

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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

*Petitioners,*

v.

ALEXI GIANNOULIAS, ILLINOIS RACING BOARD, BAL-  
MORAL 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 Supreme Court of Illinois**

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

In this case, the Illinois Supreme Court held that a state law transferring the revenues of four Illinois casinos to five Illinois horse-racing tracks is categorically not susceptible to 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:

Whether the State's taking of money from private parties is wholly outside the scope of the Takings Clause.

**RULE 29.6 STATEMENT**

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state that Empress Casino Joliet Corporation is a wholly-owned subsidiary of Hollywood Casino Corporation, which in turn is wholly owned by Penn National Gaming, Inc., a publicly traded company. Hollywood Casino Corporation is a wholly-owned subsidiary of Argosy Gaming Co, which is also a wholly-owned subsidiary of Penn National Gaming, Inc. Petitioner Elgin Riverboat Resort d/b/a Grand Victoria Casino, an Illinois general partnership, is a joint venture between Nevada Landing Partnership, an Illinois general partnership, and RBG, LP, an Illinois limited partnership. Nevada Landing Partnership is wholly owned by MGM Mirage, which is a publicly traded company. RBG, LP is privately owned. Petitioner Des Plaines Development Limited Partnership is an Illinois limited partnership, of which Harrah's Illinois Corporation is the 80% General Partner and Des Plaines Development Corporation is the 20% Limited Partner. No publicly owned company owns 10% or more of Des Plaines Development Limited Partnership.

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## **PETITION FOR A WRIT OF CERTIORARI**

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Petitioners Empress Casino Joliet Corporation, Des Plaines Development Limited Partnership, Hollywood Casino-Aurora, Inc., and Elgin Riverboat Resort (“Petitioners”), respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

### **OPINIONS BELOW**

The opinion of the Supreme Court of Illinois (App., *infra*, 1a-33a) is reported at 896 N.E.2d 277. The opinion of the Illinois Circuit Court (App., *infra*, 34a-50a) is unreported. The order denying petitioners’ petition for rehearing (*id.* at 55a) is unreported, but published at 2008 Ill. Lexis 892.

### **JURISDICTION**

The Supreme Court of Illinois entered its judgment on June 5, 2008. That court denied petitioners’ timely petition for rehearing on September 22, 2008. On December 10, 2008, Justice Stevens extended the time for filing a petition for a writ of certiorari to January 21, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Relevant portions of the Fifth and Fourteenth Amendments to the U.S. Constitution, and of 230 ILCS 10/7, are reproduced in the appendix to this petition. App., *infra*, 56a-64a.

### **STATEMENT**

This case involves a constitutional challenge to an Illinois statute that requires petitioners, who own four of the nine casinos in the State, to transfer 3% of

their adjusted gross receipts to Illinois horse-racing tracks, for the ostensible purpose of improving the financial health of the Illinois horse-racing industry. Petitioners contend that this law – which appropriates some of their property and awards it outright to their competitors – effects a taking of that property within the meaning of the Fifth Amendment’s Takings Clause. There is no doubt that the Takings Clause would have been implicated had the State expropriated a portion of petitioners’ real estate, intellectual property, slot machines, or stock certificates, and transferred *that* property to the race-tracks. But because the State instead took petitioners’ *money*, the Illinois Supreme Court rejected their takings claim, holding that the appropriation of petitioners’ revenue “is not subject to a takings challenge” *at all* because “regulatory actions requiring the payment of money are not takings.” App., *infra*, 25a-26a.

The question whether and in what circumstances money may be the subject of a constitutional “taking” is a recurring one that arises with great frequency in a wide range of contexts. It has divided the lower courts; although some agree with the rule applied below in this case, others have held that the expropriation of money *does* effect a taking. The last time this Court addressed the question, in *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998), it failed to produce a controlling opinion, an outcome that has exacerbated the confusion and disagreement on the subject in the lower courts. Yet the question is one of great practical importance: the rule that the Takings Clause affords no protection against the exaction of money encourages abusive governmental actions that “force[] 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). Review by this Court to settle the controlling rule accordingly is essential.

1. Nine riverboat casinos are currently licensed and operating in Illinois. Five casinos are located in the central or southern portions of Illinois. The other four operate near Chicago in Aurora (the Hollywood Casino), Elgin (the Grand Victoria), and Joliet (Harrah’s and the Empress Casino). Illinois Gaming Board, 2007 Annual Report 20, available at <http://www.igb.state.il.us/annualreport>. Petitioners own the licenses for the four Chicago-area casinos, which enjoy higher adjusted gross receipts (“AGR”) than their downstate counterparts. *Id.* at 15.<sup>1</sup>

There are five Illinois tracks that feature live horse racing. See App., *infra*, 1a-2a. On-track betting at these tracks has declined over the past fifteen years; racing interests blame the lure of riverboat gaming for the change. See *id.* at 3a.<sup>2</sup> In response to the racing industry’s concerns, in 1999 the Illinois General Assembly lowered the tracks’ tax burdens by approximately two-thirds. 230 ILCS 5/27. At the same time, the legislature provided that 15% of the wagering taxes paid by a tenth licensee would be paid into a “Horse Racing Equity Fund” for the bene-

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<sup>1</sup> “Adjusted gross receipts’ means the gross receipts [from wagering] less winnings paid to wagerers.” 230 ILCS 10/4(h).

<sup>2</sup> The connection is debatable. Purses increased for thoroughbred racing from 1992 to 2007, hitting a peak in 2002 after almost a decade of competition from riverboats; most of the decline is attributable to reduced interest in harness racing. Illinois Racing Board, 2007 Annual Report 8, available at <http://www.state.il.us/agency/irb/racing/reports>.

fit of the tracks (230 ILCS 10/13(c-5)). That subsidy has not yet gone into effect because until very recently the tenth license was mired in litigation.

