‘Outdated’ law tested in raisin case

By Christopher M. Kieser and Brian T. Hodges

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A man picks raisin grapes in Sanger in 2012.

On Wednesday, the U.S. Supreme Court will return its attention to a depression-era law that Justice Elena Kagan labeled “the world’s most outdated law” two years ago in *Horne v. U.S. Department of Agriculture*. At issue was whether Fresno area raisin farmers, Melvin and Laura Horne, could bring a constitutional challenge to a longstanding “marketing order” that requires raisin handlers to surrender a portion of their annual harvest to the government, rather than selling it on the open market.

In a unanimous decision, the Supreme Court held that the Hornes, who had been fined for refusing to turn over their raisins, were unquestionably allowed to bring a lawsuit challenging the government’s demands under the Fifth Amendment’s takings clause. The Hornes’ case was sent back to the federal appellate court, which ruled that the marketing order did not violate the constitutional prohibition against taking private property without payment of just compensation. That decision is now on review as the U.S. Supreme Court prepares to decide *Horne* for the second time. At issue are questions that could shape takings law for years to come.

To grasp the significance of this, let’s turn to how the marketing order works. Under the Agricultural Marketing Agreement Act of 1937, the Department of Agriculture has authority to regulate the sale of some agricultural products through the use of marketing orders. The purpose of such orders was to control and regulate the agricultural market by removing “surplus” produce from the market. The order at issue is specific to California-grown raisins: It directs the Raisin Administrative Committee to establish a yearly “reserve requirement” — the percentage of the raisin harvest that handlers must turn over to the committee. The committee may then use the raisins for several things, such as paying its own administrative expenses or giving the produce away to free school lunch programs. Handlers that fail to comply are subject to fines and penalties.

For decades, the Hornes operated only as raisin producers and were not directly affected by the marketing order. Nevertheless, because raisins only reach the market through handlers, the marketing order meant that the Hornes could not bring their entire crop to the market. But when the government demanded 47 percent of the Hornes’ harvest in 2002, they decided they’d had enough. They came up with an idea to bring their raisins to the market without going through a handler by forming a partnership and contracting with dozens of raisin growers to clean, stem, sort, box and pack their raisins for a fee. The government said their operations made them raisin handlers, and they would have to comply with the marketing order.

The Hornes refused to turn over any raisins or to allow the committee to inspect the raisins they received. As a result, the department brought an enforcement action against them, resulting in nearly $700,000 in fines, assessments and civil penalties. The Hornes challenged the fines in federal court, arguing that the marketing order constituted a confiscation of property without just compensation. The 9th U.S. Circuit Court of Appeals rejected the Hornes’ argument on three grounds: First, the 9th Circuit held that the tests the Supreme Court applies to a physical appropriation of private property are only applicable to real property, not personal property like raisins. Second, the court said the marketing order was not a categorical taking because the Hornes retained residual rights in the reserve raisins and benefitted from higher-than-market prices created by the raisin reserve. And third, the court characterized the transfer of raisins as simply a reasonable condition on entry into the raisin market. Argument will likely focus on the latter two points.

The Supreme Court is unlikely to have much difficulty rejecting the 9th Circuit’s conclusion that there can be no categorical taking of personal property. Several Supreme Court cases, including the *Koontz v. St. Johns River Water Management District* decision in 2013, have held that personal property may be subject to a physical taking, and the 9th Circuit’s holding was also in conflict with decisions of at least four other Courts of Appeal. The 9h Circuit’s decision was a significant outlier on this point.

As to the second question, the department argues there can be no taking where the order anticipates that the Hornes might recover some of the proceeds from the reserve raisins, if there are any. That argument, however, fails to acknowledge that the reserve proceeds represent a fraction of that value of the appropriated property. Moreover, it fails to acknowledge that in many years there are no excess proceeds and handlers receive nothing. And nobody disputes that the committee — an arm of the Department of Agriculture — takes physical possession of the raisins, without compensation. The Supreme Court has long held that a physical appropriation of property will constitute a taking, even if the government leaves the owner in possession of some remaining property. Indeed, in 1945, the Supreme Court in *United States v. General Motors Corp.*, explained that the takings clause demands the payment of compensation when the government takes a portion of someone’s property because, although the owner may still hold some valuable rights in the land, those rights are irreparably harmed because they are of a more limited and circumscribed nature than they were before the intrusion. Nevertheless, this question could divide the members of the court, as it has in past physical takings cases.

