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 Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

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

James C. Ho
Prerak Shah*
Sean Sandoloski
Kelly C. Burns
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Ave.
Dallas, TX 75201
(214) 698-3193
pshah@gibsondunn.com

* Counsel of Record

Counsel for Amici Curiae

QUESTIONS 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).

1. 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?

2. Did the United States Court of Appeals for the Ninth Circuit err when it held that no taking occurs when there exists the possibility that the condemnee may receive in-kind benefits as a result of the government's actions?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

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: (1) apply equally to both real and personal property and (2) apply regardless of whether physical confiscation of the property may create in-kind benefits for its owner. Accordingly, amici believe that this Court should reverse the Ninth Circuit, make clear that the Takings Clause applies equally to all private property, and clarify that in-kind benefits do not automatically render *per se* takings constitutional.

Amici include Thomas W. Bell, Professor of Law at the Chapman University Dale E. Fowler School of Law; James W. Ely Jr., the Milton R. Underwood Professor of Law Emeritus and Professor of History Emeritus at Vanderbilt University; Nicole Stelle Garnett, the John P. Murphy Foundation Professor of Law at the University of Notre Dame; J. Gordon Hylton, Professor of Law at Marquette University; Daniel B. Kelly, Professor of Law at the University of Notre Dame; Donald Kochan, the Associate Dean for

---

[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 their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for respondent and petitioners in this case have filed a letter pursuant to Supreme Court Rule 37.3(a) reflecting consent to the filing of amicus curiae briefs in support of either party.

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.

SUMMARY OF THE ARGUMENT

"The political institutions of America . . . opened a certain resource to the unfortunate and to the enterprising of every country and ensured to them the acquisition and free position of property." Thomas Jefferson, *Declaration on Taking Up Arms* (1775), *reprinted in* 2 *The Works of Thomas Jefferson* 113 (Paul Leicester Ford ed., 1904).

Protecting private property has been a central aim of our system of government since the Founding. 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).

It seems that the Ninth Circuit has forgotten this core tenet of our constitutional system.

It crippled the Takings Clause, holding that it applies fully only when the government has confiscated *real* property. This holding comports with neither the original understanding of the Takings Clause's scope, nor the manner in which it has been applied in the intervening centuries.

And the Ninth Circuit compounded this error by holding that the potential for in-kind benefits insulates the government's categorical condemnations from scrutiny. In doing so, the Court of Appeals forgot a fundamental precept of takings theory: in the event of a physical taking, the question whether there has been a taking of private property is distinct from the question whether just compensation has been provided.

This Court should 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 concluded: (1) that the "Clause affords more protection to real than to personal property," Pet. App. 18a,[2] and (2) that the Clause's protections are lesser when the government's action might "inure[] to the [condemnee's] benefit," Pet. App. 22a. 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 or when the property owner may receive implicit in-kind benefits from the public use.

But this holding was unmoored from history and logic.

---

[2] In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court noted that personal property *might* be treated differently than real property for Takings Clause purposes. *Id.* at 1027-28. This observation is inapposite for at least two reasons. First, it was dicta. Second, it was made in the context of regulatory takings that reduce the value of the property in question; the argument does not extend to situations where the government confiscates the property in question outright, as is the case here.

I. The Constitution Draws No Distinction Between Real and Personal Property.

When interpreting the Constitution, one document proves more helpful than any other: the Constitution. The Ninth Circuit's distinction between real and personal property finds no support in the text of the document.

A. The Text of the Takings Clause Itself 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.

Absolutely nothing in its text supports the Ninth Circuit's judicially invented limitation of the Clause to only real property. If the Framers wished to limit its reach to real property, they could have said just that. But they did not. *See* § I.B.3 *infra*.

This lack of a textual hook alone provides reason enough to reject the Ninth Circuit's attempt to limit the Clause's protections.

B. Other Clauses of the Constitution Suggest That the Takings Clause Applies to More Than Just Real Property.

1. The Takings Clause is not the only place the Framers used the word "property" in the Fifth Amendment. The Due Process clause states that "nor shall any person . . . be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V.

Again, there is no language limiting the due process right to real property in the text. This Clause has been interpreted time and time again to apply to more than just land. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 262 n.8, 266 (1970) (explaining that "[i]t may be realistic today to regard welfare entitlements as more like 'property'," and concluding that procedural due process requires that a pretermination evidentiary hearing be held when public assistance payments to a welfare recipient are discontinued). But a consistent application of the Ninth Circuit's reading of the text yields the perverse rule that the State can deprive its citizens of anything they own (with the exception of land) without proper process.

2. Section 3 of Article IV of the Constitution, the "Property Clause," grants to Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3.

Nothing in the plain text limits the scope of the Clause to real property, and the use of the broad modifier "other" suggests that anything that could be described as "property" would fall within its scope. This reading of the Clause makes intuitive sense. Congress needs power to make rules regarding more than just federally owned lands; it needs the power to make rules regarding federally owned chattels as well.

