No. _____

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

PETITION FOR WRIT OF CERTIORARI

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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.

PARTIES TO THE PROCEEDING

Petitioner is a wholly owned subsidiary of AmerisourceBergen, a publicly traded company.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

No. 08-____

AMERISOURCE CORPORATION, PETITIONER

V.

THE UNITED STATES OF AMERICA

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

AmeriSource Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc (App., *infra*, 43a-44a) is unreported. The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 525 F.3d 1149. The opinion of the United States Court of Federal Claims (App., *infra*, 19a-42a) is reported at 75 Fed. Cl. 743.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2008. App., *infra*, 45a. The court denied a timely petition for rehearing on July 21, 2008. App., *infra*, 43a-44a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

1. This case arises out of an August 2000 shipment of Viagra, Xenical, and Propecia from petitioner AmeriSource to Norfolk Pharmacy ("Norfolk"). The value of the shipment was approximately $150,000. Under the terms of the contract between petitioner and Norfolk, petitioner retained title to (and a security interest in) the pharmaceuticals until Norfolk paid for them. Unbeknownst to petitioner, a Federal grand jury in Alabama recently had indicted the principals of Norfolk (Anita Yates and Anton Pusztai) on charges of conspiracy, unlawful distribution of prescription pharmaceuticals, operating an unregistered drug facility, and conspiracy to commit money laundering. On August 7, 2000, the Government executed a

search warrant at a Norfolk facility in West Virginia, seizing a large quantity of pharmaceuticals, including the shipment from petitioner. Norfolk had not yet paid for the shipment of pharmaceuticals from petitioner. Norfolk subsequently went out of business. It never paid petitioner for the pharmaceuticals. App., *infra*, 3a-4a, 21a, 50a-51a.

2. In October of 2000, petitioner filed a motion in the United States District Court for the Middle District of Alabama, where the criminal proceedings against Yates and Pusztai were pending. In that motion, petitioner sought the return of the pharmaceuticals seized by the Government under Federal Rule of Criminal Procedure 41, explaining that the pharmaceuticals would expire in 2003 and become worthless at that time. The Government opposed the motion, contending that it needed the pharmaceuticals as evidence against Yates and Pusztai, and explaining to the court that the trial would take place before the pharmaceuticals expired. Eventually, in February of 2002, the district court denied petitioner's motion and allowed the Government to retain the pharmaceuticals. App., *infra*, 4a-6a, 21a-24a.

In June of 2002, the court convicted Yates and Pusztai. At the trial, the Government did not use any of the pharmaceuticals seized from petitioner's shipment. During the pendency of an appeal by Yates and Pusztai, the Government retained the pharmaceuticals for use in any retrial that might be necessary. Ultimately, after the pharmaceuticals had expired, the Eleventh Circuit sitting *en banc*

overturned the convictions, remanding the cases for a new trial. *United States v. Yates*, 438 F.3d 1307 (2006) (holding that testimony by video teleconference was inconsistent with the Confrontation Clause). Shortly after that decision, the defendants Yates and Pusztai agreed to plead guilty. They have been convicted and sentenced. App., *infra*, 4a, 24a-25a.

3. On April 8, 2004, petitioner filed a complaint in the Court of Federal Claims, seeking compensation for the loss of the expired pharmaceuticals under the Tucker Act, 28 U.S.C. § 1491. C.A. App. A22-A34.[1] The Government moved to dismiss the complaint, contending that the police power granted the Government a free right, unconstrained by the Takings Clause, to take and retain property for potential use as evidence in criminal proceedings. C.A. App. A35-A45. Relying on a line of its own decisions indicating that petitioner's claim was meritorious, the court denied the Government's motion to dismiss, explaining that "this Court has entertained takings claims" in similar situations in the past. C.A. App. A127-A132 (citing, *inter alia*, *Interstate Cigar Co. v. United States*, 32 Fed. Cl. 66 (1994)).

4. Thereafter, the trial court entertained a second motion to dismiss. C.A. App. A133-A161. Responding to that motion, the court acknowledged that the Government "provided little authority on the Government's taking of property strictly for its

[1] "C.A. App." refers to the appendix that petitioner filed in the court of appeals.

evidentiary value," *see* App., *infra*, 38a, and that decisions of the Eighth and Tenth Circuits supported petitioner's claim, App., *infra*, 37a (citing *United States v. Hall*, 269 F.3d 940 (8th Cir. 2001); *Lowther v. United States*, 480 F.2d 1031 (10th Cir. 1973)). Nevertheless, it concluded that the Federal Circuit's decision in *Acadia Technology, Inc. v. United States*, 458 F.3d 1327 (2006), compelled dismissal of the complaint. The court explained:

> We, therefore, conclude that the police power rationale does apply in this context just as it would in the long line of forfeiture cases. The ability of federal prosecutors to deprive property owners of certain items in order to secure justice and a fair trial for a criminal defendant is a legitimate and traditionally accepted exercise of the police power. Accordingly, it is by definition not a compensable taking.

App., *infra*, 41a (citing *Acadia*, 458 F.3d at 1331).

5. The court of appeals affirmed. App., *infra*, 1a-18a. The court noted that "[petitioner's] argument might have considerable force" "[i]f we confined our reasoning to a literal reading of the text." App., *infra*, 8a. The court, however, discerned "a narrower meaning" for the Takings Clause in the prior decisions of this Court and the court of appeals. *Ibid.* Specifically, the court identified a categorical exemption from the Takings Clause for actions taken under the police power: "Property seized and

retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause." App., *infra*, 10a. The court relied primarily on its earlier decision in *Acadia*. *See* App., *infra*, 10a-11a (discussing *Acadia*). But it also drew support for its analysis from this Court's decision in *Bennis v. Michigan*, 516 U.S. 442 (1996): "*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." App., *infra*, 12a.

The court recognized the incongruity of its holding, but concluded that *Bennis* and *Acadia* compelled the result:

> It is unfair that any one citizen or small group of citizens should have to bear alone the burden of the administration of a justice system that benefits us all. But the war memorials only a short distance from the Federal Circuit courthouse remind us that individuals have from time to time paid a dearer price for liberties we all enjoy. While [petitioner's] core theory is a sensible policy argument, it is just that, a policy argument that has been considered and discarded in the relevant precedents. Someday Congress may well pass a law providing compensation for owners in [petitioner's] position. In the meantime, this case stands as a

> "reminder that the Federal Constitution does not prohibit everything that is intensely undesirable." *Bennis*, 516 U.S. at 454 (Thomas, J., concurring).

App., *infra*, 18a.

6. Petitioner filed a timely petition for rehearing and suggestion for rehearing en banc. The court of appeals denied the petition and suggestion on July 21, 2008. App., *infra*, 43a-44a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals conflicts with the text of the Takings Clause, with the historical understanding at the time of its adoption, and with this Court's interpretation of it. Although those sources unite in requiring compensation for physical seizures, the court below adopted a sweeping exception from the Clause for all actions justified under the police power – even physical seizures. That categorical exception ignores this Court's regulatory takings jurisprudence and fundamentally misapprehends the relation between the Just Compensation requirement and the police power.

Bennis does not support, much less compel, such a result. *Bennis* involved property used in the commission of an offense, to which the Government acquired title by forfeiture. In contrast, the property here was confiscated from an innocent third party, without forfeiture, for use merely as evidence. The holding of the court of appeals that the Government

can seize such property without compensation is, as the courts below recognized, unprecedented.

Because of the exclusive jurisdiction of the court of appeals over cases involving the Tucker Act, 28 U.S.C. § 1491, the decision has national reach for cases seeking compensation from the United States. The analysis of the court below conflicts with the analysis used by the regional courts of appeals in analogous cases. Only this Court can ensure that the prosecutorial vigor of the Executive Branch is subject to appropriate scrutiny under the Takings Clause.

I. The Takings Clause Requires Compensation When the Government Confiscates Lawful Property of an Innocent Third Party for Use as Evidence in a Criminal Prosecution.

1. The court of appeals candidly acknowledged (App., *infra*, 8a) that "a literal reading of the text" of the Constitution supports petitioner's claim. Petitioner indisputably has private property – an interest in the pharmaceuticals for which it was never paid.[2] The Government took the property – it forcibly seized exclusive physical possession of the

[2] Paragraph 12 of the invoice provides that until full payment was received, petitioner retained both a security interest in the goods and title to the goods. *See* App., *infra*, 50a-51a. That interest indisputably rises to the level of "property" protected by the Takings Clause. *See Armstrong v. United States*, 364 U.S. 40, 45-46 (1960) (requiring compensation for a taking of materialmen's liens); *United States v. Security Industrial Bank*, 459 U.S. 70, 77-78 (1982) (taking of security interests in household goods).

property and retained it until all value was lost when the pharmaceuticals expired. The taking was for a quintessential public use – as evidence in a criminal prosecution. And petitioner has received no compensation, just or otherwise.

The court of appeals reconciled its conclusion with the Clause's text by the remarkable contention that seizures under the "police power" are by definition not for a "public use." App. *infra*, 10a. Putting to one side the difficulty of reconciling that analysis with the Public Use Clause of the Fifth Amendment,[3] this Court emphatically has recognized that the broadest deference to the police power cannot justify physical seizures without compensation:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires property for a

[3] "While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the Taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32 (2003); *see Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984)); *id.* at 491 (Kennedy, J., concurring); *id.* at 496 (O'Connor, J., dissenting); *id.* at 506-08 (Thomas, J., dissenting); *see also* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 22 (1985) (discussing the lengthy historical provenance of the public use requirement).

> public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. * * * Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules.

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 321-22 (2002). The cavalier disregard of the text of the Constitution warrants review by this Court.

2. Petitioner's claim falls within the core of the original intent of the drafters of the Clause. Scholars and Justices have debated the extent to which the original conception of the Clause required compensation for purely regulatory actions, but all agree that the Clause was intended to require compensation for physical seizures. Whether the best reading of the history limits the compensation requirement to physical seizures,[4] or extends it more broadly to require compensation whenever

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[4] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1055-61 (1992) (Blackmun, J., dissenting); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (arguing that the Clause should be limited to physical seizures); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 470 (2002) ("[T]he Court has departed from the original understanding in concluding that governmental regulation of permissible land uses can constitute a 'taking' in the absence of any physical seizure.").

regulations are not adequately related to "harms" emanating from the property,[5] compensation is due here.

