No. 01-1534

In the Supreme Court of the United States

TIMOTHY PATRICK KORNWOLF, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Based upon his sale of Indian artifacts containing golden eagle feathers, petitioner was charged with violations of the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. Petitioner contends that the statutory prohibition against the sale of golden eagle parts, as applied to golden eagle feathers that were lawfully acquired before the effective date of federal protection, effects a taking of property in violation of the Fifth Amendment. The questions presented are as follows:

1. Whether petitioner's takings claim can be asserted as a defense to a criminal prosecution for unlawful sale of golden eagle feathers.

2. Whether application of the statutory prohibition to petitioner's conduct effects a taking of petitioner's property.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A9) is reported at 276 F.3d 1014. The orders of the district court (Pet. App. A25-A28, A29-A31) are unreported. The reports and recommendations of the magistrate judge (Pet. App. A32-A35, A37-A44) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2002. The petition for a writ of certiorari was filed on April 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a conditional guilty plea, petitioner was convicted of two counts of violating the Bald and Golden Eagle Protection Act and two counts of violating the Migratory Bird Treaty Act. He was sentenced to three years' probation, a fine of $2000, and a special assessment of $400. The court of appeals affirmed. Pet. App. A3-A9.

1. In 1940, Congress enacted the Bald Eagle Protection Act in order to protect this Nation's symbol—the bald eagle—from extinction. See Bald Eagle Protection Act (Eagle Protection Act), ch. 278, 54 Stat. 250; Pet. App. A39 (discussing purpose of the Eagle Protection Act). In 1962, the provisions of the Eagle Protection Act were made applicable to golden eagles. Golden Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246 (16 U.S.C. 668). The Eagle Protection Act makes it unlawful to sell parts of a bald or golden eagle without a permit and establishes criminal penalties for violations of that ban. 16 U.S.C. 668(a). Likewise, the Migratory Bird Treaty Act prohibits the sale of migratory birds or bird parts without a permit. 16 U.S.C. 703. Both statutes prohibit sales of protected birds or bird parts without regard to when those parts were acquired. Those statutes and implementing regulations do, however, allow the possession and transportation of birds or bird parts that were lawfully obtained before the effective date of federal protection. 16 U.S.C. 668(a); 50 C.F.R. 21.2(a), 22.2(a)(1)-(2); *Andrus* v. *Allard*, 444 U.S. 51, 56 (1979).

2. On November 1, 1999, petitioner sold for $7000 a Native American dance shield containing eight golden eagle feathers to an undercover agent working with the United States Fish and Wildlife Service. Pet. App. A5.

Petitioner subsequently received an additional $5000 from the agent as a deposit for the sale of a Native American headdress that also contained golden eagle feathers. *Ibid.* Petitioner was charged in a superseding indictment with multiple violations of the Eagle Protection Act and the Migratory Bird Treaty Act. *Id.* at A48-A52. Petitioner moved to dismiss the superseding indictment, asserting that the prohibition on the sale of the shield and headdress effected an unconstitutional taking of his property. *Id.* at A33-A34, A38-A40. Petitioner asserted that he had lawfully acquired the artifacts before October 24, 1962, the date that the Eagle Protection Act was made applicable to golden eagles. See *id.* at A62-A63.

3. The magistrate judge recommended that petitioner's motion to dismiss the superseding indictment be denied. Pet. App. A37-A44. The district court adopted the report and recommendation of the magistrate judge. *Id.* at A29-A31. After the district court denied petitioner's motion to dismiss the superseding indictment, petitioner entered a conditional guilty plea to two counts of violating the Eagle Protection Act and two counts of violating the Migratory Bird Treaty Act. *Id.* at A65-A71; see *id.* at A49-A50. Petitioner reserved his right to challenge the pre-trial rulings of the district court. *Id.* at A66. Petitioner was sentenced to three years' probation (subject to a special condition that he participate for 180 days in a home detention program), a fine of $2000, and a special assessment of $400. *Id.* at A4 n.2. The district court declined to order petitioner to return the $12,000 that he had received for the dance shield and the headdress. *Id.* at A4.

4. The court of appeals affirmed. Pet. App. A3-A9. The court rejected petitioner's takings claim, holding that the constitutional question was controlled by this

Court's decision in *Andrus* v. *Allard*, *supra*. Pet. App. A5-A9. The court explained that, although the decision in *Allard* "did not directly address feathers owned by an individual prior to the effective dates of the" relevant statutes, the Court's reasoning in that case "extends to include feathers acquired prior to the passing of the Bald and Golden Eagle Protection Act." *Id.* at A6. The court also observed that petitioner had received compensation for the artifacts because the district court refused to order him to disgorge the $12,000 that he had received from the undercover agent. *Id.* at A8.

