No. 08-945

IN THE SUPREME COURT OF THE UNITED STATES

EMPRESS CASINO JOLIET CORP., DES PLAINES LIMITED PARTNERSHIP, HOLLYWOOD CASINO-AURORA, INC., AND ELGIN RIVERBOAT RESORT,
Petitioners,

v.

ALEXI GIANNOULIAS, ILLINOIS RACING BOARD, BALMORAL PARK TROT, INC., HAWTHORNE RACE COURSE, INC., MAYWOOD PARK TROTTING ASS'N, NATIONAL JOCKEY CLUB, AND ILLINOIS HARNESS HORSEMEN'S ASS'N,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF PETITIONERS

STEPHEN B. KINNAIRD
Counsel of record
PANTEHA ABDOLLAHI
ADAM J. SCHWARTZ
MICHAEL W. STEVENS
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1700
Counsel for Amici Curiae

QUESTION PRESENTED

The Illinois Supreme Court concluded a state law transferring the revenues of four Illinois casinos to five Illinois horse-racing tracks was categorically immune from challenge under the Takings Clause of the Fifth Amendment because, in that court's view, "regulatory actions requiring the payment of money are not takings." The question presented is:

Was the Illinois Supreme Court correct in holding that financial exactions are completely unconstrained by the Takings Clause?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION, STATUTE AND RULES

OTHER AUTHORITIES

INTERESTS OF AMICI CURIAE

Amici Curiae Eric R. Claeys, Richard A. Epstein, Nicole S. Garnett, Eric A. Kades, and Ilya Somin are professors of law at various law schools throughout the United States who teach, research, write and speak about constitutional and property law.[1]

Professor Claeys is an Associate Professor of Law at the School of Law at George Mason University. He has authored multiple articles on the Takings Clause, including *Takings, Regulations, and Natural Property Rights,* 88 Cornell L. Rev. 1549 (2003).

Professor Epstein is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago and Kirsten Bedford Senior Fellow at the Hoover Institution. He has taught and written in constitutional law and political theory since 1968. His books include *Takings: Private Property and the Power of Eminent Domain* (1985).

Professor Garnett is a Professor of Law at the University of Notre Dame Law School. Her primary

---

[1] Pursuant to Rule 37.6 of this Court's Rules, *Amici Curiae* certify that no counsel for a party has authored this brief in whole or in part, and no counsel or party has made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to the brief's preparation or submission. Pursuant to Rule 37.2(a) of this Court's Rules, counsel of record for petitioners and respondents were notified of the intent to file this brief at least 10 days prior to the filing of this brief. Petitioners have given blanket consent to the filing of briefs by *amicus curiae* and that letter of consent is on file in the Office of the Clerk. Respondents have consented to the filing of this brief, and Respondents' letters of consent are filed herewith.

research interests involve land use and government law, and she is the author of, among other articles, *The Public Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934 (2003).

Professor Kades is Vice Dean and Professor of Law at William and Mary Law School, and is the author of *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and its Broader Application,* 97 Nw. U. L. Rev. 189 (2002).

Professor Somin is an Assistant Professor of Law at the School of Law at George Mason University, where his research focuses on constitutional and property law. His published works include *Controlling the Grasping Hand: Economic Development Takings After Kelo,* 15 Sup. Ct. Econ. Rev. 183 (2007).

Amici Curiae have divergent views on many issues related to constitutional law and the Takings Clause in particular. *Amici Curiae* are united, however, in the view that this Court must resolve the disarray that exists in the lower courts and develop a comprehensive and coherent framework for analysis of the Takings Clause.

SUMMARY OF ARGUMENT

The Illinois Supreme Court rejected a Takings Clause challenge to a state law requiring the transfer of revenues from certain privately-held casinos to certain privately-held horse racetracks, reasoning that a state-imposed obligation to pay money can never be a constitutional "taking" of property. Specifically, Illinois Public Act 94-804 (the "Act"), 230

Ill. Comp. Stat 10/23 (1994), requires casinos with adjusted gross receipts over $200 million in 2004 to contribute, on a daily basis, three percent of their adjusted gross receipts to the Horse Racing Equity Trust Fund. Pursuant to the Act, 40 percent of the casinos' contributed funds are then distributed to five privately-held horse racetracks "to improve, maintain, market, and otherwise operate [their] racing facilities to conduct live racing, which shall include backstretch services and capital improvements related to live racing and the backstretch." Pet. App. 58a-59a. In response to a constitutional challenge, the Illinois Supreme Court upheld the Act, rejecting application of a Takings Clause analysis on the basis that the Clause does not apply to monetary exactions.