3. The Constitution refers explicitly to land on multiple occasions. *See, e.g.*, U.S. Const. art. I, § 8 ("The Congress shall have the power to . . . make rules concerning Captures on Land and Water."); U.S. Const. art. III, § 2 ("The judicial Power shall ex-

tend to . . . Controversies . . . between Citizens of the same State claiming Lands under Grants of different States.").

The Framers knew how to make reference to real property when they wanted to limit the government's powers to lands. They did not so here.

II. The Takings Clause Has Always Been Understood to Apply to Personal Property.

James Madison, the author of 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) (emphasis added).

The Takings Clause is one of the Constitution's primary methods for ensuring that the government respects individuals' property rights. It has always been understood—by the Founders, as well as prior and subsequent generations—to apply equally to real and personal property.

A. The Clause Was Understood Prior to the Founding to Apply to Personal Property.

A review of the historical record provides ample reason to reject the Ninth Circuit's attempt to gut this core constitutional protection. Its interpretation of the Clause is opposite centuries of historical evidence to the contrary.

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 that could 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 kinde 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 hire 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, 15 (1992).

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

1. Our nation's Founders took these principles to heart. Rather than limiting the Clause to apply 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 or diminution, save only by the laws of the land." 1 William Blackstone, *Commentaries* *138 (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).

2. 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., 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* (emphasis added).

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.* (second emphasis added). Not just land, but "property of every sort" and "whatever is his own."

Unsurprisingly, 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: The Making of a Revolutionary, Unpublished Papers 1745-1780*, at 461 (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 ex-

plained 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).

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

The way that the Takings Clause, and those of its state counterparts, have been applied after the Founding generation 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,[3] 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. Br. 33-36.

---

[3] 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); *see also Miller v. Horton*, 152 Mass. 540, 547-48 (1891) (Holmes, J.) (holding that a healthy horse killed as part of program to control glanders was taken for public use).

3. Similarly, personal property has long received the same constitutional protection as real property. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("The right to enjoy property without unlawful

deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account."). The caselaw demonstrates that many forms of property besides real property have been considered constitutional private property under various takings clauses, including intangible property like patents and franchises.

Regarding intellectual property, "the nineteenth-century jurisprudence was quite clear: patents were private property 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, 421 (1878) (patents secured under Takings Clause). This belief has persisted to more recent times. In *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), this Court held that trade secrets are secured as "private property" under the Takings Clause. *Id.* at 1003-04 (holding that Monsanto has "a trade-secret property right under Missouri law, [and] that property right is protected by the Taking Clause of the Fifth Amendment" and citing scholars such as Blackstone and John Locke for the proposition that "property" subsumes all things that arise from "labour and invention").

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 344-45. 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*.[4]

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. Coo-

---

[4]*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.").

ley, *General Principles of Constitutional Law in the United States of America* 336 (1880 ed.). Personal property is just that.

Cooley's was not the only nineteenth-century treatise to suggest that all property is subject to condemnation via eminent domain. In his influential *Treatise on the Law of Eminent Domain in the United States*, John Lewis wrote: "All kinds of property, and every variety and degree of interest in property, may be taken under the power of eminent domain." 1 John Lewis, *Treatise on the Law of Eminent Domain in the United States* § 262 (1st ed. 1888). Lewis put it more bluntly in a later edition of his work: "The constitution protects personalty as fully as real estate." 1 John Lewis, *Treatise on the Law of Eminent Domain in the United States* § 62 n.1 (3d ed. 1909).

This understanding is reflected in more recent caselaw as well, in square opposition to the Ninth Circuit's holding in this case.

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).

In *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156 (1998), this Court held that interest on law-

yers trust accounts is a property right protected by the Takings Clause. *Id.* at 172. If such interest accounts are protected by the Takings Clause—even though far removed from real property—surely raisins are.

And 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 ever since the Founding. The Ninth Circuit's rejection of this unbroken history on the basis of dicta and convoluted legal reasoning was simply wrong. Reversal is required to ensure that the Takings Clause provides the robust protections on property that the Framers intended.

III. The Takings Clause Applies Regardless of Potential In-Kind Benefits.

The Ninth Circuit also committed a second fundamental error in this case, when it held that no taking had occurred because "the Hornes did not lose all economically valuable use of their personal property." Pet. App. 20a. It reached this conclusion by blurring

clear lines laid out by this Court's takings jurisprudence. This was in error.

Where there has been a *per se* appropriation of property,[5] the receipt of implicit, in-kind benefits—defined by scholars as the amount of compensation that property owners receive "in kind" as a result of the exercise of eminent domain—is irrelevant to the threshold question whether a taking has occurred. *See* Richard Epstein, *Takings*: *Private Property and the Power of Eminent Domain* 195-99 (1985) (hereinafter, "*Takings*").

