No. 08-945

IN THE

Supreme Court of the United States

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

Petitioners,

v.

ALEXI GIANNOULIS, 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 a Petition for Writ of Certiorari to
The Supreme Court of Illinois

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF ILLINOIS ALLANCE FOR GROWTH, AMERICANS FOR TAX REFORM IN SUPPORT OF PETITIONER

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Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), the Illinois Alliance for Growth ("Alliance") moves for leave to file the attached brief *amicus curiae.*[1]

The Illinois Alliance for Growth, Inc. is a non-profit public policy research and advocacy

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[1] Counsel for petitioners has issued a 'blanket consent' to filing of amici curiae briefs and a copy of that consent has been filed with the Clerk.

Counsel for respondent Alexi Giannoulias, Treasurer of the State of Illinois, and the Illinois Racing Board, represented by the Attorney General of the State of Illinois, has also issued a 'blanket consent' to the filing of amici curiae briefs and a copy of that consent has been filed with the Clerk.

Counsel Lawrence Weiner, for respondent Illinois Harness Horsemen's Association has consented to the filing of this brief, and a copy of that consent has been filed with the Clerk.

Counsel for respondent Balmoral Park Trot, Inc., William J. McKenna, has verbally consented to the filing of this brief as of February 24, 2009, but as of February 26 written notice had not yet been received to file with the Clerk.

Counsel for respondents Hawthorne Race Course, Inc., Maywood Park Trotting Association, National Jockey Club, and the Illinois Horsemen's Association, consent nor objection had been received by *Amici* as of February 26, 2009.

All of the aforesaid Counsel were provided timely notice of intent to file an Amicus Brief in Support of Petitioner's Writ of Certiorari, pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States.

organization based in Springfield, Illinois. Its mission since formation in 2008 has included promoting a stable and predictable climate for investment, which is generally considered a critical predicate for economic growth, as well as low rates of public expenditures and taxation. These interests are compromised in several respects when a public body imposes a new assessment on a class of business establishments already licensed by the State of Illinois, especially when the proceeds of the surcharge it imposes are diverted to subsidize their theoretical competitors. This is the first time it has participated as *amicus curiae* before this Court.

Americans for Tax Reform (ATR) is a nonprofit taxpayer advocacy organization based in Washington, D.C. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today.

The government's power to control one's life derives from its power to tax. ATR believes that power should be minimized. It is in this mission that ATR opposed the surcharge upon receipts on four Illinois gaming establishments. Furthermore, ATR was also opposed to the confiscatory nature of the surcharge. The only thing worse than an onerous tax increase during a recession is one in which revenue derived from that tax is then passed to another private entity, making it akin to eminent domain abuse. Lastly, ATR believes such policies create a breeding ground for corruption and government waste. ATR has recently participated as *amicus curiae* before this Court in Cable News

Network v. CSC Holdings, Inc., and Cablevision Systems Corp. (No 08-448).

Amici believe that a taking has occurred when the legislature requires not only the payment of a new surcharge upon receipts, but also the transfer of the monies generated by it to their competitors. Major capital investment decisions are based upon long-term expectations and the terms prevailing at the time. While an increase in the existing rates of taxation over time may be foreseeable, the creation of an entirely new surcharge upon receipts constitutes a confiscatory change in material terms.

In particular, *Amici* believes that the allocation of the nominally public revenues generated by the surcharge to competing enterprises is not an application "of the authority to raise revenues for public purposes" (*Alaska Fish Salting & By-Products Co. v. Smith,* 255 U.S. 44, 65 L.Ed. 489, 41 S. Ct. 219 (1921)) entitled to the deference accorded taxation; but rather, serves primarily private interests. While "the Due Process Clause of the 5th Amendment 'is not a limitation upon the taxing power conferred upon Congress by the Constitution" (*Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24, 36 S. Ct. 236, 244, 60 Led. 493, 504 (1916)) nor of the several states, employment of the coercive powers of the State of Illinois to collect a daily surcharge upon receipts does not render it a tax serving public purposes merely because it passes through a state agency for its allocation. Indeed, the daily collection, allocation and distribution within ten days imposes an accounting and administrative

distribution burden upon publicly-funded entities for which the State receives no benefit.