2. In 2006, Illinois imposed the charge on casinos that is at issue in this case. Initially, the legislature considered a proposed surcharge on the AGR of all but the smallest of the Illinois casinos, which would be used to subsidize the racetracks. H.B. 1917, 94th Gen. Assemb. (Ill. 2006). After that measure twice failed to obtain the votes needed for passage, the legislation was modified so that the surcharge would be imposed only on those casino licensees that had AGR above a specified amount in 2004. H.B. 1918, 94th Gen. Assemb. (Ill. 2006). This threshold limited the statute's reach to the four Chicago-area casinos operated by petitioners, exempting the five "downstate" casinos. The legislation, Public Act 94-806 ("the Act") (reprinted in relevant part at App., *infra*, 56a-61a), passed in this form.

After declaring that riverboat gaming has had a negative impact on horse racing (see Public Act 94-806, § 1(1)-(2), App., *infra*, 56a), the Act provided that, "as a condition of licensure" and in addition to a \$5,000 annual licensing fee, all casinos with AGR above \$200 million in 2004 – in practice, the Chicago-area casinos – were, on a going-forward basis, to pay 3% of their AGR into the "Horse Racing Equity Trust Fund." 230 ILCS 10/7(a), App., *infra*, 60a. This 3% surcharge, paid on a daily basis, was "in addition to any other payments required" by Illinois law (*ibid.*), including wagering taxes imposed by 230 ILCS 10/13. Petitioners were required to pay the surcharge for "a period of 2 years." 230 ILCS 10/7(a), App., *infra*, 60a.

The Act divided the surcharge proceeds into two categories. Sixty per cent of the proceeds would be distributed to tracks as purses. 230 ILCS 5/54.5(b)(1), App., *infra*, 57a-58a. The remaining 40% of the proceeds were to be distributed directly to the tracks as an operating subsidy. 230 ILCS 5/54.5(b)(2)(B), App., *infra*, 58a. Eleven percent of the subsidy was to go to the one downstate racetrack (Fairmount Park), which is almost 250 miles away from the nearest casino required to pay the surcharge. 230 ILCS 5/54.5(b)(2)(A), App., *infra*, 58a. The remaining 89% was to be distributed to tracks pro rata according to the proportion of wagering revenues earned on live races in Illinois in 2004 and 2005. *Id.* at 5/54.5(b)(2)(B), App. *infra*, 58a. Under this distribution scheme, the tracks that have been most successful in attracting wagering activity would receive the largest subsidies; the most successful track in Illinois (Arlington Park, near Chicago) thus would receive the largest payout.

The Act gives the racetracks complete discretion as to how the subsidy would be used in their businesses, providing only that the payments are to be used “to improve, maintain, market, and otherwise operate its racing facilities to conduct live racing, which shall include backstretch services and capital improvement related to live racing and the backstretch.” *Ibid.* App., *infra*, 59a. Track operators therefore could use the money to finance their ordinary expenses; because the tracks were not obligated to undertake new projects or maintain pre-subsidy levels of investment or working capital in their operations, the subsidies could boost profits and go straight to the tracks’ bottom lines. The Illinois Racing Board is to monitor how the funds are “distributed,” but not how they are spent. 230 ILCS

5/54.5(c), App., *infra*, 57a. To assure that the entire surcharge would be used to subsidize the tracks, the Act provides that the horse racing fund is a “non-appropriated trust fund held separate and apart from State moneys.” 230 ILCS 5/54.5(a), App., *infra*, 57a.

Although the Act’s payment obligation terminated in May 2008, in November 2008 the Legislature re-enacted virtually identical legislation that extends the Act’s surcharge for an additional three years, through 2011. The burden imposed on petitioners during that period may exceed \$100 million.<sup>3</sup>

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<sup>3</sup> While the new legislation was awaiting Governor Rod Blagojevich’s signature in December 2008, the United States filed a criminal complaint against Governor Blagojevich, alleging, among other things, that a potential contributor (since identified as an official of a racetrack that benefits from the Act) was pressured to make an immediate \$100,000 contribution to “Friends of Blagojevich” as an apparent quid pro quo for the Governor’s signing of the 2008 racetrack legislation. Crim. Compl., *United States v. Blagojevich*, No. 1:08-cr-1010, ¶ 68(e) & n.18 (N.D. Ill., filed Dec. 7, 2008), available at [http://www.usdoj.gov/usao/iln/pr/chicago/2008/pr1209\\_01a.pdf](http://www.usdoj.gov/usao/iln/pr/chicago/2008/pr1209_01a.pdf); Tamara Audi & Douglas Belkin, *Affidavit Alleges Blagojevich Sought Racing Official’s Contribution*, WALL ST. J., Dec. 24, 2008, at A7. On December 15, 2008, despite the protests of the U.S. Attorney (see Patrick Fitzgerald, Press Conference, Dec. 9, 2008 (transcript available at <http://www.nytimes.com/2008/12/09/us/politics/09text-illinois.html>)), Governor Blagojevich signed the new legislation. Moreover, approximately one month after Governor Blagojevich signed the 2006 Act into law, an entity associated with the Balmoral Park racetrack made a substantial contribution to Friends of Blagojevich; a Special Investigative Committee of the Illinois House found that large donations to the Governor’s campaign committee were often made “shortly before or after the receipt of direct benefits by the donor or the donor’s employer,” an association that the committee found unlikely to be “coincidental.” Illinois House of Representatives,

3. Four days after the Act became law on May 26, 2006, petitioners brought this suit in state court, challenging the Act's constitutionality.<sup>4</sup> Among other arguments based on state law and the U.S. Constitution, petitioners contended that the 3% surcharge was an unconstitutional taking because it forced them to subsidize their competitors and did not serve a "public use." On cross-motions for summary judgment, the trial court struck down the Act under the Illinois Constitution. App., *infra*, 34a-50a. The court enjoined the Act's enforcement, but subsequently stayed its order pending appeal. *Id.* at 53a-54a. Accordingly, petitioners continued to remit the surcharge on a daily basis for the entire two-year period the Act was in effect, in amounts ultimately exceeding \$75 million. The moneys have been maintained in a protest fund, where they remain pending final resolution of this suit.

