No. 13-625

In The Supreme Court of the United States

A. GALLO AND COMPANY, INC., *ET AL.*,
Petitioners,

v.

DANIEL C. ESTY, COMMISSIONER, *ET AL.*

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

BRIEF OF BEVERAGE DISTRIBUTOR RESPONDENTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For nearly 30 years, Connecticut beverage distributors possessed established property rights in so-called "unclaimed refund values" accumulated in conjunction with the State's bottle return regulatory scheme. The Connecticut Supreme Court eliminated these rights in holding that a recent amendment to the regulatory scheme did not affirmatively vest distributors with an interest in the unclaimed refund values, allowing the State to retroactively take the distributors' property. The questions presented are:

I. Whether the Connecticut Supreme Court's opinion eliminating an established property right, and allowing the State to retroactively take the petitioners' property, effected a "judicial taking" in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

II. Whether the Connecticut Supreme Court's opinion arbitrarily deprived distributors of their property in violation of the Due Process Clause of the Fourteenth Amendment when it held that distributors had no property rights in unclaimed refund values, despite 30 years of settled expectations and practices to the contrary.

RULE 29.6 DISCLOSURE

The Beverage Distributor Respondents supporting Petitioners are: Adirondack Beverages Corporation, Coca-Cola Bottling Company of Northern New England, Inc., Coca-Cola Enterprises, Inc., and Polar Beverages. They were intervenors-plaintiffs-appellees below.

Adirondack Beverages Corporation is a subsidiary of Polar Beverages. No publicly-traded company owns 10 percent or more of its stock.

Coca-Cola Bottling Company of Northern New England, Inc. is owned by Kirin Holdings Company, Ltd., a corporation that is publicly traded on the Tokyo Stock Exchange.

Coca-Cola Enterprises, Inc. is now known as Coca-Cola Refreshments USA, Inc., and is wholly owned by The Coca-Cola Company, a publicly-traded company.

Polar Beverages has no parent corporation, and no publicly-traded company owns 10 percent or more of its stock.

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STATEMENT

Connecticut reached backwards in time to target and sweep a few private bank accounts into the general Treasury just because "the legislature wanted as much money as possible" to redress a general budget deficit. Pet. App. 64a. That is a classic *per se* taking in violation of the United States Constitution. The Connecticut Supreme Court held that this retroactive seizure was not a taking because the distributors' funds ceased being their property even *before* the funds were confiscated, at the moment the funds were deposited into special segregated accounts. That court's re-writing of Connecticut property law "contravene[d] the

established property rights of" the beverage distributors and thereby effected a taking. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2613 (2010). For that reason, respondent beverage distributors agree with petitioners that this Court should grant review to resolve the question left open after *Stop the Beach* that continues to divide the courts of appeals and state courts of last resort: whether the judiciary can effect a taking of property under the Fifth and Fourteenth Amendments. *See* 130 S. Ct. at 2602 (plurality).

1. The Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, mandates that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. Amend. V; *see Phillips v. Washington Legal Found.*, 524 U.S. 156, 163-164 (1998).

A State effects a taking when it seizes funds from identified private bank accounts without compensation. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) ("transfer of the interest" from private IOLTA accounts was "akin to [physical] occupation"); *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) ("[W]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a '*per se* [takings] approach' is the proper mode of analysis under the Court's precedent.") (quoting *Brown*, 538 U.S. at 235) (alteration in original).

A State also effects a taking when it "recharacteriz[es] the principal" deposited into a statute-mandated account "as 'public money.'" *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Thus, where "confiscatory regulations" are concerned, a "State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips*, 524 U.S. at 167. A "State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies*, 449 U.S. at 164.

In *Stop the Beach*, a plurality of the Court concluded that the "particular state *actor* is irrelevant" to this analysis, and that a court has taken property if it "declares that what was once an established right of private property no longer exists." 130 S. Ct. at 2602. Four Justices, however, declined to decide whether a judicial decision can effect a taking. *See id.* at 2613 (Kennedy, J., joined by Sotomayor, J., concurring in the judgment) ("[T]his case does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause."); *id.* at 2618 (Breyer, J., joined by Ginsburg, J., concurring in the judgment) ("[T]he plurality unnecessarily addresses questions on constitutional law that are better left for another day."). Two of those Justices suggested that the proper framework for analysis was the Due Process Clause rather than the Takings Clause. *See id.* at 2613-2618 (Kennedy, J., joined by Sotomayor, J., concurring in the judgment).