While Federal Courts have recognized that the payment of money under tax laws "are not treated as per se takings," (*Branch v. U.S.,* 69 F. 3d 1571, 1576 (Fed. Cir. 1995)), the fact that it has been necessary to review the relationship between monetary assessments and the purpose they allegedly serve suggests that a percentage assessment upon the receipts of an enterprise is not entitled to the deference accorded a tax when the full amount of funds are transferred to private parties—together with the interest earned from the first day of its transfer, within only ten days of collection.

Moreover, because all the monies generated are transferred to the licensees' competitors based upon a formula which denies the Illinois Racing Board any discretion to approve, deny or even modify how the monies are used by recipient private interests, this legislative allocation constitutes "impermissible favoritism" toward "private parties" justifying "a more stringent standard of review" by the Courts. (*Kelo v. City New London,* 545 U.S. 469 (2005)).

Amici further believe they possess a unique expertise on the public policies at issue, and a perspective on the legislative process in Illinois, in addition to information not then known to the Illinois Supreme Court when it denied a rehearing to petitioners. Given both the Alliance and ATR's interest in protection of private property rights, and in Takings Clause jurisprudence, *amici* believe that

their perspective regarding the need to subject this taking to a more stringent review under the Public Use Clause than the rational-basis standard will be useful to the Court.

Amici thus request this Court grant its motion for leave to file the attached brief amicus curiae in support of petitioner.

Respectfully, Submitted,

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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.

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BRIEF OF AMICI CURIAE OF THE ILLINOIS ALLAINCE FOR GROWTH, INC. & OF AMERICANS FOR TAX REFORM

INTEREST OF THE AMICI CURIAE[1]

Both of the above *amici* are non-profit organizations which have, as one of their prime public policy objectives, the protection of private property rights. They are therefore all keenly interested in the outcome of this case. The *amici* are:

Illinois Alliance for Growth, Inc. (the "Alliance") is a non-profit public policy research and advocacy organization based in Springfield, Illinois. The Illinois Alliance for Growth has a strong interest in promoting a stable and predictable climate for investment, which is generally considered a critical predicate for economic growth. This interest is compromised by a surcharge upon receipts which accomplishes the confiscation of the earnings of four gaming establishments already licensed by the State of Illinois, thereby reducing their market advantage against their closest competitors within the sub-

[1] Pursuant to Rule 37.3, the parties have consented to the filing of its brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party wrote this brief in whole or in part, and no person or entity, other than the *amici curiae,* their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

sector, especially when the proceeds of the surcharge upon receipts are diverted by the State to subsidize their theoretical competitors.

Americans for Tax Reform (ATR) is a nonprofit taxpayer advocacy organization based in Washington, D.C. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today.

The government's power to control one's life derives from its power to tax. We believe that power should be minimized. It is in this mission that ATR opposed the surcharge upon receipts on four Illinois gaming establishments. Furthermore, ATR was also opposed to the confiscatory nature of the surcharge upon receipts. The only thing worse than an onerous tax increase during a recession is one in which revenue derived from that tax is then passed to another private entity, making it akin to eminent domain abuse. Lastly, ATR believes such policies create a breeding ground for corruption and government waste.

SUMMARY OF ARGUMENT

The Illinois Alliance for Growth, Inc. is a non-profit public policy research and advocacy organization based in Springfield, Illinois. Its mission since formation in 2008 has included promoting a stable as well as predictable climate for investment, which is generally considered a critical predicate for economic growth, and low rates of

public expenditures and taxation. These interests are compromised in several respects when a public body imposes a new assessment on a class of business establishments already licensed by the State of Illinois, especially when the proceeds of the surcharge it imposes are diverted to subsidize their theoretical competitors. This is the first time it has participated as *amicus curiae* before this Court.

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Amici believe that a taking has occurred when the legislature requires not only the payment of a

new surcharge upon receipts, but also the transfer of the monies generated by it to their competitors. Major capital investment decisions are based upon long-term expectations and the terms prevailing at the time. While an increase in the existing rates of taxation over time may be foreseeable, the creation of an entirely new surcharge upon receipts constitutes a confiscatory change in material terms.

