No. 08-945

IN THE
Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., ET AL.,
Petitioners,

v.

ALEXI GIANNOULIAS, ILLINOIS STATE TREASURER, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL TAXPAYERS UNION, AMERICAN ASSOCIATION OF SMALL PROPERTY OWNERS, CENTER FOR INDIVIDUAL FREEDOM, CITIZEN OUTREACH, CITIZENS FOR LIMITED TAXATION, EVERGREEN FREEDOM FOUNDATION, GRASSROOTS INSTITUTE OF HAWAII, HAWAIIAN VALUES, RIO GRANDE FOUNDATION, AND SMALL BUSINESS HAWAII IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Interest of Amici

The 362,000-member **National Taxpayers Union** (NTU) is a nonpartisan citizen group founded in 1969 to work for lower taxes, smaller government, and more accountable elected officials at all levels.[1] NTU favors preserving the personal and property safeguards included in the United States Constitution and espouses the principle that private property rights are the foundation upon which a free society is built. NTU believes that its perspective on issues concerning the Takings Clause will be of assistance to the Court in evaluating the petition.

The **American Association of Small Property Owners** (AASPO) is a nonpartisan, nonprofit Section 501(c)(3) corporation. Since 1993, AASPO has been working for the right of small property owners to prosper freely and fairly—to make possible the American dream of building wealth through real estate. Based in Washington D.C., AASPO has affiliates in twenty-five states with members in

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[1] Counsel for all parties have been given at least 10 days notice of *Amici's* intention to file and have consented to the filing of this brief. Those consents are submitted herewith. Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *Amici* and their counsel made such a monetary contribution.

Illinois. AASPO believes that the issues presented in *Empress Casino Joliet v. Giannoulias* have an important impact on the ability of small property owners to flourish.

The **Center for Individual Freedom** (CFIF) is a nonpartisan, nonprofit organization dedicated to protecting the individual rights and freedoms guaranteed by the United States Constitution. Since its founding in 1998, CFIF has appeared before this Court as *amicus curiae* in several cases involving individual liberties guaranteed by the Bill of Rights, including cases implicating the Fifth Amendment's protections of life, liberty and property. In this instance, CFIF maintains an interest in safeguarding the property protections specifically enshrined in the Takings Clause of the Fifth Amendment to the Constitution.

Citizen Outreach is a 501(c)(4) nonprofit, nonpartisan organization established for the purpose of grassroots advocacy at the federal, state and local levels. Reaching over 25,000 citizens each week through its newsletters and website, Citizen Outreach addresses issues as varied as lawsuit abuse, government regulation, privatization, health care reform, school choice, social security reform, tax and spending abuses, and illegal immigration, explaining these issues in terms the average citizen can understand and act upon. *Empress Casino Joliet v. Giannoulias* presents an important opportunity to address abuses in tax policy.

Citizens for Limited Taxation is Massachusetts' largest statewide taxpayers association. While the Commonwealth does not yet allow casinos despite the best efforts of the Governor,

Massachusetts does have racetracks and the ongoing debate here always reflects the interests of the two separate enterprises. In *Empress Casino Joliet v. Giannoulias,* the Court can provide a clarification of what should be an obvious fact: that one of them cannot be taxed to support the other, since this would set a precedent that any business can be given a special assessment by the state to support its competition.

Evergreen Freedom Foundation (EFF) is a Washington nonprofit corporation dedicated to advancing individual liberty, free enterprise and limited, accountable government, and is supported by more than 4,500 Washington citizens. EFF staff provide public policy analysis to elected officials in the areas of state budgeting and taxation. This case presents a fundamental question pertaining to EFF's mission, in that Illinois' tax scheme could set a dangerous precedent in all states that would threaten the promotion of limited and accountable government as well as rational tax policy.

The mission of the **Grassroot Institute of Hawaii** (GRIH) is to promote individual liberty, the free market and limited accountable government. Through research papers, policy briefings, commentaries and conferences, the Institute seeks to educate and inform Hawaii's policymakers, news media and the general public. GRIH's members believe that each person must be free to succeed or fail in building wealth and in relationships with others, and as such several aspects of *Empress Casino Joliet v. Giannoulias* bear upon the organization's mission and goals.