2. In 1980, Connecticut enacted legislation, known as the "Bottle Bill," that requires beverage distributors to pay five-cent refunds (known as "refund values") when consumers return designated empty beverage containers like cans and bottles for recycling. *See* CONN. GEN. STAT. § 22a-243 *et seq.* (Pet. App. 96a-100a). Consumers may redeem the empty containers at retailers or redemption centers. *Id.* § 22a-245(a) & (b). The retailer or redemption center pays the five-cent "refund value" to the consumer and then is reimbursed by the beverage distributor. *Id.* § 22a-245(c). The law also requires distributors to pay a handling fee to retailers and redemption centers for each returned container (currently two cents for nonalcoholic beverage containers). *Id.* § 22a-245(d). Beverage distributors then collect and recycle the containers. Pet. App. 6a.

Some distributors, as a business practice, recoup the cost of paying refund values by charging an additional amount for the beverages they sell. Pet. App. 9a. Although this charge is colloquially referred to as a "deposit," the collection of "deposits" is not mandated by the Bottle Bill, and some distributors simply incorporate the amounts necessary to pay refund values into their pricing structure. *Id.* Those "refund values" or "deposits" are not linked to a particular consumer or container, Pet. App. 6a, and distributors are liable to pay refund values for any containers of the kind, size, and brand that they sell, using any revenue source they chose, *id.*; CONN. GEN. STAT. § 22a-245(c).

For the first three decades of the Bottle Bill's operation, the distributors counted the income from

beverage sales that they designated for the payment of refund values as general revenue and reported those funds as income on their Connecticut and federal income tax returns. Pet. App. 9a.

The law obligates distributors to pay all claimed refund values in full and, if claims exceed deposits, the companies must absorb that cost. *See* CONN. GEN. STAT. § 22a-245(c). Likewise, when more deposit revenue was collected than refunds paid, the distributors' unexpended funds associated with those refund values remained the "property of the distributors in the same way as any income over and above operating expenses would be the property of distributors." Pet. App. 51a.

3. In the fall of 2008, Connecticut "'fac[ed] a significant economic crisis'" and budget deficit. Pet. App. 39a; *see also id.* at 2a. As part of its response, in November 2008 the legislature adopted An Act Concerning Deficit Mitigation, Public Act No. 08-1 ("2008 Act"). Act of Nov. 25, 2008, Spec. Sess., Conn. Pub. Act No. 08-01 (codified as amended at CONN. GEN. STAT. § 22a-245a) (Pet. App. 91a-95a). The legislature amended the Bottle Bill "to provide the state *** with information concerning the container return rate and the amount of money representing the difference between refund values deposited and paid." Pet. App. 7a. To that end, the 2008 Act required distributors to establish accounts in their own names, segregated from their other funds, in which they would deposit "an amount equal to the [five-cent] refund value" for each container sold in Connecticut. 2008 Conn. Pub. Act 08-1, § 11(a) (Pet. App. 93a). The Act further required that all

reimbursements of refund values, as well as fees for maintaining the accounts, be paid from those same accounts. *Id.* § 11(b)-(c) (Pet. App. 93a-94a).[1]

In addition, the 2008 Act directed that distributors submit quarterly reports documenting, *inter alia*, the amount of deposit revenue collected, the refund values paid, the interest, dividends, and returns received on the account, and the fees and overdraft charges incurred. 2008 Conn. Pub. Act 08-1, § 11(c) (Pet. App. 94a). The 2008 Act contained no "provision pertaining to the disposition of the unclaimed deposits at the end of a reporting period." Pet. App. 22a. The law was enacted so that legislators could evaluate "how much revenue was being collected by the distributors and 'whether or not [the State] ought to recapture some or all of the revenue on an ongoing basis.'" Pet. App. 23a (quoting 51 H.R. Proc., Pt. 23, Nov. 24, 2008 Spec. Sess., pp. 7417-7418 (Rep. Staples)). Each beverage distributor respondent opened a special account in the company's own name and deposited the required funds beginning December 1, 2008. Pet. App. 9a-10a.