The forcible confiscation of the property here is precisely the type of conduct at which the drafters directed the Clause. For example, when Massachusetts and Vermont first constitutionalized the just compensation requirement after the Declaration of Independence, the obligation to compensate for "physical takings" was "absolute."[6] When the Bill of Rights was ratified, contemporaneous observers like John Jay and St. George Tucker explained that the Takings Clause was included to limit the forced impressment of

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[5] *See* Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988) (arguing that the history supports application of the Clause to regulatory takings unrelated to "harm" caused by the regulated property); *Pennell v. City of San Jose*, 485 U.S. 1, 19-20 (1988) (Scalia, J., concurring in part and dissenting in part) (explaining that "[t]raditional land-use regulation [is constitutional] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly."); *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 112-25 (1985) (justifying extension of the Takings Clause beyond the nuisance rationale).

[6] *See* Treanor, *supra*, 95 COLUM. L. REV. at 826-34; William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 702-08 (1985).

supplies by the military.[7] Similarly, the draft of the Clause that Madison proposed to Congress provided that "[n]o person shall be * * * obliged to relinquish his property * * * without a just compensation."[8] An interpretation of the Clause that absolves the Government from compensation in this case removes the specific application for which the historical understanding is clearest: a forcible seizure of tangible property.

3. The court of appeals articulated a stark dichotomy between actions taken under the police power (for which compensation is not due) and actions taken under the eminent domain power (for which compensation is due). That remarkable framework vitiates decades of this Court's jurisprudence. The Supreme Court's longstanding view that the Fifth Amendment requires compensation for some types of aggressive regulatory activity derives from Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The Court in that case invalidated a statute that limited the ability of mining companies

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[7] Treanor, *supra*, 95 COLUM. L. REV. at 835-36 (discussing the views of St. George Tucker published in 1 WILLIAM BLACKSTONE, COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 305-06 (St. George Tucker ed. 1803)); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1122-23 (1993) (discussing views of St. George Tucker and John Jay).

[8] James Madison, Amendments to the Constitution (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 201 (Charles F. Hobson et al. eds. 1979); *see* Treanor, *supra*, 94 YALE L.J. at 711.

to exercise mineral rights in residential areas. Justice Holmes acknowledged the "public interest" that supported the statute (260 U.S. at 413-14), but nevertheless concluded that the Takings Clause required compensation:

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss * * * should fall.

Id. at 415-16.

The Court has struggled to articulate clear rules for determining precisely *when* regulatory activity requires compensation under the Takings Clause. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 200 n.17 (1985). Still, the Court always has emphasized the importance of physical occupation of the property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982) (explaining that cases "uniformly have found a taking" for "permanent physical occupation of property" because it "is perhaps the most serious form of invasion of an

owner's property rights").[9] This makes sense because "physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights," *Tahoe-Sierra Preservation Council*, *supra*, 535 U.S. at 324. Indeed, the Court's regulatory jurisprudence is an exception to the general rule not (as the court of appeals concluded) because it identifies cases in which physical occupations are not compensable, but rather because it identifies cases in which compensation is due for regulations that do not involve physical occupation. When intrusions involve physical occupation, the Court has held firm to this guiding principle: "In 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 v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).[10]

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[9] *See also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.").

[10] It is easy to imagine takings for evidentiary purposes that are temporary or do not deprive the owner of the full value of the property, and it well may be that resolution of such cases would involve more fact-specific analysis. *Compare*, *e.g.*, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 317-320 (1987). The facts of this case and the analysis of the court of appeals, however, present the problem in the clearest possible context, in which the government action deprived petitioner of all of its interest in the property.

4. The erroneous analysis of the court of appeals rests on this Court's ruling in *Bennis v. Michigan*, 516 U.S. 442 (1996). The court of appeals interpreted *Bennis* as a foundational precedent evidencing a general principle that permits physical seizure without compensation whenever the government can justify its action by reference to the "police" power. Not surprisingly, given the discussion above, the Court's opinion in *Bennis* provides not a word of support for such a reading. The bulk of the Court's opinion in *Bennis* addresses the contention that the forfeiture at issue there violated the Fourteenth Amendment because it extinguished Bennis's interest in a car despite her lack of knowledge of her husband's criminal use of the car. 516 U.S. at 446-52. The Court's analysis of the Takings Clause appears in a single paragraph, which explains:

> [I]f the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.

516 U.S. at 452.

That analysis does not excuse compensation in this case, because the government did not forfeit

petitioner's property. The Government here, unlike the respondent in *Bennis*, never lawfully acquired title to the property. Rather, it simply took forcible possession of it. Because the Government in this case did not gain title to the property through its forfeiture power, neither *Bennis* nor the distinct constitutional justifications for the forfeiture power support the Government's action.[11] The court of appeals' loose extension of *Bennis* ignores the factual underpinnings and legal reasoning apparent from this Court's opinion.

The unbounded extension of *Bennis* is particularly dubious given the clarity with which the separate opinions in that case emphasized the narrowness of the Court's decision. Justice Thomas explained in his concurrence that limits on forfeitures "become especially significant when they are the sole restrictions on the state's ability to take property from those it merely suspects, or does not even suspect, of colluding in crime." *Bennis*, 516 U.S. at 455 (Thomas, J., concurring). He concluded that the "appropriate" response is "to apply those limits rather strictly, adhering to historical standards for determining whether specific property is an 'instrumentality' of crime." *Id.* The circumstances that concerned him are presented here: the record provides no reason to "suspect [petitioner] of colluding in crime" and the property in

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[11] The Government has not claimed in this case that the property was subject to forfeiture. *Compare* 21 U.S.C. §§ 334 (authorizing a libel for condemnation of adulterated and misbranded pharmaceuticals), 853(a) (authorizing forfeiture of property that is proceeds of an offense or used to commit or facilitate the offense).

question was not an instrumentality of crime. The analysis of Justice Thomas's concurrence would bar either a forfeiture or an uncompensated taking for use as evidence.

Justices Ginsburg and Kennedy emphasized the importance of Bennis's claims of innocence: Because Justice Ginsburg doubted Bennis's innocence, she concurred in the judgment: "Michigan * * * has not embarked on an experiment to punish innocent third parties. Nor do we condone any such experiment." *Bennis*, 516 U.S. at 458 (Ginsburg, J., concurring) (citation omitted). Justice Kennedy, by contrast, concluded that the irrelevance of innocence to the analysis of the Michigan court rendered its judgment insupportable. *Bennis*, 516 U.S. at 473 (Kennedy, J., dissenting). The court of appeals here, rejecting both of those approaches, interpreted *Bennis* as holding that innocence has no relevance to the constitutional inquiry. *See* App., *infra*, 12a ("The innocence of the property owner does not factor into the determination.").

Justice Stevens also dissented, concluding (for himself and for Justices Souter and Breyer) that *Bennis* itself went too far. As he explained, the Court repeatedly had rejected challenges to forfeiture schemes, "insist[ing] that expansive application of the law had not yet come to pass." *Bennis*, 516 U.S. at 462 (Stevens, J., dissenting). Justice Stevens noted the promise of the Court in earlier cases that it would stand ready to prevent extravagant uses of the forfeiture power: "'When such application shall be made,' we said, 'it will be time enough to pronounce upon it.'" *Id.* (quoting *J.W.*

Goldsmith, Jr. Grant Co. v. United States, 254 U.S. 505, 512 (1921)). In his view, *Bennis* presented an occasion for drawing a line: "That time has arrived." *Bennis*, 516 U.S. at 462 (Stevens, J., dissenting). Because this case presents a seizure in which the Government did not even attempt a forfeiture, it would under the analysis of Justice Stevens's dissent be even more plainly unacceptable than the forfeiture at issue in *Bennis*.

The concerns of the various Justices writing in *Bennis* about the ceaseless expansion of the Government's power to confiscate without compensation are particularly apt here. Whatever the merits of the debate regarding the forfeiture at issue in *Bennis*, there is no settled usage permitting the Government to confiscate property merely as evidence of criminal activity. Indeed, until *Warden v. Hayden*, 387 U.S. 294 (1967), the Court's view of the Fourth Amendment made such seizures unusual. The Court's decision to permit warrants for that purpose in *Hayden* only authorized those seizures. It did not validate them as wholly exempt from constitutional scrutiny.

5. Law enforcement is the quintessential public activity. The necessity of collective mechanisms to suppress harmful conduct is at the heart of the social contract that justifies a public monopoly on coercive force. *See* THOMAS HOBBES, LEVIATHAN ch. xvii (1651). Yet, no one would seriously suggest that the Government could commandeer the land or buildings in which this

Court sits.[12] Nor could the Government acquire the goods and services necessary to perform those functions without compensating the owners. The evidence the Government may wish to present in its prosecutions is no different. The cost of the criminal process is almost by definition a "public burde[n] 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).[13]

Moreover, a system in which the Government is free to shift the costs of prosecution to innocent taxpayers is one in which the Government has no obligation to pursue law enforcement in a cost-effective way.[14] This case illustrates the point well.

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[12] *But cf.* App., *infra*, 18a (concluding that the Takings Clause contemplates that "one citizen or small group of citizens" could be forced "to bear alone the burden of the administration of a justice system that benefits us all").

[13] *Compare Pennell v. City of San Jose*, 485 U.S. 1, 19-20 (1988) (Scalia, J., concurring in part and dissenting in part) (explaining that "[t]raditional land-use regulation [is constitutional] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly.").

[14] To the extent the historical materials suggest a specific motivation for the Takings Clause, concerns about arbitrary behavior by federal officials remote from the constraints of the democratic process were paramount. *See* Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 291-92 (1988); AKHIL REED AMAR, THE BILL OF RIGHTS 79-80 (1998).

The Government confiscated hundreds of boxes of pharmaceuticals shipped by petitioner, and insisted that it needed to hold all of the pharmaceuticals for years, past the date on which they expired. Ultimately, however, the Government never used any of this material as evidence.

As we emphasized in our briefing to the court below, we do not suggest that the trial court should have reviewed the reasonableness of the Government's decision to retain the property, or that trial courts routinely should order the Government to release property held for potential use as evidence. Courts are not well-placed to engage in judicial second-guessing of those kinds of prosecutorial decisions. It is sensible, however, to obligate the Government to pay when it confiscates property from innocent third parties as mere evidence. That arrangement combines Executive discretion to articulate prosecutorial policy with a salutary incentive to act with reasonable consideration of the costs of implementing that policy. But the merits of such a compromise are beside the point here, because the Takings Clause has resolved the issue specifically: the Government's decision to confiscate the property of private individuals for public purposes is checked by its Constitutional obligation to pay just compensation.

When the Government confiscates property because the property owner has acted unlawfully or because the property has been used unlawfully, it may be fair to say that the owner should bear the burden of the Government action. But that justification is exhausted when the Government

confiscates licit property of an innocent third party for use merely as evidence of criminal activity.[15] In that situation, which this petition presents to the Court, the wholly public purposes make compensation obligatory.