Respondents appealed directly to the Illinois Supreme Court (see Ill. Sup. Ct. R. 302(a)(1)) challenging the trial court's state-law ruling, while petitioners defended the lower court's decision and reasserted their contention that the Act violated the Takings Clause because it took funds for the support of private actors. The Illinois Supreme Court upheld the Act, reversing the trial court's state-law ruling and rejecting petitioners' federal takings argument. App., *infra*, 1a-33a.

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Special Investigative Committee, Final Report 29 n.41 (Jan. 8, 2009), available at <http://tinyurl.com/8of5q2>. These revelations suggest that the primary purpose of the 2006 and 2008 Acts was to benefit the racetracks, not the public.

<sup>4</sup> Various racing interests intervened as defendants. App., *infra*, 5a.

On the takings question, the Illinois Supreme Court never reached the “public use” issue. Instead, the court declared it “well settled that the takings clause[] \* \* \* appl[ies] only to the state’s exercise of eminent domain” (App., *infra*, 21a), a principle that the court believed altogether precludes a takings challenge “to fees, whether for certain services or for licensing.” *Id.* at 22a. A takings analysis therefore could not apply here, the court explained, because the Act “is in no way tied to real property” or any other “identifiable property interest.” *Id.* at 23a-26a.

In reaching this conclusion, the Illinois court relied heavily on the concurring and dissenting opinions in *Eastern Enterprises*. Pointing to those opinions, the court reasoned that “a majority of the Justices [of this Court] rejected the theory that an obligation to pay money constitutes a taking.” App., *infra*, 24a. See *id.* at 25a (“five Justices of the Supreme Court in *Apfel* reaffirmed the traditional rule that regulatory actions requiring the payment of money are not takings”). The court below accordingly “conclude[d] that the surcharge at issue here is not subject to a takings challenge,” reasoning that it “does not involve an interest in physical or intellectual property, nor does it operate upon or alter an identifiable property interest”; “[t]he case at bar does not involve the state’s exercise of its eminent domain powers, but rather involves its exercise of its taxing powers.” *Id.* at 26a. The court therefore found it unnecessary to determine whether the Act failed to serve a public use or provided just compensation.

#### **REASONS FOR GRANTING THE PETITION**

On its face, the Act appears to be the paradigm of a constitutional taking. As this Court stated in *Kelo v. City of New London*, 545 U.S. 469, 477 (2005), a

primary goal of the Takings Clause is to ensure that “the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*.” The Clause also has as a principal purpose “prevent[ing] the 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.’” *Eastern Enterprises*, 524 U.S. at 522 (plurality opinion) (quoting *Armstrong*, 364 U.S. at 49). And it is basic that a taking is likely to occur when “the cost of operating the governmental apparatus” is imposed “upon some small segment” rather than spread “throughout the society.” Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 75-76 (1964). That surely is the case here: the Act takes property from a small and politically less favored group, and transfers those assets to a different and politically powerful group. The Illinois Supreme Court nevertheless held that the Act is not subject to a takings challenge *at all* for the sole reason that “regulatory actions requiring the payment of money are not takings.” App., *infra*, 25a-26a.

The narrow but crucially important question posed by that holding – whether and when an exaction of money may be a taking – warrants this Court’s review. Although the approach taken below finds support in the decisions of some courts, it cannot be reconciled with the holdings of others, which have recognized that money *is* property, the exaction of which is subject to the strictures of the Takings Clause. The confusion about the reach of the Takings Clause is reflected in this Court’s own most recent decision on the subject, *Eastern Enterprises*; that ruling produced no majority opinion or controlling rule, an outcome that, unsurprisingly, has itself served as a source of significant disagreement and

uncertainty in the lower courts. “Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law” (*Eastern Enterprises*, 524 U.S. at 541 (Kennedy, J., concurring in the judgment & dissenting in part)), and clarification by this Court is urgently needed.

The need for review is especially acute because the rule adopted below turns on an illogical distinction that encourages abuse, tempting governments to turn to expropriation of money as a means of aiding favored constituents. In the circumstances here, the forced transfer from the casinos to the racetracks of any asset other than money would be a taking. A different rule should not apply simply because the asset the casinos are forced to give the tracks is money. Even assuming that the transfer serves a public interest, “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 charge.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). To put it plainly, “if the state believes that” the assistance provided to racetracks by the Act “is a service that should be provided, it must be willing to pay for it. There ain’t no such thing as a free lunch.” *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835, 867 (9th Cir. 2001) (Kozinski, J., dissenting), *aff’d sub nom. Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).

**A. The Lower Courts Are Divided On Whether And In What Circumstances The Exaction Of Money May Be The Subject Of A Takings Challenge.**

1. At the outset, review is warranted because the lower courts are divided on whether, and in what cir-

cumstances, a state’s taking of money from private persons may constitute a “taking” in the constitutional sense. The Illinois Supreme Court, of course, held as a general matter that “an obligation to pay money” cannot “constitute[] a taking.” App., *infra*, at 24a. Some other courts have reached the same conclusion, recognizing a per se rule that “actions requiring the payment of money are not takings.” *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001). Accord, e.g., *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990) (“Requiring money to be spent is not a taking of property.”); *BHA Investments, Inc. v. Idaho Alcohol Beverage Control Bd.*, 63 P.3d 474, 481 (Idaho 2003) (transfer fee does not implicate Takings Clause because it involves money); *Home Builders Ass’n of Greater Des Moines v. City of W. Des Moines*, 644 N.W.2d 339, 351 (Iowa 2002) (“The imposition of a tax \* \* \* is generally considered not to constitute a Fifth Amendment taking.”).