4. On January 15, 2009, the legislature enacted a second deficit mitigation measure, titled An Act Concerning Deficit Mitigation for the Fiscal Year Ending June 30, 2009, Public Act No. 09-1 ("2009 Act"). Act of Jan. 15, 2009, Conn. Pub. Act No. 09-01 (2009) (codified as amended at CONN. GEN. STAT. § 22a-245a) (Pet. App. 87a-90a). That Act amended the 2008 Act to require that, going forward,

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[1] Section 11(c) begins, "[e]ach deposit initiator ***."

distributors transfer to the State the entire balances remaining in their refund-value accounts at the end of each quarter, including not just the revenue set aside for refund values that were not redeemed, but also all interest, dividends, and returns on the account. *See* 2009 Conn. Pub. Act 09-1, § 15(d) (Pet. App. 89a). The transfer provision was made "[e]ffective April 1, 2009, and applicable to periods commencing on or after December 1, 2008." *Id.* § 15 (Pet. App. 87a) (emphasis omitted).

5. Petitioners filed suit against the Commissioner of the Department of Environmental Protection, the Governor, and the Attorney General alleging that the retroactive confiscation of all funds in their accounts prior to the law's effective date of April 1, 2009 was an unconstitutional taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The trial court granted summary judgment for petitioners on a stipulated record. Pet. App. 38a, 67a. The court first held that, under the Bottle Bill, the refund-value funds in the companies' bank accounts were the property of the distributors. *Id.* at 51a. Indeed, the court noted that the State "cannot, and do[es] not, seriously contest that prior to the 2008 Act, the unclaimed deposits were the property of the plaintiffs." *Id.*

The court further held that the 2008 Act's accounting and reporting requirements "did not strip the [beverage distributors] of their property interest in that money," concluding that the companies did not "lose their beneficial interest in their money simply because it was placed in the special

accounts[]" with limits upon the use of that money. Pet. App. 55a-56a.

Finally, the court ruled that the 2009 Act's retroactive confiscation of the account values effected an unconstitutional taking without just compensation. Pet. App. 64a-65a. In so holding, the court found that the retroactive seizure was undertaken "to address the state's budget deficit[,]" because "the legislature wanted as much money as possible paid over to the state in order to ameliorate the budget crisis." *Id.* at 64a.

Following summary judgment, the court granted intervention to six additional beverage distributors, including respondent beverage distributors, and ordered compensation. Pet. App. 11a & n.5.

6. The Connecticut Supreme Court reversed. That court held that the 2009 Act's retroactive seizure and sweeping of the distributors' accounts did not constitute a taking because the beverage distributors did not have a property interest in the funds deposited in the accounts under the provisions of the 2008 Act. Pet. App. 35a. The court declined to decide whether beverage distributors had property rights in any revenues collected to cover refund-value liability that exceeded refunds paid prior to the passage of the 2008 Act. *Id.* at 19a, 27a. Even if that were the case, the court held, the 2008 Act extinguished any property interest because it did not affirmatively provide that the funds deposited in the special accounts were the property of beverage distributors, *id.* at 18a-22a, and beverage distributors had no incidents of property ownership because of the

use restriction imposed on the segregated accounts, *id.* at 33a-35a.

REASONS FOR GRANTING THE WRIT

Respondent beverage distributors agree with petitioners that this Court should grant review of the Supreme Court of Connecticut's decision. As the petition explains, the questions presented are at the heart of a divide between federal courts of appeals and state courts of last resort regarding whether "judicial takings" are cognizable, a question that this Court left open in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010). The Court should grant review in this case to eliminate that conflict and settle that question with finality. Because the Connecticut Supreme Court's ruling eliminated long-established property rights when it declared that private revenues were public property simply because those revenues were segregated into special accounts, this case presents an ideal vehicle to resolve the question of whether Connecticut may extinguish property rights without Takings Clause scrutiny so long as it does so through judicial decree rather than legislative action.

I. STATE COURTS OF LAST RESORT AND THE COURTS OF APPEALS REMAIN DIVIDED REGARDING WHETHER A COURT DECISION CAN EFFECT A TAKING

This Court granted certiorari in *Stop the Beach* to resolve whether "the decision of a State's court of last resort took property without just compensation in violation of the Takings Clause," 130 S. Ct. at

2597, in the face of a conflict between "federal courts [that] have found judicial takings when a state court has suddenly and unexpectedly changed state common law to deprive landowners of property rights" and decisions of the Florida Supreme Court. Petition for Writ of Certiorari at 31, *Stop the Beach*, 130 S. Ct. 2592 (2010) (No. 08-1151), 2009 WL 698518, *31. Because *Stop the Beach* was decided by less than the full court, and only a plurality reached the issue of whether a judicial decision can constitute a taking, the conflict identified before this Court granted review continues to confuse the law and provide different constitutional answers to the same legal question based entirely on geography.

