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 ASSN., NATIONAL JOCKEY CLUB, AND ILLINOIS HARNESS HORSEMEN'S ASSN.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interest of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber has filed *amicus* briefs in other Takings Clause cases and is well situated to address the issues raised in this case. The Chamber has a strong interest in the constitutional protection of the property rights of its members. The question presented by the instant case – whether a state's expropriation of money from a company for purposes of subsidizing a competitor constitutes a "taking" under

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and respondents were notified of *amicus's* intent to file this brief and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

the Takings Clause of the Fifth Amendment – is of great concern to all Chamber members. The Chamber vigorously disagrees with the holding of the Illinois Supreme Court that "regulatory actions requiring the payment of money are not takings." Pet. App. 25a. The Chamber believes that money represents a quintessential form of property and should be protected by the Takings Clause just as much as other forms of property.

SUMMARY OF THE ARGUMENT

The Illinois Supreme Court's unequivocal holding that the Takings Clause applies "only to the state's exercise of eminent domain" and that "regulatory actions requiring the payment of money are not takings" conflicts with this Court's Takings jurisprudence, is inconsistent with the broad meaning of "private property" intended by the Framers, and invites all manner of legislative mischief.

For over 200 years, this Court has emphasized that "a law that takes property from A, and gives it to B" violates the Takings Clause. *Calder v. Bull*, 3 Dall. 386, 388, 1 L. Ed. 648 (1798); *Kelo v. City of New London*, 545 U.S. 469, 477 and n. 5 (2005). This case represents the paradigm of just such a taking – the Illinois Act upheld by the Illinois Supreme Court takes tens of millions of dollars away from the four largest-grossing casinos in Illinois, and gives those monies as a subsidy to the horse-racing tracks with

which the casinos compete. The Act impermissibly singles out the casinos as the source of financial support for the financially flagging but politically influential horse-racing industry. This plainly runs afoul of this Court's teaching that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens 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).

The Illinois Supreme Court's reliance on *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1995), for the notion that money does not constitute "private property" under the Takings Clause was misplaced, as the various opinions by the divided Court in that case did not yield any such holding. Moreover, the Illinois Supreme Court disregarded other opinions by this Court in which it has recognized that the reach of the Takings Clause extends beyond the exercise of eminent domain power, and also encompasses within its ambit a purely monetary appropriation. *See*, *e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998).

The petitioners have demonstrated that the fractured decision in *Eastern Enterprises* has engendered a welter of conflicting opinions in the courts below that has widened a split among them over the important and recurring issue of whether an appropriation of a person's money can constitute a taking under the Fifth Amendment. The Chamber agrees

with petitioners that this case presents an ideal vehicle to resolve that persistent conflict and provide guidance to both the lower courts and to state and local governments that may seek to emulate what Illinois has done. If the Illinois Act is allowed to stand, state and local governments now confronted by staggering deficits and budget shortfalls may well decide that they too can appropriate money from certain successful businesses in order to subsidize struggling but politically powerful competitors. It has long been recognized that the Takings Clause was intended to prevent those who are politically influential from utilizing the levers of government to appropriate property from those who are unpopular or politically weaker. *See*, *e.g.*, *Kelo*, 545 U.S. at 496 (O'Connor, J., dissenting) ("Together [the public use and just compensation requirements] ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power – particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.").

The Chamber urges this Court to grant the Petition.

ARGUMENT

A. The Illinois Supreme Court's Ruling Conflicts with This Court's Precedents and the Broad Meaning of "Private Property" Intended by the Framers

Over two hundred years ago, this Court held that "a law that takes property from A, and gives it to B" "cannot be considered a rightful exercise of legislative authority"; "[i]t is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it." *Calder v. Bull*, 3 Dall. 386, 388, 1 L. Ed. 648 (1798). This longstanding bedrock principle of constitutional law was recently reaffirmed by this Court in *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) ("the sovereign may not take the property of A for the sole purpose of transferring it to another private party B").

The Illinois Act at issue here does precisely what this Court has long declared forbidden – it expropriates from four Chicago-area casinos 3% of their adjusted gross receipts, and transfers those monies to their competitors, a politically-favored group of horse-racing tracks. This legislation simply cannot pass muster under the Takings Clause, which "was designed to bar Government from forcing some people alone to bear public burdens 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). "In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his

neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (citations omitted).

The Illinois Supreme Court rejected petitioners' constitutional challenge to the Act, holding that the Takings Clause applies "only to the state's exercise of eminent domain" and "regulatory actions requiring the payment of money are not takings." Pet. App. 21a, 25a. This conclusion is inconsistent with this Court's precedents and the broad meaning of "private property" intended by the Framers of the Constitution.