Other state courts of last resort and federal courts of appeals have disagreed, however, holding squarely that money *is* property that is subject to the strictures of the Takings Clause. The Utah Supreme Court, for example, applied the Clause to hold unconstitutional a state statute that assigned to Utah fifty per cent of the value of punitive damages awards returned in the State. *Smith v. Price Dev. Co.*, 125 P.3d 945, 947-948 (Utah 2005). That court had no difficulty concluding that, “[b]ecause taking the [plaintiffs’] money denied them the use of that money, it constituted a taking for which just compensation is constitutionally required.” *Id.* at 953.<sup>5</sup>

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<sup>5</sup> The Utah court held the statute violated both the federal and state constitutions, explaining that “[t]he Fifth Amendment

Yet in the relevant respects, the situation before the Utah Supreme Court cannot be distinguished from the one here: the State was attempting to assign to itself a specified portion of an element of the plaintiffs' income; that element of income was in no sense "tied to real property" (App., *infra*, 23a); and the State's action was not an "exercise of eminent domain," which the court below regarded as the essential touchstone of a taking. *Id.* at 21a. The Illinois Supreme Court's holding that money cannot be "taken" is thus squarely inconsistent with *Smith*.

Similarly, the Colorado Supreme Court held that a statute requiring litigants to pay one-third of any exemplary damages award to the State "effectuate[d] a forced taking of the judgment creditor's property interest." *Kirk v. The Denver Publ'g Co.*, 818 P.2d 262, 264 (Colo. 1991).<sup>6</sup> The court explained that "[o]ur conclusion derives from the nature of an exemplary damages award as a private property right, the confiscatory character of the 'taking' mandated by the statute, and the manifest absence of a reasonable nexus between the statutory taking of one-third of the exemplary damages award and the cost of any governmental services [to the plaintiff]." *Id.* at 265. In particular, the court noted that "the taking of a money judgment from the judgment creditor is substantially equivalent to the taking of money itself." *Id.* at 269. Accordingly, the court held, the State's

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analysis is virtually identical" to that under Utah takings law. 125 P.2d at 949.

<sup>6</sup> Like the Utah Supreme Court, the Colorado Supreme Court found the challenged state law violated both the federal and state constitutions. See 818 P.2d at 265. The court's takings analysis relied entirely on decisions of this Court. See *id.* at 268-272.

taking of the funds “has the effect of forcing a select group of citizens – persons who obtain a judgment for exemplary damages and are successful in collecting on the judgment – to bear a disproportionate burden of funding the operations of state government, which, ‘in all fairness and justice, should be borne by the public as a whole.’” *Id.* at 271-272 (quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980)). Again, this holding directly conflicts with the ruling below.

And in somewhat different factual circumstances, the Fifth Circuit found a taking in a state-law requirement that insurers support a workers’ compensation fund according to a formula that looked to the insurers’ volume of business written in prior years. *United States Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 420 (2000). The court held that this burden “amounts to a transfer of plaintiffs’ assets to the state or to third parties for public use.” *Id.* at 417. Pointing to the state law’s effect of “singl[ing] out certain [parties] to bear a burden that is substantial in amount,” the law’s significant retroactive effect, and its lack of relation to “any commitment that the parties made or injury they caused,” the court held that this required payment constituted a taking. *Id.* at 419 (quoting *Eastern Enterprises*, 524 U.S. at 537 (plurality opinion)). This holding, too, cannot be reconciled with the Illinois Supreme Court’s ruling that “regulatory actions requiring the payment of money are not takings.” *App., infra*, 25a.<sup>7</sup>

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<sup>7</sup> See also *In re Twin City Fire Ins. Co.*, 609 A.2d 1248, 1262 (N.J. 1992) (a regulation that interferes with “only the profits of a business enterprise” implicates the Takings Clause).

Moreover, the Illinois Supreme Court’s declaration that the Takings Clause “appl[ies] only to the state’s exercise of eminent domain and not to its power of taxation” (App., *infra*, 21a), cannot be squared with the decisions of other state supreme courts that fees, assessments, and exactions imposed as a condition for obtaining permits necessary for the development of property may violate the Fifth Amendment. These decisions turned expressly on the conclusion that the required payment of money may work a taking of property. The Texas Supreme Court, for example, held that the requirement that abutting streets be improved as a condition for the development of property could constitute a taking, explaining that such a requirement “is in no sense a use restriction; it is much closer to a required dedication of property – *that being the money to pay for the required improvement.*” *Town of Flower Mound v. Stafford Estates Ltd. P’ship*, 135 S.W.3d 620, 635 (Tex. 2004) (emphasis added). The court therefore held that monetary “exactions” are to be treated the same as “dedications [of real property to public use] in determining whether there has been a taking.” *Ibid.* Other courts have reached the same conclusion. See, e.g., *Ehrlich v. Culver City*, 911 P.2d 429, 447 (Cal. 1996) (“when \* \* \* a government imposes special, discretionary permit conditions on development,” the Takings Clause applies no matter “whether they consist of possessory dedications or monetary exactions”).<sup>8</sup>

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<sup>8</sup> See also *Home Builders Ass’n v. City of Beavercreek*, 729 N.E.2d 349, 354-58 (Ohio 2000) (applying takings analysis to impact fee); *Trimen Dev. Co. v. King County*, 877 P.2d 187, 189-190 (Wash. 1994) (park development fees reviewed under Takings Clause). Other courts, however, have reached the opposite

2. The need for this Court to resolve the conflict and clarify this area of the law is especially sharp because much of the uncertainty can be traced to the Court's own fractured decision in *Eastern Enterprises*, the most recent case in which it addressed whether the required payment of money may constitute a taking. There, a four-Justice plurality concluded that, given the enormous burden imposed upon the plaintiff by the governmentally mandated funding of health care benefits, the required payment "effect[ed] an unconstitutional taking." 524 U.S. at 504 (plurality opinion). The four dissenters disagreed, rejecting the possibility that "an ordinary liability to pay money" could constitute a taking. *Id.* at 554 (Breyer, J., dissenting). The decisive vote was cast by Justice Kennedy, who rejected the plurality's takings analysis because the challenged law did "not operate upon or alter any identified property interest, and [wa]s not applicable to or measured by a property interest" (*id.* at 540 (opinion of Kennedy, J.)); he would have invalidated the law on due process grounds. See *id.* at 547-550. Because the plurality and Justice Kennedy did not agree on the source of the governing requirement, *Eastern Enterprises* does not state a clear constitutional rule.