As the petition identifies, even after this Court's decision in *Stop the Beach*, the courts of appeals and state courts of last resort diverge regarding whether a judicial decision may work an unconstitutional taking. *See* Pet. 28–31. The Third, Ninth, and Federal Circuits, along with the Texas Supreme Court, recognize judicial takings. *See In re Lazy Days' RV Ctr., Inc.*, 724 F.3d 418, 425 (3d Cir. 2013); *Smith v. United States*, 709 F.3d 1114, 1116-1117 (Fed. Cir. 2013); *Vandevere v. Lloyd*, 644 F.3d 957, 963 n.4 (9th Cir. 2011); *Severance v. Patterson*, 370 S.W.3d 705, 710 (Tex. 2012). The Kansas Supreme Court, on the other hand, has concluded that the plurality opinion in *Stop the Beach* has no binding force and does not resolve the cognizability of judicial takings. *Northern Natural Gas Co. v. ONEOK Field Servs. Co.*, 296 P.3d 1106, 1127 (Kan. 2013). And the Second Circuit has expressed skepticism of the alternative due-process approach. *See Harmon v. Markus*, 412 F. App'x 420, 423 (2d Cir. 2011)

(unpublished). Divergence in the district courts reflects the continued uncertainty regarding the cognizability of a claim that a state court decision can effect a taking. *See* Pet. 30.

Moreover, even the courts that recognize judicial-takings claims do not expressly agree about how to identify when an established right has been extinguished such that a taking has occurred. *Compare Smith*, 709 F.3d at 1116–1117 (providing no standard), *with Vandevere*, 644 F.3d at 963 n.4 ("a subterfuge for removing a pre-existing, state-recognized property right[]"), *with In re Lazy Days' RV Ctr.*, 724 F.3d at 425 ("adjudication of disputed and competing [bona fide] claims cannot be a taking"), *with Severance*, 370 S.W.3d at 710 ("[M]erely pronouncing *** a limitation on property rights[] *** would raise serious, constitutional concerns."). This case provides a straightforward opportunity to finally resolve whether judicial-takings claims are cognizable and, if so, when those claims should prevail.

Certiorari is doubly warranted because this case presents an "important question of federal law," S. CT. R. 10(c), that this Court is uniquely positioned to resolve. When, as here, the state court declaring property to be nonexistent is the state court of last resort, this Court is the *only* judicial forum, aside from an unlikely grant of rehearing by the state court, in which petitioners, and similarly situated future plaintiffs, will be able to raise their constitutional claim. *See Stop the Beach*, 130 S. Ct. at 2600 n.4, 2609 (plurality). As the plurality explained in *Stop the Beach*, *res judicata* precludes a

claimant from "launch[ing] a lower-court federal suit against the taking effected by the state supreme-court opinion." *Id.* at 2609. Because of such preclusion, many claims of judicial takings will be barred from federal court review, except in this Court.

II. THE CONNECTICUT SUPREME COURT'S DECLARATION THAT SEGREGATING PRIVATE FUNDS INTO REGULATED BANK ACCOUNTS EXTINGUISHES ALL PROPERTY RIGHTS IN THOSE FUNDS WAS A TAKING

The Connecticut Supreme Court decision "judicially redefined" the beverage distributors' property—the revenues they set aside to pay refund-value liability—as "belong[ing] to the State" solely because those funds were segregated into special accounts. *Stop the Beach*, 130 S. Ct. at 2605 (plurality). That "contravened [the] established property" rights of beverage distributors in their own funds in their bank accounts. *Id.* at 2613. That "judicial elimination of established *** property rights," *id.* at 2606, by sweeping the funds out of private companies' bank accounts, requires this Court's intervention to settle whether "a State [may] do by judicial decree what the Takings Clause forbids it to do by legislative fiat," *id.* at 2601.