1. As petitioners have explained, the Illinois Supreme Court's heavy reliance on *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998), was entirely misplaced. There was no majority opinion in *Eastern Enterprises*, and therefore it cannot be relied upon as controlling precedent for the proposition that "regulatory actions requiring the payment of money are not takings." Pet. App. 25a. The opinion by Justice Breyer expressing the view that "an ordinary liability to pay money" does not constitute a taking (524 U.S. at 554) represented the **dissenting** opinion, and it was plainly erroneous for the Illinois Supreme Court to treat it as controlling by virtue of the concurring opinion by Justice Kennedy, who found that the Act at issue was unconstitutional on due process grounds. Neither the dissenting opinion nor the four-Justice plurality opinion, which concluded that the required

payment of health care benefits "effect[ed] an unconstitutional taking" (*id*. at 504), represents the holding of this Court.[2]

This Court has instructed that when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . " *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)). However, the *Marks* rule is applicable only where "one opinion can be meaningfully regarded as 'narrower' than another" and can "represent a common denominator of the Court's reasoning." *Rappa v. New Castle County*, 18 F.3d 1043, 1057-58 (3d Cir. 1994) (quoting *King v. Palmer,* 292 U.S. App. D.C. 362, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), *cert. denied*, 505 U.S. 1229 (1992)). Thus, in cases such as *Eastern Enterprises*, where approaches fundamentally differ,

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[2] It also is noteworthy that, in *Eastern Enterprises*, both the concurring opinion by Justice Kennedy and the dissenting opinion by Justice Breyer acknowledged that prior Court precedents lent support to the plurality's Takings Clause analysis. *See* 524 U.S. at 545 (Kennedy, J., concurring) ("It should be acknowledged that there are passages in some of our cases on the imposition of retroactive liability for an employer's withdrawal from a pension plan which might give some support to the plurality's discussion of the Takings Clause."); *id*. at 555 (Breyer, J., dissenting) ("The Court in two cases has arguably acted *as if* the Takings Clause might apply to the creation of a general liability.") (italics in original).

no particular standard is binding on an inferior court because none has received the support of a majority of this Court. *Rappa*, 18 F.3d at 1058. *See also Texas v. Brown*, 460 U.S. 730, 737 (1983) (stating that a plurality view that does not command a majority is not binding precedent); *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910) ("The principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts").

The Illinois Supreme Court erred not only in its reliance upon the dissenting opinion in *Eastern Enterprises*, but also by ignoring precedents of this Court which have recognized that a purely monetary appropriation is subject to Takings Clause analysis. For example, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), the Court held that a Florida law appropriating the interest earned on an interpleader fund deposited in the court registry violated the Takings Clause. The Court recognized that "[t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Id*. at 164. Indeed, "appropriation of the beneficial use of the fund is analogous to the appropriation of the use of private property . . . " *Id*. at 163-64.

Thereafter, in *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998), this Court relied on *Webb's* to hold that interest income generated by principal held in IOLTA accounts is the private property of the owner

of the principal for purposes of the Takings Clause. The Court emphasized that "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." *Id*. at 172. Similarly, in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), this Court recognized that "[a] law that requires that the interest on [client funds] be transferred to a different owner for a legitimate public use, however, could be a *per se* taking requiring the payment of 'just compensation' to the client." *Id*. at 240.

In the tax context, this Court has likewise recognized that money constitutes a property interest. In *Dickman v. Commissioner*, 465 U.S. 330, 336-37 (1984), the Court stated as follows:

> We have little difficulty accepting the theory that the use of valuable property – in this case money – is itself a legally protectible property interest. Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order. One court put it succinctly:
>
> > 'Property' is more than just the physical thing – the land, the bricks, the mortar – it is also the sum of all of the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible. . .
>
> * * *
>
> What was transferred here was the use of a substantial amount of cash for an indefinite period of time. An analogous interest in real

> property, the use under a tenancy at will, has long been recognized as a property right. . . For example, a parent who grants to a child the rent-free, indefinite use of commercial property having a reasonable rental value of $8,000 a month has clearly transferred a valuable property right. The transfer of $100,000 in cash, interest-free and repayable on demand, is similarly a grant of the use of valuable property. Its uncertain tenure may reduce its value, but it does not undermine its status as property. In either instance, when the property owner transfers to another the right to use the object, an identifiable property interest has clearly changed hands.

