No. _____

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of Illinois

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

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 racetracks. 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.[1]

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.[2] 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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[1] "'Adjusted gross receipts' means the gross receipts [from wagering] less winnings paid to wagerers." 230 ILCS 10/4(h).

[2] 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.[3]

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[3] 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; 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.[4] 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.

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.

[4] 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.[5]

[5] 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).[6] 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.

[6] 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.[7]

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[7] 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").[8]

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[8] 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 judgmen[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.[9] 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

[9] "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.[10] The Court subsequently built on that conclu-

[10] 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).[11]

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

[11] 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 (*Ruckleshaus* 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."[12] *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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[12] *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.[13]

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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[13] 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).[14] 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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[14] 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.[15] 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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[15] 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-

jority 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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JANUARY 2009

APPENDICES

APPENDIX A

Docket Nos. 104586, 104587, 104590 cons.

**IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS**

EMPRESS CASINO JOLIET CORPORATION et al.,

Appellees,

v.

ALEXI GIANNOULIAS, Treasurer of the State of Illinois, et al.,

Appellants.

Opinion filed June 5, 2008.

JUSTICE BURKE delivered the judgment of the court, with opinion.

Chief Justice Thomas and Justices Freeman, Fitzgerald, Kilbride, Garman, and Karmeier concurred in the judgment and opinion.

OPINION

In this case, we are asked to determine the constitutionality of Public Act 94–804 (the Act), which imposed, for a two-year period beginning on the effective date of the amendatory Act, a 3% surcharge on the four riverboat casinos in Illinois that had adjusted gross receipts (AGR) of over $200 million in the calendar year 2004. The remaining five riverboat casinos, all of which had AGRs below $200 million, were not subject to the surcharge. The Act provided that the proceeds of the surcharge were to be

distributed to the five horse racing tracks in Illinois. For the reasons that follow, we hold that Public Act 94–804 withstands the constitutional challenges raised, in the circuit court of Will County, by the four casinos subject to the tax.

BACKGROUND

The Illinois legislature authorized riverboat casinos in 1990 under the Riverboat Gambling Act (230 ILCS 10/1 *et seq*. (West 2004)). There are 10 licenses available for riverboats in Illinois: nine are in use, the tenth is in litigation. The nine riverboat casinos are located in Alton, Aurora, East Dubuque, East St. Louis, Elgin, Joliet, Metropolis, Peoria, and Rock Island. Four casinos have AGRS over $200 million–Empress Casino Joliet, Harrah's Casino Cruises Joliet, Hollywood Casino-Aurora, and Elgin Riverboat Resort-Riverboat Casino. There are five horse racing tracks with live racing in Illinois, located in Arlington Heights, Crete, Collinsville, Stickney/Cicero, and Melrose Park.

In May 2006, the General Assembly passed Public Act 94–804. The Act requires those casinos with AGRs over $200 million to daily contribute 3% of their AGR into the Horse Racing Equity Trust Fund. The Act provides that the monies (along with interest) shall be distributed, within 10 days of deposit into the Fund, as follows: 60% to organization licensees to be distributed at their race meetings as purses and 40% to racetracks "to improve, maintain, market, and otherwise operate [their] racing facilities to conduct live racing, which shall include backstretch services and capital improvements related to live racing and the backstretch." Distribution of the above-described 40% takes place as follows: 11% to Fairmount Park Racetrack and 89% to the other four

tracks pro rata based on the aggregate proportion of total handle[1] for calendar years 2004 and 2005 from wagering on live races conducted in Illinois.

In enacting Public Act 94–804, the legislature made the following findings:

> "(1) That riverboat gaming has had a negative impact on horse racing. From 1992, the first full year of riverboat operations, through 2005, Illinois on-track wagering has deceased by 42% from $835 million to $482 million.
>
> (2) That this decrease in wagering has negatively impacted purses for Illinois racing, which has hurt the State's breeding industry. Between 1991 and 2004 the number of foals registered with the Department of Agriculture has decreased by more th[a]n 46% from 3,529 to 1,891.
>
> (3) That the decline of the Illinois horse-racing and breeding program, a $2.5 billion industry, would be reversed if this amendatory Act of the 94th General Assembly was enacted. By requiring that riverboats agree to pay 3% of their gross revenue into the Horse Racing Equity Trust Fund, total purses in the State may increase by 50%, helping Illinois tracks to better compete with those in other states. Illinois currently ranks thirteenth nationally in terms of its purse size; the change would propel the State to second or third.

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[1] The "handle" is the amount of money wagered in the pari-mutuel pool or the total amount of bets taken.

> (4) That Illinois agriculture and other businesses that support and supply the horse racing industry, already a sector that employs over 37,000 Illinoisans, also stand to substantially benefit and would be much more likely to create additional jobs should Illinois horse racing once again become competitive with other states.
>
> (5) That the 3% of gross revenues this amendatory Act of the 94th General Assembly will contribute to the horse racing industry will benefit that important industry for Illinois farmers, breeders, and fans of horseracing and will begin to address the negative impact riverboat gaming has had on Illinois horseracing." Pub. Act 94–804, § 1, eff. May 26, 2006.

Plaintiffs, Empress Casino Joliet Corporation, Des Plaines Development Limited Partnership d/b/a Harrah's Casino Cruises Joliet, Hollywood Casino-Aurora, Inc., and Elgin Riverboat Resort-Riverboat Casino d/b/a Grand Victoria Casino, filed a four-count complaint for declaratory judgment and injunctive relief against defendants, Alexi Giannoulias as the Treasurer of the State of Illinois[2] and the Illinois Racing Board.

In count I, plaintiffs alleged that the Act violates the takings clause (article I, section 15) and the due process clause (article I, section 2) of the Illinois Constitution, as well as the due process clause of the United States Constitution, because the surcharge is

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[2] Judy Barr Topinka was originally named. Giannoulias was substituted as defendant when he took office.

used for a primarily private use. In count II, plaintiffs alleged that the Act violates article VIII, section 1 (the so-called public funds clause), of the Illinois Constitution because the surcharge was imposed for a private purpose only. In count III, plaintiffs alleged that the Act violates the uniformity clause (article IX, section 2) of the Illinois Constitution as well as the equal protection clauses of the Illinois and federal constitutions. Lastly, in count IV, plaintiffs alleged that the Act violates the special legislation provision (article IV, section 13) of the Illinois Constitution because the surcharge confers a benefit on a particular private group without a reasonable basis, rather than promoting the general welfare of the state. Plaintiffs sought a declaration that the Act is unconstitutional and a permanent injunction against the imposition or collection of the surcharge. Plaintiffs have paid the surcharge under protest pursuant to the State Officers and Employees Money Disposition Act (30 ILCS 230/2a (West 2006)).

Balmoral Park Racing Club, Inc., Hawthorne Race Course, Inc., Maywood Park Trotting Association, the National Jockey Club, and the Illinois Harness Horsemen's Association were granted leave to intervene on behalf of defendants.

The parties eventually filed cross-motions for summary judgment. The circuit court granted summary judgment in favor of plaintiffs, holding that the Act is invalid because it violates the uniformity clause of the Illinois Constitution. The circuit court found there was no real and substantial difference between the four casinos taxed and the five casinos not taxed and that no reasonable relationship had been provided for the classification. In so finding, the circuit court rejected defendants' contention that

the classification for the taxed casinos was reasonable since those casinos making over $200 million AGR were better able to absorb the surcharge. The court found that the ability-to-absorb justification was insufficient.

Because the circuit court invalidated an Illinois statute, defendants and intervenors appeal directly to this court. *See* 210 Ill. 2d R. 302(a)(1).

ANALYSIS

Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2–1005(c) (West 2000). We review the circuit court's grant of summary judgment *de novo*. *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 146 (2003).

We also review the constitutionality of a statute *de novo*. *Arangold Corp.*, 204 Ill. 2d at 146. "Statutes bear a presumption of constitutionality, and broad latitude is afforded to legislative classifications for taxing purposes." *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 250 (1996). The party challenging a nonproperty tax classification carries the burden of rebutting that presumption and "clearly establishing" the Act's unconstitutionality by showing that it "is arbitrary or unreasonable." *Allegro Services, Ltd.*, 172 Ill. 2d at 250-51. We have a duty to uphold a statute as constitutional whenever reasonably possible. *Arangold Corp.*, 204 Ill. 2d at 146.

I. Uniformity Challenge

A. *Standards for a Uniformity Challenge*

Article IX, section 2, of the Illinois Constitution provides:

> "In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable." Ill. Const. 1970, art. IX, §2.

The standards for evaluating a challenge to a statute based on the uniformity clause are well established:

> "To survive scrutiny under the uniformity clause, a nonproperty tax classification must (1) be based on a real and substantial difference between the people taxed and those not taxed, and (2) bear some reasonable relationship to the object of the legislation or to public policy." *Arangold Corp.*, 204 Ill. 2d at 153.

Relying on language from this court's decision in *Arangold Corp.*, plaintiffs initially contend that, to satisfy the second prong of the uniformity test, the tax (1) must be designed to remedy a special burden the class in question has imposed on the state or (2) must confer a specific benefit on the class taxed.

In *Arangold Corp.*, wholesale distributors of cigars and chewing tobacco challenged a tax on their products to fund long-term care for skilled and intermediate nursing facilities, particularly for those unable to afford the cost of such care, as a violation of due process and the uniformity clause. We rejected both challenges. With respect to the uniform-

ity challenge, we concluded that the plaintiffs failed to satisfy their burden to show that the asserted justification for the classification was unsupported by the facts. *Arangold Corp.*, 204 Ill. 2d at 157.

