No. 08-497

In The Supreme Court of the United States

AMERISOURCE CORPORATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

Ronald J. Mann
Counsel of Record
435 West 116th Street
New York, New York 10027
(212) 854-1570

Maurice R. Mitts
Rebecca Field Emerson
MITTS MILAVEC, LLC
Two Logan Square, 12th Floor
Eighteenth & Arch Streets
Philadelphia, Pennsylvania 19103
(215) 569-1800

Counsel for Petitioner

THE LEX GROUP^{DC} ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦www.thelexgroupdc.com

QUESTION PRESENTED

Whether it is a taking compensable under the Fifth Amendment for the Government to seize (and not return) an innocent third party's property for use as evidence in a criminal prosecution, if the property is not itself contraband, is not the fruits of criminal activity, and has not been used in criminal activity.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

No. 08-497

AMERISOURCE CORPORATION, PETITIONER

V.

THE UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Government's brief in opposition to the petition underscores the need for review by this Court. It declines to defend the reasoning of the court below. It offers a new rationale that is neither consistent with the reasoning of the lower court nor defensible on its own terms. Finally, despite the Government's efforts to minimize the importance of the decision, it remains undisputed that the decision below grants the Federal Government a blank check to confiscate tangible property without any duty of compensation, from the only court in which such actions can be challenged.

1. The most noteworthy thing about the Government's brief in opposition is the Solicitor General's decision to abandon the argument that the Government presented to the trial court and the court of appeals. As we explain in the petition (Pet. 4-5), the court of appeals adopts a categorical view that the Takings Clause is limited to the eminent domain power, and thus requires no compensation for property taken under the police power. By contrast, the Government in this Court (Gov't Opp. 8-10) abjures any such view and instead suggests a series of possible readings of *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) to justify the decision below.

Specifically, the Government contends (Gov't Opp. 7) that our discussion of the court of appeals' treatment of the police power relies on "isolated language" from its opinion. On the contrary, the relation between the Takings Clause and the police power was the foundation of the court of appeals' reasoning.[1] Thus, the court of appeals begins its substantive analysis (Pet. App. 10a) by stating without qualification: "Property seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause." To justify that rule of law, the court offers a detailed

[1] Nor is it true that "the court limited its holding to law-enforcement seizures that comply with due process requirements." Gov't Opp. 8 (discussing Pet. App. 13a). The passage of the court of appeals opinion to which the Government refers explains how the Due Process Clause limits the police power. It says nothing about a Due Process limitation on the Takings Clause. *See* Pet. App. 13a ("As expansive as the police power may be, it is not without limit. The limits, however, are largely imposed by the Due Process Clause.").

discussion of its decision in *Acadia Technology, Inc. v. United States*, 458 F.3d 1327 (Fed. Cir. 2006), concluding with an approving quotation of what it regarded as the *Acadia* "holding that '[t]he government's seizure, retention, and damaging of the property did not give rise to an actionable claim for a taking . . . because "items properly seized by the government under its police power are not seized for 'public use' within the meaning of the Fifth Amendment."'" Pet. App. 10a (brackets and ellipses by court of appeals) (quoting *Acadia*, 458 F.3d at 1332 (quoting *Seay v. United States*, 61 Fed. Cl. 32, 35 (2004))). The court of appeals then proceeds (Pet. App. 11a) to apply that rule of law to the facts of this case:

> In the instant case, the government seized the pharmaceuticals in order to enforce criminal laws, a government action clearly within the bounds of the police power. *Acadia* therefore dictates that the property here was "not seized for 'public use' within the meaning of the Fifth Amendment."

Quoting *Acadia*, 458 F.3d at 1332.