II. The Gravity and Consequences of the Error Below Warrant the Attention of This Court.

The discussion above underscores the need for this Court to clarify the rationale of the decision in *Bennis*. The court of appeals read the decision as a general justification for the seizure and physical retention of property without compensation. Because the doctrinal approach of the court of appeals rests directly on its understanding of *Bennis*, there is no reasonable prospect that the court of appeals will resolve the problem. Only this Court can finally "debun[k] the myth that physical occupations occurring in the regulatory context are somehow different from physical occupations arising out of eminent domain," Kmiec, *supra*, 88 COLUM. L. REV. at 1657-58.

The decision has important ramifications for administration of the Federal justice system. Because the court of appeals has exclusive jurisdiction to review Takings claims against the

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[15] When evidence is confiscated from an innocent third party, it is particularly difficult to discern the "average reciprocity of advantage" that justifies deference to regulatory exactions in Takings analysis, *Hodel v. Irving*, 481 U.S. 704, 715 (1987) (quoting *Pennsylvania Coal Co.*, *supra*, 260 U.S. at 415).

United States, the precise question presented to the court of appeals cannot arise in the other courts of appeals. Thus, the decision's categorical rejection of the claim here gives the Executive Branch a green light for aggressive exercise of prosecutorial authority throughout our Nation (and abroad). Because of the programmatic significance to the Executive Branch of decisions of the Federal Circuit, this Court frequently has reviewed decisions that set important policies on a national basis. *E.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *United States v. Winstar Corp.*, 518 U.S. 839 (1996); *see Cardinal Chemical Co. v. Morton Int'l*, 508 U.S. 83, 89 (1993) (noting "special importance" of Federal Circuit decisions "to the entire Nation"). The experience of the past decade should give us pause about casual validation of a wholly unchecked investigatory process. Absent review by this Court, the Government need not worry about the possibility that other courts of appeals will reject the analysis of the Federal Circuit. It can be sure that the court below will review all challenges to the policy in question here.[16]

The exclusive jurisdiction of the court of appeals over Tucker Act claims also means that the regional courts of appeals do not have occasion to address the precise question presented to the Court. Those courts have, however, frequently faced claims seeking damages (often under Federal Rule of

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[16] Although the Little Tucker Act (28 U.S.C. § 1346(a)(2)), grants the regional district courts jurisdiction to hear Takings claims against the Government when the amount in controversy does not exceed $10,000, 28 U.S.C. § 1295(a)(2) routes appeals from those decisions to the Federal Circuit.

Criminal Procedure 41) based on the government's confiscation of property for use as evidence. Those courts generally have been unwilling to accept the premise of the decision below -- that the Government freely may confiscate property for use as evidence with no duty to provide compensation. Hence, although the regional courts of appeals often have concluded that they have no authority to address claims for damages,[17] courts that have addressed the claims on the merits have approved a damages remedy in this context. For example, the Tenth Circuit in *Lowther v. United States*, 480 F.2d 1031 (1973), 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." *Id*. at 1033. Similarly, the Ninth Circuit in *United States v. Martinson*, 809 F.2d 1364 (1987), held that a court has power to award damages to compensate for an unjustified seizure of property for evidentiary purposes. *Id.* at 1368-69.

Despite the different setting, there can be little doubt that those courts would reject the reasoning of the court below in a case properly before them. More fundamentally, the frequency with which those cases arise suggests that the government policy challenged by this petition is not at all uncommon. It well may be that most of those

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[17] *E.g.*, *Adeleke v. United States*, 355 F.3d 144 (2d Cir. 2004); *United States v. Bein*, 214 F.3d 408 (3d Cir. 2000); *United States v. Jones*, 225 F.3d 368, 469 (4th Cir. 2000); *Pena v. United States*, 157 F.3d 984 (5th Cir. 1998).

whose property is confiscated do not have the financial or logistical resources to pursue litigation through the Court of Federal Claims to the Federal Circuit and this Court. But "[t]he Fifth Amendment draws no distinction between grand larceny and petty larceny." *Hodel v. Irving*, 481 U.S. 704, 727 (1987) (Stevens, J., concurring). The common application of this policy to the impecunious in no way lessens the "'imperative that the Court maintain absolute fidelity to' the Clause's express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally." *Kelo v. City of New London*, 545 U.S. 469, 507 (2005) (Thomas, J., dissenting).

CONCLUSION

Takings law often presents hard cases, in which weighty concerns are closely balanced. This case is not one of them. The decision ignores the text of the 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 petition for a writ of certiorari should be granted.

Respectfully submitted.

Ronald J. Mann
Maurice R. Mitts
Rebecca Field Emerson

October 2008

APPENDIX

United States Court of Appeals for the Federal Circuit

ENTERED: May 1, 2008

2007-5121

AMERISOURCE CORPORATION,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Ronald J. Mann, Mitts Milavec, LLC, of Philadelphia, Pennsylvania, argued for plaintiff-appellant. With him on the brief was Maurice R. Mitts.

Robert E. Chandler, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Jeanne E. Davidson, Director, and Deborah A. Bynum, Assistant Director.

Appealed from: United States Court of Federal Claims

Judge Lawrence M. Baskir

United States Court of Appeals for the Federal Circuit

2007-5121

AMERISOURCE CORPORATION,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 04-CV-610, Judge Lawrence M. Baskir.

DECIDED: May 1, 2008

Before MAYER and SCHALL, Circuit Judges, and YOUNG, District Judge*

YOUNG, District Judge.

This case requires us to determine whether the Fifth Amendment's Takings Clause applies when the government seizes an innocent third party's property for use in a criminal prosecution but never introduces the property in evidence, and it is

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* Honorable William G. Young, District Judge, United States District Court for the District of Massachusetts, sitting by designation.

rendered worthless over the course of the proceedings. We affirm the Court of Federal Claims' grant of summary judgment for the government on the ground that no compensable taking has occurred.

I. BACKGROUND

In early August 2000, AmeriSource Corporation ("AmeriSource"), a wholesale pharmaceutical distributor, contracted with Norfolk Pharmacy ("Norfolk") to sell it a large quantity of Viagra, Propecia, and Xenacil for $150,826.26. AmeriSource Corp. v. United States, 75 Fed. Cl. 743, 744 (2007). Although AmeriSource delivered the drugs to Norfolk's headquarters in Weirton, West Virginia, AmeriSource retained ownership at all times because Norfolk never finalized payment. See Aplt's App., at A25, A31-A34.

A few days before Norfolk entered into the agreement with AmeriSource, the United States Attorney for the Middle District of Alabama indicted the pharmacy's principals, Anton Pusztai and Anita Yates, on charges of "conspiracy, unlawful distribution of prescription pharmaceuticals, operating an unregistered drug facility, and conspiracy to commit money laundering." AmeriSource, 75 Fed. Cl. at 744. The United States Attorney seized a large number of pharmaceuticals from Norfolk's warehouse in connection with this investigation, including those that AmeriSource had recently delivered. Id. AmeriSource does not contest the legality of this seizure.

After the government rebuffed AmeriSource's initial requests for return of the drugs, AmeriSource filed a petition pursuant to Rule 41(e)[1] of the Federal Rules of Criminal Procedure, which provides a remedy for owners whose property has been seized as part of a criminal proceeding. Id. The district court denied AmeriSource's request, and the government retained the drugs through a trial that resulted in Pusztai and Yates's convictions. Id. at 745. After the Eleventh Circuit overturned the convictions, the government retained the drugs until Pusztai and Yates pleaded guilty. Id. By that point, the drugs had passed their expiration date and become worthless. Id. Contrary to the government's representations, they were never introduced in evidence in any proceeding. Id.

A. PROCEEDINGS BELOW

AmeriSource sought to recover the drugs or their equivalent value in three different proceedings. First, in October 2000, AmeriSource filed the aforementioned Rule 41(e) petition, which the District Court for the Middle District of Alabama denied. AmeriSource, 75 Fed. Cl. at 744-45. In August 2002, AmeriSource filed a claim against Norfolk in the United States District Court for the District of West Virginia, and the court entered a default judgment against Norfolk in the amount of $208,070.12. AmeriSource, 75 Fed. Cl. at 746. That judgment remains unsatisfied. Id. Finally, AmeriSource filed the instant action in the Court of Federal Claims in 2004 seeking to recover the value of the seized drugs

[1] The rule is now numbered Federal Rule of Criminal Procedure 41(g). The substance of the rule has not changed.

based upon the alleged Fifth Amendment taking. Id. at 744. The proceedings in the Middle District of Alabama and the Court of Federal Claims are outlined below.

On October 2, 2000, AmeriSource petitioned the District Court for the Middle District of Alabama to order a return of the seized drugs. Id. The court treated the request as a petition under Federal Rule of Criminal Procedure 41(e), which provides in full:

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.[2]

AmeriSource argued for the return of its property on the ground that the "use by" date on the drugs would soon pass. Id. at 744. In addition, AmeriSource maintained that the government would suffer no hardship were it allowed to retain a sample of the confiscated drugs. Id. Assuring the court that it would give back the drugs before their expiration date, the government insisted that even a partial

[2] At oral argument, neither side offered an explanation for why AmeriSource did not bring the Rule 41(e) petition in the district court in West Virginia, the jurisdiction where the drugs were seized.

return was not possible because its "trial strategy was to present all of the property in question at trial, in order to establish the illicit nature of the criminal defendants' sales activity." Id. at 745. In addition, the government maintained that AmeriSource had failed to avail itself of alternative civil remedies against Norfolk. Id.

In a report and recommendation ultimately adopted by the district court without challenge, a magistrate judge rejected AmeriSource's petition because AmeriSource could not identify with any reasonable degree of specificity the drugs it owned. Id. at 748. Apparently, the seized pharmaceuticals included drugs from a number of distributors, and they had all become commingled. See id. In addition, "[t]he magistrate found that AmeriSource had not demonstrated that it lacked an adequate remedy at law." Id.

In the proceeding that we have jurisdiction to review, the Court of Federal Claims granted summary judgment for the government. Id. at 752. The court ruled that the government had seized and retained the property pursuant to the police power, and, therefore, the Takings Clause did not apply.[3] Id. at 751. The Court of Federal Claims reasoned that "[t]he ability of federal prosecutors to deprive property owners of certain items in order to secure justice and a fair trial for a criminal defendant is a

[3] Although the motions were originally filed as motions to dismiss, the Court of Federal Claims determined that the parties had submitted sufficient evidence in the form of affidavits to convert them into motions for summary judgment. Aplt's App. at 6. Neither party challenges this conversion.

legitimate and traditionally accepted exercise of the police power. Accordingly, it is by definition not a compensable taking." Id. The court emphasized that although the police power is expansive, the government still must exercise it in a reasonable manner. The court concluded, however, that "[a] judicial endorsement of the Government's retention of property as evidence demonstrate[d] that there has been a reasonable exercise of the Government's police power." Id. at 749.