Plaintiffs maintain that, while the tax was found reasonable in *Arangold Corp.*, we must reach an opposite result here. Plaintiffs argue that the critical difference between the instant case and *Arangold Corp.* is that the General Assembly here could not rationally believe the "responsibility to pay" for subsidizing the horse racing industry "rests with the State." Moreover, plaintiffs contend that whatever harm the casinos have caused to the horse racing industry, it cannot possibly be deemed a burden imposed by the casinos on the state since the state has no responsibility to support the horse racing industry.

Plaintiffs' contention that the tax levied against them must be designed to remedy a special burden the casinos imposed on the state in order for the classification to bear a reasonable relationship to the statute is incorrect. Plaintiffs take comments this court made in *Arangold Corp.* in connection with our due process discussion and attempt to interject them into the uniformity analysis. In *Arangold Corp.*, when discussing the second prong of a due process challenge, *i.e.*, whether the statute bears a reasonable relationship to the interest intended to be protected, we noted that the General Assembly could have believed the responsibility to assist the poor with long-term care rests with the state, that persons often need long-term care due to their use of tobacco products, and thus, distributors of tobacco products should bear some measure of the costs through taxation. From this comment, plaintiffs attempt to en-

graft onto the second prong of the uniformity analysis a requirement that the tax must be designed to remedy some burden the taxed class has imposed on the state in order to satisfy that prong. We reject this argument.

When discussing the plaintiffs' challenge under the uniformity clause in *Arangold Corp.*, this court never held that, in order to bear a reasonable relationship to the object of the legislation, the tax must be designed to remedy some burden the taxed class imposed on the state. The language in *Arangold Corp.* on which plaintiffs rely was never part of the standard for assessing a uniformity challenge. Rather, it was one factor we considered when, in relation to the plaintiffs' due process challenge, we determined whether the statute at issue in *Arangold Corp.* bore a reasonable relationship to the interest sought to be protected. Accordingly, we find no support for plaintiffs' claims that a tax will violate the uniformity clause unless it is designed to remedy a special burden of the state.

Plaintiffs' alternative argument is that the tax at issue here may be upheld only if the casinos stand to benefit from the tax in some special way. Because it is undisputed the casinos will not benefit from the subsidy, plaintiffs maintain the surcharge is not reasonably related to the purpose of the legislation. We are unpersuaded by this argument.

We have repeatedly held that a tax may be imposed upon a class even though the class enjoys no benefit from the tax. *See*, *e.g., Arangold Corp.*, 204 Ill. 2d at 151 (" '[n]othing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition

to be remedied' "), quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-22, 81 L. Ed. 1245, 1260, 57 S. Ct. 868, 878 (1937). Accordingly, we reject plaintiffs' attempts to alter the standards for analyzing uniformity clause challenges. We reiterate: "To survive scrutiny under the uniformity clause, a nonproperty tax classification must (1) be based on a real and substantial difference between the people taxed and those not taxed, and (2) bear some reasonable relationship to the object of the legislation or to public policy." *Arangold Corp.*, 204 Ill. 2d at 153.

In relation to the first prong–whether a real and substantial difference exists between those taxed and those not taxed–it has been recognized that "[t]he party attacking a tax classification is not required to negate every conceivable basis that might support it." *Arangold Corp.*, 204 Ill. 2d at 153. Rather, once the plaintiff establishes a good-faith uniformity challenge, the taxing body must produce a justification for the classification. *Geja's Cafe v. Metropolitan Pier & Exposition Authority*, 153 Ill. 2d 239, 248 (1992). It then becomes the plaintiff's burden to persuade the court that the justification is insufficient, either as a matter of law or as unsupported by the facts. *Geja's Cafe*, 153 Ill. 2d at 248-29. If the plaintiff cannot do so, then, as a matter of law, judgment is proper for the taxing body. *Geja's Cafe*, 153 Ill. 2d at 249.

We further explained the nature of the uniformity clause in *Arangold Corp.*:

> "The uniformity clause was intended to be a broader limitation on legislative power to classify for nonproperty tax purposes than the limitation of the equal protection clause

> (*Searle Pharmaceuticals, Inc. v. Department of Revenue*, 117 Ill. 2d 454, 469 (1987)) and was meant to insure that taxpayers would receive added protection in the state constitution based upon a standard of reasonableness that is more rigorous than that contained in the federal constitution (*Milwaukee Safeguard*, 179 Ill. 2d at 102). * * * Despite the more stringent standard under the uniformity clause, the scope of a court's inquiry is 'relatively narrow.' *Allegro*, 172 Ill. 2d at 250. '[I]n a uniformity clause challenge the court is not required to have proof of perfect rationality as to each and every taxpayer. The uniformity clause was not designed as a straitjacket for the General Assembly. Rather, the uniformity clause was designed to enforce minimum standards of reasonableness and fairness as between groups of taxpayers.' *Geja's Cafe*, 153 Ill. 2d at 252." *Arangold Corp.*, 204 Ill. 2d at 153.

When a plaintiff challenges a legislative classification, he has the burden of showing the classification is arbitrary or unreasonable. *Geja's Cafe*, 153 Ill. 2d at 248. If a set of facts "can be reasonably conceived that would sustain it, the classification must be upheld." *Geja's Cafe*, 153 Ill. 2d at 248.

In the case at bar, the parties do not dispute that the Act creates two classifications: (1) all casinos and (2) casinos with an AGR over $200 million. The question before us is whether these two classifications are arbitrary or unreasonable. The circuit court found only that the AGR classification violated the uniformity clause. However, plaintiffs argue to this court that the classification relating to the casi-

nos as a whole is also invalid. We address this classification first, because if that classification fails, the AGR classification would necessarily fail as well.

B. *Casinos Classification*

Plaintiffs contend that the Act violates the uniformity clause because the General Assembly's stated reason for singling out casinos for taxation, *i.e.*, repairing damage to the horse racing industry, fails the rational basis test applied under uniformity clause analysis.

Defendants and intervenors, however, claim that the classification is reasonable and not arbitrary. They note that the object of the legislation at issue here was to reverse the decline in the horse racing industry. The legislature's justification for the surcharge, as expressly set forth by the General Assembly in the Act, was that the casinos have had a negative impact on that industry.

Since a justification has been produced, it is incumbent upon plaintiffs to establish that the justification is insufficient as a matter of law or that it is unsupported by the facts. In their attempt to do so, plaintiffs offer a report entitled "A Review of Racing in Illinois with a Comparison to National Trends in Pari-mutuel Wagering," compiled by Eugene Christiansen of Christiansen Capital Advisors, a company that performs studies of the economic, management, operation, taxation and regulation of leisure and entertainment businesses in the United States and abroad. The report purports to provide "trends in Illinois horse race wagering between 1983 and 2004, together with comparison of trends in Illinois horse racing with contemporary trends in horse racing in the United States as a whole; in States

with horse racing but no casinos; and in States with horse racing and casinos."

Christiansen concludes in this report:

> "These trends and comparisons do not support the statement that Illinois riverboat casinos were the sole, or even the main, factor in the decrease of wagering at racetracks in Illinois. * * * The decline in wagering at Illinois racetracks is principally due to off-track betting, which shifted a large amount of wagers from racetracks to OTB facilities, while increasing total State-wide wagering on horse races."

Further, Christiansen opines:

> "[L]icensed interactive betting services, unlicensed interactive betting services located in other countries, and interactive betting services licensed in other countries that accept bets from U.S. residents also contribute to the decline in live handle by shifting wagers from live and simulcast pari-mutual facilities to personal computers and interactive television. Simulcasting, off-track betting and Internet and other interactive bettor services including telephone account wagering were developments internal to the horseracing industry. They were not consequences of casino gaming, in Illinois or in the United States."

In the case at bar, the legislature has provided express findings regarding the necessity of the tax imposed on the casinos. The general rule regarding such findings has been explained:

> "Courts are not empowered to 'adjudicate' the accuracy of legislative findings. The legislative fact-finding authority is broad and should be accorded great deference by the judiciary. Therefore, to the extent the affidavits of record may have been offered to contest the wisdom of the legislative enactment, we reiterate that the legislature is not required to convince this court of the correctness of its judgment * * *. *See Bernier*, 113 Ill. 2d at 229, citing *Vance v. Bradley*, 440 U.S. 93, 111, 59 L. Ed. 2d 171, 184-85, 99 S. Ct. 939, 949-50 (1979); *see also Cutinello v. Whitley*, 161 Ill. 2d 409 (1994). Our task is limited to determining whether the challenged legislation is constitutional, and not whether it is wise." *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 389-90 (1997).

While it is clear that Christiansen holds a view different from that of the legislature as to the cause of the decline in the horse racing industry, that view does not render the legislative findings insufficient. Simply because Christiansen's report suggests that casinos are not the *sole* reason for the decline of horse racing does not mean that plaintiffs have satisfied their burden of establishing that the justification for the classification is arbitrary or unreasonable. Giving the legislative findings the deference they must be accorded (see *Best*, 179 Ill. 2d at 389-90), we conclude there is a reasonable relationship between the classification and object of the legislation.

C. *AGR Classification*

As previously noted, the circuit court in the case at bar held there was no real and substantial difference between the four casinos taxed and the five that

were not and, as a result, there was no reasonable relationship between the AGR classification and the object of the Act. Before this court, plaintiffs ask us to uphold this finding.

Defendants and intervenors, however, contend that the casinos with an AGR over $200 million can better absorb the surcharge and that this is a proper basis for distinguishing the casinos. Defendants and intervenors maintain that the circuit court's decision must be reversed because plaintiffs failed to meet their burden of demonstrating that this justification for the AGR classification is insufficient as a matter of law or unsupported by the facts.

Initially we note that one reason the circuit court ruled as it did was because it held that the General Assembly did not set forth its justification for the AGR classification within the Act itself. Defendants and intervenors contend that this was error on the circuit court's part. We agree.