The final issue is potentially the most consequential. Even if the Supreme Court finds that the transfer of raisins is a physical taking, the department would still prevail if the court adopts the 9th Circuit’s position that the marketing order is a reasonable condition on the Hornes’ decision to enter the raisin market. To reach that conclusion, the 9th Circuit determined that the marketing order is similar to a land-use permitting “exaction.” In the land-use context, an exaction occurs when the government conditions the approval of a building permit on the landowner’s willingness to give up a property right — such as a public easement across the property. In a trio of cases — *Nollan v. California Coastal Commission*, *Dolan v. City of Tigard*, and *Koontz v. St. Johns River Water Management District* — the Supreme Court held that governments cannot place these conditions on permit approval unless the conditions mitigate, in both nature and extent, the specific negative impacts of the property owner’s proposed development. But the court has cautioned that the *Nollan* and *Dolan* rule only applies to certain exactions.

The Supreme Court may be reluctant to say the raisin reserve requirement is an exaction. The difference between land-use exactions and pure physical takings is that, in land-use permitting, it is generally presumed that the government may deny a building permit outright without committing a taking. If a permitting agency has the power to deny a permit, it follows that it may also place conditions on granting the permit, provided it complies with *Nollan* and *Dolan*. It is because of that discretionary authority — and the notable risk that the government could abuse its permitting discretion to extort landowners into gifting land and money to the public in order to “buy” a permit — that the Supreme Court developed a special set of rules for land-use exactions.

Although many of the same concerns are implicated in *Horne*, there are also differences that make it possible that the court will decline to apply the exactions tests to the marketing order. But, if it does, the court will face a fundamental disconnect between the 9th Circuit’s understanding of the exactions tests and the Supreme Court’s case law. Where the Supreme Court has repeatedly held that a condition must be sufficiently related to some public harm caused by a proposed use of property, the 9th Circuit altered that test to say that a condition must only relate to a government objective. Those are very different standards that result in drastically different protections for property owners. A decision clarifying the appropriate standard, and thereby setting out the owners’ rights and expectations, would be invaluable for property owners and government alike.

While this case is unlikely to produce any new takings doctrine, it is significant. The questions presented will allow the Supreme Court to clarify both that the takings clause protects personal property just the same as real property and that the government cannot justify a taking by recasting it as a condition on doing business. Both rulings would be instrumental in protecting people like the Hornes from government overreach in future litigation.

Christopher M. Kieser *is a fellow in the College of Public Interest Law at the Pacific Legal Foundation.*

Brian T. Hodges *is a principal attorney at the Pacific Legal Foundation.*

CHRISTOPHER KIESER
Pacific Legal Foundation

BRIAN HODGES
Pacific Legal Foundation

Unexpected results from animation of our Constitution

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They have taken very different approaches to the issue, as illustrated by the following hypotheticals.

Hypo No. 1: A person is arrested and asked to give a DNA sample by swabbing the inside of his cheek. He refuses, and is prosecuted for the crime of refusing to give a DNA sample. He is convicted. On appeal, he challenges the constitutionality of the law requiring him to give a DNA sample in the first place.

Hypo No. 2: A person is arrested and asked to give a DNA sample, but he cooperates with police and does so. His sample is uploaded to the national DNA database, matches a DNA profile from an unsolved burglary-rape case and he is prosecuted and convicted for those crimes. On appeal, he challenges the trial court’s denial of his motion to suppress the DNA match on the ground the collection was unconstitutional in the first place.

BRIAN HOFFSTADT
California Court of Appeal

The first hypo is *Buza*. On these facts, *Buza* did not analyze whether California’s DNA collection statute was constitutional under the Fourth Amendment of the federal Constitution (the “federal Fourth Amendment”). Instead, *Buza* held that the statute violated California’s constitutional provision against unreasonable searches and seizures in Article I, section 13 (the “state Fourth Amendment”).

Here is the unusual part: The Court of Appeal in the second hypo — which is *Lowe* — could not have suppressed the DNA match if it relied upon the same reasoning as *Buza* under the state Fourth Amendment. (Instead, *Lowe* held that California’s DNA collection statute was valid under the federal Fourth Amendment.) In fact, if Buza had cooperated with the police by giving a DNA sample, *Buza* could not have used its own reasoning.

What is going on?

As an independent sovereign within our federal system, California is governed by its own constitution. That constitution is a “document of independent force,” *People v. Brisendine*, 13 Cal. 3d 528, 549-50 (1975), containing many provisions that parallel those in the federal Constitution but need not be interpreted in exactly the same way. *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307, 327-28 (1997); *Raven v. Deukmejian*, 52 Cal. 3d 336, 353 (1990).

California has put on its proverbial lab coat and experimented with both the substantive scope of the state Fourth Amendment and the remedies available to enforce it. As noted above, there have really been two factions of “scientists” at work.

