No. 15-169

IN THE

Supreme Court of the United States

CHRIS LUSBY TAYLOR, *et al.*,

Petitioners,

v.

BETTY YEE, individually and in her official capacity as State Controller of the State of California, *et al.*,

Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE UNCLAIMED PROPERTY PROFESSIONALS ORGANIZATION IN SUPPORT OF THE PETITIONERS

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THE UNCLAIMED PROPERTY PROFESSIONALS ORGANIZATION'S MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, the Unclaimed Property Professionals Organization ("UPPO") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals submitted by the Petitioners, Chris Lusby Taylor, *et al.* (hereinafter, "Petitioners").

Counsel for the Petitioners has consented to the filing of this brief. However, counsel for the Respondents Betty Yee, individually and in her official capacity as State Controller of the State of California, *et al.* (hereinafter, "Respondents"), responded to UPPO's request for consent to file this *amicus curiae* brief with a letter stating, without explanation, that Respondents would not consent to UPPO's filing, thereby making this motion necessary.

As set forth in the attached brief, for more than 20 years the Unclaimed Property Professionals Organization ("UPPO") has been the premier national organization concentrating on all aspects of unclaimed property compliance and education, and advocating for the interests of both the holders and owners of unclaimed property. UPPO is a nonprofit organization currently comprised of over 370 members who represent nearly all segments of the U.S. economy. In furtherance of its mission, UPPO identifies ambiguities in multistate unclaimed property laws and practices, as well as issues that interfere with the legal rights of owners and holders of unclaimed

property, and works with state regulators, legislators and other interested parties to resolve those issues. To its knowledge, UPPO is the only private trade association singularly dedicated to these goals.

UPPO's interest in this petition is based on its dedication to ensuring that state unclaimed property laws are consistently applied in a manner that respects the constitutional rights of property owners. To that end, UPPO seeks reformation of state unclaimed property laws to ensure that (1) states provide sufficient notice to owners before seizing and liquidating their property, and (2) states provide constitutionally adequate compensation to owners when they take their property. These issues also have a significant impact on the unclaimed property "holder" community (*i.e.*, the financial institutions, corporations, and other entities that have custodial possession of owners' funds) as the state expansion and aggressive enforcement of the scope of unclaimed property laws more frequently lead to owner claims of "wrongful escheat" or similar causes of action against holders.

For the above reasons, UPPO respectfully requests that the Court grant this motion for leave to file the attached *amicus curiae* brief in support of the Petitioners in the above-styled Petition.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Unclaimed Property Professionals Organization ("UPPO"), which was established in 1992, is the premier national organization concentrating on all aspects of unclaimed property compliance and education, and advocating for the interests of both the holders and owners of unclaimed property. UPPO is a nonprofit organization currently comprised of over 370 members who represent nearly all segments of the U.S. economy. In furtherance of its mission, UPPO identifies ambiguities in multistate unclaimed property laws and practices, as well as issues that interfere with the legal rights of owners and holders of unclaimed property, and works with state regulators, legislators and other interested parties to resolve those issues. To its knowledge, UPPO is the only private trade association singularly dedicated to these goals.

UPPO's interest in this petition is based on its dedication to ensuring that state unclaimed property laws are consistently applied in a manner that respects the constitutional rights of property owners. To that end, UPPO seeks reformation of state unclaimed property laws to ensure that (1) states provide sufficient notice to owners before seizing and liquidating their property, and (2) states provide constitutionally adequate compensation to owners when they take their property. These issues also have a significant impact on the unclaimed property "holder"

1. In satisfaction of Supreme Court Rule 37.6, UPPO represents that no portion of this brief was written by counsel for any party to this appeal, and no party (or counsel for any party) made a monetary contribution intended to fund the preparation or submission of this brief. This brief was funded entirely by *amicus curiae* and its counsel.

community (*i.e.*, the financial institutions, corporations, and other entities that have custodial possession of owners' funds) as the state expansion and aggressive enforcement of the scope of unclaimed property laws more frequently lead to owner claims of "wrongful escheat" or similar causes of action against holders.