The lower courts have not been uniform in their reading of *Eastern Enterprises*. Some courts of appeals have aggregated the votes of the four dissenters and Justice Kennedy to conclude that "five justices \* \* \* agreed that legally required actions requir-

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conclusion. See *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (no taking occurred because permitting condition sought "to impose a fee"); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995) (Takings Clause does not apply to ordinance "conditioning certain land uses on payment of a fee").

ing the payment of money are not takings” and that “we are obligated to follow the views of that majority.” *Commonwealth Edison Co. v. United States*, 271 F.3d at 1339. See *Parella v. Retirement Bd. of the R.I. Employees’ Retirement Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (following the “majority” of Justices in *Eastern Enterprises* and holding that Takings Clause did not apply because the case did “not involve tangible personal property or real property”); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674 (3d Cir. 1999) (“Five Justices \* \* \* rejected the idea that a law that imposed only a financial burden without identifying a particular property right could ever constitute a taking.”). The court below was of that view. See App., *infra*, 25a (“five Justices of the Supreme Court in *Apfel* reaffirmed the traditional rule that regulatory actions requiring the payment of money are not takings”).

But that analysis is wrong: the Court’s “settled jurisprudence” is that, “when no single rationale commands a majority, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[t] on the narrowest grounds.’” *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 764 n.9 (1988) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). See *Panetti v. Quarterman*, 127 S. Ct. 2842, 2856 (2007). In *Eastern Enterprises*, Justice Kennedy’s view was not “narrower” than that of the plurality; it was simply different from and theoretically incommensurate with that of the plurality.

Other courts of appeals have *not* read *Eastern Enterprises* to establish that monetary exactions are outside the scope of the Takings Clause. The D.C. Circuit, for one, understood the *Eastern Enterprises*

*plurality* to have “applied settled takings principles” and expressed “doubt” that the dissent could have changed the law “given that dissenting votes have no precedential authority.” *Ass’n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 n. 5 (D.C. Cir. 1998). See also *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 237 (4th Cir. 2002) (*Eastern Enterprises* states governing rule only in a case that “with respect to every critical factor[] is substantially identical”); *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001) (“*Eastern Enterprises* has no precedential effect on this case because no single rationale was agreed upon by the Court.”).

Similarly, the Fifth Circuit, believing that “Justice Kennedy’s specific dispute with the rest of the [*Eastern Enterprises*] majority rested on the extent to which a regulatory taking must refer to an identifiable property interest or fund,” found that disagreement “muted” when the court was confronted with a monetary exaction that was tied to a fund of benefits paid each year. *United States Fid. & Guar.*, 226 F.3d at 420. The Fifth Circuit proceeded to hold that the imposition of monetary liability in that case *did* effect a taking, a ruling that the court of appeals believed to be *supported* by *Eastern Enterprises*. *Ibid.*

The Court should resolve this disagreement about the meaning of a significant precedent. This case presents an ideal vehicle for doing so. The takings issue is the only one presented here; unlike in *Eastern Enterprises*, petitioners in this case do not offer alternative bases for disposition of the constitutional challenge. There also are no distracting factual complications here; the petition presents the purely legal question of whether the court below

erred in holding that “a takings analysis is not applicable to plaintiffs’ claims” because the property taken was money. App., *infra*, 26a.

Moreover, as we explain in more detail below, because the Act requires the daily payment of amounts drawn from a specified corpus of gross receipts, consideration of this case would allow the Court to address the ramifications of Justice Kennedy’s observation that the statute challenged in *Eastern Enterprises* did “not operate upon or alter an identified property interest, and [was] not applicable to or measured by a property interest.” 524 U.S. at 540 (opinion of Kennedy, J.). See also *id.* at 541, 543, 544. The specified receipts that are expropriated by the Act, unlike the payments at issue in *Eastern Enterprises*, have many of the characteristics of a discrete fund or account. Review of the decision below therefore would give the Court the opportunity to resolve the significant and recurring question posed by Justice Kennedy’s observation: how to determine when a state law should be understood to “target[] a specific property interest” or to “depend[] upon \* \* \* particular property for the operation of its statutory mechanisms” so as to trigger application of the Takings Clause. *Id.* at 543.

### **B. The Expropriation Of Money May Give Rise To A Takings Challenge.**

Review also is warranted because the Illinois Supreme Court’s per se rule that money cannot be the subject of a taking is indefensible. The Takings Clause of the Fifth Amendment provides: “[N]or shall private property be taken for public use without just

compensation.” U.S. Const., amend. V.<sup>9</sup> As Judge Kozinski put it in a dissenting opinion whose reasoning subsequently was embraced by this Court, “[m]oney *is* property,” and there is “no logical explanation for treating it differently” from other assets for takings purposes. *Washington Legal Found.*, 271 F.3d at 866 (Kozinski, J., dissenting) (emphasis in original). The Illinois Supreme Court’s contrary ruling departs from the theory and history of the Takings Clause, and rests on a distinction that is logically insupportable.

1. *This Court has held that money may be the subject of a taking.*

To begin with, the central aspect of the Illinois Supreme Court’s analysis is demonstrably wrong. That court regarded it as “well settled that the takings clause[] of the federal \* \* \* constitution[] appl[ies] only to the state’s exercise of eminent domain,” adding that the Act cannot effect a taking because it “does not involve an interest in physical or intellectual property” or “operate upon or alter an identifiable property interest.” App., *infra*, 21a, 26a. This analysis is incorrect: the Court has recognized in a range of contexts that the exaction of money may constitute a taking.