Although none of the cases cited by the parties directly analyze this question, it is evident from case law that the legislature is not required to state its justification for a classification within an act. As this court has stated: "The reasons justifying the classification, moreover, need not appear on the face of the statute, and the classification must be upheld if any state of facts reasonably can be conceived that would sustain it." *Department of Revenue v. Warren Petroleum Corp.*, 2 Ill. 2d 483, 490 (1954). We conclude, therefore, that the legislature is not required to provide its justification for a classification within the statute itself. The circuit court's holding to the contrary was in error.

On a related issue, plaintiffs argue that the "ability to absorb" justification fails because it is at odds with the expressly stated purpose of the Act, which is to address the harm created by casinos to horse track racing. Plaintiffs maintain that, when the legislature states its purpose within an act, a classification cannot later be upheld on other grounds. In support of this argument, plaintiffs rely on *Primeco Personal Communications, L.P. v. Illinois Commerce Comm'n*, 196 Ill. 2d 70 (2001).

In *Primeco*, a municipal infrastructure maintenance fee was imposed by certain municipalities on telecommunications retailers. The plaintiffs were wireless telecommunications retailers who argued that the fee violated the uniformity clause because the fee was intended as a means of compensating municipalities for the physical occupation of the public right-of-way by telecommunication providers. Because the plaintiffs, being wireless, did not physically occupy any public right-of-way, they argued that they should not be subject to the fee. *Primeco*, 196 Ill. 2d at 73. The defendants denied that the fee was a means of compensating municipalities for their occupation of the public right-of-way and instead argued that the fee was a means of raising revenue. The circuit court found that the object of the fee was to compensate municipalities for use of the right-of-way. Because the wireless retailers did not use these right-of-ways, the court held the classification as applied to plaintiffs was unreasonable. *Primeco*, 196 Ill. 2d at 82. We affirmed the circuit court and held there was no reasonable relationship between the classification and the object of the legislation.

Plaintiffs maintain that *Primeco* "held that when the General Assembly expressly sets forth the pur-

pose of a tax, the taxing body cannot defend against a uniformity challenge by offering a different rationale." However, this language appears nowhere in *Primeco*, nor can it be implied from other language in the opinion. *Primeco* simply does not so hold.

We find *Primeco* distinguishable for another reason. The defendants in *Primeco* were attempting to define the *purpose* of the act itself, not the justification for a classification. In the case at bar, defendants and intervenors do not assert, as plaintiffs maintain, that the *purpose* for imposing the surcharge was based on the ability to absorb. Instead, they assert that the *AGR classification* is based on the ability to absorb the costs.

Defendants have produced a justification for the classification, *i.e.*, the ability to absorb the surcharge, which the General Assembly could reasonably have concluded was a rational justification. It is therefore incumbent upon plaintiffs to show that the justification is insufficient as a matter of law or unsupported by the facts. Plaintiffs contend that the defendants' justification fails because it is not supported by the facts. Plaintiffs maintain that, if the General Assembly was concerned about a casino's ability to absorb the cost, it would have set the measuring point of the casinos' financial condition at the time the surcharge was paid, rather than the 2004 AGR. Plaintiffs assert that this retrospective view suggests the $200 million limit was arbitrarily selected to insulate the downstate casinos from the tax and was not a point at which a casino could afford to absorb the surcharge. Plaintiffs further argue that the $200 million AGR was selected by the legislature because it allowed the downstate casinos to be exempt from the tax and that exempting the downstate casinos

from the tax was the only way the legislature was able to get the Act passed.

We are unpersuaded by plaintiffs' arguments. First, plaintiffs have not shown that there is no real and substantial difference between the downstate casinos and the upstate casinos, which are the ones that have AGRs over $200 million. The fact is, however, that the downstate casinos' average intake is between $2 and $6 million per month, while the upstate casinos, located in more populated areas, have an average intake of $20 to $40 million per month. This is a substantial difference.

Moreover, plaintiffs' suggestion that a different method for determining the financial condition of the casinos for deciding whether to impose the surcharge is impractical. It would be inconceivable to measure the financial condition of the casinos at the time they were required to pay the surcharge. The Act requires the surcharge to be levied on a daily basis. It would be logistically impossible to measure the financial condition of each casino every single day. The legislature had to set some measuring point. Since the bill was introduced in 2005, the 2004 figures were the most recent financial figures and, thus, a logical choice to use as the measuring point.

Further, plaintiffs' suggestion that setting the measuring stick at $200 million was the result of a legislative compromise is not a relevant consideration. The justification itself is the critical focus. If the justification is reasonable, any further inquiry into the motives of the legislature is improper. *Donovan v. Holzman*, 8 Ill. 2d 87, 96 (1956) (court is not at liberty to inquire into the motives of the legislature). Plaintiffs' arguments fail to persuade us

that the justification for the AGR classification is not supported by the facts.

Plaintiffs further argue that mere quantitative differences in AGR between otherwise identical businesses should never be enough, alone, to justify an exemption from a fee. Plaintiffs maintain that a qualitative difference must exist between the five casinos below the $200 million threshold and the four above it, and that none exists here, because all casinos have the similar ability to incorporate the cost of the surcharge into the services they provide.

Initially, we do not accept plaintiffs' premise that all casinos are identical. While it may be true that all casinos might be able to incorporate a surcharge into their services and pass the charge along to customers, this does not mean the casinos are identical.

More fundamentally, however, we agree with defendants that the uniformity clause allows subclassifications and exclusions as long as they are reasonable. As such, quantitative differences in AGR may be sufficient to justify a classification. We have previously held that there need not be "proof of perfect rationality as to each and every taxpayer." *Arangold Corp.*, 204 Ill. 2d at 153.

We conclude that plaintiffs have failed to meet their burden of demonstrating there is no real and substantial difference between the two groups of casinos. Plaintiffs have not shown the classification is arbitrary or unreasonable. Accordingly, we conclude that the circuit court erred in holding that the Act violates the uniformity clause of the Illinois Constitution.

II. Public Use and Public Purpose

In an alternative argument in support of the circuit court's judgment, plaintiffs claim that the Act is unconstitutional because the subsidy to the horse racing tracks primarily benefits private parties and not the public. In making this argument, plaintiffs rely on the takings clause of the federal constitution and article VIII, section 1, of the Illinois Constitution.

The federal takings clause provides: "nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V. This provision is made applicable to the states through the fourteenth amendment (U.S. Const., amend. XIV). *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 199 Ill. 2d 225, 235 (2002). Article I, section 15, of the Illinois Constitution, the Illinois takings clause, provides: "Private property shall not be taken or damaged for public use without just compensation as provided by law." Ill. Const. 1970, art. I, §15.

Plaintiffs maintain that the surcharge should be deemed a taking because it is not characterized in the Act as a tax, but a license fee, because it does not have the fundamental characteristic of a tax in that it does not support government or government programs and because it is imposed as a condition of the casinos' continuation of a valuable property right–their licenses. Plaintiffs argue that a takings analysis should apply whenever the government takes property, whether real or monetary, from one party and gives it to another and that there is a need for heightened scrutiny to ensure a public purpose is being served.

We reject plaintiffs' assertion that a takings analysis applies here. It is well settled that the takings clauses of the federal and state constitutions apply only to the state's exercise of eminent domain and not to the state's power of taxation. *See County of Mobile v. Kimball*, 102 U.S. 691, 703, 26 L. Ed. 238, 241 (1880) ("But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution"). The West Virginia Supreme Court has aptly stated this rule:

> "Courts universally have concluded that the takings clauses of the various state and federal constitutions do not apply in the context of taxing statutes, because the power to tax is a separate constitutional power from the power to take property by eminent domain. Case law from the United States Supreme Court and federal and state courts throughout the country makes clear that the constitutional takings clause is not a limitation upon the taxing power conferred upon legislatures by their respective constitutions. *See Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24, 36 S. Ct. 236, 244, 60 L. Ed. 493, 504 (1916) (the Due Process Clause of the Fifth Amendment 'is not a limitation upon the taxing power conferred upon Congress by the Constitution'); *Branch v. U.S.*, 69 F.3d 1571, 1576 (Fed. Cir. 1995) ('[E]ven though taxes . . . indisputably "take" money from individuals or businesses, assessments of that kind are not treated as *per se* takings'); *A. Magnano v. Hamilton*, 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109 (1934) (taxing power of state or federal government not con-

> sidered a taking under the Fifth or Fourteenth Amendment) * * *." *In re Estate of Lewis*, 217 W. Va. 48, 58, 614 S.E.2d 695, 705 (2005).

See also Gilman v. City of Sheboygan, 67 U.S. (2 Black) 510, 17 L. Ed. 305 (1862). *See* generally 71 Am. Jur. 2d *State & Local Taxation* §61, at 351 (2001) (the takings clause is "appl[icable] to the power of eminent domain, but not to the power of taxation").