In particular, *Amici* believes that the allocation of the nominally public revenues generated by the surcharge to competing enterprises is not an application "of the authority to raise revenues for public purposes" (*Alaska Fish Salting & By-Products Co. v. Smith,* 255 U.S. 44, 65 L.Ed. 489, 41 S. Ct. 219 (1921)) entitled to the deference accorded taxation; but rather, serves primarily private interests. While "the Due Process Clause of the 5th Amendment 'is not a limitation upon the taxing power conferred upon Congress by the Constitution" (*Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24, 36 S. Ct. 236, 244, 60 Led. 493, 504 (1916)) nor of the several states, employment of the coercive powers of the State of Illinois to collect a daily surcharge upon receipts does not render it a tax serving public purposes merely because it passes through a state agency for its allocation. Indeed, the daily collection, allocation and distribution within ten days imposes an accounting and administrative distribution burden upon publicly-funded entities for which the State receives no benefit.

While Federal Courts have recognized that the payment of money under tax laws "are not treated as per se takings," (*Branch v. U.S.,* 69 F. 3d 1571, 1576 (Fed. Cir. 1995)), the fact that it has been necessary to review the relationship between monetary assessments and the purpose they allegedly serve suggests that a percentage assessment upon the receipts of an enterprise is not entitled to the deference accorded a tax when the full amount of funds are transferred to private parties—together with the interest earned from the first day of its transfer, within ten days of collection.

Moreover, because all the monies generated are transferred to the licensees' competitors based upon a formula which denies the Illinois Racing Board any discretion to approve, deny or even modify how the monies are used by recipient private interests, this legislative allocation constitutes "impermissible favoritism" toward "private parties" justifying "a more stringent standard of review" by the Courts. (*Kelo v. City New London,* 545 U.S. 469 (2005), 125 S.Ct. 2655, 162 L.Ed.2d 439, Kennedy, J, Concurring).

The *Kelo* decision, in which a majority of this Court sided with the Connecticut city's use of its Eminent Domain powers to condemn private homes in a residential neighborhood in order to make the real estate available for private commercial development is a key precedent which must be assessed in the instant case. *Kelo* may be

distinguished from the instant case because the commercial real estate development was part of a change in zoning and urban planning, all of which required public hearings and deliberative process.

Moreover, a Taking of property for Public Use by the due process of Eminent Domain is an express power granted both to the Federal and State Governments by their constitutions. But in the instant case the Supreme Court of Illinois denied the very existence of a property right by legislative fiat and has erected a scheme to serve exclusively private interests.

It would seem difficult to create legislation that more clearly illustrates where the "impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause"[2] than the Illinois Act, which imposes a surcharge on one class of business in order to subsidize their presumed competitor. There is no question that it takes their money, the only real question is whether this form constitutes a Taking since it was accomplished by declaration of a 'finding' in legislation.

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[2] See generally: *Kelo v. New London, at 4 (Concurring Opinion o f Justice Kennedy).*

Clarity From the Highest Court On What Constitutes a Public Use for a Taking under the 5th & 14th Amendment to the U.S. Constitution Is Required To Secure Those Rights.

ARGUMENT

A. Clarity from the highest Court on what constitutes a Public Use for a Taking under the 5th & 14th Amendment to the U.S. Constitution.

Several Courts have recognized that a regulatory action can constitute a Taking, but the facts presented to the courts are seldom so egregious as the surcharge imposed upon the daily receipts of four licensed business in order to subsidize their nominal competitors. Accordingly, this Court has recognized that, "As elsewhere in takings law, the answers are found not in absolute rules for all cases, but by the particularized weighing of public and private interests."*Agins v. City of Tiburon,* supra, 447 U.S. 255, 260-261 (1980), 100 S.Ct. 2138, 65 L.Ed.2d 106; *San Remo Hotel,* 27 Cal. 4th 643, 677, 41 P.3d 87, 109, 117 Cal.Rptr.2d 269, 296.

The implications of the *Kelo* decision, in which the U.S. Supreme Court sided with the Connecticut city's use of its Eminent Domain powers to condemn private homes in a residential neighborhood in order to make the real estate available for commercial development must be assessed in the instant case. *Kelo* may be distinguished from the instant case because the commercial real estate development was part of a comprehensive development plan which

had required public hearings and deliberative processes. In addition, multiple legal challenges in state and federal courts had settled the factual issues allowing substantial reflection by various courts. In contrast, the instant case arose when the State of Illinois appealed a trial court's summary judgment against its statute directly to its highest court, where the state's Supreme Court conducted a de novo hearing rejecting all of Petitioner's claims—and then denied them a rehearing.