ARGUMENT

1. Petitioner raises his takings challenge as a defense to a criminal prosecution. Pet. App. A26-A27. The Just Compensation Clause, however, does not afford a defense to the criminal charges in this case. As this Court has explained, the Just Compensation Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power. It is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990) (citation and internal quotation marks omitted). Thus, even if the statutory ban on the sale of golden eagle feathers effected a taking of petitioner's property, that prohibition would be constitutionally valid and enforceable so long as a just compensation remedy is available.

Because the Tucker Act, 28 U.S.C. 1491, allows petitioner to seek just compensation in the Court of Federal Claims, petitioner is not entitled to raise a takings claim as a defense to a criminal prosecution. See

Williamson County Reg'l Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172, 195 (1985) ("taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act"); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984). A statute may be declared unconstitutional on the ground that it effects a taking of property if Congress has manifested an "unambiguous intention to withdraw the Tucker Act remedy." *Preseault*, 494 U.S. at 12 (quoting *Monsanto*, 467 U.S. at 1019); see, *e.g.*, *Eastern Enter.* v. *Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion) (the "presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds," because Congress would not likely have intended to provide compensation from the Treasury for monetary payments compelled by federal law). Petitioner identifies no evidence, however, suggesting that Congress has withdrawn the Tucker Act remedy with respect to any takings of property that might result from the Eagle Protection Act or the Migratory Bird Treaty Act, nor has he actually sought compensation in the Court of Federal Claims.

Petitioner contends that he is entitled to reversal of his convictions because "[a] criminal statute is unconstitutional on its face or as applied where it conflicts with some guarantee of the Bill of Rights, and the unconstitutionality of the statute is a defense in a criminal prosecution." Pet. 27. Petitioner further suggests that the Tucker Act remedy is inadequate because the Court of Federal Claims "can only award money damages" and "cannot reverse a criminal conviction, reimburse criminal fines, or restore a citizen's good name." Pet. 28 n.15. Those arguments misconceive the nature of the

constitutional guarantee on which petitioner relies. A taking of property does not conflict with any provision of the Bill of Rights so long as the government pays just compensation to the property's owner. Because the Tucker Act remedy is fully sufficient to satisfy constitutional requirements, petitioner's claim that the Eagle Protection and Migratory Bird Treaty Acts effect a taking does not call the validity of those statutes into question, and it therefore cannot be raised as a defense to a criminal prosecution.[1]

2. Even if petitioner's takings challenge were properly raised in defense of a criminal prosecution, that claim lacks merit.

a. The appellees in *Allard* contended that the Eagle Protection Act and the Migratory Bird Act "do not forbid the sale of appellees' artifacts insofar as the constituent birds' parts were obtained prior to the effective dates of the statutes," and that "if the statutes and regulations do apply to such property, they violate the Fifth Amendment." 444 U.S. at 54-55. The Court

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[1] Petitioner also states that "[a] similar Tucker Act argument was made in *Allard* and implicitly rejected by the *Allard* Court." Pet. 28 n.15. *Allard* predates this Court's decisions in such cases as *Preseault* and *Monsanto*, which clarified the principle that a statute may not be set aside on the ground that it effects a taking so long as a just compensation remedy remains available. And because the Court in *Allard* did not explain its decision to consider the merits of the appellees' takings claim, its "implicit[]" (Pet. 28 n.15) holding that the claim was properly before it is entitled to no precedential weight. Cf., *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 352 n.2 (1996) (Court has "repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect."); *Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974) ("when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before [it].").

rejected those contentions. In holding that the Eagle Protection Act was applicable to eagle feathers lawfully acquired before the effective date of the statutory ban on sales of golden eagle parts, the Court explained:

> The prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the purposes of the Eagle Protection Act. It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds. The legislative draftsmen might well view evasion as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.

Id. at 58. The Court reached the same conclusion with respect to the Migratory Bird Treaty Act. See *id.* at 59-64.

The Court "also disagree[d] with the District Court's holding that, as construed to authorize the prohibition of commercial transactions in pre-existing avian artifacts, the Eagle Protection and Migratory Bird Treaty Acts violate appellees' Fifth Amendment property rights because the prohibition wholly deprives them of the opportunity to earn a profit from those relics." 444 U.S. at 64; see *id.* at 64-69. The Court explained that

> [t]he regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one

> traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.