Hawaiian Values is a 501(c)(4) nonprofit organization dedicated to preserving U.S. Constitutional principles in the 50th state. Hawaiian Values' support for Petitioners is not an endorsement of gambling; rather, Hawaiian Values urges the Court to grant the petition because of the serious implications involved in Illinois' seizure and arbitrary redistribution of private property from one private business to another. Hawaiian Values is concerned that the rationale of the Illinois Supreme Court, if left unreviewed, will be considered by the government—whether state, local, or federal—as an endorsement of the idea that government's function is to seize private property and redistribute it in order to fulfill some unannounced theory of economic justice. With the specter of the price tag for massive bailouts looming, and increasing pandering to entitlement voters, we are all dependent on the courts to protect the most basic American property rights.

The **Rio Grande Foundation** is New Mexico's only think tank dedicated to free markets and individual liberty. As such, the Foundation has a high level of interest in issues relating to taxation; specifically, that government should limit itself to the most basic activities for which private sector alternatives are the most difficult to attain and taxation should be used only to achieve these broad societal goals. As an organization that is concerned with the impacts of taxation, the Rio Grande Foundation espouses the philosophy that taxes should be broad-based and as fair as possible. Taxing one group and simply transferring the revenues generated by that tax to another, more sympathetic

special interest certainly violates those basic principles. The case before this Court, *Empress Casino Joliet v. Giannoulias,* deals directly with this matter.

Small Business Hawaii's (SBH) mission is dedication to promoting a better Hawaii through private, competitive, networked small businesses. SBH aims to foster job creation, reduce taxes, government regulations, and business costs, while promoting, educating, and effectively fighting for Hawaii's small business community. The organization was founded in 1975 and incorporated in 1976 as Small Business Association of Hawaii, a 501(c)(6) non profit association. Small Business Hawaii emerged in 1983. SBH's members are concerned about the implications that *Empress Casino Joliet v. Giannoulias* has for businesses in Hawaii.

Summary of the Argument

This case concerns a statute that requires a handful of companies from a small geographic area to pay a percentage of their adjusted gross revenues directly to another industry. Excusing this statute from Takings Clause scrutiny because the property taken is money needlessly limits the protection the Takings Clause was intended to provide to small groups singled out to bear disproportionate burdens.

If this statute is permitted to escape Takings Clause scrutiny, states will be free to require unpopular or geographically isolated industries to

subsidize those that have more political clout. In addition, laws—such as the one at issue here—that require a direct transfer from one small group to another defined group are exceptionally likely to lead to corruption. Thus, it is important that this Court consider whether such statutes are permitted under the Takings Clause.

Argument

I. A law that forces one segment of an industry to directly support another industry imposes a taking without just compensation.

The statute at issue in this case uses money extracted from a subset of one industry to subsidize another, favored industry. Petitioners—owners of four of the nine casinos in Illinois—are required to pay 3% of their adjusted gross revenues to Illinois horse-racing tracks.[2] This singling out of a small group to bear a disproportionate burden with no compensation is the very type of action the Takings Clause was intended to prevent. Excusing this statute from scrutiny because the property taken is

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[2] Notably, the original proposal was for all Illinois casinos to have to pay this fee to the horse-racing industry, but the law passed only after legislators limited its application to a minority of the casinos, all of which are located in a limited geographical area. *Compare* H.B. 1917, 94th Gen. Assemb. (Ill. 2006) *with* H.B. 1918, 94th Gen. Assemb. (Ill. 2006).

money needlessly limits the Takings Clause's protection of minorities.