Moreover, *Kelo* involved the question of whether an exercise of the power of Eminent Domain was for a public use under an express power granted both to the Federal and State Governments by their constitutions. But in the instant case the Supreme Court of Illinois denied the very existence of a property right by deferring to legislative findings that a surcharge transferred to private parties serves a public purpose because it might create employment opportunities in an industry which if 'finds' to have been in decline for a decade.

It would seem difficult to create legislation that more clearly illustrates where the "impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is

warranted under the Public Use Clause"[3] than the Illinois Act, which imposes a surcharge on one class of business in order to subsidize their presumed competitors. There is no disputation that the surcharge upon their receipts takes the petitioners' money; the only questions are whether this violates property rights and is compensable since it is administered by a governmental body. To project a pretextual public purpose being served by the Act, the surcharge imposed to fund private parties passes momentarily through the 'hands of government' long enough to invoke a claim that it serves a public purpose. Justice Kennedy forecast that:

> "A court applying the rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying a rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular

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[3] See generally: *Kelo v. City New London,* 545 U.S. 469 (2005) *(Concurring Opinion o f Justice Kennedy, at 4).*

> class of private parties, with only pretextual public justifications." *Kelo*, 545 U.S. at 491 (Kennedy, A., concurring).

This surcharge upon the receipts of four businesses both injures a particular class of private parties for pretextual public benefits.

1. The right to property is a foundational right by which all others are secured.

The right to retain an ownership interest in private property legitimately acquired is a foundational Constitutional Right, protected by the Fifth Amendment in explicit terms. Its infringement requires both the exercise of "due process of law" and "just compensation." (*See generally:* U.S. Constit., Amnd. 5). But even when Due Process and Compensation is provided, the Taking must still be for a Public Use.

There is no need to infer the right to retain one's property from rights not expressly articulated as an element of the "liberty" interest. Indeed, the 5th Amendment separates the right to "property" by only that one word—"liberty," from "life" itself. But even

if it was necessary to so infer, the penultimate Framer of the U.S. Constitution, John Adams, argued that property is a prerequisite to liberty. As acknowledged in a California Supreme Court's Takings challenge to a development mitigation fees in *San Remo Hotel L.P. v. City & County of San Francisco*, , Adams contended that, "Property must be secured, or liberty cannot exist", because property and liberty, are upon examination, one and the same thing." *San Remo*, 27 Cal. 4th at 691-692 (Brown, J., dissenting, Chin, J. concurring in dissent).

This guarantee of property retention in the U.S. Constitution is the enabler of liberty. The Dissenting Opinion of California Supreme Court Justice Brown in *San Remo Hotel* further elaborated how closely related property and liberty are:

> "Private property is in essence a cluster of rights inuring to the benefit of the owner, freely exchangeable in accordance with the terms of private agreements, and recognized and protected by common consent. In the case of real property, this cluster of rights includes the right to exclude persons from certain physical space. In the case of intellectual property, it may include the right to employ a valuable method or process to the exclusion of others. In other words, private property

represents zones of individual sovereignty-regions of autonomy within which we make our own choice." *Id.* at 692.

2. Illinois erred in concluding money is not a form of property.

But several courts cited by the Illinois Supreme Court in *Empress* have erroneously denigrated liberty by holding money is not property, and have interpreted the "right to exclude" from "physical space" so narrowly as to circumscribe the Constitution's protection of private property only to its most physical form, "real property."

This denial that money is a form of property is an antiquated anachronism denying the foundational relationship between money and all other forms—including real property. Money is more than Legal Tender, presumed to be 'owned' by its possessor; money is the medium of exchange in modern society. (*See generally:* Bruce Ackerman, PRIVATE PROERTY AND THE CONSTITUTION 166 (1977): we no longer count our wealth first by land, farms, buildings, but instead by stocks, bonds, pensions.) Like the right to exclude trespassers from real property in order to maintain its value, the value of money can be maintained only by excluding its

simultaneous use by others. It retains its value only by 'excluding trespassers' who would depreciate its value by encumbering its use, or by its owner's refusing to co-sign notes secured by real property.

Money is the means by which almost all property—real and personal, is acquired from its previous owner. Money is how the right to retain the property is secured, by paying of property taxes to governmental bodies. Money is how real property is maintained by procuring such goods and services necessary to ensure it retains value. Money is how improvements on real property are secured, making that property more valuable in the eyes of the tax assessor. Indeed, money is the medium by which government compensates its owner when real property is taken by the State. (*See generally:* John Fee, *The Takings Clause as a Comparative Right,* 76 S. CAL. L. REV. 1003 (2003)): money "is the currency with which government pays for property interests under the Takings Clause." (at 1038) (Pet'r's Pet. Cert. 25).