STATEMENT OF THE CASE

Petitioners Chris Lusby Taylor, et al., have petitioned for a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in *Taylor v. Yee*, 780 F.3d 928 (9th Cir. 2015). Petitioners ask the Court to reverse the Ninth Circuit's decision, which rejected Petitioners' claim that California's unclaimed property law (the "UPL") violates the Due Process Clause of the Fourteenth Amendment by failing to provide constitutionally adequate notice to owners of property to be escheated, and by failing to take adequate steps to locate and notify property owners before liquidating their property. In addition, in light of the decision in *Horne v. Department of Agriculture*, No. 140275, 135 S. Ct. 2419, 2428 (June 22, 2015), Petitioners ask the Court to vacate and remand the Ninth Circuit's decision on the separate basis that the Ninth Circuit applied the incorrect legal standard by failing to review California's unclaimed property scheme under the Takings Clause of the Fifth Amendment. In particular, Petitioners allege that California's practice of liquidating property after seizing it is an unconstitutional taking without just compensation.

SUMMARY OF ARGUMENT

UPPO urges the Court to grant Petitioners' petition because the Ninth Circuit's decision in *Taylor v. Yee* is counter to this Court's precedents and will result in significant loss to property owners, particularly owners of securities. The notice provisions in California's UPL violate due process by relying solely on written notice to an address that the state knows is no longer valid, rather than utilizing records and databases readily available to the state to try to locate the owner. The UPL also violates the Takings Clause by providing only the proceeds from the sale of securities to the owner, rather than just compensation that would make the owner whole. These defects are mirrored or exceeded by the unclaimed property laws of almost all other states, many of which still provide solely for notice to owners by publication in a newspaper. Accordingly, if the Ninth Circuit's decision is allowed to stand, the defective California scheme may serve as a model to the other states, as to what constitutes constitutionally adequate notice and compensation. Owners of securities will only suffer further as a result, as the states pursue policies that are designed to maximize revenue rather than to protect people's investments.

ARGUMENT

UPPO urges the Court to grant Petitioners' petition and, ultimately, to reverse the holding of the Ninth Circuit. The Ninth Circuit's decision sets a dangerous precedent that will result in substantial harm to owners of unclaimed property (particularly the owners

of securities) by permitting California to escheat[2] and liquidate unclaimed property (1) without providing notice reasonably designed to inform the owner of the state's intentions and actions with respect to the property, and (2) without requiring the state to provide just compensation to the (subsequently located) owner after the owner's property has been liquidated by the state and the proceeds converted to the state's own use. Furthermore, the issues raised in the petition are not limited to California's UPL, but are implicated by the unclaimed property laws of the vast majority of states because those state laws contain notice and compensation provisions similar to or less adequate that those adopted by California. Accordingly, the effects of the Ninth Circuit's decision will be felt across the country (as well as outside the country, as California and other states routinely, and contrary to law, escheat securities owned by foreign persons), as states continue to expand the scope of state unclaimed property laws while, at the same time, shorten the statutorily-defined periods of time that may elapse before property is deemed "unclaimed." As a result, we urge this Court to clarify what constitutes constitutionally adequate notice before a state may seize and liquidate an owner's property under the state's unclaimed property laws, as well as what constitutes just compensation to owners as a result of such

2. UPPO understands, as this Court has recognized, that the term "escheat" is a misnomer as it pertains to unclaimed or abandoned personal property such as the securities at issue in the underlying case, but uses it here because the term is frequently used in the petition and in the underlying case proceedings. *See Delaware v. New York*, 507 U.S. 490, 497 (1993) ("States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat.").

liquidations. Such a decision would forestall substantial litigation across the country,[3] and would protect the valuable property interests of owners of securities.

I. The Seizure and Liquidation of Securities and Other Property Pursuant to State Unclaimed Property Laws Has Become a Widespread Problem Resulting in Substantial Harm to the Owners of the Property.

Every state has adopted unclaimed property laws that permit the state to seize personal property of owners, including unclaimed wages, bank accounts, customer or vendor payments, deposits, life insurance proceeds, contents of safe deposit boxes, stock and other securities and various other types of tangible and intangible property. While states will hold cash received on behalf of owners in custody for those owners, they typically liquidate tangible personal property and securities soon after that property is remitted.