The distinction between the reasoning of the court below and the reasoning of the Solicitor General here could not be clearer. In this Court, for example, the Solicitor General acknowledges that "an exercise of the police power may or may not constitute a taking, depending on the character of

the action." Gov't Opp. 8.[2] In this Court, the Government reads *Bennis* as holding only that "a lawful exercise of the forfeiture power will not simultaneously be a compensable taking." Gov't Opp. 8. If we accept that the Government has powers other than eminent domain and forfeiture that might take private property, the argument is profoundly narrower than the argument presented to (and accepted by) the court below, that after *Bennis* there is *no* compensation requirement for *any* exercise of government power other than eminent domain. *See* Pet. App. 12a ("*Bennis* suggests that so long as the government's exercise of authority was pursuant to some power other than eminent domain, then the plaintiff has failed to state a claim for compensation under the Fifth Amendment.").[3]

The Government's unwillingness to defend the arguments it successfully pressed in the court of

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[2] Compare, for example, the first paragraph of the Government's argument on the merits in the court of appeals:

> A taking for a public use is distinct from an exercise of the Government's police power (i.e., its inherent power to regulate in order to protect the health, safety or welfare of its citizens). *Acadia*, 458 F.3d at 1332. * * * * When the Government seizes property pursuant to its police power, therefore, there is no taking pursuant to the Fifth Amendment.

Gov't C.A. Br. 11.

[3] The Government's argument below was similar: "Put another way, the requirement for the Government to pay just compensation pursuant to the takings law is limited to the exercise of the Government's power of eminent domain. *Bennis v. Michigan*, 516 U.S. 442, 452 (1996)." Gov't C.A. Br. 11.

appeals is easy to understand, because those arguments directly contradict the text, history, and jurisprudence of the Takings Clause. *See* Pet. 7-18. But the Government's shift of position in this Court does nothing to remedy the problematic decision of the Federal Circuit we challenge in the petition.

2. Having abandoned the untenable treatment of *Bennis* as a categorical exemption for all police power activity, the Government offers no answer to our demonstration that compensation in this case is required by the text and history of the Takings Clause. Rather, the Government attempts to articulate a view of *Bennis* that is both sufficiently narrow to be a fair reading of the Court's opinion in that case and at the same time sufficiently broad to extend to the facts of this case. *See* Gov't Opp. 8-10.

As we explained in the petition (Pet. 15-18), the Takings analysis of the Court in *Bennis* is quite brief, but on its face recognizes an exception to the compensation requirement for property acquired by forfeiture, because when it forfeits property "the Government has already lawfully acquired [the property] under the exercise of governmental authority other than the power of eminent domain." *Bennis*, 516 U.S. at 452. Applied to this case, that analysis suggests that compensation is required, because the Government did not acquire the property by forfeiture; it merely took forcible possession of it and retained it for the remainder of its useful life. *See* Pet. 15-16.

Ignoring the suggestions of the six concurring and dissenting Justices that *Bennis* should be

applied narrowly (*see* Pet. 16-18), the Government offers two justifications for a broad reading that extends *Bennis* to this case. First, the Government cites *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), for the proposition that personal property is inherently subject to extensive regulation. Citing *Hurtado v. United States*, 410 U.S. 578 (1973), the Government then argues (Gov't Opp. 8-9) that the obligation to provide evidence is one such inherent limitation on the right to own personal property.

Neither step of that argument supports an uncompensated permanent physical seizure of property. First, as the *Lucas* Court recognized, "[i]n general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas*, 505 U.S. at 1015. Similarly, *Hurtado* involves no question of property at all, but rather the level of compensation due to witnesses. In that case undocumented immigrants materially involved in the trial in question challenged the amount the Government paid them while they were held pending the trial. *See Hurtado*, 410 U.S. at 579-80. The *Hurtado* Court's analysis of those unusual facts sheds little light on the well-settled principles of Takings law that apply here.