In particular, the Court has held that interest earned on principal – unquestionably a monetary asset – was “taken” in a constitutional sense. In *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), the Court struck down a Florida statute that authorized a county court to confiscate

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<sup>9</sup> “The Fifth Amendment[] [is] made applicable to the States through the Fourteenth Amendment.” *Phillips v. Washington Legal Found.*, 524 U.S. 156, 163 (1998).

interest earned on funds held by the court during pendency of an interpleader action. Because the “interest was not a fee for services,” its taking was “a forced contribution to general government revenues.” *Id.* at 162, 163. The Court did not find it material that the taking involved money, explaining that the county’s “appropriation of the beneficial use of the fund is analogous to the appropriation of the use of private property” in *United States v. Causby*, 328 U.S. 256 (1946), where the government took air rights over a farm. *Webb’s Fabulous Pharmacies*, 449 U.S. at 163-164. A taking occurred, the Court held, because “[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. Expropriating the “value of the use of the fund” was “the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.” *Ibid.*

Similarly, the Court held that a taking was effected by the requirement of an Interest on Lawyers Trust Account (IOLTA) program that interest earned on client funds be paid to foundations that provide legal services. *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998). Finding that “the principal held in IOLTA trust accounts is the ‘private property’ of the client,” the Court held that “a State, by *ipse dixit*, may not transform private property into public property without compensation.” *Id.* at 164, 167 (quoting *Webb’s*, 449 U.S. at 164). See *id.* at 170, 172.<sup>10</sup> The Court subsequently built on that conclu-

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<sup>10</sup> The supposed “government-created” value of the interest did not negate the applicability of the Takings Clause. Merely because the State “mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership

sion in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), finding that interest earned on IOLTA accounts “was taken for a public purpose when it was ultimately turned over to the Foundation” and holding that “the transfer of the interest” was “akin to the occupation of a small amount of rooftop space in [*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)].” 538 U.S. at 235.

These holdings necessarily accept that money is constitutionally equivalent for takings purposes to land or other forms of physical property. And the Court, in fact, has never suggested otherwise. To the contrary, the Court has regarded it as obvious that the expropriation of particular forms of revenue is not exempt from takings scrutiny; thus, “[t]he government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amounts collected.” *Phillips*, 524 U.S. at 170. Indeed, even the *Eastern Enterprises* dissenters recognized decisions in which, as they characterized it, the Court “has arguably acted *as if* the Takings Clause might apply to the creation of a general liability.” 524 U.S. at 555 (Breyer, J., dissenting).<sup>11</sup>

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of the interest.” *Phillips*, 524 U.S. at 171 (quoting *Webb’s*, 449 U.S. at 162).

<sup>11</sup> Historically, the Court has recognized in a variety of settings that monetary exactions may be takings. See, e.g., *Norwood v. Baker*, 172 U.S. 269, 279 (1898) (“the cost of a public improvement in substantial excess of the special benefits accruing” to a person constituted “a taking, under the guise of taxation, of private property for public use without compensation”); *Houck v. Little River Drainage Distrib.*, 239 U.S. 254, 275 (1915) (taking may arise where “the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property”). A taking may occur in the taxation context when

2. *The Takings Clause applies to all forms of property.*

These decisions are of a piece with the broader premise of the Court’s takings holdings, derived from the history and theory of the Takings Clause, that *all* forms of property are protected by the Clause. Notwithstanding the Illinois Supreme Court’s focus on eminent domain and real property, the Court has applied takings analysis to personal property of all kinds. See, e.g., *Andrus v. Allard*, 444 U.S. 51 (1979) (bird feathers); *James Everard’s Breweries v. Day*, 265 U.S. 545 (1924) (alcoholic beverages). And the Takings Clause consistently has been “extend[ed] to tangibles and intangibles alike” (*Cincinnati v. Louisville & Nashville R.R.*, 223 U.S. 390, 400 (1912)), protecting such assets as intellectual property (*Ruckelshaus v. Monsanto*, 467 U.S. 986, 1002 (1984)); customer lists, trade routes, goodwill, and other elements of “going concern value” (*Kimball Laundry Co. v. United States*, 338 U.S. 1, 9-11 (1949)); liens and mortgages (*Armstrong*, 364 U.S. at 40, 48; *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 75-78 (1982)); contracts (*Lynch v. United States*, 292 U.S. 571, 579 (1934); *Long Island Water Supply Co. v. City of Brooklyn*, 166 U.S. 685, 690 (1897)); and even an option to *renew* a contract.

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the taxing statute is “so arbitrary” as to necessitate the conclusion that it is “not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment.” *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916). See *Nichols v. Coolidge*, 274 U.S. 531, 542-543 (1927) (inclusion of value of pre-death property transfers in taxable estate was “so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment”).

*United States v. Petty Motor Co.*, 327 U.S. 372, 381 (1946).

Against this background, there is no justification for the categorical rule, announced by the court below, that “an obligation to pay money” is outside the scope of the Takings Clause. App., *infra*, 24a. As Judge Kozinski put it, there surely is no denying that, in every ordinary sense of the word, “[m]oney is property.”<sup>12</sup> *Washington Legal Found.*, 271 F.3d at 867. After all, property – or the “thing” that prior to a taking “was understood to be under private ownership” – encompasses “any discrete, identifiable (even if incorporeal) vehicle of economic value which one can conceive of as being owned.” Frank Michelman, *Property, Utility, and Fairness*, 80 HARV. L. REV. 1165, 1184 n. 37 (1967) (cited in *Loretto*, 458 U.S. at 427 n.5). Money comes with the same set of rights that attach to land or personal property: the “right to possess, use and dispose of it.” *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). At the very least then, property interests inhere in “actual ownership of real estate, chattels, or money.” *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (emphasis added).

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<sup>12</sup> *United States v. Sperry Corp.*, 493 U.S. 52 (1989), is not to the contrary. There, the deduction of a fee from a damages award was held not to be a taking because it was “reimbursement of the cost of” the tribunal’s services. *Id.* at 63. The Court explained that “money is fungible” to emphasize that, *if* the government *may* charge a fee, it makes no difference whether “the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately.” *Id.* at 62 n.9. Nowhere did “the Supreme Court suggest that the government’s obligation to pay compensation is eliminated because it takes money rather than real or personal property.” *Washington Legal Found.*, 271 F.3d at 867 (Kozinski, J., dissenting).