We agree.

II. ANALYSIS

This court reviews de novo the decisions of the Court of Federal Claims to grant summary judgment. Jentoft v. United States, 450 F.3d 1342, 1346 (Fed. Cir. 2006). We have jurisdiction to review the judgment of the Court of Federal Claims under 28 U.S.C. §§ 1295(a)(3) and 1491(a)(1), but we note that neither our Court nor the Court of Federal Claims has jurisdiction to review a district court's denial of relief under Rule 41(e). See Garcia Carranza v. United States, 67 Fed. Cl. 106, 112 (2005) ("[T]he United States Court of Federal Claims does not have jurisdiction to review final judgments of the United States District Court[s] . . . including [under] Fed. R. Crim. P. 41(g) . . . .").

A. THE GOVERNMENT'S DECISION TO RETAIN AMERISOURCE'S DRUGS BEYOND THE POINT OF EXPIRATION DOES NOT CONSTITUTE A TAKING

The Takings Clause provides in full: "nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V. The clause does not entitle all aggrieved owners to recompense, only those whose property has been "taken for a public use." At first blush, the language appears to entitle vast numbers of citizens to seek relief via the Takings Clause. After all, in a "government of the people, by the people, and for the people," Abraham Lincoln, The Gettysburg Address (November 19, 1863), every government action is intended to benefit the public.

AmeriSource relies on this expansive reading of public use. Its argument that it is due "just compensation" is premised on the assumption that "public use" encompasses any government use of private property aimed at promoting the common good, including enforcement of the criminal laws. If we confined our reasoning to a literal reading of the text, AmeriSource's argument might have considerable force. The text does not qualify the term, nor does it specify particular types of public use that trigger the just compensation requirement. In the context of the Takings Clause, however, "public use" has a narrower meaning because courts have construed it in harmony with the police power.

1. The government's seizure of property to enforce criminal laws is a traditional exercise of the police power that does not constitute a "public use"

"[T]he police powers of a state . . . are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions[.]" The License Cases, 46 U.S. 504, 584 (1847) (some internal alterations omitted). An axiomatic but amorphous aspect of sovereignty, "[t]he police power was always a flexible notion – so flexible, indeed, that some have quipped that the concept has little to commend it beyond alliteration." 1 Laurence H. Tribe, American Constitutional Law § 6-4 (3d. ed. 2000). Although the precise contours of the principle are difficult to discern, it is clear that the police power encompasses the government's ability to seize and retain property to be used as evidence in a criminal prosecution. See Warden v. Hayden, 387 U.S. 294, 309-10 (1967).[4]

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[4] The government's broad power to seize and retain physical evidence is not merely for the convenience of the government. The rule of law requires that the case against a defendant may not be based upon rumor, speculation, or assertions made by the sovereign's representatives, but upon the testimony of witnesses and physical evidence. This system cannot function if property holders are free to withhold property that might form a part of the government's case.

Property seized and retained pursuant to the police power is not taken for a "public use" in the context of the Takings Clause. In Acadia Technology, Inc. v. United States, 458 F.3d 1327, 1329 (Fed. Cir. 2006), United States Customs seized three shipments of cooling fans for computer processors bearing fabricated trademark stickers in violation of section 42 of the Lanham Act, 15 U.S.C. § 1124. The government seized the fans pursuant to section 526(e) of the Tariff Act of 1930, 19 U.S.C. § 1526(e), which "provides that any merchandise bearing a counterfeit mark . . . that is imported into the United States in violation of [the Lanham Act] 'shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws.'" Acadia, 458 F.3d at 1329 (quoting 19 U.S.C. § 1526(e)). The government failed to initiate forfeiture proceedings for four years and ultimately agreed to dismiss the forfeiture action, but did not return the fans until their only value was as scrap. Id. Acadia brought a takings claim.

This court affirmed the dismissal by the Court of Federal Claims, 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.'" Id. at 1332 (quoting Seay v. United States, 61 Fed. Cl. 32, 35 (2004)). We reasoned that "[a] Customs seizure of goods suspected of bearing counterfeit marks is a classic example of the government's exercise of the police power to condemn contraband or noxious goods, an exercise that has not been regarded as a

taking for public use for which compensation must be paid." Id. 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." Id.

As the Supreme Court explained in Bennis v. Michigan, 516 U.S. 442 (1996), a case involving governmental seizure of property for law enforcement purposes, the inquiry remains focused on the character of the government action, not the culpability or innocence of the property holder. In Bennis, Mr. Bennis was convicted of engaging in sexual activity with a prostitute in an automobile, and a Michigan court ordered the car forfeited pursuant to a state law that permitted forfeiture of property that constituted a public nuisance. Id. at 443-44. Mrs. Bennis alleged that the forfeiture constituted a taking because she owned a half-interest in the car and had no knowledge of her husband's illegal act. Id. at 444. After determining that depriving Mrs. Bennis of her half-interest did not violate due process, id. at 446, the Court quickly disposed of Mrs. Bennis's takings argument on the ground that "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain," id. at 452. Because the state had acted in an effort to "deter illegal activity that contributes to neighborhood deterioration and unsafe streets," it could divest Mrs. Bennis, an innocent owner, of her property interest without compensation. Id. at 453.

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. Id. The innocence of the property owner does not factor into the determination. Id.; see also United States v. One 1979 Cadillac Coupe De Ville, 833 F.2d 994, 1000 (Fed. Cir. 1987) (noting that an acquittal "did not make the government seizure and possession [of property related to the crime with which the defendant was charged but ultimately acquitted] any less proper, or convert that seizure into a taking"); Seay, 61 Fed. Cl. at 33-35 (holding that the subject of a criminal investigation did not state a takings ctaim even though a ruptured pipe at a government storage facility had rendered his property nearly worthless, and despite the fact that he was never indicted).

As unfair as it may seem, under Acadia and Bennis, the government's decision to retain the drugs until they expired - even though they were never introduced in the case-in-chief against Pusztai and Yates - did not result in a compensable taking. Once the government has lawfully seized property to be used as evidence in a criminal prosecution, it has wide latitude to retain it so long as the investigation continues, regardless of the effect on that property. In Seay, for example, the government held Mr. Seay's property for six years before returning it in a nearly worthless condition. 61 Fed. Cl. at 33. This troubling use of authority was compounded by the fact that the six-year investigation did not even yield an indictment. Id. The Court of Federal Claims,

however, reasoned that this seeming injustice was of little moment because the government acted under the authority of the police power. Id. at 35.

As expansive as the police power may be, it is not without limit. The limits, however, are largely imposed by the Due Process Clause. "Where public officials 'unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity,' the true owner may 'bring his possessory action to reclaim that which is wrongfully withheld.'" Hayden, 387 U.S. at 308. The process described in Rule 41(g), formerly Rule 41(e), affords the district court wide latitude to conduct hearings and balance the equities in order to determine whether the government or a property owner ought retain possession of the property during the course of a criminal proceeding. Fed. R. Crim. P. 41(g). Thus, Rule 41(g) is important not only because it ensures that the government is acting pursuant to the police power, but also because it guards against abuse of the police power.

In the instant case, AmeriSource did not contest the government's position that the drugs were connected to the crime or that it was necessary for the government to introduce at least some of the drugs into evidence. See Amerisource, 75 Fed. Cl. at 745. The magistrate judge's unchallenged determination that the government should keep the drugs, id., satisfies us that there was at least some nexus between AmeriSource's pharmaceuticals and the prosecution.

AmeriSource has taken great pains to distinguish Acadia and Bennis on the ground that the drugs in this case are not contraband. That argument is beside the point. So long as there is a tenable connection, the precise relationship of the drugs to the crime is not relevant; rather, the character of the government action is the sole determining factor. The undisputed record in this case, which includes the Rule 41(e) proceeding, reveals that the United States Attorney seized the drugs pursuant to the police power.

2. None of the cases AmeriSource cites suggests that the takingsinquiry hinges on the innocence of the property owner

Notwithstanding Bennis and Acadia. AmeriSource maintains that even when the government acts pursuant to the police power a taking can occur if the aggrieved property owner is an innocent third party. Despite the considerable appeal of this position as a matter of policy, AmeriSource has failed to prove that such a taking could occur in theory, much less that such a taking occurred in this case. AmeriSource does not cite a single case where seizure of property to be used as evidence has resulted in a compensable taking under the Fifth Amendment. The cases AmeriSource proffers, Soverio v. United States, 967 F.2d 791, 793-94 (2d Cir. 1992). Mora v. United States. 955 F.2d 156, 158-61 (2d Cir. 1992), United States v. Hall, 269 F.3d 940, 941-45 (8th Cir. 2001), United States v. Martinson, 809 F.2d 1364, 1368-69 (9th Cir. 1987),

and Lowther v. United States, 480 F.2d 1031, 1033 (10th Cir. 1973), simply do not support its position.

Soverio, Mora, and Martinson do not even mention the Takings Clause. In Soverio, for example, the Second Circuit held that the government's destruction of certain property belonging to a convicted felon did not moot the felon's Rule 41 petition. 967 F.2d at 793-94. Thus, Soverio highlights the unremarkable principle that even convicted felons have some property rights. If anything, however, the case undermines AmeriSource's argument because the Second Circuit did not even refer to the Fifth Amendment or the Takings Clause, and the court assumed that motions for return of destroyed evidence are properly brought under the Federal Rules of Criminal Procedure.

The remaining precedents are non-binding and unpersuasive. In Lowther, a Tenth Circuit case from 1973, the Bureau of Alcohol Tobacco and Firearms ("A.T.F.") destroyed a citizen's guns despite the fact that he had recently been acquitted of all charges. 480 F.2d at 1032-33. The Tenth Circuit concluded that the case "boil[ed] down [ ] to the government's having destroyed appellee's property without having any authority in law to do it. Consequently, the action of the Director of the [A.T.F.] Division constituted a disregard of the evidence and law in the case and was contrary to the due process clause of the Fifth Amendment." Id. at 1033-34. Lowther simply does not apply to the case at bar. While the government's decision to destroy the guns despite Mr. Lowther's acquittal was clearly

in violation of due process, in this case, by contrast, AmeriSource has not contested the legitimacy of the government's decision to seize or retain the property. Instead, it merely requested compensation, which is plainly not due under the Fifth Amendment.

In addition, AmeriSource seizes on ambiguous language from inapplicable caselaw. For example, AmeriSource cites Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), where the Supreme Court upheld against takings and due process challenges a Puerto Rican statute providing for the seizure and forfeiture of property used in furtherance of crimes, even where the property belonged to an innocent owner, id. at 680. Near the end of the opinion, the Court mused:

> [l]t would be difficult to reject the constitutional claim of an owner. . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. at 689-90 (footnote and internal citations omitted).