To suggest that what enables property ownership is not property before it is converted to a land estate and recorded at the county, but ceases to be property when paid in exchange for it, is to deny the existence of property during its transformative states. Denying that money is a form of property is akin to

denying that ice or water vapor—which contain the same two hydrogen molecules and one oxygen molecule are not—like liberty, as essential to life as water because they are not currently in liquid form due to the prevailing temperature.

This intertwined and enabling relationship between money and property was so commonly understood by the Framers as to require no distinction. As James Madison transcribed his notes from the debates of the Constitutional Convention, Madison recorded that the discussion of whether the government under the Constitution should have the powers to 'coin money,' establish bankruptcy and set other financial standards, emanated from concerns of the Framers that several States, operating under the Articles of Confederation, had diminished the value of property:

> "In the internal administration of the states, a violation of contracts had become familiar, *in the form of depreciated paper made a legal tender, of property substituted for money*, of installment laws, and of the occlusions of the courts of justice, although evident that all such interferences affected the rights of the other states, relatively

> creditors, as well as citizens creditors within the state."[4]

Even the California Supreme Court has recognized that there is a "special potential for government abuse" meriting heightened scrutiny when a monetary burden is ad hoc and discretionary:

> "In *Ehrlich*, we extended *Nollan* and *Dolan* slightly, recognizing an exception to the general rule of deference on distribution of monetary burdens, because the ad hoc, discretionary fee imposed in that case bore special potential for government abuse. We continue to believe heightened scrutiny should be limited to such fees." (See: *San Remo Hotel L.P.*, 27 Cal.4th at 672, accord, *Krupp v. Breckenridge Sanitation Distr.* 19 P.3d 687, 698 (Colo. 2001)).

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[4] James Madison, *Introduction, Debates of the Federal Convention of 1787*, in DEBATES OF THE FEDERAL CONVEITION, IN THE CONVETNION HELD AT PHILADELPHIA, IN 1787, WITH A DIARY OF THE DEBATES OF THE CONGRESS OF THE CONFEDERATON., Rev. by Jonathan Elliot, Vol. 5, J.B. Lippincott Company, 1891, Second Edition, at 120, *emphasis added.*

Legislative history suggests that the Illinois General Assembly adjusted its AGR threshold, not to ensure fair distribution of the burden of assisting the horse racing industry, but rather, to obtain the necessary votes for its passage by exempting the casinos in Madison and St. Clair County, discussed *infra.* The financial threshold chosen— $200 Million in 2004's AGR, was selected specifically to exempt the Alton and East St. Louis casinos located in Madison & St. Clair Counties. This permitted legislators from those counties to benefit their local horse—Fairmount Park racing track, without also burdening the local casinos.

In *San Remo Hotel,* the California Supreme Court held that the "arbitrary and extortionate use" of mitigation fees should not withstand scrutiny. *Id* at 671. But by refusing to examine whether the Illinois Act was an "arbitrary and extortionate use," the Illinois Supreme Court rendered the surcharge and subsidy scheme immune from scrutiny.

While the financial threshold chosen might have been a rational choice in terms of building a political coalition, the Madison & St. Clair County casinos are likely to have been just as damaging to the horse racing track in Madison County as the ones in Will and Kane Counties—more than 250 miles away!

The California Supreme Court contemplated that abusing city council members would "face widespread and well-financed opposition" in the next election if they abused their power. *Id.* But in Illinois it could be argued that such 'opposition' is not viable, even that it would be a 'fools' errand' to challenge the established interests—as the nominating process in Cook County Illinois is so controlled by the Ward and Township Committeemen to render elections there virtually uncompetitive.

In the 'real-world' of Cook County, Illinois politics—unlike the theoretical world of San Francisco invoked in *San Remo Hotel,* the symbiotic relationship between the Ward Committeeman and the business and financial interests requiring the Committeemen's support for various municipal services and zoning variances, deters challenges to the party's political leadership. That political party's leadership in turn, chooses whom to Nominate for the legislature—and once nominated, the candidate appears on the General Election ballot with no, or only nominal, opposition.

3. **The discriminatory application of taxation based on geographic considerations can manifest a taking when it benefits businesses**

whose location also gives them political dominance.