A. Beverage Distributors Held Established Property Rights In Their Segregated Funds

The trial court held—and the government respondents and the Connecticut Supreme Court did

not dispute—that for almost 30 years under the original Bottle Bill, beverage distributors had a vested property right to any revenues collected in excess of the amount needed to pay refund-value liability. *See* Pet. App. 19a, 27a (Connecticut Supreme Court declined to decide status of funds prior to 2008 Act); *id.* at 51a ("The defendants here cannot, and do not, seriously contest that prior to the 2008 Act, the unclaimed deposits were the property of the plaintiffs.").

That holding follows inexorably from the manner in which the Bottle Bill operates. "Money is certainly property," *Pirie v. Chicago Title & Trust Co.*, 182 U.S. 438, 443 (1901), and the funds at issue are simply unexpended business revenues that were budgeted for paying refund values. Those private business funds thus "were the property of the distributors in the same way as any income over and above operating expenses would be the property of distributors." Pet. App. 51a. Indeed, the companies reported revenues equivalent to unclaimed refund values as income on their Connecticut and federal income taxes for decades. *See id.* at 9a. The starting point of the property-interest inquiry thus is that the funds ultimately confiscated by the State were private property the moment before the amendments were enacted.

The Connecticut Supreme Court's disregard for the property status of the funds prior to the enactment of the 2008 Act—which by its plain terms did not purport to divest distributors of their property interest in the funds, Pet. App. 22a—is just the first of a series of declarations within the

Connecticut Supreme Court decision that are not "consistent with *** background principles of state property law." *Stop the Beach*, 130 S. Ct. at 2612 (plurality). As petitioners explain, a cardinal principle of Connecticut property law is that a statute alters existing property rights only if it does so plainly and unmistakably. *See* Pet. 20-22. It takes more than statutory silence to terminate vested property rights under Connecticut law. "[F]or there to be *** 'the invasion of some specific legal interest in the property,' there must have been a 'definitive indication'" of the State's "fixed and irreversible" determination to take the property. *Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 739 A.2d 680, 690 (Conn. 1999) (citation omitted). No such legislative direction occurred here. It was only the Connecticut Supreme Court's decision that turned a law requiring that refund values be measured for informational purposes into an evisceration of the beverage distributors' pre-existing property rights.

Even looking at the 2008 Act standing alone, the Connecticut Supreme Court's declaration that beverage distributors had "none of the normal incidents of ownership," Pet. App. 34a, rested on judicial nullification of established property rights that the 2008 Act did not alter. The only change made by the 2008 Act was to require the distributors to segregate some of their funds—calculated by reference to a formula—in a special use account. *See* 2008 Conn. Pub. Act 08-1, § 11(a)-(b) (Pet. App. 93a-94a). That temporary limit upon the use of the funds did not alter the distributors' property right to use the funds to defray the distributors' refund liability.

See Webb's Fabulous Pharmacies, 449 U.S. at 160-161. Beyond that, the 2008 Act left entirely untouched a host of other established property rights with respect to earning income and transferring the accounts. It was only the Connecticut Supreme Court decision that willed those rights out of existence.

1. Connecticut Law Has Long Recognized Limited-Use Property as Private Property

The 2008 Act obligated beverage distributors to deposit five cents for every beverage distributed into a segregated account for the announced purpose of simply measuring the amount of funds involved in the program. 2008 Conn. Pub. Act 08-1, § 11(a) (Pet. App. 93a). The law did not specify any particular source for funding this obligation, and—as the parties stipulated, Pet. App. 9a—the law does not require beverage distributors to charge and collect a "deposit" at the time of sale. The Connecticut Supreme Court's conclusion that the limits placed on the use of those corporate funds after their segregation eliminated *any and all* property rights in the accounts, Pet. App. 34a, destroyed the established property right to use the account funds for a limited purpose benefitting the distributors—that is, for paying their excess refund-value liability. That judgment thus singlehandedly deprived petitioners and the beverage distributor respondents of their longstanding property rights.