The escheat and liquidation of securities raises particular concern. First, the owner may suffer adverse tax consequences from the escheat itself if the securities

3. *See, e.g., JLI Invest S.A. v. Cook*, No. 112740-VCN (Del. Ch. filed July 9, 2015). In this case, two Belgian citizens whose shares were escheated by Delaware sued the state to recover over $12 million, representing the loss in appreciation of the shares suffered by the owners as a result of the state's escheat and liquidation of their shares. The complaint alleges that Delaware provided no notice to the shareholders before or after escheating or liquidating their shares even though Delaware knew how to contact them, and that Delaware in fact placed a sell order for the shares a mere three days after the shares were escheated.

are held in a tax-deferred account, such as an individual retirement account (IRA), health savings account (HSA) or college savings account. Second, and potentially much more devastating to owners, the liquidation of the securities may deprive the owners of substantial appreciation in the value of the securities, as well as any post-liquidation dividends, interest, and other amounts that otherwise would have been payable to the owner.[4] The risk of loss from such liquidations is magnified by the fact that most states either do not have any restriction on when securities may be liquidated post-escheat, or have a very short required holding period by the state.[5] Furthermore,

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4. In addition, as the petition notes, substantial losses can also be triggered by the escheat and liquidation of tangible property stored in safe deposit boxes and other safekeeping repositories, as the liquidated items (which may include letters, photos, jewelry, awards, etc.) may not be recoverable and may have substantially greater value (sentimental or otherwise) than the amount for which they were sold by the state. (This problem is particularly bad in California, as California has attempted to broaden its escheat provisions related to property held in safekeeping repositories.) The escheat of bank accounts and other funds can also trigger losses to owners where the holder of property was required to pay interest to the owner, and the state fails to pay (or pays a lesser amount of) interest to the owner.

5. States that have no restriction at all on how long they must hold securities before they can be liquidated include Alabama, Connecticut, Delaware, Florida, Illinois, Indiana, Nevada, New York (which also has a fifteen-month *maximum* holding period), Ohio, Oregon, Pennsylvania, Tennessee (which also has a twelve-month *maximum* holding period), Texas, Utah and Washington. Kansas has a six-month minimum holding period and a twelve-month maximum holding period. The following states have a one-year minimum holding period: Colorado, Iowa, Maine, Maryland, Michigan, Minnesota, New Hampshire, New Jersey, Oklahoma,

as states have faced budget shortfalls in recent years, many states have been motivated to liquidate escheated securities as quickly as possible to obtain the revenues and meet state budget requirements, in the hope that the owners will never reclaim their property.

The problem is not theoretical. In recent years, states have started to conduct industry-wide audits focusing on the escheat of securities. These audits, which specifically target mutual funds, broker-dealers, transfer agents, issuers and other holders of securities, are generally conducted on a multi-state basis, with often thirty to forty states involved in a single audit. This increases the states' leverage over the holders, raises additional due process concerns and makes appeals of any adverse determinations extraordinarily difficult and expensive. Almost all states have also hired private audit firms to conduct these audits, and pay these firms on a contingent fee basis (typically, 10-15% of the amount of any unclaimed property that is identified in the audit). This provides a profit incentive to such firms (which matches the states' own revenue interests) to take aggressive positions in these audits. For example, many states and their auditors have sought to escheat securities owned by persons with foreign last known addresses, despite the fact that the states lack the right or jurisdiction to escheat such securities under this Court's precedents. *See, e.g., Texas*

Rhode Island, Vermont, Virginia and Wisconsin. California has an 18-month minimum holding period and a 20-month maximum holding period. Missouri has a two-year minimum holding period. The remaining states have a three-year minimum holding period. UPPO has recommended that, to protect the owner's interests in securities, the minimum holding period should be at least ten years, and optimally would be twenty years or longer.

v. New Jersey, 379 U.S. 674 (1965); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 444 (1979). In addition, many states and their auditors have argued that certain IRA owners should be "presumed deceased" without a confirmation of actual death, so that their accounts may be escheated. Other states have taken the position that an owner's failure to cash a single dividend check (even if de minimis) requires escheatment of the underlying security.

The amount of securities that is escheated and liquidated each year has also risen due to an increased number of states seeking to apply a more aggressive rule for determining when securities are escheatable in the first place. Historically, most states and holders of securities have applied a "returned mail" standard that triggers escheatment of securities only if mail sent to the owner has been returned as undeliverable by the U.S. Post Office and there is a period of inactivity (generally, three or five years) following such event. Under this standard, relatively few securities should be escheated, as most people do not move often or they update their addresses when they move, and many holders of securities also utilize the U.S. Postal Service National Change of Address database or third party vendors or software programs to validate the owner's address at the time the owner's account is established and later update it in the event of returned mail.