The same principle applies to fees, whether for certain services or licensing. In *Mlade v. Finley*, 112 Ill. App. 3d 914 (1983), the plaintiffs challenged certain circuit court filing fees as a violation of, *inter alia*, the takings clause. *Mlade*, 112 Ill. App. 3d at 916. The appellate court rejected the plaintiffs' argument "because the 'just compensation' [takings clause] provisions (Ill. Const. 1970, art. I, sec. 15; U.S. Const., amends. V and XIV, sec. 1) apply only to exercises of the power of eminent domain, not to applications of the authority to raise revenue for public purposes. *See Zelney v. Murphy* (1944), 387 Ill. 492." *Mlade*, 112 Ill. App. 3d at 924. *See also Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 65 L. Ed. 489, 41 S. Ct. 219 (1921). Numerous other cases have held the same. *See*, *e.g.*, *Laredo Road Co. v. Maverick County*, *Texas*, 389 F. Supp. 2d 729 (W.D. Tex. 2005); *2284 Corporation v. Shiffrin*, 98 F. Supp. 2d 244 (D. Conn. 2000); *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 41 P.3d 87, 117 Cal. Rptr. 2d 269 (2002); *Rinn v. Bedford*, 102 Colo. 475, 84 P.2d 827 (1938); *City of Thomson v. Davis*, 92 Ga. App. 216, 88 S.E.2d 300 (1955); *BHA Investments, Inc. v. State*, 138 Idaho 348, 63 P.3d 474 (2003); *Jordan v. City of Evansville*,

163 Ind. 512, 72 N.E. 544 (1904); *Bobbie Preece Facility v. Commonwealth of Kentucky, Department of Charitable Gaming*, 71 S.W.3d 99 (Ky. App. 2001); *Board of Trustees of Falmouth v. Watson*, 68 Ky. 660 (1869); *State ex rel. Interstate Air-Parts, Inc. v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 223 Minn. 175, 25 N.W.2d 718 (1947); *Rogers v. Hennepin County*, 124 Minn. 539, 145 N.W. 112 (1914); *President Riverboat Casino-Missouri, Inc. v. Missouri Gaming Comm'n*, 13 S.W.3d 635 (Mo. 2000); *Dunn v. Mayor & Council of City of Hoboken*, 88 A. 1053 (N.J. Sup. 1913); *Kisslinger's Appeal*, 59 Pa. D. & C. 126 (1947); *Smith v. Cortes*, 879 A.2d 382 (Pa. Commw. 2005); *Lamb v. Whitaker*, 171 Tenn. 485, 105 S.W.2d 105 (1937).

Ignoring this wealth of law, plaintiffs point to *Northern Illinois Home Builders Ass'n v. County of Du Page*, 165 Ill. 2d 25 (1995), where this court applied a takings analysis to a municipality's imposition of transportation impact fees. In *Northern Illinois Home Builders Ass'n*, a fee was imposed in connection with land. Specifically, a fee was imposed on persons constructing new housing developments to fund road improvements made necessary in light of the expected traffic growth from the development. *Northern Illinois Home Builders Ass'n*, 165 Ill. 2d at 30. The fee at issue in *Northern Illinois Home Builders Ass'n* was inextricably tied to real property and, thus, a takings analysis was appropriate.

The same is not true here. The 3% surcharge is in no way tied to real property. As such, *Northern Illinois Home Builders Ass'n* does not support plaintiffs' claim that a takings analysis is applicable here.

Plaintiffs also cite to *Eastern Enterprises v. Apfel*, 524 U.S. 498, 141 L. Ed. 2d 451, 118 S. Ct.

2131 (1998) (plurality op.), to support their argument that a takings analysis may be applied to a monetary obligation. However, we find plaintiffs' reliance on *Apfel* misplaced.

In *Apfel*, a plurality of Justices (Chief Justice Rehnquist, and Justices O'Connor, Scalia and Thomas) applied a takings analysis to a monetary obligation, but a majority of the Justices rejected the theory that an obligation to pay money constitutes a taking. Justice Kennedy, in his separate opinion explained:

> "Our cases do not support the plurality's conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so. To the extent it affects property interests, it does so in a manner similar to many laws; but until today, none were thought to constitute takings. To call this sort of governmental action a taking as a matter of constitutional interpretation is both imprecise and,

> with all due respect, unwise." *Apfel*, 524 U.S. at 540, 141 L. Ed. 2d at 481, 118 S. Ct. at 2154 (Kennedy, J., concurring in judgment and dissenting in part).

Justices Stevens, Souter, Ginsburg, and Breyer agreed with Justice Kennedy that the takings clause was not implicated, finding that "at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." (Emphasis in original.) *Apfel*, 524 U.S. at 554, 141 L. Ed. 2d at 490, 118 S. Ct. at 2161 (Breyer, J., dissenting, joined by Stevens, Souter and Ginsburg, JJ.). It was noted that: "The 'private property' upon which the Clause traditionally has focused is a specific interest in physical or intellectual property. [Citations.] * * * This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money * * *." *Apfel*, 524 U.S. at 554, 141 L. Ed. 2d at 490-91, 118 S. Ct. at 2161-62 (Breyer, J., dissenting, joined by Stevens, Souter and Ginsburg, JJ.). Observing that "application of the Takings Clause here bristles with conceptual difficulties," Justice Breyer noted that the plurality's analysis would seemingly be applicable to ordinary taxes and other statutes and rules that routinely create financial burdens for some that benefit others. *Apfel*, 524 U.S. at 556, 141 L. Ed. 2d at 491-92, 118 S. Ct. at 2162-63 (Breyer, J., dissenting, joined by Stevens, Souter and Ginsburg, JJ.). Thus, five Justices of the Supreme Court in *Apfel* reaffirmed the traditional rule that regulatory actions requiring the payment of money are not takings.

In light of the foregoing, we conclude that the surcharge at issue here is not subject to a takings challenge. The Act does not involve an interest in physical or intellectual property, nor does it operate upon or alter an identifiable property interest. The case at bar does not involve the state's exercise of its eminent domain powers, but rather involves its exercise of its taxing powers. We conclude that the surcharge is not a taking of private property within the meaning of the constitutional takings clauses. As such, a takings analysis is not applicable to plaintiffs' claim.

We now turn to plaintiffs' challenge that the surcharge violates article VIII, section 1, of the Illinois Constitution (the public funds clause).

Article VIII, section 1, of the Illinois Constitution of 1970 provides that "[p]ublic funds, property or credit shall be used only for public purposes." Ill. Const. 1970, art. VIII, §1. "[I]n order to proceed under article VIII, section 1(a) of the Illinois Constitution, facts must be alleged indicating that governmental action has been taken which directly benefits a private interest without a corresponding public benefit * * *." *Paschen v. Village of Winnetka*, 73 Ill. App. 3d 1023, 1028-29 (1979). In *Friends of the Parks*, we reiterated the well-settled principles regarding a public purpose:

> " 'This court has long recognized that what is for the public good and what are public purposes are questions which the legislature must in the first instance decide. [Citations.] In making this determination, the legislature is vested with a broad discretion, and the judgment of the legislature is to be accepted in the absence of a clear showing that the

> purported public purpose is but an evasion and that the purpose is, in fact, private. [Citations.] In the words of Justice Holmes, "a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect." [Citation.]' " *Friends of the Parks v. Chicago Park District*, 203 Ill. 2d 312, 320 (2003), quoting *In re Marriage of Lappe*, 176 Ill. 2d 414, 429-30 (1997).

We have further expressed:

> "What is a 'public purpose' is not a static concept, but is flexible and capable of expansion to meet the changing conditions of a complex society. [Citations.] Moreover, "'[t]he power of the State to expend public moneys for public purposes is not to be limited, alone, to the narrow lines of necessity, but the principles of wise statesmanship demand that those things which subserve the general wellbeing of society and the happiness and prosperity of the people shall meet the consideration of the legislative body of the State, though they ofttimes call for the expenditure of public money.'" [Citation.] The consensus of modern legislative and judicial thinking is to broaden the scope of activities which may be classified as involving a public purpose. [Citations.]" *In re Marriage of Lappe*, 176 Ill. 2d at 430-31, quoted by *Friends of the Parks*, 203 Ill. 2d at 320-21.

See also People ex rel. City of Urbana v. Paley, 68 Ill. 2d 62, 75, 76 (1977) (" '[w]e have held on a number of occasions that if the principal purpose and objective in a given enactment is public in nature, it does not

matter that there will be an incidental benefit to private interests.' " and " '[w]e have indicated that there is no constitutional prohibition against the use of public funds which inure to the benefit of private interests, so long as the money is utilized for a public purpose' "), quoting *People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 355-59 (1972) (observing that the courts of Illinois have adopted an expanding concept of "public purpose" where economic welfare is involved and that we have upheld legislation that has "economically benefited private interests, but has been motivated by, and served, a more compelling public interest").

In deciding whether a purpose is public or private, courts are

> " 'largely influenced by the course and usage of the government, the object for which taxes and appropriations have been customarily and by long course of legislation levied and made, and what objects have been considered necessary to the support and for the proper use of the government. Whatever lawfully pertains to this purpose and is sanctioned by time and the acquiescence of the people may well be said to be a public purpose and proper for the maintenance of good government.' *Hagler* [*v. Small*], 307 Ill. [460,] 474 [(1923)]." *In re Marriage of Lappe*, 176 Ill. 2d at 430.

See also In re Marriage of Lappe, 176 Ill. 2d at 437 ("If the principal purpose of the enactment is public in nature, it is irrelevant that there will be an incidental benefit to private interests"). If the purpose sought to be achieved by the legislation is a public one and it contains elements of public benefit, then

the question of how much benefit the public derives is for the legislature, not the courts. *McMackin*, 53 Ill. 2d at 357-58.

Plaintiffs contend that, from the face of the Act, the primary intended beneficiaries are private parties and, thus, the Act fails the public-purpose test. The standards established above require us to defer to the legislative findings announced in the Act unless plaintiffs have made a showing that the findings are evasive and that the purpose of the legislation is principally to benefit private interests.

Plaintiffs have not shown that the legislative findings, as stated in the Act, are evasive or deceptive. Thus, our inquiry turns on whether the surcharge created by the Act serves a public purpose.

Plaintiffs argue that the primary intended beneficiary of the surcharge are private parties, the track owners, and not the public. First, plaintiffs maintain that, because all of the proceeds of the surcharge are turned over to the track owners, this demonstrates the intended beneficiary is private. In a related argument, plaintiffs maintain that, because there is no effective control on how the track owners can use the 40% of the surcharge given to them, this demonstrates the intended beneficiary was private.