By the Act at issue in the instant case, businesses located in two suburban 'collar' counties have been subjected to a surcharge that fund's competitors located in three counties which were once manufacturing centers. All of the businesses being taxed are located in Kane and Will Counties. All but one of the businesses receiving the proceeds of the tax are located in Cook and Madison Counties Only one of the counties—Will County, contains resident businesses which both pay the surcharge and receive the subsidy. The Circuit Court in that county ruled on Summary Judgment that the scheme violated the Uniformity Clause of the Illinois Constitution.

B. **When only three counties whose resident businesses directly benefit from a subsidy possess the majority of the legislature, their imposing the surcharge to fund it on businesses resident in only two other counties, higher scrutiny is merited of whether the nominal tax is a Taking disguised as a tax.**

This redistribution of income from the businesses resident in two counties to benefit those in three others has created the situation in which the direct financial interest of respondents have unjustified weight in the legislative process. Moreover, the

Senators and Representatives from Cook and Madison County constitute a majority of the membership in both the Illinois State Senate and the Illinois House of Representatives.

To illustrate, the legislative powers of the State of Illinois are vested in the Illinois General Assembly.[5] Each of the 59 Legislative Districts elects a Senator and is sub-divided to also be represented by two State Representatives.

Nineteen of Illinois 59 State Legislative Districts are comprised entirely of territory and voters in Cook County.[6] Those Legislative Districts elect 19 Senators and 38 Representatives, slightly less than one-third of each chamber.

Another seven Legislative Districts contain part of the territory and voters in Cook County.[7] They elect another 7 Senators and 14 Representatives. Combined, the Senators that represent all or part of Cook County constitute 26 of the 59 Members of the Senate and a 62-vote majority in the 118 Member Illinois House of Representatives.

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[5] It consists of a Senate of 59 Members and House of Representatives with 118 Members.

[6] These are Legislative Districts 1 – 18, and 20.

[7] These are Legislative Districts 19, 26 – 28, and 39 – 41.

Madison County, where Fairmount Park is located, dominates two additional Legislative Districts represented by two Senators and four Representatives. Fairmount Park lies only a few feet from the county-line separating it from St. Clair County, where many of its employees, vendors and customers reside. Madison County's territory also extends into two additional Legislative Districts, while St. Clair County shares one of those districts, as well as extending into a third.[8]

The Senators representing all or part of Madison County total 4, while five of the six Representatives elected from those Legislative Districts include part of Madison County. Adding them to those legislators representing all or part of Cook County, provides those two counties alone (Cook and Madison) with a 30-vote Majority of the State's Senate, and combines with Cook County's already existing majority in the House of Representatives to total 67 members.

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[8] Madison County contains almost all of the 56th Legislative District, and its coterminous 111th and 112th Representative Districts, with a small portion of the Legislative District including St. Clair County. The City of Collinsville, location of Fairmount Park also forms a significant part of the 51st Legislative District and 102nd Representative District. St. Clair County contains all of the 57th Legislative District other than a part of a single township of Madison County, as well as the 113th and 114th Representative Districts. A portion of St. Clair County is located in the 58th Legislative District and dominating the 116th Representative District.

If the elected members of the Illinois General Assembly voted solely based upon the pecuniary interests of their county, they would constitute a majority in both Chambers of 31 Senators and 68 Representatives. House Bill 1918, which became the Act at issue in the instant case, passed the lower House with 70 votes on April 26, 2006.[9]

The taking that occurred in Illinois escaped the meaningful democratic review anticipated in *San Remo Hotel* because of the opaque means of nominating the state legislators in Cook County. In the Legislative Districts which represent all or part of Cook County, only one State Senate candidate had a General Election opponent in 2006[10] --the year in which those who would vote to extend the surcharge and subsidy scheme in the Act to 2011 last appeared on the ballot. But the General Assembly members who enacted Public Act 94-804 were elected in 2002 or 2004.[11]

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[9] See: Roll Call No. 8, H.B. 1918, April 26, 2006,at http://ilga.gov/legislation/votehistory/94/09400HB1918_04262006_008000T.pdf.

[10] This was 19th State Legislative District.

