12, 13-15 (1992).

3. Our nation's Founders took these principles to heart. Rather than limiting the Clause as applying only to "lands" or "real property," the Founders sought to protect "private property" in the Fifth Amendment. To be sure, the use of the term "private property" leads to the question whether the Founders considered "private property" to include only real property—as the Ninth Circuit would have us believe—or whether it includes both real and personal property. But a review of historical sources confirms that the answer is unequivocally the latter. At the

time of the Framing, "private property" included both personal and real property.

William Blackstone—whose works this Court has said, "constituted the preeminent authority on English law for the founding generation," *Alden v. Maine*, 527 U.S. 706, 715 (1999)—defined an individual's absolute rights in property as consisting "in the free use, enjoyment, and disposal of *all his acquisitions*, without any control of diminution, save only by the laws of the land." 1 William Blackstone, *Commentaries* 134 (emphasis added).

As Blackstone explained, ownership of "property" means claim and exercise "over the external things of the world, in total exclusion of the right of any other individual in the universe"—a definition which plainly encompassed personal property as well as real property. 2 William Blackstone, *Commentaries* 2.

A review of contemporary dictionaries is also instructive. Samuel Johnson, for example, defined property broadly as "Right of possession," "Possession held in one's own right," and "The thing possessed." 2 Samuel Johnson, *Dictionary of the English Language* (1755 ed.). And Noah Webster defined property as "An estate, whether in lands, *goods or money*," and included by way of example "the productions of [one's] farm or … shop." Noah Webster, *American Dictionary of the English Language* (1828) (emphasis added).

4. Madison's view of the Takings Clause's scope is particularly crucial in illuminating the Clause's original meaning. He was, after all, its primary drafter. *See* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 77-78 (1998).

Significantly, Madison incorporated Blackstone's broad conception of property in his writings on the

subject. In his essay *Property*, published just after the ratification of the Bill of Rights, Madison implicitly incorporated Blackstone's definition of property as "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." James Madison, *Property*, *reprinted in* 14 *The Papers of James Madison* 266-68 (William T. Hutchison et al. eds., University Press of Virginia 1977). Even in what Madison considered the more narrow sense of the word, he defined property as "a man's land, or merchandize, or money." *Id*.

Indeed, in Madison's view, it was the purpose of the government to "protect *property of every sort*, as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially *secures to every man, whatever is his own*." *Id.* (emphases added).

Madison's broad understanding of the Takings Clause's meaning is evident in the language he employed in drafting it. At the Founding, the phrase "private property" was widely understood to encompass both personal and real property.

Moreover, Madison's contemporaries shared his view that the Takings Clause protected property of all types. John Jay, for example, publicly denounced the "[p]ractice of impressing Horses, Teems, and Carriages by the military, without the Intervention of a civil Magistrate, and without any Authority from the Law of the Land." John Jay, A Hint to the Legislature of the State of New York (1778), *reprinted in* 1 *John Jay: Unpublished Papers* (Richard B. Morris et al. eds., 1975). It was with this intent that the Takings Clause was written—and that was also how it

was understood at the time. In the very first legal treatise written on the Constitution, St. George Tucker explained that the Takings Clause was enacted "to restrain the arbitrary and oppressive mode of obtaining *supplies* for the army, and other public uses." 1 St. George Tucker, *Blackstone's Commentaries* app. at 305-06 (1803) (emphasis added).

III. Since the Founding, the Takings Clause Has Been Consistently Applied Equally to Personal Property and Real Property.

The history of the Takings Clause after the Founding generation—and that of its state counterparts—further confirms that the Clause has *always* applied equally to personal property.

1. In 1871, this very Court affirmed this understanding of the Takings Clause. In *United States v. Russell*, 80 U.S. 623 (1871), one of the first cases to interpret the Clause directly,[2] this Court held that it required the federal government to provide compensation for steamships confiscated as part of the Civil War effort. *Id.* at 627, 630 ("Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats . . ."). A steamboat, of course, is not real property. And since that decision, courts have consistently held the confiscation by the government of personal property, not just real property, constitutes a *per se* taking. *See, e.g.*, Pet. 16-20.

[2] Supreme Court interpretation of the Takings Clause prior to Reconstruction is sparse, in part because Congress did not authorize the federal government to exercise the power of eminent domain until the 1860s. *See Kohl v. United States*, 91 U.S. 367, 373 (1875).