The plain language of the Act belies this argument. While it may be true the proceeds go directly to the track owners, the manner in which the owners must utilize the funds is controlled by statute. The Act specifically states how the money must be used: 60% goes to the tracks as purses and 40% goes to the tracks "to improve, maintain, market, and otherwise operate [their] racing facilities to conduct live racing, which shall include backstretch services and capital

improvements related to live racing and the backstretch." The track owners cannot simply pocket any of the funds they receive, not even the 40%. The 40% is earmarked for specific purposes and must be used by the tracks for those purposes.

Plaintiffs also maintain that the benefits are conferred on the tracks without regard to need. We disagree. The legislature could reasonably have concluded that the total handle of a track related to how much of a benefit to the economy that track could achieve. Stated differently, the legislature could have believed that the tracks with the larger handles would be able to contribute more benefit to the industry and economy as a whole and, thus, should be entitled to more support.

Plaintiffs' arguments do not support their contention that the Act benefits only private parties. Certainly, the principal purpose of the Act is a public one: to stimulate economic activity, including the creation and maintenance of jobs and the attraction and retention of sports and entertainment, particularly betting on horse racing. *See Friends of the Parks*, 203 Ill. 2d at 316. We conclude that the Act does, in fact, serve a public purpose. The surcharge will benefit the general well-being of society and the prosperity of the people of the State of Illinois. *See Friends of the Parks*, 203 Ill. 2d at 316; *see also People ex rel. City of Urbana*, 68 Ill. 2d at 75 ("[s]timulation of commercial growth and removal of economic stagnation are * * * objectives which enhance the public weal"). The emphasis of the Act is to benefit the entire horse racing industry, not simply the track owners, and the collateral businesses associated with that industry. The surcharge will serve to reduce the costs of unemployment and the

evils attendant thereto should the industry collapse and the 35,000-plus associated jobs lost. *See People ex rel. City of Urbana*, 68 Ill. 2d at 74 (upholding act "whose stated object was to 'reduce conditions of unemployment and the evils attendant thereto, and to encourage the increase of industry within the State'"), quoting *McMackin*, 53 Ill. 2d at 354. The ultimate result of the surcharge will encourage an increase in industry in this state, including farming, breeding, and training, will stimulate commercial growth, and will revitalize an economically stagnant industry. All of these are objects that enhance the public "weal." *People ex rel. City of Urbana*, 68 Ill. 2d at 75. Illinois has a strong interest in preserving the viability of industries in this state, which in turn will benefit the economy of the state as a whole.

As we stated in *McMackin*:

> "We believe that conditions of unemployment within the State are well known and need no documentation. Legislation intended to alleviate these conditions and their inherent problems certainly is in the public interest. New and expanded industry in communities within the State provides work and opportunities not only for those who would be directly employed, but also for others who provide goods and services to those who live and work in the community. * * * The potential impetus to economic development within our State, which otherwise might be lost to other States with financing of this type, likewise serves the public interest. The private benefit resulting from the Act is incidental to the public purpose and benefit to be served, and there is no contravention of the

> constitution in this regard." *McMackin*, 53 Ill. 2d at 358.

The same is true here.

Because we find that plaintiffs have not shown the legislative findings in the Act are evasive nor have they shown that the purpose of the Act is primarily to benefit private interests, we defer to the legislative findings in the Act and the legislature's determination that the Act was necessary. Accordingly, we conclude that the Act does not violate article VIII, section 1.

III. Retroactivity

Plaintiffs raise a cursory argument regarding retroactivity. Plaintiffs argue that it is impermissible to impose the tax at issue here because it retroactively punishes them for entirely lawful competition. Citing to *Apfel*, 524 U.S. 498, 141 L. Ed. 2d 451, 118 S. Ct. 2131, plaintiffs contend the surcharge was unconstitutionally imposed as a retribution for past success which they could not possibly have known of.

In *Apfel*, a majority of the Court struck down, on varying constitutional grounds, an act that required coal mine operators to fund health-care benefits for retired workers. *Apfel*, 524 U.S. at 537, 141 L. Ed. 2d at 479, 118 S. Ct. at 2153. There, the liability reached back 30 to 50 years (*Apfel*, 524 U.S. at 531, 141 L. Ed. 2d at 475-76, 118 S. Ct. at 2150) and was a considerable financial burden on the defendant (*Apfel*, 524 U.S. at 531, 141 L. Ed. 2d at 476, 118 S. Ct. at 2150). Moreover, the liability would continue for many years in the future. *Apfel*, 524 U.S. at 531, 141 L. Ed. 2d at 476, 118 S. Ct. at 2150. Lastly, the liability was unrelated to any injury the defendant

had caused. *Apfel*, 524 U.S. at 537, 141 L. Ed. 2d at 479, 118 S. Ct. at 2153.

The case at bar is distinguishable from *Apfel*. The surcharge does not reach back in the distant past and is of a very limited duration, *i.e.*, two years. Further, while the surcharge might be a temporary financial burden on plaintiffs, it is related to injury the casinos caused to the horse racing industry. We find no constitutional violation on this ground.

IV. Equal Protection and Special Legislation

No arguments have been raised before us in connection with the equal protection and special legislation challenges and, thus, we need not address them.

CONCLUSION

The circuit court erred in granting summary judgment in favor of plaintiffs. Public Act 94–804 does not violate the uniformity clause. Moreover, the Act is not subject to a takings analysis, does not violate the public funds clause of the state constitution, and is not impermissibly retroactive. Accordingly, we reverse the judgment of the circuit court.

Reversed.

APPENDIX B

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS**

EMPRESS CASINO JOLIET CORPORATION, An Illinois corporation, et al.,
Plaintiffs,
vs.
JUDY BAAR TOPINKA, solely in her official capacity as TREASURER OF THE STATE OF ILLINOIS, et al.,
Defendants.
No.: 06 CH 1294

ORDER

This matter comes before the Court on the Plaintiffs' Motion for Summary Judgment, the Defendants' Motion for Summary Judgment, and the Intervenors' Motion for Summary Judgment, all brought pursuant to 735 ILCS 5/2-1005. The parties provided the Court with briefs, caselaw and oral argument. For the reasons set forth below, the Plaintiffs' Motion for Summary Judgment is GRANTED in part and DENIED in part, and the Defendants' and Intervenors' Motion for Summary Judgment is GRANTED in part and DENIED in part. This Court finds that Public Act 94-0805 is unconstitutional as it violates the Uniformity Clause of the Illinois Constitution.

Background

The Illinois legislature authorized riverboat casinos in 1990 under the Riverboat Gambling Act. 230 ILCS 10/1 *et seq.* Currently, there are ten licenses available for riverboat casinos in the State of Illinois.

(Pl. Exh. 6, at p. 7.) Nine of those are in use, with the tenth license still in litigation. (Pl. Exh. 6, at p. 9.) The nine riverboat casinos are located in Alton, Aurora, East Dubuque, East St. Louis, Elgin, Joliet, Metropolis, Peoria and Rock Island. (Pl. Exh. 6, at p. 7.)

The Riverboat Gambling Act imposes two different types of taxes on riverboat casinos – an admission tax and a wagering tax. (Pl. Exh. 6, at p. 8.) An admission tax imposes $3.00 per person on all casinos except Rock Island, where the admission tax is $2.00 per person. (*Id.*) Of that tax, $1.00 is provided to the host community, and the remaining money goes to the State. (*Id.*) Further, each host community's local government receives a share equal to five percent of the adjusted gross receipts. (*Id.*) The wagering tax imposes required base amount payment from all riverboat casinos except Rock Island. (*Id.*) The wagering tax also imposes a graduated tax rate based upon the riverboat casinos' annual adjusted gross revenue. (*Id.*)

Currently there are five horseracing tracks with live racing in Illinois, namely Arlington Park, Balmoral Park, Fairmount Park, Hawthorne Race Course and Maywood Park. (Pl. Exh. 7, at p. 9.) In addition, the Illinois Racing Board authorizes horseracing at the Illinois State Fair, the Du Quoin State Fair, and the Brown County Fair each year. (Pl. Exh. 7, at p. 16.) Each racetrack is entitled to receive up to six off-track betting licenses, except Fairmount Park, which is entitled to receive seven licenses. (Pl. Exh. 7, at p. 6.) Horseracing tracks, like riverboat casinos, are required to also pay admission and wagering taxes.

In May 2005, the General Assembly passed P.A. 94-0805 which requires the four plaintiff riverboat casinos, those with adjusted gross revenues over 200 million dollars, to contribute 3% of their adjusted gross receipts into the Horse Racing Equity Trust Fund. (Pl. Exh. 1, Exh. A.) The General Assembly made the following findings in P.A. 94-0805:

> Section 1. Findings. The legislature makes all of the following findings:
>
> (1) That riverboat gaming has had a negative impact on horse racing. From 1992, the first full year of riverboat operations, through 2005, Illinois on-track wagering has decreased by 42% from $835 million to $482 million.
>
> (2) That this decrease in wagering has negatively impacted purses for Illinois racing, which has hurt the State's breeding industry. Between 1991 and 2004 the number of foals registered with the Department of Agriculture has decreased by more than 46% from 3,529 to 1,891.
>
> (3) That the decline of the Illinois horseracing and breeding program, a $2.5 billion industry, would be reversed if this amendatory Act of the 94th General Assembly was enacted. By requiring that riverboats agree to pay 3% of their gross revenue into the Horse Racing Equity Trust Fund, total purses in the State may increase by 50%, helping Illinois tracks to better compete with those in other states. Illinois currently ranks

thirteenth nationally in terms of its purse size; the change would propel the State to second or third.