However, many states have recently begun to apply their unclaimed property laws to treat securities as "presumed abandoned" and subject to escheat based on the mere inactivity of the owner of the securities, even in situations where the location of the owner is known and the address is still valid (*i.e.*, no mail sent to the owner has been

returned as undeliverable).[6] Because most securities are purchased as long-term investments, and many investors employ a "buy and hold" investment philosophy, it is not unusual for there to be extended periods of inactivity to occur relative to a security, especially in situations where the owner has contractually agreed to have dividends or other proceeds from securities automatically reinvested. As a result, under a mere inactivity standard, it is common for owners' securities to be escheated and liquidated even though they are not "abandoned" at all and both the issuer of the securities (and/or its transfer agent) and the state have a valid address on record for the owner. Compounding this problem, some states have also revised their unclaimed property laws to decrease the amount of time that a security must be "inactive" before it must be escheated to the state. States are undertaking these legislative changes expressly to increase state revenue.[7]

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6. Notably, such an inactivity standard effectively circumvents federal securities regulations which require transfer agents and broker-dealers to conduct searches to try to locate the owner if mail sent to the owner is returned as undeliverable. *See* 17 C.F.R. § 240.17Ad-17. These rules were specifically designed to prevent the abandonment of securities.

7. *See* Pennsylvania House Committee on Appropriations, *Fiscal Note on House Bill 278* (estimating that Pennsylvania's lowering of dormancy periods from 5 years to 3 years "will generate $150,000,000 in revenue for the General Fund in 2014"). The states' use of unclaimed property laws to generate revenues is also illustrated by state attempts to escheat unclaimed U.S. Treasury Savings Bond principal and interest held by the U.S. Department of the Treasury, to disregard contract conditions that owners have failed to satisfy, and to "monetize" obligations to provide goods or services (*e.g.*, unused gift cards and movie/concert/sports tickets redeemable solely for goods or services) by forcing the holder to escheat money even though the holder has no obligation to pay money to the owner.

This aggressive expansion of the unclaimed property laws thus no longer serves the historical purposes of unclaimed property laws in safeguarding property and reuniting the owners with their property or trying to prevent "windfalls" to private corporate holders. To the contrary, owners of securities would invariably be better off if their securities were never subject to state escheatment laws at all.

Given the substantial risk to individual investors in this area, including retirees dependent on IRAs and parents of students with 529 plans, a robust and comprehensive procedure for notifying owners that their securities may be subject to escheat, and in particular that their securities may be liquidated, is of paramount importance. In addition, in situations where a state has escheated and liquidated an owner's property, the state should be required to justly compensate the owner from any quantifiable loss as a result of the liquidation.

II. State Procedures for Notifying Owners of Escheated Securities Are Grossly Inadequate and Violate Due Process.

Most states, including California, lack any meaningful procedure for providing notice to the owners of escheated securities, either prior to escheat, post-escheat, prior to liquidation or even post-liquidation. For example, the 1995 version of the Uniform Unclaimed Property Act ***only requires the state to give notice to the owner by publication in a newspaper of general circulation***.[8]

8. Section 9(a) of the Uniform Unclaimed Property Act of 1995. The 1995 Act is the most recent version of the Uniform Unclaimed Property Act.

A number of states, including the states with the most aggressive escheat enforcement programs such as Delaware, New Jersey, New York and Texas, have adopted this or a similar provision.[9] However, sixty-five years ago (and forty-five years before the 1995 Act was adopted), this Court made clear in *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950), that when an owner's address is known, more than publication notice is required and ***at least*** notice by ordinary mail to the record address is required.[10] After all, notice by publication will almost never result in actual notice to the owner, except by pure luck. Indeed, the Ninth Circuit recognized the inadequacy of such notice in *Taylor v. Westly*, 488 F.3d 1197, 1201 (9th Cir. 2007), which is why California's escheat laws were amended to require direct mail notice.