The courts have interpreted the state Fourth Amendment to be “more exacting” and defendant-friendly in its substantive protections. *Brisendine*, 13 Cal. 3d at 545. For many years, these courts gave teeth to these greater protections by applying an exclusionary rule that required suppression of any evidence that was obtained in violation of those broader protections. *In re Lance W.*, 37 Cal. 3d 873, 879 (1985).

The voters felt this went too far, and in 1982, passed Proposition 8. This Proposition 8 amended the California Constitution to add language now found in Article I, section 28(f)(2). That language prevents a court from suppressing evidence unless its acquisition violates the federal Fourth Amendment; the remedy of suppression is no longer to be available for violations of the state Fourth Amendment alone. *In re Lance W.*, 37 Cal. 3d at 879, 886-87. Voters tried to shut down the lab completely in 1990 by passing Proposition 115, which would have required all state courts to read the protections of the state Constitution’s criminal defense guarantees no more broadly than the U.S. Supreme Court reads the parallel provisions in the federal Constitution. However, the California Supreme Court ruled that such a transfer of “all judicial interpretive power” of the state courts to the U.S. Supreme Court required a “revision” of the California Constitution, not just a voter initiative. *Raven*, 52 Cal. 3d at 341, 349, 352, 354.

The end result is a state Fourth Amendment that splices together a substantive scope defined by state law and a suppression remedy defined by federal law.

This unusual creature has spawned two unusual — and, by all indications, unintended — consequences.

The first is illustrated by the seeming anomaly discussed above. *Buza* is able to rely on the state Fourth Amendment only because Buza refused to cooperate with the police. Had he, like Lowe, given a sample and later sought to suppress its use (or derivative use) as evidence, he would have been out of luck because suppression is unavailable as long as California’s DNA collection statute, like Maryland’s, does not violate the federal Fourth Amendment. Cf. *Buza*, 231 Cal. App. 4th at 1485-86 (observing that case “has nothing to do with the exclusionary rule”).

But what message is this sending? “The way to best preserve your rights is not to cooperate with the police.” And this message seems to apply even when non-cooperation is a crime, which it usually is. See Penal Code sections 69 (resisting arrest), 148(a) (same), 298.1(a) (refusing to give DNA sample).

The second consequence is prosecutorial forum shopping. As long as *Smith v. Maryland*, 442 U.S. 735 (1979), remains good law, the federal Fourth Amendment does not place any restrictions on law enforcement’s ability to obtain customer records held by third parties. With regard to Internet providers (including companies providing Internet access over smart phones), Congress has enacted the Electronic Communications Privacy Act (ECPA), 18 U.S.C. Sections 2701 et seq. Among other things, ECPA requires law enforcement to obtain subscriber records by subpoena (rather than just by asking the company for them). 18 U.S.C. Section 2703(c)(2), (c)(3). With regard to real-time monitoring of the phone numbers dialed out and coming in on a phone (known as pen registers and trap-and-trace devices, respectively), law enforcement need only certify to a court that the information is “relevant to an ongoing investigation”; no further judicial inquiry is allowed. 18 U.S.C. Sections 3121(a), 3123(a).

By contrast, the state’s Fourth Amendment requires a warrant supported by probable cause for either. See *People v. Chapman*, 36 Cal. 3d 98, 105-11 (1984) (subscriber records); *People v. Blair*, 25 Cal. 3d 640, 655 (1979) (same); *People v. Larkin*, 194 Cal. App. 3d 650, 654 (1987) (pen register/trap-and-trace orders); Cal. Atty. Gen. Op. No. 03-406 (2004) (same); Cal. Atty. Gen. Op. No. 85-601 (1986).

This means that state judges cannot suppress phone data obtained with a pen register or trap-and-trace order or subscriber information obtained with a subpoena because there is no federal Fourth Amendment violation, *People v. Lissauer*, 169 Cal. App. 3d 413, 419 (1985), but those same judges must nevertheless deny any requests for a pen register/trap-and-trace order or subpoena presented to them because, as state officers, they are required to follow state law, see *Larkin*, 194 Cal. App. 3d at 654 — which in this case requires a warrant supported by probable cause.

This gives state prosecutors an incentive to walk across the street to federal court to obtain such orders or subpoenas, at least in cases where probable cause might be lacking.

With the California Supreme Court’s grants of review in *Buza* and *Lowe*, the justices may have the opportunity to look more directly at this unusual creature we have animated. It will be interesting to see whether they choose to take a closer look, and if they do, where they decide to take the experiment next.

Brian M. Hoffstadt *is an associate justice of the California Court of Appeal.*