(4) That Illinois agriculture and other businesses that support and supply the horse racing industry, already a sector that employs over 37,000 Illinoisans, also stand to substantially benefit and would be much more likely to create additional jobs should Illinois horse racing once again become competitive with other states.

(5) That the 3% of gross revenues this amendatory Act of the 94th General Assembly will contribute to the horse racing industry will benefit this important industry for Illinois farmers, breeders, and fans of horseracing and will begin to address the negative impact riverboat gambling has had on Illinois horseracing.

(*Id.*) The Act provides that 60% of the monies distributed under the Act shall be used for purses, while the remaining 40% of the monies shall be distributed as follows: 11% to any person "who had operating control of a racetrack that conducted live racing in 2002 at a racetrack in a county with at least 230,000 inhabitants that borders the Mississippi River and is a licensee in the current year." (*Id.*) It is undisputed that this 11% portion is designated for distribution to Fairmount Park, which is located Collinsville, Illinois. The remaining 89% is to be distributed pro rata to the other racetracks, excluding Fairmount Park, according to the aggregate proportion of total handle from wagering on live races. (*Id.*) These 40%

monies are to be used "by each organization licensee to improve, maintain, market, and otherwise operate its racing facilities to conduct live racing, which shall include backstretch services and capital improvements related to live racing and the backstretch." (*Id.*) The Illinois Racing Board is charged with monitoring licensees to ensure that the moneys paid are distributed as provided in the Act. (*Id.*) The Act has a sunset provision of 2 years. (*Id.*)

Plaintiffs filed this complaint in May 2006 against the Treasurer, who collects the surcharge, and the Illinois Racing Board, who administers the monies, alleging that the Act results in an unconstitutional taking and a violation of the Due Process Clause, that the Act violates Article VIII, Section 1 of the Illinois Constitution, which requires that public funds "shall be used only for public purposes", that the Act violates both the Uniformity Clause of the Illinois Constitution and the Equal Protection Clauses of both the Illinois and U.S. Constitution, and finally that the Act constitutes special legislation in violation of the Illinois Constitution. (Pl. Exh. 1.)

Applicable Law

Standard of Review

The parties have filed cross motions for summary judgment. A trial court may render summary judgment only if the record shows that there is no genuine issue of material fact and that party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (2006); *Milwaukee Safeguard Ins. Co. v. Selcke*, 179 Ill. 2d 94, 98, 688 N.E.2d 68, 70 (Ill. 1997).

Legislative enactments enjoy a heavy presumption of constitutionality. *Friends of the Parks, et al., v. Chicago Park District, et al.*, 203 Ill. 2d 312, 786

N.E.2d 161 (Ill. 2003); *In Re Marriage of Lappe*, 176 Ill. 2d 414, 680 N.E.2d 380 (Ill. 1997). The party challenging the constitutionality of a statute has the burden of clearly establishing its invalidity. Courts have a duty to sustain legislation whenever possible and resolve all doubts in favor of constitutional validity. *Lappe*, 176 Ill. 2d at 422, 680 N.E.2d at 384-85.

Public v. Private Use of Funds

The Supreme Court discussed the applicable standard for determining whether funds were being used for a public purpose in the case of *In Re Marriage of Lappe*, 176 Ill. 2d 414, 680 N.E.2d 380 (Ill. 1997). In *Lappe*, the plaintiff sought to declare sections of the Public Aid Code facially unconstitutional. The issue was whether the Public Aid Code, in allowing the Department the discretion to provide child support enforcement services to an individual who may be financially capable of pursuing enforcement privately, served a public purpose under article VIII, section 1 of the Illinois Constitution. *Id.*, 176 Ill. 2d at 422, 680 N.E.2d at 384.

> The Supreme Court noted the guidelines for this inquiry:
>
> In deciding whether such purpose is public or private, courts must be largely influenced by the course and usage of the government, the object for which taxes and appropriations have been customarily and by long course of legislation levied and made, and what objects have been considered necessary to the support and for the proper use of government. Whatever lawfully pertains to this purpose and is sanctioned by time and the acquiescence of the people may well be said to be a

> public purpose and proper for the maintenance of good government.

Id., 176 Ill. 2d at 430, 680 N.E.2d at 388. The Supreme Court noted that the Public Aid Code served a public purpose by advancing the welfare of children and noted that Illinois has a strong interest in preserving and promoting the welfare of children. Further, even though the parties privately benefited from the legislation, said incidental private benefit did not destroy the public nature of the legislation. The Court noted:

> If the principal purpose of the enactment is public in nature, it is irrelevant that there will be an incidental benefit to private interests.

Id., 176 Ill. 2d at 437, 680 N.E.2d at 391. Thus, the legislation was upheld.

In *Friends of the Parks, et al., v. Chicago Park District, et al.*, 203 Ill. 2d 312, 786 N.E.2d 161 (Ill. 2003), the parties sought a declaratory judgment that the Illinois Sports Facilities Authority Act was unconstitutional. The Authority was created by the Act to facilitate, manage and construct sports facilities in the City of Chicago. The Authority received revenue from hotel taxes and the monies generated under the Act were used to construct Comiskey Park n/k/a U.S. Cellular Field. Subsequently, Section 3 of the Act was amended to include enabling legislation that permitted public financing of the physical improvements to Burnham Park, including Soldier Field. This newly amended legislation was subsequently challenged. The Supreme Court, citing *Lappe*, noted:

> This court has long recognized that what is for the public good and what are public purposes are questions which the legislature must in the first instance decide. In making this determination, the legislature is vested with a broad discretion, and the judgment of the legislature is to be accepted in the absence of a clear showing that the purported public purpose is but an evasion and that the purpose is, in fact, private.

Id., 203 Ill. 2d at 320, 786 N.E.2d at 166. Applying those principles, the Supreme Court's examination was limited to determining whether the legislature's actions were constitutionally permissible. Deference to the legislative findings announced in the Act was mandated unless the plaintiffs made a threshold showing that the findings were evasive and that the purpose of the legislation was to principally benefit private interests. *Id.* Because the stated purpose of the Act was to materially assist the development and redevelopment of government owned sports facilities and to alleviate deleterious conditions and confer public benefits, the exercise of those powers was for public purposes. The improvements to the park benefited the members of the public served by the Chicago Park District as well as "incidentally" benefiting the Bears.

In this case, the General Assembly specifically found that the Act would assist the economy within this State, horse breeding, agriculture and employment opportunities within the State. If there is any reasonably conceivable state of facts showing that the legislation is rational, it must be upheld. *Arangold Corp., v. Zehnder*, 204 Ill. 2d 142, 147, 782 N.E.2d 786, 790 (Ill. 2003). Because there is a con-

ceivable public purpose to supporting agriculture and other Illinois industries, supporting employment opportunities within the State, as well as improving living conditions of residents of the State, the Act does not violate the terms of Article VIII, section 1(a) of the Illinois Constitution. Further, as there is no genuine issue of material fact, summary judgment in favor of the Defendants is appropriate as a matter of law.

Due Process/Equal Protection Clause

The standard to determine whether a statute violates due process is virtually identical to the standard used to determine if a statute violates the equal protection clause. *People ex rel. Lumpkin v. Cassidy*, 184 Ill. 2d 117, 123-24, 703 N.E.2d 1, 4 (Ill. 1998). This Act does not involve a suspect classification, nor does it impinge on a fundamental right. Thus, the question to be determined is whether the Act bears a rational relationship to the public interest sought to be served and whether the means adopted to accomplish this goal are reasonable. *Arangold Corp.*, 204 Ill. 2d at 147, 787 N.E.2d at 790; *Messenger v. Edgar*, 157 Ill. 2d 162, 176, 623 N.E.2d 310, 317-18 (Ill. 1993). The court is required to identify the public interest the statute is intended to protect, examine whether the statute bears a reasonable relationship to that interest and determine whether the method used to protect or further that interest is reasonable. *Arangold Corp.*, 204 Ill. 2d at 147, 787 N.E.2d at 790. The legislation will survive so long as it is reasonably designed to remedy the evils the legislature has determined to be a threat to public health, safety and welfare. *People ex rel. Lumpkin*, 184 Ill. 2d at 117-18, 703 N.E.2d at 4. Under this rational basis test, the court may even hypothesize reasons for the legis-

lation, even if the reasoning advanced did not motivate the legislation action. *Id.* *See also Illinois Health Care Ass'n v. Illinois Dept. of Pub. Health*, 879 F.2d 286, 289 (7th Cir. 1989). As noted above, the General Assembly provided its reasons for the Act in its findings, which this Court has deemed reasonable to remedy public welfare.

The *Arangold* court noted that the due process clause does not prohibit the General Assembly from taxing one group to benefit another, nor is there a mandate that those taxed directly benefit from the tax. *Arangold Corp.*, 204 Ill. 2d at 151, 787 N.E.2d at 792. In this case, again, because there is a conceivable public purpose to supporting agriculture and other Illinois industries, supporting employment opportunities within the State, as well as improving living conditions of residents of the State, the Act survives scrutiny under the rational basis test and does not violate the due process or equal protection clauses. As there is no genuine issue of material fact, summary judgment in favor of the Defendants is appropriate as a matter of law.

Uniformity Clause

Plaintiffs contend that the Act violates the Uniformity Clause of the Illinois Constitution because only four of the nine riverboat casinos are required to contribute the 3% adjusted gross revenues under the Act. Initially, all nine riverboat casinos were included within the Act. However, the Act did not pass in the General Assembly until the five riverboat casinos from the southern portion of the State were removed from the bill. This is very clear in the record. (Pl. Exh. 4, at pp.68-69; Pl. Exh. 5, at p. 11.)