And in all other contexts, the Constitution protects money, just as (and in just the same way as) it protects other forms of property. “The assets of a business \* \* \* unquestionably are property” for due process purposes. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). Due process shields against excessive punitive damage awards that take “‘property’ from the defendant” – that is, its money. *Philip Morris USA v. Williams*, 549 U.S. 346, 349, 359 (2007). Garnishment of wages likewise triggers Fourteenth Amendment procedural protections. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 341-342 (1969). Nothing in the text or history of the Constitution justifies treating money any differently for purposes of the Takings Clause.<sup>13</sup>

Indeed, excluding money from the protection of the Takings Clause would lead to a host of logical conundrums. There is no doubt that a taking would occur if Illinois conveyed \$75 million worth of petitioners’ real estate, fixtures, furnishings, trademarks, restaurant cutlery, ornamental fish, or common stock to the racetracks; it is not at all apparent

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<sup>13</sup> It therefore is no surprise that the fundamental conceptions of property that informed the Framers of the Taking Clause support the treatment of money as property. See John Locke, SECOND TREATISE OF CIVIL GOVERNMENT, Ch. 5, § 36 (1690) (“[t]he measure of property nature has well set by the extent of men’s labour”); 1 Wm. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 134 (1765) (property “consists in the free use, enjoyment, and disposal of *all his acquisitions*, without any control or diminution, save by the laws of the land”). James Madison – the driving force behind the Takings Clause – similarly believed that “a man’s land, or merchandize, or *money* is called his property.” James Madison, ESSAY ON PROPERTY ch. 16 (Mar. 29, 1792) (emphasis added).

why a taking does not occur when Illinois instead conveys an equivalent amount of petitioners' cash, an exaction that has precisely the same practical impact both on petitioners and on the tracks. Moreover, money "is the currency with which government pays for property interests under the Takings Clause." John Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1038 (2003). There accordingly would be little purpose in the Clause "if the government could take a person's land by eminent domain, compensate the owner, and then reclaim the money without constitutional limitation." *Ibid.* And that is especially so because we "no longer count our wealth by looking first to our social property of land, farms, buildings"; our chief "means of support consist of legal property: stocks, bonds, pensions." Bruce Ackerman, PRIVATE PROPERTY AND THE CONSTITUTION 166 (1977).

Thus, as Judge Kozinski explained in voicing his disagreement with the notion "that money is different [from other property] because it is fungible":

If the government comes into your house and takes [a] Renoir off the wall, you will suffer a compensable loss. You suffer the same loss if the government comes into your house and seizes an equal value in cash—the two events are indistinguishable for purposes of takings analysis. \* \* \* For purposes of the takings clause then, real and personal property are reduced to their cash equivalents.

*Washington Legal Found.*, 271 F.3d at 866 (Kozinski, J., dissenting)). That makes it "peculiar and quite dangerous to say that the government has greater latitude when it takes money than when it takes other kinds of property"; the Takings Clause does not

cease to apply because the “property in question is money.” *Ibid.*

3. *Takings analysis may not be avoided by characterizing the Act as a tax.*

For several reasons, it is no answer to this point to suggest, as did the court below, that a taking did not occur because the Takings Clause does not apply “to the state’s power of taxation” and the Act involved an “exercise of [the State’s] taxing powers.” App., *infra*, 21a, 26a. *First*, the Act is by no means a tax of the ordinary sort: a law that transfers A’s assets directly to B is not “a pecuniary burden laid upon individuals or property for the purpose of supporting the Government.” *United States v. Reorganized CF&I Fabricators*, 518 U.S. 213, 224 (1996). The Act commits some (but not all) of the licensed casinos in Illinois to support five racetracks, not governmental operations or the public in general. This perhaps explains why the Illinois legislature labeled the taking a “surcharge,” deemed it a “condition of licensure,” and cordoned off the provision in a statutory section regarding “Owners Licenses,” separate from the “Wagering tax” sections. Compare 230 ILCS 10/7(a) with 230 ILCS 10/13.

*Second*, the taking here is much more closely akin to one directed at a defined fund of assets, such as the IOLTA account in *Phillips*, than it is to the imposition of a general obligation like the one imposed by the statute challenged in *Eastern Enterprises* or an ordinary income tax. In *Eastern Enterprises*, “the Federal Government ha[d] not specified the assets that Eastern [had to] use to satisfy its obligation” (524 U.S. at 529 (plurality opinion)); the challenged statute was “indifferent as to how the regulated entity elect[ed] to comply or the property it

use[d] to do so.” *Id.* at 540 (opinion of Kennedy, J.). See *id.* at 555 (Breyer, J., dissenting). The Illinois Act, in contrast, specifies the source and nature of the assets that must be paid over: petitioners must make *daily* payments of a specified portion of the prior day’s adjusted gross receipts for a two-year period. See App., *infra*, 60a. This obligation “operate[s] upon \* \* \* an identified property interest” and is “measured by [that] property interest.” *Id.* at 540 (Kennedy, J., concurring).

*Third*, and in any event, “[t]axation is not immune from the strictures of the Takings Clause.” Calvin Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL’Y 85, 88 (1996). More than one commentator has recognized that the taxing power “is not merely similar to eminent domain; it is the same, as far as the power itself goes.” William Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 571 (1972).<sup>14</sup> Thus, as one court put it early on, “[t]he right of taxation and the right of eminent domain rest substantially on the same foundation.” *Griffin v. Mayor of Brooklyn*, 4 N.Y. 419, 422 (1851). But “most taxes are not takings because they incorporate precisely the goal which the compensation rule is designed to achieve: they spread the cost of operating the governmental apparatus throughout the society rather than imposing it upon some small segment.” Sax, *supra*, 74 YALE L.J. at 75-76. Such taxes “couple[] burdens on

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<sup>14</sup> See, e.g., Richard Epstein, TAKINGS 283-305 (1985) (rejecting a strict divide between taxing and taking); Walter Blum & Harry Kalven, Jr., THE ANATOMY OF JUSTICE IN TAXATION 5 (1973) (“Taxes can be set so high that the taxpayer is forced to dispose of specific property or simply turn it over to government in order to satisfy his tax obligation[.]”).

a broad swath of the population with benefits from the use of tax revenues sprinkled over a similarly large portion of society.” Eric Kades, *Drawing the Line Between Taxes and Takings*, 97 NW. U. L. REV. 189, 203 (2002). Taxes therefore “usually have the kind of general applicability that mutes the concerns behind takings jurisprudence. The broader the reach of a law, the less likely it is that a powerless segment of society is being unfairly singled out to bear a burden that society as a whole should bear.” *Unity*, 178 F.3d at 676.