2. This Court's decisions recognizing that money is a form of property that is protected by the Fifth Amendment comport with the intent of the Framers. The author of the Takings Clause was James Madison, and therefore his understanding of its terms has special significance.[3]

The Framers of the Constitution, with Madison at the helm, assumed the existence of property as a constitutional institution and, further, had a very broad view of the resources that the term "property" protected. It certainly protected those resources such

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[3] David A. Dana & Thomas W. Merrill, *Property: Takings* 13 (2002); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 791 (1995).

as land and goods that traded in the marketplace, but it also protected facultative resources. Madison's view is instructive:

> Property. The term in its particular application means that "dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandize, or **money** is called his **property**.

James Madison, *Property*, *The Nat'l Gazette, Mar. 29, 1792, reprinted in 6 The Writings of James Madison*, 101 (Gaillard Hunt ed., 1906) (emphasis added).

In the Federalist Papers, Madison emphasizes that "the protection of these faculties (the different and unequal faculties for acquiring property) is the first object of government." *The Federalist No. 10*, at 78 (James Madison) (Clinton Rossiter ed., 1961). Gouverneur Morris, the Framer who, after Madison, spoke most often at the Convention, also held the view that property "was the main object of society." *The Records of the Federal Convention of 1787*, at 533 (Max Farrand ed., 2d ed., 1937). For Madison, "government is instituted to protect property **of every sort**." James Madison, *Property, The Nat'l Gazette, Mar. 27, 1792, reprinted in 14 The Papers of James Madison* at 266 (Robert A. Rutland ed., 1983) (emphasis added). Madison's expansive view of

property rights cannot be reconciled with a government of social transformation empowered to redistribute property from one business to another according to the reasons of the day.

The idea that protection of property is the motivating force of men entering into society dates back at least to Locke: "The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government is the Preservation of their Property." John Locke, *Two Treatises of Government* 368-69 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690). Locke's use of the word "property" was meant to convey more than just ownership of realty or chattel; he wrote that he called "Lives, Liberty and Estates . . . by the general Name, Property." *Id*. at 368. *See also* Adam Smith, *An Inquiry into the Wealth of Nations* 670 (Edwin Cannan ed., Modern Library 1937) (1776) ("The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil government. Where there is no property, or at least none that exceeds the value of two or three days labour, civil government is not so necessary.").

Property rights were central to the Framers' understanding of the liberties secured by the Constitution: they supplied "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism 9* (1990); *see also* James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional*

History of Property Rights 42-58 (1992). The Framers saw the protection of property rights as "the first object of government." *The Federalist No. 10*, at 78 (James Madison) (Clinton Rossiter ed., 1961). They recognized, in the words of John Adams, that "[p]roperty must be secured or liberty cannot exist." John Adams, *Discourses on Davila*, *reprinted in 6 The Works of John Adams, Second President of the United States* 221, 280 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851). Knowing that "[g]overnment is instituted no less for protection of the property than of the persons of individuals" (*The Federalist No. 54,* at 339 (James Madison) (Clinton Rossiter ed., 1961)), the Framers deliberately sought to shield interests in property – no less than in life and liberty – from government intrusion. *See* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941, 946.

This Court, too, has long recognized that the protection of property rights is "a vital principle of republican institutions." *Chicago, B. & O. R.R. v. City of Chicago*, 166 U.S. 226, 235-236 (1897). Finding that "the dichotomy between personal liberties and property rights is a false one," the Court has confirmed that "rights in property are basic civil rights." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). Rights in property are not secondary to rights to liberty because, as the Court explained in *Lynch*, "a fundamental interdependence exists between the personal right to liberty and the personal right in property," and "[n]either could have meaning without the other." *Id*.

B. The Illinois Supreme Court's Ruling Further Deepens a Conflict in the Courts Below

For many years, the lower courts have struggled with the difficult question of whether the Framers intended the Takings Clause to apply to expropriations of money. As demonstrated by petitioners, the substantial doctrinal confusion in this area has been exacerbated by the fractured decision in *Eastern Enterprises*, which has spawned additional conflicts in the courts below. (Petition at 10-14). Numerous courts and commentators have repeatedly bemoaned the confusion and uncertainty in this area of the law. As Justice Stevens has remarked, "even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting). *See also Customer Co. v. City of Sacramento*, 10 Cal.4th 368, 394 (1995) (Kennard, J., concurring) ("Legal commentators have long described takings law 'as a field of doctrinal incoherence littered with differing and inconsistent rationales.'"); Holly Doremus, *Takings and Transitions*, 19 J. Land Use & Envtl. L. 1, 1-2 (2003) (calling takings law "famously incoherent"); Daniel A. Farber, *Public Choice and Just Compensation*, 9 Const. Comment. 279 (1992) ("Takings doctrine is a mess."); Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 Harv. L. Rev. 2158, 2169-70 (2002) (likening attempts to interpret the Takings Clause to the "physicist's hunt" for the elusive quark); J. Peter Byrne, *Ten Arguments*

for the Abolition of the Regulatory Takings Doctrine, 22 Ecology L.Q. 89, 102 (1995) (describing the takings doctrine as "an unworkable muddle").