The Supreme Court in *Arangold Corp. v. Zehnder* provided the appropriate standard for a uniformity clause challenge and noted that, in order to prevail, the taxing classification (1) must be based on a real and substantial difference between the people taxed and those not taxed, and (2) must bear some reasonable relationship to the object of the legislation or to public policy. *Arangold Corp. v. Zehnder,* 204 Ill. 2d 142, 787 N.E.2d 786 (Ill. 2003). In that case, a wholesale tobacco distributor challenged the validity of the Tobacco Products Act of 1995 which authorized a tax on distributors to fund government programs providing long-term care for people financially unable to meet their medical needs. The Supreme Court noted that

> The party attacking a tax classification is not required to negate every conceivable basis that might support it. [citation omitted] When faced with a good-faith uniformity challenge, the taxing body bears the initial burden of producing a justification for the classification. The challenging party then has the burden of persuading the court that the taxing body's explanation is insufficient as a matter of law or unsupported by the facts. [citations omitted] Despite the more stringent standard under the uniformity clause, the scope of a court's inquiry is "relatively narrow." . . . "[I]n a uniformity clause challenge the court is not required to have proof of perfect rationality as to each and every taxpayer. The uniformity clause was not designed as a straitjacket for the General Assembly. Rather, the uniformity clause was designed to enforce minimum standards of

> reasonableness and fairness as between groups of taxpayers." [citation omitted].

Arangold Corp., 204 Ill. 2d at 153, 787 N.E.2d at 793.

In *Arangold Corp.*, the distributor abandoned its claim that the Act discriminated between different classes of tobacco distributors, and rather only proceeded on the claim that the Act was insufficient as a matter of law or rather was unsupported by the facts. *Id.* The Supreme Court noted that the defendants provided evidence to support that the objective of the Act was to provide funds for the care of those persons who lacked the resources to pay for long-term medical care. The defendants further provided documentary evidence to establish that the Act taxed tobacco distributors because their products caused diseases which required such long-term care. Thus, the Supreme Court concluded that the tax bore a reasonable relationship to the objective of the Act. *Id.*, 204 Ill. 2d at 158, 787 N.E.2d at 796.

In this case, Defendants contend that the General Assembly could have based the Act upon the rationale that the four riverboat casinos that generate over two hundred million in revenue have a greater ability to absorb the cost. Ability to pay was upheld as a reasonable classification in the case of *Illinois State Chamber of Commerce v. Filan*, 216 Ill. 2d 653, 837 N.E.2d 922 (Ill. 2005). In that case, the General Assembly imposed a surcharge for utilization of Industrial Commission services on employers but not on individual employees. The defendant in *Filan* argued that the General Assembly could have reasonably concluded that employers as a group would be less burdened by an increase in fees than would individuals because of the employers' ability to spread the cost over a larger budget or incorporate the cost

into the price of goods and services. *Id.* 216 Ill. 2d at 666, 837 N.E.2d at 931.

The Supreme Court in *Filan* agreed that there was a real and substantial difference in the classifications and noted that the amount of surcharge paid by each employer was based upon the amount of the premium paid, which in turn is based on the number of employees and the loss history of the employer. Thus, there was also reasonable correlation between the surcharge and the frequency of the employer's use of the Commission's services. The *Filan* Court further noted:

> As with any other cost, an employer may incorporate it into the price of goods and services. Individual employees would not, for the most part, have the ability to absorb the cost of the surcharge that employers do.

Id., 216 Ill. 2d.at 667, 837 N.E.2d at 931.

Other courts have upheld classifications based upon the benefits inured to the taxed parties versus those non-taxed. *See Geja's Café v. Metropolitan Pier & Exposition Authority*, 153 Ill. 2d 239, 606 N.E.2d 1212 (Ill. 1992) (upheld tax on restaurants who would benefit from expansion of McCormick Center as not violative of Uniformity Clause); *Grais v. City of Chicago*, 151 Ill. 2d 197, 601 N.E.2d 745 (Ill. 1992) (imposition of tax on properties which benefit most from the special service area did not violate Uniformity Clause); *Coryn v. City of Moline*, 71 Ill. 2d 194, 374 N.E.2d 211 (Ill. 1978) (tax on special service are to finance shopping mall upheld under Uniformity Clause as those taxed would benefit more).

However, courts have not been willing to uphold taxing challenges when there is no real and substan-

tial difference between those taxed and not taxed and where there is no reasonable relationship for the tax. *See Federated Distributors v. Johnson*, 125 Ill. 2d 1, 530 N.E.2d 501 (Ill. 1988) (tax on alcohol products which were virtually identical to wine coolers except for the method of production of alcohol, did not constitute a real and substantial difference in classification and violated Uniformity Clause); *Commercial National Bank of Chicago v. City of Chicago*, 89 Ill. 2d 45, 432 N.E.2d 557 (Ill. 1982) (tax on commodities and securities businesses that provide the same services as exempt businesses violated Uniformity Clause; while all businesses providing the services shared the benefits of the tax, not all shared the burden); *Fiorito v. Jones*, 39 Ill. 2d 531, 236 N.E.2d 698 (Ill. 1968) (occupational tax on servicemen violated Uniformity Clause); *Winter v. Barrett*, 352 Ill. 441, 186 N.E. 113 (Ill. 1933) (exemption in sales tax act granted to farmers who sold produce at retail violated Uniformity Clause as there was no difference between retail produce farmers in direct competition with other produce nonfarmer retailers).

As noted previously, Defendants contend that the General Assembly could have determined that the four riverboat casinos that generate over two hundred million in receipts could better absorb the surcharge. However, the findings of the General Assembly discuss only the negative impact of riverboat casinos on horseracing as a whole, not by geographical area. Further, the legislative record provided does not include any justification for the exclusion of the other five riverboat casinos from the bill other than to note that the House was unable to obtain the necessary votes to pass the bill until the five riverboat casinos from southern Illinois were removed from the bill. No findings or studies were presented

that the five riverboat casinos from the southern part of the state had less of an impact on the racetracks in that part of the state. No findings or studies were presented that the four riverboat casinos from the northern part of the state had more of an impact on the racetracks in that part of the state. Further, the Act does not exclude the racetracks from the southern part of the state from receiving monies, even though those five riverboat casinos from the southern part of the state are excluded from paying any monies. In fact, Fairmount Park, which is located close to two of the excluded riverboat casinos, receives a greater proportional share than the other racetracks. As there are no real and substantial differences between the two classes of riverboat casinos and as there has been no reasonable relationship provided for the classification, the Act violates the Uniformity Clause of the Constitution and summary judgment is granted in favor of the Plaintiffs on this issue of law.

Special Legislation Clause

Plaintiffs contend that the Act violates the Illinois Constitution's prohibition against special legislation, specifically Article IV, section 13, which states:

> The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.

Thus, the General Assembly is prohibited from conferring a special benefit on one group or person and excluding others that are similarly situated or arbi-

trarily discriminating in favor of a select group. *Allen v. Woodfield Chevrolet, Inc.*, 208 Ill. 2d 12, 21, 802 N.E.2d 752, 758 (Ill. 2003). The standard for review is two fold: (1) whether the classification at issue discriminates in favor of a select group, and (2) if so, whether the classification is arbitrary. *Crusius v. Illinois Gaming Board*, 216 Ill. 2d 315, 325, 837 N.E.2d 88, 94 (Ill. 2005).

In this case, Plaintiffs' argument is that the Act is special legislation because it is primarily designed to benefit private owners rather than promote the general welfare. Plaintiffs further contend that the Act creates a benefit without rational basis, specifically citing the increase amount of subsidy to Fairmount Park, and thus, that the Act is arbitrary. Finally, in their Reply Brief, Plaintiffs contend that this is impermissible special legislation because the "perceived problem" that the Act was designed to address is not adequately connected with the purpose of the statute. In other words, the question becomes whether the General Assembly rationally could have believed that its method furthers the legislative goals. That answer has already been provided in the affirmative.

Further, courts have noted that even when select groups or "groups of one" benefit from legislation, the legislation does not necessarily fail, as long as there is a rational justification for the legislative focus and the classification used to focus the legislation is reasonably related to that justification. *See Chicago National Ball Club, Inc., v. Thompson*, 108 Ill. 2d 357, 483 N.E.2d 1245 (Ill. 1985); *City of Geneva v. The DuPage Airport Authority*, 193 Ill. App. 3d 614, 550 N.E.2d 261 (2d Dist. 1990). Again, there is a presumption in favor of validity of any legislation. In-

deed when a classification under a statute is challenged, if any state of facts can reasonably be conceived to sustain the classification, the existence of that state of facts at the time of enactment must be assumed. *Chicago National Ball Club, Inc.*, 108 Ill. 2d at 369, 483 N.E.2d at 1251. Because in this case the rational basis test has been met, the special legislation argument must be rejected and summary judgment is appropriate in favor of Defendants as a matter of law.

CONCLUSION

For the reasons set forth above, and pursuant to Supreme Court Rule 18, this Court finds that Public Act 94-0805 is unconstitutional in that it violates the Uniformity Clause of the Constitution in its classification of taxed vs. non-taxed, and it cannot reasonably be construed in a manner that would preserve its validity. This finding is necessary to the decision herein rendered and such decision cannot rest upon an alternative ground. Finally, this Court finds that notice required by Rule 19 has been served, and that those served with such notice were given adequate time and opportunity under the circumstances to defend Public Act 94-0805.