This dicta has no bearing on the case at bar. See Bennis, 516 U.S. at 450 (declining to follow this very passage on the grounds that it was "obitur dictum"). To begin, it references innocent owners who

did not "voluntarily entrust[]" their property to criminals. Id. at 690. Here, there is a strong argument that AmeriSource did not "do all that could be expected" to prevent the deprivation of its property because it sold the drugs to Norfolk a few days after the company's principals had been indicted. AmeriSource, 75 Fed. Cl. at 744. Moreover, it is not clear whether the Court meant to suggest that such a deprivation would implicate the Due Process or the Takings Clause. Most importantly, the dicta is phrased as a hypothetical; the Court has yet to find such a plaintiff, and Bennis, decided two decades later, indicates that it is unlikely to do so.

See Bennis, 516 U.S. at 450.

AmeriSource's final refuge is Shelden v. United States, 7 F.3d 1022 (Fed. Cir. 1993). In Shelden, this court concluded that an innocent mortgage holder stated a takings claim after the government foreclosed on the property following the mortgagor's conviction for violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962. 7 F.3d at 1029-30. AmeriSource contends that "Shelden was a case, like this one, involving a takings claim by an innocent party whose property was taken solely because of a criminal conviction of an unrelated third party." Aplt's Br. at 14. AmeriSource's reliance on Shelden is misplaced. To begin, Shelden was decided before Bennis. To the extent that it purports to create any rules with respect to innocent owners in the takings context, it has plainly lacks force. Moreover, the Acadia court explained in a footnote that "Shelden was limited to an in personam criminal forfeiture following the

criminal conviction of a third party, in which an innocent owner-claimant sought to recover his interest in the forfeited property." Acadia, 458 F.3d at 1333 n.1. Here, the government did not exercise control over the pharmaceuticals vis-á-vis a in personam criminal forfeiture; rather, it seized the drugs as part of a criminal prosecution.

III. CONCLUSION

It is unfair that any one citizen or small group of citizens should have to bear alone the burden of the administration of a justice system that benefits us all. But the war memorials only a short distance from the Federal Circuit courthouse remind us that individuals have from time to time paid a dearer price for liberties we all enjoy. While AmeriSource's core theory is a sensible policy argument, it is just that, a policy argument that has been considered and discarded in the relevant precedents. Someday Congress may well pass a law providing compensation for owners in AmeriSource's position. In the meantime, this case stands as a "reminder that the Federal Constitution does not prohibit everything that is intensely undesirable." Bennis, 516 U.S. at 454 (Thomas, J., concurring).

The judgment of the Court of Federal Claims is therefore AFFIRMED.

AFFIRMED

In the United States Court of Federal Claims

Case No. 04-610C
(Entered: March 23, 2007)
TO BE PUBLISHED

****

AMERISOURCE CORPORATION, *
Plaintiff, *
*
v. *
*
THE UNITED STATES OF AMERICA, *
Defendant. *

****

Fifth Amendment Takings; Police Power; Retention of Personal Property for Use as Evidence in Criminal Proceeding; Motion for Return of Property Under Fed. R. Crim. P. 41(e)/(g). Reasonableness; Legality of Governmental Actions Presumed.

Maurice R. Mitts, with whom was ***Carolyn M. Plump,*** Philadelphia, PA, for Plaintiff.

Gerald M. Alexander (opening brief), ***Robert E. Chandler*** (reply), with whom were ***Deborah A. Bynum, David M. Cohen,*** and ***Peter D. Keisler,*** Department of Justice, Washington, D.C., for Defendant.

John M. Bergen, Law Clerk; ***Elizabeth Bradshaw,*** Intern.

OPINION

BASKIR, Judge.

The present matter comes before us for the second time on the Government's renewed motion to dismiss. AmeriSource Corporation is a wholesale distributor of pharmaceuticals whose products were seized and retained as evidence in criminal proceedings against third parties. The Plaintiff, which is not implicated in the criminal activities of the third parties, alleges a Fifth Amendment taking. It demands just compensation in excess of $150,000, the original value of the pharmaceuticals which have since aged beyond their expiration date. Defendant contends that the retention of the property falls within the Government's police power and is, therefore, not compensable under the takings doctrine.

Although we do not accept all of the Government's arguments, we conclude that AmeriSource's claims are not compensable under takings jurisprudence. **We, therefore, GRANT Defendant's motion.**

Factual Background

Although familiarity with the following facts is not necessary for the resolution of the legal issues in this case, we relate them in some detail to provide the context in which the legal issues arise.

Seizure of Pharmaceuticals

In early August 2000, AmeriSource entered into a contract to sell Viagra, Xenical, and Propecia to Norfolk Pharmacy (Norfolk) for $150,856.26. Plaintiff delivered fully conforming shipments of the drugs to Norfolk at the latter's principal place of business in Weirton, West Virginia.

On July 27, 2000, immediately prior to entering into this contract, Norfolk's principals, Anita Yates and Anton Pusztai, were indicted by a Federal grand jury in Alabama. They were charged with conspiracy, unlawful distribution of prescription pharmaceuticals, dispensing misbranded pharmaceuticals, operating an unregistered drug facility, and conspiracy to commit money laundering.

On August 7, 2000, the United States executed a search warrant of Norfolk's facility in Weirton, West Virginia. As part of its investigation, the United States Attorney for the Middle District of Alabama seized a large quantity of pharmaceuticals, including the pharmaceuticals that had just been shipped by AmeriSource. Norfolk had not tendered payment to AmeriSource at the time of seizure. Norfolk has since become defunct, with the outstanding AmeriSource debt left unresolved.

Plaintiff's Rule 41(e) Motion

On October 2, 2000, AmeriSource filed a motion in the United States District Court for the Middle District of Alabama seeking an order requiring the Government to return the seized pharmaceuticals to

Amerisource. AmeriSource Corporation's Motion for Release of Property (Oct. 2, 2000); Def. App. 1-7. Although it was not captioned as such, the court treated AmeriSource's request as a formal motion under Rule 41(e) of the Federal Rules of Criminal Procedure. The rule, which has since been renumbered Rule 41(g) without substantive changes, provides the following remedy to property owners in Plaintiffs position:

> A person aggrieved by an unlawful search and seizure of property *or by the deprivation of property* may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

FED. R. CRIM. P. 41(g) (emphasis added).

In connection with its motion, Plaintiff argued that the pharmaceuticals would soon expire and become worthless. Motion for Release of Property; Def. App. 2. The United States opposed AmeriSource's motion, claiming these pharmaceuticals were required as evidence in the criminal trials of Ms. Yates and Mr. Pusztai. *See* Government's Response to AmeriSource Corporation's Motion for Release of Property (Oct. 17, 2000); Def. App. 14-19. Furthermore, the Government assured the Court that it would complete the trial well in advance of the expiration dates listed on the

pharmaceuticals. *Id.* at 18. The expiration dates were in April and May of 2003, two and one-half years away at that point in time.

In its reply brief, AmeriSource suggested the Court could order the prosecution to retain a representative sample of the pharmaceuticals for trial and return the balance. *See* AmeriSource Corporation's Reply Regarding Motion for Release of Property Dec. 20, 2000); Def. App. 20 ("The government cannot retain *per se* legal property for evidentiary purposes when its interests can be adequately served by counting, weighing, testing, photographing, photocopying or retaining a small sample of the product.") (citing MOORE'S FEDERAL PRACTICE, § 641.21[5], 641-82). AmeriSource indicated that both Ms. Yates and Mr. Pusztai consented to the release of the property back to AmeriSource. Def. App. 21.

The district court permitted AmeriSource to inspect the seized drugs in order to identify those drugs it had shipped to Norfolk. Apparently the search of the Norfolk business yielded drugs from other sources, as well. Plaintiff identified several items among the seized evidence that it had shipped to Norfolk but could not identify the entire shipment. *See* AmeriSource Corporation's Report Regarding Inspection of Property (Feb. 22, 2001) and AmeriSource Corporation's Response to Order (Mar. 8, 2001); Def. App. 24-29.

On March 20, 2001, the United States filed a supplemental response to the Plaintiff's motion, rejecting the proposal to use only a representative sample of the seized Pharmaceuticals. Government's Supplemental Response to AmeriSource Corporation's Motion for Release of Property (Mar. 21, 2001); Def. App. 30-40. The prosecution's trial strategy was to present all of the property in question at trial, in order to establish the illicit nature of the criminal defendants' sales activity. The Government also reiterated that AmeriSource had failed to avail itself of available civil remedies against Norfolk and its principals. *Id.* at 39-40.

Finally, on January 28, 2002, almost 18 months after the Government first took custody of Plaintiff's property, the magistrate judge issued a recommendation that the district court deny the Plaintiff's motion. Recommendation and Order, Magistrate Judge Susan Russ Walker (Jan. 28, 2002); Def. App. 41-46. AmeriSource failed to file any objections to the magistrate's recommendation. Consequently, on February 11, 2002, the presiding judge adopted the recommendation and denied the Rule 41 (e) motion. Order, Case No. 00-109-N (Feb. 11, 2002); Def. App. 47. In the Discussion that follows, we address in more detail the Rule 41 proceedings.

Criminal Trial and Subsequent Appeals

Ms. Yates and Mr. Pusztai were convicted in June of 2002. Contrary to the Government's position in the litigation of the Rule 41 motion, prosecutors did not use as evidence the drugs which had been identified by AmeriSource. Notwithstanding the

success of the prosecution, and the impending expiration of the pharmaceuticals, the drugs were not returned to AmeriSource. Instead, they were retained for possible use in a retrial.

That precaution proved prescient. Ms. Yates and Mr. Pusztai appealed their convictions to the United States Court of Appeals for the Eleventh Circuit. The appeals court found that Ms. Yates and Mr. Pusztai had been denied their Sixth Amendment rights when the district court permitted a prosecution witness to testify by video teleconference. The convictions were reversed and the cases remanded for a new trial. Prosecutors filed a petition for rehearing. The appeal was reargued and on February 13, 2006, the full court upheld the panel's decision. *United States v. Yates,* 438 F.3d 1307 (11th Cir. 2006) *(en banc).* The district court scheduled a new trial date for the end of February 2007. In the interim, however, both defendants changed their pleas to guilty, apparently pursuant to plea agreements dismissing certain charges. According to the public dockets for those cases, Mr. Pusztai was sentenced November 27, 2006, to 60 months confinement. Ms. Yates was sentenced to 49 months confinement on March 22, 2007, the day before the issuance of this Opinion.