Id. at 65-66. The Court also observed that "it is not clear that appellees will be unable to derive economic benefit from the artifacts; for example, they might exhibit the artifacts for an admissions charge. At any rate, loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Id.* at 66. The *Allard* Court's takings analysis is equally applicable here.[2]

b. In *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002), this Court recently reaffirmed the principle announced in *Allard* that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Id.* at 1481 (quoting *Allard*, 444 U.S. at 65-66). The Court observed that "[t]his requirement that the 'aggregate must be viewed in its entirety' explains why, for example, a regulation that prohibited commercial trans-

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[2] Petitioner contends that he acquired the artifacts at issue in this case before October 24, 1962, when the Eagle Protection Act was made applicable to golden eagle parts. Pet. App. A62-A63. As the court of appeals observed, "*Allard* did not directly address feathers owned by an individual prior to the effective dates of the acts." *Id.* at A6. The appellees in *Allard* alleged that the feathers in question had been lawfully acquired before the effective date of federal protection, but they did not allege that *they* had obtained the feathers before that date. See 444 U.S. at 54-55. The *Allard* Court's takings analysis, however, did not turn on that factual distinction. See Pet. App. A6-A7.

actions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking." *Ibid.* (quoting *Allard*, 444 U.S. at 66). The Court's decision in *Tahoe-Sierra* refutes petitioner's contention (Pet. 15-20) that the core principle on which *Allard* rests has been undermined by subsequent rulings of this Court.

c. Petitioner contends (Pet. 21-26) that the ban on sale of golden eagle feathers, by destroying the market for those items, effects a categorical taking of property under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). Petitioner's reliance on *Lucas* is misplaced. First, as petitioner acknowledges (Pet. 22), the Court in *Lucas* expressly distinguished for purposes of takings analysis between real and personal property:

> [I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). In the case of land, however, we think the notion * * * that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Lucas, 505 U.S. at 1027-1028 (citations omitted).

Second, *Tahoe-Sierra* makes clear that "the categorical rule [of *Lucas*] would not apply if the diminution in value were 95% instead of 100%." 122 S. Ct. at 1483. As the Court recognized in *Allard*, the Eagle Protection and Migratory Bird Treaty Acts allowed petitioner

to sell his artifacts with the contraband feathers removed, 444 U.S. at 68 n.25, and to charge admission fees for viewing the artifacts, *id.* at 66. *Lucas* therefore provides no support for petitioner's contention that the federal ban on the sale of golden eagle feathers rendered his property valueless or effected a categorical taking.

d. The Court in *Allard* upheld the federal ban on the sale of eagle parts lawfully acquired before the effective date of federal protection, based in part on its determination that "[i]t was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles." 444 U.S. at 58. Petitioner contends (Pet. 8-15) that *Allard* has been called into question by *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980), which stated that "[t]he application of a general zoning law * * * effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land." In petitioner's view (see Pet. 10), the phrase "substantially advance" imposes a more demanding standard than the reasonableness analysis that the *Allard* Court employed. That argument lacks merit.

First, the passage in *Agins* on which petitioner relies applies by its terms to *land-use regulation*, not to regulation of commercial transactions involving personal property. See 447 U.S. at 260 (describing circumstances under which "[t]he application of a general zoning law * * * effects a taking"). Subsequent decisions of this Court have used the phrase "substantially advance" with specific reference to regulation of real property. See, *e.g.*, *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas*, 505 U.S. at 1016; *Nollan* v.

California Coastal Comm'n, 483 U.S. 825, 834 n.3 (1987). Petitioner cites no decision in which this Court has used the phrase in connection with regulation of other commercial transactions. As *Lucas* makes clear, the takings principles that govern land-use regulation cannot be mechanically applied to other commercial settings. See p. 9, *supra*.

Second, the *Agins* Court's use of the phrase "substantially advance" was supported by citation to *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928), in which the Court stated that a restriction on private development adopted as part of a municipal zoning plan generally "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Ibid.* (citing *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926)). In setting forth the legal principles governing its review, the *Nectow* Court observed that

> a court should not set aside the determination of public officers in such a matter unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."

Id. at 187-188 (quoting *Village of Euclid*, 272 U.S. at 395). Thus, even with respect to land-use regulation, there is no reason to suppose that the *Agins* Court intended the phrase "substantially advance" to require more than a reasonable relationship between means and ends.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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