[11] Approximately half of all Senators are elected every four years, to serve four year terms. All Senators faced election for either a two-year or a four-year term in new Legislative Districts in 2002, reflecting the redistricting that occurred

In 2002, Senators representing the 1st, 4th, 6th,7th, 9th, 10, 12, 13th, 15th, 16th, 18th, 19th Legislative Districts within Cook County were elected to four-year terms in the Illinois Senate. That same year (2002), Ten of the 20 Senators elected from these Districts contained entirely in Cook County (Legislative Districts 1 – 19, and 33) had no opposition in the Democratic Primary. Thirteen of those 20 Senators nominated in their party's Primary, including all 10 who faced no Primary Opposition, also had no opponent in the General Election.[12] In addition, the Senator elected from 57th Legislative Districts, dominated by St. Clair County, faced no opposition in the Democratic Primary or the General Election.[13]

In 2004, Senators representing the 3rd, 5th, 8th, 11th, 14th, 17th & 20th Legislative Districts within Cook County were elected to four-year terms in the Illinois State Senate. That same year (2004), Senators representing the 21st, 23rd, 27th, 32nd, 33rd, 41st

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following the 2000 Census. In 2004, the Senators representing the following Legislative Districts were elected: 3, 5, 8, 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, and, 59.

[12] *See Generally:* OFFICIAL VOTE, Cast at the Primary Election, General Primary, March 19, 2002, The State Board of Elections, Springfield, Illinois, at 67-72.

[13] Id., at 87-88.

Legislative Districts that include territory within Cook County were elected. All 7 of the seven Senators elected from the Districts contained entirely in Cook County (Legislative Districts 1 – 19, and 33) had no opposition in the Democratic Primary, and 5 of those seven Senators nominated without Primary Opposition also had no opponent in the General Election.[14] In addition, the Senator elected from 56th Legislative Districts, dominated by Madison County, faced no opposition in the Democratic Primary or the General Election.[15]

Combining the 2002 & 2004 elections, 17 of the 27 Senators representing Cook, Madison & St. Clair Counties at the time this legislation was before them had not faced a challenge before the voters in either their party's Primary nor the General Election.

C. Revelations Since the Illinois Supreme Court's Denial of Rehearing.

Subsequent to the Illinois Supreme Court's decision in the instant case, it has become publicly known

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[14] *See Generally:* OFFICIAL VOTE, Cast at the Primary Election, General Primary, March 16, 2004, The State Board of Elections, Springfield, Illinois, at 130-133.

[15] Id.

through a federal investigation's evidence presented at his Impeachment Trial by the Illinois State Senate, that then-Governor of Illinois, Rod Blagojevich, delayed signing an extension for two additional years of the surcharge and transfer scheme at issue here, while seeking to collect on a pledged political contribution linked to one of interests benefiting from the original legislation.

According to the Affidavit which provided Probable Cause for the U.S. District Court for the Northern District of Illinois to issue an arrest warrant for the then-Governor of Illinois, Rod Blagojevich, sought to collect $100,000 from a lobbyist seeking the Governor's signature on the legislation that extended the surcharge on casinos to subsidize the horse racing industry for two additional years.[16] The redacted transcripts of the telephone intercepts played in the Illinois State Senate's Impeachment Trial of Governor Blagojevich on multiple grounds illustrate the degree by which lobbyists and the Governor corruptly valued the surcharge and subsidy scheme to them.

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[16] *See generally:* Criminal Complaint, in *United States of America v. Rod. R. Blagojevich, and John Harris,* N.D. Ill., Dec. 7, 2008, Affidavit of Daniel W. Cain, Special Agent, F.B.I., at Part 2, "Information Obtained from Intercepted Phone Conversations Concerning Efforts to Obtain Campaign Contributions In Exchange for Official Acts," Item 68(e), at 39-40.

The redacted transcripts of four telephone conversations which occurred on November 13, December 3 & 4 of 2008 have now entered the public records of the Illinois State Senate and been published in newspapers, recounting cryptic conversations between then-Governor Blagojevich and his brother, Rob Blagojevich, in which the latter reports to the Governor on a conversation between an individual identified by the U.S. Attorneys' Office as "Lobbyist 1" and an individual referred to as John or "Johnny Johnson" in their conversations. A person bearing the same name is one of the owners business associated with the horse racing industry in Illinois.