Thus, the property at issue in this takings claim was never used for trial. AmeriSource's Pharmaceuticals had expired in the midst of the appeals and rehearings. Once expired, the Government would not have released the property in any event. Transcript of Oral Argument on Initial Motion to Dismiss at 14.

Alternative Remedies

As a final piece of background, we note that AmeriSource did not place all its hopes in the return of the property by the trial court or by the United States Attorney. While unsuccessfully petitioning the trial court in Alabama for the drugs, Plaintiff also brought a civil action against Norfolk. On August 20, 2002, the United States District Court for the Northern District of West Virginia entered a default judgment against Norfolk, and awarded AmeriSource damages in the amount of $208,070.12 - $149,691.36 for the unpaid invoices and the remainder in attorney fees and interest. Compl., ¶ 40; Def. App. 69. Apparently AmeriSource has been unable to collect on this judgment since Norfolk, which had ceased operations, had no assets. Compl., ¶ 41-42. Although well beyond the scope of our case, there may be methods by which Plaintiff could satisfy this judgment. We do not know whether or to what extent Plaintiff has pursued this course of action.

The fact that Plaintiff obtained a civil judgment against Norfolk may well have divested Plaintiff of its property interest in the pharmaceuticals, themselves. If so, this would adversely affect the merits of Plaintiff's takings case. A takings claim may be maintained only by the lawful owner of the property for which just compensation is sought. *Aulston v. United States,* 11 Cl. Ct. 58, 60 (1986), *aff'd in part and vacated in part,* 823 F.2d 510, 513 (Fed. Cir. 1987).

Procedural History

Plaintiff filed its complaint against the United States in this Court on April 8, 2004. Defendant initially filed a motion to dismiss Plaintiff's claim for lack of jurisdiction and for failure to state a claim upon which relief may be granted, pursuant to RCFC 12 (b)(1) and RCFC 12 (b)(6), respectively. The crux of the Government's argument in support of the motion was that no taking occurred because the United States acted pursuant to its police powers. On November 15, 2005, we denied the Defendant's motion without prejudice. *AmeriSource Corp. v. United States,* No. 04-610C (Fed. Cl. Nov. 15, 2005) ("Order").

In the wake of this ruling, the Plaintiff and Defendant voluntarily suspended further proceedings while exploring settlement with the assistance of an ADR judge. The parties also did some informal discovery in conjunction with these settlement efforts. Ultimately, however, the parties submitted a joint status report expressing the Government's desire to terminate settlement negotiations and renew its motion to dismiss.

The Government supplemented its motion with Rule 41 information that had not been presented when its motion was first heard. On August 8, 2006, several days after the Government filed its second motion to dismiss, the Federal Circuit decided the case of *Acadia Technology, Inc. v. United States,* 458 F.3d 1327 (Fed. Cir. 2006). In its October 4, 2006, reply brief, the Defendant argued this new authority in support of its police power theory, and contended that the opinion undermines the basis of our previous holding. We

permitted the Plaintiff to file a surreply on October 24, 2006, in order to respond to the new authority and counter the Government's revised argument.

The Defendant's case for dismissal has evolved significantly since the briefing of its initial motion, most notably as a result of its belated familiarity with the Rule 41 proceedings in district court. Indeed, this rule of criminal procedure was never mentioned in the Complaint or in the papers filed by the parties, and we were unaware that any such proceedings had been conducted. Counsel only had the most rudimentary knowledge of the criminal proceedings and the formal rulings on Plaintiff's request for relief. The first round of briefing merely stated in general terms that the district court denied Plaintiff's request for the property. Counsel could offer no corroboration for its representations. Only after the Court pressed this issue during oral argument, did the Government promise to enlighten the Court concerning the impact of the independent adjudicatory process on Plaintiffs takings theory. As a result, the Defendant filed an entirely new motion with an 84-page appendix, including documents and orders filed as part of the Rule 41 litigation, a declaration by one of the prosecuting attorneys, and other matters pertaining to civil remedies Plaintiffs have allegedly neglected to pursue in district court.

The litigation of Defendant's motion to dismiss has progressed well beyond the Plaintiff's pleadings. We, therefore, treat the Defendant's motion as a motion for summary judgment, as opposed to a motion to dismiss for lack of subject matter jurisdiction or for failure to state a claim upon which relief may be granted. Under our Rules:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in RCFC 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by RCFC 56.

RCFC 12(b); see *also Rotec Indus., Inc. V. Mitsubishi Corp.,* 215 F.3d 1246, 1250 (Fed. Cir. 2000); *Advanced Cardiovascular Sys., Inc. V. Scimed Life Sys., Inc.,* 988 F.2d 1157, 1164 (Fed. Cir. 1993).

Accordingly, we apply the well known standards of RCFC 56 to the exhibits accompanying Defendant's brief, most of which are court documents having purely legal significance. Both parties in this case have been afforded the opportunity to present facts and argument pertinent to the Rule 41 question. *See* Transcript of Status Conference (Apr. 26, 2006) at 20 (Court identified issues for briefing and permitted the parties to engage in limited discovery). We find the supplemental briefing sufficiently informative and, therefore, dispense with a second hearing on this matter.

Discussion

Just Compensation Under the Fifth Amendment

The "takings clause" of the Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST, amend. V, cl. 4. This provision prevents the government from imposing burdens on the property of individuals, when in fairness, the public should bear the burden. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The provision does not prohibit the taking of private property or governmental interference with property rights, but rather guarantees compensation for property owners when otherwise legitimate activities of the government amount to a taking. *Commonwealth Edison Co. V. United* States, 46 Fed. Cl. 29, 41 (2000) (quoting *First English Evangelical Lutheran Church of Glendale v. Co. of Los Angeles,* 482 U.S. 304, 315 (1987)). Accordingly, takings claims are "founded upon the Constitution" and give rise to our jurisdiction under the Tucker Act. *See* 28 U.S.C. § 1491(a)(1); *United States v. Causby,* 328 U.S. 256, 267 (1946).

Limits of the Police Power

It is well settled that when the Government acts pursuant to its police power, independent of Fifth Amendment rights, in order to protect the general health, safety and welfare of its citizens, no compensable taking occurs. *See Atlas Corp. v. United States,* 895 F.2d 745, 757-58 (Fed. Cir. 1990), *cert. denied,* 498 U.S. 811 (1990). As this Court has held,

property taken not to secure a public benefit but rather to prevent public harm is not compensable under the Fifth Amendment. *Seay v. United States,* 61 Fed. Cl. 32, 35 (2004); *see also, Scope Enterprises, Ltd. v. United States,* 18 Cl. Ct. 875, 883 (1989) (No compensable taking where Government acted to prevent illegal exportation of classified military equipment). In the present case, the Defendant argued that whenever it seizes and retains property intended for use as evidence in a criminal prosecution, no other showing is necessary for this to constitute a noncompensable exercise of police power. Accordingly, the Government contends its retention of the Plaintiff's pharmaceuticals did not violate the Plaintiff's Fifth Amendment rights.

While we, of course, recognize the relationship of the police power and takings, we were not prepared to accept uncritically the Government's bare assertions at the initial stages of this litigation, especially given the procedural posture of the case. *See Sommers Oil Co. v. United States,* 241 F.3d 1375, 1378 (Fed. Cir. 2001) (On Rule 12(b)(6) motion, Court "must accept as true all factual allegations in the complaint . . . [and] indulge all reasonable inferences in favor of the non-movant."). Thus we invited Defendant's second effort. *See* Order (Nov. 15, 2005) (denying Defendant's Rule 12 motions without prejudice); Joint Status Report (Mar. 24, 2006) (Defendant requests opportunity "to provide the Court sufficient factual and legal detail to allow the Court to rule conclusively with regard to its jurisdiction in this matter"). Defendant has made full use of that opportunity. The case is now in a different procedural and factual posture than it was with the original motion. While the Government asks that we reconsider

our prior ruling, we see no reason to turn the clock back. We will decide the case on the present record.

Effect of Rule 41(e) Motion on Takings Claim

The details of the Rule 41(e) litigation are recounted both because they are interesting in themselves, and because they shed light on the position taken by the parties in the present litigation. These details do not, however, control in resolving the Government's motion. Disputes as to the facts underlying the district court proceedings are of no significance for us.

As we have previously indicated, AmeriSource filed a motion in the district court requesting return of the pharmaceuticals it had shipped to Norfolk that the Government seized. After coordinating with the prosecuting attorneys for the Yates/Putsztai trial, the company itemized the following pharmaceuticals: (1) 667 bottles of 100 mg. Viagra and 25 bottles of 50 mg. Viagra; (2) 24 bottles of 120 mg. Xenical; and (3) 10 boxes of 1 mg. Propecia. Recommendation of the Magistrate Judge (Jan. 28, 2002); Def. App. 41. AmeriSource's pharmaceuticals represented only a portion of the total amount of evidence seized. Apparently, a wide variety of medication from a number of distributors had been shipped to Norfolk. At a hearing held on February 15, 2001, it "became clear . . . that neither AmeriSource nor the government knew exactly which medications shipped by AmeriSource to Norfolk were actually in the possession of the government and claimed by AmeriSource." *Id.* at 42. A period of inspections and responsive pleadings followed. Finally, one week before the criminal trial

commenced, the magistrate judge issued her formal recommendation.

The magistrate judge found that Plaintiff was not entitled to return of the evidence for several reasons. First, AmeriSource could not conclusively establish ownership for a large portion of the pharmaceuticals outlined in its request. *Id.* at 41. Second, the expiration date for the items which could actually be linked to AmeriSource would not occur until Spring 2003, over a year after the trial date. Because the pharmaceuticals were apparently being maintained at the proper temperature while in the government's custody, the magistrate reasoned AmeriSource had failed to establish that it will be irreparably harmed by government retention of the property for possible use at trial. Def. App. 44-45. And, finally, the magistrate found that AmeriSource had not demonstrated that it lacked an adequate remedy at law. Def. App. 45. This last ground for denial implies that AmeriSource could pursue a civil judgment against the company or its principals for non-payment. In fact, Plaintiff had just filed a breach of contract action against Norfolk two weeks prior to the magistrate's recommendation. It did not obtain a judgment until August of that same year.

The Order issued by the magistrate advised the parties to file any objections to her proposed findings and recommendation prior to January 30, 2002, and further warned that failure to file objections would bar *de novo* review of those issues by the district court. Def. App. 46. AmeriSource did not file any objections, and the district court subsequently adopted the magistrate's findings and denied the Rule 41 (e) motion

in a one-paragraph order. *See* Order (Feb. 11, 2002); Def. App. 47.