First, Connecticut law is settled that limitations upon the use of property, even constraining use to one purpose, do not deprive an owner of his status as

a property holder or his legal right to use his property consistent with regulatory constraints. In multiple contexts, Connecticut law—at least until now—had allowed limitations on use without "judicially redefin[ing]" the property "to belong to the State," *Stop the Beach*, 130 S. Ct. at 2605 (plurality). *See, e.g.*, *Department of Soc. Servs. v. Saunders*, 724 A.2d 1093, 1105 (Conn. 1999) (ward remains equitable owner of tort settlement conveyed into special needs trust even though the funds are not "available" to the ward for purpose of assessing resources for public assistance eligibility); *Edgewood Sch. v. Town of Greenwich*, 38 A.2d 792, 794 (Conn. 1944) (noting that school's "property is sequestered for educational uses" in upholding tax exemption); *Louney v. Louney*, 535 A.2d 1318, 1320 (Conn. App. Ct. 1988) (upholding divorce property division order "limiting the use of funds held in joint accounts [to] the children's education").

Second, Connecticut law is consistent in this respect with cases from this Court recognizing that merely segregating funds and limiting their use neither eliminates property interests in those account funds nor entitles the government to take the account funds for itself. *See Brown*, 538 U.S. at 234 (holding transfer of funds into a governmentally specified and regulated account was "merely a transfer of principal" with no property-ownership repercussions under the Takings Clause); *Webb's Fabulous Pharmacies*, 449 U.S. at 164 (transfer of funds into interpleader account did not "transform private property into public property without compensation, even for the limited duration of the deposit in court").

The Connecticut Supreme Court tried to evade that settled precedent by asserting that the private ownership of the "funds placed in the accounts" was undisputed there. Pet. App. 33a. But that chicken-and-egg response overlooks that the only basis the court identified for questioning ownership here was the statute's regulation of those funds *after* they were deposited into the statutorily directed account. *See* Pet. App. 34a (distributors had "no property interest" because of post-segregation limits on the "right to use and control" segregated funds). The court here thus simply repeated the Florida Supreme Court's rejected "*ipse dixit*" in *Webb's Fabulous Pharmacies* that the transferred money became public property just because it was transferred into an interpleader account. *See* 449 U.S. at 164.

Third, there is no precedent in Connecticut law for conflating "severe[] limit[s]" on "the[] right to use and control" property with having "no property interest" at all. Pet. App. 34a; *cf. Kaufman v. Valente*, 162 A. 693, 695 (Conn. 1932) (recognizing "present rights in *** compensation *** although subject to alteration in amount *** or to defeat"). Nor could there be, because regulation that deprives an owner of all value in the regulated property is itself a taking of private property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

Finally, the right to use the segregated funds to pay the distributors' refund value liabilities is a valuable property right. By declaring that beverage distributors had no property rights in the segregated funds, the Connecticut Supreme Court upheld the

confiscation of the full account funds, which eliminated the companies' valuable right to use their funds to pay business debts. *See* Pet. App. 35a (holding the 2009 Act did not "disturb" the (non-existent) property rights under the 2008 Act, but "simply added a provision directing the state to collect the unclaimed deposits at the end of each reporting period").

More specifically, under the 2008 Act, the distributors had the property right to use funds deposited in one calendar quarter to pay for redemptions made several quarters later. *See* 2008 Conn. Pub. Act 08-1, § 11(a)-(b) (Pet. App. 93a-94a). That right was economically valuable because the amount of liability incurred by a distributor does not necessarily match its sales. Specifically, a distributor must pay retailers five cents when presented with an empty container of the kind, size, and brand sold by the distributor, regardless of who actually sold that container and when. Pet. App. 6a. Indeed, a distributor can incur liability to pay five cents for a beverage that was donated to charity and was never sold by anyone.[2] Distributors may also be subject to refund-value liability for cans sold out of state without a corresponding deposit. *Cf. American Beverage Ass'n v. Snyder*, 735 F.3d 362, 367 (6th Cir. 2013) (discussing redemption of out-of-state containers). As the 2008 Act's express recognition of the possibility of "overdraft charges" makes plain,

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[2] The Bottle Bill was later amended to allow distributors a credit for refund-value payments for donated beverages. *See* CONN. GEN. STAT. § 22a-245a(j).

2008 Conn. Pub. Act 08-1, § 11(c) (Pet. App. 94a), distributors may be subject in any given quarter to refund-value liability in excess of the amount they are required to segregate into the special accounts.