The degree to which a land use disperses benefits back to the public may impact the amount of in-kind compensation that a landowner is entitled to. For instance, where the value of the in-kind benefits received fails to even approach the value of the property lost, a slight diminution in the amount of compensation owed *may* be appropriate. *See Bauman v. Ross*, 167 U.S. 548, 574-75 (1897) (noting that early eminent domain precedents support the conclusion that specific and direct benefits received by a condemnee can be subtracted from his compensation); *see also Takings*, 195-97; Frank I. Michelman, *Prop-*

---

[5] This case involves a *per se* physical taking. The Raisin Marketing Order mandates the transfer of ownership of raisins to the federal government's designee, a forced transfer of an owner's title to physical goods. We, therefore, limit our commentary to the realm of *per se* physical takings and do not address regulatory takings. *Cf. Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323-24 (2002) (holding it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa").

erty, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 Harv. L. Rev. 1165, 1218, 1255 (1967).

But it is irrelevant to the question whether there has been a taking at all.[6]

The Ninth Circuit forgot this maxim. Instead, it considered that the Hornes may receive implicit in-kind compensation to determine whether there had been a taking. That the Hornes may have received a benefit from the Raisin Administrative Committee (RAC), then, insulated the government's action from takings scrutiny in the Ninth Circuit's opinion.

In so holding, the Ninth Circuit forgot an "oft-overlooked lesson about takings law: one must carefully distinguish between the question whether there is a taking of private property for public use from the

---

[6] Theory and caselaw distinguish between "general" and "specific" benefits. 3 *Nichols on Eminent Domain* § 8A.01. If a benefit received by the property owner is common with the entire community or general public—rather than just by himself—the benefit is general and its value not offset against the fair-market-value compensation owed. *Id.* § 8A.02. Subtracting that value from his compensation would place him in a worse position than a neighbor who received benefits without losing her property and would be fundamentally unjust. Indeed, the primary purpose of the Takings Clause is "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). But a property owner who receives a disproportionally greater share of benefits than those similarly situated should receive a reduced amount of money in return. He should be deemed to have received benefits that can be offset against the "fair compensation" he is to receive. *See Bauman*, 167 U.S. at 583-84 (1897).

very different question whether just compensation has been provided." Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. Chi. L. Rev. 1081, 1085 (1999). "[T]he issue of compensation—and hence of implicit in-kind compensation—can be reached *only if* there has been a taking of private property." *Takings*, at 198 (emphasis added); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, at 437-48 (1982).

Conflating these inquiries, or addressing them in the wrong order, has serious consequences. It allows the courts to whitewash the fact that the State has committed unconstitutional overreach by finding that just compensation has already been received. But that cannot mean that a taking has not occurred. It is pure legal fiction to assume that there is no impact on the condemnee's property or rights. The fact remains that the property owner has lost ownership and control of something which was once his and that the Constitution protects his property rights.

For example if the government were to confiscate a portion of coastal land to build a fort, the owner of that land would plainly benefit because the fort makes the rest of her property more secure from attacks by sea. But we would still say that a taking has occurred and consider whether the value of the increased security should be considered "just compensation." (And eventually we would decide that she should not be required to bear that burden on behalf of all coastal dwellers. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). (The primary purpose of the Takings Clause is "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by

the public as a whole.")). The same rationale applies to personal property. If provisions are taken from a private farmer to feed the troops at the fort, would we say that the farmer is owed no compensation because the farmer benefits from the protection the well-fed troops provide?

This case presents a paradigmatic example of what can happen when Courts make this error. The Ninth Circuit concluded that the government's expropriation of the raisins did not constitute a taking because the Hornes retained an "equitable stake" that "funds the administration of an industry committee tasked with (1) representing raisin producers, such as the Hornes, and (2) implementing the reserve requirement, the effect of which is to stabilize the field price of raisins." Pet. App. 21a. But that the RAC may act for the benefit of all raisin producers, as well as the public-at-large, does not insulate its actions from being labeled a taking.

By first considering whether the Hornes received in-kind benefits—the value of which may or may not offset the value of their confiscated raisins—the Ninth Circuit deprived them of the possibility of receiving any compensation whatsoever. The Fifth Amendment entitles the Hornes to compensation that is "just," and while that compensation may be lessened as a result of the implicit in-kind benefits received, *see Bauman*, 167 U.S. at 574-75, these benefits cannot zero out their damages as a matter of course.

Allowing the Ninth Circuit's error to stand uncorrected would alter the takings landscape and could substantially weaken the protections provided by the Takings Clause. Once a government knows that it

can take property without having to compensate its owner, simply by pointing to the possibility that in-kind benefits may inure to the owner, what government would be foolish enough to ever compensate its citizens?

CONCLUSION

The Court should reverse the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

James C. Ho
Prerak Shah*
Sean Sandoloski
Kelly C. Burns
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Ave.
Dallas, TX 75201
(214) 698-3193
pshah@gibsondunn.com

* Counsel of Record

Counsel for Amici Curiae

DATED: March 9, 2015