2. The federal government is not alone in protecting the right to personal as well as real property. From the Nineteenth Century on, courts have consistently held that the state analogues to the Takings Clause applied equally to all sorts of property, not just real property.

For example, the Massachusetts Constitution of 1780 provided that "whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. of 1780, part I, art. X, *reprinted in Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* (Handlin & Handlin eds., 1966).

And in one of the earliest cases to interpret that language, the Massachusetts Supreme Court determined that it applied to chattel, as well as real property. *Perry v. Wilson*, 7 Mass. 393 (1811). Specifically, the Court held that the state constitution required compensation for logs taken for canal construction. *Id.* at 394-95. Four decades later, Chief Justice Lemuel Shaw confirmed this broad understanding of the Commonwealth's takings provision, stating that it applied broadly to "every valuable interest which can be enjoyed as property and recognized as such." *Old Colony & Fall River R.R. v. Cnty. of Plymouth*, 80 Mass.155, 161 (1859).

Similarly, personal property has long received the same constitutional protection as real property. The case law demonstrates that many forms of property besides real property have been considered constitutional private property under various takings clauses, from patents to franchises.

Regarding patents, "the nineteenth-century jurisprudence was quite clear: patents were private prop-

erty rights secured under the Constitution." Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. Rev. 689, 700-11, 711 (2007); *see also McKeever v. United States*, 14 Ct. Cl. 396 (1878) (patents secured under Takings Clause).

And as to franchises, this Court held in *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), that the owner of a lock and dam, who also owned a "vested franchise to receive tolls for its use," was entitled to just compensation for the taking of both the real property and the franchise. *Id*. at 344. In reversing the trial court, which had granted compensation for only the lock and dam itself, this Court stated "[s]uch a franchise was as much a vested right property as the ownership of the tangible property," and that "just compensation requires payment for the franchise to take the tolls, as well as for the value of the tangible property." *Id.* at 344-45.[3]

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[3] *See also, e.g., Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 571 (1837) (McLean, J, concurring in result) (noting in a Contracts Clause case, which he believed should have been dismissed for want of jurisdiction, that in granting a charter for the Warren Bridge, the Massachusetts legislature provided compensation to the franchise holders of the Charles River Bridge company); *Enfield Toll Bridge Co. v. Hartford & New Haven R.R.*, 17 Conn. 40, 59-61 (1845) ("The right rests upon the principle, that individual interests must be subservient to that of the public, and that they must yield, when public necessities require. This, however, in constitutional governments, is not to be done, but upon compensation. The principle, then, is broad enough to include all kinds of property."); *Piscataqua Bridge v. N.H. Bridge*, 7 N.H. 35, 66 (1834) ("That franchise, as we have said, is property.").

As the late-nineteenth century law professor and Michigan Supreme Court Justice Thomas Cooley noted, "[e]very species which the public needs may require . . . is subject to be seized and appropriated under the right of eminent domain," including: "timber, stone, and gravel." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 646 (6th ed. 1890). And as Cooley wrote in his influential treatise *General Principles of Constitutional Law in the United States*, "[t]he property which the Constitution protects is anything of value which the law recognizes as such." Thomas M. Cooley, *General Principles of Constitutional Law in the United States of America* 336 (1880 ed.). Personal property is just that.

This understanding is reflected in more recent case law as well, making the Ninth Circuit's conclusion even less tenable. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court held unanimously that interest earned on interpleader funds deposited in the registry of a county court in Florida constituted protectable property and that its taking without compensation by the county constituted a violation of the Fifth and Fourteenth Amendments. *Id*. at 164. *Cf. id.* at 161 ("[P]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source[.]") (internal quotations and citations omitted) (omission in original).

Indeed, in *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), a panel of the D.C. Circuit concluded that President Nixon's private presidential papers were "property" for the purposes of the Fifth

Amendment and that their confiscation pursuant to the Presidential Recordings and Materials Preservation Act was a *per se* taking entitling him to just compensation. *Id.* at 1287.

* * *

The historical record unambiguously demonstrates that the government's confiscation of personal property has been considered a compensable *per se* taking prior to, during, and since the Founding. The Ninth Circuit's rejection of this unbroken history on the basis of dicta and convoluted legal reasoning was not only wrong, it has led it to deviate from this Court's prior holdings and create a split among the Circuit Courts of Appeals.

This Court's intervention is needed to bring the law of the Ninth Circuit in line with this Court's precedents, as well as those of its sister circuits.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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DATED: October 8, 2014