At some point very close to the time of the magistrate judge's resolution of the Rule 41 motion (the exhibit list for trial was due on January 25, 2002), the prosecutors decided "to narrow [their] focus," and opted not to present all of the pharmaceuticals that had been retained. The property identified as belonging to AmeriSource was not used at all. *See* Hardwick Decl., ¶¶ 9-13. Of course, we are in no better position than was the district court to second guess the prosecutors' ability to prepare for possible exigencies of proof and to present the Government's case in the manner of their choosing. The fact the body of evidence was pared down on the eve of trial in no way affects the legitimacy of the Rule 41 process.

Reasonable Exercise of Police Power

Because an aggrieved property owner has at his disposal the Rule 41 procedure itself, the Government's actions do not give rise to a compensable taking. We do not sit as a reviewing court to evaluate the procedures or findings of a Rule 41 proceeding. *Joshua v. United States*; [sic] 17 F.3d 378 (1994) ("[T]he Court of Federal Claims does not have jurisdiction to review the decisions of district courts or the clerks of district courts relating to proceedings before those courts."); *Cf. Verada, Ltd. v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001) (Tucker Act jurisdiction over *in rem* forfeiture preempted due to specific and comprehensive statutory scheme for administrative and judicial review carried out under the auspices of the district courts); *Hammitt v. United States*, 69 Fed.

Cl. 165 (2005) (same), *aff'd,* No. 2006-5062, 2006 WL 3779499 (Fed. Cir. Dec. 26, 2006); *see also, Carranza v. United States,* 67 Fed. Cl. 106, 112 (2005) (alternative holding in Rule 41(g) context follows *Vereda).* We simply consider the entire process -- including the Government's justifications for maintaining custody of the property and the magistrate's recommended disposition of Plaintiff's motion for its return -- in order to determine, as an objective matter, whether the alleged deprivation is aimed at obtaining a public use or benefit, or whether it furthers a police function. As we stated above, this distinction defines the line between compensable and noncompensable governmental action.

A judicial endorsement of the Government's retention of property as evidence demonstrates to us that there has been a reasonable exercise of the Government's police power. The Rule 41 proceedings make it clear that the Government does not seek to convert Plaintiff's property for public use but rather to temporarily retain the property in order to perfect a case against those who intended to use the property in the furtherance of a criminal enterprise. A portion of the pharmaceuticals remained in their original packaging and reasonable measures were apparently taken to preserve them. The magistrate expressly invited AmeriSource to file objections to its findings, yet none were entered.

In light of the Rule 41 process, the Government was incorrect in suggesting that its police power is unlimited and not subject to a standard of reasonableness. *See Wilson v. United States,* 540 F.2d 1100, 1103-04 (D.C. Cir. 1976) (Discussing duty of the

trial court to ensure the return of property seized during an investigation once it is no longer needed for evidentiary purposes); *Kessler v. United States,* 3 Cl. Ct. 123 (1983) (same); *see also, Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594-95 (1962) (exercise of police power must be necessary to protect the public interest and not unduly oppressive to the property owner) (citing *Lawton v. Steele,* 152 U.S. 133, 137 (1894)).

In fact, the Federal Rules Advisory Committee notes concerning the 1989 amendments to Rule 41 illustrate that reasonableness is built into this scheme:

> If the United States has a need for the property in an investigation or prosecution, its retention of the property generally is reasonable. But, if the United States' legitimate interests can be satisfied even if the property is returned, continued retention of the property would become unreasonable.

Fed. R. Crim. P. 41(g) (Advisory Committee Notes, 1989 Amendments).

Defendant insists the Government's action here was plainly an exercise of police power. In fact, other takings cases in which Rule 41 proceedings had been involved at the district court level do not lend support to the assertion. Where evidence is retained for use at trial, as opposed to being set aside for destruction or forfeiture, judges of this Court have dismissed takings claims on alternative grounds, without reaching the question of whether the police power doctrine barred relief. *See Carranza,* 67 Fed. Cl. at 110-12 (held

takings claim barred under *res judicata* due to district court's adverse ruling on Rule 41 (g) motion); *Carter v. United States,* 62 Fed. Cl. 365, 369-70 (2004) (takings claim stayed while portion of claim that had not yet been subject to Rule 41 adjudication transferred to district court); *Duszak v. United States,* 58 Fed. Cl. 518, 520-21 (2003) (takings claim dismissed on ripeness).

A number of Article III courts have also suggested that a takings claim would lie under some circumstances to compensate the owner for the value of the property. *See* e.g., *United States v. Hall,* 269 F.3d 940 (8th Cir. 2001) (Citing Tucker Act, court noted that "[a] cause of action may accrue under one or more of those statutes when the government discloses that it has lost, destroyed, or transferred property that would otherwise be subject to a Rule 41(e) order to return."); *see also, Lowther v. United States,* 480 F.2d 1031 (10th Cir. 1973) (taking without due process for unauthorized forfeiture). Moreover, certain district courts have rested on their concurrent Tucker Act jurisdiction in compensating owners for the lost value of their property. *See United States v. One 1961 Red Chevrolet Impala Sedan,* 457 F.2d 1353, 1356-57 (5th Cir. 1972) (Rule providing for relief from judgment did not give district court authority to compensate claimant for improperly forfeited property; appropriate remedy is under Little Tucker Act); *United States v. One 1965 Chevrolet Impala Convertible,* 475 F.2d 882, 886 (6th Cir. 1973) (in the event of vacated forfeiture, depreciation of property compensable under Little Tucker Act); *but see, United States v. One 1979 Cadillac Coupe de Ville,* 833 F.2d 994, 999 (Fed. Cir. 1987) (forfeiture statue provides only for return of

property; vehicle's depreciation in value during period of government custody not compensable taking).

Defendant provided little authority on the Government's taking of property strictly for its evidentiary value. The Government focuses on property seized as a result of its illicit nature or its illegal use. This distinction cannot be so cavalierly disregarded. The Defendant has cited to clear examples – seizures of contraband, property subject to forfeiture, or property which poses a serious public threat – where the police power trumps an owner's property interests. In each of these areas, there is ample precedent establishing that the Government acts pursuant to its police power, and not to secure property for a public use. *See e.g., Bennis v. Michigan,* 516 U.S. 442, 446 (1996) (property interest in automobile may be forfeited by reason of use to which property is put, even where owner was unaware of illicit use); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 668 (1974) (unknowing owner's interest in yacht forfeited as a result of lessee's possession of narcotics); *see also, Atlas Corp.,* 895 F.2d at 757-58 and *B&F Trawlers, Inc. v. United States*, 27 Fed. Cl. 299, 304-05 (1992) (relying on public safety rationale).

The Defendant's incorporation of the *Acadia* decision in its reply brief is merely the most recent instance in which the Government's police power is manifest. As the Court of Appeals observed in that case, "[a] Customs seizure of goods suspected of bearing counterfeit marks is a classic example of the government's exercise of police power to condemn contraband or noxious goods." *Acadia,* 458 F.3d at 1332. The Defendant brings that case to our attention

for the obvious and unremarkable conclusion that a takings claimant must concede the lawfulness of the Government's initial seizure and continued possession of the property. The Court of Appeals found that the takings claim alleging improper seizure and subsequent unreasonable delay in initiating forfeiture proceedings, fails in that it is predicated upon unlawful government conduct. *Id.*, at 1332-34; *See Tabb Lakes, Ltd. v. United* States, 10 F.3d 796, 802-03 (Fed. Cir. 1993) ("claimant must concede the validity of the government action which is the basis of the taking claim") (citing *Florida Rock Indus v. United States,* 791 F.2d 893, 899 (Fed. Cir. 1986), *cert. denied,* 479 U.S. 1053 (1987)). AmeriSource has made no such challenges. *See* Plaintiff's Response at 14 ("We readily acknowledge, and support, the Government's need to Retain AmeriSource's product as reasonably necessary to th[e] prosecution.")

The most analogous case found in the Defendant's briefs is *Interstate Cigar Co. v. United States*, 32 Fed. Cl. 66 (1994). In that case, this Court held against a plaintiff seeking compensation under a takings theory for prescription drugs labeled for export only and being diverted to the domestic market. *Id.* at 67. The drugs were seized by United States Customs Service officials and subsequently retained beyond their expiration date while an investigation continued. Judge Hodges rejected the takings claim under the police power doctrine, finding that the prescription pharmaceuticals were retained in order to "curb the illegal operation of a diversion market for prescription drugs." *Id.* at 70. The Court also found that the Government's actions were based on the belief that the drugs presented a "serious threat to public health" and

could no longer be legally sold on the domestic market. *Id.*

This rationale does not wholly apply in the present case – the Government has conceded that its custody of AmeriSource's pharmaceuticals was *not* predicated on public safety grounds. Despite the distinction, we found *Interstate Cigar* helpful in that it confirmed that Plaintiff's claims should not be dismissed based solely on the pleadings. To the contrary, that decision – which resulted from a trial, not a hearing on a Rule 12 motion – demonstrated the careful balance struck between just compensation under the Fifth Amendment and the Government's police powers.

Therefore, merely invoking the police power without providing any context for the Government's actions does not suffice. Both *Interstate Cigar* and Defendant's newly cited authority support our original view that the police power is not necessarily absolute:

> While it is *insufficient to avoid the burdens imposed by the Takings Clause simply to invoke the "police powers" of the state, regardless of the respective benefits to the public and burdens on the property owner,* the prohibition on importing goods bearing counterfeit marks that misrepresent their quality and safety is the kind of exercise of the police power that has repeatedly been treated as legitimate even in the absence of compensation to the owners of the imported property.

Acadia, 458 F.3d at 1332-33 (emphasis added).

In RCFC 12(b)(6) parlance, we could not conclude based on the pleadings alone that the Plaintiff could prove no set of facts entitling it to relief. *See* Order (Nov. 15, 2005) ("public safety purpose [here] cannot be inferred from the pleadings."); *King v. United States,* 221 Ct. Cl. 838, 840-41 (1979) (Supplied with "sketchy information" Court denied motion to dismiss without prejudice: "It may well be . . . defendant will be able to prevail on summary judgment, but we think it should at least come into court and show from its records what it did."). The Rule 41 procedure subsumes the inquiry. In the second round of briefing, Defendant defined the authority under which its agents acted and the process by which the district court endorsed the Government's actions. Once the government survives this inquiry, that is the end of the takings analysis in our review.