Second, the Government argues (Gov't Opp. 9-10) that *Bennis* extends not only to the cases discussed in *Bennis* – in which the Government acquires title to property through a forfeiture proceeding – but also to any other case in which the

Government "acquired lawful possession." Essentially, the Government suggests that our emphasis on seizure weakens our case, because the Government actually took only possession, not title. But that argument proves far too much. For one thing, if the argument is taken at face value to suggest that the Takings Clause never requires compensation when the Government takes "mere" possession, then it is directly inconsistent with the regulatory takings cases discussed in the Petition. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (explaining that the Takings Clause always has required compensation for "the functional equivalent of a practical ouster of the owner's possession") (quoting *Lucas*, 505 U.S. at 1015 (brackets and internal quotation marks omitted)); *see also* Pet. 10-14.

If read more narrowly as an interpretation of the breadth of the forfeiture rule articulated in *Bennis*, it misses the point of both that case and our argument. *Bennis* offered the Government an avenue for securing property related to criminal prosecutions without owing compensation. The logic of the argument is that the Government's long-recognized ability to extinguish the private ownership of the property through the forfeiture power avoids the need to take the property for "public use" and thus pay compensation. In this case, however, the Government was unable to use that method of obtaining the property, apparently because the property was not adulterated or misbranded and was neither proceeds of the offense nor used to facilitate it or commit it. *See* Pet. 16

n.11.[4] In the absence of an exercise of the forfeiture power (or some analogous power related to contraband or the like), the reasoning of *Bennis* can have no application.

3. Finally, the Government's claims that the decision below is unimportant are unavailing. First, the Government challenges (Gov't Opp. 11-12) our assertion that the decisions in *Lowther v. United States*, 480 F.2d 1031 (10th Cir. 1973), and *United States v. Martinson*, 809 F.2d 1364 (9th Cir. 1987), indicate that those courts would reject the reasoning of the court below. But the Government merely quotes snippets from the opinions discussing issues other than the Takings Clause. *Lowther* affirmed an award of damages "to remedy a taking of property contrary to the Fifth Amendment" when the Government confiscated property that was "neither narcotics nor other contraband" and had been "determined by the trial court to have been innocently used and to have not been illegal per se." *Lowther*, 480 F.2d at 1033. Similarly, *Martinson* directly recognized the authority to award damages to compensate for a seizure of property for evidentiary purposes. *Martinson*, 809 F.2d at 1368-69. Neither conclusion would be tenable under the view of the court of appeals that compensation can never be required for actions taken under the police power.[5]

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[4] The Government has not suggested that the property in this case was subject to forfeiture.

[5] The other authorities the Government offers as reaching results similar to the decision below (Gov't Opp. 12) are similarly off-base. The court in *Dickens v. Lewis*, 750 F.2d 1251 (1984) noted that the plaintiff's own allegations admitted

The Government also suggests (Gov't Opp. 12-13) that the issue frequently could arise in courts other than the Federal Circuit. In truth, however, there is little prospect for review of this question by federal courts other than the Federal Circuit. With respect to State and local activity, *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) makes it quite difficult for plaintiffs to obtain a federal forum in which to present a Takings claim. As Chief Justice Rehnquist recently explained, "*Williamson County* all but guarantees that claimants [challenging State or local actions] will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 342 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy & Thomas, JJ., concurring in the judgment).

More broadly, whatever the likelihood of lower federal court review of state and local activity, the applicability of the Takings Clause to federal activity is by itself a question worthy of this Court's attention. The Government understandably does not dispute the exclusive jurisdiction of the Federal Circuit over claims under the Tucker Act and the Little Tucker Act. *See* Pet. 22 & n.16. Thus, there is no prospect that the lower courts will constrain the broad conception of the Takings Clause that the

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that the confiscated gun parts were contraband. Similarly, the rabbits at issue in *Scott v. Jackson County*, 2008 U.S. App. LEXIS 22685 (9th Cir. 2008) apparently were taken by forfeiture. Slip op. at *6. Finally, *Eggleston v. Pierce County*, 64 P.3d 618 (Wash. 2003) (en banc) and *Emery v. State*, 688 P.2d 72 (Ore. 1984) reject claims under state constitutions, not the Fifth Amendment.

Government pressed upon the court of appeals in this case.