The Takings Clause reflects concerns that were central to those who drafted and ratified the Constitution. The framers placed great importance on the protection of property from government power. To many of the framers, "property was the main object of society." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533-34 (Max Farrand ed., 1911) (quoting Governeur Morris). James Madison, the drafter of the Takings Clause, stated that "Government is instituted to protect property of every sort . . . ." THE COMPLETE MADISON at 267-68 (Saul K. Padover ed., 1953) (remarks published in NATIONAL GAZETTE, Mar. 29, 1792). A government that would not only fail to protect property rights, but also actively impair those rights without compensation, would be inimical to those principles. Thus, as William Paterson (a delegate from New Jersey) wrote later as a Justice of the Supreme Court, "[t]he preservation of property then is the primary object of the social compact. . . . The legislature, therefore, had no authority to make an act divesting one citizen of his freehold and vesting it in another, without a just compensation." *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795).

Individuals and groups may, in general, pursue their interests—including protection of their property—through representation in the democratic political process. However, when a small group disproportionately bears the burden of a law, political representation will not be as effective. Thus, other protections, such as the Takings Clause, may be

necessary. The requirement that government pay "just compensation" for taking property prevents it from allowing a majority to simply shift burdens onto a minority that does not have sufficient political power to protect itself.

In fact, James Madison believed that landowners were likely to become a minority and that the Takings Clause was necessary to protect property claims that were "in opposition to that of the majority." *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 853 (1995). While majority interests would be protected through the political process, a constitutional restriction was necessary to protect landowners.

Similar concerns were addressed in the takings clause of the Vermont constitution, one of the few takings clauses that predates the federal takings clause. When the territory that would later become Vermont was transferred to New York from New Hampshire, the New York legislature invalidated land grants made by New Hampshire, an act that was politically possible because the Vermont landowners were a minority in New York politics. When Vermont separated from New York, it inserted a takings clause in its constitution explicitly to prevent such a situation from occurring again. Treanor, *supra* at 827-29.

This concern for laws that burden a small group is not seen only in the Takings Clause. For example, the distinction between the protections that are necessary when actions burden many and when actions burden a small group may also be seen in administrative law, which requires adjudicative

hearings when a few people are burdened. *See* Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 306-11 (1990). *See also* Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 50 (1985) ("When a personal or narrowly held interest is at stake, the processes of representation are unlikely to be of sufficient help. Hence the rule, fundamental to administrative law, that the due process clause requires the right to participate only in adjudicative proceedings.").[3]

The concern with placing a disproportionate burden on a minority of citizens can be seen throughout this Court's Takings Clause jurisprudence. As the Court stated in *Armstrong v. United States*, 364 U.S. 40, 49 (1969), the Takings Clause "was designed to bar 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." Requiring payment of just compensation "prevents the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

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[3] It has been generally suggested that a "more searching judicial inquiry" may be necessary for statutes directed at "discrete and insular minorities" because such prejudice may curtail the operation of the political processes that would protect these minorities. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). Justice Thomas noted the relevance of this concept to the Takings Clause in his dissent in *Kelo v. City of New London,* 545 U.S. 469, 522 (2005) (Thomas, J., dissenting).

The Court has consistently pointed to the problems inherent in forcing a small number of individuals to bear public burdens. For example, in *Nollan*, it stated: "If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987). As Justice O'Connor has stated, the Takings Clause protects "particularly . . . those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will." *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting).

The decision below, which restricts the protection of the Takings Clause to the confiscation (or regulation) of a specific real property or intellectual property asset, needlessly diminishes the protection given to minorities. The restriction is particularly burdensome because, for the majority of citizens, wealth is no longer measured by holdings of real property. *See* Treanor, *supra* at 812. "Unlike our ancestors, we no longer count our wealth by looking first to our social property of land, farms, buildings. Instead, our principal means of support consist of legal property: stocks, bonds, pensions, an assortment of rights granted by the activist welfare state." Bruce Ackerman, PRIVATE PROPERTY AND THE CONSTITUTION 166 (1977).