The Connecticut Supreme Court declared that the right to use any excess funds to defray future refund liability was not a property right of the beverage distributors. *See* Pet. App. 34a (holding distributors had "no property interest" because "their right to use and control the deposits was severely limited"). That declaration judicially licensed the legislative confiscation in the 2009 Act, which required the distributors to relinquish any surplus on a quarterly basis and deprived them of the power to use any surplus funds from one quarter to cover refund liability in another. 2009 Conn. Pub. Act 09-1, § 15 (Pet. App. 89a). Instead, distributors must now pay any excess refund liability out of their general funds, because the refund liability admits of no exception for insufficient segregated funds. *See* CONN. GEN. STAT. § 22a-245(c) (Pet. App. 100a).[3]

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[3] The 2009 Act contains a roll-over provision allowing a distributor to credit any payment of excess refund-value liability against future payments to the State. 2009 Conn. Pub. Act 09-1, § 15(e) (Pet. App. 89a-90a). This does not cure the problem; there is a difference between using a surplus to cover refund-value liability and forwarding general corporate funds that cannot be recovered to pay that liability. The right to a future credit against a payment to the State gives distributors nothing more than a cushion in the segregated account to cover future refund liabilities. It does not allow distributors to recover the outlay from their general funds, and is therefore no substitute for the right to use the distributors' segregated funds to pay

In sum, while the 2008 Act limited distributors' use of the segregated funds, it unambiguously left them with a property interest of great value: insurance against any costs accompanying refund-value deficits and the important ability to pay future liabilities. The Connecticut Supreme Court's assertion that the right to use the funds to pay corporate refund-value liabilities was not a property interest thus abruptly upended established Connecticut property law.

2. Beverage Distributors Also Retained a Bundle of Established Rights After the 2008 Act

Beyond the distributors' property interest in use of the funds to pay refund-value liability, the Connecticut Supreme Court's decree that petitioners had no property interest in the segregated funds after the 2008 Act meant that all of the distributors' other "established right[s] of private property" in those funds suddenly "no longer exist[ed]" either. *Stop the Beach*, 130 S. Ct. at 2602 (plurality).

Property is a "bundle" of rights under Connecticut law. *See, e.g.*, *Gangemi v. Zoning Bd. of Appeals*, 763 A.2d 1011, 1015 (Conn. 2001). There is no serious dispute that before the 2008 Act, distributors' owned the full bundle of property rights associated with any funds budgeted for the payment of refund values. *See* Pet. 19–20. The only question

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corporate liabilities up front. *See Stop the Beach*, 130 S. Ct. at 2613 n.12 (plurality) (what matters is whether "the property owner continues to have what he previously had").

is whether the funds' segregation destroyed every one of those rights.

The answer under settled-until-now law is "no." The Connecticut Supreme Court listed several incidents of ownership recognized under state law: "the right to use the property," "the right to earn income from the property and to contract over its terms with other individuals," and "the right to dispose of, or transfer, ownership rights permanently to another party." Pet. App. 33a; *see also, e.g.*, *Celentano v. Oaks Condo. Ass'n*, 830 A.2d 164, 192 (Conn. 2003) (noting possession, use, exclusion, and transfer). The Court then concluded that distributors possessed "no property interest" because of limitations solely on how to "use and control" the segregated funds.

That analysis *sub silentio* extinguishes all of the distributors' other rights in those account funds, such as the rights to earn income on the funds, to contract over terms, and to transfer the accounts, *see Celentano*, 830 A.2d at 192. Although petitioners correctly explain that the right to transfer an asset is not required to achieve the status of property, *see* Pet. 25–26, the property loss here is even more straightforward than that because the 2008 Act did not eliminate the right of the distributors' to transfer the special accounts anyhow. For example, the distributors could have transferred the accounts—which were held in each company's name and provided a pool of funds to cover that company's particular refund-value liability—as part of a sale of the company.

Furthermore, although the 2008 Act cabined the distributors' discretion in *how* to exercise the right to earn income, *see* Pet. App. 34a (noting the act required the funds to be "deposited in a special interest bearing account" in a Connecticut branch), it did not eliminate either the distributors' power to make choices about those accounts nor the right to earn income on them. Distributors could choose from any interest-bearing account in any financial institution with a Connecticut branch, *see* 2008 Conn. Pub. Act 08-1, § 11(a) (Pet. App. 93a), providing them the opportunity to contract over the terms of the accounts. More fundamentally, distributors had the right (indeed, the obligation) to earn income on the segregated funds. Although that income remained segregated with the principal, it was nonetheless available for each distributor's use to pay its own refund-value liability. The Connecticut Supreme Court's decree that petitioners "had no property interest" in the segregated funds thus did what the 2008 Act did not do: it singlehandedly eliminated all of those remaining "sticks" in the "bundle" of rights that constitutes property under established Connecticut law.[4]