Finally, the Government presents a variety of minor miscellaneous concerns, all of which tend to suggest that the question we discuss is not squarely presented. None of those concerns, however, offers any reason to doubt that the court of appeals has finally decided the question adversely to petitioner, nor to doubt that a contrary analysis of that question by this Court would require reversal of the judgment below.[6]

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[6] For example, the Government suggests (Gov't Opp. 4 n.2) some doubt as to whether petitioner can prove that the Government confiscated all of petitioner's pharmaceuticals. This case was disposed of on a motion to dismiss, treated as a motion for summary judgment. Pet. App. 28a-29a. Petitioner has alleged that the Government confiscated the entire $150,000 shipment. The record definitively indicates that the Government retained possession of ten boxes of the shipment worth approximately $102,000. *See* C.A.App. 175a. Although there is some doubt as to what happened to the remainder of the shipment, the record contains no proof that the Government did not confiscate the entire shipment. At worst, there might be a genuine issue of fact regarding the circumstances in which the remainder of the shipment was lost.

The Government also expresses interest (Gov't Opp. 4 n.3 & 14 n.6) in the question whether petitioner could have (or perhaps has) collected its debt from Yates, Pusztai, or Norfolk, implicitly suggesting that the case would become moot if petitioner successfully recovered from any of those parties. There is nothing in the record to suggest that those collection efforts have borne any fruit. The record does show, however, that Norfolk ceased operations immediately after the seizure and that Yates and Pusztai were convicted and imprisoned (Pet. App. 25a), which suggests a limited likelihood that petitioner could collect from them.

The Government also suggests (Pet. 10-11) that there is no need for compensation because Rule 41 provides an adequate shield against "arbitrary or tyrannical treatment." But Rule 41 serves the distinct purpose of ensuring that the Government has evidence whenever it needs it. Notwithstanding the Government's suggestion in this Court (Gov't Opp. 13-14), it would make no sense to interpret Rule 41 as a mechanism for mediating questions about compensation for evidence. *See* Pet. 15. There is nothing in the Rule to suggest that a criminal trial court must release evidence simply because it is valuable to the person from whom it was taken. The question whether the Government can make valuable use of property as evidence is logically distinct from the question whether it is "arbitrary or tyrannical" to take the property from its owner to serve the public interest in law enforcement. The Takings Clause treats it as arbitrary and tyrannical whenever such activity forces a single person to bear a burden that should be borne by the public as a whole. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Finally, the Government suggests (Gov't Opp. 13-14) that the facts of the case are "idiosyncratic" because it is not clear at what point the Government's seizure became sufficiently permanent to amount to a taking. That question arises whenever temporary interference with property approaches the point where it amounts to a taking. The virtue of the facts before the Court here is that there can be no doubt that the taking was complete; the expiration of the pharmaceuticals provided a sharp dividing point beyond which the Government indisputably had taken all economic value of the property. Thus, this case squarely presents the fundamental question of the relation between the police power and the Takings Clause; the Court need not worry that its attention would be diverted by the fact-specific problems of temporary takings. *See* Pet. 14 n.10 (discussing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Activity*, 535 U.S. 302, 331-32 (2002).

CONCLUSION

As we explain in the petition, the decision below ignores the text of the Takings Clause, cannot be reconciled with its history, and rests on a fundamental misunderstanding of the most basic aspects of this Court's decisions interpreting the Clause. The Government has forcibly seized tangible personal property belonging to petitioner, for use in an indisputably public activity, and retained it for the remainder of its useful life, yet the court below finds the Takings Clause categorically inapplicable. The Government's brief in opposition implicitly acknowledges the error into which the court of appeals has fallen, but offers no reason to think that any court other than the Federal Circuit will cabin the Government's continuing use of the powers that the decision below validates. Review by this Court is necessary to ensure that the Takings Clause continues to limit the Government's actions.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Ronald J. Mann
Maurice R. Mitts
Rebecca Field Emerson

February 25, 2009