This Court has not hesitated to review the decisions of high state courts that, like this one, break new ground in interpreting the protections afforded by the Federal Constitution. Indeed, whether the Fifth Amendment's mandatory restrictions on a state's regulatory power can be applied to a governmentally imposed monetary exaction represents the archetypal "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Amici Curiae respectfully submit that the Court should give immediate attention to defining the proper constitutional standard to be applied to a state-imposed monetary exaction, and delineate the appropriate boundary between lawful taxation and unlawful confiscation. The reasons for granting certiorari are threefold. First, the Illinois Supreme Court's rigid rule is contrary to this Court's exaction

and regulatory-takings doctrines. Second, the Illinois Supreme Court's ruling endorses legislative exactions involving naked wealth transfers and invites state and local governments to undermine the substance of federal eminent-domain limitations. Finally, the issues raised in the petition are recurring ones for federal, state, and local government entities, and the want of a clear test to define appropriate governmental conduct is critical.

REASONS FOR GRANTING THE PETITION

I. The Categorical Distinction between Taxes and Takings Adopted by the Illinois Supreme Court is Constitutionally Unsupportable

The Takings Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This provision is made applicable to the states via the Fourteenth Amendment. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978).

In the court below, Petitioners urged that the constitutionality of the Act should be evaluated under the Takings Clause because property (money) was being taken from one party (the casinos) and given to another (the racetracks). The court below rejected the applicability of a takings analysis, reasoning that "[i]t is well settled that the takings clause of the federal and state constitutions apply only to the state's exercise of the power of eminent domain, and not to the state's power of taxation." Pet. App. 21a. The Illinois Supreme Court further concluded "[t]he

Act does not involve an interest in physical or intellectual property, nor does it operate upon or alter an identifiable property interest." *See* Pet. App. 26a.

The court's rigid segregation between the powers of taxation and of eminent domain, and its limited view of the scope of the Takings Clause, require reexamination by this Court for four reasons.

First, this Court repeatedly has held that money is a property interest that may, in certain circumstances, be subject to protection under the Takings Clause. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003). Moreover, because a necessary conceptual predicate of the Just Compensation provision of the Takings Clause is that all property can be converted into money, it is unclear why money should be treated differently from other forms of property when assessing the applicability of the Takings Clause. Nor is it coherent to exclude taxation or other monetary exactions categorically from the Takings Clause; taxes if unpaid give rise to tax liens, and liens are property interests. *Armstrong v. United States*, 364 U.S. 40, 44-45 (1960). Taxation is a form of property transfer. The necessity of taxation in any government suggests that there must be definite standards to distinguish legitimate taxation from confiscation; it does not suggest that taxation is never unconstitutionally confiscatory.

Second, the precedents upon which the Illinois Supreme Court relied in fashioning its categorical rule, such as *County of Mobile v. Kimball*, 102 U.S.

691, 703 (1880) and *Brushaber v. Union Pac. R.R. Co.,* 240 U.S. 1, 24 (1916), are not as absolute as the Illinois court suggests. For example, the court quotes *Kimball* for the proposition that "'neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution.'" Pet. App. 21a. But *Kimball* considers taxation where "the party bears only a share of the public burdens," *Kimball*, 102 U.S. at 703, not an exaction imposed on one party to give to another. Similarly, while this Court acknowledged the general rule that taxation does not run afoul of the Takings Clause in *Brushaber*, the Court also declared that

> this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property -- that is, a taking of the same in violation of the 5th Amendment. . . .

Brushaber, 240 U.S. at 24-25. Such arbitrariness may be exemplified when a few entities are the sole target of a legislative exaction.

Third, both *Kimball* and *Brushaber* predate the abandonment of the categorical exemption of regulation from the Takings Clause pronounced in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and its progeny.[2] Building on *Mahon*, this Court now

---

[2] *Kimball* also predates the application of the Takings Clause to the states. *Kimball* was not decided under the Takings Clause,

uses a substance-over-form approach to determine whether a challenged government action undermines eminent-domain protections even if the action purports not to relate to eminent domain at all. The Court considers the character of the government action, the economic hardship on the subject of the action, the property owner's reasonable expectations, *Penn Central*, 438 U.S. at 124, and most of all whether a government is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. Incorrectly considering the issue settled by this Court's precedents, Pet. App. 21a-22a, the Illinois Supreme Court did not treat these considerations with anywhere near the seriousness this Court expects.

Fourth, the Illinois Supreme Court failed to explain why monetary exactions on the income earned from deploying property in economic activity should be treated differently from exactions on the use of property. In the latter context, this Court has been careful to ensure that conditions placed on land-use permits do not circumvent the protections of eminent-domain law, and thus has required that any

---

but under the "substantive due process" doctrine of the *Lochner* era, which allowed challenges to state condemnations under the Due Process Clause of the Fourteenth Amendment. The relatively lax standards the *Lochner*-era Court adopted for review of state takings under the Due Process Clause have little, if any, relevance to modern review of condemnations under the Takings Clause of the Fifth Amendment. *Cf.* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 Sup. Ct. Econ. Rev. 183, 240-244 (2007); Eric R. Claeys, *Takings: An Appreciative Retrospective*, 15 Wm. Mary Bill of Rts. J. 439, 441 and n. 19 (2006).

exaction have an "essential nexus" to a legitimate state interest and "rough proportionality" to the public burdens the use will create. *Dolan v. City of Tigard*, 512 U.S. 374-75 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Confiscations may masquerade as taxes or surcharges just as they may masquerade as permit conditions, and it makes no sense to exclude the former categorically from the reach of the Takings Clause. As in the land-use context, this Court should look to the substance and not the form of the exaction.