In addition, this Court has recognized that the line between taxing and taking may be difficult to

draw. While giving legislatures great leeway, the Court has recognized that extremely disproportionate burdens should not be permitted under the Takings Clause. In *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 615 (1899), the Court suggested that it would be unconstitutional for a state to lay taxes that were "so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax."[4]

At the most extreme case, it is clear that the line between taxation and confiscation of a specific asset is not tenable:

> Taxes can be set so high that the taxpayer is forced to dispose of specific property or simply turn it over to

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[4] State courts attempted to draw a similar line. For example, in *Cheaney v. Hooser*, 48 Ky. 330, 344-45 (1 B. Mon. 1848), the court stated: "[The Takings Clause] was not intended to exclude or even to restrict the ordinary power of general or local taxation inherent in the legislative function . . . . [The limit on the legislature] can only consist in the discrimination to be made between what may with reasonable plausibility be called a tax, and for which it may be assumed that the objects of taxation are regarded by the Legislature was forming a just compensation, and that which is palpably not a tax, but is, under the form of a tax, or in some other form, the taking of private property for the use of others or of the public, without compensation."

> government in order to satisfy his tax obligation. This perception is at the core of the notion of confiscatory taxation. Indeed, revolutionary regimes have sometimes used the format of 100 percent taxation as the very vehicle of confiscation.

Walter J. Blum & Harry Kalven, Jr., THE ANATOMY OF JUSTICE IN TAXATION 15 (Univ. of Chicago Law School, Occasional Papers, 1973). To completely excuse the confiscation of any fungible asset from Takings Clause scrutiny ignores this problem and lessens the protection the Takings Clause was intended to provide.

II. If the law at issue in this case is not subjected to scrutiny under the Takings Clause, states may force disfavored industries or segments of industries to subsidize favored industries.

If the Illinois statute at issue here is permitted to stand, there is no reason for states to limit the application of the basic structure to casinos and horse racing. Industries that are unpopular or geographically isolated will be vulnerable to requirements that they subsidize those that are more popular or have more political clout.

In fact, this Court has already faced a similar situation in the agriculture context. In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), Massachusetts propped up in-state milk producers with fees imposed on goods imported from outside the

state. Although the Court struck down that law under the Dormant Commerce Clause, the allure of such laws—as can be seen in this case—is not necessarily limited to situations where burdens can be placed on out-of-state entities. The workings of state legislatures may make geographic minorities within the state (as in this case)[5] almost as vulnerable as out-of-state entities.

In addition to out-of-state or geographically isolated industries, unpopular industries may also be targeted to subsidize industries that are more popular. Suppose, for example, that a statute required the three most profitable cold-medicine firms to pay a tax whose proceeds were funneled directly to less successful competitors who believe their research to develop a new vaccine against colds is more important to society. While finding a cure for the common cold may be a laudable goal—one the amici would prefer to see reached through private investment—the costs should not be borne by one segment of a politically disadvantaged industry alone. It is easy to envision a host of other situations in which a legislature will be tempted "to take property from A and give it to B," *Calder v. Bull*, 3 U.S. 386 (1798), if there are no limits on its actions.

Allowing a direct transfer from a small group of entities to another defined group also creates a fertile ground for corruption. There is less risk to a

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[5] As noted above, when the fee at issue here was originally proposed, it applied to all casinos in the state. However, it did not garner the votes necessary to be enacted until it was limited to only 4 casinos, all in the Chicago area. *See supra* at n.2.

legislator or executive in taking a bribe to enact a law like this, because such a small group of entities bear the burden, and therefore fewer people are likely to question or object to the legislator's or executive's actions. In addition, a small, defined group of beneficiaries receiving a direct payment is more likely to offer a bribe or "contribution" than if a large group of parties were receiving funds. A small group is not only likely to be receiving a larger benefit per member, it will be able to police "free-riders" who might otherwise avoid paying the bribe or contribution. Thus, the combination of a small burdened group and a direct transfer to a small benefited group is uniquely suited to encouraging corruption.

In this case, there are allegations that the governor did, in fact, demand "contributions" in exchange for effectively continuing the law. *See, e.g.,* Tamara Audi & Douglas Belkin, *Affidavit Alleges Blagojevich Sought Racing Official's Contribution*, WALL ST. J., Dec. 24, 2008, at A7. While these allegations are not necessarily relevant to the legal status of the law in this case, they illustrate the danger of permitting such schemes. Excusing them from Takings Clause scrutiny only increases their likelihood.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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