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[4] The beverage distributor respondents argued in the Connecticut Supreme Court that the 2008 Act did not divest them of their property rights in the amount of their funds set aside to cover payment of refund values. *See* Br. for Intervenors-Plaintiffs-Appellees, No. S.C. 18764, at 9-15 (Conn. Sept. 26, 2011). Moreover, they and the "[p]etitioners unquestionably raised a taking claim," and "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim *** ." *Yee v. City of Escondido, Cal.*, 503

B. Established Connecticut Law Precludes Extinguishing Property Rights Based On Preparatory Steps

The Connecticut Supreme Court supported its analysis by reasoning "that the Connecticut legislature did not view the unclaimed deposits as the property of the distributors." Pet. App. 30a. Specifically, the court cited legislative history indicating that the legislature enacted the 2008 Act to measure the amount of refund values so that the legislature might evaluate "'whether or not [the state] ought to recapture some or all of the revenue on an ongoing basis.'" Pet. App. 23a (quoting 51 H.R. Proc., Pt. 23, pp. 7417-7418 (Rep. Staples)). From that, the court concluded that the legislature did not view "the funds placed in the special accounts [as] merely a component of the purchase price" and "unavailable for collection by the state," Pet. App. 22a, 24a.

But established Connecticut law mandates precisely the opposite conclusion, for two reasons. First, the fact that the legislature sought only to measure unclaimed refund values and not "to collect" that revenue, Pet. App. 23a, makes plain that the 2008 Act deliberately eschewed altering the status of

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U.S. 519, 534–535 (1992) ("[A]rguments that the ordinance constitutes a taking in two different ways[] *** are not separate *claims*."). Finally, when the claim is that the state court of last resort's decision itself violated federal law, this Court's review is not barred simply because the state court of last resort did not pass upon the question. *Cf. Stop the Beach*, 130 S. Ct. at 2600 n.4.

the general revenues paid into the special accounts as the distributors' property. It was not until a July 2010 amendment that the legislature declared that "[t]he amount required to be deposited pursuant to this section, when deposited, shall be held to be a special fund in trust for the state." CONN. GEN. STAT. § 22a-245a(a). If unclaimed deposits were *already* in trust for the state by virtue of the 2008 Act, that provision would be a nullity. But under Connecticut law, no provision of the Bottle Bill is "mere surplusage." *Rydingsword v. Liberty Mut. Ins. Co.*, 615 A.2d 1032, 1036 (Conn. 1992).

Second, an established principle of Connecticut property law—until this decision—is that private property belongs to its owner until the actual time of government seizure. Title is not divested by threats or advance warnings, let alone the type of hypothesized legislative potentiality that underlay the 2008 Act. *See Santini*, 739 A.2d at 687-688 ("[M]ere governmental planning and temporary steps in anticipation of condemnation of property do not constitute a constitutional taking."); *cf. Stop the Beach*, 130 S. Ct. at 2610 (plurality) ("[A] judicial elimination of established private-property rights that is foreshadowed by dicta or even by holdings years in advance is nonetheless a taking.").

Because the Connecticut Supreme Court declared that the 2008 Act divested the distributors of any property interest in the funds they paid from their corporate treasuries into special accounts, that court upheld the 2009 Act's retroactive confiscation of the accumulated balances in the distributors' special accounts to shore up the State's general budget

deficit. Absent those judicial declarations erasing pre-existing property rights, such a sweeping of select private accounts to solve a general public problem like deficit mitigation would be a classic *per se* taking, *see Brown*, 538 U.S. at 235. That declaration is not "consistent with *** background principles of state property law," *Stop the Beach*, 130 S. Ct. at 2612, and is nothing more than an impermissible re-characterization of private funds as public ones by judicial *ipse dixit*, *Webb's Fabulous Pharmacies*, 449 U.S. at 164. Had the legislature similarly declared that property rights vanished, a taking unquestionably would have occurred. The Constitution equally precludes judicial erasure of longstanding property rights.

CONCLUSION

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

Respectfully submitted.

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December 23, 2013

APPENDIX

APPENDIX TO THE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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United States Constitution, Amend. V.....1a

APPENDIX: RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.