This case presents an excellent opportunity for the Court to clarify an enormously important issue of constitutional law which has profound consequences not only for the parties involved, but also for governments and business entities nationwide. The discrete legal question is squarely presented by the Illinois Supreme Court's unequivocal holding that the Takings Clause applies "only to the state's exercise of eminent domain." Pet. App. 21a. This case does not involve the government's appropriation of money to satisfy an obligation to the government or a third party. Moreover, as explained in the Petition (pp. 26-30), the Act does not represent an exercise of the State's taxing powers. In short, unlike *Eastern Enterprises*, this case does not "bristle[ ] with conceptual difficulties." 524 U.S. at 556 (Breyer, J., dissenting).

C. The Illinois Supreme Court's Ruling Invites Substantial Legislative Mischief

It has long been recognized that one of the fundamental purposes of the Takings Clause is to prevent those who are politically powerful from exploiting that advantage in the legislative process to expropriate property from those who are politically vulnerable. *See*, *e.g.*, *Kelo*, 545 U.S. at 496 (O'Connor, J., dissenting) ("Together [the public use and just compensation requirements] ensure stable property

ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power – particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will."); Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 Harv. J.L. & Pub. Policy 491, 547 (Spring 2006) ("One enduring concern surrounding the Takings Clause has been the risk of 'majoritarian oppression:' that is, abuse of the political process by a powerful majority that exerts sufficient control over the government such that it can co-opt the eminent domain power to confiscate the property of a less powerful minority"); Herbert Hovenkamp, *Legislation, Well-Being and Public Choice*, 57 U. Chi. L. Rev. 63, 87 (Winter 1990) (noting the importance of takings law in "limiting the power of legislatures to grant favors to politically powerful interest groups," and to prevent "[t]he victims of takings" from being "legislatively robbed"); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 Int'l Rev. L. & Econ. 125, 137 (1992) ("The takings clause can be defended as a barrier against a serious form of discrimination against politically disfavored groups."); Saul Levmore, *Just Compensation and Just Politics*, 22 Conn. L. Rev. 285, 310-11 (1990) (arguing that takings law does and should protect those who are particularly vulnerable in political process).

The Act at issue in this case takes tens of millions of dollars away from the four largest-grossing casinos and bestows those monies on the racetracks, with whom they compete. It is a redistribution of wealth, pure and simple, and plainly violates the Takings Clause's core underlying principle that "the sovereign may not take the property of A for the sole purpose of transferring it to another private party B." *Kelo*, 545 U.S. at 477. Not only is the Act the result of the racetrack owners' exercise of their political clout with the Legislature and the now-impeached Governor, it has also been alleged by the U.S. Attorney that renewal of the 3% surcharge that the former Governor signed into law in December 2008 was a part of an illegal "pay-to-play" scheme. *See* Petition at p. 6 n. 3. This type of corrupt political environment makes it all the more important that the politically disadvantaged entities whose monies are being taken away from them to subsidize their well-connected competitors be afforded protection by the courts under the Fifth Amendment.

If Illinois is allowed to compel certain of its casinos to transfer tens of millions of dollars in revenues to their less successful racetrack competitors, then any other state or local government would be free to follow suit. In this very difficult economic environment, countless businesses are looking for assistance and bailouts to weather the storm, and state and local politicians will be all too happy to act as "Robin Hood" to redistribute the wealth from successful but politically unpopular businesses to

more politically well-connected competitors. One can envision legislation requiring large banking institutions to pay over millions of dollars to smaller, local banks that are in dire straits; or requiring a large home supply chain to pay 5% of its revenues to subsidize unprofitable local hardware stores; or requiring large supermarket chains to pay 10% of their revenues to subsidize struggling local grocers; or requiring national "big-box" retailers to pay 15% of their revenues to subsidize scuffling local Mom-and-Pop stores. A legislature could decide that "factory farms" should transfer 15% of their revenues to competing "family" farms. If no constitutional constraints are imposed on the ability of state and local governments to rob Peter to pay Paul, all manner of legislative mischief may ensue.

This Court should grant certiorari to reaffirm its longstanding commitment to the principle that, under the Takings Clause, the Government is barred from singling out certain persons to pay for the misfortunes of others. As this Court has emphasized, the Takings Clause "was designed to bar Government from 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.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 27, 2009