We, therefore, conclude that the police power rationale does apply in this context just as it would in the long line of forfeiture cases. The ability of federal prosecutors to deprive property owners of certain items in order to secure justice and a fair trial for a criminal defendant is a legitimate and traditionally accepted exercise of the police power. Accordingly, it is by definition not a compensable taking. *See Acadia*, 458 F.3d at 1331 (enforcement of Tariff Act not "public use" of property for which Takings Clause requires compensation); *see also, Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959) (exercise of police power is presumed to be constitutionally valid). To the extent the property owner challenges the scope of the government's interference with his rights, he must seek a remedy independent of the Fifth Amendment. The present version of Rule 41(g) affords a remedy

against governmental abuse in holding seized property unreasonably. *See Acadia*, 458 F.3d at 1333 ("the courts have recognized a right not to have property held . . . for an unreasonable time and have crafted a remedy to vindicate that right.").

Conclusion

Although it only became clear once the Government filled in the gaps of information, the observance of Rule 41(g) procedures in this case confirms our view that the Government acted in accordance with its police powers. Under these circumstances, it was entirely legitimate for the Government to retain custody over the Plaintiff's pharmaceuticals. We agree with the Defendant that the takings clause of the Fifth Amendment provides no compensation and that the Government is entitled to judgment as a matter of law.

Defendant's motion is hereby GRANTED. The Clerk of Court shall dismiss the Complaint filed in this case and enter judgment in favor of the Defendant.

IT IS SO ORDERED.

/s/ Lawrence M. Basker
LAWRENCE M. BASKIR
Judge

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ENTERED: JULY 21, 2008

2007-5121

AMERISOURCE CORPORATION,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 04-CV-610, Judge Lawrence M. Baskir.

ORDER

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on July 28, 2008.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: 07/21/2008

cc: Maurice R. Mitts
Robert E. Chandler

AMERISOURCE CORP V. US, 2007-5121
(CFC-04-CV-610)

United States Court of Appeals for the Federal Circuit

ENTERED: MAY 1, 2008

2007-5121

AMERISOURCE CORPORATION,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Judgment

ON APPEAL from the United States Court of Federal Claims in CASE NO(S). 04-CV-610.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly
Jan Horbaly, Clerk

DATED May 01 2008

ISSUED AS A MANDATE: JUL 28 2008

Reprinted from Court of Appeals Appendix A174

1. PRICE. Prices are subject to change by Seller without notice. Increases in labor, freight and material cost before completion of contract plus applicable overhead may be invoiced to Buyer. Premium time as required by Buyer will be invoiced as an extra item.

2. DELIVERY OR PERFORMANCE. Unless otherwise specified on the face hereof, all deliveries made via common carrier are FOB point of shipment. Shipment will be made in accordance with Seller's instructions. Upon delivery of goods to carrier, Buyer assumes risk of all loss and damage resulting from any cause whatsoever. Shipping, delivery or performance dates are approximate and are not guaranteed.

3. FORCE MAJEURE. Seller shall not be liable for delay or other failure of performance due to cause beyond its reasonable control including without limitation acts of God, acts of Buyer, acts of military or authorities, fire or other casualty, strikes, lockouts, weather, epidemic, war, riot, delays in transportation or car shortages, or inability to obtain necessary labor, materials, components, equipment, services, energy or utilities through Seller's usual and regular sources at usual and regular prices. In any such event Seller may at any time without further liability to Buyer, (a) postpone performance under this contract; (b) make partial performance or cancel all or any portion of this contract; or (c) allocate available quantities among its customers in any manner which Seller deems reasonable.

Cancellation of any part of this contract shall not affect Buyer's duty to pay for performance of any other part thereof.

4. WARRANTY AND REMEDY. Unless otherwise expressly stated on the face thereof, Seller warrants to Buyer for a period of twelve months from the date of shipment and/or performance of services, that its services hereunder are performed in a good and workmanlike manner and that goods delivered hereunder are free from defect in materials and workmanship, except that goods and materials furnished by Seller's suppliers or subcontractors are warranted by Seller only to the extent of the suppliers or subcontractor's express warranty to Seller. If during such period Buyer promptly notifies Seller in writing of any breach such warranty and complies with any applicable warranty procedures of Seller, Seller shall, at Seller's option, reperform services, repair or replace any defective goods at Seller's plant (Buyer to pay all transportation charges) or refund the price of the goods or services or part thereof which gives rise to the claim. Seller shall make no allowance for repairs or alterations made by Buyer, unless made with Seller's prior written consent. The foregoing shall constitute the sole and exclusive remedy of Buyer and the full liability of Seller for any breach of warranty. THE FOREGOING IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN, ORAL OR IMPLIED, INCLUDING ANY WARRANTY OF PERFORMANCE, MERCHANTABILITY OR FITNESS FOR PURPOSE AND SUPERSEDES AND EXCLUDES ANY ORAL WARRANTIES OR

REPRESENTATIONS, OR WRITTEN WARRANTIES OR REPRESENTATIONS, NOT EXPRESSLY DESIGNATED IN WRITING AS A "WARRANTY" OR "GUARANTEE" OF SELLER, MADE OR IMPLIED IN ANY MANUAL, LITERATURE, ADVERTISING BROCHURE OR OTHER MATERIALS.

5. LIMITATION OF SELLER'S LIABILITY. Seller's liability on any claim of any kind including negligence, with respect to the goods or services covered hereunder, shall in no case exceed the price of the goods or services or part therefor which gives rise to the claim. IN NO EVENT SHALL SELLER BE LIABLE FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, OR FOR DAMAGES IN THE NATURE OF PENALTIES.

6. LIMITATION OF ACTIONS. Any action for any loss or damage with respect to the goods or services covered hereunder must be commenced by Buyer within six months after Buyer's cause of action has accrued.

7. INDEMNIFICATION AND WAIVER. Buyer shall defend, indemnify and hold harmless Seller from any loss or damage sustained directly by Seller and from and against all claims asserted against Seller with respect to the goods or services covered hereunder arising in whole or in part out of (a) failure of Buyer, its agents, employees or customers to follow specifications, instructions, warnings or recommendations furnished by Seller, (b) failure of Buyer, its agents, employees or customers to comply with all applicable legal requirements, including the

Occupational Safety and Health Act of 1970, (c) misuse of the goods by Buyer, its agents, employees or customers, (d) misrepresentation by Buyer, its agents, employees or customers, (e) the sole or contributing negligence of Buyer, its agents, employees, or customers, or (f) alleged infringement of any patent, trademark or copyright as a result of Seller's performance in accordance with Buyer's designs, plans or specifications. Buyer hereby waives and releases Seller from all rights of contribution or indemnity to which it may otherwise be entitled. As used in this paragraph, the term "Seller" shall mean Seller, its officers, directors, agents, employees, subcontractors, parent, subsidiaries, divisions and affiliates.

8. CANCELLATION BY BUYER. Buyer may cancel this contract only upon written notice to Seller and payment of reasonable cancellation charges including (1) the price of goods and services completed prior to Seller's receipt of such notice; (2) all costs previously incurred in connection with sale and delivery of goods or services together with reasonable profit thereon; and (3) the expenses incurred by Seller by reason of such cancellation.

9. TAXES. All taxes and other charges imposed by federal, state, local or foreign governments on the manufacture, sale, shipment, import, export or use of the goods or services (other than income taxes) shall be paid by Buyer. Buyer shall defend, indemnify and hold harmless Seller from and against all liabilities for such taxes or charges and attorney fees or costs incurred by Seller in connection therewith.

10. ADVICE AND ASSISTANCE. Upon request, Seller in its discretion may furnish as an accommodation to Buyer technical advice or assistance regarding the goods or services. Seller assumes no obligation or liability for the advice or assistance given or results obtained, which shall be at Buyer's sole risk.

11. SELLER'S PROPRIETARY RIGHTS. All drawings, software programs, inventions or improvements made by or for Seller in connection with the performance of this contract shall remain Seller's property. Buyer shall not reproduce or transfer any such proprietary property, any drawing or software program furnished by Seller. Buyer shall not use or disclose any of Seller's trade secrets or confidential information, whether or not designated as such, except as required in connection with the use of the goods or services covered hereunder.

12. SECURITY AGREEMENT; CREDIT AND COLLECTION. To secure payment of all sums due Seller hereunder or otherwise, Seller shall retain a security interest in the goods delivered hereunder and this contract shall be deemed a Security Agreement under the Uniform Commercial Code. Buyer authorizes Seller as its attorney to execute and file on Buyer's behalf all documents Seller deems necessary to perfect such security interest. Seller is relying upon Buyer's representation of solvency and if Seller at any time reasonably believes that Buyer is insolvent or that Buyer's credit is impaired, Buyer shall be in material breach hereof and Seller may, without liability to Buyer,

withhold performance hereunder, change the payment terms and/or repossess goods theretofore delivered. Title to the goods covered hereby shall remain in Seller until full payment is received. Seller may charge Buyer finance, service, or late charges in an amount not greater than allowed by law, and if Buyer fails to make payment when due, Buyer shall be liable to Seller for all costs of collection including attorney's fees.

13. GENERIC SUBSTITUTIONS. Buyer agrees that in certain situations Seller is authorized to substitute one generic manufacturer's product for the equivalent product of another generic manufacturer without prior notice to Buyer.

14. RETURNS. Buyer agrees that any products that are returned will be handled in accordance with the Prescription Drug Marketing Act and Seller's Returned Goods procedures.

15. CLAIMS. All claims by Buyer for overcharges, shortages, breakage, misshipments and/or misorders shall be reported to Seller promptly and in compliance with Seller's procedures.

16. ALLOWANCES AND DISCOUNTS. The price identified for the goods invoiced on the reverse may not reflect all allowances and discounts given on those goods. Allowances and discounts must be accurately reported by Buyer to federal, state and private reimburses in accordance with all applicable laws.

17. MISCELLANEOUS. This contract constitutes the entire agreement between Buyer and Seller relating to the goods or services covered hereunder. No modification shall be binding upon the Seller unless in a writing signed by Seller's duly authorized representative. No waiver by Seller of default by Buyer shall be deemed a waiver of any subsequent default. Captions used herein shall have no substantive significance.

EQUAL OPPORTUNITY CLAUSE Seller shall not maintain segregated facilities or discriminate against any employee or employment applicant because of age, race, color, religion, sex, sexual orientation, national origin, disability, or on any other ground prohibited by law. Seller shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to age, race, color, religion, sex, sexual orientation, national origin or disability. Such action shall include employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; pay or other forms of compensation; and training, including apprenticeship. Seller shall post in conspicuous places available to employees and employment applicants, notices setting forth the provisions of this Clause. Seller certifies that it does and will comply with, and there are incorporated herein by reference all provisions of Executive Order 11246, as amended, The Vietnam Era Veterans Readjustment Act, The Rehabilitation Act, The Americans With Disabilities Act, all other equal opportunity laws and Executive Orders and of the rules, regulations and orders of the Secretary of

Labor. This clause is hereby incorporated in every non-exempt contract between Seller and Buyer, and shall be contained in each non-exempt contract between Seller and its subcontractors.