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9. *See* Del. Code, tit. 12 § 1142; N.J. Stat. Ann. § 46:30B-51; N.Y. Aband. Prop. § 1402; Tex. Prop. Code § 74.201. Other states that require only notice by publication include Alaska, Arizona, Arkansas, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

10. *See also Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798, 799 (1983) (holding that notice by publication is insufficient to satisfy due process and that "***notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition*** to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable") (emphasis added).

But the direct mail notice provided by California and certain other states[11] is also inadequate—at least where mail previously sent to the owner has been returned as undeliverable, as in such cases, the address on record is apparently no longer valid and so further action is necessary to satisfy due process. Notably, this should ***always*** be the case in California, as securities are required to be escheated only if the holder "does not know the location of the owner," and that phrase has been widely construed to mean that mail sent to the owner has been returned as undeliverable (thus demonstrating that the holder no longer knows the location of the owner).[12] In *Mullane*, this Court held that where persons may be deprived of their property, due process requires the government to provide the owner "notice and opportunity for a hearing appropriate to the nature of the case." 339 U.S. at 313. The Court explained that "due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (quoting *Mullane*, 339 U.S. at 314). In other words, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. Thus, "notice required will vary with circumstances and conditions." *Jones*, 547 U.S. at

11. Other states or jurisdictions that require direct mail notice to owners include Alabama, Colorado, Washington, the District of Columbia, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, Pennsylvania, Tennessee, and Washington.

12. Cal. Civ. Proc. Code § 1516(b).

227. Process which is a mere gesture, however, is not due process. *Mullane*, 339 U.S. at 315.

Thus, due process requires additional action by the state to notify an owner of the escheat of his or her property, in situations where the state knows that the owner's address is (or likely is) invalid. Indeed, in *Jones v. Flowers*, this Court expressly held that "***when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property***, if it is practicable to do so." *Jones*, 547 U.S. at 225 (emphasis added). The Court explained that it did not think that "a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed," and "failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman." *Id.* at 229. This Court's other rulings further support the conclusion that further notice is required if the regular mailing is known to be ineffective or if it would be unreasonable not to do so based on the other facts and circumstances involved. *See, e.g., Robinson v. Hanrahan,* 409 U.S. 38, 40 (1972); *Covey v. Town of Somers,* 351 U.S. 141, 146-47 (1956).

We are aware of no state that currently provides for any notice greater than direct mail or publication, despite the substantial resources available to the states, including tax and real estate records, motor vehicle registration databases, and other public databases. Thus, if the Ninth Circuit's decision stands, it is likely that the California notice provisions, inadequate though

they are, will become the "model" that other states will follow—an untenable position for owners of securities and other property who will suffer greatly as a result. It is worth pointing out that the California State Controller's Office itself recently trumpeted that it had reached a settlement with a large multinational financial services company under which that company agreed, in exchange for a waiver of potential interest and penalties, that the United States Social Security Administration's Death Master File, the State Vital Statistics database, the U.S. Postal Service's National Change of Address database, AccuZIP or equivalent software containing the U.S. Postal Service's Coding Accuracy Support System, and state and local real estate records could all be used in the context of the audit for purposes of establishing that securities were escheatable to the state.[13] If California has taken the position that all these tools can be used to determine if securities are escheatable in the first place, it would seem appropriate that California should be required to use the same and other available tools and databases at its disposal to try to locate the owner of property once it has been escheated and before it is liquidated.

Thus, readily available and easily-accessible information clearly exists to allow the states to find owners entitled to their property. It is not only unconstitutional, but disingenuous, for states to claim to use unclaimed property laws as a consumer protection measure, while actively skirting the obligation to provide sufficient notice. And as long as the Ninth Circuit's decision is left to stand, states will continue to circumvent proper notification.

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13. See http://www.sco.ca.gov/eo_pressrel_15900.html (last visited September 3, 2015).

The same due process considerations apply to every other type of unclaimed property escheated by states, even though the potential for loss to the property owner may not be present for most other property types. In each case, the state is taking money that belongs to someone else. Although such taking is purportedly for the purpose of preserving that property for the rightful owner, it is still essential that the owner be properly notified that his or her property has been escheated, so that the owner may reclaim it. As illustrated above, the states have a direct financial incentive to aggressively audit holders to extract the property in the first place, while then doing little or nothing to try to return the property to the rightful owner. Due process requires that states make meaningful efforts to try to find and return whatever property has been escheated to the owner.