It is unknown whether comparable considerations existed when the Act originally passed both houses of the General Assembly in 2006. But, the floor statement of Representative William Black during the final voting on the legislation indicates that the same Governor was previously engaged in actively persuading several members of the state's House of Representatives to change their vote to favor its passage. The floor statement of this Representative strongly hints at allegations of impropriety by his own colleagues.[17]

[17] ....I'm not going to question the motives of the Sponsor. I have voted for this Bill. I told you earlier of my background, an association with people who raise and breed and train horses, but *I've been here a long time now and I know when something doesn't smell right. Now, Mr. Speaker and Ladies and Gentlemen of the House, you don't get 12 or 14 people to change their vote on an issue like this, after two bites of the apple, unless something's going on* and I know something's going on....and if something is going on, why do I know that. The Democrat staff is positioned at each door of this chamber and have been for about an hour with a seating chart and if any Democrat leaves the chamber, they're asked where they're going, where they will be. So, obviously, they're anticipating a challenge to the vote and they wanna make sure those who have changed vote will be here for a verification. And I...and I bring this up 'cause this makes me very uncomfortable. And I didn't overhear anything, *I wasn't eavesdropping, but when a Democrat Legislator is standing at my desk and when one of your staffers comes up in an excited voice and says, 'Representative, the Governor and the Speaker want you to come down to the Governor's Office right now.'* Well, I'm sure she didn't go down there to be told what a wonderful job the House of Representatives is doing. You know the love that the Governor has for all of us. *I know why she went down there, ya get the Roll Call and ya look at 14, 15, 16 people that changed from 'no' to 'yes' on the Amendment. It might be interesting in the unlimited debate if somebody will tell us, what's the deal. What's the deal? Don't we ever learn anything around here? Didn't you read the verdict on a previous Governor?*

As reflected in the legislative history and noted by Representative Black, legislation that originally

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Haven't ya heard the U.S. Attorney saying there should be no quid pro quo in Illinois politics? Then what's going on? Why are some you called down to the Governor's Office, then you come back up and change your vote? *You voted 'no' twice on this Bill. You're gonna tell me that this has changed so dramatically that all of a sudden you're gonna vote 'yes'? Well, Mr. U.S. Attorney in Chicago, get your subpoenas out because I guess we're never gonna learn anything in the State of Illinois.* You wanna change your vote fine, but I don't think that's the reason some of you changed your vote. I can remember when the horseracing tax supported the agricultural premiums for the county fairs in this state, it hasn't been able to do so for a number of years. I like horses, but I don't like what I smell here. I don't like it at all. And some of you oughta stop and consider what you're doing because I have a reasonable suspicion that some of you have been, I don't wanna use the word, some of you have been talked to and perhaps convinced this suddenly is a good idea, but you didn't think it was a good idea the two previous times it was brought up. It'll be good to get the Roll Call and make sure that other people can see the Roll Call and then maybe you can answer questions from some people that you may not want to answer questions from. (See: Remarks of Representative William B. Black, in Debate on HR 1918, in State of Illinois, 94th General Assembly, House of Representatives, transcription Debate, 124th Legislative Day, 4/26/2006, at 63-64, *emphasis added.)*

applied the surcharge to more casinos was rejected twice in the same chamber, was unable to obtain sufficient votes for passage until the $200 Million AGR threshold was proposed. Even that threshold reportedly required unusual lobbying by the Governor of Illinois, according to that legislator's remarks favoring the bill, but disturbed by what he witnessed. Subsequently, it has been revealed by intercepted communications obtained by the U.S. Attorney for the Northern District of Illinois, and played at trial of Impeachment in the State Senate, that the Governor of Illinois had been promised and was seeking to collect prior to his approval, $100,000 in political contributions. This suggests that there never was a truly public purpose in the surcharge but that it was, instead, intended to serve the private interests of those who tainted the legislative process.

CONCLUSION

In the instant case, a taking occurred when legislation was enacted to amend Illinois' Riverboat Gaming Act to impose a surcharge upon the receipts of only four companies located exclusively in two suburban counties for the benefit of horse racing tracks located in three urban counties. The full amount of revenues generated from the surcharge—together with any interest earned on it, is then

transferred to the direct benefit of those private interests who own horse racing tracks. This is not a "tax" entitled to deference; but rather, it is the confiscation of private property by another private interest, using the State of Illinois as its collections' mechanism.

This misuse of the authority to raise revenues for Public Purpose amounts to a Taking under the 5th & 14th Amendments to the Constitution of the United States. Clarity from the Highest Court on what constitutes a Public Use for a Regulatory Taking is now required to secure those rights.

Respectfully, Submitted,

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