3/26/07 /s/

Date Hon. Bobbi N. Petrungaro

APPENDIX C

**IN THE CIRCUIT COURT FOR THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS**

EMPRESS CASINO JOLIET CORPORATION, an Illinois corporation, DES PLAINES DEVELOPMENT LIMITED PARTNERSHIP, an Illinois limited partnership d/b/a Harrah's Casino Cruises Joliet, HOLLYWOOD CASINO-AURORA, INC., an Illinois corporation, and ELGIN RIVERBOAT RESORT-RIVERBOAT CASINO, an Illinois general partnership d/b/a GRAND VICTORIA CASINO,
Plaintiffs,
v.
ALEXI GIANNOULIAS, solely in his official capacity as TREASURER OF THE STATE OF ILLINOIS, and the ILLINOIS RACING BOARD,
Defendants.

No. 06 CH 1294
Hon. Bobbie N. Petrungaro,
Judge Presiding

Filed April 20, 2007

FINAL JUDGMENT AND PERMANENT INJUNCTION ORDER

This matter comes before the Court for entry of a final judgment and order in light of the Court's decision on the parties' cross-motions for summary judgment issued on March 26, 2007. For the reasons set forth in the March 26 Order, IT IS HEREBY ORDERED THAT:

1. P.A. 94-0805 ("the Act") is declared unconstitutional and invalid in its entirety because it violates the Uniformity Clause of the Illinois Constitution;

2. Defendants are permanently enjoined from imposing or collecting the 3% surcharge imposed by the Act, or from taking any action against Plaintiffs as a result of their non-payment of that surcharge;

3. Plaintiffs are excused from further payment of the 3% surcharge imposed by the Act; and

4. Defendant Treasurer Alexi Giannoulias is hereby substituted as a defendant for Judy Baar Topinka and is ordered to refund to the Plaintiffs all surcharge payments collected pursuant to this Court's Order dated June 14, 2006, along with all interest required by the Protest Fund Act, 30 ILCS 230/2a, ~~within five (5) business days of the entry of this Order.~~

3/26/07 /s/
Date Hon. Bobbi N. Petrungaro

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APPENDIX D

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

EMPRESS CASINO JOLIET CORP., et al

Plaintiff

VS.

ALEXI GIANNOLULIAS, et al

Defendant

No. 06 CH 1294

COURT ORDER

STAY ORDER

This cause coming on to be heard on motion of the State Defendants, Alexi Giannoulias and the Illinois Racing Board, for a stay of enforcement of the order of this Court of April 20, 2007 entering a final judgment and permanent injunction, without bond, due notice having been given and the Court having heard argument and being duly advised in the premises;

IT IS HEREBY ORDERED THAT

1. Enforcement of the final order of this Court entered on April 20, 2007 is hereby stayed pending appeal.

2. The Court finds that the State Defendants are acting in their official capacity for the benefit of the public and the Court therefore orders that

* * *

this stay be without bond or other form of security.

3. The Agreed Preliminary Injunction Order entered on June 14, 2006 shall remain in full force and effect during pendency the of these proceedings on appeal, while this stay remains in effect. Plaintiffs shall continue making payments into the fund as provided in said order.

3/26/07	/s/
Date	Hon. Bobbi N. Petrungaro

APPENDIX E

SUPREME COURT OF ILLINOIS

Nos. 104586, 104587, 104590 cons.

EMPRESS CASINO JOLIET CORPORATION, etc., et al.,

appellees,

v.

ALEXI GIANNOULIAS, etc., et al.,

appellants.

Appeal, Circuit Court (Will).

ORDER

Petition for rehearing denied.

September 22, 2008

APPENDIX F

Public Act 094-0804

HB1918 Enrolled LRB 02935 LRD 32936 b

AN ACT concerning gaming.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Findings. The legislature makes all of the following findings:

(1) That riverboat gaming has had a negative impact on horse racing. From 1992, the first full year of riverboat operations, through 2005, Illinois on-track wagering has decreased by 42% from $835 million to $482 million.

(2) That this decrease in wagering has negatively impacted purses for Illinois racing, which has hurt the State's breeding industry. Between 1991 and 2004 the number of foals registered with the Department of Agriculture has decreased by more then 46% from 3,529 to 1,891.

(3) That the decline of the Illinois horseracing and breeding program, a $2.5 billion industry, would be reversed if this amendatory Act of the 94th General Assembly was enacted. By requiring that riverboats agree to pay 3% of their gross revenue into the Horse Racing Equity Trust Fund, total purses in the State may increase by 50%, helping Illinois tracks to better compete with those in other states. Illinois currently ranks thirteenth nationally in terms of its purse size; the change would propel the State to second or third.

(4) That Illinois agriculture and other businesses that support and supply the horse racing in-

dustry, already a sector that employs over 37,000 Illinoisans, also stand to substantially benefit and would be much more likely to create additional jobs should Illinois horse racing once again become competitive with other states.

(5) That the 3% of gross revenues this amendatory Act of the 94th General Assembly will contribute to the horse racing industry will benefit that important industry for Illinois farmers, breeders, and fans of horseracing and will begin to address the negative impact riverboat gaming has had on Illinois horseracing.

* * *

Section 10. The Illinois Horse Racing Act of 1975 is amended by adding Section 54.5 as follows:

(230 ILCS 5/54.5 new)

Sec.54.5. Horse Racing Equity Trust Fund.

(a) There is created a Fund to be known as the Horse Racing Equity Trust Fund, which is a non-appropriated trust fund held separate and apart from State moneys. The Fund shall consist of moneys paid into it by owners licensees under the Riverboat Gambling Act for the purposes described in this Section. The Fund shall be administered by the Board. Moneys in the Fund shall be distributed as directed and certified by the Board in accordance with the provisions of subsection (b).

(b) The moneys deposited into the Fund, plus any accrued interest on those moneys, shall be distributed within 10 days after those moneys are deposited into the Fund as follows:

(1) Sixty percent of all moneys distributed under this subsection shall be distributed to or-

ganization licensees to be distributed at their race meetings as purses. Fifty-seven percent of the amount distributed under this paragraph (1) shall be distributed for thoroughbred race meetings and 43% shall be distributed for standardbred race meetings. Within each breed, moneys shall be allocated to each organization licensee's purse fund in accordance with the ratio between the purses generated for that breed by that licensee during the prior calendar year and the total purses generated throughout the State for that breed during the prior calendar year by licensees in the current calendar year.

(2) The remaining 40% of the moneys distributed under this subsection (b) shall be distributed as follows:

(A) 11% shall be distributed to any person (or its successors or assigns) who had operating control of a racetrack that conducted live racing in 2002 at a racetrack in a county with at least 230,000 inhabitants that borders the Mississippi River and is a licensee in the current year; and

(B) the remaining 89% shall be distributed pro rata according to the aggregate proportion of total handle from wagering on live races conducted in Illinois (irrespective of where the wagers are placed) for calendar years 2004 and 2005 to any person (or its successors or assigns) who (i) had majority operating control of a racing facility at which live racing was conducted in calendar year 2002, (ii) is a licensee in the current year, and (iii) is not eligible to receive moneys under subparagraph (A) of this paragraph (2).

The moneys received by an organization licensee under this paragraph (2) shall be used by each organization licensee to improve, maintain, market, and otherwise operate its racing facilities to conduct live racing, which shall include backstretch services and capital improvements related to live racing and the backstretch. Any organization licensees sharing common ownership may pool the moneys received and spent at all racing facilities commonly owned in order to meet these requirements.

If any person identified in this paragraph (2) becomes ineligible to receive moneys from the Fund, such amount shall be redistributed among the remaining persons in proportion to their percentages otherwise calculated.

(c) The Board shall monitor organization licensees to ensure that moneys paid to organization licensees under this Section are distributed by the organization licensees as provided in subsection (b).

(d) This Section is repealed 2 years after the effective date of this amendatory Act of the 94th General Assembly.

* * *

Section 15. The Riverboat Gambling Act is amended by changing Sections 7, 13, and 23 as follows:

(230 ILCS 10/7) (from Ch. 120, par. 2407)

Sec. 7. Owners Licenses.

(a) The Board shall issue owners licenses to persons, firms or corporations which apply for such licenses upon payment to the Board of the non-

refundable license fee set by the Board, upon payment of a $25,000 license fee for the first year of operation and a $5,000 license fee for each succeeding year and upon a determination by the Board that the applicant is eligible for an owners license pursuant to this Act and the rules of the Board. For a period of 2 years beginning on the effective date of this amendatory Act of the 94th General Assembly, as a condition of licensure and as an alternative source of payment for those funds payable under subsection (c-5) of Section 13 of the Riverboat Gambling Act, any owners licensee that holds or receives its owners license on or after the effective date of this amendatory Act of the 94th General Assembly, other than an owners licensee operating a riverboat with adjusted gross receipts in calendar year 2004 of less than $200,000,000, must pay into the Horse Racing Equity Trust Fund, in addition to any other payments required under this Act, an amount equal to 3% of the adjusted gross receipts received by the owners licensee. The payments required under this Section shall be made by the owners licensee to the State Treasurer no later than 3:00 o'clock p.m. of the day after the day when the adjusted gross receipts were received by the owners licensee. A person, firm or corporation is ineligible to receive an owners license if:

(1) the person has been convicted of a felony under the laws of this State, any other state, or the United States;

(2) the person has been convicted of any violation of Article 28 of the Criminal Code of 1961, or substantially similar laws of any other jurisdiction;

(3) the person has submitted an application for a license under this Act which contains false information;

(4) the person is a member of the Board;

(5) a person defined in (1), (2), (3) or (4) is an officer, director or managerial employee of the firm or corporation;

(6) the firm or corporation employs a person defined in (1), (2), (3) or (4) who participates in the management or operation of gambling operations authorized under this Act;

(7) (blank); or

(8) a license of the person, firm or corporation issued under this Act, or a license to own or operate gambling facilities in any other jurisdiction, has been revoked.

* * *

APPENDIX G

United States Constitution Amendment V

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.

APPENDIX H

United States Constitution Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as

a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.