The Act, however, is of an entirely different character. It has nothing in common with the myriad income, property, sales, consumption, and corporate taxes routinely imposed by government. The surcharge imposed by the Act is not a special assessment or a general tax for which petitioners receive something in return, either directly (like a fee for road construction that may increase the number of casino visitors) or indirectly (like a tax supporting police services or the other general benefits of living in a civilized society). Rather, petitioners pay a portion of their revenues directly to a small and identified group of their competitors, to be used by those competitors for essentially any purpose and without government supervision, even though petitioners do not obtain *any* “average reciprocity of advantage.” *Pennsylvania Coal Co.*, 260 U.S. at 415.

In fact, as petitioners argued below, the Act’s award of benefits is so skewed to the advantage of private interests that it does not satisfy the Fifth Amendment’s public use requirement: “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), and there is every reason to

believe that the Act’s “actual purpose was to bestow a private benefit.” *Id.* at 478.<sup>15</sup> These oppressive characteristics of the legislation, which make clear that the Act’s burdens are not “shared among a community \* \* \* for [its] collective benefit” (Fee, *supra*, 76 S. CAL. L. REV. at 1040), “implicate[] fundamental principles of fairness underlying the Takings Clause” and establish that the Act is a taking rather than a tax. *Eastern Enterprises*, 524 U.S. at 537 (plurality opinion).

Even if the Court accepts at face value the legislative declaration that the Act served a public purpose by “benefit[ing] \* \* \* Illinois farmers, breeders, and fans of horseracing” (App., *infra*, 57a), it forces four casinos “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. The Court has long recognized that the Takings Clause “prevents the public from loading upon one individual

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<sup>15</sup> The Act lacks the characteristics that might give it a clear public purpose: it is a naked transfer of assets from petitioners to known entities, as opposed to one where “the identity of *B* was unknown” (*Kelo*, 545 U.S. at 478 n.6); and that transfer is made without strings, rather than as part of a “carefully formulated” and “comprehensive” plan. *Id.* at 483-484. As the Court noted in *Kelo*, such “a one-to-one transfer of property, executed outside the confines of an integrated development plan,” is “an unusual exercise of government power [that] would certainly raise a suspicion that a private purpose was afoot.” *Id.* at 487. See *id.* at 487 n.17 (“Courts have viewed such aberrations with a skeptical eye.”); *id.* at 493 (Kennedy, J., concurring) (“there may be categories of cases in which transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose”). For these reasons, the Act cannot not survive “public use” scrutiny.

more than his just share of the burdens of government.” *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). “A tax singling out one or a handful of citizens offends” that oft-repeated constitutional principle. Kades, *supra*, 97 NW. U. L. REV. at 190. But that is just what the Act is designed to do.

4. *The question presented is one of great importance.*

Finally, review is imperative because the issues presented here are potentially recurring ones of great practical importance. As noted above, the question whether money may be “taken” in a constitutional sense arises repeatedly in a wide range of contexts. Often, as in this case and *Eastern Enterprises*, enormous sums are at stake in such disputes. And the problem has particular currency at times of economic distress, as governments at all levels seek additional and alternative sources of revenue – for themselves and for particular private parties – to relieve serious budgetary constraints. If the decision below upholding the Act is correct, state and local governments will be emboldened to enact legislation that takes money from successful businesses and awards it to less successful (or more favored) competitors, under the guise of advancing the local economy. It is hardly farfetched, for example, to envision local governments imposing such charges on “big box” stores to be distributed as subsidies to local retailers, or on chain drug stores to be distributed to local pharmacies, or in a host of similar circumstances.

As the Texas Supreme Court has noted, “it [is] entirely possible that the government could ‘gang up’ on particular groups to force extractions that a ma-

majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.” *Town of Flower Mound*, 135 S.W.3d at 641. And this Court has long recognized the legislative temptation to enact laws “that take[] property from A, and gives it to B.” *Kelo*, 545 U.S. at 478 n.5 (quoting *Calder v. Bull*, 3 Dall. 386, 388 (1798)). That temptation to impose special burdens on disfavored groups, and to do so for the benefit of the politically powerful, is made more difficult to resist if expropriations of money are not constrained at all by the Takings Clause. See Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 309 (1990) (“[a] central theme of takings law is that protection is offered against the possibility that majorities may mistreat minorities”).

As this case demonstrates, these dangers are not theoretical. Federal officials have alleged that the Governor of Illinois pressed a racetrack operative for a substantial campaign contribution as a quid pro quo for effectively extending the Act for an additional three years; it appears that other racing officials donated to the Governor’s campaign committee shortly after he signed the initial Act into law. See note 5, *supra*. These allegations support the conclusion, already evident from the way in which the Act was structured, that the legislation was intended to further the tracks’ private interests, at the expense of their competitors. But whatever the ultimate outcome of the federal corruption case against the Governor, the allegations against him show the ease with which government can force disfavored parties “alone to bear public burdens.” *Armstrong*, 364 U.S. at 49. Indeed, wholly apart from the allegations of corruption, this case illustrates how a rule excluding money from the protections of the Takings Clause

encourages subversion of a core principle of that Clause: 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 478 n.5. This Court has recognized its special obligation to guard against such abuses. See *Id.* at 487 n.18. Review of the decision below accordingly is in order.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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