Based on the hundreds of thousands of hours our members have devoted to unclaimed property, it is our belief that states require certain guiding principles beyond the mandate to act reasonably. Left to their own, states will continue to provide minimal (if any) notice, and property owners will suffer as a result. We urge this Court to articulate clear standards that the states must follow to satisfy their constitutional obligations to property owners.

III. State Laws Requiring the Escheat and Liquidation of Securities Also Violate the Takings Clause Because They Fail to Provide Just Compensation to Property Owners.

The escheat and liquidation of securities (and other appreciable or irreplaceable property) by California and other states also violates the Takings Clause. This Court

has held that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 324 (2002). This Court recently clarified that this rule applies to personal property and stated that "[t]he Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Horne v. Department of Agriculture*, 135 S.Ct. 2419, 2426 (2015). This Court explained that the physical appropriation of personal property, similar to the appropriation of real property, is perhaps the most serious form of invasion of an owner's property interest, depriving the owner of "the rights to possess, use and dispose" of the property. *Id.* at 2427 (*quoting Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

The seizure and liquidation of an owner's property through the escheat process is a permanent deprivation of property in which the owner loses all of his or her rights in the escheated and sold property, including "the right to possess, use and dispose of" the property. *Loretto*, 458 U.S. at 435.[14] Accordingly, just compensation must be paid. Furthermore, "a reasonable, certain and adequate provision for obtaining compensation [must] exist at the time of the taking." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) (internal quotation marks omitted). To satisfy

14. Indeed, at the time of escheat, states even require securities to be re-registered in their name. The taking of securities may also deprive the owner of voting rights with respect to the securities.

this standard, "***[t]he owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken.***" *United States v. Miller*, 317 U.S. 369, 373 (1943) (emphasis added).

Neither the California UPL nor the unclaimed property laws of any other state satisfies this standard. Rather, these laws generally require the state to provide to the owner only the proceeds or net proceeds from the sale of the securities.[15] However, the amount of just compensation that must be paid to the owner of escheated and liquidated securities should be determined based not on the proceeds from the sale but on the value of the securities at the time the owner is actually compensated, plus any dividends, interest or other amounts that would otherwise have been payable to the owner. Otherwise, an owner of securities that appreciated (or depreciated) after the state's sale of those securities would not be placed in "as good [a] position pecuniarily as he would have occupied if his property had not been taken." *Id.* Furthermore, if the state is obligated merely to return the proceeds from the sale of the securities, then the state will have no incentive to either hold the securities on behalf of the owner (which normally will be in the owner's best interest, at least over the long term) or timely pay the proceeds from the sale to the owner. New York's unclaimed property laws recognize this, by providing that "In the event a claim is made and approved subsequent to the sale of the securities, the comptroller shall pay the rightful owner the cash equivalent of such securities as of the date of

15. *See* Cal. Civ. Proc. Code § 1563(b). *See also, e.g.,* Del. Code Ann. tit. 12, § 1143(b); Mass. Gen. Laws Ann. ch. 200A, § 9; N.J. Stat. Ann. § 46:30B-72; and Tex. Prop. Code Ann. § 74.501(b).

approval of any such claim."[16] However, even under New York's standard, the owner of liquidated securities will apparently not be compensated for dividends, interest or other amounts that the owner would have received absent the liquidation.

Current state unclaimed property laws increase the financial incentive of the states to employ inadequate notice to owners, and do not properly hold the states accountable for their actions in escheating and liquidating such property. In other words, these laws provide a financial benefit to the states to take and liquidate property and to keep owners in the dark about their loss. Such laws violate not only due process, but the Takings Clause as well.

16. N.Y. Aband. Prop. Law § 1403 2-a.

CONCLUSION

For all of the reasons described in this *amicus curiae* brief, UPPO urges the Court to accept Petitioners' petition so that it may reverse the decision of the Ninth Circuit, and provide clear standards to the states regarding (1) what constitutes constitutionally adequate notice before a state may seize and liquidate an owner's property under the state's unclaimed property laws, and (2) what constitutes just compensation that must be paid to owners of escheated and liquidated property. At minimum, though, we agree with Petitioners that the Ninth Circuit's judgment in this case should be GVR'd to address the Takings Clause issue.

Respectfully submitted,

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