II. This Case Presents a Ripe Opportunity for the Court to Clarify Why Expropriative Transfers Violate the Takings Clause

As the petition demonstrates, there is deep disarray among both federal and state courts as to the applicability of the Takings Clause to laws that impose monetary exactions, and *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), did not settle the question. Pet. 10-18. Thus, it is incumbent upon this Court to define the characteristics that distinguish lawful exactions from unlawful confiscation.

The answer cannot be that monetary exactions are categorically immune from challenge under the Takings Clause. An unrestrained power of government to impose special exactions, and to oblige the politically disfavored to fill the coffers of the favored, is pernicious in a system of private property. The normal political checks are evaded. Legislators can impose excessive exactions on targeted groups without the political costs of enacting broad-based taxes; politically powerful interests can secure benefits from targeted exactions upon rivals that they

could never obtain if they had to compete for general expenditures. Matters of this import cannot be left to the doctrinal incoherence of the fractured decision in *Eastern Enterprises.*

This Court previously has articulated certain elementary Fifth Amendment precepts. First, as noted above, the purpose of the Takings Clause is to protect some people from unfairly shouldering burdens that "should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. Second, while "it cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another," *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986), naked wealth transfers – *i.e.*, robbing Peter to pay Paul – are strictly prohibited. *Thompson v. Consolid. Gas Utilities Corp.*, 300 U.S. 55, 79-80 (1937). Third, the exercise of governmental powers, such as land-use restrictions or other regulation, may *in extremis* amount to confiscation and give rise to a takings claim. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central,* 438 U.S. at 131.

These precepts clarify that naked wealth transfers in the guise of taxation, license fees, or surcharges run afoul of the Takings Clause. Just as this Court has established means-ends proportionality standards in *Nollan* and *Dolan* to root out unconstitutional takings in the land-use context, so too must the Court define federal standards that delineate when a special exaction for the benefit of a third party passes constitutional muster. This is separate from the question of whether governmental support of the third party is proper, or whether the

public would benefit economically from a revival of the third party's business; under *Armstrong*, there must also be a legitimate basis for burdening the particular taxpayer with the funding of that support (as opposed to paying for the support from general revenue or other sources). The legislative declaration here that a special surcharge on casino revenues is justified because racetracks have been "negatively impacted" from lawful competition from casinos, Pet. App. 56a, is not a legitimate basis for transferring the revenues of one competitor to another.

At present, the lower courts operate without proper guidance from this Court as to how the various standards of modern takings jurisprudence should apply in this context. *Cf. Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 548 (2005) (summarizing the different approaches). Yet as long as this Court does not clarify the proper analytical framework for addressing takings challenges to monetary exactions, lower courts will be tempted to conclude that *none* of the standards applies -- and continue to refrain from reviewing seriously expropriative transfers.

III. There Is a Pressing Need for this Court's Guidance

The issue presented is a recurring one for federal, state, and local government entities. As such, there is a vital need for this Court to articulate the appropriate test to be applied to monetary exactions, so that legislators are able to reasonably predict the contours of their levying powers. In the absence of a clear standard, governments may either overreach and trench upon citizens' constitutional rights, or

forgo necessary and beneficial legislation out of an abundance of caution. Further, no purpose would be served by waiting to review the issue presented until more courts have addressed it; it is for this Court to clarify the validity and applicability of its prior precedents like *Kimball* and *Brushaber*.

The Illinois Supreme Court's decision sanctions the transfer of revenue from a few profitable companies to a few less profitable competitors. Such a measure is arbitrary. The decision also undermines this Court's modern exactions jurisprudence by immunizing monetary exactions from the takings analysis. If monetary exactions can never be considered takings, then government may, at whim, undermine private property rights by simply imposing a special "surcharge" on any owner that refuses to accept arbitrary restrictions on the use of its property.

In times of economic distress, legislatures may be more tempted to engage in expropriative transfers from healthy to weaker competitors, making more imperative that this Court clarify the basic tenets for the courts and legislatures to follow.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for certiorari, this Court should grant the petition.

Respectfully submitted,

STEPHEN B. KINNAIRD
Counsel of Record
PANTEHA ABDOLLAHI
ADAM J SCHWARTZ
MICHAEL W. STEVENS
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

Counsel for Amici Curiae

February 2009